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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff\***

### *Summary*

In the present report, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence lists key activities undertaken by him between August 2013 and June 2014.

In the report, he addresses the topic of prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law, elaborating on possible elements of a prioritization strategy with a view to strengthening accountability for massive violations. The Special Rapporteur calls for such strategies to tackle the systemic dimensions of violations so as to dismantle the web of players and structures that enabled the atrocities to take place.

He stresses that criminal justice must not lead to instances of mere “turn-taking”. As a major safeguard against that risk, he underscores the importance of the independence of prosecutors, enabling them to address impartially the complex pattern of violations committed by all sides, which in turn allows for charges that are representative of the actual violations.

In conclusion, the Special Rapporteur emphasizes the growing importance of the participation of victims in judicial processes, including in relation to the design of prosecutorial strategies, and calls for in-depth studies on the institutionalization of participation mechanisms.

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\* Late submission.

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## **I. Introduction**

1. The present report is submitted pursuant to Human Rights Council resolution 18/7 by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. It lists key activities undertaken by the Special Rapporteur from August 2013 to June 2014, and addresses the topic of prosecutorial prioritization strategies in the aftermath of gross human rights violations and serious violations of international humanitarian law.

## **II. Activities of the Special Rapporteur**

### **A. Country visits and regional consultations**

2. The Special Rapporteur undertook country visits to Spain (see A/HRC/27/56/Add.1) and Uruguay (see A/HRC/27/56/Add.2). He thanks both Governments for their invitation and cooperation.

3. The Special Rapporteur is pleased to announce that the Government of Côte d'Ivoire has agreed to a country visit, and looks forward to undertaking that visit in November 2014. He had hoped to visit Guatemala in 2013, and remains in contact with the Government with a view to a visit before the end of 2014. Since 2012 he has been requesting the authorities of Nepal for a country visit, but to date has not received a reply.

4. Other pending country visit requests concern Brazil, Burundi, Cambodia, the Democratic Republic of the Congo, Guinea, Indonesia, Kenya, Rwanda and Sri Lanka.

5. The Special Rapporteur undertook regional consultations for Africa in November 2013 in Kampala and for Europe and North America in May 2014 in Berlin. The results of the meetings will form part of the study requested in Human Rights Council resolution 18/7 (para. 1 (f)).

### **B. Communications and press releases**

6. From August 2013 to June 2014, the Special Rapporteur sent communications to Algeria, Bosnia and Herzegovina, El Salvador, Guatemala, Nepal and Spain,<sup>1</sup> and issued press releases on Egypt, Nepal and the Syrian Arab Republic.

### **C. Other activities**

7. Following the presentation of his 2013 report to the Human Rights Council on truth commissions (A/HRC/24/42), the Special Rapporteur participated in side events on the "Japanese military sexual slavery issue" and "Access to truth archives". He also met with representatives of Argentina, Egypt, Japan, Kenya, Sweden, Tunisia, Uganda and Uruguay, and several non-governmental organizations (NGOs).

8. In September 2013, the Special Rapporteur gave a presentation to the Human Rights Working Group of the Council of the European Union, presenting preliminary thoughts on a European Union policy on transitional justice as part of its broader Strategic Framework

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<sup>1</sup> A/HRC/26/21; A/HRC/25/74.

on Human Rights and Democracy. In December 2013, he delivered an opening statement at the 15th EU-NGO Forum on Human Rights, and met with several European Union officials, including the Special Representative for Human Rights.

9. In October 2013, he gave a keynote speech via video link to the Second International Conference on Transitional Justice in Zimbabwe.

10. At the sixty-eighth session of the General Assembly, at which the Special Rapporteur presented his report on the interrelationship of transitional justice and development (A/68/345), he was a panellist in side events on “Teaching history in divided societies” and “Transitional justice and development: new agenda, concepts and possibilities”.

11. In October/November 2013, the Special Rapporteur gave presentations on the relationship between the rule of law and transitional justice at the meeting of the Transitional Justice and Rule of Law Interest Group of the American Society of International Law, and on “Truth without facts: on the erosion of the fact-finding function of truth commissions” at a conference, held in New York, entitled “International human rights fact-finding in the twenty-first century”. During that period, he also contributed to the session on “Peace agreements and truth commissions” at the high-level symposium on “Challenging the conventional: can truth commissions effectively strengthen peace processes?”

12. Prior to the regional consultations for Africa, the Special Rapporteur held discussions with the authorities of Uganda, including the State Minister for Justice and Constitutional Affairs and the State Minister for Foreign Affairs (International Affairs)

13. In December 2013, he gave a keynote speech at a seminar on the post-2015 global development agenda, organized by the Dag Hammarskjöld Foundation.

14. In May 2014, the Special Rapporteur convened an expert meeting with prosecutors on the issue of prosecutorial strategies in the aftermath of atrocities, hosted by Sweden. In June, he took part in an NGO-expert round table on the same topic in Geneva.

15. Following the regional consultations for Europe and North America, the Special Rapporteur had the honour to meet with the Federal President of Germany and several representatives of the German Foreign Office, including the Director General for the United Nations and Global Issues, and the Head of the Human Rights Division.

16. In June 2014, the Special Rapporteur gave a keynote speech at the inauguration of the Truth and Dignity Commission of Tunisia. He had the pleasure to hold meetings with the Commission, government representatives and NGOs.

17. Also in June, the Special Rapporteur gave a briefing to Member States in Geneva, and met with representatives of Argentina, Germany, Guatemala, Nepal, Spain, Switzerland and Uruguay, and several NGOs.

### **III. Prosecutions as part of a comprehensive transitional justice policy**

18. In his first report to the Human Rights Council (A/HRC/21/46), the Special Rapporteur emphasized the importance of implementing the measures under his mandate — truth, justice, reparation and guarantees of non-recurrence — as elements of a comprehensive policy. On the basis of practical experience, he argued in the report that the measures work best when designed and implemented in relation to one another. Rather than being alternatives among which States can pick and choose, those measures are parts of a whole, each with corresponding legal obligations attached. Individually insufficient, but

mutually supporting, means to redress the legacies of mass violations, the measures help to achieve justice in the aftermath of repression and/or conflict.

19. The four elements share common goals: all of them are functionally designed to provide recognition to victims, foster trust among individuals and particularly in State institutions, strengthen the rule of law and promote social cohesion or reconciliation. The report therefore stresses that “transitional justice” is not a special, even less a “soft”, form of justice. It is rather a strategy for the achievement of a legally grounded understanding of justice. Consequently, the report underscores that there is no “shortcut” to social reconciliation, as reconciliation at a society level can only be reached in a sustainable manner through measures of truth, justice, reparation and guarantees of non-recurrence, among other reform policies.

20. Based on a comprehensive approach, the present report pursues the undertaking by the Special Rapporteur to devote a report to each of the four elements of the mandate to strengthen its foundations and offer practical guidance with respect to the resolution of abiding challenges in the implementation of the measures.<sup>2</sup>

21. Within the element of “justice”, the present report focuses on criminal prosecutions, which, in many ways, are the most developed element of the mandate. Prosecutions form part of all formal justice systems, so there is extensive practice, dense frameworks of law and jurisprudence at national, regional and international levels, in addition to conceptual discussions about what justice requires in this domain.

