UNODC
United Nations Office on Drugs and Crime

The Status and Role of Prosecutors

A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide

CRIMINAL JUSTICE HANDBOOK SERIES

IAP

International Association of Prosecutors

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Foreword

United Nations Office on Drugs and Crime

While the role and status of prosecutors varies greatly among Member States, in all legal traditions prosecutors occupy a key position in the criminal justice system and exercise considerable powers and responsibilities. Ultimately, the rule of law cannot be upheld, nor can human rights be protected, without effective prosecution services that act with independence, integrity and impartiality in the administration of justice.

The United Nations Office on Drugs and Crime (UNODC) is mandated to assist Member States in reforming their criminal justice systems and implementing United Nations standards and norms in crime prevention and criminal justice. Those standards and norms include the United Nations Guidelines on the Role of Prosecutors, as well as the International Association of Prosecutors Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.

UNODC is also mandated to support Member States in combating or preventing the most serious forms of crimes, including organized crime, corruption and terrorism. The fight against these crimes requires not only well-trained and well-organized prosecutors but also prosecutors who are supported and protected by their governments.

This publication is conceived with the aim of assisting Member States in their review or development of rules for the prosecution service, in accordance with the above-mentioned international standards and norms. It obviously does not propose a single model for their implementation, but rather seeks to illustrate those standards and norms and to expose readers to different noteworthy practices.

Moreover, this publication is the welcome result of what has now become a long history of cooperation between UNODC and the International Association of Prosecutors. We very much hope that Member States and, in particular, their prosecution services, will benefit from this joint work.

Yury FEDOTOV

Executive Director of the United Nations Office on Drugs and Crime

International Association of Prosecutors

This publication is the culmination of a joint commitment by the International Association of Prosecutors (IAP) and the United Nations Office on Drugs and Crime (UNODC) to produce a guide to expand and illustrate the principles set out in the United Nations Guidelines on the Role of Prosecutors and the IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (the IAP Standards) and other relevant instruments which apply to the status and role of prosecutors within the context of criminal justice.

The catalyst for this commitment was the endorsement of the IAP Standards by the Commission on Crime Prevention and Criminal Justice in its resolution 17/2 at its seventeenth session, held in Vienna from 14 to 18 April 2008.

To produce a guide that encompassed the different legal traditions and criminal justice systems existing throughout the world and that spoke to all vested interests would demand a publication of encyclopaedic proportions, and it would be of only temporary application.

Accordingly, the present guide is intentionally generic and is designed to be relevant and useful in the long term to prosecutors and those associated with prosecutors and the service they deliver to the public.

It is acknowledged that this guide, as with any guide of this kind, can be improved upon through the constructive comments of our members and other readers. IAP welcomes the comments and suggestions of readers of this guide. The possibility exists to produce a further guide to address the status and role of prosecutors outside the context of criminal justice.

Special thanks are given to Elizabeth Howe, IAP General Counsel, who was instrumental in initiating this project and ensuring its successful completion on behalf of IAP.

Gerhard JAROSCH

President of the International Association of Prosecutors

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Contents

Introduction

A. The central role of prosecutors in criminal proceedings

> Prosecutors are the essential agents of the administration of justice, and as such should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary.
>
> (Report of the Special Rapporteur on the independence of judges and lawyers (A/HRC/20/19), para. 93.)

As essential agents of the administration of criminal justice, the prosecutor's role is one of great responsibility. Few other positions in society are invested with the authority and responsibility to decide on issues fundamental to the administration of justice.

In most systems, the core functions of prosecutors are the decision to prosecute and representation of the prosecution in court. Core functions in some jurisdictions may also encompass investigating crime, supervision of investigators' compliance with procedural rules, judicial interim release ("bail"), plea and sentence agreements, diversion of offenders to alternatives to prosecution, victim support, recommendations regarding sentence, the supervision of the execution of sentences and treatment of persons in custody. Additionally, in all systems the strategic role of prosecutors in criminal proceedings qualifies them to make recommendations concerning criminal justice policies.

In many systems, prosecutors may also have the role of representing the public interest and protecting vulnerable people (including children, disabled and aged persons and minority groups) in matters of civil or administrative law and may have a wider role within the public service. The focus of this guide, however, is solely on the prosecutor in relation to the criminal prosecution process.

All prosecutorial decisions must be made against a backdrop of the requirements of domestic law and procedure and a constant and unwavering appreciation of fundamental human rights. Much is expected of prosecutors and their respective offices by the courts, investigative agencies, the accused, victims of crime and the public they serve, who all must have the fullest confidence that prosecutors are exercising their authority properly and in accordance with the rule of law.

B. International standards for prosecution and prosecutors

Despite the central role played by prosecutors in criminal proceedings, there is little mention of prosecutors in international instruments in comparison with references to judges, defence lawyers and court administrators.

For example, neither the Universal Declaration of Human Rights nor the International Covenant on Civil and Political Rights mention prosecutors, and the case law of the Human Rights Committee of the United Nations gives little attention to the status of the prosecution.[1] Despite this absence of consideration in international instruments, prosecutors can be considered instrumental in the implementation of many of the principles set forth by international instruments, such as the right to a fair trial, the right to be heard by a court, the principle of equality before the law and before the court, and the prohibition against torture.

In 1980, at the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,[2] it was recognized that there was a need for defining international standards regarding prosecutors. The Congress (1980) linked the effective implementation of article 14 of the International Covenant on Civil and Political Rights to the proper selection and training of judges and prosecutors:[3] "Member States should ensure that those responsible for the functioning of the criminal justice system at all levels

[1] See Manfred Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, 2nd rev. ed. (Kehl/Strasbourg/Arlington, N. P. Engel Vertrag, 2005).

[2] United Nations congresses on crime prevention and criminal justice are convened every five years pursuant to resolution 415 (V) of the General Assembly. They gather Member States experts, as well as individual experts from academia and representatives of civil society. Resolutions made by the experts are then communicated to the Secretary-General of the United Nations and to the United Nations policymaking bodies.

[3] *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, 25 August-5 September 1980: report prepared by the Secretariat* (United Nations publication, Sales No. E.81.IV.4), chapter I, sect. B.16.

should be properly qualified for their tasks and should perform them in a manner which is independent of personal or group interest".[4]

The Seventh Congress (1985) underlined the importance of the "impartiality of prosecutors in instituting prosecutions" and the need to avoid any discrimination in the selection and appointment of prosecutors, and recommended that Member States should guarantee the objectivity of the prosecution service. The Seventh Congress further called for consideration to be given to drafting guidelines relating to the selection, training and status of prosecutors, their expected tasks and conduct, immunity, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings.[5]

The Guidelines on the Role of Prosecutors (hereafter referred to as "the Guidelines" and also known as the "Havana Guidelines") were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Their purpose is described as follows:

> The Guidelines … which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.[6]

The International Association of Prosecutors (IAP) was established in June 1995 at the United Nations offices in Vienna and was formally inaugurated at its first General Meeting in Budapest in September 1996. The main impetus for its formation was the rapid growth in serious transnational crime, particularly drug trafficking, money-laundering and fraud. There was

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[4] See Caracas Declaration, General Assembly resolution 35/171, annex, op. para. 5.

[5] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chapter I, sect. E.7.

[6] *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chapter I, sect. C.26, annex.

a perceived need for greater international cooperation between prosecutors and greater speed and efficiency in mutual assistance, asset tracking and other international cooperative measures. Its creation was also inspired by the United Nations, following the publication of the Guidelines on the Role of Prosecutors, since a vehicle was needed to promote the principles and standards contained therein.[7]

The Guidelines were the first international attempt to define the role of the public prosecutor but are addressed to States and those concerned with State action and do not address the relationship between the prosecutor and the executive or legislature in any detail. One of the most important of the objectives adopted by IAP in its constitution is to "promote and enhance those standards and principles which are generally recognized internationally as necessary for the proper and independent prosecution of offences" (art. 1.3 *(d)*), and work on that led to the creation in 1999 of the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (hereinafter referred to as "the IAP Standards"), in which, again, there was an acknowledgement of the work of prosecutors and their fundamental place in the administration of justice. The IAP Standards complement and expand the Guidelines and serve as an international benchmark for the conduct of individual prosecutors and prosecution services. They promote international cooperation, highlighting the need for independence. The IAP Standards assume a particular significance in that they are not the product of an agreement between States or governments but were written and adopted by prosecutors themselves, coming from all parts of the world and from different legal traditions, and may therefore be taken to represent the views of prosecutors themselves as to the standards that should apply to the profession of a prosecutor.

In 2008, through Commission on Crime Prevention and Criminal Justice resolution 17/2, the IAP Standards were recognized by the United Nations as being complementary to the Guidelines on the Role of Prosecutors, and Member States were invited to encourage their prosecution services to take the IAP Standards, together with the Guidelines and the addendum to the

[7] The International Association of Prosecutors is an international community of prosecutors committed to setting and raising standards of professional conduct and ethics for prosecutors worldwide; promoting the rule of law, fairness, impartiality and respect for human rights and improving international cooperation to combat crime. Its mission is to be a world authority for prosecutors in the conduct of criminal prosecutions and 25 associated matters and to operate as an organization of international repute and referral. IAP comprises more than 145 organizational members and more than 1,000 individual members from every region in the world, and holds special consultative status with the United Nations Economic and Social Council. It works in cooperation with many regional and international organizations such as the United Nations Office of Drugs and Crime (UNODC). (Elizabeth Howe, "The International Association of Prosecutors (IAP)", *Commonwealth Law Bulletin*, Vol. 38, No. 2 (June 2012), pp. 347-350.)

IAP Standards[8] into consideration when reviewing or developing rules for prosecutorial conduct in their own countries.[9]

The role of the prosecution has also been referred to in several United Nations crime conventions, which seek to increase the effectiveness of investigations and prosecutions against serious crimes such as drug trafficking, organized crime and corruption. Those conventions require States parties to ensure that any discretionary legal powers relating to the prosecution of such offences "are exercised to maximize the effectiveness of law enforcement measures".[10]

Finally, under article 11 of the United Nations Convention against Corruption, which recognizes the crucial role of the judiciary and the prosecution in combating corruption, States parties may take measures to strengthen integrity and to prevent opportunities for corruption, which may include rules of conduct, to the same effect as rules established for the judiciary, to be applied within the prosecution service in those States parties where the prosecution service does not form part of the judiciary but enjoys similar independence. The "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework" provides detailed information on the implementation of prosecutorial integrity.[11]

More detailed standards have also been issued at the regional level, particularly by the institutions of the Council of Europe.[12]

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[8]United Nations Office on Drugs and Crime, "Addendum to the Standards of Professional Responsibilities and Statement of the Essential Duties and Rights of Prosecutors: compilation of comments received from Member States" (Vienna, 2011).

[9]Commission on Crime Prevention and Criminal Justice resolution 17/2.

[10]United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations, Treaty Series, vol. 1582, No. 27627), art. 3, para. 6; the United Nations Convention against Transnational Organized Crime (United Nations, Treaty Series, vol. 2225, No. 39574), art. 11, para. 2; and the United Nations Convention against Corruption (United Nations, Treaty Series, vol. 2349, No. 42146), art. 30, para. 3.

[11]United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework", chapter 4.

[12]Council of Europe, Recommendation Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000. See also the opinions adopted by the Consultative Council of European Prosecutors: opinion No. 1 (2007) on ways to improve international cooperation in the criminal justice field, opinion No. 2 (2008) on alternatives to prosecution, opinion No. 3 (2008) on the role of prosecution services outside the criminal law field, opinion No. 4 (2009) on the relations between judges and prosecutors in a democratic society, opinion No. 5 (2010) on the role of public prosecution and juvenile justice, opinion No. 6 (2011) on the relationship between prosecutors and the prison administration, opinion No. 7 (2012) on the management of the means of prosecution services, opinion No. 8 (2013) on relations between prosecutors and the media, available at www.coe.int/t/dghl/cooperation/ccpe/opinions, and the European Guidelines on Ethics and Conduct for Public Prosecutors ("the Budapest Guidelines", 2005) adopted by the Conference of Prosecutors General of Europe at its sixth session, held in Budapest from 29 to 31 May 2005.

One of the major challenges in establishing an internationally recognized set of rules for prosecutors has been the differences in the rules regarding substantive law, evidence and procedures owing to the different legal traditions[13] and legal systems[14,15] existing worldwide. There are also various hybrid legal systems in operation, and the international tribunals and courts are now developing their own processes.

That challenge still continues to exist globally,[16] but it is becoming less and less pronounced, as different legal traditions and systems begin to meld together and adopt each other's characteristics[17] over time.[18] Despite the different legal traditions, it has proved possible to state principles of general applicability to prosecutors in different legal traditions, as the Guidelines, the IAP Standards and the various regional instruments demonstrate.

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[13] A "legal tradition" is the rationale and methodology behind how laws are created, interpreted and enforced in a country (see United Nations Office on Drugs and Crime, *Manual on Mutual Legal Assistance and Extradition* (Vienna, 2012), p. 8). The Manual also provides a description of the three major legal traditions:

- The civil law tradition is premised on the system of codification of laws, thus giving clear direction to a State's citizenry as to what the law is. It is the most commonly found legal tradition in the world.

- The common law tradition is premised on the law being developed through jurisprudence, essentially meaning that the courts make the law. Common law originated in England and is the legal tradition typically followed in the Commonwealth countries of the former British Empire and the United States of America. It is the second most commonly found legal tradition in the world.

- The Islamic legal tradition is premised on the fact that there is no distinction between a legal system and other controls on a person's behaviour. The tradition operates under the assumption that Islam, as a religion, provides all the answers to questions about appropriate behaviour and acceptable conduct. It is important to note that not all Muslim societies are bound solely by Islamic law and that some have a blended approach to their laws that incorporates other legal traditions.

[14] *Manual on Mutual Legal Assistance and Extradition*, p. 8.

[15] From the point of view of a comparison between prosecution systems, there are distinctions other than those made between those three legal systems that are undoubtedly much more significant. For example, whether a prosecution system takes the approach of discretionary prosecution (the opportunity principle) or mandatory prosecution (the legality principle) does not follow the civil law/common law divide. Nor does the important question of whether the prosecutors are a part of the executive or the judicial power, the question of whether the prosecutor may be subject to political instruction, or the question of whether the prosecution service is ordered hierarchically or on the basis of the independence of each individual prosecutor. Finally, there is a tendency of borrowing practices from other systems. Juries are now used in many civil law countries. Plea-bargaining is now used in a number of civil law countries. Many civil law systems have adopted more adversarial procedures. As an example of movement in the other direction, the now universal system of public prosecutor was a civil law institution that had no equivalent in the original common law system.

[16] See footnote 11.

[17] Scott N. Carlson, "Intro to civil law legal systems: INPROL consolidated response (09-002)" (International Network to Promote the Rule of Law, May 2009), p. 15.

[18] For commentary on the ongoing confluence of the civil law and common law traditions, see Vivienne O'Connor, "Practitioner's guide: common law and civil law traditions" (International Network to Promote the Rule of Law, March 2012), p. 33.

This guide does not specifically address the jurisdiction and the developing jurisprudence of the international ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, nor that of the International Criminal Court, which dispense international criminal justice. However, prosecutors working within those institutions are expected to have regard for the principles and standards enunciated in this guide. And in some instances, these courts and tribunals have developed their own bespoke prosecution standards and codes, which closely follow the IAP Standards and the Guidelines on the Role of Prosecutors.

