

RESEARCH REPORT

# Guiding and Protecting Prosecutors

Comparative Overview of Policies Guiding Decisions to Prosecute

October 2019



**Cover Image:** British prosecutor Khawar Qureshi (left) speaks with Kenyan prosecutors Dorcus Oduor (center) and Alexander Muteti (right) before the corruption trial of Kenyan Deputy Chief Justice Philomena Mwilu, the country's second-highest judge, in Nairobi on December 6, 2018. (YASUYOSHI CHIBA/AFP/Getty Images)

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## About ICTJ

The International Center for Transitional Justice (ICTJ) works across society and borders to challenge the causes and address the consequences of massive human rights violations. We affirm victims' dignity, fight impunity, and promote responsive institutions in societies emerging from repressive rule or armed conflict as well as in established democracies where historical injustices or systemic abuse remain unresolved. ICTJ envisions a world where societies break the cycle of massive human rights violations and lay the foundations for peace, justice, and inclusion. For more information, visit [www.ictj.org](http://www.ictj.org)

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## Introduction: Role of the Prosecutor

In any criminal justice system, prosecution is a central component of the criminal justice process. Traditionally, the prosecutorial function entails taking legal action against individuals who are accused of violating a state's criminal laws and ensuring a fair trial for persons accused of criminal offenses. Depending on the history, culture, and traditions of a given legal system, prosecutors are often afforded a measure of discretionary power to decide whether to initiate criminal proceedings or not. Other discretionary powers include deciding on plea agreements, offers of immunity, the role of witness testimony in trial strategy, and the content of sentencing recommendations.<sup>1</sup> Given the numerous decisions that must be made to carry out the prosecutorial function, prosecutors exercise considerable power vis-à-vis citizens in the criminal justice system. This report will focus exclusively on the important decision of whether or not to prosecute. It will also highlight the challenges facing prosecutors in post-conflict settings who must decide whether to pursue politically sensitive cases involving high-profile individuals accused of crimes.

Deciding whether or not to prosecute is the most important step in the prosecution process. It requires assessing and balancing numerous factors, such as the availability of evidence, the likelihood of conviction, and the interests of various stakeholders, including the victim, the accused, and the community at large. Prosecution guidelines identify the necessary factors that prosecutors must consider before making the decision to prosecute.<sup>2</sup>

The rationale for prosecution policies or guidelines stems from an acknowledgment that prosecutors ought to make key decisions with consistency. Guidelines are designed to govern the professional conduct and performance of prosecutors. They have a dual purpose of providing benchmarks for decision making in the prosecution process and acting as a shield for prosecutors in the face of undue influence, pressure, or interference. For example, when prosecutors are pursuing sensitive cases and are accused of making politically motivated decisions, they should be able to justify their decisions using binding, objective, fair, and publicly known criteria. Typically, a prosecution policy sets out these criteria. Ultimately, prosecution guidelines help ensure prosecutors take a uniform approach—one that eliminates arbitrariness in prosecutorial decisions.

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<sup>1</sup> Nicholas Cowdery, "Challenges to Prosecutorial Discretion," *Commonwealth Law Bulletin* 39, no. 1 (2013): 17–20.

<sup>2</sup> An example of a binding policy is the South African prosecution policy. In terms of Sec. 179(5)(a) and (b) of the 1996 Constitution of South Africa, the National Director of Public Prosecutions, with the concurrence of the Minister of Justice, and after consulting the Directors of Public Prosecutions, must determine a "prosecution policy, which must be observed in the prosecution process."

## Roadmap of the Report

This report seeks to assist national judicial organs develop or strengthen their own prosecution guidelines, specifically those pertaining to the decision to prosecute. Because the factors relevant to the decision to prosecute differ depending on whether criminal justice systems are operating in “ordinary” times or in the context of post-conflict transitions, this report is divided into two parts. The recommendations provided in the annex to this report are based on this analysis.

### Part 1: Prosecutorial Guidelines and the Decision to Prosecute in “Ordinary” Contexts

The first part of this report provides a general overview of factors that influence the decision to prosecute and an analysis comparing international standards and national prosecution policies and best practices in eight common law countries: Australia, Canada, Fiji, Kenya, New Zealand, South Africa, the United Kingdom, and the United States. A review of each country’s prosecution policies finds several common factors that prosecutors are encouraged to contemplate when deciding whether or not to prosecute. These factors can be divided into two primary categories: evidentiary and public interest considerations.

### Part 2: The Decision to Prosecute and the Pursuit of Post-Conflict Justice

Part 2 of this report presents the standards and principles that ought to guide prosecutorial decision making in post-conflict contexts. Prosecutorial discretion takes on heightened significance in societies that are emerging from violent conflict and seeking to address their legacy of mass atrocities.<sup>3</sup> Serious human rights violations are often prosecuted in intensely political circumstances. Prosecutorial decisions taken in such contexts can have significant social consequences and are frequently seen as controversial.<sup>4</sup>

Many post-conflict states are plagued by weak or corrupt justice systems that may have helped legitimize past atrocities. A decision to prosecute human rights violations followed by a perceived lackluster pursuit of justice by the authorities is likely to erode public confidence in the criminal justice system and weaken the rule of law.<sup>5</sup> In contrast, the vigorous prosecution of human rights abuses is often viewed as promoting general deterrence and is linked to the macro-level goals of post-conflict peacebuilding, democratic consolidation, reconciliation, and the strengthening of the rule of law. These goals are notoriously difficult to achieve in post-conflict periods of transition because the state and its institutions are typically weakened or decimated, with a compromised or dysfunctional justice sector.<sup>6</sup>

Part 2 of this report reviews aspects of the decision to prosecute that are unique to post-conflict contexts. It describes typical post-conflict dynamics such as political pressure and interference that are often brought to bear on prosecutors. Post-conflict prosecutorial strategies are considered and proposed. Part 2 then examines what crimes and what perpetrators should be prosecuted in the post-conflict period. International legal obligations to prosecute core international crimes are explored as well as the evidentiary and public interest factors that ought to guide such decisions.

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3 M. Gaitan, “Prosecutorial Discretion in the Investigation and Prosecution of Massive Human Rights Violations: Lessons from the Argentine Experience,” *American University International Law Review* 32, no. 2 (2016): 540–568; Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100, no. 8 (June 1991): 2537–2615.

4 Daniel D. Ntanda Nsereko, “Prosecutorial Discretion before National Courts and International Tribunals,” *Journal of International Criminal Justice* 3 (2005): 125.

5 Martin Schönsteich, Institute for Security Studies Papers, “Strengthening Prosecutorial Accountability in South Africa” (2014): 1–23.

6 Miriam J. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,” *Harvard Human Rights Journal* 15 (2002): 39–97.



## PART 1: Comparative Overview of Prosecution Policies on the Decision to Prosecute

### International Standards and the Decision to Prosecute

Few international instruments make explicit reference to the role of prosecutors in criminal proceedings. However, since the 1980s, two valuable international tools have been developed to fill this gap to guide prosecutorial conduct: the United Nations Guidelines on the Role of Prosecutors (UN Guidelines),<sup>7</sup> adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana in September 1990, and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (IAP Standards),<sup>8</sup> created by the International Association of Prosecutors (IAP) in April 1999.

The UN Guidelines, the first international attempt to outline the role and functions of the public prosecutor, were “formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings...”<sup>9</sup> The IAP Standards expanded on the principles outlined by the UN Guidelines and sought to “promote and enhance those standards and principles which are generally recognized internationally as necessary for the proper and independent prosecution of offences.”<sup>10</sup> The IAP Standards were developed and adopted by prosecutors from a range of legal traditions—and as such, further contributed to the development of comprehensive standards.<sup>11</sup>

#### UN Guidelines

Article 13 of the UN Guidelines delineates the criteria prosecutors must meet to initiate prosecutions. The guidelines state that in the performance of their duties, prosecutors shall, *inter alia*:

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7 Guidelines on the Role of Prosecutors, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana in September 1990, [www.ohchr.org/Documents/ProfessionalInterest/prosecutors.pdf](http://www.ohchr.org/Documents/ProfessionalInterest/prosecutors.pdf).

8 International Association of Prosecutors (IAP), Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, April 23, 1999, [www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/English.pdf.aspx](http://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/English.pdf.aspx)

9 Guidelines on the Role of Prosecutors, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana in September 1990, Ch. 1, Sec. C.26, Annex.

10 IAP Standards, Art. 1.3(d).

11 United Nations Office on Drugs and Crime, *The Status and Role of Prosecutors* (Vienna: United Nations, 2014), 3, [www.unodc.org/documents/justice-and-prison-reform/14-07304\\_ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf)

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual, or any other kinds of discrimination;
- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; ... [and]
- (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>12</sup>

Importantly, the UN Guidelines emphasize the need for prosecutors to keep in mind the public interest as well as the interests and concerns of victims when carrying out their duties. Article 13(d) reaffirms the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, which mandates prosecutors “allow the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”<sup>13</sup>

#### International Association of Prosecutors (IAP) Standards

Article 4 of the IAP Standards is particularly relevant to the decision to prosecute. Article 4.2 stipulates that prosecutors shall perform their roles “objectively, impartially and professionally,”<sup>14</sup> and “when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights.”<sup>15</sup> Along similar lines, the standards mandate that “in the institution of criminal proceedings...[prosecutors] will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible and will not continue with a prosecution in the absence of such evidence.”<sup>16</sup> Prosecutors are also reminded to “always act in the public interest.”<sup>17</sup>

Like the UN Guidelines, the IAP Standards uphold the concerns of victims throughout the justice process. The criteria provided by both sets of guidelines on the role of prosecutors in the decision to prosecute provide a useful framework from which to evaluate domestic prosecution policies.

#### Tests for Prosecution

A review of the existing prosecution policies of Australia, Canada, Fiji, Kenya, New Zealand, South Africa, the United Kingdom, and the United States—all common law countries—reveals that the decision to institute criminal proceedings is typically guided by *evidentiary* and *public interest* considerations. Evidentiary considerations are typically evaluated prior to any public interest considerations.

<sup>12</sup> UN Guidelines, Art. 13.

<sup>13</sup> UN General Assembly Resolution 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the 96th Plenary Meeting, November 29, 1985, [www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29\\_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf](http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf). Also see Howard Varney and Katarzyna Zduńczyk, “The Role of Victims in Criminal Proceedings” (April 5, 2018), [www.ictj.org/publication/role-victims-criminal-proceedings](http://www.ictj.org/publication/role-victims-criminal-proceedings)

<sup>14</sup> IAP Standards, Art. 4.2(a).

<sup>15</sup> *Ibid.*, Art. 4.2(b).

<sup>16</sup> *Ibid.*, Art. 4.2(c).

<sup>17</sup> *Ibid.*, Art. 4.2(d) and Art. 4.3.

Kenya's and New Zealand's prosecution guidelines are emblematic of this two-part sequencing. In both countries, the decision to prosecute is structured by a test for prosecution that consists of an evidential test and a public interest test.<sup>18</sup> The evidential test must be satisfied before the public interest test is applied.<sup>19</sup> A case that does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.<sup>20</sup>

However, meeting the evidential test does not necessarily guarantee that a prosecution will proceed, since public interest considerations may lead prosecutors to decline to prosecute. According to the U.S. Principles of Federal Prosecution, “merely because this [evidential] requirement can be met in a given case does not automatically warrant prosecution; further investigation may instead be warranted and the prosecutor should still take into account all relevant considerations,” including public interest considerations.<sup>21</sup>

### Differences between Civil and Common Law Systems

There are few prosecution guidelines or policies in civil law countries.<sup>22</sup> However, most civil law countries have codes of procedural law, which typically include binding principles for prosecutors to follow during the prosecution process.<sup>23</sup> The *mandatory principle* tends to apply in civil law systems, whereas the so-called *opportunity principle* generally applies in common law systems.<sup>24</sup> Some countries, such as India,<sup>25</sup> are inspired by both common law and civil law traditions.

Typically, the mandatory principle as applied in civil law countries largely denies prosecutors' discretion in the decision to prosecute since prosecutors are required to handle each offense as framed and prescribed by the law. This system promotes certainty and reduces or largely eliminates arbitrary decision making.<sup>26</sup>

However, the principle of opportunity can be found in certain civil law jurisdictions, such as in the laws of France, the Netherlands, Slovenia, and Sweden. The principle states that a crime will be punished only if its prosecution is considered opportune. Therefore, prosecutors may decide against prosecution on this basis.<sup>27</sup>

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18 New Zealand Solicitor-General's Prosecution Guidelines, para. 5.1; Kenya National Prosecution Policy, p. 7, Sec. 1.

19 Ibid.

20 Kenya National Prosecution Policy, p. 7, Sec. 1; United Kingdom Code for Crown Prosecutors, 2013, para. 4.6, [www.cps.gov.uk/sites/default/files/documents/publications/code\\_2013\\_accessible\\_english.pdf](http://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf) and the Guidance to Police Officers and Crown Prosecutors, [www.cps.gov.uk/legal-guidance/charging-directors-guidance-2013-fifth-edition-may-2013-revised-arrangements/](http://www.cps.gov.uk/legal-guidance/charging-directors-guidance-2013-fifth-edition-may-2013-revised-arrangements/). Both the UK code and guidelines are binding on prosecutors.

21 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.200, [www.justice.gov/usam/usam-9-27000-principles-federal-prosecution-and-the-federal-rules-of-criminal-procedure](http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution-and-the-federal-rules-of-criminal-procedure), [www.federalrulesofcriminalprocedure.org/table-of-contents/](http://www.federalrulesofcriminalprocedure.org/table-of-contents/). See also United Kingdom Code for Crown Prosecutors, para. 4.4.

22 A prosecution policy was launched by the Office of the Attorney-General of Yucatan in Mexico in July 2018 (Política Interna Persecución Para La Priorización De Casos, Fiscalía General Del Estado De Yucatan), making it the first official prosecution policy in Mexico. On December 14, 2018, the “implementing law” (Ley Orgánica) of Mexico's new National Prosecutor's Office was officially published (Diario Oficial de la Federación, Ley Orgánica de la Fiscalía General de la República), [www.diputados.gob.mx/LeyesBiblio/pdf/LOFGR\\_201218.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LOFGR_201218.pdf). The law creates a new independent national structure to oversee prosecutions, including a special capacity to investigate human rights violations, electoral crimes, corruption, and other serious crimes. The law also establishes the institutional framework and tools with which the National Prosecutor's Office will operate. See Wola, “Report: Fully Implementing Mexico's New National Prosecutor's Office Critical to Strengthening Rule of Law,” March 8, 2019, [www.wola.org/2019/03/mexico-national-prosecutors-office-implementing-law](http://www.wola.org/2019/03/mexico-national-prosecutors-office-implementing-law)

23 Examples of civil law codes include the Indonesia Criminal Procedure Code ([www.legal-tools.org/doc/a8a8ef/pdf/](http://www.legal-tools.org/doc/a8a8ef/pdf/)), Law no. 16 of the Republic of Indonesia, The Public Prosecution Service, and the Tunisian Code of Criminal Procedure (in French; [www.legislation.tn/sites/default/files/codes/Procedurepenale.pdf](http://www.legislation.tn/sites/default/files/codes/Procedurepenale.pdf)).

24 Peter J. P. Tak, “The Prosecution Service in Control of Police Investigation Policy? A European Comparison,” unpublished talk at the conference “The Growing Importance of the Public Prosecution Service: Best European Practices in the Face of Heightened Crime Rates” (2005), Georg-August University Gottingen, Germany, October 6-8, 2005.

25 Code of Criminal Procedure, 1973 (India).

26 Tak, “Prosecution Service,” note 24.

27 See First Book, First Title, Fourth Section of the Dutch Criminal Procedure Code (Arts. 12–13a), [www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering\\_ENG\\_PV.pdf](http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf)

In the common law tradition, there are no predetermined answers to prosecutorial decisions, allowing some flexibility to accommodate different circumstances. Typically, a test is applied to decide whether or not to prosecute. The common law approach promotes the individualization of criminal justice but can lead to injustices, since sometimes crimes deserving of prosecution are not taken forward.<sup>28</sup> The common law approach has been criticized for not always advancing consistency in the exercise of prosecutorial discretion.<sup>29</sup>

### Evidentiary Test Considerations

Australia's policy is the most detailed and comprehensive of those reviewed; it identifies 25 factors that should be considered when assessing the evidentiary strength of a state's case.<sup>30</sup> In contrast, the national prosecution policies of Canada, Fiji, New Zealand, South Africa, and the United Kingdom are significantly less thorough in this regard. These countries' policies identify general aspects of evidence to assess, such as its credibility and admissibility, and list a small number of questions to ask. Interestingly, the U.S. guidelines for federal prosecutors only require prosecutors to consider evidence in relation to establishing probable cause that a criminal offense has been committed; there are no directives or guidelines related to the admissibility, credibility, or reliability of evidence.

Canada's prosecution policy is the most forceful policy in terms of evidentiary considerations. According to the Principles Governing Crown Counsel's Conduct, it is imperative that Crown counsel be objective when making assessments regarding the availability, admissibility, and credibility of evidence. Further, when assessing the sufficiency of evidence in a given case, counsel must refrain from "usurping the role of the court" by "substituting his or her own views for those of the trial judge or jury, who are the community's decision makers..."<sup>31</sup> Further, "Crown counsel must also zealously guard against the possibility that they have been afflicted by 'tunnel vision,' through close contact with the police or investigative agency, or victims, such that the assessment [of evidence] is insufficiently rigorous and objective."<sup>32</sup>

The national prosecution policies of the common law countries reviewed vary in their evidentiary considerations in two important respects: (1) the threshold of proof that must be met for evidence in a given case to satisfy the evidential test and (2) the nature and range of evidentiary factors identified.

#### Threshold of Proof

Evidential tests in common law countries differ in the evidentiary thresholds that must be met for a decision to prosecute. Thresholds range from a reasonable prospect of conviction to probable cause.

#### *Reasonable Prospect of a Conviction*

In Kenya and the United Kingdom, prosecutors must be satisfied that there is enough evidence to support a realistic prospect of conviction against each suspect on each charge. They must consider what the defense case may be and how it is likely to impact the prospects of conviction.<sup>33</sup> Prosecutors must assess whether an objective, impartial, and reasonable jury, magistrate,

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28 Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995).

29 Ibid.

30 See Australia Prosecution Policy of the Commonwealth, Secs. 2, 5–7, [www.cdpp.gov.au/sites/default/files/Prosecution-Policy-of-the-Commonwealth\\_o.pdf](http://www.cdpp.gov.au/sites/default/files/Prosecution-Policy-of-the-Commonwealth_o.pdf)

31 Public Prosecution Service of Canada Deskbook ([www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf](http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf)), Part II: Principles Governing Crown Counsel's Conduct, Sec. 3.1, citing *Miazga v. Kvello Estate* 2009 SCC (Supreme Court of Canada) 51, 920090 3 SCR (Supreme Court Rules) 339, para. 47.

32 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel's Conduct, Sec. 3.1.

33 United Kingdom Code for Crown Prosecutors, para. 4.6; Kenya National Prosecution Policy, pp. 7–8, Sec. 2.

or judge, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charges.<sup>34</sup>

Similarly, in Australia, a case that does not have a reasonable prospect of conviction should not proceed.<sup>35</sup> The existence of a bare prima facie case is not enough to justify the commencement or continuation of a prosecution; the prospects of conviction must be considered. This test will not be satisfied if it is clearly more likely than not that an acquittal will result.<sup>36</sup> Fiji's prosecution code follows those of Australia and the United Kingdom, requiring prosecutors to objectively assess whether a court operating in accordance with the law is more likely than not to convict a defendant.<sup>37</sup>

South Africa's prosecution policy also requires prosecutors to assess whether "there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution," but it does not go so far as to define "reasonable prospect."<sup>38</sup> In contrast, New Zealand's prosecution policy requires that prosecutors be "satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence."<sup>39</sup> This means that "the evidence available to the prosecutor must be capable of reaching the high standard of proof required by the criminal law."<sup>40</sup>

The Crown counsel in Canada must assess evidence according to the "reasonable prospect of conviction"; Canadian guidelines clarify that "a reasonable prospect of conviction requires that there be more than a bare prima facie case, or in other words, it requires more than evidence that is capable of making out each of the necessary elements of the alleged offence against an accused."<sup>41</sup> Interestingly, the guidelines state that this threshold "does not require a probability of conviction, that is, it does not require a conclusion that a conviction is more likely than not."<sup>42</sup> Thus, in contrast to Australia's and the United Kingdom's policies, Canada's prosecution policy defines the "reasonable prospect of conviction" as an evidentiary threshold requiring more than the existence of a prima facie case, but not necessarily a greater likelihood of conviction than acquittal.