22. The contributions of criminal prosecutions to transitional processes are manifold. At the most general level, criminal prosecutions provide recognition to victims as rights holders. They also provide an opportunity for the legal system to establish its trustworthiness. Effective prosecutions, in systems that respect due process guarantees, strengthen the rule of law and finally, in doing all of the above, contribute to social reconciliation.

23. More concretely, criminal prosecutions in cases of serious violations, especially in contexts in which the law has been applied arbitrarily, offer the possibility of giving life to the principles of equality and the supremacy of law. No one, regardless of rank or status, is above the law. More practically, given the complexities of criminal trials for massive violations and abuses, prosecutions help to develop transferable skills, contributing to the overall capacity of domestic judicial systems.

24. Contexts in which gross violations of human rights and serious violations of international humanitarian law have occurred pose particular challenges. In practice, only a fraction of those who bear responsibility for violations are ever even investigated. Among the main reasons for this outcome are: the high number of suspected perpetrators, the relative scarcity of financial and human resources, capacity and will, in addition to the fact that in many transitions the predecessor regime or forces maintain a certain power.

25. The present report seeks to contribute to the fight against impunity. Given the significant constraints on prosecutions in the aftermath of mass violations, efforts should be directed at increasing their effectiveness. With this aim in mind, the report focuses on prosecutorial strategies and, more specifically, on prioritization strategies at the national level.

26. Prioritization strategies need to be clearly distinguished from strategies for the selection of cases. The question the report addresses is that of establishing a strategic order for the investigation and prosecution of violations and abuses. Selection strategies, by

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<sup>2</sup> A/HRC/24/42.

contrast, establish various thresholds to identify whether a particular case falls within a specified range for investigation or prosecution.

#### IV. The duty to investigate and prosecute

27. States have a duty to investigate and prosecute violations of human rights and humanitarian law which constitute crimes under national or international law, in particular genocide, war crimes, crimes against humanity, or other gross violations of human rights, including summary or extrajudicial killings, torture and other forms of cruel, inhuman or degrading treatment, slavery, enforced disappearance, rape and other forms of sexual violence, and other serious violations of international humanitarian law. Failure to investigate and prosecute such violations gives rise to a separate breach of human rights treaty law.<sup>3</sup>

28. From a human rights perspective, the duty to investigate and prosecute flows from the right to an effective remedy.<sup>4</sup> The right to truth of the victim, his or her next of kin, and, in certain instances, the whole society, forms part of this remedy.<sup>5</sup>

29. States may not relieve suspected perpetrators of individual responsibility through amnesty or prior immunity or indemnity.<sup>6</sup> The duty to prosecute also includes the removal of procedural impediments, such as the defence of obedience to superior orders or unreasonably short statutes of limitation.<sup>7</sup>

30. Furthermore, States have the duty to assist each other in bringing to justice persons suspected of having committed gross human rights violations or serious violations of international humanitarian law that are crimes under domestic or international law.<sup>8</sup> With regard to crimes such as genocide, crimes against humanity, war crimes and torture, where States have an obligation to extradite or prosecute alleged perpetrators,<sup>9</sup> States are required to enact and give effect to legislation with extraterritorial effect to cover such crimes, wherever and by whomever the crimes are committed, in order to fulfil their obligations (universal jurisdiction).<sup>10</sup>

31. Despite national and international obligations, countries in transition have been shown to be greatly tempted by amnesties, including blanket amnesties that shield perpetrators of even the worst violations from their legal responsibility. The Special Rapporteur expresses grave concern at such amnesties. They, in fact, put some people above the law. When granted as part of an effort to achieve peace, while pursuing the

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<sup>3</sup> Human Rights Committee general comment No. 31, para. 18.

<sup>4</sup> See International Covenant on Civil and Political Rights, art. 2, para. 3; African Charter on Human and Peoples' Rights, art. 7, para. 1 (a); American Convention on Human Rights: Pact of San José, Costa Rica, art. 25; Arab Charter on Human Rights, art. 9; European Convention on Human Rights, art. 13. See also *Boucherf v. Algeria*, para. 11, Human Rights Committee communication No. 1196/2003 and *Kurt v. Turkey*, para. 140, judgement of the European Court of Human Rights (25/05/1998).

<sup>5</sup> A/HRC/24/42, paras. 18–20.

<sup>6</sup> General comment No. 31, para. 18.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5 and 7; Convention on the Prevention and Punishment of the Crime of Genocide, arts. 4–7; First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

<sup>10</sup> A/HRC/27/56/Add.1, paras. 83–84 and 104 (xix).

laudable aim of attempting to end violence imminently, amnesties for such violations<sup>11</sup> have not only been shown to further entrench a culture of impunity,<sup>12</sup> but also to be counterproductive as they fail in the long run to prevent the recurrence of new violations and vicious circles of violence.

32. Reasons for the tendency to opt against accountability are complex and manifold: one of them is the perception that prosecutions may threaten incipient, transitional institutions and that, in any case, results are too difficult to attain. One of the main objectives of the present report is to demonstrate that there are strategies that can be followed to contain the risks that have proved to be effective and that have led to defensible results.

## V. Strengthening accountability through prosecutorial prioritization strategies

33. Countries in transition, whether post-authoritarian, post-conflict or which combine features of both, are characterized by a large number of crimes committed with the involvement of possibly several thousands of individuals, leaving behind a massive number of victims. Prosecuting and judging all of those responsible at the outset of a transition might be simply impossible, especially considering the credibility, capability and resource constraints faced almost inevitably by judiciaries in the aftermath of repression and/or conflict, particularly in weakly institutionalized contexts.<sup>13</sup>

34. The standard approach to prosecutions in most domestic jurisdictions is to take cases as they are received and, usually, to treat them individually. Thus, most jurisdictions do not develop explicit prioritization strategies.

35. A prosecutorial strategy is part of a system of laws, political measures and funding priorities, involving the adoption of concrete courses of action. At the broadest general level, a prosecutorial strategy consists of a framework for giving direction to investigations, concentrating prosecutorial efforts and guiding the deployment of necessary resources. It is a “focalizing” tool.

36. In transitional situations, where compliance with legal norms is often low, violations are frequently the result of complex systems organized with criminal intent or enabled by severe, systemic failure, and judicial systems show themselves unable to deal with their caseloads while offering all required due process and fair trial guarantees, not adopting a prioritization strategy may be particularly detrimental. The main risks include:

(a) Institutions severely weakened by repression and/or conflict, with low levels of credibility, capacity and resources, may end up dispersing and duplicating investigations and multiplying caseloads;

(b) Acting on the implicit promise of addressing cases in the order received may lead to large numbers of poor investigations, weak indictments and, as a result, acquittals

<sup>11</sup> S/2004/616, S/2011/634 and Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice (March 2010); see also International Committee of the Red Cross, *Report of the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law*, p. 32, stressing the prohibition of amnesties for international crimes.

<sup>12</sup> [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14824&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14824&LangID=E).