It is against that constantly changing backdrop that the present guide is written with a view to stating some basic principles and tenets of the role and status of the prosecutor that should remain uniform and unchanged, no matter where in the world and under which legal tradition these roles are performed.[19]

C. Target readership

There are many individuals who are directly involved or have an interest in the roles and responsibilities of prosecutors and prosecution services. This document is written for individuals and groups, including the following, who may benefit from having an awareness of the internationally recognized standards found in the Guidelines and the IAP Standards and of how those principles should be applied in practice:

- National policymakers (executive and legislative branches of government)
- Prosecutors (public prosecutors, both full time and ad hoc appointed prosecutors)
- Technical assistance providers (United Nations and others) tasked with strengthening the integrity and capacity of prosecution services
- Criminal justice practitioners, including judges and defence lawyers
- Academia

[19] See A/HRC/20/19, paras. 29-34.

- Non-governmental agencies focusing on criminal justice and human rights
- Students
- The general public

Part I. Status of prosecutors

1. Prosecutorial independence

Norms and standards

Guidelines on the Role of Prosecutors

4. States shall ensure that prosecutors are able to perform their functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

2. Independence

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

"It is essential that prosecutors have sufficient independence or autonomy to take their decisions regardless of any outside pressure, in particular from the executive power of the State. Where such pressures can be and are brought the prosecutor will not be able to protect the interests of justice, will not be able to respect the rule of law or human rights, and will be powerless to deal effectively with cases of corruption or abuse of State power."

Source: Speech of the President of the International Association of Prosecutors, James Hamilton, at the opening ceremony of the 18th Annual Conference of the International Association of Prosecutors, on the theme "The prosecutor and the rule of law", held in Moscow from 8 to 12 September 2013.

The above quotation from James Hamilton emphasizes the importance of having a prosecution service with sufficient independence to be able to perform its duties free from inappropriate outside pressure. The term "independence" is sometimes misconstrued to mean absolute autonomy, but that is not necessarily the case. This section discusses the concept of independence in prosecutions and how it interacts with another pillar of prosecutions: accountability. In this section, independence will be considered in relation to other powers or institutions, such as the other branches of government that may control or influence the prosecution service. The relationship of individual prosecutors with their superiors in systems that are ordered hierarchically is considered below in section 3.3 ("Protection against unlawful orders and arbitrary action").

The Guidelines on the Role of Prosecutors do not take a definitive stance on the issue of the formal independence of prosecutors from the executive branch, recognizing that different legal traditions and legal systems deal with the principle in different ways. The IAP Standards expressly provide that when prosecutorial discretion is permitted it should be exercised independently and be free from political interference. While the possibility of instructions from non-prosecutorial authorities is envisaged, such instructions must be transparent, consistent with lawful authority and subject to guidelines in order to safeguard both the actuality and the perception of prosecutorial independence.

Independence of prosecutorial decision-making is recognized as being necessary as prosecutors play an important role and functions in relation to the executive branch. An independent prosecution service helps ensure that the Government and the administration are held to account for their actions. In order to fulfil this role and ensure the completely free and unfettered exercise of its independent prosecutorial judgement, a prosecution service

cannot be party to inappropriate connections with other branches of government, as that can lead to the prosecution service being subject to inappropriate influences from those other branches. Prosecutorial independence thus serves as the guarantee of impartiality, which in turn leads to a transparent and robust prosecution service with strong ethics and integrity based on the rule of law. This independence must also be maintained in the face of inappropriate pressure that may arise from the media and individuals or interest groups in the community or even the public as a whole.[20] When described in this manner, prosecutorial independence can be viewed as a fundamental component of the administration of justice.

Both the Guidelines and the IAP Standards also emphasize that prosecutorial decisions regarding criminal cases should be made free of outside influences, particularly, but not exclusively, political influence, in situations and legal systems where prosecutors may exercise discretion over the decision to prosecute.[21]

1.1. Principle of legality, principle of opportunity and independence

The decision to prosecute is one of the core responsibilities granted to a prosecutor and is generally exercised by using two different methodologies: the principle of opportunity and the principle of legality. These two methodologies are explained in more detail in part II, section 5, of this guide ("The prosecution test and the exercise of prosecutorial discretion"). It is important to emphasize the link between the application of discretion and the independence of prosecutorial decision-making. In States where the principle of legality applies, the prosecutor is in principle required to prosecute every case where there is sufficient evidence to sustain a prosecution.[22] This principle exists mostly in States using the civil law legal tradition; all common law jurisdictions, as well as some civil law jurisdictions such as France and the Netherlands, operate on the basis of the opportunity principle. In States where the principle of opportunity is utilized, prosecutors may exercise discretion with respect to whether or not to institute criminal proceedings or, when proceedings have been commenced, to decide whether to withdraw specific charges or the entire proceedings.[23] This discretion

[20] International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, item 3.

[21] Ibid., item 2.

[22] United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework", para. 150.

[23] Ibid., para. 130.

can potentially lead to abuse. The Guidelines[24] and the IAP Standards[25] state that in States where this methodology exists, the prosecutorial decision must be protected from interference, especially political interference. The IAP Standards and the Guidelines also recommend that the use of discretion be governed by policy guidelines within the relevant jurisdiction. A further mechanism to minimize the risk of abuse, used in States operating on the basis of the opportunity principle, is to provide for an internal review mechanism or an appeal to a court by the victim of a crime in the case of a decision not to prosecute.

1.2. Protecting prosecutorial independence

Prosecutorial independence refers to individuals as well as institutions. On the one hand, prosecutorial independence is an individual state of mind that enables an individual prosecutor to make decisions rationally and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference. On the other hand, prosecutorial independence should also underpin the institutional and operational arrangements that the State must establish to enable prosecutors to exercise their responsibilities properly and impartially. This means that protecting the prosecution of a case from political influence or other interference must be assured by the authority and independence of the prosecution service to which the prosecutor belongs and must be guaranteed by government.

In some States, every individual prosecutor has individual independence in the same way as a judge has. Such, for example, is the case in Italy. Other prosecution services are organized according to a hierarchical principle: while the individual prosecutor must make decisions in an independent manner, some decisions may be overruled or may be subject to confirmation by a more senior prosecutor. In hierarchical systems, the precise scope of any power to overrule or modify the decisions of a more junior prosecutor should be clearly established in legislation, regulations or protocols.

States have found different solutions to protect the independence of the prosecution service in its operations and in its relationship with the executive branch. These different forms are summarized in the following paragraphs.

[24] Guidelines on the Role of Prosecutors, para. 17.

[25] International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, item 2.1.

(a) Status of the prosecution services

Some prosecution services form part of the executive branch of a State's government. Where chief prosecutors are, for example, answerable to Ministers of Government for the proper exercise of the prosecution function, it is essential that the scope of the prosecutor's answerability is clearly set out in legislation and exercised lawfully in a transparent and publicly accountable fashion in accordance with international instruments, national legislation and sound ethical practice.[26]

Other prosecution services, while remaining part of the executive branch of government, have also been developed as stand-alone entities in order to further guarantee their independence. In Ireland, for example, the Prosecution of Offences Act, 1974, established the office of Director of Public Prosecutions as an independent office within the executive branch. The Attorney General has a power to hold a consultation with the Director on matters pertaining to the Director's function but has no power to give a direction or an instruction.[27] In England and Wales, for example, further to the creation of the Crown Prosecution Service in 1986,[28] the relationship between the Attorney General and the directors of prosecution offices (the Crown Prosecution Service and the Serious Fraud Office) were further defined in a protocol.[29] That protocol articulates the extent of prosecutorial independence and, in its paragraph 2.4, sets out that "the Attorney General is responsible for safeguarding the independence of prosecutors in taking prosecution decisions".

This trend is also observed in recent reforms where completely independent prosecution services have been created (for example, Argentina, Brazil, Canada, Kenya and Northern Ireland).

In some civil law countries (for example, France, Italy and Tunisia), prosecutors belong to the judiciary. Prosecutors are not themselves trial judges,

[26] See Hong Kong, China, Prosecution Code, sect. 1; United Kingdom of Great Britain and Northern Ireland, Crown Prosecution Service, "The Code for Crown Prosecutors", 7th ed., sect. 1.2 (London, January 2013); and United States, Department of Justice, United States Attorney's Manual, article 9-2.001.

[27] Ireland, Office of the Attorney General, Prosecution of Offences Act, 1974, sect. 2 (5) and (6).

[28] In England and Wales, the Crown Prosecution Service was established in 1986 as a statutory authority under the direction of the Director of Public Prosecutions by The Prosecution of Offences Act 1985. Section 3(1) of the Act provided as follows: "The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General".

[29] United Kingdom, Attorney General's Office, Crown Prosecution Service, Serious Fraud Office and the Revenue and Customs Prosecutions Office, Protocol between the Attorney General and the Prosecuting Departments (London, July 2009).

but their judicial status enables them to benefit from the regulatory measures protecting the independence of judges.

In some legal systems, the fundamental basis of the prosecutor's status is enshrined in the constitution. Prosecution services are either created by the constitution of the country where they operate or they have a constitutional or legislative mandate and protection to operate independently.[30] As a result, the status and function of prosecution services created in this manner cannot be changed without seeking a constitutional amendment requiring significant political consensus or at least legislative amendment. Constitutional and legislative provisions may also contain some basic principles protecting prosecutors from undue influence.

(b) Regulation of appointment and removal of heads of prosecution services

The head of a prosecution service should be appointed through a clearly articulated appointment process with established guarantees regarding salary and other emoluments, term of appointment, service in office and succession arrangements, a procedure for removal for cause, appointment of deputies in the case of incapacity, etc.[31] An appointment process involving the executive branch and representation of the legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in view of the risks of politicization of the prosecution service, it is important to provide transparency in the appointment process. Clear criteria for appointment to office should be established. Vacancies should be advertised and suitable candidates invited to apply. There should be input into the selection process from suitably qualified persons with suitable expertise and of high reputation. For example, in the Republic of Korea, a committee formed for the purpose recommends three candidates to the Minister of Justice. From those three, the Minister of Justice recommends one final candidate to the President. After a hearing by the Congress, the candidate may then be appointed by the President as the Prosecutor General. In Ireland, a statutory committee consisting of the Chief Justice, the Chairman of the General Council of the Bar of Ireland, the President of the Incorporated Law Society, the Secretary

[30] For example, in South Africa, the National Prosecution Authority was created pursuant to Section 179 of the *Constitution of the Republic of South Africa, 1996* (Act No. 108 of 1996). See in particular, paragraph 4 of section 179: "National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

[31] See Canada, Director of Public Prosecution Act, Statutes of Canada, chapter 9, sect. 121 (2006).

to the Government and the Senior Legal Assistant in the Office of the Attorney General assesses the suitability of candidates for office before the government makes its decision.[32]

In its report on the independence of the prosecution service, the Council of Europe's Venice Commission[33] stated the following:

> It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the State, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government.[34]

The involvement of an independent committee, such as a high judicial council,[35] in the appointment process is also an option, especially when the prosecution service is part of the judiciary.

Fixing by law a non-renewable term of office for the head of the prosecution service[36] and having an established, transparent and accountable regime for the removal of the head of the prosecution service serve to protect independence.

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[32] See Ireland, Prosecution of Offences Act, 1974, sect. 2 (7).

[33] Established in May 1990, the European Commission for Democracy through Law, known as "the Venice Commission", acts as the Council of Europe's advisory body on constitutional matters. The Venice Commission is composed of constitutional and international law experts, supreme or constitutional court judges and members of national parliaments. It is dedicated to the promotion of Europe's legal heritage and is now recognized as an international independent legal think tank.

[34] Council of Europe, "Report on European standards as regards the independence of the judicial system: part II — The Prosecution Service" (CDL-AD(2010)040), para. 34.

[35] Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers on 17 November 2010, appendix, chapter IV, paras. 26 and 27: Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system (para. 26).

[36] For example, as in the Republic of Korea, Singapore and Thailand and most jurisdictions in Australia.

(c) Appropriate resources allocated to prosecution services

The allocation of funds by the legislature to the prosecution service should be made in clear acknowledgement of the principle of the service's independence, and budgetary allocations should enable prosecution services to accomplish their mission and operate effectively.[37]

(d) Provisions regulating instructions to be given to prosecution services by the executive branch

Instructions to prosecutors from outside sources are particularly sensitive, as they can potentially give rise to actual or perceived abuse and improper influence. It is suggested that instructions given by the executive branch to the prosecution service be guided by the Constitution or by legislation. Legislation, guidelines and procedures must safeguard prosecutorial independence. If outside authorities are legally mandated to give general instructions (such as giving priority to certain types of crime) or specific instructions to prosecutors (including instructions to institute or terminate specific proceedings),[38] such instructions must be consistent with lawful authority and be given in a transparent and accountable manner.[39,40]

(e) Police and military prosecutors

Police prosecutors, i.e., officers belonging to the police force who are given prosecution powers, can often initiate part or all of the prosecution proceedings and appear in court for minor cases. This may raise an issue of prose-

[37] See Opinion No. 7 (2012) of the Consultative Council of European Prosecutors, document CCPE(2012)3 Final, para. 13.

[38] For example, in Austria the Minister of Justice is the de facto head of the prosecutorial system. The Minister can give the order to indict a person or to drop a case. Such instructions in each case must be provided in written form and are visible to suspects, victims and others who are allowed to see the file. The Minister also has to report to the Parliament once a year on cases in which such orders have been given.

[39] Article 30 of the French Code of Criminal Procedure states: "The Minister of Justice carries out the criminal policy defined by the Government. He ensures the coherence of its application throughout the national territory. To these ends, he sends general instructions to the prosecutors attached to the public prosecutor's office. He cannot issue to them any instruction in individual cases."

[40] In some States there is already a well-developed and well-established set of prosecution guidelines providing guidance for all aspects of a prosecutor's role and responsibilities (see the Code for Crown Prosecutors of England and Wales). Other States have not had as much experience in developing and utilizing guidelines but have recognized their utility and are in the process of developing their own guidelines while creating an ethos of utilizing the guidelines in their day-to-day operations (see Pakistan, Punjab Criminal Prosecution Service, "Prosecutorial decision-making guidelines" and "The prosecutor's field guide: a guide to effective prosecution" (2012)).

cutorial independence, as police prosecutors may receive orders or suggestions from the police hierarchy or their investigating colleagues regarding the initiation, conduct or withdrawal of a prosecution and may not be able to resist even if a prosecution is not desirable from a legal or public interest point of view. The public perception of such relationships can also adversely affect community confidence in the integrity of the prosecution process and therefore the criminal justice process. For this and other reasons, some systems have tried to "phase out" police prosecution in various ways.[41]

Military prosecutions can also present a challenge to prosecutorial independence. As stated by the Special Rapporteur on the independence of judges and lawyers, "States must ensure that the conduct and functioning of prosecutors in military courts comply with international norms and standards. Prosecutors in military courts must act independently and impartially and uphold the rule of law in the same manner as those discharging their functions in civilian courts."[42]

2. Accountability

> The fair, independent and impartial administration of justice also requires prosecutors to be held to account should they not fulfil their functions in accordance with their professional duties. In this vein, the Special Rapporteur emphasizes that autonomy should not exist to the detriment of accountability (A/HRC/20/19, para. 82).