#### *Probable Cause*

The evidentiary threshold in the United States is much less strict than that of a "reasonable prospect of conviction." According to the Principles of Federal Prosecution, the first consideration of federal prosecutors when deciding to initiate or decline a prosecution should be whether there is probable cause to believe the accused has committed a federal offense.<sup>43</sup> The probable cause standard is defined in *Brinegar v. United States* as a situation "where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime

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34 United Kingdom Code for Crown Prosecutors, para. 4.7; Kenya National Prosecution Policy, p. 8, Sec. 2.

35 Australia Prosecution Policy of the Commonwealth, para. 2.14.

36 *Ibid.*, para. 2.5.

37 Fiji Prosecution Code of 2003, Sec. 5.2, [http://odpp.com.fj/wp-content/uploads/2015/03/The-ODPP-Prosecution-Code-2003\\_Office-of-the-Director-of-Public-Prosecutions\\_Republic-of-Fiji.pdf](http://odpp.com.fj/wp-content/uploads/2015/03/The-ODPP-Prosecution-Code-2003_Office-of-the-Director-of-Public-Prosecutions_Republic-of-Fiji.pdf) and *The Prosecutor's Handbook*, [www.paclii.org/fj/other/prosecutors-handbook.pdf](http://www.paclii.org/fj/other/prosecutors-handbook.pdf)

38 South Africa, Prosecution Policy, (June 2013), p. 5, [www.npa.gov.za/sites/default/files/Library/Prosecution Policy %28Final as Revised in June 2013. 27 Nov 2014%29.pdf](http://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%28Final%20as%20Revised%20in%20June%202013.pdf)

"Introduction," South African Prosecution Policy, p. 3.

39 New Zealand Solicitor-General's Prosecution Guidelines, para. 5.3, [www.crownlaw.govt.nz/publications/prosecution-guidelines/](http://www.crownlaw.govt.nz/publications/prosecution-guidelines/)

40 *Ibid.*, para. 5.4.

41 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel's Conduct, Sec. 3.1.

42 *Ibid.*

43 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-2700027.000.

is being committed.”<sup>44</sup> This same standard must be met for the issuance of an arrest warrant or a summons upon a complaint.<sup>45</sup>

The probable cause requirement is in accordance with Rule 29(a) of the U.S. Federal Rules of Criminal Procedure, which requires sufficient evidence to sustain a conviction. It is designed to ensure fairness, promote efficiency in the administration of justice, and avoid an acquittal. Nevertheless, the policy holds that even where a guilty verdict appears unlikely, the prosecutor may properly conclude that it is necessary and appropriate to commence a prosecution.<sup>46</sup> In such instances, however, federal prosecutors must be certain that the prosecution meets other requirements, such as satisfying substantial federal interest.<sup>47</sup>

### Admissibility of Evidence

The prosecution policies of Australia, Canada, Fiji, Kenya, New Zealand, South Africa, and the United Kingdom all refer to the need for prosecutors to assess the admissibility of evidence when making the decision whether or not to prosecute. Each of these states requires prosecutors to consider whether there are grounds for believing evidence might be excluded in light of common law and statutory obligations.<sup>48</sup> In Kenya, prosecutors are advised to assess whether the evidence “would be excluded on the basis of its inadmissibility, for instance, under the hearsay and the bad character rules.”<sup>49</sup> Prosecutors in New Zealand and South Africa must evaluate the manner in which evidence was acquired, as well as its relevancy, when determining the admissibility of evidence in a given case.<sup>50</sup> Australia’s and Fiji’s policies note that prosecutors should ensure that confessions have been properly obtained.<sup>51</sup> In the case of evidence that is deemed likely inadmissible before a court of law, both Australia’s and the United Kingdom’s prosecution policies require that prosecutors consider the weight of the evidence in question when deciding whether to prosecute an offender.<sup>52</sup>

### Reliability and Credibility of Evidence

Guidelines regarding the reliability and credibility of evidence in the prosecution policies surveyed focus predominantly on these attributes as they apply to state witnesses.<sup>53</sup> Fiji’s test for prosecution, for example, explicitly requires prosecutors to weigh the credibility of witness evidence within the context of the evidence as a whole.<sup>54</sup> Australia’s prosecution policy is quite detailed in this regard. It requires prosecutors to assess whether a witness is exaggerating, whether his or her memory is unreliable, or if a witness has a hostile or friendly relationship with the defendant.<sup>55</sup> They must also evaluate whether state witnesses have motives for providing a less-than-complete picture of the truth or for concocting similar accounts with other witnesses. Other considerations include how a witness is likely to respond to cross-examination and if a

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44 *Brinegar v. United States*, 338 U.S. 160 (1949), <https://supreme.justia.com/cases/federal/us/338/160/>

45 United States Federal Rules of Criminal Procedure 2014, 4(a), [www.uscourts.gov/rules-policies/archives/superseded-rules/federal-rules-criminal-procedure-2014](http://www.uscourts.gov/rules-policies/archives/superseded-rules/federal-rules-criminal-procedure-2014)

46 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual, 9-27.220.

47 *Ibid.*

48 Kenya National Prosecution Policy, p. 8, Sec. 2(a), 1(C); Australia Prosecution Policy of the Commonwealth, para. 2.7(a); Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 3.1; South Africa Prosecution Policy, p. 6; Fiji Prosecution Code (2003), para. 5.2(a) and (b); New Zealand Solicitor-General’s Prosecution Guidelines, para. 5.4; United Kingdom Code for Crown Prosecutors, para. 4.8.

49 Kenya National Prosecution Policy, p. 8, Sec. 2(c).

50 South Africa Prosecution Policy, p. 6.

51 Fiji Prosecution Code (2003), para. 5.2(b).

52 Australia Prosecution Policy of the Commonwealth, para. 2.7(a); United Kingdom Code for Crown Prosecutors, para. 4.8.

53 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 3.1; South Africa Prosecution Policy, p. 6.

54 Fiji Prosecution Code (2003), para. 5.2(b).

55 Australia Prosecution Policy of the Commonwealth, para. 2.7(c).

witness suffers from any physical or mental ailment that may affect his or her credibility.<sup>56</sup> The competency of child witnesses must be similarly assessed.<sup>57</sup> The policy further requires prosecutors to weigh the reliability and credibility of evidence obtained by a suspect by considering his or her age, intelligence, and apparent understanding.<sup>58</sup>

South Africa's prosecution policy, like Australia's,<sup>59</sup> states that prosecutors should evaluate the credibility of witnesses in light of the impression they are likely to make: whether a given witness will be regarded as honest and reliable, for example, and whether contradictory accounts provided by witnesses "go beyond the ordinary and expected" and thereby materially weaken the state's case.<sup>60</sup> Furthermore, if the identity of the alleged perpetrator is contested, prosecutors must gauge whether those who claim to be able to identify the perpetrator will be perceived as honest and trustworthy.<sup>61</sup>

In its discussion of a "reasonable prospect of conviction," New Zealand's prosecution policy defines credible evidence as that "which is capable of belief."<sup>62</sup> According to the policy, "If...it is judged that a Court in all the circumstances of the case could reasonably rely on the evidence of a witness, notwithstanding any particular difficulties, then such evidence is credible and should be taken into account."<sup>63</sup> The United Kingdom's policies related to the reliability and credibility of evidence go further: the assessment of accuracy and integrity is not limited to witnesses, but must be applied to the evidence in general.<sup>64</sup>

#### Availability of Evidence

The prosecution policies of Australia, Canada, Kenya, New Zealand, South Africa, and the United States describe the need for evidence to be not only admissible but available.<sup>65</sup> Importantly, apart from Canada, the prosecution policies of these countries do not require evidence to be available *at the time of the decision to prosecute*. In New Zealand, for example, evidence that "is or reliably will be available" should be considered when making a decision to prosecute.<sup>66</sup> According to the U.S. Principles of Federal Prosecution, a federal attorney "need not have in hand, at that time, all of the evidence upon which he or she intends to rely at trial, if he or she has a reasonable and good faith belief that such evidence will be available and admissible at the time of trial."<sup>67</sup> Thus, even if a key state witness is abroad at the time a decision to prosecute is being made, as long as there is a reasonable and good faith belief that the witness will be present at the trial, it is acceptable to commence criminal proceedings. South Africa's prosecution policy similarly requires prosecutors to consider whether "the necessary witnesses [are] available, competent, willing and if necessary, compellable to testify, including those who are out of the country."<sup>68</sup>

Kenya's approach to the availability of evidence is explicitly tied to its threshold-of-proof test. The country's national prosecution policy encourages prosecutors to evaluate evidence in light

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56 Ibid., para. 2.7(d), (f).

57 Ibid., para. 2.7(g).

58 Ibid., para. 2.7(b).

59 Ibid., para. 2.7(f), (g).

60 South Africa Prosecution Policy, p. 6.

61 South Africa Prosecution Policy, p. 5.

62 New Zealand Solicitor-General's Prosecution Guidelines, para. 5.4.

63 Ibid.

64 United Kingdom Code for Crown Prosecutors, para. 4.8.

65 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel's Conduct, Sec. 3.1; Australia Prosecution Policy of the Commonwealth, para. 2.7(i); U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.220; New Zealand Solicitor-General's Prosecution Guidelines, para. 5.4; South Africa Prosecution Policy, p. 6.

66 New Zealand Solicitor-General's Prosecution Guidelines, para. 5.4.

67 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.220.

68 South Africa Prosecution Policy, p. 6.

of whether “an impartial tribunal [would] convict on the basis of evidence available,”<sup>69</sup> a threshold much higher than Canada’s “reasonable prospect of conviction.” Kenya’s policy acknowledges that “in some cases, the available evidence at the time may not be sufficient to determine the evidential test, that is, ‘reasonable prospect of conviction.’”<sup>70</sup> For example, “relevant expert evidence or evidence required to determine bail risk may not be available within the limited time of arraignment of a suspect before court.”<sup>71</sup> If a prosecutor, faced with these circumstances, believes there are “reasonable grounds...that evidence will become available in good time,” and if “the seriousness of the matter and the circumstances of the case justify the making of an immediate decision to charge,”<sup>72</sup> the prosecutor can do so. In the absence of such conditions, however, a decision to charge should be withheld.<sup>73</sup>

### Strength of the Case for the Defense

Five of the six prosecution policies reviewed have guidelines that specifically direct prosecutors to consider the strength of the case for the defense when assessing the reasonable prospect of conviction.<sup>74</sup> Prosecutors in the United Kingdom “must consider what the defense case may be and how it is likely to affect the prospects of conviction.”<sup>75</sup> Similarly, Crown prosecutors in Canada “should also consider any defenses that are plainly open to or have been indicated by the accused...”<sup>76</sup> Fiji’s, Kenya’s, and South Africa’s prosecution policies require prosecutors to anticipate the defense of the accused person.<sup>77</sup>

### Public Interest Test Considerations

The second component of the decision to prosecute typically involves an assessment of the case in light of the public interest in prosecuting or not. The prosecution strategies in Kenya and the United Kingdom state that in every case where there is enough evidence to justify a prosecution, prosecutors must then decide whether a prosecution is required in the public interest.<sup>78</sup> In line with the principle of opportunity, the policy stipulates that a prosecution will not automatically follow simply because the evidential threshold is met. A prosecutor must be satisfied that the public interest demands a prosecution before proceeding.<sup>79</sup> South Africa’s prosecution policy similarly acknowledges that there is no rule that all provable cases must be prosecuted. Such a rule would impose an impossible burden on prosecutors and on society in the pursuit of fair administration of justice.<sup>80</sup>

Except for the U.S. guidelines, all prosecution policies reviewed require the evidentiary threshold to be met first, before a prosecutor may consider whether a prosecution would best serve the public interest. Canada’s prosecution guidelines stipulate that “Crown counsel [may] only consider the public interest when satisfied that the evidentiary foundation to support a charge has been met as ‘no public interest, however compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction.’”<sup>81</sup> In contrast, the U.S. Principles of

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69 Kenya National Prosecution Policy, p. 8, Sec. 2.

70 *Ibid.*, p. 8, Sec. 2(ii).

71 *Ibid.*, p. 8, Sec. 2(iii).

72 *Ibid.*, p. 8, Sec. 2(iv).

73 *Ibid.*, p. 8, Sec. 2(vi).

74 Fiji Prosecution Code (2003), para. 5.2; United Kingdom Code for Crown Prosecutors, paras. 4.6–4.7.

75 United Kingdom Code for Crown Prosecutors, paras. 4.6–4.7.

76 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 3.1.

77 Kenya National Prosecution Policy, p. 8, Sec. 2(b); South Africa Prosecution Policy, p. 6; Fiji Prosecution Code, para. 5.2.

78 United Kingdom Code for Crown Prosecutors, para. 4.9; Kenya National Prosecution Policy, p. 9, Sec. 3.

79 *Ibid.*

80 South Africa Prosecution Policy, pp. 6–7.

81 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 3.2.



Federal Prosecution hold that even in the face of a likely acquittal, some prosecutions may prove to be in the public interest and justify prosecution nonetheless.<sup>82</sup>

All of the prosecution policies reviewed in this study stress that the public interest factors they list are not exhaustive, as additional factors often emerge that are relevant to specific cases at different times. Typical criteria in the assessment of whether it is in the public interest to prosecute or not are set out below. Importantly, as Kenya's prosecution policy holds, "the assessment of the public interest test is not simply a sum of the factors tending towards or against a prosecution but rather the assessment of each case on its own merit.... Public prosecutors must determine the weight accorded to each public interest factor on the circumstances of each case and make an overall assessment."<sup>83</sup> Ultimately, one public interest factor may outweigh several other factors that support an alternative conclusion.

### The Nature and Seriousness of the Crime

The nature and the seriousness of an offense are important aspects that must be evaluated when deciding whether or not to prosecute. However, the details of these considerations vary in different prosecution policies.

#### *Type and Prevalence of Offense*

Kenya's prosecution policy identifies offenses that convey grave penalties, such as offenses that involve weapons, violence, or the threat of violence, as crimes that should be prosecuted.<sup>84</sup> In contrast, prosecutions are discouraged for trivial offenses or offenses for which the court is likely to impose a negligible penalty.<sup>85</sup> In the United States, limited federal resources dictate that prosecutors must evaluate the nature and seriousness of the violation; the Principles of Federal Prosecution urge prosecutors not to waste scarce resources prosecuting "inconsequential cases or cases in which the violation is only technical."<sup>86</sup> Australia similarly considers the "relative triviality of the alleged offence" or the technical nature of the offense as factors weighing against a decision to prosecute.<sup>87</sup>

In Fiji, prosecutors may decline to prosecute if "the loss or harm can be described as minor and was the result of a single incident."<sup>88</sup> As Fiji's policy suggests, the prevalence of a crime is connected to the nature and seriousness of that crime. Prosecutors must consider whether "the offence, though not serious in itself, is widespread in the area where it was committed."<sup>89</sup>

Australia also cites the prevalence of a crime as a factor weighing in favor of prosecution, linking prevalence to the need for deterrence.<sup>90</sup> The relationship between the prevalence of a crime, the need for deterrence, and criminal prosecutions is similarly acknowledged in the prosecution guidelines of the United States, which hold deterrence as one of the primary goals of criminal law. As such, U.S. prosecutors assessing commonly committed but minor offenses are required to keep in mind the impact of criminal accountability on notions of deterrence within the broader community.<sup>91</sup> According to the principles, "some offenses, although seemingly not of

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82 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.220.

83 Kenya National Prosecution Policy, p. 9, Sec. 3.

84 Ibid., p. 10, Sec. 3(i)(a)(b).

85 Ibid., p. 11, Sec. 3(ii)(a).

86 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

87 Australia Prosecution Policy of the Commonwealth, paras. 2.10(a) and 2.11.

88 Fiji Prosecution Code (2003), para. 7.3(c).

89 Ibid., para. 7.2(n).

90 Australia Prosecution Policy of the Commonwealth, para. 2.10(k).

91 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

great importance by themselves, if committed commonly, would have a substantial cumulative impact on the community.”<sup>92</sup>

#### *Victim Interest and Impact*

Related to the nature and seriousness of an offense is its actual or potential impact on victims. In Fiji, prosecutors must determine whether the victim of an offense “has been in fear or suffered personal attack, damage, or disturbance.”<sup>93</sup> In the United States, prosecutors are encouraged to consider the real or potential consequences of the offense on the victim(s), measured in terms of the gravity of economic, physical, and psychological harm.<sup>94</sup>

When assessing the impact of an offense on victims, prosecutors are often urged to take into account a victim’s desire for criminal accountability.<sup>95</sup> Crown counsel in Canada as well as the United Kingdom are advised to also consider the views of the victim’s family regarding prosecution.<sup>96</sup> In the United States, federal guidelines recommend prosecutors engage in conversations with victims to ascertain their interest in prosecution.<sup>97</sup> However, none of the policies reviewed in this study make explicit reference to a recommended method by which the impact on victims is to be assessed.

It is common for prosecution policies to frame victim interest in prosecutions as but one part of broader public interest considerations. Fiji’s prosecution policy, for example, asserts that prosecutors “must always act in the public interest, not just in the interests of any one individual.”<sup>98</sup> The UK’s Code for Crown Prosecutors takes a similar approach, reminding prosecutors that “the CPS [Crown Prosecution Service] does not act for victims or their families in the same way as solicitors act for their clients and prosecutors must form an overall view of the public interest.”<sup>99</sup>

South Africa’s prosecution policy follows those of Fiji and the UK, noting that while “the attitude of the victim of the offense towards prosecution and the potential impact on victims of discontinuing it” are relevant factors when determining the seriousness of an offense, “care must be taken when considering this factor, since the public interest may demand that certain crimes be prosecuted—regardless of whether or not a complainant wishes to proceed.”<sup>100</sup>

#### *Community Interest and Impact*

In the United Kingdom, the greater the impact that an offense has on a community, the more likely it is that a prosecution is required.<sup>101</sup> The Code for Crown Prosecutors proceeds from a broad definition of *community*, asserting that it “is not restricted to communities defined by location.”<sup>102</sup> Rather, community “may relate to a group of people who share certain characteristics, experiences, or backgrounds, including an occupational group.”<sup>103</sup> Crown prosecutors are encouraged to identify the impact of an offense on a community by consulting Community Impact Statements.<sup>104</sup> Canada’s prosecution guidelines adopt a similarly wide understanding

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92 Ibid.

93 Fiji Prosecution Code (2003), para. 7.2(h).

94 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

95 See, for example, Australia Prosecution Policy of the Commonwealth, para. 2.10(o).

96 United Kingdom Code for Crown Prosecutors, para. 4.14(c).

97 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

98 Fiji Prosecution Code (2003), para. 7.5.

99 United Kingdom Code for Crown Prosecutors, para. 4.14(c).

100 South Africa Prosecution Policy, p. 7.

101 United Kingdom Code for Crown Prosecutors, para. 4.14(e).

102 Ibid.

103 Ibid.

104 Ibid. A community impact statement is a written statement that describes the harm or loss that an offense has caused to a community. It is generally a short document illustrating the concerns and priorities of a specific community

of community, holding that “the nature of harm includes loss or injury to...the community, the environment, natural resources, safety, public health, public welfare or societal, economic, cultural, or other public interests.”<sup>105</sup>

Australia’s prosecution guidelines note that an offense can have an impact not only on “community harmony” but on “public confidence in the administration of justice” as well.<sup>106</sup> As such, prosecutors are urged to consider the seriousness of a crime in light of “the necessity to maintain public confidence in the rule of law and the administration of justice through the institutions of democratic governance including the Parliament and the Courts.”<sup>107</sup> Crown counsel in Canada must also evaluate “whether a prosecution would maintain public confidence in the government, courts, a regulatory regime and the administration of justice or have the opposite effect.”<sup>108</sup> Canada’s policy further notes that prosecutions of trivial crimes may have a negative impact on public confidence in the administration of justice by committing resources to matters that the public does not regard as serious.<sup>109</sup>

The U.S. Principles of Federal Prosecution address community in narrower terms, with the effects of an offense considered only within the context of the physical community in which the offense is committed.<sup>110</sup> Federal prosecutors are required to assess the offense’s impact in terms of economic harm, physical danger to persons or public property, and “the erosion of the inhabitants’ peace of mind and sense of security.”<sup>111</sup> This emphasis on economic, physical, and psychological harm is mirrored in South Africa’s prosecution policy,<sup>112</sup> which draws a connection between the use of prosecutorial resources and community impact, noting that “the likely length and expense of a trial” may result in a prosecution being deemed counterproductive to the interests of the broader community.<sup>113</sup>

In the United States, assessing the nature and the seriousness of the offense also requires consideration of public attitudes toward prosecution, as “the public may be indifferent, or even opposed to enforcement of the controlling statute...on substantive grounds, or because of a history of nonenforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued.”<sup>114</sup>

### Victim Characteristics

There are considerable dissimilarities in the extent to which prosecution policies include the personal characteristics of a victim as factors to weigh in the decision to prosecute. For example, the South African and the U.S. prosecution policies make no reference to specific characteristics of the victim. In contrast, the “youth, age, intelligence, vulnerability, disability, dependence, physical health, mental health and other personal circumstances of the victim” are explicitly categorized as relevant considerations in the prosecution guidelines of Australia, Canada, Fiji, New Zealand, and the United Kingdom.