<sup>13</sup> Siri Frigaard, “Some introductory remarks”, in Morten Bergsmo, ed., *Criteria for Prioritizing and Selecting Core International Crimes Cases*, FICHL Publication Series No. 4 (2010), pp. 1–3.

and/or low sentences not in line with underlying evidence, further eroding the trustworthiness of the judicial system;

(c) Individuals bearing the greatest responsibility may end up being the major beneficiaries of the resulting de facto limited criminal liability, while low-level perpetrators are the focus of whatever investigations are launched;

(d) Failing to address cases taking into account the pattern and systemic nature of the violations results in victims testifying in several cases in a unorganized manner, leading to their possible retraumatization, revictimization and even security risks;

(e) Specific crimes requiring specialized prosecutorial and investigatory efforts, including sexually-related crimes and the recruitment and use of children in hostilities, are frequently not sufficiently brought to justice;<sup>14</sup>

(f) The case-by-case approach renders it difficult to establish links between the different cases, identify patterns of violations and ascertain chains of command, all of which are essential precisely wherever violations are not isolated occurrences but the result of systems of crime. This approach, therefore, is not an effective means for disabling the structures that enabled the violations to occur in the first place, one of the most urgent aims of a transitional prosecutorial strategy.

37. Refraining from prosecuting mass violations is not an option since this omission in itself constitutes a new violation of international human rights obligations. The question is how to muster and organize available resources — institutional, political, human and material — to maximize the impact of criminal justice measures.

38. Failure in the area of prosecutions affects the perception of transitional justice initiatives overall. In Liberia, for instance, the lack of prosecutions has called into question the entire spectrum of transitional justice measures, including the serious efforts made by the Truth and Reconciliation Commission.<sup>15</sup> This is true even of the well-known South African experience, where the absence of prosecutions cast a shadow over the entire framework, which led the former head of the Commission to stress the “‘unfinished business’ of the TRC healing”.<sup>16</sup>

39. Importantly, the use of inadequate or unjustified criteria in the distribution of prosecutorial resources can result in new or renewed ways of discrimination and rights violations, which may undermine the effort to overcome past violations and establish a new social order based on justice, equality and the rule of law. It may even provoke a renewal of violence by creating feelings of injustice and resentment against the institutions.<sup>17</sup>

40. To sum up, the systemic nature of past violations concerns not only the rights of victims, whose redress is immediately at stake, but the validity of the rights of all

<sup>14</sup> International Criminal Court, Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (June 2014) ([www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf)).

<sup>15</sup> There have been no prosecutions for war crimes in Liberia and only a handful abroad, the most important of them being the conviction of the former president, Charles Taylor, by the Special Court for Sierra Leone.

<sup>16</sup> Archbishop Desmond Tutu, “‘Unfinished business’ of the Truth and Reconciliation Commission’s healing” (<http://mg.co.za/article/2014-04-24-unfinished-business-of-the-trc-healing>).

<sup>17</sup> Morten Bergsmo and María Paula Saffon, “Enfrentando una fila de atrocidades pasadas: ¿cómo seleccionar y priorizar casos de crímenes internacionales centrales?” in Kai Ambos, ed., *Selección y priorización como estrategia de persecución en los casos de crímenes internacionales* (2011), p. 26.



individuals. Implementing a successful prosecutions strategy should not be seen as a concern for the few, but for the entire society.<sup>18</sup>

41. Among the main advantages of adopting a prosecutorial strategy are the following:

(a) Enhancing the performance of criminal institutions through a more deliberate allocation of scarce resources, which in turn enables institutional strengthening, resulting in increased confidence in institutions that demonstrate positive outcomes, leading, in turn, to increased resources;<sup>19</sup>

(b) Making available a tool to explain to the public and victims, in an accessible and transparent manner, why some cases will have to be processed before others, helping to minimize otherwise frequently defeated expectations;

(c) Helping shield prosecutorial decisions from undue influence;

(d) Providing a tool for more accurate evaluation of the work of criminal law actors.

42. In contexts of mass violations the adoption of a sound prosecutorial strategy is especially important for the following reasons:

(a) A strategy targeting the structures which enabled the violations to occur in the first place is likely to contribute to their dismantlement. This makes trials more than isolated events, increasing the sustainability of the impact of the judicial processes, one of the crucial challenges of all transitional justice measures;

(b) A strategy that concentrates on the proper identification of patterns of victimization enhances the possibility of addressing the situation of vulnerable groups;

(c) A robust strategy can also serve victim protection through the development of risk assessments, the identification of crucial suspected perpetrators, and minimizing the exposure of victims, and especially witnesses, to repeated procedures;

(d) The very process of articulating a strategy involves a planning exercise, including calculating feasibility and giving incentives to establish over time significant links with sectoral reforms, such as security and development policies, thereby maximizing the positive contribution of prosecutions to strengthening the justice system overall.

43. The adoption and implementation of a prosecutorial strategy, however, face various obstacles. Some of the more structural constraints include: bars on prosecutorial discretion, in some cases stemming from interpretations of the principle of legality;<sup>20</sup> the absence of relevant categories of crimes in the existing legal framework, which may prevent prosecutors from targeting certain crimes or conduct (e.g. forced recruitment of child soldiers, different kinds of sexually-based crimes and even enforced disappearance); a high number of individuals in pretrial detention, which generates pressure to deal with those cases first, independently of more strategic considerations.

## VI. Elements of an effective prioritization strategy

44. Prioritization strategies emerge from the decision to classify and organize cases within a jurisdiction to define the order in which those suspected of gross human rights

<sup>18</sup> A/68/345, paras. 16–21.

<sup>19</sup> On processes of institutional transformation in post-conflict and weak States, see *World Development Report 2011: Conflict, Security and Development*, part 2.

<sup>20</sup> A/HRC/20/19, para. 34.

violations or serious violations of international humanitarian law should be prosecuted and tried.<sup>21</sup>

45. The present report is not intended to suggest a specific prescription or the adoption of a particular prioritization strategy constructed around one of the elements elaborated below. The articulation and adoption of a strategy must not constitute a straightjacket. No strategic plan can eliminate all contingencies. Judicial processes are dynamic and the horizon of prosecutorial possibilities shifts at different stages of a transitional process, and thus, there is no single strategy likely to be good at all times. Similarly, a sufficiently complex strategy will involve various factors which can hardly be ranked in order without sacrificing some of the advantages of complexity.

46. The report does not specify the precise weight or the place order of the different elements. It rather intends to outline the variety of the elements, together with their main advantages and drawbacks, so as to equip those developing a prosecutorial strategy with an understanding of the consequences and implications of certain choices.

47. The easiest cases. Some jurisdictions have decided to prioritize the prosecution of “easy cases” (“low-hanging fruits”), where the focus is placed on the likelihood of advancing a case, obtaining an arrest warrant, a hearing, an extradition, a trial or a conviction. This has the advantage of allowing prosecutors to achieve some quick wins and show results in addressing a potential backlog of cases. It may also contribute to the gathering of valuable evidence, at minimum expense. Prosecuting and trying easier or small cases against low-level perpetrators could also be deemed necessary to prepare more complex proceedings against those most responsible.<sup>22</sup>

48. The initial criteria for Bosnia and Herzegovina, for example, state that it may be necessary to prioritize cases considering the “stage of investigations” and “if individual cases are ready to be tried”.<sup>23</sup> A similar strategy was followed in Argentina after the annulment of amnesty laws, when prosecutors were pressured to advance cases in which formal indictments had already been presented, rather than initiating new investigations — enacting a sort of a “do not give up on what you have already started” principle.

