



OFFICE OF THE UNITED NATIONS  
HIGH COMMISSIONER FOR  
HUMAN RIGHTS



# **RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES**

*Prosecution initiatives*



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## **Prosecution initiatives**



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## **NOTE**

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The Office of the United Nations High Commissioner for Human Rights (OHCHR) has increasingly recognized the need to enhance its assistance in United Nations-wide efforts to work quickly and effectively to re-establish the rule of law and the administration of justice in post-conflict missions. Countries emerging from conflict and crisis are vulnerable to weak or non-existent rule of law, inadequate law enforcement and justice administration capacity, and increased instances of human rights violations. This situation is often exacerbated by a lack of public confidence in State authorities and a shortage of resources.

In 2003, OHCHR, as the United Nations focal point for coordinating system-wide attention for human rights, democracy and the rule of law, began to develop rule-of-law tools so as to ensure sustainable, long-term institutional capacity within United Nations missions and transitional administrations to respond to these demands. These rule-of-law tools will provide practical guidance to field missions and transitional administrations in critical transitional justice and rule of law-related areas. Each tool can stand on its own, but also fits into a coherent operational perspective. The tools are intended to outline the basic principles involved in: *Mapping the Justice Sector, Prosecution Initiatives, Truth Commissions, Vetting and Monitoring Legal Systems*.

This publication specifically sets out basic considerations on prosecution initiatives, and is intended to assist United Nations field staff when advising on approaches to addressing the challenges of prosecuting perpetrators of crimes such as genocide, crimes against humanity and war crimes. The focus of this guidance is mainly on the strategic and technical challenges that these prosecutions face domestically, and sets out the principal considerations that should be applied to all prosecutorial initiatives: the need for a clear political commitment to accountability; the need for a clear strategy; the need to ensure that initiatives are endowed with the necessary capacity and technical ability to investigate and prosecute the crimes in question; the need to pay particular attention to victims; and the need to have a clear understanding of the relevant law and an appreciation of trial management skills, as well as a strong commitment to due process.

The principles used in these tools have been primarily garnered from previous experience and lessons learned in the prosecution of international crimes. Clearly, this document cannot dictate strategic and programmatic decision-making, which needs to be made in the field in the light of the particular circumstances within each post-conflict environment. However, the tools are meant to provide field missions and transitional administrations with the fundamental information required to advise effectively on the development of prosecution initiatives for serious human rights abuses, in line with international human rights standards and best practices.

The creation of these tools is only the beginning of the substantive engagement of OHCHR in transitional justice policy development. I wish to express my appreciation and gratitude to all those who have contributed to the preparation of this important initiative.

A handwritten signature in black ink, appearing to read 'Louise Arbour', with a large, sweeping initial 'L'.

Louise Arbour

United Nations High Commissioner for Human Rights

## ***ACKNOWLEDGEMENTS***

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OHCHR wishes to thank the individuals and organizations that provided comments, suggestions and support for the preparation of this tool. In particular, it would like to gratefully acknowledge the consultants who had primary responsibility for developing the tool, Paul Seils and Marieke Wierda. OHCHR would also like to acknowledge the organization that provided essential support to the consultants, the International Center for Transitional Justice.

Special thanks are due to the European Commission, whose financial contribution made it possible to carry out this project and publish the rule-of-law tools.





This tool addresses the challenges of prosecuting perpetrators of crimes such as genocide, crimes against humanity and war crimes. Prosecutions form one of the central elements of an integrated transitional justice strategy, aimed at moving a society beyond impunity and a legacy of human rights abuse. While this publication seeks to draw lessons from past experiences, there is an obvious limitation: impunity has been the norm for serious violations of national and international law, while successful prosecutions are the exception. Nevertheless, there have been significant advances over the past two decades.

This tool presumes that long-term and sustainable solutions to impunity should aim mostly at building domestic capacity to try these crimes.<sup>1</sup> The Secretary-General's report, "The rule of law and transitional justice in conflict and post-conflict societies," states that "[of] course, domestic justice systems should be the first resort in pursuit of accountability."<sup>2</sup> This basic presumption is not affected by the establishment of the International Criminal Court, since the Court will assume jurisdiction only where States are "unwilling or unable genuinely" to investigate or prosecute themselves.<sup>3</sup> Moreover, the Court will have jurisdiction only where States are parties to the Rome Statute or in situations referred to it either by a State itself or by the United Nations Security Council, and then only over crimes committed after July 2002.

The focus of this tool is therefore mainly on the strategic and technical challenges that these prosecutions face domestically.<sup>4</sup> Devising a well-grounded strategy and building adequate technical capacity will serve to bolster the independence and impartiality of prosecutorial initiatives.

In some situations, however, it will not be possible to act through the domestic legal system, because of a lack of capacity or political will. This tool lays out some of the policy considerations that pertain to internationalizing the process, for instance through the creation of international or hybrid tribunals. It is not a comprehensive evaluation of all of these initiatives, as each merits a detailed study in its own right. Rather, its purpose is to gain practical insights from past experiences that may help in executing complex operations in often adverse circumstances.

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<sup>1</sup> See the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616, para. 34): "While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system."

<sup>2</sup> *Ibid.*, para. 40.

<sup>3</sup> Rome Statute of the International Criminal Court, art. 17.

<sup>4</sup> Note that many of the issues raised may also be relevant to the investigative functions of international commissions of inquiry.

Five guiding considerations should be applied to all prosecutorial initiatives (whether domestic or with international assistance):

1. Initiatives should be underpinned by a *clear political commitment* to accountability that understands the complex goals involved.
2. Initiatives should have a *clear strategy* that addresses the challenges of a large universe of cases, many suspects, limited resources and competing demands.
3. Initiatives should be endowed with the *necessary capacity* and *technical ability* to investigate and prosecute the crimes in question, understanding their complexity and the need for specialized approaches.
4. Initiatives should *pay particular attention to victims*, ensuring (as far as possible) their meaningful participation, and ensure adequate protection of witnesses.
5. Initiatives should be executed with a clear understanding of the *relevant law* and an appreciation of *trial management skills*, as well as a strong commitment to *due process*.

# I. STRATEGIC CONSIDERATIONS

## A. The political commitment

First, it is important for any policymaker, whether domestic or international, to have an understanding of the political context of prosecutorial initiatives. Such prosecutions generally take place in a highly politicized environment. The most common complaint from those who oppose them is that they are driven by political vengeance. To some extent, those who support criminal accountability can point to the State's legal duties to support the pursuit of justice. However, experience shows that local populations generally require a more comprehensive explanation of the general and specific objectives of any prosecutorial effort.

Especially in domestic settings, the need for a strong commitment to criminal accountability at the political level is crucial.<sup>5</sup> Some of the key challenges are (1) presenting the commitment without politicizing the quest for justice and (2) understanding the complex goals and managing expectations.

Policymakers can depoliticize the pursuit of justice by discussing accountability in a manner that respects the presumption of innocence, does not detract from fairness or the appearance of fairness, and reflects an understanding of the complex goals that such a policy seeks to achieve.<sup>6</sup> An example is the Presidential Accord of President Vicente Fox in Mexico, in which he requested the creation of a special prosecutor to investigate federal crimes committed by public servants against members of social and political movements. In that declaration, he

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<sup>5</sup> Mechanisms that may help to depoliticize the implementation of a prosecutorial policy include the appointment of an independent board to oversee investigations and prosecutions (such as the Investigation Task Board appointed in South Africa in the mid-1990s), a monitoring capacity or other forms of civilian oversight. Systems that allow direct victim participation in prosecutions may provide additional safeguards. It is common for the absence of political will to manifest itself as a host of technical, legal or other obstacles.

<sup>6</sup> The absence of an overt political commitment to justice is sometimes presented as a desire not to interfere in the judicial process out of respect for the separation of powers. However, experience shows that the absence of a public commitment to a policy of justice is often accompanied by an active policy of impunity.

set out the aims of restoring the legitimacy of State institutions and confidence in the rule of law.<sup>7</sup>

Policymakers should also have an informed view of the goals that drive a justice policy. For example, relying on a *deterrence* argument alone may raise expectations that are difficult to sustain,<sup>8</sup> whereas an overemphasis on *retribution* may be confused and manipulated by opponents as calls for vengeance and may create conditions conducive to acts of revenge and reprisal.<sup>9</sup>

A better rationale for prosecutions of massive human rights violations is to convey to citizens a *disapproval of violations* and *support for certain democratic values*.<sup>10</sup> A strong expression of formal disapproval by State institutions committed to human rights and democratic values can help to persuade citizens as well as institutions of the centrality of those values. Trials can help draw the distinction between conduct that is condoned and conduct that is condemned by the State, which contributes to the public's trust in State institutions. The underlying purposes of prosecutions can therefore be seen in a positive light, and may offer a more realistic justification than arguments based purely on deterrence or retribution. (Examples of prosecutions that can

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<sup>7</sup> Since the positive declaration of President Fox, the Special Prosecutor's Office has been beset with difficulties, the latest of which surrounds the controversial indictment of former President Echeverría for genocide for the killing of student protesters in 1971. (See "A Promise Unfulfilled? The Special Prosecutor's Office in Mexico", June 2004, available at [www.ictj.org](http://www.ictj.org).) Another example of positively expressed prosecutorial goals can be found in the campaign of President Alfonsín in Argentina in 1983, where the architects of the justice policy presented a serious argument in favour of prosecuting those responsible for the deaths, disappearances and mistreatment of thousands of civilians.

<sup>8</sup> Deterrence is premised on two notions: (1) that you are likely to be caught and punished for what you do and (2) that punishment will prevent a rational decision maker from committing the crime. There is a dearth of empirical evidence to date supporting the view that prosecutions deter the commission of crimes such as genocide, war crimes and crimes against humanity. Most of these crimes are committed in a context where some kind of institutional ideology dominates those ordering or executing the crimes. The fact that large-scale atrocities continue to be committed in places such as the Democratic Republic of the Congo, despite several advances in the prosecution of such crimes (including the ICTR work on neighbouring Rwanda and the International Criminal Court's investigations on the Democratic Republic of the Congo itself), may indicate that the general possibility of prosecutions is not sufficient to dissuade those inclined to commit massive atrocities, although this too is based on a presumption rather than on empirical work.

<sup>9</sup> The concept of retribution is a moral justification and does not address the legitimate social or political goals prosecutions may achieve, such as deterrence, persuasion, rehabilitation and restoration. Moreover, criminal justice should not be equated with retributivism. This may be taken to suggest that the pursuit of criminal justice is a matter of vengeance and somehow a morally dubious pursuit. This concept denigrates the dignity of victims as rights-bearing citizens and distorts the very essence of criminal justice, which is to avoid lawless vengeance and maintain the rule of law. Furthermore, even though criminal justice is primarily concerned with the role of the defendant, the trend in criminal justice over the past 30 years has been increasingly attuned to victims' needs. Describing criminal justice as retributive in nature is therefore an outdated and unhelpful caricature, as the goal should be more meaningful participation of victims in the process.

<sup>10</sup> See Pablo de Greiff, "Deliberative democracy and punishment", *Buffalo Criminal Law Review*, vol. 5, No. 2 (2002), pp. 373–405. This concept is also referred to as *persuasion*.

be seen as reaffirming democratic values are the trials that took place in Greece in 1974 and in Argentina from 1984 to 1987.)<sup>11</sup>

Prosecutorial efforts therefore require:

- A clear understanding of *system crimes* (i.e., genocide, crimes against humanity and war crimes if committed on a large scale) and how they should be investigated and prosecuted;
- The development of processes that are likely to *inspire public confidence* in the institutions dealing with the criminal prosecutions and trials, both technically and substantively; and
- An appreciation of *the role victims should play* in the judicial process and an emphasis on restoring victims' dignity as rights-bearing citizens.