As noted above, the independence of the prosecutor does not mean that a prosecutor is completely autonomous and accountable to no one. Prosecution services are accountable to the executive and legislative branches of government, to the public and to an extent the judiciary. "Accountability" of the prosecutor means that a prosecution service may be required to account for its actions either by filing reports, responding to inquiries or,

[41] Chris Corns, "Police summary prosecutions: the past, present and future", paper presented at the History of Crime, Policing and Punishment Conference, Canberra, December 1999. Two main models of phasing out were experimented with: restructuring, i.e., creating a more specialized prosecutorial service within the police, possibly including civilian lawyers, separated from investigation units; and "wholesale transfer" (transfer of all the police prosecutorial functions to the public prosecution service). This latter method raises human resource issues as well as funding issues. In Ireland, while the police may still prosecute summary offences in the lower courts, they must do so in the name of the Director of Public Prosecutions and are subject to any general or specific directions he or she may give (see Garda Síochána Act 2005, (Irish Statute Book), sect. 8).

[42] See A/HRC/20/19, paras. 55-57.

in some situations, acting as a respondent in a court hearing. Accountability may also mean that a prosecution service can potentially be held liable as a result of inefficiencies and abuses of its authority.[43] Individual prosecutors are also accountable for their decisions and actions, through the courts, the hierarchies of their prosecution services, their professional associations and the media and public interest in their professional conduct.[44] Many standards mentioned in this guide are related to accountability, including oversight mechanisms, discipline and maintaining statistics.[45] Accountability also involves accountability to other branches of government and the general public.

2.1. Accountability to the executive and legislative branches of the government

First, a prosecution service may be required to report on its activities or on specific issues to the executive branch and to the Parliament.

The Ministry of Justice, the legislative branch and financial and auditing services of government can be kept informed of the activities and expenditures of a prosecution service in a variety of ways.[46] One method is the preparation and tabling of annual reports to the legislature[47] and in some jurisdictions the subsequent publication of those reports. The appearance

[43] Andreas Schedler, "Conceptualizing accountability" in *The Self-restraining State: Power and Accountability in New Democracies*, Andreas Schedler, Larry Diamond and Marc F. Plattner, eds. (Boulder, London 1999).

[44] "Accountability is an acknowledgement that prosecution services derive their powers from the State, which in turn derives its powers from the people." (Martin Schönteich, "Strengthening prosecutorial accountability in South Africa", ISS Paper 255 (Institute for Security Studies, South Africa, April 2014) p. 2).

[45] For a thorough discussion of measures to ensure integrity and accountability of the prosecution, see United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework".

[46] See the Explanatory Memorandum to Council of Europe Recommendation Rec(2010)19 of the Committee of Ministers to Member States on the role of public prosecution in the criminal justice system: "Apart from individual decisions that are the subject of specific recommendations, all public prosecutors … must give account of their work at local or regional level, or indeed national level if the service is highly centralized. These regular accounts must be made to the general public — either directly through the media or a published report, or before an elected assembly."

[47] Canada, Director of Public Prosecutions Act, *Statutes of Canada*, chapter 9, sect. 121, paras. 16(1) and (2) (2006). The wording of subsection 16(1) below comes into force in October 2014:

> 16. (1) The Director shall, not later than June 30 of each year, provide a report to the Attorney General on the activities of the office of the Director in the immediately preceding fiscal year (S.C. 2014, c. 12, s. 152).
>
> (2) The Attorney General shall cause a copy of the Director's report to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after he or she receives the report.

of senior members of the prosecution services before legislators to answer questions regarding the operation of the prosecution service[48] is an example of another method.

However, care should be taken to ensure that any accountability to Parliament does not extend to permitting the legislature to give directions to a prosecutor in any individual case or to compel the disclosure of information which is properly confidential.

2.2. Accountability to courts

Prosecutors are accountable to courts to an extent, insofar as their actions are always under scrutiny by the courts and in some cases can be reviewed by the courts.[49] Examples of accountability include the undertaking of a review of a prosecutor's decision not to prosecute a particular individual[50] where citizens took issue with that decision or where the court wished to satisfy itself and as a result satisfy the public that a decision not to continue with the prosecution of a high-ranking politician was based on the law and on no other extraneous factors.[51]

2.3. Accountability to the public

Owing to the nature of their work, the prosecution service engages with members of the public on a regular basis. As a major component of the administration of justice in their communities, the public expects prosecutors to perform their duties efficiently, competently, fairly and impartially.

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[48] See Jason M. Breslow, "Is Wall Street Still 'Untouchable'?", PBS Frontline, 21 May 2013, commenting on United States Attorney General Eric Holder's responses to the United States Senate Judiciary committee on the lack of United States Justice Department prosecutions of United States financial institutions after the 2008 financial crisis. For an example of a civil law State responding to a parliamentary committee see the commentary provided by Eric J. Maitrepierre on the *Outreau* case in France in his article "Ethics, deontology, discipline of judges and prosecutors in France" in *Resource Material Series No. 80* (Tokyo, Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, March 2010), p. 258.

[49] See Opinion No. 12 (2009) of the Consultative Council of European Judges and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors on the relations between judges and prosecutors in a democratic society, para. 32.

[50] See *Manning, R (On The Application Of) v. Director Of Public Prosecutions (2000)* England and Wales High Court, EWHC Admin 342 of 17 May 2000.

[51] Democratic Alliance v. The Acting National Director of Public Prosecutions, Case No. 288/11 [2012] ZASCA 15, 20 March 2012 and Democratic Alliance v. President of the Republic of South Africa and Others 2013 (1) SA 248 (CC). See also National Director of Public Prosecutions v. Freedom Under Law, Case No. 67/14 [2014] ZASCA 58, 17 April 2014 and Booysen v. Acting National Director of Public Prosecutions and Others, Case No. 4665/2010 [2014], 26 February 2014.

Prosecution services are accountable to the public they serve and as such they should be in a position to inform and explain actions they have taken in the administration of justice.

As previously mentioned, in some jurisdictions the annual report that the prosecution service submits to the legislature is also made available to the general public at the same time or at a later date. That allows the public to see what activities the prosecution service has engaged in over the previous year, thus enhancing transparency and accountability. The publication of prosecution guidelines and rules of conduct also facilitates public scrutiny of the prosecution service by providing information on the roles and responsibilities of prosecutors and the prosecution service.

Local community engagement is another way for prosecution services to explain their roles and responsibilities to the citizens they serve and the rationale for the decisions that have been made by the prosecutions service. For example in Japan, prosecution review committees were established as a way of including the public in the criminal justice system. The principal function of the committees is to empanel a group of randomly chosen Japanese citizens to examine and review a prosecutor's discretion in decisions not to indict: "[The committees] can exert a significant authority over, and insert public sentiments and equitable judgments into, prosecutorial decisions on politically sensitive cases or controversial issues".[52] Such a mechanism may not be supported by many legal systems, however, being viewed as an inappropriate infringement on the independence of the prosecutor. It should be borne in mind that the IAP Standards require the prosecutor to "remain unaffected by individual or sectional interests and public or media pressures".[53] The IAP Standards encourage consideration of the "views, legitimate interests and possible concerns of victims and witnesses" but does not suggest that any consultation with a wider public is either desirable or appropriate.[54] A more acceptable procedure may be to provide for recorded consultation between the prosecution and police and victims of crime, which may make the process sufficiently accountable.

At the individual level, stating reasons for specific decisions, for example, explaining to a victim why a prosecutor is seeking a specific range of

[52] Hiroshi Fukurai, "Japan's prosecutorial review commissions: lay oversight of the Government's discretion of prosecution", in *East Asia Law Review*, vol. 6, No. 2 (Philadelphia, University of Pennsylvania Law School, 2011), pp. 1-42.

[53] International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, item 3 *(b)*.

[54] Ibid., item 4.3 *(b)*.

sentence in their case (where the legal system permits that to be done), is a way to enhance transparency for the general public.

3. Directions to prosecutors and management of the prosecutor's office

Guidelines on the Role of Prosecutors

DISCRETIONARY FUNCTIONS

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

4. Role in criminal proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

EMPOWERMENT

6. In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: […]

(i) to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

A management vision at the highest level and an organizational structure promoting the Guidelines and the IAP Standards while supporting prosecutors in their daily duties is important for a robust and transparent prosecution process. The following sections deal with the need for a clear organizational structure, guidelines for prosecutors in performing their duties within their respective legal regimes and—in this time of increasingly complex crimes and criminal enterprises and classes of offending requiring special prosecutorial skills—the need for specialized prosecutors to combat certain types of crime.

There are a number of different methods for ensuring that even large prosecution services have a consistency of approach with respect to various aspects of their operations. Prosecution guidelines are one method that can provide standard operating procedures for prosecutors, but the headquarters element of a prosecution service can also provide ongoing guidance[55] through publications addressing recent developments in the domestic law of a State or in some cases, regional decisions that may affect the operation of a prosecution service.[56] In an age of increasingly specialized sub-units of prosecution services, the management has a responsibility to ensure that there is coordination among sub-units when working on a case with overlapping mandates. For example, a drug prosecution sub-unit might prosecute a large drug trafficking case in which a large amount of money and assets attributed to the trafficking of the drugs will be dealt with by a money-laundering sub-unit and proceeds of crime by another sub-unit of the same prosecution service.

3.1. Hierarchical organizations

In performing their duties, prosecutors must keep in mind "the rights of the individual and the necessary effectiveness of the criminal justice system as a whole".[57]

Further,

> In the civil law system, where the prosecution may form part of the judiciary, prosecutors may enjoy individual independence but may also function as part of the judicial hierarchy with regulated limitations on the exercise of discretion. In the common law tradition, where the prosecution is part of the executive and may be integrated into the justice department, it may enjoy a very high degree of independence

[55] See, for example, the Crown Prosecution Service of England and Wales guidance for various types of offences such as domestic violence, assisted suicide and hate crime. Those and other examples of the United Kingdom Crown Prosecution Service policies are available at www.cps.gov.uk. The French Ministry of Justice also provides guidance publications for prosecutors (*circulaires*) addressing the same concerns in the civil law context.

[56] For example, decisions from the European Court of Human Rights that may have bearing on the prosecution services of European Union member States.

[57] Antonio Mura, President of Consultative Council of European Prosecutors, "Council of Europe Standards on Public Prosecutors", statement to the 18th Annual Conference of the International Association of Prosecutors, "Essential ethical standards for prosecutors: how to assure integrity", Moscow, 12 September 2013.

> and be guided by internal rules and regulations governing the exercise of discretion and other powers.[58]

Hierarchical organizations can coordinate the efforts of a prosecution service as a whole while also allowing prosecutors to properly exercise their discretion:

> With regard to the internal organization of prosecution service departments, the prevailing model at the European level is definitely that of a hierarchical structure, which many countries prefer for reasons primarily connected with ensuring the effectiveness and consistency of prosecutions.
>
> However, the requirements that such a hierarchical structure should meet according to the Council of Europe Recommendation Rec(2000)19 on the role of public prosecution are very specific and intended to assure impartiality in the conduct of criminal prosecutions and the independence of the prosecution service, with the sole objective of maximizing the operation of the criminal justice system.[59]

A hierarchical system provides strong advantages for organizational control and management and is better able to deliver a much sought-after consistency of approach within a prosecution service. However, some countries have chosen to follow a different structure for various reasons. In Italy, for example, the prosecution services do not follow the hierarchical organizational structure:

> No hierarchical organization of prosecution offices exists at a national level and the power to prosecute is diffused and not centralized. This has been usually considered as a means of avoiding interference by the Executive and of guaranteeing the equal treatment of citizens.[60]

3.2. Guidelines and policies

In performing their duties, prosecutors will deal with a large number of issues on a daily basis. Those issues cover both the legal and administrative aspects of their work and can be either routine or complex and unusual.

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[58] United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework", para. 131.

[59] See footnote 57.

[60] www.euro-justice.com.

A quick reference compendium of legal, procedural and administrative guidelines serve as useful and necessary tools for the smooth and consistent functioning of a prosecution service.

There are tangible benefits in having established policies and guidelines in prosecution services for all to follow in the performance of their duties. Many prosecution services worldwide have established guidelines[61] for many aspects of a prosecutor's practice, some of them being annotated with recent case law,[62] thus providing a legal backdrop for the policy and allowing prosecutors to take direction from the law. The guidelines (often also known as "policy manuals", "desk books" or "codes") provide both prosecutors and managers with a quick reference to common questions that arise during the daily practice of their profession and allow for quick reference and consistent responses to those queries within the prosecution service and outside it. Making reference to a manual can provide not only direction to the individual prosecutor but also protection from accusations of arbitrary conduct if a decision to pursue or not pursue a certain course of action is challenged at a future date.

Reference to how the guidelines guided their decisions can provide an articulable, legally sound response to any challenges that may arise and further promotes transparency in the decision-making process.[63]

In order for guidelines to be truly effective, they must be promoted and utilized at every opportunity by management to show both their importance and efficacy in the daily operation of the prosecution service.[64] This practice

[61] In the civil law tradition, see, for example, France, *Circulaire de politique pénale de Mme la garde des sceaux*, NOR: JUSD1235192C, 19 September 2012.

[62] See Hong Kong, China, Prosecution Code, and Ireland, Office of the Director of Public Prosecutions, Guidelines for Prosecutors (available at www.dppireland.ie).

[63] An example of a typical table of contents covering various aspects of prosecutions including the prosecution of specific types of cases can be found in the Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales (Sydney, 2007):

> The Director of Public Prosecutions; Role and duties of the Prosecutor; Fairness; The decision to prosecute; Expedition; Settling charges; Discontinuing prosecutions; Election for offence to be dealt with on indictment; Finding bills of indictment; Taking over proceedings; Privacy; Reasons for decision; The Director of Public Prosecutions and police; Advice to police; Induced statements; Informers; Immunities (indemnities and undertakings); Disclosure; Victims of crime, vulnerable witnesses, conferences; Charge negotiation and agreement, agreed statements of facts, form 1; Young offenders; Mental health issues; Unrepresented accused persons; Judge alone trials; Jury selection; Witnesses; Evidence; Sentence; Appeals against sentences; Proceeds of crimes; Retrials; Media contact; International guidelines; Calling of expert evidence and the use of audiovisual links.

[64] See A/HRC/20/19, para. 73: "In order to ensure a fair and consistent approach in criminal justice policy, general guidelines can be issued by the prosecution service itself (internally) and by non-prosecutorial authorities (externally). The issue of policy guidelines and other general instructions for the prosecution service may be of importance to create consistency in the actions of the prosecution service. In this vein, the United Nations Guidelines state that States shall ensure that prosecutors are made aware of the ideals and ethical duties attributable to their public office."

must occur primarily with new prosecutors at the induction phase and be reinforced throughout their careers. Care must be taken to ensure that more experienced prosecutors do not forget the basic responsibilities of their office while also promoting the idea that guidance in dealing with difficult and complex problems[65] can frequently be found in the guidelines. The guidelines should be constantly reviewed and revised in the light of experience and changing practice.

Guidelines for prosecutors are usually read in conjunction with legal obligations on prosecutorial conduct found in the primary and subordinate legislation in each State, as well as in codes of professional ethics, and many States have taken steps to adopt guidelines that assist prosecutors with their professional responsibilities.