With regard to mental health, Fiji’s and New Zealand’s prosecution policies classify “marked difference[s] between the actual or mental ages of the accused and the victim” as public interest

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over a set time period. The statements are compiled and owned by the police. See [www.cps.gov.uk/legal-guidance/community-impact-statements-adult](http://www.cps.gov.uk/legal-guidance/community-impact-statements-adult)

105 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 2(a).

106 Australia Prosecution Policy of the Commonwealth, para. 2.10(g).

107 *Ibid.*, para. 2.10(u).

108 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 3.2(a).

109 *Ibid.*, 3.2(c).

110 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

111 *Ibid.*

112 South Africa Prosecution Policy, p. 7.

113 *Ibid.*

114 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

factors that weigh in favor of prosecution.<sup>115</sup> Related to considerations about the physical and mental health of a victim is the question of whether criminal proceedings will have a negative impact on the victim's physical or mental health. Prosecutors are often directed to weigh such impact against the seriousness of the offense, the availability of special measures to mitigate the adverse effects of prosecution on the victim, and the likelihood of conviction in the absence of victim participation.<sup>116</sup>

#### *Degree of Victim Vulnerability*

The UK's Code for Crown Prosecutors notes that in addition to the harm caused to a victim by an offense, the specific circumstances of victims are highly relevant to the decision to institute criminal proceedings. The code holds that "the more vulnerable the victim's situation, or the greater the perceived vulnerability of the victim, the more likely it is that a prosecution is required."<sup>117</sup> The vulnerability of a victim increases the public interest in a prosecution because "the more vulnerable the victim, the greater the aggravation."<sup>118</sup> According to the majority of prosecution policies reviewed in this study, the vulnerability of a victim increases when "a position of trust or authority exists between the suspect and the victim."<sup>119</sup> Considerations of positions of authority or trust are also found in the prosecution policies of Fiji, Kenya, New Zealand, and the United States, but not those of Australia or South Africa.<sup>120</sup>

#### *Victim Employment*

Several prosecution policies cite the type of employment held by the victim at the time of the offense as relevant to the public interest test. The UK policy maintains that "a prosecution is... more likely if the offence has been committed against a victim who was at the time a person serving the public."<sup>121</sup> The guidelines of Canada, Fiji, Kenya, and New Zealand similarly view a victim's employment as a public official as a characteristic that supports a decision to prosecute.<sup>122</sup> New Zealand's prosecution guidelines deem offenses committed "against a person serving the public, for example a doctor, nurse, member of the ambulance service, member of the fire service, or a member of the police," as public interest considerations that weigh in favor of prosecution.<sup>123</sup> Kenya's prosecution policy stipulates that "offences committed against a State Officer or a Public Officer (such as a police officer), or a citizen providing essential services (such as a doctor or nurse)" are particularly egregious and support the decision to prosecute.<sup>124</sup> In contrast, the prosecution policies of Australia and the United States do not make a distinction between victims who are public servants and victims who are not.

#### *The Suspect's Situation*

In general, national policies also recommend prosecutors consider the personal and situational characteristics of the alleged offender when deciding whether or not to institute criminal proceedings.

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115 Fiji Prosecution Code (2003), para. 7.2(j); New Zealand Solicitor-General's Prosecution Guidelines, para. 5.8.16.

116 United Kingdom Code for Crown Prosecutors, para. 4.14(c); Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel's Conduct, Sec. 4.3.e.

117 United Kingdom Code for Crown Prosecutors, para. 4.14(c).

118 New Zealand Solicitor-General's Prosecution Guidelines, para. 5.8.11.

119 United Kingdom Code for Crown Prosecutors, para. 4.14(c).

120 Fiji Prosecution Code (2003), para. 7.2(d); New Zealand Solicitor-General's Prosecution Guidelines, para. 5.8.14; Kenya National Prosecution Policy, p. 10, Sec. 3(i)(f).

121 United Kingdom Code for Crown Prosecutors, para. 4.14(c).

122 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel's Conduct, Sec. 3(e); Fiji Prosecution Code (2003), para. 7.2(c).

123 New Zealand Solicitor-General's Prosecution Guidelines, para. 5.8.15.

124 Kenya National Prosecution Policy, p. 10, Sec. 3(i)(c).

### *Suspect Characteristics*

Prosecutors in Australia are encouraged to consider “the youth, age, intelligence, physical health, mental health, or special vulnerability of the alleged offender”<sup>125</sup> as well as “the alleged offender’s antecedents and background.”<sup>126</sup> However, little guidance is offered as to whether these factors weigh in favor of or against the decision to prosecute. For example, it is unclear whether the ill health of an offender would justify a decision to not prosecute. Australia’s prosecution policy provides an explicit discussion only of the prosecution of juvenile offenders, asserting that the “prosecution of a juvenile should always be regarded as a severe step.... In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.”<sup>127</sup> Canada’s prosecution policy is similarly vague, only encouraging prosecutors to take note of the suspect’s background when assessing public interest in the decision to prosecute.<sup>128</sup> There is no direct discussion of the types of background characteristics that may weigh against the decision to prosecute an offender.

In contrast, the U.S. policy is much more explicit about the role that a suspect’s personal circumstances may play in the decision to prosecute. Such circumstances include “extreme youth, advanced age, or mental or physical impairment,” all of which may weigh against the decision to prosecute.<sup>129</sup> The prosecution policies of Fiji and New Zealand are also more specific about the personal characteristics of an offender. The New Zealand policy stipulates that an offender’s old age and ill health are factors militating against prosecution.<sup>130</sup> In Fiji, prosecutors are directed to make an exception to the personal mitigating factors only when “the offence is serious or there is a real possibility that it may be repeated.”<sup>131</sup> In New Zealand, youth is considered a public interest factor weighing against prosecution.<sup>132</sup>

The United Kingdom’s prosecution policy provides the most comprehensive discussion of the impact of an offender’s young age on the decision to prosecute. The policy asserts that significant weight must be attached to a suspect’s age if he or she is under the age of 18, stating that “the younger the suspect, the less likely it is that a prosecution is required.” Prosecutors are reminded to consider not only the age of offenders but their maturity level as well, “as young adults will continue to mature into their mid-twenties.”<sup>133</sup>

### *Level of Culpability*

The level of culpability is also a relevant public interest consideration. In the United Kingdom, assessments of culpability should be derived from an evaluation of a suspect’s level of involvement, the degree of premeditation, and the extent to which a suspect has benefited from the alleged criminal conduct.<sup>134</sup> Premeditated offenses are also deemed more serious by Fiji’s and New Zealand’s prosecution guidelines.<sup>135</sup>

In the United States, even when there is evidence of guilt, prosecutors are encouraged to consider a suspect’s level of culpability, both in the abstract and relative to others involved in the commission of a crime. Minor participants in a criminal enterprise and cases in which no other factors justify prosecution may reasonably support decisions to pursue nonprosecutorial courses

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125 Australia Prosecution Policy of the Commonwealth, para. 2.10(c).

126 *Ibid.*, para. 2.10 (d).

127 *Ibid.*, para. 2.15.

128 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 3.2.1.4.

129 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

130 New Zealand Solicitor-General’s Prosecution Guidelines, paras. 5.9.6 and 5.9.9.

131 Fiji Prosecution Code (2003), para. 7.3(f).

132 New Zealand Solicitor-General’s Prosecution Guidelines, para. 5.9.7.

133 United Kingdom Code for Crown Prosecutors, para. 4.14(d).

134 United Kingdom Code for Crown Prosecutors, para. 4.14(b)(i–vi).

135 Fiji Prosecution Code (2003), para. 7.2(f); New Zealand Solicitor-General’s Prosecution Guidelines, para. 5.5.8.

of action.<sup>136</sup> The prosecution policy of the United Kingdom adds that lower levels of culpability may be assessed if an accused's participation in a crime was compelled, coerced, or exploited, or if the suspect is also the victim of a crime related to his or her offense.<sup>137</sup> Kenya's prosecution policy holds that when suspects are ringleaders or organizers, their level of culpability weighs in favor of prosecution.<sup>138</sup> South Africa's prosecution policy proves to be an outlier with regard to this factor: it recommends that prosecutors determine not only an offender's degree of culpability but also "whether or not the accused person had admitted guilt, shown repentance, [or] made restitution."<sup>139</sup>

#### *Past Criminal Records and Cooperation with Law Enforcement*

Most prosecution policies urge prosecutors to consider the past criminal records of the accused, albeit to varying degrees. In Fiji, the defendant's previous convictions are deemed public interest factors that support prosecution only when such convictions are relevant to the offense in question.<sup>140</sup> New Zealand's prosecution policy also holds relevant convictions of the accused as important public interest considerations supporting prosecution.<sup>141</sup> Its guidelines further assert that the complete absence of previous convictions is a factor that supports a decision not to prosecute.<sup>142</sup>

In contrast, federal prosecutors in the United States are directed to take note of an accused's prior convictions, the nature of prior criminal involvement, when past crimes were committed, and the relationship between prior offenses and the present offense. If the accused has avoided previous prosecutions by entering into plea agreements with the state, the decision to commence criminal proceedings may be further justified. Australia's policy is the only one of the policies reviewed in this study that makes no reference to past criminal records.

In the United States, an accused's previous and current willingness to cooperate with federal law enforcement agents may support a decision not to prosecute. As the Principles of Federal Prosecution note, an accused's willingness to cooperate does not strip him or her of criminal liability, but in certain cases, the nature and value of an accused's cooperation may result in outcomes that outweigh the federal interest in initiating a prosecution.<sup>143</sup>

South Africa's prosecution policy provides an important qualification for prosecutors to consider when evaluating the weight of an accused's willingness to cooperate with authorities in the investigation or prosecution of others, reminding prosecutors that "in this regard, the degree of culpability of the accused person and the extent to which reliable evidence from the said accused person is considered necessary to secure a conviction against others will be crucial."<sup>144</sup> Notably, not all prosecution policies hold prior or current cooperation as a factor that weighs against prosecution. For example, no mention of past or current cooperation is made in the prosecution policies of New Zealand and the United Kingdom.

#### *The Accused's Motivation*

A related public interest consideration is whether an offense was motivated by any form of prejudice against the ethnicity, nationality, biological sex, gender identity, disability, age, reli-

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136 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

137 United Kingdom Code for Crown Prosecutors, para. 4.14(b).

138 Kenya National Prosecution Policy, p. 10, Sec. 3(i)(e)).

139 South Africa Prosecution Policy, p. 7.

140 Fiji Prosecution Code (2003), para. 7.2(k).

141 New Zealand, Solicitor-General's Prosecution Guidelines, para. 5.8.4.

142 Ibid., para. 5.9.8.

143 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

144 South Africa Prosecution Policy, p. 7.

gion, or sexual orientation of the victim.<sup>145</sup> The presence of identity-based motives can increase the public interest in the prosecution of such offenses.

The United Kingdom's Crown Prosecution Service (CPS) points out that it is important to prosecute hate crimes because they have "a disproportionate impact on the victim because they are being targeted for a personal characteristic," and such crimes can "send reverberations through communities."<sup>146</sup> The International Association of Prosecutors asserts that "hate crimes seek to divide communities," and they "convey the message to both the victims and to their group that they are not welcome and they are not safe," which "makes hate crimes more serious than the same crime without the bias motive."<sup>147</sup>

### Length of Delay in Criminal Proceedings

Prosecutors in Australia, Canada, Kenya, and South Africa are encouraged to include in their public interest evaluations whether there has been an unreasonably long delay between the time in which an offense was committed, when the offense was discovered, when the prosecution was instituted, and when trial proceedings would begin.<sup>148</sup> Crown counsel in Canada, for example, are required to assess the impact of any delays in light of "the responsibility of the accused for the delay, the discoverability of the alleged offence by the police or investigative agency and the complexity and length of the investigation."<sup>149</sup> New Zealand's prosecution policy explicitly states that delays between the commission of a crime and the likely trial date that give rise to "undue delay or an abuse of process" should be treated as a public interest factor that weighs against prosecution, unless "the offence is serious; or delay has been caused in part by the defendant; or the offence has only recently come to light; or the complexity of the offence has resulted in a lengthy investigation."<sup>150</sup> Only the prosecution policy of the United Kingdom omits consideration of delays in criminal proceedings.

In a recent South African case, prosecutors decided in 2018 to prosecute a 79-year-old for the 1971 murder of a detainee in police custody. The accused sought a permanent stay of prosecution due to the long delay, which he argued was exacerbated by political interference in the work of the prosecutors. The court held that the factors to consider were the length of the delay, the reasons the government gave to justify the delay, prejudice to the accused, the nature of the offense, and the public interest, including the interest of the family and the victim. After weighing the different factors, the court determined that the political interference did not justify stopping the prosecution. In particular, the interests of justice and the societal need to ensure accountability for serious crimes, especially in the historical context, militated against the granting of a permanent stay of prosecution.<sup>151</sup>

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145 United Kingdom Code for Crown Prosecutors, para. 4.14(c); Fiji Prosecution Code (2003), para. 7.2(i); New Zealand Solicitor-General's Prosecution Guidelines, para. 5.8.17; South Africa Prosecution Policy, p. 7. See also International Association of Prosecutors & OSCE, *Prosecuting Hate Crimes, A Practical Guide* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2014), [www.osce.org/odihr/prosecutorsguide?download=true](http://www.osce.org/odihr/prosecutorsguide?download=true)

146 Crown Prosecution Service, "Public Statement on Prosecuting Racist and Religious Hate Crime" (August 2017), [www.cps.gov.uk/sites/default/files/documents/publications/racist-religious-hate-crime-statement-2017.pdf](http://www.cps.gov.uk/sites/default/files/documents/publications/racist-religious-hate-crime-statement-2017.pdf). In relation to hate crimes, the CPS can apply to the courts for a "sentence uplift," which is an increased punishment: [www.cps.gov.uk/hate-crime](http://www.cps.gov.uk/hate-crime)

147 International Association of Prosecutors & OSCE, *Prosecuting Hate Crimes*, 15–16.

148 South Africa Prosecution Policy, p. 7; Australia Prosecution Policy of the Commonwealth, para. 2.10; Kenya National Prosecution Policy, Sec. 3(i)(e).

149 Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel's Conduct, Sec. 3.2.1(e).

150 New Zealand Solicitor-General's Prosecution Guidelines, para. 5.9.4.

151 *Rodrigues v. National Director of Public Prosecutions of South Africa and Others* (76755/2018) [2019] ZAGPJHC 159 (June 3, 2019), [www.saflii.org/za/cases/ZAGPJHC/2019/159.html](http://www.saflii.org/za/cases/ZAGPJHC/2019/159.html)

### The Likely Consequences of Prosecution

An additional set of public interest factors pertains to the likely consequences of prosecuting a particular offense. The national prosecution policies in Australia, Canada, and Kenya urge prosecutors to evaluate “the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court.”<sup>152</sup> In the United States, prosecutors are also required to consider the likely sentence or other consequences to be imposed if a prosecution is successful. Does the sentence or consequence justify the devotion of time and resources to prosecution, particularly from a deterrence perspective? The U.S. Principles of Federal Prosecution emphasize that the time and resources already expended in federal investigations should not justify the commencement or continuing of a prosecution if the prosecution is not supported on other grounds. Australia’s prosecution policy also requires prosecutors to assess the likely length and expense of a trial as a public interest factor related to the consequences of prosecution, but it does not provide clear direction as to whether such factors justify a decision not to prosecute.

### Noncriminal Alternatives to Prosecution

A final category of public interest considerations that are often weighed when deciding to initiate or decline prosecutions is that of adequate noncriminal alternatives to prosecution.<sup>153</sup> In some cases, prosecutors may be satisfied that the public interest can be properly served by offering offenders the opportunity to address the matter via out-of-court disposal rather than through prosecution.<sup>154</sup> Australia’s and Canada’s policies note that it is important to assess “whether the consequences of any resulting conviction would be unduly harsh and oppressive.”<sup>155</sup> The value of noncriminal alternatives to prosecution is affirmed in the U.S. prosecution policy, which recognizes that the “resort to the criminal processes is not necessarily the only appropriate response to serious forms of antisocial activity.”<sup>156</sup> It encourages prosecutors to explore noncriminal processes such as civil tax proceedings and civil actions under regulatory laws, and administrative consequences such as suspension and debarment proceedings. Pretrial diversion is another option offered to prosecutors.<sup>157</sup> In the United States, the adequacy of noncriminal alternatives should be determined by the nature and gravity of the alternatives, the likelihood of such alternatives being imposed, and the impact of noncriminal alternatives on federal law enforcement interests.<sup>158</sup>

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152 Australia Prosecution Policy of the Commonwealth, para. 2.10(s); Kenya National Prosecution Policy, p. 11, Sec. 3(ii)(a).

153 United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York: United Nations, 2006), [www.unodc.org/pdf/criminal\\_justice/Handbook\\_on\\_Restorative\\_Justice\\_Programmes.pdf](http://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf). See also United Nations Office on Drugs and Crime, United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, Resolution 2002/12 of the Economic and Social Council, [www.unodc.org/pdf/criminal\\_justice/Basic\\_Principles\\_on\\_the\\_use\\_of\\_Restorative\\_Justice\\_Programs\\_in\\_Criminal\\_Matters.pdf](http://www.unodc.org/pdf/criminal_justice/Basic_Principles_on_the_use_of_Restorative_Justice_Programs_in_Criminal_Matters.pdf)

154 United Kingdom Code for Crown Prosecutors, para. 4.10; South Africa Prosecution Policy, p. 7; New Zealand Solicitor-General’s Prosecution Guidelines, para. 5.9.13.

155 Australia Prosecution Policy of the Commonwealth, para. 2.10(l). See also Public Prosecution Service of Canada Deskbook, Part II: Principles Governing Crown Counsel’s Conduct, Sec. 3.2(d).

156 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-22.000.

157 *Ibid.* In the United States, Pretrial diversion is an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processes into a supervision and services program administered by the U.S. Probation Service. In most cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged, or, if they have been charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution. See Pretrial Diversion Program of the U.S. Department of Justice: [www.justice.gov/jm/jm-9-22000-pretrial-diversion-program](http://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program).

158 *Ibid.*, 9-27.250.



## PART 2: Decisions to Prosecute in Post-Conflict Contexts

Armed conflicts and periods of violent repression are often characterized by large-scale human rights violations, with the sheer number of offenses presenting practical difficulties for even well-functioning justice systems in stable societies.<sup>159</sup> Mass rights violations are usually perpetrated by large numbers of individuals, and the number of people in the victimized group may exceed thousands. The complex nature of mass atrocities such as genocide and crimes against humanity (CAH) makes the investigation and prosecution of such crimes particularly costly, requiring significant time and prosecutorial resources to establish the elements of the crime and the culpability of the offenders. Many egregious abuses, such as enforced disappearances, are committed clandestinely, and the careful and deliberate suppression of evidence makes such crimes especially difficult to prove.<sup>160</sup>

The severe challenges facing nations recovering from armed conflict and periods of repression are invariably exacerbated by the destruction or erosion of the judiciary, prosecution service, and police.<sup>161</sup>

The remainder of this report examines three critical questions that must be addressed in the development of post-conflict prosecution guidelines. First, what prosecutorial strategy should be adopted in a post-conflict setting? Second, what crimes should be prosecuted? Third, which perpetrators should be prosecuted? Ultimately, these questions require a consideration of how to pursue prosecutions in difficult and tense political circumstances and how to prioritize state resources during post-conflict transitions.

### **Normative Frameworks of Post-conflict Prosecution Policies**

The scope of post-conflict criminal prosecutions is dependent, in part, on the normative framework explaining the justification for punishment.

Under the *retributive* conception, punishment is justified as a means of righting a wrong. Retributivist conceptions of punishment largely ignore the causal roots of offenses, and post-conflict prosecution policies rooted in this tradition are characterized by attempts to prosecute

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159 Orentlicher, "Settling Accounts," 2596.

160 Diane F. Orentlicher, "Bearing Witness: The Art and Science of Human Rights Fact-Finding," *Harvard Human Rights Journal* 3 (1990): 131–132.