Where the international community assumes a role in the process, it, too, must be clear about the objectives of such prosecutions.

## **B. Developing a clear strategy**

Even with an appropriate political commitment to support criminal accountability, a well-developed, strategic plan is essential to the success of a prosecutorial effort. The main strategic challenges are:

- A large number of crimes will have been committed and it will be possible to investigate only a small number; and
- Hundreds, if not thousands, of people may have been involved in the crimes and not all can be prosecuted.

In a transitional or post-conflict setting, the initiative to prosecute often has to compete with other urgent political, social and economic demands (both domestically and internationally). Many post-conflict countries experience high levels of ordinary crime. Competition for resources and overburdened courts are obvious challenges in these environments. Moreover, an overly ambitious approach to prosecutions may cause a backlash, including potential threats to stability from perpetrators, increased difficulties in protecting large numbers of potential witnesses and renewed calls for legislative barriers, such as amnesty laws.

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<sup>11</sup> In both countries, the armed forces responsible for massive atrocities were, to a large extent, reintegrated into the democratic framework and submitted themselves to the rule of law. It is not suggested that trials alone were responsible for this, but there is enough evidence to suggest that they played a meaningful role in encouraging institutions to change the way they saw their role in society. Most of the crimes we are addressing in these contexts are committed by such institutions, so the policy should address that reality. The primary aim should be to contribute to making certain conduct unacceptable to those organizations themselves. It is worth noting that in Argentina there was a significant backlash to President Alfonsín's originally robust approach to prosecutions, which resulted in pressure and threats from the military and eventually the "full stop" and "due obedience" laws limiting liability, as well as subsequent pardons granted under President Menem. (The legality of the two laws is currently under review.) However, there can be no doubt of the overall impact of the trials and of the fact that, after the trials, the military in Argentina resumed its proper role in society, and has not since exceeded this, even in the light of recent turmoil resulting from Argentina's economic woes.

A number of practical steps can address these challenges. It is important for the prosecutorial strategy to be transparent. The decisions on what crimes and which alleged perpetrators are likely to be investigated must be made clear in order to maintain the integrity of the process. Two steps are essential:

- A *mapping exercise* should be carried out before developing a detailed prosecutorial strategy, taking into account the universe of suspects and victims; and
- Provision should be made for *outreach* to explain the purposes of the prosecution policies and strategies.

## 1. Mapping

A mapping exercise can assist preparation of prosecutorial initiatives by providing a sense of what kinds of crimes occurred, when and where, who the victims were, and the likely identity of the perpetrators.<sup>12</sup> A mapping process could rely on detailed or official investigations, including those of international commissions of inquiry that have already taken place. The information to be gathered at this stage must meet only a prima facie standard. The objective is to provide the basis for the formulation of initial hypotheses of investigation by giving a sense of the scale of violations, detecting patterns and identifying potential leads or sources of evidence.<sup>13</sup> Appropriate use of journalistic and civil society sources will often establish an adequate basis for setting out the broad trends of violations. The mapping process should be a preliminary exercise, carried out by a qualified team, and need not be prolonged. Its benefit is threefold:

1. It makes the process more objective by basing strategic decisions on preliminary indications of actual events, rather than on pure suppositions.
2. As a result of the former, it establishes the essential discipline of “rational hypotheses” in complex investigations, i.e., proceeding on the basis of presumptions which are supported by the facts and gradually building on those to construct further “hypotheses”.
3. It allows those directing the process to make more realistic estimates of the necessary resources.

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<sup>12</sup> In some circumstances, prosecutors have been able to take advantage of particularly detailed or sophisticated inquiries that made the determination of the universe of cases and formulation of initial hypotheses. For example, the work of the National Commission on Disappeared Persons in Argentina was extremely useful to prosecutions and is perhaps the best example of the effective use of existing material to frame an investigative strategy. In that case, an investigation that accounted for abuses of more than 9000 civilians led to 700 incidents being presented in criminal trials. However, a cautionary lesson may be learned from relying too much on previous reports, which may unnecessarily restrict the focus of the investigative efforts. Another example of this can be seen in the Special Prosecutor’s Office in Mexico, where the universe of cases in relation to several decades of abuses has been limited almost exclusively to matters already investigated by the National Human Rights Commission in relation to alleged disappearances and two other massacres subject to previous investigations. Many local NGOs have complained that insufficient attention has been paid to other credible information in relation to systematic abuses.

<sup>13</sup> A methodology on mapping will need to refrain from using methods that may be deemed to taint evidence, thus rendering it useless for subsequent trials. This is a particular consideration for common-law jurisdictions, where technical rules of evidence may apply. For example, those carrying out the mapping should be cautious about taking statements from witnesses where these are likely to be subject to subsequent disclosure and likely to be used to attack witness credibility. Guidelines dealing with such considerations should be developed before embarking on the mapping.

## (a) The universe of suspects

In a situation where thousands of people were involved in committing systematic crimes, not everyone can be prosecuted. It is essential to establish a transparent set of criteria to explain the strategy of identifying suspects to be investigated and prosecuted.<sup>14</sup>

There can be many different approaches to prosecutorial strategy. For example, the *vertical* or *longitudinal* approach entails investigating and indicting perpetrators from different levels of the chain of command and building the case against the perpetrators at the apex. The International Criminal Tribunal for the Former Yugoslavia (ICTY) pursued this approach in its early years, when it proved impossible to obtain custody of anyone other than low- or mid-level perpetrators,<sup>15</sup> although the focus subsequently changed to high-level perpetrators.<sup>16</sup> Another approach, taken in recent years, deliberately restricts the focus to high-level perpetrators, as in the Statute of the Special Court for Sierra Leone, which explicitly focuses on prosecuting those *bearing the greatest responsibility*. (The Prosecutor of the International Criminal Court has already indicated that he will take a similar approach.)

In recent international debate, the prevailing view has been that focusing on those with the greatest degree of responsibility is justified. This approach has its own challenges. Some argue that this position may suggest that those who implement plans or orders (the so-called trigger-pullers) are somehow not morally culpable for their actions. There is also a question of whether victims would prefer to see prosecutions of those who planned or ordered atrocities or those who carried them out. The matter is obviously complex, but in situations where few people are likely to be brought to trial, choices must be made as to where scarce resources will be allocated. (Such a focused strategy is likely to have particular appeal in post-conflict situations, where the reintegration and rehabilitation of minor perpetrators is often a priority.)

Conversely and at the other end of the spectrum, the pursuit of only low-level perpetrators may lead to a perception (if not a reality) of scapegoating. The first domestic proceeding held in Serbia and Montenegro since the Yugoslav conflict, relating to the Vukovar hospital massacre,<sup>17</sup> focused on six low-ranking accused and has been widely criticized because it did not address

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<sup>14</sup> The criterion established by the United Nations International Commission of Inquiry on Darfur to identify suspects was there must be "a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime." See its report of 25 January 2005 to the United Nations Secretary-General pursuant to Security Council resolution 1564 (2004).

<sup>15</sup> See the address by its Prosecutor, Carla del Ponte, to the United Nations Security Council, 27 November 2001.

<sup>16</sup> See, for instance, Security Council resolution 1534 (2004). Part of the ICTY completion strategy is to plan for the handover of cases of lower-level perpetrators to the domestic jurisdiction. A special chamber of the State Court of Bosnia and Herzegovina has been created to receive such cases.

<sup>17</sup> In this case, it was alleged that, in November 1991, Serbian military personnel removed up to 300 wounded Croatian soldiers and civilians from a hospital in Vukovar after the town had fallen, then took them to a remote farm, where they were executed.



the real authors of the crime. Similar criticisms were levelled at the majority of the indictments of the Serious Crimes Unit in Timor-Leste, which focused on Timorese militia rather than high-ranking Indonesian military officials.

Focusing on those with the greatest degree of responsibility also fits with the central objective of prosecutions and is responsive to the nature of system crimes. Perpetrators often attempt to justify their crimes in ideological terms; thus, condemning their conduct and persuading them of its unacceptable nature will be most effective if efforts are aimed at those responsible for the formulation of the policies and strategies that led to the crimes.

This is not to say that all consideration of pursuing lower-level perpetrators ought to be abandoned. In some cases, targeting subordinates may provide a strategic advantage. However, in the investigation of system crimes, the idea of building up a “pyramid of responsibility” by starting with low-level suspects should be treated with some caution. The use of such an approach may depend on specific legal systems: for example, guilty pleas tend to be more readily available and used as a tactic in common- rather than civil-law systems.<sup>18</sup> Most of the convictions at ICTY have relied not on insider testimony, but on the presentation of strong circumstantial evidence indicating knowledge and control on the part of relatively high-ranking officials.<sup>19</sup> At the same time, guilty pleas or alternatives to trials may be quicker, cheaper and more effective in establishing certain facts. (Guilty pleas should require a disclosure of the facts and should be presented as admissions rather than as expedient arrangements.)

In some situations, it may also be important to include in a prosecutorial strategy charges that reflect particular types of crimes, in order to continue the development of the protections that international criminal law affords. For instance, the ad hoc Tribunals have been essential in prosecuting gender crimes, even though the perpetrators were not necessarily of high rank. A more recent example is charges of recruiting child soldiers and forced marriage included in the indictments in Sierra Leone. However, all of this can be achieved in the context of a targeted prosecutorial strategy.

Finally, a clear and limited prosecutorial strategy is useful in budgeting available resources. Trials for system crimes tend to be large and costly, as demonstrated by the ad hoc International Criminal Tribunals. Casting the net too wide will lead to a congestion of the docket and lengthy periods of pretrial detention (as shown in recent domestic prosecutions in Rwanda and Ethio-

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<sup>18</sup> Guilty pleas are a common-law construct that assist to avoid trial if the accused agrees that he is guilty of the charges in the indictment. This agreement is usually preceded by a negotiation with the prosecutor. While it is too early to say how the legislation is working in various countries, there are examples from Peru, Chile and Mexico (the last in relation to organized crime, rather than human rights violations) that indicate a number of civil-law jurisdictions prepared to amend traditional positions in order to promote effective prosecutions.

<sup>19</sup> In the highly charged ethnic context of the conflict in the former Yugoslavia, it has been difficult to persuade insiders to testify. Other situations may offer more opportunity in this regard.

pia). The pursuit of limited numbers of perpetrators allows for more accurate planning and costing. Donor fatigue has set in as a result of the high budgets for ICTY and the International Criminal Tribunal for Rwanda (ICTR).<sup>20</sup> A clearly defined prosecutorial strategy will enable more careful budgeting vis-à-vis competing priorities, such as rebuilding the domestic justice system or dealing adequately with ongoing crime.

## **(b) The impunity gap**

The fact that only a few perpetrators can be prosecuted creates challenges of what to do with the remaining perpetrators (and their victims): the so-called impunity gap. The fact that many people will not be investigated, much less prosecuted, should not mean that they should escape any form of accountability. Wherever possible, some effort should be made to deal with large numbers of those responsible who are not likely to face criminal justice. For example, thousands of military and civil servants not prosecuted in Greece in 1974 were subject to a far-reaching vetting process. Another example is Timor-Leste, where low-level perpetrators have been subjected to community reconciliation processes and may be required to perform community service.