Many States have embraced international standards such as those created by the International Association of Prosecutors and the United Nations and have incorporated those standards into their domestic law and their prosecutorial guidelines.[66]

3.3. Protection against unlawful orders and arbitrary action

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

6. In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: […]

(i) To relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

One of the hallmarks of an individual prosecutor's ability to exercise discretion and independence while being part of a hierarchical system is the ability and the duty to refuse orders from superiors that are unlawful.

[65] For example, see the commentary found in the Public Prosecution Service of Canada Deskbook, chapter 2.4, on the risk of "tunnel vision" in criminal cases.

[66] See South Africa, National Prosecuting Authority Act (No. 32 of 1998), chapter 4, para. 22 (4) *(f)*, which provides that the National Director of Public Prosecutions "shall bring the United Nations Guidelines on the Role of Prosecutors to the attention of the Directors and prosecutors and promote their respect for and compliance with the above-mentioned principles within the framework of national legislation".

The Special Rapporteur on the independence of judges and lawyers,[67] as well as the Council of Europe Council of Ministers,[68] endorses allowing prosecutors to request to receive instruction in writing.

Different States have different methods of ensuring that independence is safeguarded, and it is important that the ability to refuse or voice concerns over a direction or an order is available to every prosecutor serving in a prosecution service. An example of one way of ensuring that this duty is articulated is shown below in this excerpt from the Hungarian Prosecution Service. Not only is the right to refuse enshrined but also there is a protocol for recording the refusal for review, setting out what can be done in the case of a refusal:

> The higher-ranking prosecutor's power to give instructions, however, is not without limits. The prosecutor is obliged to reject any instruction which when carried out would involve a criminal offence or contravention. Moreover, he may also refuse to carry out an instruction when, by following the instruction, his life, health or corporal integrity would be seriously and directly endangered. It is of more practical importance that if the prosecutor considers the instruction to be incompatible with his professional opinion, he may ask for an exemption from proceeding with the case. This request should be put in writing and be motivated. Compliance with such a request cannot be denied, the prosecutor concerned should be substituted by someone else or the superior prosecutor can take over the case. In addition, the prosecutor may refrain from acting on an instruction before it is issued in written form.[69]

Prosecutors should also be protected against arbitrary actions taken by their superiors, such as reassignment of cases without explanation, reduction in seniority or pay scale without cause or forced relocation to another part of the prosecution service's area of operations without consideration of the prosecutor's personal circumstances and without an operational requirement. Such actions can impinge on the independence of the prosecutor and can also have a negative effect on the morale of the individual prosecutor concerned, leading to a resultant negative effect on the operational effectiveness of the prosecution service.

Prosecution services with organizations that look after their interests can help ensure that situations such as those mentioned above are avoided or

[67] See A/HRC/20/19, para. 74.

[68] Council of Europe, Recommendation Rec(2000)19, para. 10.

[69] See Eurojustice, "Country report: Hungary", chapter II.

can be addressed in a transparent and fair manner. It is also beneficial to have defined grievance procedures in place so that matters of the type mentioned above can be addressed. See section 5.2 ("Rights of prosecutors), below, which covers the benefits of associations of prosecutors for, inter alia, protecting the rights of prosecutors.

3.4. Specialization of prosecutors

The nature of crime and the methods by which crime is perpetrated are constantly evolving, with a criminal element that capitalizes on developments in technology, world affairs and the changing needs of the population. Many criminals exhibit a level of organization and sophistication that poses real challenges in both the investigation and prosecution of offences. The legal regime and legislation needed to combat these types of crimes can also be very complex, so that prosecutors require specialist knowledge and experience.

There are also more traditional kinds of crime, such as child sexual assault and sexual assault in general, civil rights abuses, environmental crime, taxation fraud, election crimes and other types of crime, for which special skills and a multidisciplinary approach may be required in order to achieve the most effective prosecution and best outcomes for those involved.

In order to deal with these challenges, prosecution services should consider creating specialized units or sections of their prosecution services that can concentrate on the investigation and prosecution of various discrete types of offences.

Certain crimes often require a multidisciplinary approach, with the prosecution being only one aspect.[70] This is particularly true in the case of complex fraud, cybercrime and crime committed in other specialized fields. Prosecutors who are dedicated to a specific prosecution section can build the necessary relationships and expertise with other participants in the investigation, thereby providing much-needed continuity of advice and knowledge of the file in order for the investigation and prosecution to be successful.

[70]The explanatory memorandum to Council of Europe Recommendation Rec(2000)19 notes the following type of specialization: "The formation, under the direction of prosecutors who are themselves specialists, of truly multidisciplinary teams whose members are drawn from a variety of backgrounds ... This pooling of expertise in a single unit is a vital factor in the operational effectiveness of the system".

Challenges arise with this model as care should always be exercised to prevent the impartiality and objectivity of the prosecution from being compromised owing to close and ongoing cooperation between the prosecution and the investigators.[71] Some prosecution services independent of the investigation process have addressed this issue by dividing their prosecutors into different groups, with one group being tasked with providing ongoing legal advice during the investigative stage, while another group takes the file when it is completed and makes an independent assessment of the strength of the investigation, deciding whether to prosecute and actually prosecuting the case.[72] This separation of responsibilities and effort makes it possible to provide much-needed professional legal advice during the conduct of a complex investigation while at the same time not adversely affecting the prosecutor's role and status as an independent arm of the justice process.

Many prosecution services have already engaged in this type of activity, with dedicated prosecutors being assigned to concentrate on organized crime, terrorism, proceeds of crime and money-laundering, anti-corruption or cybercrime or, in the case of diversion from the formal criminal process to drug treatment courts, mental health courts, domestic violence courts, etc. In some jurisdictions, these prosecutors may operate in tandem with specific types of courts, while in others the creation of specific sections of prosecutors is solely the result of the head of prosecutions seeing a need for expertise in a specific type of crime and therefore assigning specific prosecutors to address it.[73] In other cases, it may be as a result of a State ratifying an international convention that recognizes the need for specialist prosecutors to address the issues that the convention was put in place to combat. The Convention against Corruption, for example, requires States to ensure the existence of bodies or persons specialized in combating corruption through law enforcement.[74]

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[71] See Bruce A. MacFarlane, "Wrongful convictions: the effect of tunnel vision and predisposing circumstances in the criminal justice system" (Government of Ontario, Canada, 2008), part III, sect. B, item 4*(b)*(4), p. 55, in which the author notes the following: "The criminal justice system has important checks and balances built into it. Distinctions between roles are a part of those checks and balances. A blurring of the Crown role can lead to a loss of objectivity in the assessment of the case, and set the stage for Crown tunnel vision to set in. A Crown attorney co-opted by the police is, at best, unhelpful to the investigators, and, at worst, can through admittedly skilful advice eventually take all of the justice system participants through the tunnel and into a wrongful conviction."

[72] See Canada, Public Prosecution Service of Canada Deskbook, chapter 2.7, where it is recommended that counsel who advises the investigative agency during the investigation be different from counsel who conducts the prosecution.

[73] See, for example, the Serious Fraud Office of England, Wales and Northern Ireland or the National Accountability Bureau of Pakistan.

[74] United Nations Convention against Corruption, art. 36.

Specialization of prosecution services may also involve concentrating particular types of cases in one prosecution office in order to ensure that prosecutors have physical protection and are free from external pressures.[75]

3.5. Assignment of cases

Criminal proceedings cover a vast spectrum. Some cases will have few legal issues, witnesses who are not vulnerable and exhibits that are of a type and number that are easily managed. Other cases will be vast, complex affairs with multiple accused, complex legal and evidentiary issues, vulnerable and protected witnesses and exhibits requiring complex forensic analysis and detailed testimony. As noted in the report of the Special Rapporteur on the independence of judges and lawyers:

> The method for assigning cases within the prosecution service is another important element to safeguard the independence and impartiality of prosecutors. An independent and impartial case assignment system protects prosecutors from interference from within the prosecution service.[76]

The level of experience and, sometimes, the number of prosecutors assigned to any given case can have an effect not only on the success or failure of the case, but also on the prosecutors assigned to conduct it. Prudent assignment of cases that are commensurate with the level of experience of the prosecutor, keeping in mind the cumulative stress that can sometimes come with repeated complex or emotionally trying cases, is a major concern in maintaining the well-being of the prosecutors on staff and the operational effectiveness of a prosecution service.

It benefits no one in the criminal justice system to overburden prosecutors or send them to court to conduct cases that are beyond their level of expertise or experience. Careful management and tracking of case

[75] An example, is found in Italy: "In 1991 a law was enacted establishing, within the office of the General Prosecutor to the Supreme Court, the *Procuratore nazionale antimafia* (national prosecutor against the mafia). His task is to promote the cooperation and the exchange of information among public prosecutors and to support their investigation in most serious cases, involving mafia crimes and, more generally, organized crime. For the same crimes, a special group of prosecutors (*Direzione distrettuale antimafia*) assigned to the office to the tribunal which is situated in the chief town of the district is entitled to investigate and prosecute. The national prosecutor against the mafia can take the case away from the competent prosecutor, but only if the latter remains inactive or refuses to cooperate; moreover, the measure can be opposed with a claim to the Prosecutor-General to the supreme court." (Eurojustice, "Country report: Italy", chapter II).

[76] A/HRC/20/19, para. 80.

assignments is crucial to ensuring that all cases are either prosecuted fairly and vigorously to the extent that the law will allow or screened out of the criminal process through careful consideration and the application of the appropriate legal tests.

3.6. Improvements in case management

Accountability, transparency and operational effectiveness all require a prosecution service to be able to track and articulate what is being done on any file that has been opened or closed by any office in the prosecution service. In most jurisdictions, that will require considerable effort on the part of the administration in conjunction with management and the prosecutors themselves to ensure that the file is properly documented and tracked throughout its lifetime, including while archived.

There are a number of advantages to tracking files in this manner, some of the major advantages are as follows:

- The ability to generate statistics on the files that can assist in improving the efficiency of the prosecution service as well as providing performance information to support public accountability
- Ensuring that individual prosecutors are not overburdened by too many files
- Ensuring that individual prosecutors are assigned files in enough time to properly prepare the case
- The ability to quickly access files in order to brief senior officials or other interested parties such as victims or witnesses as to the status of the file
- The ability to review a file that has been closed to see what the outcome was (i.e., closed for lack of evidence, acquittal and on what grounds, conviction and sentence, recommendations for appeal)
- The ability to share pleadings, decisions or methodologies among prosecutors who have similar cases, allowing for lessons learned to be disseminated and helping to ensure consistency of response

There are many software packages in existence, used by prosecution services worldwide to address the above-mentioned types of issues, as well

as a number of manual file management systems that have proved to be effective.[77] It is suggested that each State look at the specific requirements of their legal system and either modify or create a case management system[78] for their offices that is managed and maintained by dedicated and experienced staff.

Finally, one should bear in mind the desirability of creating a case management system that can follow the outcome of a case through all the processes—including the police investigation and the subsequent court outcome—and not merely the processes for which the prosecutor is responsible. Of course, this should be done while preserving all necessary confidentiality of the different actors in the legal process. Often, different legal case tracking systems are not compatible, and apart from causing operational difficulties, that makes the problem of obtaining accurate and reliable crime statistics more difficult.

3.7. Importance of maintaining statistics

Statistics can be used in a positive way in many enterprises, including the realm of a prosecuting authority. Case clearance rates, actions taken in response to incoming cases, the number of cases being handled by a prosecution service or sub-office by day, week, month or year can tell a prosecutor general or director of public prosecutions a great deal about how staff should be allocated, whether a sub-office or a court system is working efficiently, what actions should be taken and how those challenges may be resolved. Overwhelmed prosecutors are not in a position to make sound and timely decisions, and they may become more reactive than proactive, resulting in poor decisions affecting the accused, victims, police, the court and the public in general. Careful scrutiny of the number of cases carried by each prosecutor and the case clearance rate of an office can inform senior officers as to the action that needs to be taken. It may very well be

[77] An example of a manual system is the one utilized in Ethiopia. Case files were identified by a uniform identifier number and colour. Alphabetical log books and a material index that define a code number related to the nature of the offence were studied, tested and implemented. A fast-tracking card system allowed fast access to files. This system was created on the basis of specific training of the staff and the implementation of standard operating procedures. See "Evaluation report: improvement of the justice system in the Federal Democratic Republic of Ethiopia" (Addis Ababa, 2010), p. 31.

[78] See, for example, the Republic of Korea's electronic system, used pursuant to the Act on the Use of Electronic Documents in Summary Proceedings. Targeting cases such as drunken driving or driving without a licence, the summary case procedure, subject to the consent of the suspect, can be electronically processed, without paper records. Under this system, the case proceeding period (from the police intervention to the court's issuance of a summary order) can be reduced from 45 days to about 25 days, and the progress of the proceedings can be inquired about through the criminal justice portal.

that efficiencies can be found simply by ensuring that each prosecutor's caseload is properly maintained instead of overburdening some while others have capacity to do more. Statistics can also be useful in addressing negative perceptions held by groups or individuals regarding the efficiency of a prosecution service. Statistics allow the prosecution service to answer queries of this type in a transparent and defensible manner, thus reinforcing public confidence in the administration of justice.[79]

Challenges arise, however, when statistics are used to measure the performance of prosecutors or if they are used as an overall indicator of "success" in the pursuit of a certain crime or programme. The idea of "winning or losing" a criminal case if the case was decided fairly on its merits should not be a deciding factor in assessing a prosecutor's performance or lack thereof. Careful reviews of cases should take place where errors of judgement or law on the part of the prosecutor might be identified and dealt with, but these are sometimes harder to identify as a "failure" on the part of the prosecutor as there are usually multiple options that were available at the time that the decision was made, all of them with their positive and negative outcomes. There are times when an acquittal is a just and proper verdict, and that must be taken into account as well. Managers should assess each case on its merits before deciding whether the performance of a particular prosecutor is lacking.[80] Appropriate considerations will include whether the prosecutor concerned applied the law correctly, whether he or she took into account all relevant factors and evidence and also, where

[79] See, for example, how the Crown Prosecution Service of England and Wales addressed the issue of allegedly ineffective prosecutions raised by a major newspaper. The Times asked for a response to the claim that the number and proportion of ineffective trials due to court/Crown Prosecution Service reasons was on the rise. In response, a Crown Prosecution Service spokesperson said the following: "The number of Crown Court ineffective trials due to prosecution reasons is at the lowest, proportionally, since 2010/11. Of course any delays are regrettable, and where a victim or witness withdraws support for the prosecution we do what we can to overcome this, but it is misleading to portray this as either a growing trend or indicative of CPS inefficiency. We are protecting frontline teams and improving our overall performance; conviction rates have remained consistent at 85 per cent or above for the past eight years." (Source: Crown Prosecution Service).