161 Gaitan, "Prosecutorial Discretion," 547–549.

all cases of human rights violations that pass the evidential test. Public interest considerations, as discussed in Part 1, are largely eschewed.<sup>162</sup>

A *utilitarian* conception of punishment emphasizes the positive consequences of post-conflict punishment, such as individual and general deterrence and the prevention of vigilante justice.<sup>163</sup> Here, prosecution is not necessarily pursued to give each offender the punishment he or she deserves. Rather, it is a means of achieving social goals such as revealing truths about past conflict periods, building a culture of human rights, strengthening public faith in the administration of justice, and (re)establishing the rule of law.<sup>164</sup>

It may not be possible to punish all perpetrators because of limited state resources and the need to first reform the justice sector. In such circumstances, the prosecution of specific classes of crimes and perpetrators should be considered in terms of its utility, such as redressing harm inflicted on victims and communities, building faith in the administration of justice, and establishing a culture of human rights that recognizes atrocity crimes as particularly heinous.

## Post-conflict Dynamics

In countries emerging from conflict, prosecutors face significant challenges and pressures. Probably the most contentious issue arising in any transition is the pursuit of justice against senior role players, particularly politicians and high-ranking officers. Typically, such individuals wield considerable power in society, and in the past, they may have dictated or influenced prosecutorial decisions to some degree. Following the end of conflicts, such individuals may continue to exercise influence, or even intimidation, to ensure that they escape justice. In short, perhaps the most serious challenge facing prosecutors is resisting political interference in their work.<sup>165</sup>

### Examples of Political Interference

In South Africa, the celebrated truth-for-amnesty formula demanded that prosecutors follow up on those cases in which amnesty was denied or not applied for. However, although the Truth and Reconciliation Commission (TRC) handed over nearly 400 cases for possible prosecution, less than a handful were taken forward.<sup>166</sup> Recent court cases have exposed how senior government members at the cabinet level secretly intervened to suppress these cases. In 2004, the government established a secret Amnesty Task Team to recommend measures to protect perpetrators from justice.<sup>167</sup> As a result of these recommendations, the prosecution policy was amended to authorize the National Prosecuting Authority (NPA) to decline to prosecute apartheid-era

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162 Kent Greenawalt, "Punishment," *Journal of Criminal Law and Criminology* 74 (1983): 347.

163 *Ibid.*, 350–353.

164 Pdraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (New York: Routledge, 2013), 131.

165 Howard Varney and Michael Schwarz, "The Pitfalls of Post-Conflict Justice: Framing the Duty to Prosecute in the Aftermath of Violence," in *Beyond the Binary: Securing Peace and Promoting Justice after Conflict*, eds. Nelson Camilo Sánchez León and Rodrigo Uprimny Yepes (Bogotá: Dejusticia, 2019), [www.dejusticia.org/en/publication/beyond-the-binary-securing-peace-and-promoting-justice-after-conflict/](http://www.dejusticia.org/en/publication/beyond-the-binary-securing-peace-and-promoting-justice-after-conflict/)

166 Howard Varney, "Transitional Justice, Criminal Justice and Exceptionalism in South Africa," in *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience*, eds. Michael Reed and Amanda Lyons (Bogotá: International Center of Transitional Justice and Ministry of Foreign Relations of Norway, 2010), 13, [www.ictj.org/publication/contested-transitions-colombia-comparative](http://www.ictj.org/publication/contested-transitions-colombia-comparative). See also Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Leiden: Martinus Nijhoff Publishers, 2009); Carnita Ernest, "Reconciliatory Justice: Amnesties, Indemnities and Prosecutions in South Africa's Transition," in *After the Transition: Justice, the Judiciary and Respect for the Law in South Africa*, ed. Centre for the Study of Violence and Reconciliation (Johannesburg: Centre for the Study of Violence and Reconciliation, 2007), 12–14.

167 *Report: Amnesty Task Team*, which was classified "secret" and disclosed during the proceedings in the matter of *Nkadimeng & Others v. The National Director of Public Prosecutions & Others* (T.P.D. Case No. 32709/07).

crimes on various new criteria,<sup>168</sup> including the same amnesty criteria employed by the TRC. In reality, the amendments provided for a backdoor amnesty under the guise of prosecutorial discretion. In striking down the revised prosecution policy, the High Court described it as an impermissible and unconstitutional rerun of the TRC's amnesty program and a recipe for conflict.<sup>169</sup>

The political interference was confirmed by two senior prosecutors, including the former national director of public prosecutions, in a 2015 case brought by the family of a young woman who had been tortured and disappeared by the police in 1983.<sup>170</sup> The family sought a court order to compel the prosecuting authority to decide whether or not to prosecute the known suspects.<sup>171</sup> In 2019, the NPA formally admitted in court papers that the cases referred to it by the TRC had been suppressed because of political pressure; the court hearing the matter directed the NPA as well as the government to take steps to ensure nonrecurrence.<sup>172</sup> Also in 2019, former commissioners of the TRC urged the president to apologize to victims for the massive denial of justice and to establish a commission of inquiry into the political interference.<sup>173</sup>

In Kenya, successive governments, working with political elites, systematically prevented the investigation and prosecution of serious crimes committed during the post-election violence of late 2007. In 2008, the Commission of Inquiry into Post-Election Violence (CIPEV) recommended that a special hybrid tribunal be created to prosecute cases arising from the post-election violence (PEV). However, the political leadership quickly signaled that accountability would not be pursued. In 2009, the Kenyan Parliament rejected a bill that sought to establish such a special tribunal to address PEV crimes.<sup>174</sup> Since Kenya had not taken steps to investigate the crimes,<sup>175</sup> the International Criminal Court (ICC) in 2010 authorized the ICC prosecutor, acting *proprio motu*, to commence an investigation into the Kenyan situation.<sup>176</sup> However, Kenya sought to challenge the admissibility of the cases before the ICC on the grounds that it had the capacity and the political will to manage the cases itself.<sup>177</sup> Even government efforts to

168 These included novel personal circumstances of the alleged offender, including his or her sensitivity to the need for restitution; the degree of remorse shown and his or her attitude toward reconciliation; whether he or she was willing to renounce violence and abide by the constitution; the degree of indoctrination to which he or she was subjected; and the extent to which the prosecution or nonprosecution may help or undermine the national project of nation-building.

169 *Nkadimeng @ Others v. The National Director of Public Prosecutions @ Others* (T.P.D. Case No. 32709/07).

170 Zenzile Khoisan, "Government Interference Let Killers off Hook," *Weekend Argus*, May 31, 2015.

171 *Nkadimeng v. the National Director of Public Prosecutions and Others* (T.P.D. Case No. 3554/2015), Gauteng Division of the High Court of South Africa.

172 *Rodrigues v. National Director of Public Prosecutions of South Africa and Others* (76755/2018) [2019] ZAGPJHC 159 (June 3, 2019), paras. 21–24 and 55–65, [www.saflii.org/za/cases/ZAGPJHC/2019/159.html](http://www.saflii.org/za/cases/ZAGPJHC/2019/159.html)

173 "No Justice for Apartheid Victims—Apologise and Appoint Inquiry, TRC Members Tell Ramaphosa," *City Press*, February 6, 2019, <https://city-press.news24.com/News/no-justice-for-apartheid-victims-apologise-and-appoint-inquiry-trc-members-tell-ramaphosa-20190206>

174 Thomas Obel Hansen, "Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns," *California Western International Law Journal* 42, no. 1 (2011): 1–35; Stephen Brown and Chandra Lekha Sriram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya," *African Affairs* 111, no. 443 (2012): 244–260.

175 The preamble and Art. 1 of the Rome Statute of the International Criminal Court confirm that the ICC shall be complementary to national criminal jurisdictions. Accordingly, the ICC will not intervene unless a national jurisdiction is unwilling or unable to pursue the crimes within the court's jurisdiction, as set out in Art. 17, which deals with issues of admissibility.

176 Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (March 31, 2010). Majority decision.

177 Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute, ICC-01/09-01/11-101 (May 30, 2011), [www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-101](http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-101). On March 13, 2015, Trial Chamber V(B) of the ICC, following the withdrawal of charges by the prosecutor against Uhuru Kenyatta, terminated the proceedings and vacated the summons to appear against him. On April 5, 2016, Trial Chamber V(A) terminated the case against William Samoei Ruto and Joshua Arap Sang. The parties have not appealed this decision: [www.icc-cpi.int/kenya](http://www.icc-cpi.int/kenya). The prosecutor alleged that systematic witness interference and political intimidation of witnesses had forced the withdrawal of charges: Human Rights Watch, "ICC: Kenya Deputy President's Case Ends—Witness Interference Undermined Trial," April 5, 2016, [www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends](http://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends)

supposedly demonstrate that Kenya had the ability and will to investigate and prosecute the PEV crimes, such as the proposal to establish a special division of the High Court, were not permitted to go forward—notwithstanding the police department’s claim that it had prepared files implicating some 6,000 persons.<sup>178</sup> In 2012, a committee of the Judicial Service Commission (JSC) also recommended the establishment of an International Crimes Division of the Kenyan High Court to prosecute PEV cases, including other international and transnational crimes.<sup>179</sup> Political opposition to accountability for PEV crimes has ensured that this initiative remains stalled and that perpetrators of such crimes continue to enjoy near-total impunity.

In Uganda, political negotiations resulted in a peace agreement (the Juba Agreement) that exempts state actors from being prosecuted before “special justice processes,” which includes the International Crimes Division of the High Court, established to try serious offenses amounting to international crimes.<sup>180</sup> This has effectively immunized government forces, especially the Uganda People’s Defence Forces (UPDF), from criminal accountability in relation to the most serious crimes, even though there is extensive evidence that military officers are responsible for such crimes.<sup>181</sup> In addition, because the UPDF plays such a dominant role in society, it has declined to cooperate with prosecutors when its interests are implicated. An example is the brazen refusal of the army to comply with a court-issued arrest warrant for a former Lord’s Resistance Army (LRA) commander who resides in military barracks.<sup>182</sup> Moreover, attempts by the Office of the Director of Public Prosecutions to prosecute abuses committed by state actors in the normal courts are often hampered by a lack of cooperation and even refusal of the police to investigate or enforce arrest warrants.<sup>183</sup>

In Tunisia, the state authorities, particularly the Interior Ministry, appear to have withdrawn support for the Specialized Chambers operationalized in 2018 to contend with the most serious crimes committed under past regimes. Accused persons have appeared in only nine of the 38 cases initiated so far.<sup>184</sup> In May 2019, a group of local human rights organizations condemned the refusal of the Interior Ministry to execute orders issued by the Specialized Chambers summoning accused persons and witnesses to appear in court. They also expressed alarm at the police unions’ threats to withdraw police protection from the trial courts of the Specialized Chambers and their unlawful call to accused persons to ignore summonses and warrants issued by the chambers.<sup>185</sup>

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178 ICTJ International Center for Transitional Justice, “Prosecuting International and Other Serious Crimes in Kenya” (April 30, 2013), [www.ictj.org/publication/prosecuting-international-and-other-serious-crimes-kenya](http://www.ictj.org/publication/prosecuting-international-and-other-serious-crimes-kenya)

179 Judicial Service Commission, “Report of the Committee of the Judicial Service Commission on the Establishment of an International Crimes Division in The High Court of Kenya” (October 30, 2012). See also Athman Amran, “Post-Election Violence Suspects May Face International Law,” *Standard*, August 18, 2012, [www.standardmedia.co.ke/?articleID=2000064300&story\\_title=Post-election-violence-suspects-may-face-international-law](http://www.standardmedia.co.ke/?articleID=2000064300&story_title=Post-election-violence-suspects-may-face-international-law)

180 Art. 4.1 of the Agreement on Accountability and Reconciliation, Government of the Republic of Uganda-LRA, (2007).

181 “NRA Atrocities: The Case of Burcoro,” *Daily Monitor*, February 2, 2014, [www.monitor.co.ug/Magazines/PeoplePower/NRA-atrocities--The-case-of-Burcoro/689844-2168944-132832hz/index.html](http://www.monitor.co.ug/Magazines/PeoplePower/NRA-atrocities--The-case-of-Burcoro/689844-2168944-132832hz/index.html)

182 “Former Senior LRA Commander Faces Arrest over War Crimes,” *Mega FM News*, May 9, 2019, <http://megafm.co.ug/2019/05/09/former-senior-lra-commander-faces-arrest-over-war-crimes/>

183 Paul Tajuba, “Police Defy DPP Directive to Produce Suspects in Court,” *Daily Monitor*, September 28, 2013, [www.monitor.co.ug/News/National/Police-defy-DPP-directive-to-produce-suspects-in-court/688334-2009918-1dxc4jz/index.html](http://www.monitor.co.ug/News/National/Police-defy-DPP-directive-to-produce-suspects-in-court/688334-2009918-1dxc4jz/index.html); “DPP, IGP Clash Over Sebuwufu Murder Investigations,” *Uganda Radio Network*, November 24, 2015, <https://ugandaradionetwork.com/story/dpp-igp-clash-over-sebuwufu-murder-investigations>; Anthony Wesaka, “Chief Justice Warns Police, DPP on Poor Investigations,” *Daily Monitor*, June 13, 2018, [www.monitor.co.ug/News/National/Chief-Justice-warns-police-DPP-poor-investigations/688334-4609078-bmk6gkz/index.html](http://www.monitor.co.ug/News/National/Chief-Justice-warns-police-DPP-poor-investigations/688334-4609078-bmk6gkz/index.html)

184 Olfa Belhassine, “Tunisia: A Year of Trials under Pressure,” *JusticeInfo.net*, June 6, 2019, [www.justiceinfo.net/en/tribunals/national-tribunals/41612-tunisia-a-year-of-trials-under-pressure.html](http://www.justiceinfo.net/en/tribunals/national-tribunals/41612-tunisia-a-year-of-trials-under-pressure.html)

See also Olfa Belhassine, “The Silence of the Accused in Tunisia,” *JusticeInfo.net*, September 20, 2018, [www.justiceinfo.net/en/truth-commissions/38941-the-silence-of-the-accused-in-tunisia.html](http://www.justiceinfo.net/en/truth-commissions/38941-the-silence-of-the-accused-in-tunisia.html)

185 *Ibid.* See also No Peace Without Justice, “A Year of Specialized Transitional Justice Chambers: The Fight against Impunity,” May 31, 2019, [www.npwj.org/ICC/A-year-specialized-transitional-justice-chambers-fight-against-impunity.html](http://www.npwj.org/ICC/A-year-specialized-transitional-justice-chambers-fight-against-impunity.html)

## Implications for Prosecutors

These examples illustrate the challenges facing prosecutors in post-conflict settings. The South African case demonstrates how prosecution policies can be abused for political ends. Only the intervention by families, activists, and lawyers prevented the prosecution policy from becoming a tool of impunity in relation to apartheid-era cases. The original prosecution policy was guaranteed under the constitution;<sup>186</sup> it upheld the independence of prosecutors,<sup>187</sup> and interference was criminalized by the NPA's enabling statute.<sup>188</sup> Notwithstanding these guarantees and prohibitions, South African prosecutors still succumbed to political interference and acquiesced to the demands of politicians. This points to a corrupt culture within the prosecution service, a failure of leadership, and a distinct lack of courage, a quality required of all prosecutors. The lesson to be gleaned from this shameful period is that a prosecution policy and other legal guarantees of independence on their own do not necessarily prevent political interference.

In Kenya, prosecutors operated within a dominant political discourse that did not tolerate criminal accountability for PEV crimes, particularly for those in leadership positions. Few prosecutors were willing to earn the wrath of the leadership by pursuing such cases. The Office of the Director of Public Prosecutions (ODPP) espoused core values of independence, impartiality, integrity, responsiveness, dedication, and professionalism.<sup>189</sup> Nevertheless, it ultimately hid behind the failure of Parliament to enact a special hybrid court and the subsequent failure to establish an international crimes division within the High Court, even though it could have vigorously pursued cases or inquests in the normal courts. As with South Africa, the Kenyan prosecuting authority was constitutionally protected from interference<sup>190</sup> but failed to withstand the political pressure.

In Uganda, prosecutors' hands were tied by political arrangements struck in the peace accord that prohibited them from pursuing cases against state actors before the International Crimes Division (ICD). Consequently, crimes committed by members of the army could only be tried before the military courts,<sup>191</sup> which are not seen as sufficiently independent or impartial.<sup>192</sup> Indeed, it is unsurprising that few serious crimes arising from the conflicts with the LRA have been prosecuted in the military courts. It probably does not help that Uganda's prosecution policy is entirely silent on the need for prosecutors to act independently and impartially.<sup>193</sup>

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186 Secs. 179(2) and (4) of the 1996 Constitution of the Republic of South Africa.

187 The NPA's Prosecution Policy requires at pp. 2–3 that the NPA must “*exercise its prosecutorial functions independently*” and that prosecutorial decisions be made independently (p. 12).

188 Secs. 20(1), 32(1)(a) and (b), 32(2)(a), and 41(1) of the National Prosecuting Authority Act 32 of 1998, [www.justice.gov.za/legislation/acts/1998-032.pdf](http://www.justice.gov.za/legislation/acts/1998-032.pdf). In addition, Sec. 9 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 criminalizes multiple acts aimed at preventing the performance of a prosecutorial function or showing any favor or disfavor to any person relating to the institution of criminal proceedings: [www.justice.gov.za/legislation/acts/2004-012.pdf](http://www.justice.gov.za/legislation/acts/2004-012.pdf)

189 Core Values of the ODPP Office of the Director of Public Prosecutions, [www.dpp.go.ug/index.php/about-dpp/core-values](http://www.dpp.go.ug/index.php/about-dpp/core-values). The ODPP Strategic Plan for 2016 to 2021 identifies the development of a national prosecution policy as a key task. The lack of criminal justice policy was identified as a threat to the future of the ODPP: [www.odpp.go.ke/wp-content/uploads/2018/02/ODPP-STRATEGIC-PLAN-2016-2021-FINAL.pdf](http://www.odpp.go.ke/wp-content/uploads/2018/02/ODPP-STRATEGIC-PLAN-2016-2021-FINAL.pdf)

190 Art. 157(10) of the 2010 Constitution of Kenya provides that the director of public prosecutions is not permitted to seek the consent of any person or authority for the commencement of criminal proceedings, and in the exercise of his or her powers or functions must not be under the direction or control of any person or authority.

191 Art. 210 of the 1995 Constitution of the Republic of Uganda read with Part 8 of the 2005 Uganda People's Defence Forces Act.

192 Ronald Naluwairo, “Uganda's Civil Courts and the Administration of Military Justice: An Appraisal of Their Jurisprudence on Selected Issues,” *Law Democracy & Development* 17 (2013): 128, [www.idd.org.za/images/stories/Ready\\_for\\_publication/naluwairoru\\_article.pdf](http://www.idd.org.za/images/stories/Ready_for_publication/naluwairoru_article.pdf). Note also Principle 29 of the United Nations “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (E/CN.4/2005/102/Add.1)” (2005) explicitly excludes the adjudication of human rights violations by military courts, mandating ordinary domestic courts as the only appropriate venue of judicial oversight.

193 However, Art. 120(6) of the 1995 Constitution of the Republic of Uganda stipulates that the director of public prosecutions (DPP) shall not be subject to the direction or control of any person or authority. This clause conflicts with Art. 4.1 of the Juba Agreement, which excludes state actors from the jurisdiction of the International Crimes Division

However, even if it did express this stipulation, the system for conflict-related prosecutions is rigged at a political level and will remain so until the courts clarify whether the peace accord prevents prosecutions of state actors by the ICD.

In Tunisia, elements within the state are actively sabotaging the pursuit of justice by the Specialized Chambers, with brazen impunity. Prosecutors and judges employed in the chambers are courageously continuing with their work against considerable adversity, but it is difficult to see how credible justice can be secured in such circumstances.