In order to bridge the impunity gap, prosecutorial initiatives will need to build constructive relationships with other transitional justice mechanisms. It is generally accepted that massive human rights violations require a complex and integrated response comprising a variety of complementary mechanisms, including prosecutions, truth-seeking mechanisms, institutional reforms, reparations and programmes that reintegrate ex-combatants. In designing each mechanism an effort should be made to ensure that they complement rather than undermine one another.<sup>21</sup>

However, the reality is that, in situations where these mechanisms co-exist and, particularly, where their relationships develop in ways other than as part of a coherent policy approach or a common vision,<sup>22</sup> ideological and practical tensions that have the potential to cause disputes if they are not properly managed may emerge. For example, truth commissions may seek to engage ex-combatants or facilitate their reintegration, but the possibility of subsequent prosecution may discourage perpetrators from coming forward and speaking about their crimes.<sup>23</sup>

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<sup>20</sup> Although it is generally acknowledged that international tribunals are expensive, an overly simplistic approach to highlighting this problem should be resisted. As mentioned above, the goals of prosecuting system crimes are broader than effecting retribution on a few individuals, and much more effort and resources may go into the strategic indictment of a few than is reflected in such a figure.

<sup>21</sup> See S/2004/616, sect. IX.

<sup>22</sup> Situations in which truth commissions and prosecutions have formed part of a single policy approach include Timor-Leste, Peru and South Africa (although very few prosecutions were pursued in that context). Sierra Leone is an example of a situation where a truth commission and prosecutions were pursued as part of distinct and unrelated policies.

<sup>23</sup> See, for example, "Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone", September 2002, available at [www.ictj.org](http://www.ictj.org).

In practice, trials and truth commissions may compete for the same information or physical evidence, which might hamper the efforts of the other to secure possession of such information.<sup>24</sup> The simultaneous pursuit of various mechanisms may also give rise to public confusion about the different goals and operations of these institutions, and may cause rivalry between those supporting each process. These rivalries, in turn, may lead to people involved in various transitional justice efforts to draw unhelpful and overly simplistic conclusions (e.g., truth commissions promote and prioritize forgiveness while trials are essentially divisive).

These potential problems should be anticipated, and approaches should be developed to craft constructive and harmonious relationships between mechanisms. This is best done by seeking to harmonize their objectives from the outset or by forming the mechanisms as part of an integrated approach, but, even where this cannot be achieved, the following may still be useful:

- Frequent and open lines of communication between various policymakers;
- Training and activities that foster understanding of the different mandates;
- Clarifying the rights of individuals in respect of each of the mechanisms; and
- The conclusion of advance agreements on certain practical issues (including information sharing, exhumations, access to detainees, joint communications, resolving of disputes by independent third parties and outreach events).<sup>25</sup>

See also: OHCHR rule-of-law tools for post-conflict States on truth commissions and on vetting.

## 2. Communications strategy and outreach

Once a prosecutorial strategy has been devised, it should be communicated to the public in a transparent manner.<sup>26</sup> The following are some of the considerations and challenges that may arise in terms of communications and outreach. Most of these lessons stem from the international or hybrid tribunals but also apply in the domestic context:

- *Importance of transparency and clarity.* Limiting a prosecutorial strategy to “those bearing the greatest responsibility” can be difficult to explain to the public. The indictment of a

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<sup>24</sup> In Sierra Leone, the Truth and Reconciliation Commission stressed its power to grant confidentiality, with the result that its information could not be shared with the Special Court (although the Prosecutor himself declared that he would not seek such information). The Special Court, on the other hand, took the position that accused held in its detention could not come before the Commission in a public hearing, which prevented the Commission from hearing key actors in the conflict.

<sup>25</sup> A similarly complex relationship may exist between prosecutorial initiatives and reparations. It is rare for the criminal process to result in direct reparation, although with the establishment of the International Criminal Court, international practice is moving towards an increased emphasis on linking criminal accountability with reparations.

<sup>26</sup> It is widely acknowledged that ICTY and ICTR were late in implementing outreach programmes. The Special Court for Sierra Leone has fared better by (1) holding town hall meetings conducted by senior officials in every district of the country; (2) establishing an outreach team within the Court with enough staff to be able to deploy quickly to the districts; (3) conducting a regular interactive forum with civil society to discuss key concerns; and (4) producing a wide variety of material that can be used in domestic and international outreach.

small number of perpetrators and the conduct of lengthy and expensive trials may raise questions of relevance and whether this is a good use of resources. Also, the prosecution of popular leaders in post-conflict settings, as a result of a commitment to even-handed prosecutions, may require proactive justification. These problems may be alleviated by a clear message on prosecutorial strategy, justified through the overall objectives of prosecutions discussed above.

- *Comprehensive outreach throughout the proceedings.* Strategic planning on outreach should accompany every phase of the trial and should not focus solely on investigations and indictments. It should also seek to explain the role of the defence and other developments in the proceedings. Outreach should be representative of the court itself, and should be carried out in ways that equally represents the perspectives of the prosecution, defence and the court itself (although there may be more onus on the prosecutor to explain his or her actions).
- *Partnerships with the media and civil society.* With the necessary precautions, partnerships can be used to expand and strengthen an outreach strategy network. Interaction with the media should be proactive and may require capacity-building and special information sessions, particularly in contexts where the media lack strength or independence. The same applies to civil society: outreach should be a two-way communication with civil society and the public, and should allow for interaction and feedback.
- *Adequate funding.* Outreach should be adequately funded from the core budget. It must seek to incorporate solutions to logistical and linguistic challenges posed by resource-poor or post-conflict environments, such as high illiteracy rates. In many situations, radio may be the most effective way to reach remote populations.

### C. The appropriate technical approach: understanding system crimes

One of the key approaches adopted by ICTY and ICTR has been the development of investigative techniques in dealing with “system” crimes (defined as genocide, crimes against humanity and war crimes if committed on a large scale).<sup>27</sup> Critics of the Tribunals often overlook this crucial contribution. The challenges of investigating system crimes and some suggested approaches are elaborated below. Especially in domestic settings, these are crucial issues, as the lack of expertise and experience in such matters are key contributors to impunity.

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<sup>27</sup> The presumption behind system crimes is that they are *generally* of such a scale that they require a degree of organization to perpetrate. This is not to say that the prosecution must show that all acts of genocide, crimes against humanity or war crimes were carried out by an organization or pursuant to a policy. Most often, this organization will be the apparatus of the State. The term “system” crime was first used by the Dutch jurist B.V.A. Röling, who was a judge on the International Military Tribunal for the Far East (Tokyo Tribunal) after the Second World War. Pertinent examples are found in the trials conducted under Control Council Law No. 10, such as the *Medical case*, the *Einsatzgruppen case*, the *Justice case*, the *High Command case*, etc. These cases are documented in *Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946–April 1949* (Washington, D.C., United States Government Printing Office, 1949).

System crimes (as with most organized crime) are generally characterized by a division of labour between planners and executants, as well as arrangements in structure and execution that tend to make connections between these two levels difficult to establish. They are complicated by the fact that they are often (though not always) committed by official entities and frequently with the involvement of people who were, or may remain, politically powerful. The crimes usually affect large numbers of victims, and these issues of scale and context make investigations more logistically difficult.

On the other hand, system crime investigation is facilitated by the fact that official bodies generally operate under an institutional framework with direct lines of reporting and accountability. This structure provides a useful basis for developing lines of investigation, which allows for inferences to be drawn regarding the authorization of crimes in the absence of any direct evidence.

Investigative techniques for system crimes differ from those relating to ordinary crimes. The prosecutor's work in investigating and presenting most ordinary crimes can be likened to that of a film director, whose task is to describe clearly how a particular event occurred, and whose main concern is describing the carrying-out of a specific criminal act. The clearer the description, the easier it will be for the court to determine responsibility. However, the investigation of system crimes requires an approach closer to that of an engineer. The task is not simply to describe the carrying-out of the criminal act, but to elucidate the operation of the elements of the machinery.

System crime investigation, whether in relation to a series of criminal acts or an isolated one, requires a detailed exploration of the system itself, and not merely of the results, which are manifested in the underlying crimes that constitute the so-called *crime base* (e.g., murder, torture, rape, deportation). However, few investigative bodies have developed the necessary techniques and resources to investigate system crimes effectively.

### ***1. The need for a multidisciplinary investigation***

System crimes are most often committed by State security forces (army or police) or by insurgent or paramilitary organizations. Effective investigation requires appropriate analysis of the ways in which such organizations are legally required to work, as well as how they actually operated during the time in question. Lawyers may lack all the skills necessary to carry out such analyses, and significant input from other experiences and disciplines can be very beneficial.

Such investigations require analysis that presents persuasive evidence in relation to:

- *The particular practices of military and paramilitary organizations.* Training, command structures, logistics, communications systems, munitions supplies and disciplinary procedures may all be relevant to investigations. Expert guidance is often necessary if investigations are to be carried out effectively.

- *The general socio-historical context of the events.* This is particularly important where there is a reasonable hypothesis that political authorities knew of, tolerated or aided and abetted the crimes in question. Several countries have witnessed crimes committed by official forces while apparently under democratic rule. To present an accurate understanding of how these events can occur, it is important for the investigation to uncover the real nature of the political, historical and institutional relationships. Again, this work generally requires historians and political scientists, rather than lawyers.
- *The local context and dynamics of violence.* System crimes generally occur in the context of a real or perceived threat to the established political order, such as political opposition or armed resistance. Studies of areas where violence has occurred can be significant for a number of reasons. First, when the alleged crimes took place several years earlier and in places not well known to investigators, such studies allow them to understand more clearly the context of the investigation. This will help them to develop the lines of investigation more effectively and relate more easily to potential witnesses. Furthermore, understanding the local social, political and cultural dynamics at the time the crimes were committed will help in anticipating lines of defence and allow the investigation to develop hypotheses and counter-hypotheses.
- *Analysis of public and restricted documentary information.* Recovering and analysing documentary information is often vital to the success of these investigations. Documentary evidence may have advantages over personal testimony, as it may help to prove matters more quickly and succinctly. It is not subject to the difficulties presented by intimidation and changing disposition of witnesses. Although always subject to interpretation, it can often provide more conclusive evidence of specific events or orders than personal recollections or conjectures.
- *Crime-base reconstruction.* This relates to the more traditional business of gathering personal testimonies and forensic evidence to recreate the scene where the criminal act was committed.

One of the main difficulties is that most investigative forces base their expertise on crime-scene reconstruction and forensic analysis. This is increasingly so because of the technological advances in forensic pathology. Regardless of the crime, it is clearly essential to prove the facts of the criminal act; however, this procedure alone generally cannot provide the proof of participation of those behind the scenes. Most investigative bodies are not trained to prove such participation through different forms of analysis. The tendency is to overload investigations with crime-scene information that ultimately proves only that a great number of criminal acts were committed. It does not clarify the nature of participation in these crimes or the identity of the intellectual authors.

Expert capacity in investigating system crimes rarely exists in countries grappling with a legacy of massive crimes. Various models of assistance might be contemplated, but it is important to understand the relationship between the mapping exercise and the capacity demands. The goal should not be to reform the entire justice system at the exact same pace, but rather to

construct specialized teams to deal with the multifaceted issues that emerge in the investigation of complex crimes.

## 2. Considerations relating to evidence

Documentation retrieval and analysis is a vital part of investigating system crimes. For example, analysis of logistical, communications, operational, munitions, reporting and disciplinary practices can lead to strong evidence of general control, and make it increasingly difficult to rebut the conclusion that those high in the chain of command authorized the crimes under investigation.<sup>28</sup> Depending on the circumstances, documentary investigations require creativity and subtlety, and may require proactive measures to stop those under investigation from subverting the process.