[80] See Organisation for Economic Co-operation and Development, "Anti-corruption specialisation of prosecutors in selected European countries", chapter 1, item 1.3.3.:

> While there are no international standards for the assessment of effectiveness of the prosecutors, it is possible to propose criteria based on good practice developed in various countries:
>
> - The prosecution rate: number of persons prosecuted, including decisions on waiver of prosecution, relative to the total number of indictments
> - Speed of case-flow: how quickly a decision to prosecute or not prosecute is made
> - Number of cases referred to the court relative to the number of cases that have been referred for prosecution by investigatory bodies
> - Uniformity of application of law for the most common types of prosecutorial decisions.
>
> Care must be exercised in applying measures of efficiency that might motivate prosecutors to put speed and number before quality of investigations/prosecutions.

applicable, applied any public interest criteria appropriately. To that end, it is important that prosecutors accurately and comprehensively record their decision-making considerations. An overreliance on quantitative measures can lead staff to artificially manipulate results and to engage in hasty and poorly considered decision-making. It should be remembered that a higher conviction rate can be secured simply by deciding not to prosecute the more difficult cases.

4. Qualification, recruitment selection, training and career management of prosecutors

Guidelines on the Role of Prosecutors

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.

2. States shall ensure that:

(a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

6. In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: […]

(e) To recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;

Achieving the goals espoused in the Guidelines and the IAP Standards is heavily dependent upon the people who are recruited to effectively and fairly perform the prosecution function. It is to be expected that prosecution services will have systems and processes and criteria to ensure that only properly qualified persons are eligible to be appointed as prosecutors. Careful, considered and transparent recruitment processes and ongoing evaluation

and training of prosecutors throughout the course of their career helps ensure that the goals of the IAP Standards and Guidelines will be met and perpetuated throughout the prosecution service. Different States will have different recruitment methods depending on how the prosecution service is constructed and on factors such as the way legal education is taught in the State, the qualifications and standards needed to practise law and become a prosecutor and the strength of the body that governs the profession. Many States have taken steps to establish well-defined protocols for the hiring and monitoring of prosecutors, thus leading to enhanced transparency and trustworthiness of the prosecution service in the eyes of the public.

The Council of Europe has also prepared recommendations on recruitment, promotion and assessment[81] that complement those of IAP and the United Nations, and it is reiterated that "both external and internal independence of prosecutors can be guaranteed through provisions on the appointment and dismissal of prosecutors, career management and tenure, provisions on discipline and removal of prosecutors".[82]

4.1. Selection

As mentioned in the preceding section, the selection of prosecutors is an important function and should be governed by fair and impartial procedures for recruitment, promotion and transfer. The selection process varies from State to State,[83] but the nature of the selection process does not matter as much as how it is conducted. What is important in selection is that prosecutors are properly screened to obtain candidates who possess the requisite integrity, and legal ability to prosecute[84] and that the selection process itself is conducted in a fair, impartial and transparent manner. Some methods of selection are a national competitive examination,[85] programmes aimed at young law graduates, a multifaceted interview process,[86] and examination

[81] Council of Europe, Recommendation Rec(2000)19 on the role of public prosecution, point 5.

[82] Organisation for Economic Co-operation and Development, "Anti-corruption specialisation of prosecutors in selected European countries".

[83] E/CN.15/2011/8, paras. 50-54.

[84] See, for example, the reference to Jordan in the report of the Secretary-General (E/CN.15/2011/8, para. 52): In Jordan, conditions of appointment were regulated by the Prosecution Act and based on competence, qualifications and experience.

[85] See, for example, the situation in Bosnia and Herzegovina (E/CN.15/2011/8, para. 52).

[86] Information on the programme aimed at young law graduates in the United States is available at www.justice.gov/careers/legal/entry.html.

and appointment by the government.[87,88] Prosecution services should ensure that their screening process does not exclude any person due to prejudice against any group and should ensure that steps, including legislative protections, are enacted to prohibit any inequality in employment opportunities in the prosecution service.[89] Rigorous attention to the Guidelines and the IAP Standards regarding recruiting and promotion practices also has the benefit of ensuring that corruption in the form of favouritism in recruitment or promotion does not find its way into a prosecution service, with consequent negative impact on operational effectiveness and subsequent loss of public confidence. Steps should be taken to prevent political considerations from being a factor in the appointment of career prosecutors.

4.2. Training

Guidelines on the Role of Prosecutors

2. States shall ensure that: […]

(b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

1. Professional conduct

Prosecutors shall: […]

(d) Keep themselves well-informed and abreast of relevant legal developments […]

[87] In many States with a civil law tradition, students indicate a desire to enter the magistrate's stream early in their legal training and upon graduation will take up a position as a prosecutor.

[88] An example of the basic and fundamental expectations that prosecution services require of their prosecutors can be found in the code of ethics contained in Ireland's *Guidelines for Prosecutors*, chapter 3, where the following subjects are discussed: purpose and scope of the code, independence, responsibility, integrity and competence.

[89] See, for example, paragraph 8 of South Africa's National Prosecuting Authority Act (No. 32 of 1998), on the need for the prosecuting authority to be representative: "The need for the prosecuting authority to reflect broadly the racial and gender composition of South Africa must be considered when members of the prosecuting authority are appointed." And, in France, specific training and grants are made available to candidates for the prosecution service who are from disadvantaged categories.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: […]

(h) […] to promote their professional training […]

Prosecutors have great responsibility, and much is expected of them by society.[90] The courts expect prosecutors to demonstrate a high level of legal acumen and well-defined ethics; society in general expects prosecutors to be sensitive to the needs of that society, particularly victims of crime; investigators expect and need sound and proper legal advice or supervision in increasingly complex investigations; and the accused expects that the evidence will be carefully considered and the law correctly applied and that where discretion can be used, it is used fairly and impartially.[91]

None of the competencies mentioned above are easily obtained, but none of them can be ignored by a prosecution service that is committed to excellence.[92] Training in these skills is a lifelong endeavour requiring commitment from management to provide the training and the duty of prosecutors to avail themselves of it and, in many instances, provide it.[93] The increasing complexity of crime has required that new skills be developed in the prosecution services, with specialized legal and forensic knowledge being an important component of a prosecution service's training regime.[94] Training should commence in the induction phase[95] and continue through

[90] The report of the Special Rapporteur on the independence of judges and lawyers states that training is essential in order to maintain a competent and skilled prosecution service with the confidence and capability to operate autonomously with the support and confidence of the public (A/HRC/20/19, para. 89).

[91] Canada, Public Prosecution Service of Canada Deskbook, chapter 2.2.

[92] In its Recommendation Rec(2000)19, para. 7, the Council of Europe states that training is both a right and a duty for all public prosecutors, both before their appointment as well as on a permanent basis.

[93] Examples of training facilities dedicated to prosecutors are the National Advocacy Training Center of the United States Department of Justice, the Korean Institute of Justice and the Academy of the Prosecutor General's Office of the Russian Federation.

[94] The report of the Special Rapporteur notes: "In this vein specialization constitutes an important aspect of the training of prosecutors, who should also be provided with the adequate human and technical resources to properly investigate crimes, when they have the mandate to do so." (A/HRC/20/19, para. 90).

[95] See, for example, the Republic of Korea's methodology of instructing prosecutors by providing one year of training once they become prosecutors further augmented by continuing legal education through the duration of the prosecutor's career.

the prosecutor's career,[96] enabling the prosecutor to take on more complex cases and allowing for career advancement. Training of this type should also be viewed as an investment by the prosecution service, and appropriate funds should be allocated to provide training to staff.

Advanced training could be provided to prosecutors in subjects such as transnational crime, organized crime, cybercrime, money-laundering, international cooperation in criminal matters, forensic evidence such as DNA analysis and dealing with vulnerable victims and witnesses.

The effectiveness of a prosecution service does not just require knowledge of criminal law and forensic issues. As an organization, a prosecution service is responsible for creating and maintaining an ethos of professionalism, integrity and fairness that is the foundation of all that is done by the office. The Council of Europe Recommendation Rec(2000)19 identified "five core areas" regarding these aspects of a prosecution service's practice:

(a) The principles and ethical duties of their office;

(b) The constitutional and legal protection of suspects, victims and witnesses;

(c) Human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by articles 5 and 6 of the Convention;

(d) Principles and practices of organization of work, management and human resources in a judicial context;

(e) Mechanisms and materials which contribute to consistency in their activities.[97]

4.3. Career management

Guidelines on the Role of Prosecutors

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

[96] E/CN.15/2011/8, para. 53.

[97] Council of Europe, Recommendation Rec(2000)19, para. 7.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

EMPOWERMENT

6. In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: […]

(e) To recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures.

Transparency and fairness in the recruiting process of prosecutors must also be mirrored in their career advancement. Appointments and promotions must be based on objective factors and with remuneration that is commensurate with their abilities and experience. This again provides protection for prosecutorial independence by preventing external influences, such as offers of money, or internal influences, such as offers of promotion designed to influence the decision of a prosecutor. Promotions should not be made by politicians or political appointees and should not be open to political influence.

The prosecution of criminal matters covers a vast array of cases and responsibilities. Prosecution services should endeavour to provide work that challenges prosecutors and that is commensurate with their experience while at the same time ensuring that they are not letting prosecutors prosecute a repeated number of emotionally draining cases, which can lead to lasting personal and professional issues affecting not only the prosecutor but their colleagues and family as well.

5. General duties and rights of prosecutors

The role and status of a prosecutor not only places duties on those performing that role in the office or in court. It extends to other professional capacities and to their lives outside the office. This section addresses the issues of what prosecution services should expect from prosecutors and what prosecutors should expect from their respective prosecution services.

5.1. Duties of prosecutors

Guidelines on the Role of Prosecutors

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

Professional conduct

1. Prosecutors shall:

(a) At all times maintain the honour and dignity of their profession;

(b) Always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;

(c) At all times exercise the highest standards of integrity and care;

(d) Keep themselves well-informed and abreast of relevant legal developments;

(e) Strive to be, and to be seen to be, consistent, independent and impartial;

(f) Always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;

(g) Always serve and protect the public interest;

(h) Respect, protect and uphold the universal concept of human dignity and human rights.

3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall:

(a) Carry out their functions impartially;

(b) Remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

(c) Act with objectivity;

(d) Have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

(e) In accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

(f) Always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

(a) Duties related to private life

Prosecutors have the right to pursue their private lives as they see fit but must do so within the bounds of the law and within the peculiar constraints of their profession. The independence that is so important to prosecutors in effectively performing their duties places some limits on activities that may compromise or give the appearance of compromising the independence of their office: activities such as outside employment that could lead to a conflict of interest, running for political office while still employed as a prosecutor, consorting with known criminals or frequenting venues where criminals may be found or engaging in activities that may bring the office of the prosecutor into disrepute are considerations that prosecution services may need to address with their staff.[98] This is perhaps the case now more than ever as the digital age has allowed anyone practically anywhere to take photographs or video recordings and disseminate them worldwide with the press of a button. This has the potential to intrude upon every person's private life, including prosecutors.

In addition, prosecutors should not allow their personal or financial interests or family, social or other relationships to improperly influence their conduct. A prosecutor should not play any part in a case in which the prosecutor or the prosecutor's family or business associates have a personal, private or financial interest or association. It is unacceptable behaviour for a prosecutor to accept any gifts, prizes, benefits, inducements or hospitality from third parties or carry out any task that may be seen to compromise the prosecutor's integrity, fairness and impartiality, as is using the official

[98] See, for example, the policy on outside employment found in the Public Prosecution Service of Canada Code of Conduct.

capacity of the prosecutor's office to obtain a personal advantage.[99] In some States prosecutors are required to declare their assets and all sources of income to their employer as a method of preventing corruption. This can be a valuable safeguard against corruption as well as tending to draw the individual prosecutor's attention to any potential conflict of interest. Management should ensure that procedures are in place to guide prosecutors who seek advice concerning possible conflicts of interest.

(b) Duties related to professional life

A prosecutor should always take direction from the law and should always resort to the law when making decisions such as whether to proceed with a case or not. Other considerations, such as whether bringing a prosecution will enhance the prosecutor's employment prospects, curry favour with any political group or result in any particular media or community reaction, should be avoided and constantly guarded against.

Prosecutors must also abstain in all conduct from unfair discrimination on the basis of sex, ethnic or national origin, colour, language, religion, political or other opinion, social origin or class, social or political affiliation, lawful activities, beliefs, property, birth, health, disability or any other personal characteristic of any individual concerned or the personal feelings or beliefs of the prosecutor.

The pressures and stress of the courtroom should not diminish basic standards of professional conduct. Prosecutors should discharge their duties with the courts, the police and other public authorities, as well as with other members of the profession, with respect and courtesy.

Much of what is gathered during a criminal investigation is of a sensitive nature involving the most intimate details of a person's life, and all of that information will end up in the prosecution file. Prosecutors should preserve professional confidentiality, subject to disclosure requirements in accordance with proper professional practice, and should not use any information to which they have had access during the course of their employment to unjustifiably further their own private interests or those of others.

[99] See also Council of Europe, Group of States against *Corruption, Fourth Evaluation Round, "Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors"*, evaluation report: Netherlands (Strasbourg, 2013), p. 34.

In all States, prosecutors act to represent a party to criminal proceedings (the people, the State or the Crown) before the judiciary. As a result of this interaction, it is essential that prosecutors maintain and demonstrate a professional detachment from the judiciary and other legal professionals in their daily activities.

Socializing[100] among all parts of the criminal justice system and all branches of the legal profession is expected and appropriate, but any situation that might give rise to the reality or a reasonable perception of undue closeness to any judicial officer must be avoided. For example, a prosecutor who sees a judge regularly on a social basis in a small social group setting should consider whether the public might assume the prosecutor and judge discuss their cases in such settings. Prosecutors need to consider whether the public can be confident that the close relationship does not have any impact on the judge's rulings and whether the public might be more confident in unbiased judicial decisions if the judge recused himself from cases brought by that prosecutor or the prosecutor withdrew from cases assigned to that judge.

At times when a prosecutor is engaged in proceedings before a judicial officer, special care must be taken and additional circumspection exercised concerning comments, gestures and expressions used towards or in the presence of a judicial officer presiding in criminal proceedings who is known to the prosecutor. There may be a need for disclosure to other parties of any close relationship between judge and prosecutor. An example could be where lawyers A and B had a prior personal relationship: Lawyer A is now a prosecutor and Lawyer B has become a judge. Prosecutor A is now to prosecute a case listed before Judge B. The nature of the previous relationship may cause Prosecutor A to decline to appear and may give the case to another prosecutor. If Prosecutor A decides that there is nothing that would preclude appearing before Judge B, he or she should still disclose that previous relationship to the defence representative.

As with judicial officers, it is also acceptable that there be social interaction with defence representatives in appropriate settings; but again, care must be taken not to create or allow a reasonable perception of a relationship likely to produce unprincipled dealing between the parties. Similarly, any relationship must be disclosed. For example, if a prosecutor married to a defence lawyer discovers that his wife was involved in the preparation

[100] See, for example, France, Conseil supérieur de la Magistrature, Compendium of the Judiciary's Ethical Obligations (Paris, 2010), sect. A, a.17: "Despite the fact that they belong to the same judicial corps and discharge their duties in the same place, judges and prosecutors shall maintain and publicly demonstrate their mutual independence." Available at www.conseil-superieur-magistrature.fr.

of the defence of a file he was assigned, the prosecutor may decline to prosecute the file and have it reassigned. If that prosecutor does not feel that he needs to recuse himself, he must disclose to the representative of the accused person and to the court the fact that his wife had involvement in the preparation of the defence.