### Addressing Political Interference

The independence of prosecutors and the requirement for them to act impartially and to prosecute without fear or favor should be enshrined in constitutions,<sup>194</sup> enabling statutes,<sup>195</sup> and prosecution policies.<sup>196</sup> These requirements should be legally binding, and any political or other interference in the prosecutorial function should be criminalized, with severe penalties imposed.<sup>197</sup> In order to give meaning to such requirements and prohibitions, the clauses in question should be seriously enforced.<sup>198</sup>

However, the examples illustrate that binding obligations on their own do not necessarily deliver independent and impartial prosecutorial decision making. Even where guidance and protection are provided, prosecutors still need courage and commitment to their oaths of office to invoke such protections. This is particularly the case when prosecutors operate within a culture that does not promote excellence or professionalism. In some instances, a culture of corruption and intimidation can take root, and in such an environment, even the most resolute and exceptional prosecutors will struggle as they are inevitably sidelined, persecuted, and hounded out of the service.<sup>199</sup> Building a culture of integrity and excellence is a long-term project, and the effort must start at the top. Regrettably, those in leadership positions often set the worst of examples by protecting political and economic elites and targeting political opponents of the incumbent administration. Leadership positions in most prosecution services tend to be political appointments, with heads of state largely having free rein to appoint who they wish.<sup>200</sup> Sometimes compliant and malleable persons are appointed to serve political and occasionally, corrupt agendas.<sup>201</sup>

Prosecutors can hardly be expected to act with courage and unquestionable integrity if the leadership does the opposite. Ideally, the root of the problem should be tackled: the appointment process for national directors of prosecutions and attorneys general. An exclusively politicized

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(ICD). However, this agreement was never ratified by Parliament and accordingly cannot override the constitutional authority accorded to the DPP. Moreover, the legal notice establishing the ICD does not exclude UPDF soldiers from its jurisdiction (Legal Notice No. 10 of 2011, The Uganda Gazette, No. 38, Volume CIV, dated May 31, 2011). The decision by the DPP not to prosecute UPDF soldiers accused of serious crimes is accordingly not motivated by legal constraints but due to political reasons.

194 See Secs. 179(2) and (4) of the 1996 Constitution of the Republic of South Africa.

195 See Secs. 20(1), 32(1)(a) and (b), 32(2)(a), and 41(1) of the South Africa National Prosecuting Authority Act 32 of 1998.

196 See the South African Prosecution Policy, pp. 2–3.

197 Sec. 26 of the South Africa Prevention and Combating of Corrupt Activities Act 12 of 2004, in relation to crimes involving interference with prosecutors, provides for sentences of up to five years imprisonment when imposed by a lower court, up to 18 years when imposed by a regional court, and up to life imprisonment when imposed by the High Court.

198 Supreme Court of Canada, *Valente v. The Queen* (1986) 24 DLR (4th) 161 (SCC), 172. The court held that the test for independence should include public perception. See also South Africa Constitutional Court, *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para. 207, [www.saflii.org/za/cases/ZACC/2011/6.html](http://www.saflii.org/za/cases/ZACC/2011/6.html)

199 *Nkadimeng v. the National Director of Public Prosecutions & Others* (Case No. 3554/2015), Gauteng Division of the High Court of South Africa. See the affidavits of Vusi Pikoli and Anton Ackermann.

200 Africa Criminal Justice Reform, “The Appointment and Dismissal of the NDPP: Instability since 1998” (October 2018), <https://acjr.org.za/resource-centre/appoint-and-dismiss-of-ndpp-fs-7-fin.pdf>

201 Johan Burger, “Political Interference Weakening the Rule of Law in SA,” *SangoNet*, September 29, 2016, [www.ngopulse.org/article/2016/09/29/political-interference-weakening-rule-law-sa](http://www.ngopulse.org/article/2016/09/29/political-interference-weakening-rule-law-sa)

appointment process would likely result in the appointment of compliant personnel. In Sri Lanka, the constitution was amended in 2015 to create a Constitutional Council comprising 10 members, including opposition members, to remove exclusive discretion from the president in the appointment of key posts, including the attorney general.<sup>202</sup> During 2018, the South African president created an independent advisory panel to recommend three to five names for appointment as the new national director of public prosecutions. Although the president was not constitutionally required to take the panel's advice, he did so to instill confidence in his selection, given the torrid history of poor, politically motivated appointments.<sup>203</sup> In addition, a court ordered that the interviews conducted by the advisory panel be open to the public and broadcast live.<sup>204</sup> Ultimately, clear and objective criteria for appointments and removals, particularly of senior staff, should be enshrined in law and be strictly applied.

Structurally, prosecutors can be afforded a measure of protection from political interference through measures such as guaranteeing the autonomy of prosecutorial authorities to exercise control over their own finances and to make their own operational decisions and ensuring the necessary budgetary and technical resources are available for effective investigations and prosecutions.<sup>205</sup> In this regard, a prosecuting authority should be allowed to participate and to be heard in the determination of its budget and resourcing. The head of a prosecuting authority should enjoy security of tenure and be subject to a fixed and nonrenewable term of office. In addition, statutorily secured remuneration should be guaranteed for the head and most senior staff.<sup>206</sup>

Typically, oversight of prosecutors is provided by both the executive and the legislative branches of government.<sup>207</sup> But when a special mechanism is established to deal with the most sensitive of cases, consideration should be given to creating an independent oversight body to protect the investigations and prosecutions from possible manipulation. Such an oversight body should be composed of both members of the executive branch and nonmembers, including respected persons from civil society and various professions.<sup>208</sup>

#### Post-conflict Prosecutorial Strategies

In all the examples of political interference, a common factor is the absence of a specific policy or strategy outlining the approach to cases arising from past conflicts. This lacuna probably opened the door to opaqueness and political manipulation. A fair, objective, and public policy might have limited the scope for interference in these cases, especially if such a policy had been

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202 "The Constitutional Council in Brief," *Daily FT*, May 22, 2015, [www.ft.lk/article/423517/The-Constitutional-Council-in-brief](http://www.ft.lk/article/423517/The-Constitutional-Council-in-brief)

203 Karyn Maughan, "Cyril Ramaphosa in Major Shift Asking Panel to Help Find Shaun Abrahams's Replacement," *Business Day*, October 10, 2018, [www.businesslive.co.za/bd/national/2018-10-10-cyril-ramaphosa-in-major-shift-asking-panel-to-help-find-shaun-abrahams-replacement/](http://www.businesslive.co.za/bd/national/2018-10-10-cyril-ramaphosa-in-major-shift-asking-panel-to-help-find-shaun-abrahams-replacement/). See also the statement of the president: [www.gov.za/speeches/president-cyril-ramaphosa-appointment-national-director-public-prosecutions-4-dec-2018-0000](http://www.gov.za/speeches/president-cyril-ramaphosa-appointment-national-director-public-prosecutions-4-dec-2018-0000)

204 Ntwaagae Seleka, "NDPP Interviews to Be Open to the Media," *news24*, November 13, 2018, [www.news24.com/SouthAfrica/News/ndpp-interviews-to-be-open-to-the-media-20181113](http://www.news24.com/SouthAfrica/News/ndpp-interviews-to-be-open-to-the-media-20181113)

205 UN General Assembly, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1/RES/55/89, February 22, 2001, Art. 3(a).

206 Howard Varney, "Assessing the Prospects for Transitional Justice in Georgia" (2017), 33–36, [www.ictj.org/publication/transitional-justice-georgia](http://www.ictj.org/publication/transitional-justice-georgia)

207 South African Constitutional Court, *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), para. 239.

208 The erstwhile National Crime Squad in the United Kingdom was overseen by the National Crime Squad Service Authority, which consisted of a mix of independent persons and members from the executive branch. The successor to the squad, the National Crime Agency (NCA), a non-ministerial government department that leads the country's investigations into serious and organized crime, maintains such oversight through the NCA Board of Directors, which includes three non-executive directors from civil society including a victim support expert. See [www.nationalcrimeagency.gov.uk/news/new-non-executive-directors-on-the-nca-board](http://www.nationalcrimeagency.gov.uk/news/new-non-executive-directors-on-the-nca-board).

developed in an open and participatory manner and communicated to the public. Such an approach would have generated a measure of public support, legitimacy, and ownership.<sup>209</sup>

It is undoubtedly challenging to decide what should be included in a post-conflict prosecutorial strategy or policy. Such a strategy should enable prosecutors to pursue the most serious crimes of the past in a fair manner, without exhausting scarce prosecutorial resources. It should carefully review the context in which crimes were committed. The strategy should be consistent with a country's constitutional arrangements, not deviate unduly from any existing prosecution policy, and avoid absurd outcomes. It must take into account the country's history of violations, past prosecutorial strategies, and efforts to manage the transition. Any strategy will likely need to limit the number of cases to be considered for prosecution, necessitating a method for identifying the most egregious cases. This, in turn, requires developing sensible guidelines and criteria for the selection of such cases.<sup>210</sup>

Once prosecutors have located cases within the context of the conflict and determined that there is enough evidence to sustain a prosecution, they should carefully assess the circumstances of each case, including the nature of the crime and the circumstances of the perpetrator. Where the nature of the act or its gravity are entirely out of proportion to the political, social, security, or military objective being pursued, such a case should be considered as serious or egregious and short-listed for prosecution.<sup>211</sup>

Perpetrator circumstances fall into two categories. Mitigating circumstances are situations in which junior perpetrators acted in accordance with issued instructions. This includes contexts in which perpetrators were involved in mob violence but did not orchestrate it. Aggravating circumstances are situations in which a perpetrator acted in a position of great influence, authority, leadership, or command. In this position of power, the perpetrator chose, for example, not to abide by established rules or standards; not to prevent a criminal act from proceeding; or not to employ lawful means to pursue a political, social, security, or military objective, even though the option was available.<sup>212</sup> Aggravating factors center on the perpetrator's level of authority.

Once such factors have been considered, prosecutors are better placed to prioritize cases. Low-priority cases include non-egregious offenses committed by persons not exercising authority, command, or influence. Non-egregious offenses committed or ordered by high-ranking persons or those exercising authority could also be categorized as low-priority cases. However, a non-egregious offense committed by a senior person in aggravating circumstances may be classified as a middle-order-priority case. Low-priority cases should not be prioritized for prosecution.

Middle-order-priority cases involve egregious offenses committed by junior ranks or by an individual not responsible for orchestrating or planning violence. Mitigating circumstances in cases involving lower ranks may be enough to push the seriousness of the crime down to a low-priority case. It may be argued that middle ranks who involve themselves in egregious crimes can make no claim to mitigating circumstances. This category may also include cases in which

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209 Varney and Schwarz, "The Pitfalls of Post-Conflict Justice." See also Case Matrix Network, "Prioritising International Sex Crimes Cases in the Democratic Republic of the Congo" (November 2015), 25–40, [www.casematrixnetwork.org/fileadmin/documents/reports/CMN\\_DRC\\_Report\\_ENG.pdf](http://www.casematrixnetwork.org/fileadmin/documents/reports/CMN_DRC_Report_ENG.pdf)

210 Howard Varney, "Exploring a Prosecutions Strategy in the Aftermath of the South African Truth and Reconciliation Commission," unpublished seminar paper presented at the conference "Domestic Prosecutions and Transitional Justice," organized by the International Center for Transitional Justice and the Foundation for Human Rights, May 16–19, 2005, in Magaliesburg, South Africa.

211 Applying the proportionality principle involves ascertaining whether the means employed justified the ends. This really amounts to applying "the ordinary person's sense of fairness." See William Wade and Christopher Forsyth, *Administrative Law*, 8th ed. (Oxford: Oxford University Press, 2000), viii.

212 Varney, "Exploring a Prosecutions Strategy."



non-egregious crimes have been committed or ordered by senior individuals in aggravating circumstances. Middle-order-priority cases should be earmarked for prosecution.

High-priority cases are those involving senior perpetrators who have committed, ordered, or orchestrated egregious crimes, particularly in aggravating circumstances. These cases should be prioritized above all others, and the most attention should be devoted to bringing them to trial. The proposed strategy is graphically represented in Table 1.

**Table 1: Strategy for Prioritizing Cases**

	LOW PRIORITY	MIDDLE PRIORITY	HIGH PRIORITY
Low ranks or low authority	<ul style="list-style-type: none"> <li>• Non-egregious offenses</li> <li>• Egregious offenses with mitigating circumstances</li> </ul>	<ul style="list-style-type: none"> <li>• Egregious offenses</li> </ul>	
Middle ranks or middle authority	<ul style="list-style-type: none"> <li>• Non-egregious offenses</li> </ul>	<ul style="list-style-type: none"> <li>• Egregious offenses</li> </ul>	
High ranks or high authority	<ul style="list-style-type: none"> <li>• Non-egregious offenses</li> </ul>	<ul style="list-style-type: none"> <li>• Non-egregious offenses with aggravating circumstances</li> </ul>	<ul style="list-style-type: none"> <li>• Egregious offenses</li> <li>• Egregious offenses with aggravating circumstances</li> </ul>

The order of priority increases moving down the table from low-ranking to high-ranking individuals and moving from left to right as the nature of the offense becomes more serious and/or the circumstances of the perpetrator become aggravating. Most prosecutorial resources should be allocated to those crimes that are located toward the bottom and the right of the table.<sup>213</sup>

In appropriate circumstances, prosecutors should be encouraged to include applicable international crimes in conjunction with domestic crimes when drawing up indictments. International crimes could be included as self-standing counts on the charge sheet in addition to domestic charges or alternative charges. This may be a useful strategy when local crimes do not adequately represent the horrors of the conduct in question, such as when a jurisdiction criminalizes assault but not torture. If it can be shown that torture has passed into customary international law at the time of committal, prosecutors could include this more serious charge in the indictment (dealt with below). In addition, the available evidence may demonstrate an international crime, such as enforced disappearance, but not necessarily or sufficiently a domestic crime, such as murder. In such circumstances, the prospects of securing a conviction are likely to be greater for the former than the latter.

When prosecutors are faced with large numbers of victims, perpetrators, and potential witnesses arising from multiple crimes implicating many of the same actors who are characterized by similar modus operandi and who are connected to each other across time and location, consideration could be given to consolidating such cases into mega trials or groups of trials. Perhaps the best-known example of this strategy was the Argentinian trial of 68

<sup>213</sup> Ibid.

defendants accused of torture, murder, and other crimes involving nearly 800 victims of the Navy Mechanics School.<sup>214</sup>

Cases arising following conflict are invariably controversial and sensitive. They present prosecutors with some of their most difficult and agonizing decisions. However, prosecutors should not turn from such challenges. A strategy or policy that provides prosecutors with objective factors to consider and apply allows them to act fairly. It also avoids simplistic or tit-for-tat approaches and ensures that the most deserving cases are prioritized.

### What Crimes Should Be Prosecuted?

Addressing the question of which crimes to prosecute requires consideration of various international and domestic legal obligations to prosecute core international crimes and other serious crimes; the need to prioritize particular classes of crimes, such as gender-based violence; the complexity of cases; and the time period in which atrocities took place.

While investigative strategies are beyond the scope of this report, prosecutors should nonetheless play a role in ensuring that cases that are prioritized for trial are representative of past conflicts. Selected cases should fairly represent the nature of human rights violations and abusive practices as experienced across different regions of a country. The cases should also fairly reflect the actual range of victims and perpetrators, including state and nonstate actors, involved in the conflict.

#### International Crimes

Referred to as *core international crimes*, acts of genocide, crimes against humanity, and war crimes are distinguished from ordinary crimes proscribed under domestic law in that they reflect instances of “extraordinary international criminality” characterized by exceptional evil that threatens all humankind. These crimes are generally planned, systematic, and widespread in comparison to ordinary crimes. In addition, perpetrators of international crimes tend to target victims based on perceived or actual group membership. As Drumbl notes, “the attack is not just against individuals, but against the group and thereby becomes something more heinous than the aggregation of each individual murder.”<sup>215</sup>

Acts of criminality in the domestic sphere are often said to threaten the values, security, and rule of law of the *state*. In contrast, international crimes are seen as *universal* in nature and thus as attacks on the legal order of civilized nations everywhere.<sup>216</sup>

#### International Legal Obligations to Prosecute International Crimes

At the international level, the obligation to prosecute international crimes can be found in instruments across a wide body of international law.<sup>217</sup> However, the obligation is not without limitations. While customary international law, supported by various instruments of interna-

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214 Marcela Valente, “Argentina’s Biggest Human Rights Trial Begins,” *Inter Press Service News Agency*, November 28, 2012. See also Nadia Hajji, “After Repeal of El Salvador’s Amnesty Law: Next Steps in Justice and Accountability,” *Texas International Law Journal* 53, no. 1 (2018): 77, 93; Francesca Lessa, “Operation Condor on Trial: Justice for Transnational Human Rights Crimes in South America,” *Journal of Latin American Studies* 51, no. 2 (2019): 409–439.

215 Mark Drumbl, “Atrocity, Punishment, and International Law,” Washington and Lee Legal Studies Paper No. 2007-14 (New York: Cambridge University Press, 2007).

216 *Ibid.*

217 *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, 71 (1948), Art. 8: “Everyone has the right to an effective remedy by the competent national tribunals.” International Covenant on Economic, Social and Cultural Rights, December 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3. Art. 2: “To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

tional humanitarian and human rights law, imposes requirements to investigate and prosecute egregious human rights abuses, there is debate about the scope of these requirements.<sup>218</sup> It is beyond the capacity of this report to deal with the applicability of amnesties and immunities imposed under law, since once they are imposed prosecutorial discretion is removed.<sup>219</sup>

The Human Rights Committee established to oversee and monitor state compliance with the International Covenant on Civil and Political Rights (ICCPR) has held that state parties are obliged to investigate and bring to justice those responsible for extrajudicial executions, torture, and enforced disappearances.<sup>220</sup>

Article 4 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) requires state parties to criminalize all acts of torture and make these offenses punishable “by appropriate penalties which take into account their grave nature.” Furthermore, Article 12 mandates every state party to “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed....”<sup>221</sup>

The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid criminalized apartheid *as a self-standing international crime* and required the prosecution of the “crime of apartheid” by “an international penal tribunal” as well as any “competent tribunal of any State Party.”<sup>222</sup> It provided for “[i]nternational criminal responsibility” for individuals who “abetted, encouraged, or cooperated in the crime of apartheid.”<sup>223</sup>

Article 4 of the 2006 Convention for the Protection of all Persons from Enforced Disappearance (ICPPD) requires that all acts of enforced disappearance be treated as offenses under criminal law punishable by appropriate penalties that take into account their extreme seriousness. However, Article 7(2)(a) directs state parties to establish mitigating circumstances for perpetrators who are instrumental in bringing victims forward alive or in providing information that discloses their fates.<sup>224</sup>

### Why Is Customary International Law Important for Prosecutors?

Binding on all states, customary international law (CIL) is derived from “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>225</sup> CIL develops from state practice, treaty provisions, diplomatic practices, and court and tribunal decisions. It estab-

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218 Gaitan, “Prosecutorial Discretion,” 544.

219 Fernando Travesi and Henry Rivera, “Political Crime, Amnesties, and Pardons: Scope and Challenges” (2016), [www.ictj.org/sites/default/files/ICTJ\\_Colombia\\_2016\\_Political\\_Crime.pdf](http://www.ictj.org/sites/default/files/ICTJ_Colombia_2016_Political_Crime.pdf); Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge, UK: Cambridge University Press, 2010), 71, 32; Ronald C. Slye, “The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?” *Virginia Journal of International Law* 43 (2002): 173; E. B. Ludwin King, “Amnesties in a Time of Transition,” *The George Washington International Law Review* 41 (2010): 617–618; Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, “The Justice Balance: When Transitional Justice Improves Human Rights and Democracy,” *Human Rights Quarterly* 32 (2010): 982–997.

220 Orentlicher, “Settling Accounts,” 2571–2572. See also Report of the Human Rights Committee, 37 U.N. GAOR Supp. (No. 40) Annex V, general comment 7(16), para. 1, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982); *Dermit v. Uruguay*, Comm. No. 84/1981, 38 U.N. GAOR Supp. (No. 40) Annex IX, para. II.a, U.N. Doc. A/38/40 (1983).

221 In addition, Art. 7 requires state parties to extradite or submit perpetrators to relevant authorities for the purpose of prosecution. The obligation to prosecute established by Art. 7 is understood to be “a practical and effective means of suppressing torture,” creating a link between punishment and the prevention of future crimes. See Orentlicher, “Settling Accounts,” 2566–2567.

222 Art. 5, Apartheid Convention. See United Nations Economic and Social Council, *Study on Ways and Means of Insuring the Implementation of International Instruments Such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention*, UN Doc E/CN.4/1426 (1981), 5.

223 John Dugard, *International Law: A South African Perspective* (Cape Town: Juta and Company Ltd., 1994), 214.

224 United Nations Human Rights Office of the High Commissioner, International Convention for the Protection of All Persons from Enforced Disappearance, [www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx](http://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx)

225 Restatement (Third) of the Foreign Relations Law of the United States Sec. 102(2) (1987). See also Art. 38(1)(b) of the Statute of the International Court of Justice (1945), 33 UNTS 993.

lishes the duty to investigate and prosecute core international crimes, such as torture, extrajudicial killings, and enforced disappearances,<sup>226</sup> but it also *obliges* the international community to abide by the principle of *aut dedere aut judicare* (extradite or prosecute), even in the absence of territorial or nationalistic links to the crime.