Prosecutorial initiatives are often seen as urgent because evidence may be lost, destroyed or weakened with the passage of time. However, this depends on the type of evidence. It is highly unlikely that all witnesses in proceedings on large-scale and systematic human rights violations will suffer faded recollection, and there are usually plenty of available witnesses (as opposed to eyewitnesses, who can be scarce).<sup>29</sup>

Similarly, the degradation of physical evidence (such as human remains), while undesirable, may not significantly damage its evidential use. Exhumations are generally not required to determine that crimes occurred, or to identify victims, but they are helpful in demonstrating the immediate circumstances of the victims' deaths and may give credible indications (in the case of genocide) that victims belonged to a particular social or ethnic group. Even several years between the event and the investigation generally will not degrade the evidence to the extent that it cannot be used for this purpose. (There are many other considerations governing exhumations that are significant but beyond the scope of this tool.)

However, the greater risk lies with intentional contamination or destruction. Clandestine graves may be disturbed by relatives looking for the remains of their loved ones or by those seeking to pervert the course of investigations. This can create serious difficulties for the admissibility of any evidence from a particular site. The need for urgent action should emphasize effective protection of evidential sites or documents for future investigation. Such steps may need to be taken by those who are first on the ground. Anyone with responsibilities for gathering or preserving evidence should be given adequate training and should follow pre-established pro-

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<sup>28</sup> See Williams J. Fenrick (Senior Legal Adviser of the Office of the Prosecutor at ICTY), "Attacking the enemy civilian as a punishable offense", *Duke Journal of Comparative and International Law*, vol. 7, p. 539, available at [www.law.duke.edu/journals/djCIL/articles/djCIL7p539.htm](http://www.law.duke.edu/journals/djCIL/articles/djCIL7p539.htm). Strongly recommended is section VIII on proving offences to give a sense of the complexity of the investigation in which ordinary criminal investigators normally will have no experience.

<sup>29</sup> In cases of system crimes, witnesses willing to testify to the general events may be plentiful, although eyewitnesses remain rare (usually many are dead or missing). In general, inconsistencies in prior statements or allegations that the witness suffers from post-traumatic stress disorder will not be fatal to the testimony.

protocols governing the chain of custody and other such considerations. Even in purely domestic initiatives, ad hoc international assistance may be sought in the preservation of evidence, for instance in the engagement of a forensic capability.<sup>30</sup>

United Nations employees that witness or investigate crimes should be aware of the fact that they may be called to testify.<sup>31</sup> United Nations reports compiled by bodies such as expert groups that have conducted investigations on the ground may be admissible in subsequent criminal trials. Likewise, those engaged in compiling such reports may be called as experts,<sup>32</sup> as may other United Nations representatives, depending on the applicability of the Convention on the Privileges and Immunities of the United Nations or any other ad hoc arrangements.<sup>33</sup> Such testimony is usually taken in conditions that respect the confidentiality and sensitive nature of the testimony, such as in closed session or under other controlled conditions.<sup>34</sup>

### *3. The significance of analysis of patterns in the investigation of system crimes*

While reconstructing the crime base is essential to the prosecution of system crimes, analysis must play a central role. A lack of emphasis on analysis will likely result in a more expensive process that takes longer, addresses a smaller number of victims and has a diminished prospect for proving participation of those behind the scenes.

Part of the goal of analysis will be to identify patterns. A “pattern” refers to a set of events that, by their frequency, location and nature, imply some degree of planning and centralized control. The use of patterns can help prove that a particular crime was part of a planned process. The legal inferences that can be drawn from the use of patterns in evidence will depend on the facts

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<sup>30</sup> Discussions for the formation of a regular international capacity for this, in the form of “justice rapid response teams”, are currently under way among various Governments.

<sup>31</sup> Regarding the International Criminal Court, it appears that the Office of the Prosecutor will approach the issue of United Nations staff testimony with great caution and, in general, seek to use it only if the information cannot be obtained from another source and is deemed vital to the case. Nevertheless, one has to remember that the defence also has the right to call United Nations staff.

<sup>32</sup> In the ICTY case of *Kovacevic*, the Prosecution called one of the members of the United Nations Commission of Experts for the former Yugoslavia established under Security Council resolution 780. The Trial Chamber allowed the evidence on the reasoning that she was analogous to a contemporary historian and that she had made a study of the material and was qualified to testify on it. However, the Trial Chamber specified that the evidence was hearsay, that the defence would be able to cross-examine, and that the accused would not be convicted on the basis of such evidence alone.

<sup>33</sup> For instance, the International Criminal Court has concluded its own relationship agreement with the United Nations to regulate these issues. Specifically, it currently states in article 16 that: “If the Court requests the testimony of an official of the United Nations or one of its programmes, funds or offices, the United Nations undertakes to cooperate with the Court and, if necessary and with due regard to its responsibilities and competence under the Charter and the Convention on the Privileges and Immunities of the United Nations and subject to its rules, shall waive that person’s obligation of confidentiality.”

<sup>34</sup> For instance, several prominent United Nations witnesses have given evidence before the ad hoc Tribunals, including General Morillon, former commander of the United Nations Protection Force (UNPROFOR), and General Dallaire, former commander of the United Nations Assistance Mission in Rwanda (UNAMIR).



themselves.<sup>35</sup> Although not all system crimes relate to patterns of events, the investigation of patterns can be crucial in determining the responsibility of those behind the scenes. This issue is particularly important in situations where responsibility may be based on omission, rather than commission. Reconstructing patterns can help build a framework that implies that those behind the scenes knew or had reason to know that the events were occurring or were likely to occur and failed in their duty to prevent them.

There are further compelling reasons to conjoin cases involving similar acts:

- *Judicial economy.* As a matter of economy and prudent use of resources, it is much more efficient to group cases for the purposes of investigation and trial than to deal with each one individually.
- *Efficiency.* Apart from the simple but expensive issue of court time, an atomistic approach will inevitably lead to a huge duplication of efforts of investigators and prosecutors on several aspects of the multidisciplinary investigation.
- *Security.* A long series of individualized trials dealing with very limited subject matter isolates witnesses, lawyers and judges. The longer the process takes, the more costly it is to maintain the necessary levels of protection of all those involved.
- *Potential for impact.* Long, drawn-out trials on very restricted incidents ignore the important opportunity to present cases in a way that describes to the public the real nature of the events as they happened—as part of a systematic attack organized at a high level.<sup>36</sup>
- *Legal requirements.* If trials seek to deal with certain international crimes, demonstrating patterns will also be a legal requirement.

#### 4. A proposed model for investigations

The following is a possible structure of investigations and prosecutions.<sup>37</sup> A dedicated multidisciplinary unit should be established to address serious crimes. Various models of such ap-

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<sup>35</sup> For example, the kinds of massacres the army committed in the Guatemalan civil war required considerable strategic organization, including surrounding villages, controlling exits and entrances, torturing and murdering unarmed civilians, and destroying houses and livestock. Several incidents carried out in limited geographical areas suggest knowledge and control on the part of regional commanders and possibly even at the level of the high command. For an excellent explanation of the potential significance of patterns, see Fenrick, loc. cit. It is not possible to say with certainty how many specific acts must be included in the proof of a pattern to establish knowledge and control. The more information on planning and organization, the less will be needed in terms of acts showing frequency, modus operandi and location. In the final analysis, the art of investigation is finding the correct balance of all the elements.

<sup>36</sup> One of the architects of the trials in Argentina has noted that it was the very drama of the trials, describing the abusive system in question, that played such an important role in helping to restore the rule of law and respect for the administration of justice. Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, Yale University Press, 1996), pp. 132–134.

<sup>37</sup> It follows, to a large extent, the model adopted by the Special Prosecutor in Mexico. This is one of the strongest aspects of those efforts in that country, although the practical results are not ideal. Most of the difficulties related to a lack of resources in some teams or to a lack of appropriate training in others. The model also borrows heavily from the experience of the ICTY Office of the Prosecutor, especially in the central role of analysis. However, ICTY has not been very successful in creating suitable mechanisms to ensure the meaningful participation of victims.

proaches already exist.<sup>38</sup> This tool focuses on investigative and prosecutorial capacity, which should include the following:<sup>39</sup>

- Lawyers who are skilled in the particularities of guiding system crimes investigations;
- Expert analysts in various fields, including historical, military and political analysts;
- Sufficient crime-scene investigators for the expected universe of cases;
- A liaison unit with NGOs and victim organizations to assist in victim preparation and awareness; and
- Experts to deal with the particular needs of women and children.

It is important to realize that a well-designed structure, guided by the correct analytical focus, may be capable of significant results even with small numbers of staff. Building constructive partnerships, such as harnessing effective victim and civil society cooperation, may reduce time and cost. While many NGOs will want to play an active part in prosecutions through evidence gathering and investigative work, they can also contribute to the strategic development of domestic prosecutions in ways that official prosecutorial bodies cannot. Because of their proximity to victims, NGOs can and should develop programmes that allow victims to participate meaningfully in the prosecution process.<sup>40</sup>

## D. Respecting victims' needs and rights

### 1. Involving victims in the process

One of the International Criminal Court's relatively novel features is its emphasis on the participation of victims in the trial. From a common-law perspective, this approach may seem odd or even inappropriate, but it reflects something close to the norm for civil-law jurisdictions.<sup>41</sup>

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<sup>38</sup> An example is Peru, where a "subsystem" has been created to deal with terrorism cases from the conflict period and proposals are being discussed to allow this to be extended to deal with other crimes from the past. Complex proposals are under consideration for the creation of a tribunal for justice and truth in Colombia as part of a process to help disarm organized groups. Many common-law jurisdictions established war crimes investigations units in the late 1980s as a result of specific cases that emerged at the time. Several people moved from these units to have a significant influence in the development of the Office of the Prosecutor in ICTY.

<sup>39</sup> If the legal system employs a more old-fashioned inquisitorial model with an active investigating role for the *juge d'instruction*, additional training would also be necessary at that level.

<sup>40</sup> Key examples of how NGOs may relate to victims can be seen in the excellent examples of the Centro para la Acción Legal en Derechos Humanos (CALDH) in Guatemala in its work with 24 indigenous communities seeking prosecutions for war crimes and crimes against humanity, or with Paz y Esperanza in Ayacucho, Peru. While many other NGOs stand out for effective work, what distinguishes these organizations is the care taken in working with the victims and trying to ensure that the process restores their dignity.

<sup>41</sup> One of the most progressive examples can be seen in the Guatemalan criminal procedure (at least in theory). There, victims and human rights organizations that can demonstrate a right to be involved in a case may act as associated plaintiffs (*querelante adhesivo*). They have the right to present lines of inquiry throughout the investigation to the prosecutor. A controlling judge, whose function is limited to ensuring the legality of the investigation and confirming the indictment, can hear complaints on the failure of the prosecutor to act on the suggestions of the *querellante*. At trial the victim can examine in chief and cross, present evidence, propose witnesses and appeal.

The concept of victim involvement has been the procedural norm in many countries for a long time.<sup>42</sup> At the same time, domestic *and* international initiatives have often failed to appreciate the central importance of protecting the dignity of victims. The reality is that lack of appropriate training and work pressures frequently relegate victims to instruments of proof, rather than human beings and citizens with rights and needs.