49. However, focusing only on readiness to proceed has obvious drawbacks. First, it makes the strategy entirely dependent on previous (often not entirely justified) decisions about which cases to move (it is always worth asking why certain fruits “hang lower” than others). Second, readiness to move is not necessarily related to the identification of overall patterns of violations, any judgement about their gravity or seriousness, or any effort to determine who is most responsible for them. Third, if evidence against one group happens to be more readily available, this strategy may generate perceptions of bias.

50. “Readiness to proceed” may be an attractive option temporarily, but can hardly be considered as the nucleus of a sufficiently comprehensive strategy. In Bosnia and Herzegovina, for example, the initial strategy was changed and additional criteria such as prioritizing the most serious violations and the most responsible were introduced.<sup>24</sup> Indeed, as the very term “proceed” suggests, this is a procedural and not a substantive, strategic criterion.

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<sup>21</sup> Among the States which have adopted explicit prosecutorial strategies are Bosnia and Herzegovina and Colombia. Efforts in Argentina — while not having a written strategy — in this domain are exemplary, as are those of Chile.

<sup>22</sup> Bergsmo and Saffon, “Enfrentando una fila”, p. 57.

<sup>23</sup> Special Department for War Crimes, “Orientation criteria for sensitive rules of the road cases”.

<sup>24</sup> Morten Bergsmo and others, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, FICHL Publication Series No. 3 (2009), pp. 57–86.

51. “High impact” cases. Practice in some jurisdictions suggests prioritizing cases which are likely to influence public opinion positively contributes to raising awareness about various aspects of past violations, sends important signals, or galvanizes different forms of international support. A particular subset of this universe is “leading” cases, that is, those aiming to establish important legal precedents and/or to motivate changes in legislation.

52. The *Simón* case in Argentina, for example, managed to pave the way for fully-fledged prosecution in the country after years of stalemate caused by impunity laws introduced after the junta trials in the 1980s. In 2001, in a case filed by a human rights organization, a federal judge held the Full Stop and Due Obedience Laws unconstitutional as they were incompatible with international human rights obligations of Argentina. The *Simón* decision was subsequently affirmed by the Federal Court of Appeals of Buenos Aires and many cases were reopened as a consequence. In August 2003, new legislation<sup>25</sup> declared the Laws null and void. Finally, in July 2005, the Supreme Court affirmed the Federal Court of Appeal’s decision in *Simón* and validated the new law.

53. There is much to commend in the idea of prosecutors having a sense of the potential impact of prosecuting a particular case or the make-up of a whole set of cases. However, the eventual impact is heavily contingent on, among other things, how the particular case is in fact decided, and on the jurisprudential fate of that decision. Furthermore, the judgement on whether a given case will turn out to be “leading” in itself depends on an underlying conception of what would be prosecutorially useful overall. If there are any criteria that would allow for “high-impact” cases to be recognized, not only retrospectively but also prospectively, it is those criteria which would form the core of a prosecutorial strategy, rather than the notion of “high impact”.

54. “Most serious” violations. The strategic consideration of prioritizing the prosecution of the “most serious” violations usually refers to those leading to loss of life or to serious violations of physical integrity. Crimes against humanity, genocide and war crimes, firmly entrenched at the international level, including in the Rome Statute of the International Criminal Court,<sup>26</sup> as the most serious crimes, also form the core of judgements about gravity at the national level through their incorporation into domestic penal law.

55. The use of this prioritization criterion has a long history. It was used in the successful junta trials in Argentina in 1985, which prioritized cases of summary executions, forced disappearances and torture perpetrated as part of a systematic plan crafted and implemented by former junta leaders. It has also been used in recent domestic prosecutions in Bosnia and Herzegovina, Côte d’Ivoire, the Democratic Republic of the Congo, Guatemala and Uganda. Prosecutors in the Democratic Republic of the Congo, for example, have appealed to this notion to focus on crimes of sexual violence.

56. Prioritizing the most serious violations presents the clear advantage of acknowledging the gravity of the most outrageous crimes, distinguishing them from lesser ones and underlining the importance of their clarification and the punishment of their perpetrators.

57. The term “most serious crimes”, however, is not unproblematic as the strategy’s organizing criterion, mainly for three reasons:

(a) There are lingering questions about the boundaries of the “gravity” or “seriousness” criterion. The trend in favour of incorporating into national law criminal categories derived from international law is important, but does not fully settle remaining

<sup>25</sup> Congress Law 25779.

<sup>26</sup> Art. 5.

questions on the definition of the term. The “most serious crimes” category at the international level remains underconceptualized and underspecified, and one that, for good reason, has changed over time, for instance with certain types of sexually-based violations.

(b) There is no necessary relationship between “gravity” and other important considerations of a prosecutorial strategy, such as “prevalence”. In a good number of cases, the most prevalent types of violation fall outside the core of the internationally defined most serious crimes. Targeting only the latter would create a large “impunity gap”, whereby most violations would remain unaddressed. A prosecutorial strategy that pays no attention to the bulk of the violations will evidently face severe legitimacy questions, even if it focuses on violations that are especially egregious;

(c) Organizing a prioritization strategy only around the “most serious crimes” risks providing weak incentives to pursue connected crimes that may not quite cross the threshold of gravity, but which with the application of a different strategy would be prosecutable (for example, sexual or gender-related offences and even some economic crimes), or other dimensions of atrocities, such as corporate or judicial complicity.

58. International tribunals have made use of this criterion as part of their prosecutorial strategies, the International Tribunal for the Former Yugoslavia having come to it over time, the International Criminal Court in a deliberate fashion.<sup>27</sup> The latter has contributed to the discussion through the analysis of the criterion in terms of the scale, nature, manner of commission and impact of the crimes in question.<sup>28</sup> Disturbingly, however, it seems that decisions made for the selection of cases by the Court have influenced prioritization decisions at the domestic level. The Special Rapporteur is concerned that the principle of complementarity is used as a “licence for minimalism” which increases, rather than closes the impunity gap.

59. “Most responsible perpetrators”. A prioritization strategy can concurrently (or alternatively) focus on pursuing those who were most responsible for serious violations. The term “most responsible” has been commonly defined as encompassing individuals who are in senior leadership positions or a position of influence to plan, order or incite serious crimes.<sup>29</sup>

60. Examples of the pursuit of the most responsible perpetrators at the domestic level are the trial in Guatemala of Efraín Ríos Montt (who in 2013 became the first president convicted for genocide by a national court, a judgement controversially overturned by a divided Constitutional Court on procedural grounds 10 days after the lower court ruling);<sup>30</sup> the 1985 junta trials in Argentina; as well as the proceedings which could have led to the extradition of Augusto Pinochet of Chile. The trial in Peru against Alberto Fujimori in 2009 suggests the same rationale. In addition, prosecutorial strategies in Bosnia and Herzegovina and Colombia<sup>31</sup> focus on this criterion. With some limitations, the recent cases of sexual violence in the Democratic Republic of the Congo also show some willingness to focus on high-level perpetrators.<sup>32</sup>

<sup>27</sup> Bergsmo, *Criteria for Prioritizing*, pp. 25–78.

<sup>28</sup> International Criminal Court, Office of the Prosecutor, *Prosecutorial Strategy 2009–2012* (2010), para. 20.