5.2. Rights of prosecutors

Guidelines on the Role of Prosecutors

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

(a) To perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;

(b) Together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;

(c) To reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished;

(d) To reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;

(e) To recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;

(f) To expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;

(g) To objective evaluation and decisions in disciplinary hearings;

(h) To form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status; and

(i) To relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

The nature of prosecutors' work may bring them into contact with individuals or elements that rely on intimidation and violence to further their own ends. From time to time this can mean that prosecutors or their families can come under direct threat from those who would wish to thwart the administration of justice. Prosecutors must be able to perform their duties knowing that their own personal safety and that of their families is of the utmost concern to their respective prosecution services. Protocols and measures must be put in place in each prosecution service that guides the service and prosecutors in matters such as conducting threat assessments, reporting threats or other incidents of intimidation, agreements with police forces to provide protection in court houses, prosecutors' offices and in exceptional circumstances close personal protection for prosecutors and their families. Guidance of the type found in the Declaration on Minimum Standards Concerning the Security and Protection of Public Prosecutors and Their Families developed by IAP can greatly assist prosecution services and individual prosecutors in defining what constitutes a safe working environ-

ment and what prosecution services can do to ensure that such a safe working environment exists for their staff and their families.

Organizations such as IAP, the National Association of Attorneys General of the United States, the Association of Justice Counsel of Canada, the Australian Association of Crown Prosecutors, the Society of State Advocates of South Africa, the Ukrainian Association of Prosecutors, the Austrian Association of Prosecutors, the Hungarian Association of Prosecutors (which was a founding member of IAP), the Pacific Prosecutors' Association, associations of prosecutors in Brazil and the European Judges for Democracy and Liberty (MEDEL) are examples of groups dedicated to the rights of prosecutors domestically and internationally and which promote the professional interests of prosecutors. Prosecutors should be encouraged to form or join national, regional or international associations of this type as the support and expertise that can be found by concentrating the efforts of prosecutors on behalf of prosecutors can greatly benefit all concerned.[101] The Guidelines and the IAP Standards specifically approve the formation of such associations.

6. Liability and discipline of prosecutors

There are times when the decisions made by prosecutors are viewed by some as being neither fair nor popular. The exercise of that discretion must always be made in an independent manner without fear of personal or financial retribution.[102] In order to ensure that prosecutors maintain their independence and not be swayed or intimidated by the threat of liability, guidelines should be put in place to clarify what may constitute behaviour worthy of sanction or protection. A disciplinary regime is an important component in regulating prosecutorial conduct but should not be used to sanction prosecutors for arbitrary or unfounded reasons. The disciplinary system should be clear and transparent, with well-defined rules.

[101] See IAP, Standards of Professional Responsibility …, first preambular paragraph: "Whereas the objects of the International Association of Prosecutors are set out in Article 2.3 of its Constitution and include the promotion of fair, effective, impartial and efficient prosecution of criminal offences, and the promotion of high standards and principles in the administration of criminal justice".

[102] See the Guidelines on the Role of Prosecutors, para. 4, and the IAP Standards of Professional Responsibility …, item 6.

6.1. Liability of prosecutors for unprofessional conduct or professional misconduct

Despite careful screening and hiring practices, a prosecutor may be found not to be a fit and proper person to engage in the conduct of prosecutorial duties because of unsatisfactory professional conduct or professional misconduct. In many parts of the world, definitions or guidance as to what constitutes unprofessional conduct or professional misconduct can be found in legislation that governs the prosecution service, in the ethics codes of the judiciary, the law societies or bar associations or other professional associations that govern the profession generally or in case law that establish tests for malicious or negligent prosecutions, for example. Breaches of a country's criminal law by a prosecutor would obviously be viewed as unprofessional conduct, and if the criminal breach were attributed to conduct such as the trading of information on a file for financial gain, the breach would be professional misconduct as well.

6.2. Oversight mechanisms

The independence of a prosecution service is desirable for a viable, transparent process. As mentioned above, with independence comes accountability to the legislature and the public in order to ensure that the responsibilities of the prosecution service are carried out in an appropriate manner in compliance with the law and are managed efficiently and fairly with due regard to any fiscal requirements. In order to ensure that the mandate of the prosecution service is being carried out and managed effectively, many States have internal and/or external protocols or agencies in place to review decisions and management of their prosecution services. Some of those protocols, such as appearing before parliamentary or senate committees to address specific concerns of legislators, are mentioned above. Others that have been utilized by the prosecution services of various States are stand-alone oversight units,[103] file and office audit procedures, legal risk management protocols, prosecution inspectorates (such as in the United Kingdom)

[103] See the United Kingdom Crown Prosecution Service Audit and Risk Committee is chaired by a non-executive board member. The Committee, on behalf of the Crown Prosecution Service Board, maintains an overview of the risk, control and governance of the Service, ensuring that the system of internal control is adequate to deliver regulatory compliance, financial probity and value for money. The Committee reviews and monitors the Crown Prosecution Service's risk management processes and arrangements for ensuring compliance with regulatory and financial reporting requirements. It also agrees a programme for internal audit. A link to the terms of reference for the Committee and the Crown Prosecution Service Board is available at www.cps.gov.uk.

and appearances before commissions of inquiry.[104] Oversight mechanisms can be a useful component of a prosecution service, especially in their audit and legal risk management functions, as they allow for a proactive approach to identifying the practices and procedures of a prosecution service that are potentially legally or operationally unsound and resolving them before they become problematic.

6.3. Disciplinary proceedings

Guidelines on the Role of Prosecutors

DISCIPLINARY PROCEEDINGS

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

6. In general they [prosecutors] should be entitled: […]

(f) To expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;

(g) To objective evaluation and decisions in disciplinary hearings;

Like lawyers and judges, prosecutors should be held accountable for the way in which they discharge their duties and functions:[105] "To maintain

[104] Canada, Department of Justice, Report on the Prevention of Miscarriages of Justice (Ottawa, Federal/Provincial/Territorial Heads of Prosecutions Committee Working Group, 2004) summarizes the work of a number of Canadian Commissions of Inquiry examining the administration of justice in Canada and notes how the Commissions' recommendations have changed the criminal justice system including the practices of prosecution services.

[105] A/HRC/20/19, para. 86.

public confidence in the prosecution system, prosecutors should be directly or indirectly accountable to the public."[106] Both the Guidelines on the Role of Prosecutors and the IAP Standards speak to the need for clarity and fairness in disciplinary proceedings against prosecutors. Prosecutors subject to disciplinary hearings should be made aware of the allegations of their misconduct, and this should be communicated to the prosecutors clearly and effectively. If a prosecutor is found guilty of professional misconduct, the sanctions that are imposed should be proportional to the gravity of the infraction committed and be based in law.[107] A decision of a disciplinary hearing should also be subject to appellate review should either party see fit.

An example of a disciplinary process in a prosecution service that covers the entire spectrum of misconduct and concomitant sanctions that can be imposed can be found in the Netherlands.

In the *Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors: Evaluation Report Netherlands*, 2013, the Netherlands policy on the discipline and potential prosecution of prosecutors is summarized, at paragraphs 182-184:

182. Any report of a suspected integrity violation has to be processed according to an Instruction on the Handling of Violations of Integrity, also adopted on 22 May 2012 by the Board of Procurators General. A report triggers an integrity investigation, which usually consists of a number of phases: a preliminary investigation, a disciplinary investigation concerning the facts, and—if the authorities decide there are grounds for suspicion of dereliction of duty—a disciplinary process. At the end of this process, during which the person concerned is allowed to submit objections, the authorities decide whether a disciplinary sanction is justified. Depending on the nature of this measure, the competent authority to impose this sanction is the chief district prosecutor, the Board of Procurators General—by a majority vote—or the Crown.

183. Disciplinary sanctions applicable to integrity violations are the following (article 34b, Law on the organization of the judiciary):

- Letter of admonishment
- Reduction of leave
- Special duties on unusual days
- Fine (max. €22)

[106] Ibid.

[107] Ibid.

- (Partial) attachment of pay
- Reduction of pay grade
- Denial of annual pay rise
- Reduction of salary tier
- Transfer to another district
- Suspension with or without denial of pay
- Dismissal

184. If there is a suspicion of a criminal offence committed by a prosecutor either in the course of his/her official duties, or in private, this must always be reported to the National Prosecutor for Internal Affairs. The Coordination Committee for the National Police Internal Investigations Department then decides which department is to carry out the criminal investigation. The prosecution and trial of judicial officers is conducted according to the Code for Criminal Procedure and is the same as for all citizens. However, a judicial officer is never prosecuted and tried before his/her own (appellate) court, as the OM in such a case asks the Supreme Court to appoint another equivalent court to handle the case … Prosecutors do not enjoy any immunity.

Part II. Role of prosecutors in criminal proceedings

Guidelines on the Role of Prosecutors

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

4. Role in criminal proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

(a) Where authorized by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

(b) When supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;

(c) When giving advice, they will take care to remain impartial and objective;

(d) In the institution of criminal proceedings, they 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;

(e) Throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;

(f) When, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

Care should be taken by prosecution services to ensure that all prosecutors respect and uphold the independence of the judiciary.[108,109] Prosecutors exercise considerable influence over the initiation of an investigation, the investigation itself, the decision to prosecute individuals charged as a result of the investigation and the outcome of the proceedings. The following section deals with the roles and responsibilities that prosecutors have at various phases of an investigation and how they interconnect in ensuring the effective administration of justice.

If coercive powers are held by a prosecution service, such as the power to authorize search and seizure or to order preventive detention, they must be carefully handled as they may infringe on the role of the judiciary in controlling these kinds of measures.[110] Furthermore, the concentration of coercive and investigative powers may hamper the independence and fairness of criminal investigations and proceedings, thereby affecting the principle of equality of arms, which requires procedural equality between the prosecution and the defence. Coercive powers exercisable by a prosecutor should always be subject to an effective right of appeal to a court of law.[111]

[108] See Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chapter I, sect. D.2, annex), which states: "It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."

[109] A/HRC/26/32/Add.1, paras. 68 and 130.

[110] See, for example, the long police custody oversight by prosecutors limited by the European Court of Human Rights. The prosecutor cannot be the authority that reviews detention pursuant to article 5, paragraph 3, of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "The judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority …" (European Court of Human Rights, Case of *Medvedyev and Others v. France*, Application No. 3394/03, para. 124).

[111] See Opinion No. 12 (2009) of the Consultative Council of European Judges and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors on the relations between judges and prosecutors in a democratic society.

1. Role in the investigation of crime

Apart from their responsibility to dispose criminal cases for prosecution, prosecutors in every country play some important roles in criminal investigation despite the differences in basic legal principles. In some countries, prosecutors have an overall responsibility over investigation, while in others they have a limited role in carrying out investigation.

Source: Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, "Cooperation between the police and the prosecutors" in *Annual Report for 2001 and Resource Material Series No. 60*, part two ("Work product of the 120th International Senior Seminar: 'Effective administration of the police and the prosecution in criminal justice'"), p. 195.

Regardless of the relationship and the extent of prosecutorial involvement in the investigation of crime, prosecutors "should … ensure that the police or other investigators respect legal precepts and fundamental human rights".[112]

The roles that prosecutors perform during the investigative phase of a criminal case may differ depending on the legal tradition of each State.[113] In most civil law and some common law systems, the prosecutor has control over the entirety of the investigation and directs the police in what course of action they should take in their investigation and what charges will be brought against an accused.[114] The involvement of prosecutors in the investigation varies depending on the legal system and complexity and seriousness of cases. They may conduct the investigation and carry out some investigative steps, such as interviews or searches. They may have control of the investigators either directly when investigators are assigned to the prosecution office or indirectly. For example, prosecutors may be consulted about the performance of an investigation unit or individual investigators.

[112] United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework", para. 161.

[113] See, for example, the United States, which has a common law tradition; prosecutors there lead and conduct almost every sophisticated and complex investigation, often through direct questioning of witnesses in grand juries. That goes far beyond supervising investigations by the police.

[114] See the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, "Cooperation between the Police and Prosecutors", p. 195, which states: "One of the most important and common roles of prosecutors is to check police investigations against due process of law, while keeping the effectiveness of police investigation. In order to meet the rule of law standards, promote acceptance of court decisions by the accused and strengthen public confidence in the police's right to conduct searches and seizures in private premises, the investigation work of the police should be, at least in principle, critically monitored."

Historically, in the common law and some civil law systems, the police investigated crime and could decide whether charges should be laid against an individual. The prosecution has decided whether the evidence gathered is sufficient to prove the crime alleged and if so, presented the case before the court for adjudication by the judiciary and may barely intervene in the police investigation.

In these systems, the relationship between the police and the prosecutor at the investigative stage was traditionally an exclusive and independent one. For example, in Thailand, prosecutors have no role in the investigation of the case, this being left solely to the police even in large, complex cases (although there are exceptions).[115]

Experience has shown, however, that strict adherence to this methodology is proving to be problematic. The advent of new and sophisticated methods of perpetrating crimes and increasing complexities within the law have led to increased prosecutorial intervention in the police investigation and greater cooperation between these two groups[116] where previously such intervention or cooperation did not exist:

> [All the problems mentioned above] caused a gradual change of thinking regarding the prosecutors' involvement in investigations. Before reflecting on this, it should be mentioned that the police themselves were gradually forced to seek prosecutors' advice more often. The appearance of new forms of criminality (organized crime, especially money-laundering and drug trafficking) and the ever-increasing complexities of substantive and procedural law made the police more dependent on the prosecutors for legal advice. In many common law jurisdictions, this has evolved into forms of cooperation that provide the prosecutor with some influence in the investigation process itself. In most jurisdictions, however, this form of cooperation has remained on an informal level and is usually ad hoc, without changing the constitutional relationship between the two institutions.[117]

[115]For example, Thailand's Department of Special Investigation, tasked with investigating "sophisticated crimes" as defined by law, provides a scheme for prosecutors to work closely with the special investigators from the start so as to make more effective the investigation and prosecution of such "sophisticated crimes". Also, some attorney offices in the United States have conducted direct investigations, especially against serious corporate crime or in cases of national importance.

[116]There are exceptions in common law jurisdictions, for example the Serious Fraud Office in England, Wales and Northern Ireland, where prosecutors, investigators and other disciplines work in investigative and prosecution teams.

[117]Despina Kyprianou, "Comparative analysis of prosecution systems (Part II): the role of prosecution services in investigation and prosecution principles and policies" in *The Role of Cyprus Attorney General's Office in Prosecutions: Rhetoric, Ideology and Practice* (Berlin, 2010), p. 6.

In some common law jurisdictions (e.g., the Crown Prosecution Service of England and Wales), the decision to initiate proceedings in all but minor cases is now the province of the prosecutor. In Ireland, all prosecutions are in principle controlled by the Director of Public Prosecutions. General directions issued by the Director require the police to refer certain categories of cases to the Director before charges are preferred; these include sexual offences and terrorism.