It is important to strike a balance between giving victims an appropriate place in prosecutions and not creating the impression that they have a veto power over proceedings. In practical terms, prosecutors will often rely on victims' goodwill to present evidence effectively against the accused. However, victims will generally be able to provide limited information. They will rarely be able to provide information on the structures of the groups that were behind specific crimes. Therefore, it is important that victims understand prosecutorial strategies and the reasons they have been selected as witnesses so that they do not feel that their views are being ignored or that they have not contributed meaningfully to the process.

Some basic guidelines can go a long way towards helping to make the pursuit of justice a much more meaningful experience for victims:

- *Managing expectations.* Those dealing with victims should manage expectations honestly. The risks of participating in trials, and the prospects for success, should be discussed honestly and not disguised. There is no long-term value in misleading victims simply to ensure the provision of testimony.
- *Regular communications.* Communication is central to a respectful relationship with victims; even a simple leaflet that outlines the process and gives contacts for further information can be invaluable. Communications policies should reflect and respect local customs and dynamics. For example, village farmers should not be called to day-long meetings or interviews during sowing or harvest times unless it is absolutely unavoidable. Such matters are most easily addressed if there is a process that allows victims to explain what would work for them and when. This in itself can be seen as part of the process of restoring their dignity.
- *Education.* Many victims may have no real knowledge of what a legal process involves, so an educational programme is essential. Victim liaison teams, guided by legal personnel, can provide basic information as long as they are adequately trained and properly briefed. This kind of information should take into account illiteracy rates among local populations.
- *Staff awareness training.* Many jurisdictions will benefit from some form of awareness training that deals with respectful treatment of sensitive gender or race issues. This presents special difficulties in domestic proceedings, especially where there is general denial about discrimination.

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<sup>42</sup> Common-law systems have not been blind to the possibilities of better treatment of victims, and may seek their input through informal consultations or victim impact statements.

- *Information prior to trial.* Prior to trials, victims and witnesses should be familiar with the trial process and the courtroom itself. They should understand both the defence's right to challenge the prosecution's version of events and their own right to be treated with respect and dignity.

It is important that witnesses do not feel that they have been manipulated for the sake of obtaining a conviction. This runs the risk of denigrating victims even further if the supposed vindication of their rights is a process that appears abusive or insensitive, or takes risks with victim security.

It is desirable for NGOs working with victims to assume a broader educational and strategic role in helping them with prosecutorial efforts.<sup>43</sup> Ideally, a liaison unit within the prosecution team could help NGOs develop an approach that addresses a number of key issues, such as risk assessment, realistic expectations, prosecutorial strategy, the role of witnesses, the rights of victims, and what to expect from the prosecuting authorities in terms of treatment, communication and transparency. Such an approach is not only ethically desirable, but has the strategic benefit of allowing victims to feel invested in the process, thus enhancing their inclination to cooperate, even when matters are not going well.<sup>44</sup>

## 2. *Witness protection*

Another essential element in respecting the dignity of victims is to ensure that there are adequate protections in place for those who will need to testify. The principle in protecting potential witnesses must be to "do no harm" and to ensure their well-being, prior to, during and after the proceedings. Persons who lack adequate support from relatives or the community may be difficult to protect, even in a well-developed witness protection system. Special protocols should be developed for dealing with women and children.

Effective witness protection involves many aspects, including:

- Completing thorough and ongoing risk assessments;
- Training investigators on how to interact with victims and potential witnesses;
- Involving trauma experts and psychological counsellors in the investigation;
- Providing victims and witnesses with adequate information of the process and their rights;

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<sup>43</sup> This must never amount to coaching them in terms of evidence or in manipulating them into committing to give testimony when they may have legitimate grounds for preferring not to. The focus of such a role is to allow victims to come to a decision on their participation in the light of a full understanding of the process and associated risks.

<sup>44</sup> The victim liaison team might deal with different matters, including specific security and health issues. Again, its mandate has to be realistic and honest from the outset and should avoid creating unrealistic expectations or converting the prosecution service into a humanitarian organization.

- Establishing secure premises in which to conduct interviews;
- Limiting contact with the witness only to what is necessary;
- Removing a potential witness to a safe house or area; and
- Ensuring that their basic needs, including medical needs and financial considerations (such as compensation for lost earnings), are met.

The International Tribunals have extensive experience in dealing with aspects of witness protection at trial, the establishment of victim and witness sections, and the implementation of a variety of technological protective measures in the courtroom, including voice and image distortion, closed sessions, protective screens, pseudonyms and closed-circuit television. In some cases relocation, even to another country, and a new identity may be needed. For victims of sexual offences, these measures may be accompanied by evidentiary safeguards such as the inadmissibility of evidence of past sexual conduct or the limited admissibility of evidence of consent. It is also important that former witnesses are kept informed of the proceedings and the outcome of cases. Protocols on these issues should be developed early on, with adequate expertise on women's and children's issues. If domestic jurisdictions lack adequate legislation or expertise in this area, they may wish to consult international counterparts with extensive expertise, including the International Criminal Court.

## II. APPLICABLE LAW, TRIAL MANAGEMENT AND DUE PROCESS

### A. Legal strategy

To succeed, prosecutorial initiatives must demonstrate a clear understanding of applicable law. The main framework for conducting these trials will usually be international law insofar as it has been incorporated into domestic law. The duty to prosecute certain crimes is a complex legal topic. In brief, such a duty may derive from several sources:

- From *international treaties* such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. These conventions usually contain obligations to investigate and prosecute (or extradite). For the Geneva Conventions, this treaty-based duty applies only to crimes that constitute “grave breaches”, as specified in the Conventions.
- From *international human rights law*, pursuant to several conventions such as the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms or the American Convention on Human Rights, victims of gross violations of human rights are entitled to an effective remedy for the breaches they have suffered. The Human Rights Committee and the European and the Inter-American Courts of Human Rights have interpreted this to encompass investigation and prosecution.
- From *customary international law*, in the case of crimes against humanity (tried at Nuremberg and other trials after the Second World War, and since expanded to include the crimes now listed in the Rome Statute) or war crimes when committed in internal armed conflict (contained in common article 3 of the Geneva Conventions). This depends in part on the state of customary international law at the time the crimes were committed, and on the status of customary international law in the domestic laws of the particular jurisdiction concerned.

All States parties to the Rome Statute must incorporate the crimes encompassed in its article 5 (genocide, crimes against humanity and war crimes) into their domestic law. However, as mentioned previously, individuals cannot be prosecuted retroactively for violations occurring before July 2002.

Although international treaties prohibit particular crimes, it is through the jurisprudence of the ad hoc Tribunals that crimes and various forms of participation as well as defences have been much further defined. Domestic prosecutorial initiatives should pay attention to the significant developments in the jurisprudence dealing with genocide, crimes against humanity and war crimes from ICTY and ICTR. These include significant judgements on the definition of genocide;<sup>45</sup> the scope of crimes against humanity and its various underlying crimes,<sup>46</sup> including extermination<sup>47</sup> and persecution;<sup>48</sup> the definition of various forms of sexual crimes, including rape as genocide,<sup>49</sup> rape as torture, or enslavement;<sup>50</sup> conditions of application of grave breaches of the Geneva Conventions<sup>51</sup> and violations in the context of internal armed conflict;<sup>52</sup> forms of participation including superior responsibility,<sup>53</sup> joint criminal enterprise,<sup>54</sup> and aiding and abetting;<sup>55</sup> and the availability of defences such as duress,<sup>56</sup> reprisals<sup>57</sup> and diminished responsibility.<sup>58</sup> The Rome Statute and its Elements of Crimes may provide further guidance.

If a crime is not clearly defined in domestic law at the time it was committed, a prosecution may contravene the principle of legality. Other legal obstacles to prosecutions may include statutes of limitations, immunities, double jeopardy or *ne bis in idem*. These obstacles should be challenged creatively, as has been the case in a number of recent examples.<sup>59</sup>

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<sup>45</sup> *Jelisić*, ICTY Appeals Chamber, 5 July 2001; *Krstić*, ICTY Appeals Chamber, 19 April 2004; *Akayesu*, ICTR Trial Chamber, 2 September 1998.

<sup>46</sup> *Tadić*, ICTY Appeals Chamber, 15 July 1999.

<sup>47</sup> *Krstić*, ICTY Trial Chamber, 2 August 2001.

<sup>48</sup> *Kupreskić*, ICTY Trial Chamber, 14 January 2000.

<sup>49</sup> *Akayesu*, ICTR Trial Chamber, 2 September 1998.

<sup>50</sup> *Kunarac, Kovac and Vuković*, ICTY Appeals Chamber, 12 June 2002.

<sup>51</sup> *Tadić*, ICTY Appeals Chamber, 15 July 1999.

<sup>52</sup> *Tadić*, ICTY Appeals Chamber, 2 October 1995.

<sup>53</sup> *Blaskić*, ICTY Appeals Chamber, 29 July 2004.

<sup>54</sup> *Tadić*, ICTY Appeals Chamber, 15 July 1999.

<sup>55</sup> *Furundžija*, ICTY Trial Chamber, 10 December 1998.

<sup>56</sup> *Erdemović*, ICTY Appeals Chamber, 7 October 1997.

<sup>57</sup> *Kupreskić*, ICTY Trial Chamber, 14 January 2000.

<sup>58</sup> *Vasiljević*, ICTY Trial Chamber, 29 November 2002.

<sup>59</sup> International developments over the past few decades may be helpful. For instance, on statutes of limitation, see the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*. On immunities of former and current Heads of State, guidance may be found in the statutes of international criminal courts and in the decision on the lack of immunity of Charles Taylor (decision by the Special Court for Sierra Leone, 31 May 2004), Jean Kambanda before ICTR and Slobodan Milošević before ICTY. For guidance on *ne bis in idem*, see article 20 of the Rome Statute. For a very useful discussion on these issues as well as other matters of State practice, see the "Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity" by Professor Diane Orentlicher (E/CN.4/2004/88). This study was aimed at commenting on the Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1, annex II), which have since been updated (see E/CN.4/2005/102/Add.1).

An important question may concern the permissibility of amnesties. Blanket amnesties for genocide, war crimes, crimes against humanity and other serious violations of human rights are generally deemed impermissible under international law and need not be respected by the international community. The Secretary-General of the United Nations has taken the view that United Nations-endorsed peace agreements can never grant amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights, nor will such amnesties constitute a bar before United Nations-created or United Nations-assisted courts.<sup>60</sup> International jurisprudence, including the cases before ICTY, the Inter-American Court of Human Rights and the Special Court for Sierra Leone, has also supported the non-recognition of amnesties.<sup>61</sup> Recently, amnesties have also successfully been challenged in a number of national courts, including in Chile and Argentina.

Moreover, amnesties in countries that are States parties to the Rome Statute covering crimes under the jurisdiction of the International Criminal Court may contravene legal obligations under that Statute, and the Prosecutor is under no duty to respect them. There may be less certainty where amnesties are subject to conditions short of full punishment, such as disclosure accompanied by some form of sanction. Such measures may fall to the Prosecutor and Pre-Trial Chamber to evaluate under article 53 of the Rome Statute, pursuant to which he can decide whether an investigation or prosecution would serve the “interests of justice.” As a matter of general principle, however, it is clear that States have a “duty to exercise their criminal jurisdiction” under the Rome Statute and any invocation of the “interests of justice” as a basis not to proceed will be extremely exceptional.

In terms of a choice of forum, the updated Set of Principles for the protection and promotion of human rights through action to combat impunity state that trials of massive violations of human rights should be held before ordinary civilian courts rather than military tribunals.<sup>62</sup> Regional human rights courts or treaty-monitoring mechanisms may be used creatively to catalyse domestic cases.