<sup>29</sup> *Ibid.*, para. 19.

<sup>30</sup> See the 781 judgement of the Tribunal Primero, Sentencia 01076-2011-00015, and Expediente 1904–2013 of the Constitutional Court.

<sup>31</sup> Resolución 01810 de la Fiscalía General (2012).

<sup>32</sup> Office of the United Nations High Commissioner for Human Rights, *Progress and obstacles in the fight against impunity for sexual violence in the Democratic Republic of the Congo*, 2014 ([www.ohchr.org/Documents/Countries/CD/UNJHROApril2014\\_en.doc](http://www.ohchr.org/Documents/Countries/CD/UNJHROApril2014_en.doc)).

61. The main virtue of this criterion is that it sends the crucial message of equality before the law. Particularly in cases in which parts of the State apparatus were abused for the promotion of particular interests and in which some individuals clearly stood beyond the reach of the law, the idea that in the end no one is above the law is a crucial one.<sup>33</sup> Indeed, the very image of former leaders having to submit themselves to the discipline of the courtroom is pedagogically important; it is a concrete instantiation of the rule of law in action.

62. Prioritizing the most responsible also sends the key message that the greatest responsibility does not necessarily require direct involvement in a criminal act.

63. However, a strategy that concentrates on the senior leadership will always face the risk of being seen as excessively narrow or mistargeted, since “most responsible”, if understood primarily in terms of seniority or rank, need not focus on the worst violations or the most notorious criminals.

64. Furthermore, this strategy is a demanding one, particularly in places where the former regime and allied elites retain significant power. In this connection, the Special Rapporteur stresses that providing prosecutors with the appropriate framework and enabling conditions, including through the protection of their physical safety, and also guarantees of independence and impartiality, is a State’s duty under international law.<sup>34</sup>

65. If this prioritizing criterion puts a premium on the State’s willingness to fulfil its duties towards independent and impartial prosecutors, by the same token it puts a premium on prosecutors’ willingness to proceed only on the basis of meticulously careful and objective evaluation of the evidence, respecting due process guarantees, so as to avoid the strategy’s inherent risk, namely, creating the perception that it constitutes a form of “victor’s justice”.

66. The Guidelines on the Role of Prosecutors emphasize the duty of prosecutors to protect the public interest, which is not to be confused with the protection of the interest of the sitting government, a political party or any other State institution.<sup>35</sup> Hence, their duty vis-à-vis the public is to give due attention to the prosecution of crimes committed by public officials,<sup>36</sup> former and/or incumbent.

67. The prosecution of those formerly or currently in senior leadership posts with influence to plan, order or incite serious crimes is a complex undertaking, in particular if domestic criminal law lacks provisions regarding command responsibility. International tribunals and a few domestic jurisdictions have attempted to use constructions such as “joint criminal enterprises”<sup>37</sup> or *Organisationsherrschaft*,<sup>38</sup> which relate to “functional perpetration”. In this connection, the Special Rapporteur would like to highlight the crucial

<sup>33</sup> A/67/368, paras. 5–13 and 46–57; see also Ellen L. Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge University Press, 2009).

<sup>34</sup> The same court that overturned Ríos Montt’s conviction cut short the term of the Attorney General, Claudia Paz y Paz, in a decision that was widely seen as retribution for her efforts in that case.

<sup>35</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990; see Venice Commission, *Report on European Standards as regards the Independence of the Judicial System* (CDL-AD(2010)040), para. 71.

<sup>36</sup> Guidelines on the Role of Prosecutors, para. 15.

<sup>37</sup> *Tadić*, case No. IT-94-1-A, paras. 196–201, confirmed, inter alia, by *Krajišnik*, case No. IT-00-39-T, para. 655, and *Popović et al.*, case No. IT-05-88-T, para. 1021.

<sup>38</sup> Kai Ambos, “Command responsibility and organisationsherrschaft: ways of attributing international crimes to those ‘most responsible’”, in A. Nollkaemper and H. van der Wilt, eds., *System Criminality in International Law* (2009).

importance of the process of uncovering, preserving, organizing, clustering and archiving pieces of evidence.

68. “Symbolic” or “paradigmatic” cases. Even in contexts in which the universe of violations is large and varied, there are some cases which “shake the conscience” either of humanity at large, or of a specific group. If faced with the impossibility of prosecuting all cases simultaneously or over a given period of time, there are good reasons to ponder whether prosecutorial efforts can be concentrated on this type of case.<sup>39</sup>

69. The difficulty in using this prioritizing criterion lies, precisely, in the definition of the terms. If they are reduced to meaning “being the object of popular concern”, the strategy would then automatically reproduce all sorts of biases contained in public opinion. For instance, it may be that violations against the marginalized (e.g. ethnic minorities) will not rise in popular opinion to the level of a “symbolic” case. By contrast, it may be that cases involving elites, some respected figures or those that for various reasons manage to attract international attention, will do so.

70. In theory, it is possible to come up with a list of “symbolic” cases organized around criteria including gravity, types of violation, geographical dispersion, the demographics of both victims and perpetrators, so as to show a defensible even-handedness in the distribution of prosecutorial efforts. But then, these criteria, and not popular opinion, are the core of the prioritization strategy.

71. Prioritizing the linkages in “structure crimes”. A criticism that may be levelled against all the above-argued elements is their insufficient attention to the contribution that all transitional justice measures should make to disabling the structures that made the initial violations possible. International crimes, notably crimes against humanity, genocide and war crimes, are not the crimes of lone individuals, but require networks in which the individual authors of those acts are embedded.<sup>40</sup> Thus, a strategy for prosecution should be particularly concerned with the systemic or structural dimensions of massive violations.

72. Mass violations usually require not just complex organization of the “armed” operations that immediately cause the violations, but the coordination of those operations with supportive political and economic actors, and even with social and cultural entrepreneurs, capable of mobilizing large groups and resources. A prosecutorial strategy at the domestic level which seeks to have long-term impact should therefore target the “nodes” in this web of actors. Clearly, this requires a particular prosecutorial focus that emphasizes patterns of violations, helps discover chains of command, links between armed actors and other groups, as well as financial and other support, including arms trade and smuggling. The challenge here is not only to establish individual criminal accountability for isolated violations, but to zero in on the structures or networks that enabled the various actors to jointly make the horrific violations happen. To target those enabling connections could contribute to the dismantlement of the whole criminal set-up.

73. Unquestionably, this is a particularly demanding strategy: (a) politically, because it targets powerful groups, in the political as well as in the economic sense; and (b) technically, as this strategy requires investigatory and prosecutorial skills which prosecutors (used to thinking about isolated cases) will not have had many incentives or opportunities to develop.<sup>41</sup> It also requires a high degree of international cooperation and

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<sup>39</sup> See recent prosecutions in Argentina, Attorney General’s Office, instruction 13/08 ([www.mpf.gov.ar/resoluciones/PGN/2008/PGN-0013-2008-001.pdf](http://www.mpf.gov.ar/resoluciones/PGN/2008/PGN-0013-2008-001.pdf)).

<sup>40</sup> Nollkaemper and van der Wilt, *System Criminality*.

<sup>41</sup> Experience from the prosecution of organized crime will be relevant in this respect.

support (which is not always forthcoming), given the increasingly dense transnational criminal networks.