The Guidelines on the Role of Prosecutors and the IAP Standards do not take a preferential position on the issue of prosecutorial intervention in the investigation of crime. Throughout the world today there is a wide spectrum of prosecutorial involvement at the investigative stage, ranging from no involvement at all to being in charge of and taking an active role in criminal investigations. However, there is an increasing tendency for prosecutors to become involved at an earlier stage, particularly in complex cases such as fraud or corruption, even in countries where the prosecutor has no formal role in investigations, using the mechanism of the police seeking advice at the investigative stage. The following excerpt provides an example of the breadth of responsibility that prosecutors have in various jurisdictions around the world and emphasizes the point that there are no hard and fast rules for prosecutorial involvement,[118] even in jurisdictions sharing the same legal tradition:

> In Germany, prosecutors are by law responsible for leading investigations by themselves, and the police are only an investigatory body of the public prosecution office, whereas in reality it is the police who are actually leading investigations in most cases. Prosecutors are vested with similar responsibility in [the Republic of] Korea. In Japan, prosecutors are also empowered to carry out investigations, but at the same time, the Code of Criminal Procedure states that the primary responsibility of investigation lies with the police. On the contrary, in other countries with common law traditions such as Kenya, Pakistan, Papua New Guinea, [the United Republic of] Tanzania and the United Kingdom, prosecutors play no role in investigation as such, but do exercise their advisory or supervisory authority to guide the police investigation in such ways as advising or instructing the police to carry out their investigation to certain direction.

[118] Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, "Cooperation between the police and prosecutors" in Annual Report for 2001 and Resource Material Series No. 60. The Annual Report states (p. 195) that "Prosecutors' authorities in supervising and giving advice/instructions to police investigators can be viewed in this regard. The extent of such authorities varies from country to country, from non-binding advice to complete control over police investigation".

In this context, it should be kept in mind that the development of new forms of cooperation between the police and prosecutors should not be viewed as just an adjustment for the sake of convenience, on the contrary, such developments in many countries are structured upon the deep consideration as to the independently entrusted roles of the police and prosecutors in the course of realizing the rule of law. The relationship between the police and prosecutors inevitably and desirably involves, to some extent, a conflicting nature. Accordingly, close collaboration between the police and prosecutors should be only developed on such a challenging, though positively stimulating, relationship.[119]

2. Dealing with evidence illegally or improperly obtained

Guidelines on the Role of Prosecutors

16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

4. Role in criminal proceedings

4.3 Prosecutors shall: […]

(e) Examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

(f) Refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment;

(g) Seek to ensure that appropriate action is taken against those responsible for using such methods;

[119] Annual Report for 2001 and Resource Material Series No. 60.

The spectrum of evidence to be excluded on the ground that it was illegally or improperly obtained differs from State to State and is subject to different legal tests for admissibility. In modern criminal law, regardless of legal tradition, evidence acquired by unlawful methods that constitute a grave violation of the suspect's human rights[120] is absolutely excluded, although such exclusions are based on different theories in each legal system.

In this regard, prosecutors must examine the proposed evidence to see if it has been unlawfully or improperly obtained and should consider refusing to use evidence reasonably believed to have been obtained through unlawful or improper methods, according to the gravity of unlawfulness or impropriety and the standards described in their own State's rules of evidence.

In particular, when those methods constitute a grave violation of the suspect's human rights, such as the obtaining of evidence through torture or cruel, inhuman or degrading treatment or punishment, prosecutors should not use the evidence against anyone other than in proceedings against those who used such methods.

Further, in States where prosecutors participate in, conduct, direct or supervise investigations, they themselves should not use unlawful or improper methods in obtaining evidence, and should give appropriate instructions and advice to police or investigators to do likewise.

As "essential agents of the administration of justice", prosecutors should always be mindful of human rights violations in the whole course of obtaining evidence and take appropriate actions against those responsible for them. Thus, for example, when prosecutors come to know or suspect that evidence was obtained using unlawful methods, such as torture or inhuman treatment, or improper methods of lesser severity, they should consider the investigation of those who implemented or directed such methods, and disciplinary action should also be considered, if applicable.[121]

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[120] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states, in its article 15 that "each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

[121] On torture investigation, see Office of the United Nations High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004 (HR/P/PT/8/Rev.1).

3. Disclosure

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

4.3 Prosecutors shall … disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;

The principle of equality of arms, as it is described in some jurisdictions, requires a number of procedural steps to be taken for the benefit of an accused person. He or she is entitled in most places to the effective assistance of a lawyer and to "have adequate time and facilities for the preparation of his defence …"[122] According to the Human Rights Committee, "adequate facilities" must include access to documents and other evidence; that access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g., indications that a confession was not voluntary).[123,124]

The constitutions and laws of many States, consistent with the provisions of article 14 of the International Covenant on Civil and Political Rights, have provisions dealing with the right of an individual accused of a crime to know the particulars of the crime that he or she is alleged to have committed and be provided with information regarding the evidence gathered against him or her. These individual rights place duties on prosecution services in some States to perform what is commonly known as "disclosure" (or "discovery"). In some States, the duty on the prosecution to disclose information is a result of court decisions that have established the standards that the prosecution has to meet,[125] while in other States the disclosure obligation arises from legislation that addresses the issue.[126]

[122] International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex), art. 14, para. 3 *(b)*.

[123] Human Rights Committee, General Comment No. 32 (2007) on article 14 on the right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32), para. 33.

[124] See also European Guidelines on Ethics and Conduct for Public Prosecutors, "The Budapest Guidelines, 2005", Part III, and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

[125] See for example in common law countries, in the United States: *Brady v. Maryland*, 373 U.S. 83 (1963); in Canada: *R. v. Stinchcombe* [1991] 3 S.C.R. 326; and in Ireland, *People (Director of Public Prosecutions) v. Tuite*, 2 Frewen 175.

[126] See, for example, New Zealand's Criminal Disclosure Act 2008.

Owing to very different rules of evidence and procedure, disclosure obligations take very different forms in common law and civil law systems.[127]

Prosecutors should ensure that there is fair disclosure of material that may be relevant to the innocence or guilt of the accused, may assist the accused in the timely preparation and presentation of the defence case and may assist the court to focus on the relevant issues in the trial. The disclosure should be presented in a format that enables the accused to fully comprehend the case against him and the charges he is facing. Disclosure not meeting these objectives may prevent a fair trial. Fairness does, however, recognize that there are other interests that may need to be protected, including those of victims and witnesses who might otherwise be exposed to harm, and that the public interest in such circumstances would justify keeping certain documents or information confidential.

4. Plea and charge negotiation

Charge negotiation, also known as "plea bargaining",[128] is a major component of the work of prosecutors in some States. Plea bargaining is commonly found in many, but not all, common law legal systems, and depending on the jurisdiction, involves various levels of formality in proceedings. Charge negotiation can be an effective tool as it can lessen the burden on a court system by expediting a case directly to the sentencing phase instead of taking the time and resources of a trial. The system works only if both the prosecution and the defence have a solid, trustworthy working relationship with mutual respect for each other's roles and responsibilities. Negotiation of charges with a sentence falling completely outside the range of sentence

[127] Máximo Langer and Kent Roach "Rights in the criminal process: a case study of convergence and disclosure rights" in *Routledge Handbook of Constitutional Law*, Mark Tushnet, Thomas Fleiner and Cheryl Saunders eds. (New York, Routledge, 2013), part three, chapter 3, sect. 21, p. 275: "Different expressions have been used to refer to disclosure rights that reflect different conceptions of it. While in civil law jurisdictions it has been defined as the right to access the file (as reflected by expressions such as the *droit de consulter le dossier* in French, *Akteneinsichtsrecht* in German, *derecho a examinar el expediente* in Spanish), in common law jurisdictions the right has been defined as the right to disclosure or discovery of an open-ended list of items, typically possessed by the prosecutor but also at times possessed by the police and other agencies."

[128] Vivienne O'Connor, "Practitioner's guide, common law and civil law traditions" (International Network to Promote the Rule of Law, March 2012), p. 26: "'Plea-bargaining' is the name given to the process whereby the accused person (through his or her lawyer) enters into discussions with the prosecutor with regard to whether the accused will admit guilt. Negotiations ensue about whether the prosecutor will ask the judge for a reduced sentence in exchange for the accused admitting guilt. Alternatively, the prosecutor could offer to prosecute the crime based on a lesser charge (e.g., manslaughter instead of murder) that would carry a lesser sentence. This can be done informally. However, in some countries it is done through a formal 'plea agreement'. While the recommendation to the judge [where that is permitted] is not binding, it can be very persuasive."

for the sake of expediency is not the aim of this exercise. Nor is the deliberate inflation of the number and types of charges against an accused in order to trigger an offer by defence legal representatives to negotiate a reduction in sentence. It is important for a prosecutor to have a solid understanding of the sentence range or sentence guidelines, and each decision made must be legally defensible.

Plea bargaining may also take the form of negotiation of a sentence agreed between the defence and prosecution that is then presented to the judge. If the judge finds the sentence appropriate, the judge may accept the plea arrangement. The judge may also reject the arrangement as not appropriate given the facts of the case, in which case the prosecution will continue to trial.

Regardless of whether the parties engage in charge bargaining or sentence bargaining, it is critical that the process be transparent. The defendant should be examined by the judge to ensure that he is pleading guilty because he is in fact admitting guilt and understands the nature and consequences of his options, and the record should contain sufficient facts to support the guilty plea. In addition, all undertakings made to a defendant or his legal representative should be stated on the record and acknowledged by the parties. The defendant should be further questioned to ensure that he is pleading guilty voluntarily, without any threats or coercion, and with full knowledge of the consequences of the plea. It should also be ascertained that the defendant understands he has a right to plead not guilty and to have a trial, to be assisted by a lawyer at trial and to challenge the evidence that the prosecutor will present, as well as present his own evidence if he chooses to do so. At all times the judge must retain control of the case and must sentence in accordance with the law and his or her conscientious decision. A record must be kept of all court appearances, including any which are held "in camera" (excluding the public) at a preliminary stage and which must subsequently be made public. If the "bargain" breaks down, the judge should consider whether he or she has become aware of matters that could affect his or her decision, in which case the trial should be transferred to another judge.

5. The prosecution test and the exercise of prosecutorial discretion

Guidelines on the Role of Prosecutors

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

DISCRETIONARY FUNCTIONS

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

[…] 4.2 *(b)* In the institution of criminal proceedings, they 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;

The role of a prosecutor in case screening is one of the most important duties entailed to his job. From the very inception of his career, he is required to master this method by properly studying all the case records and investigation records submitted to him for scrutiny and making determination as to whether the matter should be tried by a court of law or whether other means of disposing the case should be employed.

Source: Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, "Prosecution in the screening of criminal cases" in Annual Report for 1997 and Resource Material Series No. 53 (Tokyo, February 1998), p. 326.

The "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework" notes the following:

> When instituting criminal proceedings, the prosecutor should proceed only when a case is well-founded, upon evidence reasonably believed to be reliable and admissible, and should not continue with such proceedings in the absence of such evidence. In court, the prosecutor

> should ensure that the case is firmly but fairly presented, and not beyond what is indicated by the evidence …[129]

Applying the prosecution test to a case prior to it being forwarded for prosecution is an important duty performed by many prosecution services irrespective of the legal system in which they operate. Section 1.1 ("Principle of legality, principle of opportunity and independence") discusses both principles. Some of the positive factors that the process of screening cases offers are as follows:

- Allowing for a proper marshalling and vetting of evidence prior to trial
- Minimization of the disposal of cases that do not meet the prosecution standard or can be dealt with by another method
- Helping to ensure that only those who were properly investigated and charged with a criminal offence go to trial
- Avoidance of trivial or vexatious cases going before the courts
- Helping to resolve the issue of prison overcrowding[130]

Prosecutors must not initiate or continue proceedings when an impartial investigation shows the charge to be unfounded.

Certain factors should not be considered when exercising discretion to bring or not bring charges unless they have special significance to the commission of the offence (for example, in a hate crime offence) or should otherwise be objectively taken into account in the particular circumstances; for example, the alleged offender's race, religion, gender, sexual orientation, political associations, activities or beliefs, the personal feelings or beliefs of the prosecutor, investigator, or alleged offender are not relevant considerations.

More difficult considerations may arise where a victim is opposed to a prosecution. While in principle the determining factor in deciding whether to prosecute is public interest rather than the interests of a victim, in practice it may be impossible to prosecute a case without the victim's cooperation.

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[129] United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework", para. 159.

[130] Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, "Prosecution in the screening of criminal cases", p. 326.

In States where prosecutorial discretion is recognized, prosecutors should avoid prosecuting offenders when it does not serve the public interest. In every case, great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.[131]

In determining whether the public interest requires pursuing a prosecution, the prosecutor will have to consider all provable facts and all surrounding circumstances. Factors to be considered will vary from case to case, but may include the following:

- Whether the offence is serious or trivial
- Any mitigating or aggravating circumstances
- The age, intelligence, health or any special infirmity of the alleged offender, any witness or victim
- The amount of time that has passed since the commission of the offence
- The attitude of the victim

Generally, the more serious the alleged offence, the more likely it is that the public interest will require that a prosecution be pursued (although severity alone will not be determinative).

In countries where the principle of legality applies, laws and regulation may allow prosecutors not to proceed with cases in certain conditions. In those States (and in some cases in States applying the opportunity principle) there may also be time limits for bringing prosecutions. The box below describes how the principle of legality is adapted in Germany:

> The principle of legality is regarded as a fundamental principle of the rule of law pursuant to the German Constitution, though not expressly stated. The German Code of Criminal Procedure (StPO) states that "the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications" (section 152, para. 2, German Code of Criminal Procedure (StPO)).

[131] See Australia, Office of the Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: guidelines for the making of decisions in the prosecution* process (Canberra, 1990).

Case overload and more liberal theories of punishment resulted in amendments to the Code of Criminal Procedure in 1975. For the less serious offences, it is possible to drop a prosecutable case if there is no public interest in prosecuting. It does not require a judge's approval if the offence is minor and consequences are slight (§§ 153, 153a, 154, 154a StPO and for juveniles: § 45, 47 JGG). For more serious offences, the non-prosecution shall be authorized by a Court and requires the offenders to be submitted to reparative measures. As a result, a significant proportion of prosecutable proceedings are disposed out of court (36 per cent of unconditional disposals and 8 per cent of conditional disposals in 2006, according to figures published in Jörg-Martin Jehle, "Criminal justice in Germany" (German Federal Ministry of Justice, 2009)).

6. Diversion from prosecution, alternatives to prosecution

Guidelines on the Role of Prosecutors

ALTERNATIVES TO PROSECUTION

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of the suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pretrial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special considerations shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

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4.3 *(h)* In accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

Prosecutors should give due consideration to diverting criminal cases, in particular those involving young offenders, offenders charged with minor offences and first-time offenders, from the formal justice system, where such action is appropriate and permitted by law.

When prosecutors decide to employ alternative measures, they should ensure that alternative measures are consistent with preventing re-offending, assisting redress of the damage incurred by society, having regard to the interest of victims, upholding the rights of the defence, and forming a response to illegal acts that is in the public interest. There should be no undue intervention in the activities of prosecutors when they use their discretionary powers in relation to such measures.