If crimes have extraterritorial aspects, efforts should be made to put in place appropriate arrangements for extradition and judicial assistance from abroad. In the context of the International Criminal Court, new provisions will be adopted that allow for cooperation with the Court and other States parties. Other treaty regimes, such as the Geneva Conventions of 1949 (including the Additional Protocols of 1977) or the Convention against Torture, may entail their own obligations in terms of extradition and judicial assistance. Alternatively, ad hoc arrangements should be made.

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<sup>60</sup> See S/2004/616, sect. XIX.

<sup>61</sup> See the case of *Furundzija*, ICTY Trial Chamber, para. 155, 10 December 1998, the case of *Barrios Altos*, Inter-American Court of Human Rights, No. 75 (series C), paras. 39–41, 14 March 2001, and the case of *Kallon and Kamara*, Special Court for Sierra Leone Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004.

<sup>62</sup> See E/CN.4/2005/102/Add.1, principle 29.



See *also*: Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher (E/CN.4/2004/88).

## B. Issues relating to trial management

Equally important legal advances in procedural developments have been made to cope with the magnitude and unique challenges of these trials.

1. *Admissibility of evidence.* One of the biggest challenges for prosecutions of mass crimes is the volume of evidence. In general, international criminal courts have rejected technical approaches to evidence and have taken a flexible approach to admissibility. Evidence with probative value is generally admissible (including hearsay).<sup>63</sup> Also, to speed up the trials, there is an increasing tendency to rely on written evidence in the place of oral testimony, including written witness statements, particularly when it relates to matters other than the direct role of the accused.<sup>64</sup>

2. *Trial management.* Due to the sheer size of these trials, they can be very difficult to manage effectively. ICTY and ICTR have developed an extensive practice of organizing pretrial hearings, including conferences to discuss the parties' intentions. On occasion, judges have taken stringent measures, including limiting available court time or numbers of witnesses. Particular lessons may be drawn from the *Milosevic* case, which is one of the most ambitious trials attempted in modern times.<sup>65</sup> That trial may also give insights into how to handle a trial that is the subject of intense political and media interest.

3. *Considerations in conducting joint trials.* Joint trials are a common feature in dealing with system crimes and are allowed where the acts of various accused form part of the same "transaction."<sup>66</sup> On the one hand, these may be considered advantageous in respect of judicial economy and not requiring witnesses to make repeated appearances. On the other,

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<sup>63</sup> Hearsay constitutes a statement, other than one made by the witness while testifying at trial, offered in evidence to prove the truth of the matter asserted. Hearsay evidence is generally not admissible in common-law systems.

<sup>64</sup> ICTY, Rules of Procedure and Evidence, rule 92 bis. Although these rules are not uncontroversial for the common lawyer, many of the technical approaches have developed in the context of jury trials, and judges do not need to be protected to the same extent. The rationale behind flexible rules of admission is that direct evidence is not easily available in these trials, and should not be excluded on purely technical grounds. (Civil-law systems, in any case, tend to take a more liberal approach to evidence.)

<sup>65</sup> See, for example, a series of orders in the *Milosevic* trial dated 5 December 2001, 4 January 2002 and 11 January 2002, in which the ICTY Trial Chamber required the parties at the outset of the trial to provide extensive information on the number of anticipated witnesses and exhibits, the anticipated length of their respective cases, the status of disclosure, etc. The Trial Chamber used this information to impose strict limitations on the time afforded to the prosecution, although the trial has since been delayed repeatedly due to the health of the accused.

<sup>66</sup> ICTY rule 48.

due regard should be had for conflicts of interests between the accused, and the strain on witnesses of cross-examination by several defence counsel.

4. *The need for training.* Managing these trials is not comparable to working on ordinary criminal proceedings, and extra training will benefit even the most experienced legal professionals.

## C. Due process standards

Without strict adherence to due process standards laid out in international human rights law, the trials may become vulnerable to accusations of politicization and their objectives will be fatally undermined. These standards are enshrined in article 14 of the International Covenant on Civil and Political Rights, which has formed the basis for similar provisions in the statutes of the international tribunals. The practice of the international tribunals therefore may provide valuable guidance in this area. Due process rights include:

- *Rights of suspects.* Under international human rights law, suspects have a right to legal counsel and to be questioned in the presence of counsel, a right to remain silent, a right to translated documents and a right to be free from any form of coercion, duress, threat or torture.<sup>67</sup>
- *Rights to be promptly informed of charges.* This gives the accused adequate opportunity to challenge his (or her) detention and to prepare his (or her) defence.<sup>68</sup> This does not mean that the indictment, of which he (or she) is to be informed upon arrest, cannot subsequently be amended.<sup>69</sup>
- *Legality and conditions of detention.* In situations where bail may not be available and pretrial detention is the rule rather than the exception, persons should be indicted only after charges can be supported.<sup>70</sup> Conditions of pretrial detention should be open to monitoring by the International Committee of the Red Cross or other groups and subject to regular judicial review.
- *An impartial bench.* For trials to be perceived as successful, it is essential to compose a bench that is competent, fair and impartial. Any issues regarding impartiality should be dealt with preferably during the judicial selection process.<sup>71</sup>

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<sup>67</sup> See, for instance, the Rome Statute, art. 55.

<sup>68</sup> See the International Covenant on Civil and Political Rights, art. 9 (2).

<sup>69</sup> *Kovacevic*, ICTY Appeals Chamber Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 36.

<sup>70</sup> In Kosovo, numerous arrests were made before the judicial capacity was in place to start any trials.

<sup>71</sup> Otherwise, this will become an issue of litigation that may be harmful to the public perception of the court. For example, in Sierra Leone, defence counsel brought a motion to have Judge Robertson removed from the bench because of remarks about Foday Sankoh, Charles Taylor and the Revolutionary United Front (RUF) that he made in his book on international justice. The motion succeeded: the Appeals Chamber found that his statements did raise an issue of appearance of bias and directed that he should not participate in any cases involving RUF. Judge Robertson had been appointed by the President of Sierra Leone. Selection should preferably be a part of a more extensive process.

- *Right to translated documents.* The Tribunals have held that the accused should be entitled to receive in translation (a) all the evidence against him or her; (b) all materials supporting the indictment; and (c) all orders and decisions of the court. Less crucial are other materials disclosed by the prosecutors, motions and transcripts; these can be in a working language of the court.<sup>72</sup>
- *Equality of arms.* An essential element of fair trials is that equal opportunity to present their case should be provided to both parties. In an adversarial setting, this may require particular attention to the defence, which often lacks the prosecution's full investigative machinery.<sup>73</sup> Defence counsel should receive adequate institutional support to carry out their tasks.
- *Right to an expeditious trial / to be tried without undue delay.* It is critical to conduct an expeditious trial and this right is applicable to all stages of the proceedings. While war crimes trials are complex and may on average last longer than ordinary trials, they should be expedited wherever possible, including through the admission of background evidence in written form and limiting the number of witnesses.<sup>74</sup>
- *Right to be present during trial.* In general, international criminal courts have not allowed for in absentia trials, although proceedings in the absence of the accused short of conviction may be permissible.<sup>75</sup>
- *Public trial.* Although security concerns may be considerable, it is of the utmost importance to conduct the proceedings openly and to make them accessible to the public. Whenever possible, the trial should remain in open session. Courtroom layout is important and due consideration should be given to the necessary technology.<sup>76</sup> Basic documents—including indictments, court orders and decisions, and pretrial briefs—should be available online. Anonymous witnesses have not generally been permitted by the international criminal courts.
- *Right to "examine or have examined witnesses against him or her".* The fact that evidence has not been subject to cross-examination does not in itself lead to its exclusion. But the absence of an opportunity to cross-examine may decrease its probative value, even to the point where it may be rendered inadmissible.<sup>77</sup> Absence of cross-examination may be less of an issue where the evidence does not pertain directly to the accused or his role in the crimes.<sup>78</sup>

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<sup>72</sup> *Delalic et al.*, ICTY Trial Chamber Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, para. 6.

<sup>73</sup> For example, it may be necessary to provide defence witnesses with procedural tools such as safe conduct and limited immunity from prosecutions in order to ensure testimony from key witnesses.

<sup>74</sup> See, for instance, ICTY rule 73 bis and ter and rule 92 bis.

<sup>75</sup> See, for instance, ICTY rule 61.

<sup>76</sup> Technology may include television screens that enable the viewing of exhibits and the distortion of the witness's voice and image for the public gallery. Layout is important. For instance, in the first hearings of the Special Court for Sierra Leone, exhibits were projected in such a way that they could be viewed by only half the public gallery. Screens should be made available for protected witnesses, and they should be able to enter and leave the courtroom without being seen by the public gallery and without needing to halt the proceedings.

<sup>77</sup> *Aleksovski*, ICTY Appeals Chamber Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15.

<sup>78</sup> See ICTY rule 92 bis.

- *Presumption of innocence*. This standard applies at all times prior to conviction and governs the application of the burden of proof in the criminal trial.
- *Right to silence*. The fact that the accused chooses not to testify in his or her own defence cannot be held against him or her, meaning that no adverse inferences can be drawn.<sup>79</sup> Whether he or she will choose to testify under oath or not will depend on the particular legal system. Confessions are admissible if taken in the presence of counsel or audio and video-recorded.<sup>80</sup> If there is proof that a confession is involuntary, it should be excluded, and if a confession was gathered by means of torture, this may be sufficient grounds to dismiss the indictment (see below on remedies).
- *Consistency in sentencing*. Sentencing, perhaps more than any other part of the trial process, will have an impact on the public perception of the trial. In domestic courts, the judges' discretion may be curtailed through legal provisions that impose minimum or maximum sentences, or through the use of guidelines. At the international level, discretion has been unfettered, and sentences have often been criticized for disparity or leniency. In any case, there should be consistency in sentencing. Conditions of post-conviction imprisonment should comply with international standards.
- *Right to appeal*. The right to a fair trial should include the right to a meaningful appeal on both legal and factual issues.<sup>81</sup>
- *Remedies for breaches of due process*. Jurisprudence has also developed in regard to remedies that should be made available to defendants for breaches of due process, ranging from compensation and exclusion of evidence to dismissal of the indictment with prejudice. The latter should be reserved for violations so egregious that they would cause irreparable damage to the integrity of the proceedings.<sup>82</sup>

Due process standards and other aspects of the trials or effective functioning of the prosecutorial initiative should be actively monitored by civil society organizations and by international monitors. Such monitoring may lead to the provision of international assistance should that prove necessary.

See also: OHCHR rule-of-law tool on monitoring legal systems.

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<sup>79</sup> *Delalic et al.*, ICTY Appeals Chamber Judgement, 20 February 2001, paras. 783–785.

<sup>80</sup> ICTY rule 92.

<sup>81</sup> In Timor-Leste, this opportunity was not available for some time because the Court of Appeals had not been staffed.

<sup>82</sup> See the case of *Barayagwiza*, ICTR Appeals Chamber Decision, 3 November 1999, for discussion on the standard for dismissal of an indictment.



### III. POLICY CONSIDERATIONS IN RELATION TO INTERNATIONAL JUSTICE

#### A. Which form should an international intervention take?

##### 1. *Relevant factors*

In certain situations, it will be impossible to rely purely on domestic authorities to take domestic prosecutions forward. In fact, throughout history, domestic trials of system crimes have been very rare, not least because State authorities themselves are often implicated in these crimes.