74. Expectations about the role prosecutions can play in dismantling whole structures and criminal networks in the short run, however, need to take into account the limits of the available criminal justice tools. Changing deeply entrenched systems requires broader institutional as well as socioeconomic reform. Prosecution and reform efforts should go hand in hand, complementing and reinforcing each other.

## **VII. Criteria and institutional arrangements for an effective prioritization strategy**

75. A brief analysis of the factors that may impinge on the successful articulation and implementation of a domestic prosecutorial strategy in transitional situations, and particularly one that could contribute to the dismantlement of structures that allowed the violations in the first place, would identify power relations, capacities and resources as crucial constraints.

76. There is no legal mechanism that can completely neutralize unequal power relations or that can make up for the lack of so-called “political will”. However, the independence and impartiality of prosecutors are a tool for preventing criminal justice from becoming an instrument of the powerful.

### **A. Independence of prosecutors**

77. The Special Rapporteur stresses the importance of the Guidelines which highlight the role of prosecutors<sup>42</sup> as essential agents of the administration of justice in performing an active role in criminal proceedings. The Guidelines require prosecutors to carry out their functions impartially and avoid any kind of discrimination, while taking into account the position of the suspect and the victim and, at the same time, protecting the public interest. As noted above, the exercise of public interest functions, such as criminal prosecution, should not be aimed at protecting the interest of the (incumbent or previous) government, a political party or any other State institution.

78. To shield prosecutors from political influence, the relationship between prosecutorial services and ministries of justice has to be arranged in ways that do not make the former subservient to the latter. This is manifested in the relationship between the institutions (including power over the disposition of budgets); the procedures of appointment and removal of prosecutors, especially chief prosecutors; the hierarchical relations between chief and other prosecutors; as well as in mechanisms for the distribution of cases among prosecutors, and the criteria and procedures under which cases can be taken away from particular prosecutors. The external autonomy of prosecutors (*vis-à-vis* other State and non-State actors) as well as their internal autonomy (the independence of prosecutors *vis-à-vis* their superiors) need to be guaranteed.

79. While the institutional and procedural set-up can take different forms, it should effectively increase the likelihood that decisions to investigate and prosecute are taken on the basis of the evidence of the case alone.

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<sup>42</sup> See para. 66 above; and A/HRC/20/19.

## **B. Impartiality of prosecutors and representativeness of the charges**

80. Measures seeking to protect the independence of prosecutors are means to enable the exercise of impartial decision-making about which cases to investigate and prosecute.

81. Nothing undermines the perception of impartiality of prosecutorial efforts more than patterns of one-sided prosecutorial attention, such as the deliberate foregoing of the possibility of investigating and prosecuting violations committed by one side of a conflict. Even sequencing prosecutions in a way that decreases the possibility of the cases of one party being investigated and prosecuted can raise serious questions about the legitimacy of efforts, and threaten the contribution that criminal justice initiatives can make to strengthening the rule of law.

82. A defensible prosecutorial strategy cannot close itself off from the possibility of pursuing cases on any side of a conflict, even with the rationale that the violations of one party are less serious than those of others. Removing the bars leading to one-sided prosecutorial activity does not mean that equal numbers of crimes or perpetrators from each side to a conflict need to be prosecuted if the level of crimes committed by each side is uneven. It does not entail precise arithmetical proportion either. However, criminal justice must not become an instance of mere “turn-taking”. Prosecutorial investigations must follow credible indicia, and decisions to prosecute must be based on evidence alone, assessed in an even-handed manner. Recent prosecutions and trials in Bangladesh<sup>43</sup> and Egypt<sup>44</sup> provide grounds for concern.

83. The greater the departure — tied to factors relating to identity, politics, or affiliation — from patterns of violation as corroborated by evidence, the more significant will be concerns about the legitimacy of the efforts. False symmetries or the thesis that “mutual guilt” should lead to reduced accountability result in such a problematic departure.

84. The possibility of investigating and prosecuting any party regardless of partisan considerations is only one of the consequences of adopting methodologies designed to capture the magnitude and character of atrocity crimes. The other important consequence is the broadening of the scope of investigations, going from an exclusive interest in direct and intermediate perpetrators to other parties and structures that knowingly collaborated with or intentionally profited from the perpetration of violations. In the long run, a prosecutorial strategy cannot be effective if it leaves those structures in place.

85. A prosecutorial strategy also has an impact on the charges eventually presented. A deeper understanding of the systemic and complex nature of the pattern of violations allows for charges that are more representative of actual crimes committed. Such patterns identified during investigations should be reflected in the facts and the charges of the indictment.

86. Furthermore, the Special Rapporteur is concerned about the tendency observed in recent (post-)conflict situations of focusing mainly on types of charges that make the State appear as the ultimate victim of the majority of the violations (offences against national security, terrorism, criminal conspiracy), while violations of human rights and humanitarian law are either ignored or demoted to a secondary level. This, for example, has been the focus of ongoing prosecutions in Mali, which have left out of consideration other grave and

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<sup>43</sup> [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13204&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13204&LangID=E); and [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12972&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12972&LangID=E).

<sup>44</sup> [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14596&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14596&LangID=E); and [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14457&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14457&LangID=E).



prevalent crimes perpetrated during the 2012/13 crisis in the north of the country, including crimes of sexual and gender-based violence.

87. In States where national legislation has not been adjusted so as to comply with international obligations to prosecute mass violations, and where the definition of the crimes has not been incorporated into national law, prosecutors should try to pursue charges that are as close as possible to international human rights standards, in line with respective international obligations. Thus, where crimes against humanity and other international crimes are not defined in domestic criminal codes, this should not prevent prosecutors from addressing their systemic and massive nature.

### **C. Capacities, institutions and resources**

88. An effective prioritization strategy requires capacities that most countries in a transitional setting are unlikely to have. A novel strategy that concentrates on the massive and systemic nature of violations and the identification of patterns and that targets nodes in networks of systemic crimes requires a change in practice and investigative techniques. The required skills need not only to be developed, but also husbanded and promoted. Given the complexity of prosecutions for serious international crimes, a good number of countries have established specialized units or bodies.<sup>45</sup>

89. There is no single institutional form that can be replicated from one context to another independently of local circumstances, needs and resources. The range of alternatives is broad: from (relatively) stand-alone institutions (Germany, Poland) to specialized units of different types within prosecutorial institutions (Argentina, Chile, Colombia, Côte d'Ivoire) with mandates of different scope. The basic function of such bodies is to strengthen the specialized know-how required for successfully and efficiently prosecuting complex cases. Until now, the aim of capturing and redressing massive violations has only been adequately understood — or dealt with — in very rare instances.

90. In order for these specialized bodies or coordination mechanisms to be effective, they need to be provided with adequate human resources. In Germany, the Central Office for the Investigation of National Socialist Crimes at the time of its highest workload disposed of 120 staff members. In Colombia, the National Unit of Analysis and Context is composed of 50 prosecutors, 70 investigators and 60 criminal analysts, with backgrounds in the fields of political science, history, military strategy, anthropology, sociology, economics and systems engineering.

91. There is ample room for cooperation to support the development of the required skills. Given the significant stock of knowledge and expertise accumulated in post-authoritarian and post-conflict countries that have prosecutorial experience, this is an area in which international and regional cooperation should emphasize country-to-country and triangular support modalities.