The Restatement (Third) of the U.S. Foreign Relations Law asserts that repeated failures to punish violations of rights protected under CIL may constitute government condonation of such acts “if such acts, especially by officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators.”<sup>227</sup> The UN Working Group on Enforced or Involuntary Disappearances identifies a relationship between lack of punishment and continued human rights violations, holding that “impunity is perhaps the single most important factor contributing to the phenomenon of disappearance.”<sup>228</sup>

Customary international law is important for prosecutors because many countries have only recently ratified various treaties that outlaw serious international crimes such as genocide, crimes against humanity, and war crimes. However, these crimes were invariably already prohibited under CIL. The rule against retrospectivity prevents prosecutors from pursuing crimes created by treaties if the crimes were committed before the treaties’ dates of ratification.<sup>229</sup> However, prosecutors may pursue these crimes under CIL, if they can demonstrate that relevant criminal prohibitions had passed into customary international law at the time the crimes were committed.<sup>230</sup>

The ICCPR stipulates in Article 15(2) that a state party may indict, bring to trial, and punish any person for any conduct “which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” Accordingly, Article 15(2) of the ICCPR allows prosecutors to pursue crimes proscribed under customary international law, even where such conduct was not domestically criminalized. Prosecutors will face considerable challenges when invoking CIL, but they should not turn away from these. Some constitutions specifically authorize the direct application of CIL,<sup>231</sup> while others are silent on its application. However, even where constitutions do not explicitly authorize direct application, countries are still required to comply with CIL.<sup>232</sup> In 2015, the South African Constitutional Court held:

Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because “all states have an interest as they violate values that constitute the foundation of the world public order”. Torture, whether on the scale of crimes against humanity or

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226 Jeremy Sarkin, “Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law,” *Nordic Journal of International Law* 81, no. 4 (2012): 541.

227 Restatement, Sec. 102(2) (1987)), comment b. See also *U.S. v. Mex.*, 4 REP. INT’L ARB. AWARDS 82 (1926) 89–90.

228 Report of the Working Group on Enforced or Involuntary Disappearances, 47 U.N. ESCOR Commission on Human Rights at 86, para. 406.

229 Art. 15(10) ICCPR: Art. 15(1) of ICCPR stipulates, “No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed.” See also, for example, Art. 11(2) UDHR; Art. 40(2)(a) CRC.

230 M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge, UK: Cambridge University Press, 2011), 300.

231 For example, Sec. 232 of the 1996 South African Constitution provides that “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

232 Art. 38(1)(b) of the Statute of the International Court of Justice (1945), 33 UNTS 993. In some countries, such as the United Kingdom, crimes under customary international law, particularly those implicating state immunities, generally cannot be prosecuted unless they have been incorporated into domestic law. See *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No. 3) (1999), 2 All E.R. 97, <https://www.iclr.co.uk/wp-content/uploads/media/vote/1996-2014/ac2000-1-147.pdf>; *R v. Jones* [2006] UKHL 16, <https://publications.parliament.uk/pa/ld200506/ljudgmt/jdo60329/jones-1.htm>

not, is a crime in South Africa in terms of section 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.<sup>233</sup>

The International Military Tribunal (IMT) at Nuremberg rejected assertions that crimes against humanity were uncertain, were not codified, and have retrospective effect, in violation of the principle of *nullum crimen sine lege*.<sup>234</sup> Canada's Crimes Against Humanity and War Crimes Act of 2000 outlaws any crime against humanity that:

at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.<sup>235</sup>

#### *Determining Whether Conduct Is Criminalized under Customary International Law*

Ultimately, prosecutors must determine whether certain conduct or acts were criminalized under CIL at the time they were committed. This can be challenging, but, as Gevers asserts in his analysis, with application and research, prosecutors can make such determinations and persuade courts to proceed with such trials.<sup>236</sup> War crimes were proscribed at the level of treaty law by the four Geneva Conventions of 1949 and the two additional protocols of 1977 as well as by international customary rules.<sup>237</sup> Many war crimes had already been proscribed by the Hague Conventions of 1907.<sup>238</sup> Crimes against humanity have been crimes under international law since at least 1945. They were first prosecuted by the International Military Tribunal at Nuremberg,<sup>239</sup> and they were also included in the Charter of the International Military Tribunal for the Far East, which created a tribunal to try Japanese leaders following World War II.<sup>240</sup>

Since then, the United Nations has adopted resolutions and instruments confirming the international prohibition of crimes against humanity,<sup>241</sup> including a convention that excludes statutory limitations from applying to war crimes and CAH.<sup>242</sup> In the first decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the court found that “since the Nürnberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not

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233 *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another*, 2015 (1) SA 315 (CC), para. 37, [www.saflii.org/za/cases/ZACC/2014/30.html](http://www.saflii.org/za/cases/ZACC/2014/30.html)

234 Trial of the Major War Criminals before the International Military Tribunal, 218–223 (1947). See Nuremberg Judgement, 49. Affirmed in Report of the Sixth Committee, UN GAOR, 1st Sess., pt. 2, 55th Plenary meeting at 1144, U.N. Doc. A/236 (1946), GA Res. 95, UN Doc A/64/Add.I (1946).

235 Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24), <https://laws-lois.justice.gc.ca/eng/acts/c-45.9/>

236 This section is based on the *Expert Opinion of Christopher Gevers: In Re the Case of Ms Nokuthula Simelane*, an unpublished opinion dated February 16, 2019, submitted to the South African National Prosecuting Authority to persuade them to include international crimes under CIL in the indictment.

237 ICRC, IHL Database on Customary International Humanitarian Law, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>

238 The Hague Conventions of 1899 and 1907 were the first multilateral treaties that addressed the conduct of warfare and were largely based on the Lieber Code, which was issued by President Abraham Lincoln to the Union Forces of the United States in 1863: [www.loc.gov/law/help/us-treaties/bevans/m-ustoo0001-0631.pdf](http://www.loc.gov/law/help/us-treaties/bevans/m-ustoo0001-0631.pdf)

239 Art. 6 of the Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

240 See Art. 5(c) of the Charter (annexed to the Special Proclamation of January 19, 1946, by the Supreme Commander of the Allied Powers in the Far East).

241 “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal,” *International Law Commission Report on the Nuremberg Principles*, 5 UN GAOR, Supp. No. 12, UN Doc. A/1316 (1950).

242 General Assembly resolution 2391 (XXIII) of November 26, 1968 (entered into force November 11, 1970). See also *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, adopted by General Assembly resolution 3074 (XXVIII) of December 3, 1973.

been seriously questioned.”<sup>243</sup> However, the scope of CAH has been “variously defined” and its elements refined over time.<sup>244</sup> For this reason, prosecutors will need to identify the definition that prevailed at the time the crimes were committed as well as the contextual requirements that applied.<sup>245</sup> These typically include the context of an “attack against civilians” and, at different times, that the attacks are directed “*on national, political, ethnical, racial or religious grounds*”;<sup>246</sup> that the attacks are “*widespread or systematic*”;<sup>247</sup> and that the attacks are committed “pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>248</sup>

By way of example, the Extraordinary Chambers in the Courts of Cambodia (ECCC) in *Kaing Guek Eav alias Duch* (“the *Duch* case”)<sup>249</sup> found that the contextual requirement that CAH must be connected to an armed conflict, as well as the discriminatory and “state or organizational policy” requirements, were not part of the customary international law definition of the crime in the mid-1970s. However, the court did find that the “widespread or systematic” requirement was part of the definition at that time.<sup>250</sup>

Next, prosecutors must consider whether the applicable underlying acts of CAH, such as torture, murder, and enforced disappearance, were recognized under CIL at the relevant time. Then, based on the available evidence, they must determine whether such underlying acts existed in each case. Prosecutors will also have to research the pertinent definitions of each underlying act as they existed at the time the acts were committed since such definitions have been altered over time.<sup>251</sup>

#### *Murder, Imprisonment, and Torture under Customary International Law*

Murder was part of the IMT’s first definition of crimes against humanity at Nuremberg in 1945 and has been included in every relevant instrument since. Imprisonment and torture were included in Article II of Control Council Law No. 10, which followed closely after the IMT at Nuremberg.<sup>252</sup>

There is an unambiguous prohibition against torture under international law that amounts to *ius cogens*.<sup>253</sup> The crime has been incorporated into the statutes of special chambers as a separate crime<sup>254</sup> and is also a material element for crimes against humanity, war crimes, and genocide.<sup>255</sup> CAT was adopted in 1984 to “make more effective” the already existing prohibition of torture

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243 *Prosecutor v. Dusko Tadic aka “Dule” (Opinion and Judgment)*, IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), May 7, 1997, para. 623, [www.refworld.org/cases,ICTY,4027812b4.html](http://www.refworld.org/cases,ICTY,4027812b4.html)

244 *Kaing Guek Eav alias Duch*, Judgment, ECCC, Case No. 001/18-07-2007/ECCC/TC, para. 290 (July 26, 2010).

245 See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 1 34, 35, UN Doc. S/25704 (1993); *Prosecutor v. Tadic*, ICTY Case No. ICTY-94-1-T, 72; *Prosecutor v. Delalic et al.*, ICTY Case No. IT-96-2 1-T, 313 (ICTY Trial Chamber November 16, 1998); Arts. 11, 21–24 of the Rome Statute.

246 Art. 5 of the ECCC Law and Art. 3 of the ICTR Statute.

247 Rome Statute, Art. 7.

248 *Ibid.*, Art. 7(2)(a).

249 *Kaing Guek Eav alias Duch*.

250 *Ibid.*, paras. 292, 300, 301, and 314.

251 *Expert Opinion of Christopher Gevers: In Re the Case of Ms Nokuthula Simelane*, an unpublished opinion dated February 16, 2019, submitted to the South African National Prosecuting Authority.

252 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50–55 (1946).

253 A peremptory norm from which no derogation is permitted. See Art. 5 of the Universal Declaration of Human Rights 1948; Art. 7 ICCPR; Arts. 4 and 5 of the African Charter; Arts. 129 and 130 of Geneva Convention III (Prisoners of War); Arts. 146 and 147 of Geneva Convention IV (Civilians).

254 See, for example, Sec. 7 UNAET Reg., Art. 3 of Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, January 15, 2001, as amended by NS/RKM/1004/006, October 27, 2004.

255 See, for example, Art. 6 ICCSt, Art. 7(1)(f) ICCSt., Art. 8(2)(a)(ii) ICCSt.

under international law.<sup>256</sup> This wording strongly suggests that the prohibition already applied under CIL before the CAT was adopted.<sup>257</sup>

The Canadian Superior Court found in 2009 in *R v. Munyaneza* that both imprisonment and torture were underlying acts before 1945.<sup>258</sup> National courts in South America and Europe have adjudicated acts of torture that occurred in the 1970s and early 1980s as crimes against humanity.<sup>259</sup> In respect to torture specifically, the ECCC found in the *Duch* case:

The crime of torture is proscribed and defined by numerous international instruments, including the 1975 United Nations General Assembly Declaration on Torture, adopted by consensus, and the 1984 Convention against Torture. The definition in the 1984 Convention against Torture, which closely mirrors that of the 1975 General Assembly Declaration, has been accepted by the ICTY as being declaratory of customary international law. *The Chamber accordingly finds that this definition had in substance been accepted as customary by 1975.*<sup>260</sup>

#### *Enforced Disappearance under Customary International Law*

Even before the ICC statute expressly provided for the crime of enforced disappearance as a crime against humanity,<sup>261</sup> it was defined as a crime under international law.<sup>262</sup> Although the crime against humanity of enforced disappearances was not specifically included in Article II of Control Council Law No. 10, the Nuremberg Military Tribunals did prosecute it as a war crime and a crime against humanity under the residual “other inhumane acts” category.<sup>263</sup>

The crime of enforced disappearance is recognized by international instruments,<sup>264</sup> including the ICPPD. While there has been some debate as to when enforced disappearance passed into CIL, it can be safely concluded that it is indeed a crime under CIL.<sup>265</sup> The International Committee of the Red Cross (ICRC) Rule 98 on Customary International Humanitarian Law states that the prohibition of enforced disappearance constitutes a norm of customary international law applicable in both international and noninternational armed conflicts.<sup>266</sup>

In addition, enforced disappearances may be treated as a “continuing” crime,<sup>267</sup> in that “the crime continues to be committed for as long as the whereabouts or fate of the person who has

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256 Preamble CAT.

257 See also Arts. 2 and 7 ICCPR; Art. 37(a) CRC; Art. 5 of African Charter; Arts. 2.4 and 16 CAT.

258 *R. v. Munyaneza*, 2009 QCCS 2201 (CanLII), para. 112, <http://canlii.ca/t/240j1>

259 *Scilingo Manzorro (Adolfo Francisco) v. Spain*, Appeal judgment, No. 798, ILDC 1430 (ES 2007), October 1, 2007, Spain, Supreme Court. In 2005 a Spanish court convicted an Argentine naval officer, Adolfo Scilingo, of torture as a crime against humanity, committed between 1979 and 1983. In 2010 a Uruguayan court handed down a conviction for torture as a crime against humanity committed in 1976. Bordaberry case, IUE 1-608/2003, First Instance Criminal Court, 7th turn (February 9, 2010).

260 *Kaing Giiak Eav alias Duch*, para. 353.

261 Art. 7(1)(i) ICCSt.

262 Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge, UK: Cambridge University Press, 2010), 216, referring to Nuremberg Judgment, reproduced (1947) 41 AJIL 172, 230.

263 Brian Finucane, “Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War,” *Yale Journal of International Law* 35 (2010): 178–179.

264 UN Declaration on the Protection of All Persons from Enforced Disappearance 1992; Inter-American Convention on the Forced Disappearance of Persons 1994; ICCSt.

265 Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003); W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (New York: Oxford University Press, 2010), 180; contrasted with Brian Finucane, “Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War,” *Yale Journal of International Law* 35 (2010), 2010; and Elisenda Calvet Martínez, “Enforced Disappearances in International Law,” in *Oxford Bibliographies in International Law*, ed. Tony Carty (Oxford University Press, 2019).

266 ICRC, “Rule 98. Enforced Disappearance,” IHL Database on Customary International Humanitarian Law, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule98](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule98)

267 Alan Nissel, “Continuing Crimes in the Rome Statute,” *Michigan Journal of International Law* 25 (2004): 653, 661.

disappeared remain concealed.”<sup>268</sup> Until the fate of the disappeared has been determined, the crime is maintained and continues.<sup>269</sup> Nissel explains the difference between completed crimes and continuing crimes as follows:

To commit a continuing crime, the perpetrator must be in breach of a prohibition over a period of time. Enforced disappearance of persons, for example, takes time to commit—whether the disappearance is mere moments or endures for decades. Thus, if a perpetrator kidnaps a victim, murders that victim secretly without revealing any information, (at least) two crimes were committed at the same time. The instant the victim was murdered, the perpetrator committed the [completed] crime of murder; additionally, so long as the perpetrator does not release information about the victim’s whereabouts, the former is in continuing commission of the crime of enforced disappearance of persons.<sup>270</sup>

Article 17(1) of the ICPPD stresses that the crime of enforced disappearance is “a unique and consolidated act and not a combination of acts.”<sup>271</sup> When an enforced disappearance commences before the entry into force of a statutory prohibition and the fates of disappeared persons remain unknown, it may be found that such crimes continue because they have not ended.<sup>272</sup> In *Blake v. Guatemala*, the Inter-American Court of Human Rights held that the enforced disappearance of a journalist was “the beginning of a continuing situation” with “actions and effects subsequent to the date on which Guatemala accepted the competence of the Court” in 1987.<sup>273</sup> The European Court of Human Rights and various UN bodies have expansively interpreted their jurisdiction and mandate to ensure that continuing violations are included.<sup>274</sup>

### International Crimes and the Gravity Principle

International crimes are sometimes distinguished from ordinary criminality by the gravity, or seriousness, of the offense. These crimes are described in the Rome Statute as “unimaginable atrocities” that “deeply shock the conscience of humanity.”<sup>275</sup> Thus, the principle of gravity is akin to public interest considerations regarding the nature and seriousness of a crime. In the context of international crimes, two points in particular must be borne in mind when applying the gravity principle.

First, as Schabas points out, significant variation exists with regard to *when* gravity is invoked as a justification for prosecution or lack thereof. In July 2003, the ICC’s Office of the Prosecutor (OTP) provided justification for its decision to investigate certain crimes in the Democratic

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268 Judgment, *Castillo Páez case*, Supreme Court of Justice (Peru), First Provincial Criminal Chamber, Case No. 0012-2006-HC/TC (December 18, 2007, §), Sec. 3(ii) and (iv).

269 Nissel, “Continuing Crimes in the Rome Statute,” 661–663.

270 *Ibid.* See also Rome Statute, Art. 7(2)(i). Note that in relation to Arts. 11 and 24 of the Rome Statute, the framers left it open as to whether “continuous crimes” were included, and it will be for the court to determine how it should be handled. See William Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge, UK: Cambridge University Press, 2007), 70.

271 Art. 17(1) ICPPD, note 43.

272 See GA General Comment on Enforced Disappearance as a Continuous Crime by Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48, January 26, 2011, Sec. 39.

273 *Blake v. Guatemala*, January 24, 1998, IACHR Series C, No. 36, paras. 66–67.

274 *Loizidou v. Turkey (Article 50) (40/1993/435/514)*, Grand Chamber judgment of 28 July 1998, European Court of Human Rights; *Kalashnikov v. Russia*, Application no. 47095/99, Chamber judgment of 15 July 2002, European Court of Human Rights, Third Section, para. 111; *Posti and Rahko v. Finland*, Application no. 27824/95, Chamber judgment of 24 September 2002, European Court of Human Rights, Fourth Section, para. 39; *Blečić v. Croatia*, Application no. 59532/00, Chamber judgment of 29 July 2004, European Court of Human Rights, First Section, paras. 73 *et seq.*; *Gueye et al. v. France*, Communication No. 196/1985, Views of the Human Rights Committee, *Official Records of the General Assembly, Forty-Fourth Session, Supplement No. 40 (A/44/40)*, pp. 189 and 191–192. See also Human Rights Council, *Report by the Human Rights Council Advisory Committee on Best Practices in the Matter of Missing Persons*, Sixteenth Session, A/HRC/16/70 (February 7, 2011), para. 13.

275 Rome Statute of the International Criminal Court, preamble, July 17, 1998, 2187 U.N.T.S. 90.



Republic of the Congo (DRC) without mentioning the gravity criterion, whereas elsewhere it was regarded as one of the most important criteria.<sup>276</sup> As these examples indicate, the gravity criterion has at times been invoked by the ICC as a justification for declining to pursue investigations, rather than as a factor guiding the decision to investigate.<sup>277</sup>

Second, there is substantial variation in *how* the gravity threshold is interpreted. Gravity can be viewed in terms of both quantity (e.g., the total number of crimes committed or the total number of deaths resulting from crimes) and quality (e.g., the position of the perpetrators, such as those acting on behalf of the state). Consideration should also be given to the impact of the crimes on victims and their communities. Egregious acts of violence perpetrated against marginalized groups should be viewed in a particularly serious light. Prioritizing such crimes enables prosecutors to recognize victims' humanity and send a clear message to the broader society that the abuse and exploitation of vulnerable groups will not be tolerated.

In 2005, the OTP declared gravity to be “among the most important of [the] criteria” that it relied on to justify the ICC's decision to investigate crimes committed by the LRA in Uganda, but not in respect of crimes committed by Ugandan government forces. In justifying the decision to pursue one-sided investigations against the LRA, the ICC Office of the Prosecutor invoked a quantitative understanding of gravity as the *number of instances of criminality*, arguing that the Ugandan People's Defence Forces engaged in significantly fewer crimes against civilians than the LRA did. This approach ignored the fact that the committal of crimes on behalf of the state, by those in positions of authority and trust, is as germane to determining the objective gravity of crimes as the number of instances of criminality.<sup>278</sup>

To muddle the definition of gravity further, in an analysis of the situation in Iraq following the U.S. invasion in 2003, an ICC prosecutor contended that the behavior of British troops in the country did not meet the gravity threshold as defined by Article 8(1) of the Rome Statute. His argument centered on the recognition that British forces were accused of war crimes in only 10 or 20 cases in Iraq, whereas thousands of deaths resulted from conflict in the DRC. Here, the prosecutor engaged in an imprecise comparison between the number of crimes in Iraq and the number of deaths in the DRC. Had he considered the total number of deaths resulting from the limited number of crimes attributed to British troops in Iraq, he may have been forced to view the situation in Iraq as equally as grave as the situation in the DRC, or serious enough to warrant action. These examples illustrate the potential for extreme variation in how a single prosecutorial body interprets the gravity principle.<sup>279</sup>

### Priority Crimes<sup>280</sup>

A public interest consideration that should arise in the decision to prosecute egregious acts of violence is the normative impact that the prosecution of a class of crimes may have on the building of a culture of human rights and the establishment of rule of law. The types of offenses prioritized for prosecution can send a strong signal regarding the status of such crimes within the post-conflict state's criminal justice system.<sup>281</sup>

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276 See the approach of the ICC prosecutor to the Ugandan cases in William A. Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,” *Journal of International Criminal Justice* 6 (2008): 738.