The following are possible “models” or forms which such assistance has taken in the past:

- *International tribunals.* The conflicts in the former Yugoslavia and Rwanda led to the establishments of two ad hoc Tribunals through resolutions of the Security Council.<sup>83</sup> Both have been functioning for about a decade, one in The Hague (Netherlands) and the other in Arusha (United Republic of Tanzania). Both have grown to large institutions and have indicted close to 100 persons. By the end of 2004, ICTY had tried about 50 individuals, whereas ICTR had tried about 23. Although their achievements are undeniable, the Tribunals have been criticized in some quarters for excessive bureaucracy and inefficiency, and for the length of trials.
- *Extraterritorial or universal jurisdiction.* Prosecutions can also take place within a third jurisdiction, under the principle of “universal jurisdiction.” Certain States, such as Germany, Belgium and the Netherlands, now require a nexus between their jurisdiction and the crime committed. Trials pursuant to universal jurisdiction suffer the same weaknesses as purely international trials, e.g., a lack of connectedness with victim populations, and hence have a limited impact on restoring trust in the rule of law. They are also more susceptible to politicization. But in certain situations, these may provide the only opportunity to take accountability forward, and may serve to catalyse domestic developments (as was the case

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<sup>83</sup> See Security Council resolutions 808 (1993) and 955 (1994), respectively.

with the *Pinochet* indictment in the United Kingdom, which catalysed domestic criminal actions against Augusto Pinochet in Chile).<sup>84</sup>

- *Hybrid tribunals*. If at all possible, a tribunal should be developed in the country where the crimes occurred, as it will have more impact and may assist to develop domestic capacity. Hybrid tribunals have taken different forms. In cases where domestic capacity was lacking, such as in Timor-Leste and Kosovo, the United Nations administration placed an internationalized criminal capacity within the domestic legal system (e.g., the international judges' and prosecutors' programme in Kosovo, and the Serious Crimes Unit and Special Panels in Timor-Leste). In Sierra Leone and Cambodia, the United Nations concluded an agreement with each respective Government.<sup>85</sup> These were situations in which there was a measure of political will and some domestic capacity, but where each needed to be augmented. In Sierra Leone this resulted in the establishment of the Special Court, which sits outside of the domestic legal system and is governed by its own Statute and Rules of Procedure and Evidence. In Cambodia this resulted in a proposal for "Extraordinary Chambers," which likewise will be governed by their own law and procedures. These Chambers had not yet become operational at the time of writing. A recent model is the War Crimes Chamber in Bosnia and Herzegovina, which became operational in 2005. This Chamber was established through a combination of international agreements and domestic legislation, and the international component is due to be phased out over a number of years.<sup>86</sup>
- *International assistance to purely domestic trials*. International assistance need not be channelled through the United Nations but may take the form of direct assistance to a domestic process. These are some of the issues that may govern the choice of the international community to get involved with domestic proceedings:
  - *Division of labour*. In some situations the international community and domestic authorities may cooperate in bringing to trial different defendants by sharing the burden. This scenario may be envisaged particularly when the International Criminal Court is involved.
  - *Fairness*. If a domestic initiative or system is deemed to fall significantly short of international standards of fairness, this may limit the role that particular States are able to play. The choices will be between critical engagement, to try to increase the fairness of the process, or disengagement. For instance, direct support for trials where the death penalty is applied may contravene international obligations, such as those imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. This is currently one of the issues regarding the Iraqi Special

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<sup>84</sup> E/CN.4/2004/88, paras. 49–55.

<sup>85</sup> The Special Court Agreement was signed in 2002 and the Agreement on the Extraordinary Chambers was concluded in 2003.

<sup>86</sup> See the Project Plan for the Registry of Section I of the Court of Bosnia and Herzegovina and the Special Department of the Office of the Prosecutor of Bosnia and Herzegovina, Office of the High Representative, 20 October 2004.

Tribunal (which has also been questioned on grounds of the legitimacy of its establishment and other due process concerns).

These are additional factors which may be taken into account when deciding which form international assistance should take:

- *Lack of political will.* In certain situations it will be difficult to ascertain whether there exists a genuine political will to prosecute. It is important to analyse the entire criminal process rather than simply the verdict in order to make such a determination. (This is precisely what the International Criminal Court will be required to do in determining whether States are “unwilling”). A recent example may be found in the trials before the Indonesian Ad Hoc Human Rights Court on East Timor of military accused for crimes committed in what is now Timor-Leste.
- *International armed conflict.* In the aftermath of international armed conflict between Timor-Leste and Indonesia, the international community opted for domestic trials in Indonesia and a hybrid tribunal in Timor-Leste. However, the trials of senior military officials in Indonesia have exhibited a lack of good faith to conduct serious prosecutions. The trials in Timor-Leste have shown the limitations of relying on domestic trials combined with hybrid institutions after an international armed conflict.
- *Ongoing conflict.* Are criminal prosecutions ever appropriate during ongoing conflict? The former Yugoslavia was still in conflict at the time of the creation of ICTY. The International Criminal Court is currently investigating three ongoing conflicts (Democratic Republic of the Congo; Darfur, Sudan; and Uganda). If prosecutions are not a realistic possibility without posing undue security risks to victims and witnesses, or if they may lead to instability or further conflict, preparatory steps for evidence preservation or eventual prosecutions can still be pursued.<sup>87</sup>

A conclusion from the international experience to date is that hybrid tribunals may have several advantages over ad hoc tribunals, in terms of cost, being located in situ, with more potential to have an impact on the domestic legal system and the affected population. These advantages have created a preference for hybrid tribunals where possible. The rest of this tool therefore focuses mainly on policy considerations involving hybrids.

## 2. Consultation with domestic stakeholders

It is essential to consult domestic actors from the outset or the approach chosen will risk being perceived as a foreign imposition. This process of consultation should seek to engage groups beyond Government representatives, such as local bar associations and civil society. If new laws

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<sup>87</sup> For instance, in Afghanistan, the Afghan Independent Human Rights Commission has consulted the population extensively and documented past human rights abuses, and OHCHR has documented the situation extensively based on existing materials on crimes committed during the 23-year conflict.



and procedures need to be promulgated in order to proceed with prosecutions, care should be taken to consult local legal professionals in the process.<sup>88</sup>

## **B. Considerations relevant to the establishment of hybrid tribunals**

Hybrid tribunals raise many policy considerations aside from the obvious added security considerations from being located in the country.

### *1. General policy goals and considerations*

The policy goals of a hybrid are essentially the same as those of the domestic initiatives described above, but one should guard against the danger of having these diluted by international involvement, which may bring its own policy considerations.<sup>89</sup>

Another pertinent question is whether the international assistance should take the form of assistance to the domestic legal system as a whole or whether system crimes should be tried by a “special” court, panel or chamber. The latter is a well-defined project which may make it easier to mobilize resources and support. On the other hand, a model which sits outside the ordinary court structure may be less influential in bringing about lasting change on the legal system as a whole (so-called legacy).

### *2. Coordination of policies at the international level*

So far, hybrid tribunals have been established under the auspices of the United Nations and this route of establishment has been an important factor in their perceived international legitimacy.<sup>90</sup> However, a coordinated approach to transitional justice in post-conflict societies has been lacking at the international level, as acknowledged in the Secretary-General’s report.<sup>91</sup> For instance, the United Nations Mission in Sierra Leone (UNAMSIL) originally did not consider itself

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<sup>88</sup> When Kosovo and Timor-Leste came under United Nations administration, there was a legal vacuum and the law that was originally proposed to apply was the law in force before the conflict (see United Nations Interim Administration Mission in Kosovo (UNMIK) regulation 1999/1 and United Nations Transitional Administration in East Timor (UNTAET) regulation 1999/1). A model criminal code has been drafted to help to prevent this, but this code should only be applied after it has undergone a consultative process with local actors.

<sup>89</sup> This was a consideration in both Kosovo and Timor-Leste, where certain objectives of the peacekeeping missions such as security issues and dealing with persons in detention drove the establishment of a hybrid capacity.

<sup>90</sup> This is with the exception of the Iraqi Special Tribunal, which will probably receive considerable bilateral international assistance and could therefore be considered a hybrid, but it was not established under such auspices.

<sup>91</sup> S/2004/616, para. 59: “[I]t is crucial that donors, peace missions and the United Nations system commit themselves to working jointly with each other in a collective effort led by key actors of the civil society and Government concerned. Mere information sharing is not enough. Rather, all partners should work through a common national assessment of needs, capacities and aspirations and a common national programme of transitional justice, justice reform and rule of law development.”

mandated to render assistance to the Special Court.<sup>92</sup> This cost the Special Court considerable time and resources in terms of duplicating structures to enable its establishment. Moreover, two transitional justice policies were being pursued at once in Sierra Leone, one of criminal justice and one of truth and reconciliation. On occasion, the two approaches collided.

All of this speaks for a coordinated approach in any international intervention. A coordinated approach should ensure that international efforts to investigate past crimes and to restore the domestic legal system are complementary and mutually supportive.<sup>93</sup>

## C. Capacity considerations

### 1. *Balance between domestic and international capacity*

One key challenge in designing a hybrid approach is to bolster capacity and impartiality, while maintaining local legitimacy. A thorough assessment of domestic capacity at the planning phase should help to guard against over-internationalization, which may detract from local legitimacy. Staffing hybrids with too many internationals may be unnecessary and could lead to local resentment.

Also, in the past, the international community has tended to bolster investigative and judicial capacity while neglecting areas like the defence and court administration.<sup>94</sup> In fact, international expertise and personnel may be most required:

- In technical capacities where domestic capacity may be lacking, such as forensics;
- In roles where internationals are at less risk, such as in providing security and in supervising detention centres;
- In areas such as administration, where there are distinct problems in the domestic sector (e.g., corruption).

On the other hand, domestic capacity will be crucial in carrying out any functions that require *integration* into the domestic context, such as:

- Investigations, particularly where this involves dealing with potential witnesses, since in general it will be beneficial to address witnesses directly rather than through translation and to treat them in a culturally sensitive and appropriate manner;

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<sup>92</sup> The military component of UNAMSIL has been supportive of the Special Court from the outset, but all expenses for assistance, such as the use of helicopters, are borne by the Special Court.

<sup>93</sup> In Sierra Leone, the Special Court was conceived and developed separately from related initiatives, such as those developed by the UNAMSIL Rule of Law section, and the Truth and Reconciliation Commission, which received support from OHCHR. Hybrids should be integrated into a coordinated approach to the judicial sector on the international level, and should form a consistent part of this approach.

<sup>94</sup> This has been more the case in Kosovo and Timor-Leste than in Sierra Leone.

- Filling certain key and publicly representative roles, so that the hybrid is not perceived as primarily international;
- Witness support, so that this is seen to be attuned to the domestic culture; and
- Outreach and public information, to ensure effective public messaging and interaction with local populations.

Many elements of a hybrid may benefit from mixed representation, such as the judiciary, which may benefit from a perception of impartiality through a mixed composition, or mixed teams of defence counsel, which combine knowledge in both international and domestic law and practices. Moreover, international assistance need not mean establishing an entire court but may simply be used to bolster a particular aspect of the criminal process such as investigations and prosecutions: an interesting example is the Agreement between the United Nations and the Government of Guatemala for the Establishment of a Commission for the Investigation of Illegal Groups and Clandestine Security Organizations in Guatemala (which has not yet been implemented).<sup>95</sup>

## *2. Finding qualified and dedicated international staff*

A key challenge is finding suitable international candidates to serve on hybrid tribunals. A roster or pool of qualified and available international judges or experts does not yet exist, although it has been suggested.<sup>96</sup> Targeted searches and loan arrangements with host countries may help, as may attractive conditions of service. Nevertheless, high turnover has been common, particularly in places such as Kosovo and Timor-Leste, and getting appropriately qualified candidates for judges continues to be a challenge. Rigorous selection criteria should apply, and the process should have similar requirements for international and domestic candidates.