## **VIII. Victim participation in the design of a prosecutorial strategy**

92. Recent years have seen an increasing emphasis on the participation of victims in transitional justice mechanisms, including in criminal justice processes. International human rights standards and principles provide for the right of victims to participate in

<sup>45</sup> These include, among others, Belgium, Bosnia and Herzegovina, Denmark, France, Germany, Kenya, Norway, Poland, Rwanda, the Netherlands, Serbia, South Africa, Sweden, Uganda, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

mechanisms of justice, which stems from their rights to access to justice and to an effective remedy.<sup>46</sup> The recognition of the special status of victims at the international level has been described as reflecting the “collective will of the international community to restore the balance between the fundamental rights of suspects and offenders, and the rights and interests of victims”.<sup>47</sup> Provisions for victim participation in the statutes of international and hybrid courts and tribunals, such as the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia, the Extraordinary African Chambers in the Courts of Senegal and the Special Panels for Serious Crimes in East Timor, which provide for their participation at all stages of the proceedings, have reinforced the centrality of victims in criminal proceedings.

93. Participation can take different forms, ranging from direct methods, such as taking part in decision-making and/or being consulted thereon, to more indirect forms of participation through notification, outreach and sharing of information.<sup>48</sup> Participation occurs at different levels of a judicial process, ranging from the initiation of investigations to the sentencing stage and reparation procedures attached to criminal justice procedures.<sup>49</sup> While the specific contours and scope of participation are subject to ongoing debate, there is clearly room for enhanced understanding of the implications of the current models of victim participation.

94. There are several reasons to celebrate the emphasis that victim participation has been given in criminal procedures. They include:

- (a) Victim participation implies the recognition of victims as rights holders, which is tremendously empowering for them and others in the experience of being afforded the respect of formal State institutions. This contributes to victims gaining a space in the public sphere;
- (b) Such participation both manifests and strengthens the right to truth;
- (c) Formalizing methods of victim participation represents an acknowledgement that victims have played a crucial role not only in initiating procedures, but in collecting, sharing and preserving evidence;
- (d) Victim participation increases the likelihood that the needs of victims will be taken seriously in processes that have had a long tradition of treating them solely as sources of information, as “mere” witnesses;
- (e) Allowing for the participation of victims in criminal procedures increases the likelihood that those procedures can be integrated better into other transitional justice processes, including truth-seeking and reparations;

<sup>46</sup> See para. 28 above; see also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

<sup>47</sup> United Nations Office for Drug Control and Crime Prevention, *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, p. 1.

<sup>48</sup> Impunity Watch, *Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?* (2014), pp. 22–27.

<sup>49</sup> See, for example, articles 19 and 68, paragraph 3, of the Rome Statute of the International Criminal Court; and rules 50, paragraph 1, 89 and 91 of the Rules of Procedure and Evidence of the Court; see also rule 23 of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia.

(f) The sense of empowerment that victims derive from participating in criminal procedures can catalyze demands for justice which, in turn, may have beneficial non-recurrence effects.

95. Whether those consequences occur depends on the way in which victim participation mechanisms are designed. The track record seems to be mixed, but highlights the relative dearth of institutionalized mechanisms. The Special Rapporteur, therefore, calls for support for systematic studies of victim participation measures, particularly in domestic processes, and, given their promise, of ways of turning potential into reality more effectively. The Special Rapporteur will devote attention to this topic in the future.

96. Analysis of more specific questions relating to victim participation in the design of prosecutorial strategies has thus far been neglected. The following are among the main motives for formalizing the participation of victims in the process of formulating a prosecutorial strategy:

(a) Since many major decisions crucially affecting the interests and the rights of victims are taken long before a trial starts, the promotion of the rights of victims should call for allowing them to participate in the very formulation of prosecutorial strategies.

(b) A very concrete contribution of victims to the articulation of a prosecutorial strategy relates to the identification of the range of possible violations, allowing the prosecutors to determine the range of possible charges. Ensuring the input of victims at the outset can later help prosecutors to take cases forward, and to investigate and frame charges according to the evidence obtained. If done at an early stage, it can serve as an additional incentive for victims to come forward with testimonies and present evidence. It may also prevent the need to amend the strategy or indictments at a later stage. A strategic decision to engage victims at an early stage, potentially leading to prosecution services bringing cumulative charges, where appropriate, can help to reflect the multidimensional nature of international crimes. Cases at the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda have demonstrated that victims have a decisive role to play in the identification of the charges.<sup>50</sup> At the Extraordinary Chambers in the Courts of Cambodia, the intervention of civil parties at the investigation stage resulted in investigations and subsequently in charges of forced marriage, a crime which remained hidden until then.<sup>51</sup> It can be expected that victims would play a similar role in helping to identify relevant charges in domestic jurisdictions.

(c) In the difficult exercise of trying to weigh the different elements of a prosecutorial strategy, the contributions of victims can be important in the determination of the “most responsible” and “most serious crimes”, as they are not bound by formal conceptions of hierarchy, but are familiar with the dynamics of local contexts and, particularly, with the impact of the various forms of criminality from which they have suffered, often bodily.

97. Against this background, the Special Rapporteur calls for greater attention to be paid to the development and strengthening of mechanisms enabling the effective participation of victims in deliberations on the design of prosecutorial strategies.

<sup>50</sup> See, for example, International Tribunal for Rwanda, *Prosecutor v. Akayesu*, case No. ICTR-96-4-T; Jean-Paul Akayesu was convicted for, inter alia, rape as a crime against humanity, and rape as a crime of genocide. However, the failure to include charges at the outset prevented future prosecutions for sexual violence crimes at the Tribunal. See also REDRESS and African Rights, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes* (2008), pp. 95–98.

<sup>51</sup> Office of the Co-Investigating Judges, Order on request for investigative action concerning forced marriages and forced sexual relations (document No. D268/2).

98. Finally, the effective participation of victims in the articulation of prosecutorial strategies depends, as does their participation at all stages in the criminal justice process, on the ability to guarantee their safety. The Special Rapporteur calls on Member States to fulfil their duty to guarantee the safety of victims and all other participants in processes meant to redress serious violations.