277 *Ibid.*, 731–761. William A. Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,” *Journal of International Criminal Justice* 6 (2008): 731–761.

278 *Ibid.*, 748.

279 *Ibid.*

280 The authors are grateful for the research provided for this section by the Center for International and Comparative Law at Emory Law School, in particular Sama Kahook and her supervisor, senior fellow Hallie Ludsin.

281 McAuliffe, *Transitional Justice and Rule of Law Reconstruction*, 131.

In the ICC's *Lubanga* case,<sup>282</sup> the decision to exclude charges of sexual violence against children from the prosecution's case and instead focus on child soldier recruitment indicated that the ICC did not find sexual violence to be a priority for the court. In response, the Women's Initiative of Gender Justice argued that the failure to prosecute certain types of crimes, such as sexual violence, would reduce the deterrence capacity of the court and could "send the signal that such crimes can continue to be committed with impunity."<sup>283</sup> In contrast, the narrow focus on child soldier recruitment in the *Lubanga* trial "was a strong signal of the new position of the crime in the corpus of international justice—it was no longer a crime tacked onto other, more serious charges, but the sole focus of one of the most anticipated trials in international criminal law history."<sup>284</sup> This example points to two types of crimes that have come to be prioritized by international and domestic courts: gender and sexual-based crimes, and the recruitment of child soldiers.

### Gender and Sexual-based Crimes

A significant jurisprudential development in the definition of war crimes and crimes against humanity is the inclusion of gender- and sexual-based crimes. Gender-based violence is violence that targets men or women because of their roles in society; sexual violence is a subcategory of gender-based crimes, constituted by acts of sexualized violence such as rape and sexual assault against women, girls, men, and boys. Significantly, gender-based crimes have come to be treated as a priority crime as part of a larger gender justice movement that recognizes that women experience conflict and suffer injustices differently from men.<sup>285</sup> Prosecutions of crimes against women and girls are needed to acknowledge the humanity of women, redress their experiences, establish a culture of respect for women's rights, and deter further abuse.<sup>286</sup> In addition, there is increasing recognition that deep taboos attached to sexual violence against men and boys have masked the real extent of such crimes, which need to be prioritized going forward.<sup>287</sup>

The ICTY and International Criminal Tribunal for Rwanda (ICTR) were the first to expressly recognize gender crimes as serious international crimes constituting grave breaches of the Geneva Conventions; the ICTR ruled that rape and other sexual violence was a form of genocide.<sup>288</sup> The Rome Statute includes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity" as elements of crimes against humanity and war crimes.<sup>289</sup>

The prosecution of gender crimes among the most serious crimes is not limited to international tribunals. The attorney general of Colombia "adopted a plan of action to defend the rights of women victims of sexual violence in the context of the armed conflict" that included "special investigation and attention to victims that simplifies proceedings to avoid re-victimization."<sup>290</sup> The War Crimes Chamber in Bosnia and Herzegovina, a hybrid national court, similarly "prosecut-

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282 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, [www.icc-cpi.int/drc/lubanga](http://www.icc-cpi.int/drc/lubanga)

283 Letter from Brigid Inder, executive director, Women's Initiative for Gender Justice to Luis Moreno Ocampo, prosecutor, International Criminal Court (August 2006), [www.iccwomen.org/news/docs/Prosecutor\\_Letter\\_August\\_2006\\_Redacted.pdf](http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf)

284 Julie McBride, *The War Crime of Child Soldier Recruitment* (The Hague: Asser Press, 2013), 145.

285 Case Matrix Network, "Prioritising International Sex Crimes Cases."

286 UN Human Rights Council, *Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice: Report of the Office of the United Nations High Commissioner for Human Rights* (June 30, 2014), A/HRC/27/21, para. 3-8, [www.refworld.org/docid/55c88ef04.html](http://www.refworld.org/docid/55c88ef04.html)

287 Chris Dolan, "Into the Mainstream: Addressing Sexual Violence against Men and Boys in Conflict" (2014), [https://reliefweb.int/sites/reliefweb.int/files/resources/Into\\_The\\_Mainstream-Addressing\\_Sexual\\_Violence\\_against\\_Men\\_and\\_Boys\\_in\\_Conflict.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf)

288 ICTR Statute, note 7, Arts. 3 and 4; ICTY Statute, note 8, Art. 5; Outreach Programme on the Rwanda Genocide and the United Nations, <https://www.un.org/en/preventgenocide/rwanda/>

289 Rome Statute, note 6, Arts. 7 and 8.

290 UN Human Rights Council, "Analytical Study," para. 32.

ed sexual violence as the crimes against humanity of rape, torture, sexual slavery, enslavement and persecution.”<sup>291</sup>

### The Recruitment of Child Soldiers

Since the early 2000s, advancements have been made in establishing the recruitment and use of child soldiers as a core international crime. First prohibited by the 1977 Additional Protocols to the Geneva Conventions, the recruitment and use of children under the age of 15 was codified as a war crime and violation of customary international law by the Rome Statute in 2002. International jurisprudence has made further progress in establishing criminal accountability for the use of child soldiers, with the Appeals Chamber of the Special Court for Sierra Leone (SCSL) asserting in 2004 that “the practice of child recruitment bears the most atrocious consequences for the children...”<sup>292</sup>

Given the nature of the Sierra Leonean conflict, in which children were specifically targeted, the SCSL actively pursued accountability for such crimes, which featured in the indictments against all nine accused prosecuted by the court. The 2007 trials of four defendants represented the first convictions by an international court for the crime of child soldier use.<sup>293</sup>

At the national level, over 30 countries have passed domestic legislation prohibiting the recruitment and use of child soldiers, both in combat and support roles, with many countries setting the maximum age at which a person is considered a child at 18 years. This age limitation is in line with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which prohibits the use of children under the age of 18 in warfare.<sup>294</sup>

### National Crimes

Deciding which domestic crimes to prosecute is invariably based on what society, not international law, views as the most reprehensible and inhumane acts. Some of the crimes prosecuted in post-conflict and transitional societies include murder, enslavement, imprisonment, rape, and torture. Several states, such as Serbia, have also prosecuted “the destruction of cultural heritage, cruel treatment of the wounded, sick and prisoners of war, aiding an offender and unlawful production of forbidden weapons.”<sup>295</sup>

### Who Should Be Prosecuted?

Once prosecutors have decided which classes of crimes should be prioritized in the post-conflict period, it becomes necessary to distinguish, among the numerous perpetrators, *who* should face prosecution. Prosecuting all perpetrators will not be possible in most circumstances. Distinctions between perpetrators can be made based on conflict positionality (i.e., high-level state officials and military commanders versus foot soldiers) and degree of culpability. Applying obligatory “even-handedness” for the sake of being seen as neutral should be avoided as it

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291 Ibid., para. 33.

292 Tom Malinkowski, “In Support of the ‘Child Soldiers Accountability Act of 2007’; Hearing in the U.S. House Judiciary Subcommittee” (April 7, 2008), <https://www.hrw.org/news/2008/04/07/support-child-soldiers-accountability-act-2007-hearing-us-house-judiciary>

293 Human Rights Watch, “Sierra Leone: Landmark Convictions for Use of Child Soldiers” (June 20, 2007), [www.hrw.org/news/2007/06/20/sierra-leone-landmark-convictions-use-child-soldiers](http://www.hrw.org/news/2007/06/20/sierra-leone-landmark-convictions-use-child-soldiers)

294 UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, Art. 1, [www.refworld.org/docid/47dfb180.html](http://www.refworld.org/docid/47dfb180.html)

295 Serbia Criminal Code (Official Gazette of the Republic of Serbia Nos. 85/2005, 88/2005, and 107/2005), <https://wipolex.wipo.int/en/text/191241>; Republic of Serbia, “National Strategy for the Prosecution of War Crimes for the Period 2016–2020” (January 2016), [www.tuzilastvorz.org.rs/upload/HomeDocument/Document\\_\\_en/2016-05/p\\_nac\\_stragetija\\_eng.PDF](http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF)

may result in a simplistic tit-for-tat approach, with potentially perverse outcomes. Prosecutors should instead impartially apply fair and objective criteria to all suspects, regardless of their affiliation or faction.

Most international tribunals have adopted prosecution policies that target those “most responsible” for the commission of international crimes. For example, the SCSL focused its prosecutorial resources on persons who bear the “greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”<sup>296</sup>

Identifying those most responsible is not an easy task within the context of widespread violations of international human rights and humanitarian law. Most mass atrocities are carried out by members of groups, as a matter of group policy, rather than by isolated individuals acting on their own initiative. Who should be considered most responsible, for example, for enforced disappearances carried out on behalf of the state? Should commanders who ordered such abductions, but did not directly participate in the crimes, be deemed most responsible? Should the foot soldiers who carried out their superiors’ orders be held most responsible, as they directly participated in the enforced disappearances? And what level of responsibility is attributed to foot soldiers who not only carried out superiors’ orders regarding enforced disappearances but may have gone beyond such orders and engaged in other egregious acts, such as torture?

The theory of “indirect perpetration” holds that the most responsible actors are those who are most distant from egregious acts of violence because they have used their powers as heads of hierarchical organizations to control the undetermined will of essentially interchangeable subordinates.<sup>297</sup>

### Direct Perpetrators

*Direct perpetrators* are those who physically engage in criminal conduct, such as torture, abductions, and sexual-based violence. Under the doctrine of indirect perpetration, physical perpetrators are not the most responsible for criminal acts because they only play a secondary role in the commission of a crime. A direct perpetrator, from the perspective of indirect perpetration, “does not appear as a free and responsible individual, but as an anonymous, fungible figure” who does not have the power to stop the violent acts conceived by the upper echelons of an organization.<sup>298</sup> If subordinates solicited as direct perpetrators refuse to obey orders, they would merely be replaced by others who would duly carry out the directives. The final or actual decision to engage in the commission of a crime is not made by direct perpetrators, as “(i) their roles as physical perpetrators have been imposed on them by the indirect perpetrator and (ii) they are not aware of the real dimension of their roles.”<sup>299</sup> The latter characteristic, lack of awareness, is based on the recognition that the system “turns the direct executor into a tool of the actor behind him”; the system of command and control works to legitimize superiors’ orders to subordi-

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296 Charles Chernor Jalloh, “Special Court for Sierra Leone: Achieving Justice?” *Michigan Journal of International Law* 32 (2011): 419. Art. 7, Sec. 1 of the ICTY Statute states: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Arts. 2 to 5 of the present Statute, shall be individually responsible for the crime.” Other international and national tribunals have adopted this language, including the ICTR and Special Court of Sierra Leone, intentionally trying to capture anyone with any role in the commission of the most serious crimes. Also see Art. 6 of the ICTR Statute and Art. 6 of the SCSL.

297 Neha Jain, “Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration,” *American Journal of Comparative Law* 61 (2013): 853.

298 Claus Roxin, “Crimes as Part of Organized Power Structures” (translated by Belinda Cooper), *Journal of International Criminal Justice* 9 (2011): 200.

299 Francisco Munoz-Conde and Hector Olasolo, “The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain,” *Journal of International Criminal Justice* 9 (2011): 123.

nates to the extent that direct perpetrators are unable to assess the legality of those orders. Thus, a system of indirect perpetration is “based on the fungibility of the cogs, not on their coercion or deceit.”<sup>300</sup>

### Indirect Perpetrators

An *indirect perpetrator*, also known as a “perpetrator behind the perpetrator” or a “perpetrator by means,” is typically a superior who commands a hierarchical organization of power that enables him or her to effectively exercise complete control over the conduct of subordinates by virtue of control over the apparatus of power.<sup>301</sup> An apparatus of power includes not only state organizations but also paramilitary organizations and organized crime syndicates. The ICC statute holds that indirect perpetration is a form of commission, thereby attaching the highest degree of criminal responsibility to those who engage in such conduct.<sup>302</sup> Prosecutors seeking to classify a senior individual as an indirect perpetrator must establish that he or she controlled the volition of those who physically carried out the crime, either through replacing subordinates who refused or failed to carry out orders or through the enforcement of obedience via punishment, strict drills, and payment.<sup>303</sup>

In 2009, former Peruvian president Alberto Fujimori was convicted by the Peruvian Supreme Court and sentenced to 25 years’ imprisonment as an indirect perpetrator of serious human rights violations amounting to crimes against humanity committed under his presidency between 1991 and 1992. The conviction was based on the “theory of control/domination of the act by virtue of an organized power apparatus.”<sup>304</sup>

### Context-specific Strategies

Not all prosecutorial strategies can necessarily accommodate a focus on the most responsible perpetrators or the most serious crimes, at least not in the immediate or short term. Conditions on the ground, such as resource constraints, lack of evidence, safety concerns, or other obstacles, may limit prosecution options. At the commencement of the ICTY’s investigations, for example, prosecutors were faced with regional insecurity, shortage of funds, and a lack of access to evidence implicating the top echelons.<sup>305</sup> “In order to get the ball rolling,” the ICTY’s first prosecutor, Richard Goldstone, resisted initially targeting the top leadership, which would be “too complicated and time-consuming,” and instead focused on low- and mid-level perpetrators.<sup>306</sup>

Goldstone referred to his strategy as “pyramidal” since he hoped it would eventually lead to the prosecution of the top leadership.<sup>307</sup> His approach prioritized those suspects who appeared to be, as he described, “most guilty and most culpable on the evidence available from time to time.”<sup>308</sup> Ultimately, Goldstone’s strategy worked, and he issued indictments against 70 suspects in two years, many of whom belonged to the upper echelons. According to de Vlaming,

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300 Roxin, “Crimes,” 248; Munoz Conde and Olasolo, “Application,” 660.

301 See Kai Ambos, “The Fujimori Judgment—A President’s Responsibility for Crimes against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus,” *Journal of International Criminal Justice* 9 (2011): 150, <https://ssrn.com/abstract=1874615>

302 Art. 25(3)(a) of the Rome Statute.

303 See *Katanga and Ngudjolo Chui*, ICC (PTC) Decision of September 30, 2008, para. 518. See also *Ruto et al.*, ICC (PTC), Decision of January 23, 2012, paras. 317, 320.

304 Ambos, “Fujimori Judgment.”

305 Frederiek de Vlaming, “The Yugoslavia Tribunal and the Selection of Defendants,” *Amsterdam Law Forum* 4, no. 2 (2012): 93, <http://amsterdamlawforum.org/article/view/260>

306 Richard Goldstone, “Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation?,” *Hastings Constitutional Law Quarterly* 22 (1995): 617; Cees Banning and Petra de Koning, *Balkan aan de Noordzee. Over het Joegoslavië-tribunaal, over recht en onrecht* (Amsterdam: Prometheus, 2005), 43.

307 de Vlaming, “Yugoslavia Tribunal,” 94, quoting Goldstone in the documentary *Against All Odds* (Sense Agency, 2003).

308 Richard Goldstone, “The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action,” *Duke Journal Comparative and International Law* 6 (1995): 7.

Goldstone fulfilled his stated ambitions and set the wheels of prosecution in high gear. He was responsible for making the new tribunal a visible asset among other international institutions. His strategy may have been ambiguously formulated, but he neither raised expectations nor made promises he could not fulfil.<sup>309</sup>

In contrast, Bosnia and Herzegovina's National War Crimes Strategy targeted the most complex and serious cases in the first seven years before proceeding with other war crimes.<sup>310</sup> In practice, the strategy over-promised and relied on unworkable assumptions, resulting in high expectations that were not always met.<sup>311</sup> This in turn gave rise to calls for a revised prosecution approach.<sup>312</sup>

The initial approach of the ICTY described above is sometimes referred to as the “vertical or longitudinal approach” as it involves first preparing cases at the low levels in order to ultimately build cases “against the perpetrators at the apex.”<sup>313</sup> The UN's *Rule-of-law Tool for Post-conflict States Prosecution Initiatives* proposes a strategy for focusing on “system crimes” that involves understanding the machinery of violence in order to make connections between institutionally powerful planners and the executors of crimes on the ground. This typically involves multidisciplinary investigations.<sup>314</sup>

Timing and sequencing must also be considered. Before launching high-profile prosecutions pursuing the most controversial and sensitive cases, prosecutors must ask whether the criminal justice system in question is ready to handle such cases. In the mid-1990s, South African president Nelson Mandela appointed a special independent investigation to address the role of certain elements in the military and police in promoting organized political violence.<sup>315</sup> Among the cases presented to a provincial attorney general were murder charges against the former minister of defense, the top command structure of the military and police, and political functionaries.<sup>316</sup> During the trial, the attorney general failed to call critically important witnesses and delivered a perfunctory performance. The presiding judge, in acquitting all 20 accused, largely ignored authenticated military documents that spoke of “hit squads” and that were consistent with the evidence of state witnesses, former military intelligence officers.<sup>317</sup>

309 de Vlamming, “Yugoslavia Tribunal,” 96.

310 Jared O. Bell, *The Bosnian War Crimes Justice Strategy a Decade Later*, FICHL Policy Brief Series No. 92 (Torkel Opsahl Academic EPublisher, 2018), [www.researchgate.net/publication/324277151\\_The\\_Bosnian\\_War\\_Crimes\\_Justice\\_Strategy\\_a\\_Decade\\_Later\\_FICHL\\_Policy\\_Brief\\_Series\\_No\\_92\\_Torkel\\_Opsahl\\_Academic\\_EPublisher\\_2018](http://www.researchgate.net/publication/324277151_The_Bosnian_War_Crimes_Justice_Strategy_a_Decade_Later_FICHL_Policy_Brief_Series_No_92_Torkel_Opsahl_Academic_EPublisher_2018)

311 David Schwendiman, “Prosecuting Atrocity Crimes in National Courts: Looking Back on 2009 in Bosnia and Herzegovina,” *Northwestern University Journal of International Human Rights* 8 (2010): 273, 274.

312 Haris Rovčanin, “Bosnian Ministers Fail to Adopt National War Crimes Strategy,” *Detektor*, July 24, 2019, <http://detektor.ba/en/bosnian-ministers-fail-to-adopt-national-war-crimes-strategy/>. Organization for Security and Co-operation in Europe, “Observations on the National War Crimes Processing Strategy and Its 2018 Draft Revisions, Including Its Relation to the Rules of the Road ‘Category A’ Cases” (September 27, 2018), <https://reliefweb.int/report/bosnia-and-herzegovina/observations-national-war-crimes-processing-strategy-and-its-2018>

313 UN Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-conflict States: Prosecution Initiatives* (HR/PUB/06/4) (New York: United Nations, 2006), 7, [www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf](http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf)

314 *Ibid.*, 11–13. Complex cases require multiple skills and a close working relationship between prosecutors and investigators. See Martin Schönsteich, “Prosecution-Led Investigation: An Innovative Approach from South Africa,” presentation for the Open Society Justice Initiative conference in Mar del Plata, Argentina, December 5–6, 2005; Despina Kyrianiou, “Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies,” *Cyprus and European Law Review* 7 (2008); Council of Europe, Recommendations issued by the Council of Europe relating to prosecutions, Rec. (2000) 19, Rec. (97) 13, Rec. (92) 17, Rec. (95) 12.

315 Melanie Lue, “A Short History of the Establishment of the ITU: Making Enemies—Dismantling KwaZulu Natal’s Hit Squads,” *Crime and Conflict* (1996).

316 *State v. Peter Msane and 19 Others* 1996, Case No. CC1/96, Durban & Coast Local Division of the Supreme Court.

317 Lynne Duke, “Top Apartheid-Era Official Acquitted,” *Washington Post*, October 12, 1996, [www.washingtonpost.com/archive/politics/1996/10/12/top-apartheid-era-official-acquitted/](http://www.washingtonpost.com/archive/politics/1996/10/12/top-apartheid-era-official-acquitted/); “Why McNally Lost the Malan Trial,” *Mail & Guardian*, October 18, 1996, <https://mg.co.za/article/1996-10-18-why-mcnally-lost-the-malan-trial>. See also Howard Varney and Jeremy Sarkin, “Failing to Pierce the Hit Squad Veil: A Critique of the Malan Trial,” *South African Journal of Criminal Justice* 2 (1997), 141–161.