## *3. Legacy considerations and capacity-building*

Where international staff are employed, there should be a conscious effort to impart their skills and experience to domestic counterparts as part of the “legacy” of a hybrid.<sup>97</sup> Legacy may involve the phasing-out of international participation, as is being proposed in the establishment of a hybrid War Crimes Chamber in Bosnia and Herzegovina. Legacy will not be an automatic result of mixing international and domestic capacity, and must be built into the structure of an approach to prosecutions from the outset. In any case, the commitment of time and resources required to leave a legacy may give rise to certain tensions, as involvement in capacity-building

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<sup>95</sup> This Agreement proposes an international investigative / prosecutorial unit operating under Guatemalan law.

<sup>96</sup> See S/2004/616, sect. XVIII.

<sup>97</sup> In some situations, such as in Timor-Leste, such interaction has been hampered by a lack of linguistic skills on the part of internationals. Prosecutors and judges in Kosovo have said that mentoring is not a specific part of their mandate and that they are not given adequate time to engage properly in such a task.

may be perceived as detracting from efficiency. However, legacy should not be regarded as an optional or ancillary activity, but should form a part of the core mandate of a hybrid tribunal and should be adequately supported and funded. Individual staff members should be encouraged to take initiatives in these areas as part of their job descriptions. Such initiatives may include mentoring, but may also involve participating in discussions for legal reform, training and capacity-building of civil society.

Much of the impact that hybrids may have in this area will require effective partnerships with civil society, the local legal profession and other domestic actors. The role of internationals should not be to eclipse these initiatives, but to provide support and advice to any initiatives that are locally led.<sup>98</sup> Moreover, capacity-building should be a two-way process, with internationals joining a hybrid initiative being required to learn about a country's history, culture and legal tradition. For instance, this will be crucial for judges in assessing the demeanour of witnesses.

At the same time, it must be accepted that rebuilding a domestic legal system is a much larger and more ambitious task, and a hybrid tribunal cannot be expected to perform this task in full, although it may have a contribution to make. That is why due consideration must be given to a coordinated approach that seeks to balance the policy considerations in pursuing justice for past crimes and rebuilding the rule of law and the domestic legal system. The report of the Secretary-General highlights the relationship between these constructs, but the appropriate balance will be context-specific.

#### **4. Other capacity considerations**

Some other capacity considerations relevant to hybrid tribunals are:

- *Need for flexible staffing structure depending on phase of work.* Much of the challenge in establishing any specialized capacity, including a hybrid tribunal, is logistical. Hybrids need to be adequately resourced and staffed, and should have a flexible staffing structure that is able to expand and contract in order to accommodate the various stages of the proceedings. Early needs are likely to be logistical and in the area of investigations, whereas later stages will require suitable trial lawyers and appellate counsel. Hiring staff (including judges) on a phased basis, as needed, will help keep expenditures within the approved budget.
- *Creation of adequate defence capacity.* As mentioned, hybrids have generally allocated insufficient capacity and resources (international or domestic) to the defence, resulting in lack of equality of arms. The Defence Office of the Special Court for Sierra Leone, led by the Principal Defender, constitutes a significant improvement on prior practice and ought

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<sup>98</sup> What should in any case be avoided is a “reverse legacy”, where the problems of the domestic legal system are incorporated into the hybrid. Short-term negative consequences may also be caused by draining local capacity away from the domestic legal system into the hybrid structure.

to be replicated. The Defence Office provides duty counsel to the accused when they are taken into detention and also provides institutional support to defence teams chosen by the accused.

- *Preventing tensions between international and national staff.* Tensions may arise between domestic and international staff, particularly on issues such as differing pay scales. One solution may be to classify posts, rather than candidates, as local or international.<sup>99</sup> Hybrids should make attempts to locate well-qualified locals for all posts.<sup>100</sup> Other tools that may help to alleviate tensions are briefings on the country's context and on cultural sensitivity. Good translation facilities should be prioritized and available at all times. Convenient opportunities should be made available for internationals to learn local languages.
- *Particular considerations arising from being located in situ.* Being situated in the country poses particular challenges. The most obvious of these is security, which will by necessity consume a large part of the budget.<sup>101</sup> There may also be significant challenges in dealing with the disparities that arise in applying international standards in the domestic context, such as inequality in due process standards and prison conditions. These challenges should be anticipated and handled sensitively. Also, witness protection may pose a particular challenge in resource-poor environments where ordinary measures (compensation for lost earnings, relocation) could be seen as incentives to testify. Policies on this should be transparent.
- *Considerations arising from limited nature of mandate.* A personnel policy will need to be devised to create incentives to retain staff and to ease their transition to a domestic context. For hybrids that are not integrated into the domestic legal system, there will be complex questions to resolve regarding residual functions such as outstanding indictments, supervision of sentences and ongoing witness protection, and these should be resolved early.

## D. Enforcement powers

Security Council resolutions place binding legal obligations on States to cooperate with tribunals by virtue of the Security Council's powers under Chapter VII of the Charter of the United Nations. This has been the case with ICTY and ICTR, but Chapter VII powers have not been granted to hybrids (although there is nothing that inherently prevents a hybrid from being endowed with such powers). Hybrid tribunals have had tremendous difficulty in obtaining custody of the accused sheltering outside their territory (e.g., the Indonesian military, Liberia's former

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<sup>99</sup> This system is used by the Special Court for Sierra Leone.

<sup>100</sup> In Timor-Leste, UNTAET even dropped leaflets by air to seek Timorese legal personnel with some success. Many Timorese with legal training who had gone abroad returned and ended up in positions of political leadership in the country and were thus unavailable.

<sup>101</sup> In Sierra Leone, security issues, including particularly witness protection and relocation, consume 20 per cent of the total budget.

President Charles Taylor). It should be noted that this particular challenge is not unique to hybrid tribunals,<sup>102</sup> and that Chapter VII powers do not automatically lead to State cooperation. Nonetheless, the absence of Security Council endorsement has led to questions about the overall efficacy and international standing of hybrid tribunals.<sup>103</sup>

Securing adequate cooperation from States other than the host country is essential to many of a court's main functions, such as the transfer of detainees for medical treatment, witness protection or relocation, the transfer of witnesses, the surrender of the accused and the enforcement of sentences. Hybrid tribunals need a capacity to develop State relations that enable them to conduct these functions (e.g., staff with experience in conducting diplomatic relations at the regional and international levels and negotiating agreements). They should also establish groups of supportive States (such as the Group of Interested States for the Special Court for Sierra Leone or the Friends of the International Criminal Court). Such bodies should be allocated duties to raise awareness and financial and political support for the particular initiative. Other tools such as Interpol red notices and other means of international cooperation may help to obtain custody of the accused if they travel outside the jurisdiction of an uncooperative State. Regional or multilateral organizations should be sought out to assist in applying such pressure. Further solutions to these problems must come from a more consistent and coordinated approach at the international level by the Security Council itself.

## E. Funding

Funding is one of the core challenges to international justice today. Throughout their lifespans, the annual budgets for the ad hoc Tribunals have grown steadily and, at the moment, each is consuming around \$120 million a year, a cost that has been driven up by the "completion strategy". ICTY has so far spent approximately \$16 million per individual conviction/ acquittal in the first instance (including all costs on investigations and the appeals process to date). These numbers may seem very high, but are not completely incongruous with complex criminal trials in developed jurisdictions.

Nevertheless, there can be no doubt that these high costs are straining relations with donors and that efficiencies will have to be achieved. The Special Court for Sierra Leone has a slimmer

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<sup>102</sup> In their recent addresses to the Security Council, the ICTY President and Prosecutor highlighted the continued lack of State cooperation in handing over high-level indictees such as Radovan Karadzic, Ratko Mladic and Ante Gotovina.

<sup>103</sup> Although UNTAET concluded a memorandum of understanding with Indonesia, it has received no cooperation in the handing over of accused or evidence. Similarly, repeated requests to Nigeria to hand over former President Charles Taylor to the Special Court for Sierra Leone have been disregarded to date. Finally, many Serbs remain out of reach for the Kosovo trial panels, and it is particularly complex to arrange for extradition, as Kosovo is not an independent State and negotiations must be conducted through Serbia and Montenegro. Another disadvantage of lacking Chapter VII powers is that, in the case of the Special Court for Sierra Leone, the ad hoc Tribunals took the position that they had no legal ground for giving direct assistance to it in the form of temporarily housing a detainee that posed a particular security threat in Sierra Leone.

structure and is already significantly cheaper, functioning at roughly \$25 million a year. Even a court with a larger international component need not be significantly more expensive. Again, such policies as classifying posts rather than individuals as local or international may help to achieve efficiencies.

The Special Court for Sierra Leone has until recently been mainly funded by voluntary, rather than assessed, contributions (and the same is proposed for Cambodia). Although voluntary contributions have some advantage in terms of flexibility, they are vulnerable to changing political commitments on the part of donors. Oversight by a limited number of States that are donors has implications for both the hybrid's perceived independence and its ability to attract funding from other sources.<sup>104</sup> Finally, the lack of reliability of voluntary contributions complicates future planning and imposes obligations on senior officials to raise funds. All of these factors make voluntary contributions an unsuitable form of funding for future tribunals.

Further policy recommendations specific to hybrid tribunals include:

- *Continuous political support by host country and international community.* It is important that the host Government of a hybrid should seek to continually affirm its support, including in practical ways (for instance by donating premises, by ensuring adequate police cooperation, etc.). At the same time, it is equally important that the international community stays the course and does not abandon its political support to and funding of hybrid initiatives if these are increasingly put under local control.
- *Standards for continued evaluation.* On the other hand, international policymakers should continue to evaluate processes that come under domestic control for issues such as due process considerations, witness protection and so forth.
- *Completion strategy.* Hybrid or ad hoc tribunals should devise a clear and early completion strategy, including planning on how to resolve outstanding investigations and indictments, staffing issues, and sales of equipment and property. This will help to maintain momentum in terms of funding.

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<sup>104</sup> However, it may be helpful to allow a hybrid tribunal to depart from United Nations policies on the hiring of personnel for instance, as has been the case with the Special Court for Sierra Leone.

## Conclusion

Prosecutorial initiatives face many hurdles. Long-term solutions will require domestic capacity development, and a significant commitment of time and resources. In the interim, efforts should be made to staff and equip specialized teams of prosecutors and investigators who understand the specific challenges of pursuing accountability for system crimes.

Mapping exercises can help inform a strategic approach to prosecutions, and efforts should be made to gather and preserve documentation and other forms of evidence. Ideally, such an approach will help to build an enduring, specialized and multidisciplinary capacity to deal with future violations. Taking a goal-oriented, strategic approach that seeks to build trust in public institutions and restore the dignity of victims is essential to the contribution of these initiatives to reducing impunity, restoring democratic values, preventing further violations and building the rule of law. For this, it is also essential for trials to apply the optimum legal strategy and to be perceived as fair.

Complementing domestic capacity with international capacity may allow prosecutions to proceed more effectively and expeditiously, but the deployment of such capacity should be carefully planned, with the aim in mind of leaving a legacy.