## **IX. Conclusions and recommendations**

### **Conclusions**

99. **Criminal prosecutions contribute to the recognition of victims as rights holders, (re-)establishment of trust in the legal and judicial system, strengthening of the rule of law and the promotion of social reconciliation and cohesion. Prosecutions can exemplify the principles of equality and the supremacy of law.**

100. **States have a duty to investigate and prosecute violations of human rights and humanitarian law which constitute crimes under national or international law. This duty flows from the right to an effective remedy, including the right to truth. Failure to investigate and prosecute such violations gives rise to a separate breach of human rights treaty law.**

101. **States may not relieve suspected perpetrators of individual responsibility through amnesty, prior immunity or indemnity, the defence of obedience to superior orders, unreasonably short statutes of limitation or other impediments.**

102. **States have the duty to assist each other to bring to justice persons suspected of having committed crimes under domestic or international law. The Special Rapporteur is concerned at the recent regress in the area of universal jurisdiction, in which some “pioneer countries” have opted to be more restrictive in their legislation regarding the extraterritorial jurisdiction over international crimes.**

103. **The Special Rapporteur is gravely concerned at amnesties for suspected perpetrators of genocide, war crimes, crimes against humanity and other gross human rights violations or other serious violations of international humanitarian law. Such amnesties risk further entrenching impunity. They have also even proven counterproductive in the sustainable prevention of the recurrence of violations and vicious circles of violence.**

104. **Experience demonstrates that only a fraction of those bearing responsibility for massive violations are ever investigated. The main reasons for this in situations of transition are the high number of suspected perpetrators, the relative scarcity of financial and human resources, limited capacity and lack of will. The dearth of prosecutions calls into question other transitional justice initiatives.**

105. **A prosecutorial prioritization strategy consists of establishing a strategic order in which cases and situations of violation and abuse are investigated and prosecuted. For transitional justice situations, the main risks in not adopting such a strategy include: dispersing and duplicating investigations; a large number of poor investigations, weak indictments and, as a result, acquittals and/or low sentences; further eroding the trustworthiness of the judicial system; de facto limited criminal liability, particularly for the senior-level perpetrators; retraumatization and revictimization of victims; specific crimes requiring specialized prosecutorial efforts, including sexually-related crimes and the recruitment and use of children in hostilities, are frequently not pursued.**

106. Inadequate or unjustified criteria for the distribution of prosecutorial resources can result in new or renewed ways of discrimination and of violating rights, which may even provoke a renewal of violence.

107. Among the main advantages of developing a prosecutorial prioritization strategy are: improved efficiency; addressing otherwise frequently defeated expectations of victims and the population; shielding prosecutorial decisions from undue influences; enhancing the sustainability of the effects of judicial processes; helping to address the situation of vulnerable groups; and strengthening victim and witness protection.

108. The design of a strategy must not constitute a straightjacket, but should be conceived in a dynamic manner as prosecutorial possibilities shift at different stages of a transitional process. When designing a prioritization strategy, the advantages, drawbacks and implications of the possible elements should be considered as detailed in the present report. Those elements include: the “easiest” cases, “high impact” cases, “symbolic/emblematic/paradigmatic” cases, “most serious violations” and “most responsible perpetrators”.

109. A sustainable prioritization strategy requires a prosecutorial focus on patterns of violations, helping to discover chains of command, links between armed actors and other groups, as well as financial and other support. The strategy’s objective is to undo the structures or networks that enabled the various actors jointly to make horrific violations happen.

110. Targeting the violation enabling structures requires a change in practice and investigative techniques. Several States have established specialized units or bodies. Cooperation between jurisdictions, while critically needed, is not often forthcoming.

111. The Special Rapporteur is seriously concerned about patterns of one-sided prosecutorial attention, which call into question the legitimacy of the entire transitional justice effort. This implies both the deliberate foregoing of investigations and the sequencing of prosecutions in a way that decreases the possibility of one party being investigated.

112. The independence and autonomy of prosecutors are crucial to prevent criminal justice being used as a means of power. Establishing effective means to guarantee the independence and autonomy of prosecutors is a State’s duty.

113. The Special Rapporteur is concerned about the tendency of several (post-) conflict States to frame prosecutions in such a way as to make the State appear to be the ultimate and only victim of the majority of the violations, while violations of human rights and humanitarian law are ignored or demoted to secondary level.

114. The Special Rapporteur is encouraged by the apparent collective will of the international community to take the rights of victims as seriously as the rights of suspects. Statutes of international and hybrid courts have reinforced the centrality of victims in criminal proceedings.

115. Victim participation implies recognition of victims as rights holders; manifests and strengthens the right to truth; acknowledges the crucial role victims have played in initiating procedures and in collecting, sharing and preserving evidence; empowers victims and catalyzes demands for justice – likely to contribute to guaranteeing non-recurrence.

116. Victim participation in the design of prosecutorial strategies at international and hybrid courts has proven crucial in identifying the array of possible violations. The Special Rapporteur highlights the dearth of institutionalized mechanisms for

victim participation at the domestic level, and the lack of comprehensive studies in this area.

117. The Special Rapporteur stresses that victim and witness protection is a precondition for justice.

## **Recommendations**

118. On the basis of these conclusions, the Special Rapporteur:

(a) Urges Member States to meet their duty to investigate and prosecute violations of human rights and humanitarian law which constitute crimes under national or international law;

(b) Urges States to refrain from adopting, and intergovernmental organizations to refrain from supporting, amnesties for genocide, war crimes, crimes against humanity and other gross violations of human rights or other serious violations of international humanitarian law;

(c) Encourages States to enact legislation with extraterritorial effect for gross violations of human rights and serious violations of international humanitarian law, and calls on those States with universal jurisdiction not to backtrack on their accomplishments;

(d) Urges Member States to refrain from using the principle of complementarity as a “licence for minimalism” which increases, rather than closes the impunity gap;

(e) Calls for the adoption of prioritizing strategies as a “focalizing” tool and a means to strengthen accountability;

(f) Encourages those developing a prosecutorial strategy to carefully consider different elements of prioritization, taking into account the consequences and implications of certain choices, and to design a strategy, with the effective participation of victims, with a view to maximizing accountability;

(g) Stresses that strategies for prosecutions should be particularly concerned with the systemic and/or structural dimensions of massive violations, patterns of violations, the identification of chains of command, and other supporting players and arrangements. The aim of prioritization strategies should be directed at disabling the web of actors and structures that enabled the various actors to jointly make the violations happen;

(h) Urges States to adopt and implement broader institutional and socioeconomic reforms which go hand in hand with prosecutions, and complement and reinforce each other.

(i) Emphasizes that designing a prosecutorial strategy is an important first step, but needs to be complemented with the willingness to implement such a strategy;

(j) Calls on States to adopt all necessary measures, including constitutional and legislative changes, to protect effectively the independence and impartiality of prosecutors;

(k) Urges authorities to refrain from reprisals against prosecutors for their independent and impartial efforts to bring perpetrators of mass violations to justice;

(l) Urges prosecutors to exercise diligently their duty to protect the public interest, which is not to be confused with defending the interest of a government, political party or State institution;

(m) Urges States and prosecutors to ensure that criminal justice does not become an instance of mere “turn-taking”. Prosecutorial investigations must follow credible indicia and abide by due process standards, and decisions to prosecute must be based on evidence alone, assessed in an even-handed manner. All explicit and implicit bars leading to one-sided prosecutorial activity must be removed.

(n) Urges States to pay appropriate attention to violations against individuals and to refrain from portraying the State as the ultimate and only victim of mass violations;

(o) Calls on prosecutors to concentrate on charges that are representative of actual crimes committed;

(p) Encourages States to consider the establishment of specialized bodies or coordination entities, afford them adequate financial and human resources, and ensure the adequate representation on them of people from a variety of backgrounds, including forensic and archiving experts for the preservation of critical evidence;

(q) Encourages more focused international and regional cooperation, with an emphasis on country-to-country and triangular support modalities;

(r) Calls for more victim participation in the design and implementation of prosecutorial strategies, and the institutionalization of participative mechanisms;

(s) Calls for more systematic and comprehensive studies of victim participation measures, particularly at the domestic level;

(t) Urges States to fulfil their duty to guarantee the safety of victims and all participants in processes meant to redress massive violations.

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