The outcome of the trial reinforced the impression in the minds of many South Africans that the prosecution service and the courts were still in the tight grip of powerful elements of the apartheid order.<sup>318</sup> It also called into question whether such a sensitive case should have been brought while apartheid-era officials still firmly controlled the prosecution service and the courts, and whether the case should not have been suspended until adequate institutional reforms to the prosecution service and judiciary had been completed. In situations like this, consideration should be given to the creation of independent mechanisms to investigate, prosecute, and adjudicate the most sensitive cases, including special courts or chambers and an independent or special prosecutor.<sup>319</sup>

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318 Amnesty International, “The Criminal Justice System and the Protection of Human Rights: The Role of the Prosecution Service,” AFR/53/01/98 (February 1, 1998), [www.refworld.org/docid/3ae69aac.html](http://www.refworld.org/docid/3ae69aac.html)

319 Elena Naughton, “Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals” (December 5, 2018), [www.ictj.org/publication/committing-justice-serious-human-rights-violations-lessons-hybrid-tribunals](http://www.ictj.org/publication/committing-justice-serious-human-rights-violations-lessons-hybrid-tribunals); Howard Varney and Katarzyna Zduńczyk, “Legal Frameworks for Specialized Chambers: Comparative Studies for the Tunisian Specialized Criminal Chambers” (May 4, 2018), [www.ictj.org/publication/legal-frameworks-specialized-chambers-comparative-studies-tunisian-specialized-criminal](http://www.ictj.org/publication/legal-frameworks-specialized-chambers-comparative-studies-tunisian-specialized-criminal); Open Society Justice Initiative, *Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes* (Open Society Foundations, 2018), [www.justiceinitiative.org/publications/options-justice-handbook-designing-accountability-mechanisms-grave-crimes](http://www.justiceinitiative.org/publications/options-justice-handbook-designing-accountability-mechanisms-grave-crimes)

## Conclusion

Prosecutors are critical actors in any criminal justice system, possessing a range of discretionary powers, including power over perhaps the most important decision in the evolution of a criminal case: the decision to prosecute. National prosecution policies or guidelines are intended to assist prosecutors in making such decisions and are meant to promote consistency and fairness in the administration of justice. Policies that provide sensible evidentiary and public interest factors will facilitate the prioritization of the most deserving cases for prosecution that are likely to serve higher societal goals. However, in the absence of prosecutors acting with courage and dedication to justice, the principles and concepts contained in such policies and guidelines will prove to be meaningless, with little or no impact.

In the annex that follows, recommendations are made for countries interested in developing prosecution policies or bolstering existing guidelines. These recommendations are based on a review of relevant international standards and the selected common law country policies set out in this report. Recommendations are also made in respect to prosecutions that may take place in societies that are transitioning from violent conflict and periods of repression.

The dynamics in post-conflict societies are often intensely political, which can interfere with the administration of justice, which in turn can influence the transition. In such circumstances, guidelines governing the decision to prosecute must not only guide prosecutors through evidentiary and public interest considerations but also provide direction in relation to the complex nature of mass atrocities and post-conflict transitions. Fairly applying credible prosecution policies can provide a measure of protection to prosecutors who have to make difficult decisions in tense and politically charged contexts. As gatekeepers to the pursuit of individual criminal accountability for both ordinary national and extraordinary international crimes, prosecutors should be provided with all the necessary guidance to perform their onerous duties in a just manner.



## Annex: Recommendations

### Tests for Prosecution

- National prosecution policies should include a test for prosecution that incorporates both the evidentiary and public interest tests. Evidentiary and public interest considerations are inherently related to each other, and the failure to give due consideration to one aspect of the test is likely to give rise to flawed prosecutorial decisions.

### Evidentiary Test

- **Evidentiary thresholds:** Prosecution policies ought to require a case to meet the evidentiary threshold of “reasonable prospect of conviction,” with the threshold of proof defined, in line with Canada’s prosecution policy, as sitting between the existence of a prima facie case and a greater likelihood of conviction than acquittal. The probable cause threshold employed in the U.S. federal guidelines is insufficient as it fails to prevent inadequate cases proceeding to trial, sometimes resulting in the overuse of plea agreements, wrongful convictions, and case dismissals.<sup>320</sup>
- **Admissibility of evidence:** Reference to the admissibility of evidence is crucial in any prosecution policy. This is necessary to reduce the likelihood that state resources will be misused or wasted by bringing a case to trial that rests on evidence that is ultimately going to be excluded or rejected. In addition, this requirement acts as a check on improper investigative and evidence collection procedures and thereby strengthens public faith in the administration of justice.
- **Reliability and credibility of evidence:** Prosecution agencies are advised to adopt policies that provide detailed guidance on the different dimensions of reliability and credibility, particularly for witness-based evidence. Research has shown the fallibility of eyewitness testimony,<sup>321</sup> so prosecutors should be required to consider various factors, such as those set out in Australia’s guidelines, that affect the credibility of witnesses.<sup>322</sup> Prosecutors should

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320 U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.200.

321 See, for example, Elizabeth F. Loftus and J. C. Palmer, “Eyewitness Testimony,” in *Introducing Psychological Research*, eds. Philip Banyard and Andrew Grayson (London: Palgrave, 1996), 305–309; Elizabeth F. Loftus, “Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification,” *Journal of Applied Psychology* 65, no. 1 (1980): 9; Judith M. Siegel and Elizabeth F. Loftus, “Impact of Anxiety and Life Stress upon Eyewitness Testimony,” *Bulletin of the Psychonomic Society* 12, no. 6 (1978): 479–480.

322 The credibility of witnesses is closely related to maintaining their safety, particularly when such witnesses are called upon to confront very powerful accused in post-conflict trials. Witness intimidation plagues most cases of mass criminality; however, the issue of witness protection is beyond the scope of this report.

adopt holistic, rather than piecemeal views of the available evidence, as recommended by the policies of Fiji and the United Kingdom, always assessing single pieces of evidence within the context of the evidence as a whole.

- **Availability of evidence:** Often, evidence such as witness testimony is unavailable prior to trial proceedings. Nonetheless, domestic prosecution policies should require prosecutors to delay decisions until crucial or material evidence becomes available rather than proceeding in the hope that it will become available. Note should be taken of the “evidence problem” that plagued the Office of the Prosecutor at the International Criminal Court, where arrest warrants were authorized on the assumption that evidence against accused persons would eventually be secured.<sup>323</sup> National prosecution policies should require prosecutors to base decisions to prosecute on actionable evidence that is readily available. Acquittals due to lack of evidence undermine public faith in the administration of justice and waste prosecutorial time and resources.
- **Strength of the case for the defense:** Prosecutors should be required to assess the strength of the case for the defense in order to evaluate the credibility and reliability of the state’s case. This requirement will help to avoid prosecutorial tunnel vision and other cognitive biases that may exaggerate the strength of the case for the state.

#### Public Interest Test

- **Type and prevalence of offense:** Any prosecution policy governing the decision to prosecute should require prosecutors to assess the nature and seriousness of a crime by weighing the gravity of an offense against the need for specific and general deterrence. These factors should be assessed against the prevalence of a crime. It may still be in the public interest to prosecute minor crimes that are commonly committed, given the cumulative negative impact on the community, particularly where impunity would undermine the rule of law and faith in the administration of justice.
- **Victim and community interest and impact:** National prosecution policies should carefully consider the impact of an offense on victims and the community when making decisions whether or not to prosecute. A relatively broad definition of victims should be adopted, encompassing both direct and indirect victims, such as witnesses to offenses, victims’ families, and the broader community. National policy should identify specific ways in which victims are likely to have been affected by a given offense, such as through economic, physical, and psychological harm; however, impact should also not be limited to such predetermined categories. For example, a victim’s family suffering psychological harm from a lack of closure arising from cases of murder and enforced disappearance may in turn suffer economic harm resulting from mental health constraints.

The definition of community should not be restricted to physical location but ought to include groups with shared characteristics, such as the environments in which they live, work, and play. Damage to the community, including intangible damage such as the breakdown of trust, degradation of the rule of law, and the promotion of social alarm, should be specified to remind prosecutors to assess the impact of an offense on the community.

A glaring omission in most prosecution policies reviewed is their failure to identify distinct mechanisms by which to assess the impact of an offense on victims and communities, such

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<sup>323</sup> Christian M. De Vos, “Investigating from Afar: The ICC’s Evidence Problem,” *Leiden Journal of International Law* 26, no. 4 (2013): 1009–1024.

as through Victim and Community Impact Statements. Few references are made to victims' rights to participate in the prosecutorial decision-making process. Prosecution policies should urge prosecutors to promote the rights of victims to participate in criminal justice proceedings, as supported by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>324</sup> It is recommended that civil society organizations representing both victims and communities be consulted to garner credible, localized insight into the impact of an offense.

- **Victim characteristics:** Prosecution guidelines should consider the characteristics of a victim, including mental health, physical health, and age, when deciding whether to institute criminal proceedings. In order to give real meaning to “equality before the law,” crimes against the most vulnerable in society should be prioritized by prosecutors. Employment of victims is not a relevant characteristic to weigh in the decision to prosecute. Victims who are employed in public service, including public officials, doctors, firefighters, and police officers, are not more deserving of justice than those who hold other jobs or may be unemployed.
- **Suspect characteristics:** Guidelines regulating the decision to prosecute should list aspects of the suspect's situation to be considered by prosecutors, explicitly categorizing different factors as those that weigh in favor of and against prosecution. A suspect's occupation of a position of trust or authority at the time of an offense, for example, should weigh in favor of prosecution. A significant age difference between the victim and the offender is also a factor. Characteristics that may weigh against a decision to prosecute include young age and any special vulnerability. The prosecution of juveniles, particularly first-time offenders, has great potential to adversely affect the future of young offenders, and prosecutors are advised to explore alternatives to criminal proceedings, such as pretrial diversion.
- **Level of culpability:** To make efficient use of limited prosecutorial resources and to promote restorative alternatives to prosecution, prosecutors should make distinctions between offenders with low and high degrees of culpability. Those whose participation in a crime was relatively minor, perhaps due to coercion, should be considered eligible for alternative forms of accountability. High levels of culpability, particularly in premeditated offenses, as well as reaping significant benefits from a crime, should weigh in favor of prosecution.
- **Past criminal records and cooperation with law enforcement:** Prosecutors are advised to consider past criminal records in detail before declaring such records as factors weighing in favor of or against prosecution. The U.S. Principles of Federal Prosecution direct prosecutors to assess the nature and timing of past criminality and the relationship between past convictions and current offenses. Such factors may shed light on the likelihood of recidivism and the need for individual deterrence. Prosecution guidelines should also urge prosecutors to weigh the accused's willingness to cooperate with law enforcement, considering the degree of culpability and the strength and necessity of the evidence to secure convictions against others. Those who are repeat offenders of heinous crimes should generally not be rewarded for their knowledge of others' criminality, particularly if they have been able to escape prosecution in the past by serving as state witnesses.
- **The accused's motivation:** The presence of identity-based motives should be deemed a factor that weighs in favor of prosecution. All nations have an interest in preventing hate crimes,

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<sup>324</sup> United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34 Adopted by the General Assembly in the 96th plenary meeting, November 29, 1985. See also Varney and Zduńczyk, “Role of Victims.”

as such criminality has serious deleterious effects on both victims and the wider community. Prosecuting identity-motivated crimes helps to reinforce the value and humanity of victims targeted because of their identity.

- **Length of delay in criminal proceedings:** While delays in criminal proceedings give rise to questions regarding the right of the accused to a fair trial, they should not be considered as immediate bars to prosecution. Rather, prosecutors should undertake a balancing test that weighs the length of the delay against the reason for the delay, such as the complexity of an investigation and any misconduct on behalf of the accused or the state, as well as the seriousness of an offense. Courts around the world have held that the right to a speedy trial is “necessarily relative,” not absolute, and “does not preclude the rights of public justice.”<sup>325</sup>
- **The likely consequences of prosecution:** The prosecution of offenders who are already facing substantial sentences or incarcerated because of prior convictions may not be desirable, unless another conviction would result in “a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender’s record accurately reflects the extent of his/her criminal conduct.”<sup>326</sup>
- **Noncriminal alternatives to prosecution:** Noncriminal alternatives to prosecution should be evaluated within the context of all other public interest factors, particularly in relation to first-time and juvenile offenders in minor offenses. Victim and community interest in prosecution is paramount when determining the suitability of noncriminal alternatives to prosecution. Prospects for rehabilitation through noncriminal alternatives should take into account the gravity of the offense, the prevalence of the offense, and the need for general deterrence. Egregious acts of violence, frequently committed offenses, and past criminal records directly related to the offense in question should weigh in favor of the decision to prosecute.

### Post-conflict Dynamics: Addressing Political Interference

- The independence of prosecutors and the requirement to prosecute without fear or favor should be enshrined in constitutions, enabling statutes, and prosecution policies. Political or other interference in the prosecutorial function should be criminalized, with severe penalties, which should be seriously enforced.
- Prosecutors require courage and commitment to their oaths of office. Building a culture of integrity and excellence is a long-term project, which must start with those in leadership, who will set the example for others.
- Political appointments should be avoided in favor of meritorious appointments based on proven integrity, competence, and experience. Appointments of directors of prosecution services should not be the exclusive preserve of the head of state, and the appointment process should be open and transparent.

### Post-conflict Prosecutorial Strategies

- Prosecutorial strategies or policies should be developed to guide prosecutorial decisions in post-conflict settings. Policy development should take place in an open and participatory manner, and the resulting policies should be fair, objective, and public.

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<sup>325</sup> For example, *Commonwealth v. Bruno*, 435 Pa. 200 (Pa. 1969), <https://casetext.com/case/commonwealth-v-bruno-14>  
<sup>326</sup> U.S. Department of Justice, Principles of Federal Prosecution, Justice Manual 9-27.250.

- Prosecutorial strategies should carefully consider context and enable prosecutors to pursue the most serious crimes of the past in a fair manner without exhausting scarce prosecutorial resources. This is likely to mean limiting prosecutions to the most egregious cases, which requires the development of sensible criteria for the selection of cases.
- In selecting cases to pursue, prosecutors should consider the nature of the crime and the circumstances of the perpetrator. The proportionality of the crime must be assessed in relation to the objectives being pursued in the commission of a crime.
- Consideration should be given to which circumstances require prosecution and which militate against prosecution. Mitigating circumstances include situations in which junior perpetrators acted in accordance with issued instructions. Aggravating circumstances include situations in which the perpetrator acted in a position of great influence or authority and could have prevented a crime from proceeding but did not or could have adopted lawful means to achieve an objective but did not.
- Prosecutors should prioritize cases following careful analysis. Low-priority cases may include non-egregious offenses committed by persons not exercising authority, whereas middle-order-priority cases may be those cases involving egregious offenses committed by junior ranks or by an individual not responsible for orchestrating or planning violence.
- High-priority cases are those involving senior perpetrators who ordered or orchestrated egregious crimes, particularly when the crimes were committed in aggravating circumstances. These cases should be prioritized above all others.

### Post-conflict Prosecutions: What Crimes Should Be Prosecuted?

- **International crimes:** Post-conflict prosecution policies should prioritize the prosecution of the most serious violations of international humanitarian law, namely, the international crimes of genocide, crimes against humanity, and war crimes. Such prioritization builds on the practices of the International Criminal Court, whose founding statute limits the jurisdiction of the court to “the most serious crimes of concern to the international community as a whole,”<sup>327</sup> as well as tribunals such as the ICTR, whose statute calls for the prosecution of “serious violations of international humanitarian law.”<sup>328</sup> However, in domestic settings, crimes such as torture, enforced disappearances, and other gross violations of human rights amounting to crimes that do not rise to the level of crimes against humanity or war crimes, should nonetheless be prioritized for prosecution.
- **Importance of customary international law:** CIL takes on considerable importance in contexts where actions amounting to serious crimes, such as crimes against humanity, are committed at times when treaty or domestic statutory prohibitions are not in place. Applying CIL can overcome these constraints as often atrocities were previously criminalized under CIL, which allows prosecutors to pursue these cases without offending the principle against the retrospective application of law. Prosecutors will have to determine whether particular conduct was prohibited as a war crime, CAH, or other international crime under CIL at the time it was committed. War crimes and CAH passed into CIL at least by the mid-twentieth century. However, since definitions of these crimes altered over time, prosecutors will need to establish which definitions, as well as which contextual requirements, applied at the relevant

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<sup>327</sup> UN General Assembly, Rome Statute of the International Criminal Court, Art. 5 (July 17, 1998).

<sup>328</sup> UN Security Council, Statute of the International Criminal Tribunal for Rwanda (“ICTR Statute”), November 8, 1994.

time. Finally, in respect to CAH, prosecutors will have to consider whether the underlying acts were recognized in CIL at the time they were committed. Underlying acts such as murder, imprisonment, torture, and enforced disappearance have been part of CIL at least from the mid-20th century. In addition, where an enforced disappearance commenced before a statutory or treaty prohibition came into force, or where the fate of the disappeared person remains undisclosed, prosecutors may pursue such disappearances as continuing crimes.

- **The gravity principle:** Prioritizing the prosecution of international crimes should be based on considerations of the gravity of a given crime. Applying the gravity principle serves a procedural end as it allows prosecutors to exercise discretion in a manner that conserves limited resources for crimes that most threaten domestic and international priorities. In light of the wide diversity in the use and interpretation of gravity as a discretionary guideline, national policies should provide a clear and detailed definition of the principle. Any definition of gravity should include references to both its quantitative and its qualitative characteristics.
- **National law enforcement priorities:** Limited national law enforcement resources prevent the prosecution of every serious crime committed during conflict. To maximize the effectiveness of limited prosecutorial resources, prosecutors should consider whether a prosecution supports broader national law enforcement priorities and is of local, regional, or national significance.<sup>329</sup>

Transitional societies should promote the prosecution of the gravest international crimes as a national law enforcement priority since such prosecutions signal that devastating crimes will not be tolerated in the post-conflict era. In pursuing such crimes, scarce resources should not be deployed on isolated incidents but rather on those crimes with significant impacts on victims and communities. Crimes with significant socioeconomic and cultural impacts should not be overlooked.

### Who Should Be Prosecuted?

- **Indirect perpetrators:** The prosecution of policymakers and commanders should be encouraged, even if such persons are classed as indirect perpetrators. This approach will also help to establish a more complete picture of the past. Classifying top leaders—civilian and military—as mere accessories to the crimes of foot soldiers indicates that the orchestrator of a system of violence is inherently less blameworthy and less deserving of accountability than those who directly participated in crimes at a leader’s behest. However, without the planning and controlling carried out by the masterminds, the mass atrocities would not have taken place.

The necessity of targeting planners is illustrated by the role of military commanders of the military juntas behind Argentina’s Dirty Wars. Once the commanders declared an end to all irregular operations and the war itself, instances of kidnappings, disappearances, and torture stopped.<sup>330</sup> A post-conflict prosecution policy that targets the planners of violence will allow post-conflict societies to devote scarce judicial resources to holding those most responsible to account, before turning to those who went beyond the violence sanctioned by commanders. Remaining resources can then be devoted to targeting direct perpetrators, many of whom were likely caught up in the system of violence as cogs rather than active participants.

<sup>329</sup> United States Principles of Federal Prosecution—Substantial Federal Interest—Commentary, 9-27.250.

<sup>330</sup> Munoz-Conde and Olasolo, “Application,” 117.

- **Direct perpetrators:** The category of direct perpetrators should be further disaggregated into two groups: those who carried out their orders precisely and those who not only carried out their orders but went beyond them and engaged in criminality that was not demanded by the superiors. Such an approach was adopted by the Argentine prosecutors, who distinguished between “those who, prompted by cruelty, perversion, or greed, acted beyond their orders; and those who carried out orders strictly to the letter.”<sup>331</sup> Argentina was motivated by a utilitarian view of punishment in which prosecutions would promote deterrence and guarantee future social order. It accordingly prioritized the prosecution of indirect perpetrators and those who went beyond the scope of their orders.<sup>332</sup>
- **Context-specific strategies:** Conditions on the ground will not always favor a strategy of prosecuting the most senior perpetrators or those most responsible for crimes. In such circumstances, strategies will have to be developed that advance justice in the short term while working toward more comprehensive justice when conditions are suitable. This may involve tackling lower-level cases first and in a vertical or longitudinal approach, slowly building cases toward apex perpetrators. Care should be taken not to make promises that cannot be kept. Understanding how “system crimes” work and employing multidisciplinary investigations will greatly facilitate prosecutions of mass atrocities. Timing and sequencing must be considered when pursuing controversial and sensitive cases. It may be necessary to delay prosecution until institutions in the criminal justice system are reformed or temporary independent mechanisms are established to deal with such crimes.

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<sup>331</sup> Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1996), 106.

<sup>332</sup> *Ibid.*

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