In some States the prosecuting authority has not only a discretion whether to prosecute or not, but also the ability to conditionally discontinue the case, that is to bind over or sanction the suspected offender. Where prosecutors are vested with the power to impose penalties without court intervention, they should ensure that the rights of the accused are safeguarded by affording the latter the right to be heard and to give his/her consent before the prosecution imposes a penalty.[132] The imposition of conditions should not be oppressive for the offender.[133]

Examples of alternatives to prosecution are drug or alcohol treatment, community service orders, victim compensation, written warnings and restorative justice mechanisms such as indigenous conferencing programmes.[134]

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[132]For example, the Netherlands' Public Prosecution Service describes settlement out of court thus:

"The public prosecutor may, at his own discretion, decide to impose a fine instead of taking the case to court. This often happens in the case of relatively minor offences such as shoplifting or minor damage to property. The revenue goes to the State. Fines in lieu of prosecution are a quick way of dealing with petty offences and they have become an increasingly common form of sanction. The Public Prosecution Service usually sets the amount as soon as the suspect has been arrested. This means that he can pay on the spot or transfer the money soon afterwards, so that the case can be closed. The public prosecutor can also impose community service or a training programme instead of a fine. If the suspect fails to pay the fine (or fails the community service or training programme), the case is taken to court. The advantage of this system is that the suspect does not have to wait for the courts to impose a sanction. It also reduces the courts' workload and the backlog of cases waiting to be heard." See information on what the Netherlands' Public Prosecution Service does and the settlement out of court, available at www.om.nl.

[133]See also *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.06.V.15) and UNODC *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, Criminal Justice Handbook Series (United Nations publication, Sales No. E.07.XI.2).

[134]The Attorney General of New South Wales, the Hon. J. W. Shaw, defined the objectives of conferencing as follows: "[T]o encourage discussion between those affected by the offending behaviour and those who have committed it in order to produce an agreed outcome plan which restores the harm done and aims to provide the offender with developmental and support services which will enable the young person to overcome his or her offending behaviour." Parliament of New South Wales, Parliamentary Debates (Hansard) Legislative Council, Young Offenders Bill of 21 May 1997, Second Reading Speech at 8960.

7. Prosecutor's role in sentencing, asset restraint and forfeiture

The duties of a prosecutor do not end with the arguing of the case before the court. Prosecutors can and do play an important role after a finding of guilt by the trial court at the sentencing, asset restraint and forfeiture phases of proceedings as well.

7.1. Sentencing

The prosecutor's role at the sentencing stage of a trial requires the same scrupulous fairness adhered to during the investigation and trying of the case. If prosecutors have the right to recommend sentence or have any role in sentencing, they must ensure that the sentence they seek is within the bounds of the law for similar offences and that all aggravating and mitigating factors in sentence are considered by the court, particularly in the case of an unrepresented accused. Any plea agreements must be honoured and any evidentiary rules that govern the sentencing process must be abided by. Consistency and fairness in sentencing is important as recommendations on sentence will be considered by the court. Prosecutors should consider alternatives to imprisonment[135] if the facts and the law allow for these alternatives to be pursued:[136]

> In making a recommendation to the sentencing judge regarding the appropriate sentence following a criminal conviction, the prosecutor must consider the interests of justice, the wishes of the victim, the seriousness of the crime, factors of individual and society deterrence, the protection of society, the role of the offender and many other factors as well. The prosecutor should not simply seek the maximum penalty that might be possible under the offence or offences of conviction, but instead balance the interests present — most importantly the interests of justice.[137]

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[135] Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment.

[136] See, for example, the following alternatives to imprisonment that may be available to prosecutors, as listed in the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex, sect. II, item 8, para. 8.2.): *(a)* verbal sanctions, such as admonition, reprimand and warning; *(b)* conditional discharge; *(c)* status penalties; *(d)* economic sanctions and monetary penalties, such as fines and day fines; *(e)* confiscation or an expropriation order; *(f)* restitution to the victim or a compensation order; *(g)* suspended or deferred sentence; *(h)* probation and judicial supervision; *(i)* a community service order; *(j)* referral to an attendance centre; *(k)* house arrest; *(l)* any other mode of non-institutional treatment; *(m)* some combination of the measures listed above.

[137] United Nations Office on Drugs and Crime, "United Nations Convention against Corruption: article 11 implementation guide and evaluative framework", para. 156.

7.2. Asset restraint and forfeiture

Asset restraint and forfeiture is becoming an increasingly common component of many criminal investigations and prosecutions as States look to combat an increasingly sophisticated criminal element that embraces globalization and capitalizes on the benefits and protections it can offer. Many States have domestic legislation designed to trace, freeze and seize proceeds of crime, and many States have also ratified international conventions such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime.

Legislation and conventions of this type provide powerful tools to combat domestic and international crime but they require prosecutors who are well versed in complex crime and multidisciplinary teams with specialist knowledge. In many cases, this knowledge will have to go beyond the domestic legal framework and enter the realm of international legal cooperation (see section 12, below).[138]

The legal rationale for seeking asset restraint and forfeiture may have to be scrutinized by prosecutors to ensure that there are compelling legal reasons to fairly restrain and seek the forfeiture of property. Particular attention may have to be given to the reason for forfeiture in jurisdictions where proceeds of forfeiture proceedings are part of a funding mechanism for law enforcement or the justice system in general. Transparency in the decision-making process, including any plea negotiations that have taken place, will be paramount in assuring the public that the forfeiture proceedings were legally defensible and were not the product of oblique motives on behalf of the authorities.[139]

8. Role of the prosecutor at the post-sentencing stage

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4. Role in criminal proceedings

[138] See the Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime (2012), for an overview of considerations pertaining to seizure and forfeiture of assets.

[139] For an example of an established protocol dealing with property that has been the subject of restraint and potential forfeiture, see the United States Attorneys' Manual, section 9, sections 9-111.000–9-121.000. Seizure and forfeiture is an activity where complete transparency in the process is an important component in maintaining public trust in the administration of justice.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows:
[…]

(f) When, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

Depending on the jurisdiction prosecutors may have a number of different roles to play at the post-sentencing stage. Some of these roles are as follows:

- Considering an appeal by the prosecution against sentence
- Responding to an appeal by the defence against conviction and sentence or against sentence alone
- Responding to new evidence being presented that was not available at trial and that may have a bearing on the ultimate issue of guilt or innocence in the case
- Implementation of sentence
- Supervision of prison conditions for those serving a sentence
- Providing input into the issue of conditional release of offenders
- Informing victims of the release and whereabouts of offenders

Prosecution services should consider consulting broadly on the decision to appeal so that the prosecutor who tried the case initially does not have the sole responsibility and authority to file an appeal. This ensures that decisions to appeal are fair and transparent.

In some States, prosecutors play an important role in the execution of sentences and exercise supervision over the legality of detentions and of the living conditions of the detainees within prisons. Prosecutors should ensure that the conditions of detention do not amount to degrading or inhuman treatment and that the human rights of detainees are safeguarded. In case of any breach of legal regulations within the process of detention, prosecutors should respond by requesting strict compliance with the applicable legal provisions and should initiate or promote, where appropriate, disciplinary or criminal proceedings against those responsible.

Depending on the national legal systems, prosecutors may also play an important role in the process of conditional release of offenders, as well

as in decision-making about pardons. Prosecutors shall ensure that the interests of society are safeguarded where there is a real prospect of reintegration into society.

9. Victims and witnesses

Guidelines on the Role of Prosecutors

13. In the performance of their duties, prosecutors shall: […]

(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.

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4.3 *(b)* Prosecutors shall … in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights;

Testifying or providing statements in the criminal process can be an unfamiliar and potentially frightening experience for witnesses who are not properly informed of the criminal process and their place in that process. Those persons who are witnesses should be kept apprised of how cases are progressing from the time of the initial complaint to the completion of the last appeal.

Prosecutors should work closely with victim services workers and other support services to ensure that victims and witnesses are made aware of the criminal process and what their role and the roles of other participants are. Care should be taken to explain that the prosecution does not represent the victim and what can be expected during the trial and at sentencing should there be a conviction. Dealing with witnesses and victims is a skill requiring tact and understanding and a firm knowledge of the role and responsibility of the prosecution. Care should be taken to always maintain a professional detachment even in the most emotional case so that the integrity of the system is maintained.[140]

[140] See E/CN.15/2011/8, para. 60.

10. Vulnerable persons

The criminal process can touch many lives during the investigative, pretrial, trial and sentencing phases of the process. Some of those individuals who find themselves participants in the criminal process may have challenges or conditions that require special consideration by prosecutors. Persons such as young or disabled offenders,[141] female offenders,[142] female victims,[143] child victims,[144] child witnesses, elderly witnesses, disabled witnesses and victims of hate crime may require particular attention from the prosecutor. The creation of established protocols providing guidance to prosecutors when dealing personally with those who require special assistance[145] can assist in ensuring that all those who are required to participate in the criminal trial process are accommodated in a manner where they can fully participate in that process.

Depending on the jurisdiction, there may also be procedural and evidentiary avenues providing for protection of vulnerable witnesses, such as testimony given where the accused and witness are screened from one another, allowing for the admissibility of hearsay evidence under limited circumstances (in those jurisdictions where generally hearsay evidence is not admissible), testimony via video link or hearings in closed court.

[141] Prosecution services should consider the creation of specialized offices or a cadre of specialized prosecutors to deal with juvenile offenders and their particular needs regarding sentencing. See Committee on the Rights of the Child, General Comment No. 10 (2007) on children's rights in juvenile justice (CRC/C/GC/10), para. 92.

[142] See United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), General Assembly resolution 65/229, annex.

[143] Violence against women is a challenge to the criminal justice system. The United Nations has recommended specialized training for prosecutors dealing with crimes against women. The United Nations Special Rapporteur on violence against women, its causes and consequences noted that prosecution of this kind of crime was frequently limited by stereotypes, minimizing the gravity of these offences and by a lack of appropriate collection of evidence, that absence of care by criminal justice professionals increases risks of revictimization during the process, that some charging patterns favour charging for the less serious offences, and that orientation to alternative and mediation may not be appropriate (A/HRC/23/49), paras. 53-56.

[144] When children are victims of sexual abuse and violence, criminal proceedings can be an additional trauma. United Nations Guidelines recommend limiting interference with the child's private life to the minimum needed while maintaining a high standard of evidence collection, and that interviews and examinations be conducted by trained professionals in a sensitive, respectful and thorough manner (Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Economic and Social Council resolution 2005/20, annex)).

[145] For an example of protocols and procedural safeguards for vulnerable witnesses, see a summary of the regime in Germany found at New Zealand, Law Commission, "Alternative Pre-trial and Trial Processes: Possible Reforms", Issue Paper 30 (Wellington, 2012), appendix 3, p. 59.

The prosecutor also has a duty to ensure that vulnerable accused persons are treated fairly and with respect. Care must be taken to ensure that the accused is aware of the nature of the proceedings against him or her and that procedural requirements such as the attendance of a parent or guardian when a young offender is in court are complied with.

11. Media and the public

Guidelines on the Role of Prosecutors

13. In the performance of their duties, prosecutors shall: […]

(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice. In particular they shall: […]

(b) Remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest;

4.3 Prosecutors shall, furthermore:

(a) Preserve professional confidentiality;

The public and the media who inform them have an abiding interest in the administration of justice. As a result, the cases that are dealt with by a prosecution service can sometimes attract media attention. Prosecution services must be able to satisfy the public's right to know about aspects of a criminal proceeding[146] while at the same time not jeopardizing the proceeding itself through the dissemination of information subject to a publication ban or by comments that could be considered inflammatory or damaging to an accused

[146] See article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

who is under trial,[147] or to the trial process itself. Confidentiality requirements protect not only the internal work of the prosecutor's office but also the large amount of information to which prosecutors have access, including information pertaining to suspects, victims and witnesses.

Publicly criticizing the courts or commenting on ongoing cases being investigated or prosecuted is not appropriate conduct for prosecutors in any public forum, particularly the media. Communication of personal information of suspects, victims and witnesses is improper, as is providing personal information to the media prior to informing the individual concerned. Prosecutors should also not display any bias towards specific members of the media.

Media in the twenty-first century can include not only traditional publications and news outlets such as newspapers or radio and television stations but also bloggers, websites, other social media sites or any number of constantly growing technological advances that allow anyone, from professional journalists to amateurs, to capture a sound bite or video clip and disseminate it around the world in a matter of seconds. Prosecutors now operate in this realm and must be aware of the potential challenges that may arise as a result of it. Additionally, prosecutors must be cautious with respect to their own participation in social media.[148] Previous sections have

[147] See Council of Europe, Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings:

Principle 6 — Regular information during criminal proceedings

In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

Principle 7 — Prohibition of the exploitation of information

Judicial authorities and police services should not exploit information about ongoing criminal proceedings for commercial purposes or purposes other than those relevant to the enforcement of the law.

[148] See Kathryn K. Van Namen, "Facebook facts and twitter tips — prosecutors and social media: an analysis of the implications associated with the use of social media in the prosecution function", *Mississippi Law Journal*, vol. 81, No. 3 (2012), p. 587, where the author states the following challenges for the future regarding prosecutorial conduct and social media:

It is essential to educate attorneys about the potential ethical ramifications involved in their use of social media and to establish clear standards and guidelines for the profession to help prevent future ethical violations. Until more bar association ethics committees and courts decide the issue of social media use in the legal profession, however, prosecutors must be aware of the potential ways the professional rules of conduct govern all actions of the profession, specifically the prosecution function, and the consequences they may face as a result of social networking.

Moreover, attorneys, specifically prosecutors, must be aware of the impact their actions will have on others involved in the judicial process. As leaders of the legal profession, prosecutors have an obligation to help develop the standards necessary to avoid dismissals, mistrials and wrongful convictions, and ultimately, to ensure that justice prevails. Part of this obligation may very well include the duty to develop guidelines for the legal profession regarding courtroom social media.

addressed the responsibilities of prosecutors outside their official duties and the fact that they are judged by their behaviour both inside and outside the courtroom. Public commentary on social media sites either under their own name or under a pseudonym is improper practice that can jeopardize a prosecution even after the verdict is rendered, possibly leading to a successful appeal and a retrial.

With respect to the traditional media, there are some jurisdictions in the world where media access is limited, but in many jurisdictions media interest in all types of prosecution cases is typical. Prosecution services should have media policies in place to provide guidance to prosecutors in dealing with the media. These same services should, given the dynamic nature of interaction with the media, consider providing specialized training for prosecutors in communicating effectively during interviews, impromptu interviews outside court, media conferences, etc. Prosecution services should also have guidelines[149] in place to provide guidance on the establishment of spokespersons, media contacts and a communication plan for major cases, particularly those of national interest and where major legal issues are involved.

[149] For examples of media guidelines for prosecutors from the civil law and common law traditions, see France, Code of Criminal Procedure, article 11:

> Except where the law provides otherwise and subject to the defendant's rights, the enquiry and investigation proceedings are secret … However, in order to prevent the dissemination of incomplete or inaccurate information, or to put an end to a disturbance to the public peace, the prosecutor may, on his own motion or at the request of the investigating court or parties, publicize objective matters related to the procedure that convey no judgement as to whether the charges brought against the defendants are well founded.

Also see Hong Kong, China, Prosecution Code, para. 24.2:

> In communications with representatives of the media, a prosecutor may confirm facts that are already in the public domain upon request, including matters presented in open court (subject to any court order), the settled future course of events (e.g., trial date, pre-trial argument, when a particular witness may testify) and general open information about a case. However, a prosecutor is not obliged to provide information to the media.

12. International cooperation

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5. Cooperation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

(b) Render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual cooperation.

Globalization has been embraced by the criminal element with great vigour. Law enforcement and prosecution services must embrace this new reality in order to effectively combat some of the most complex and serious crimes affecting States.[150] This requires unprecedented consultation, communication and coordination efforts between the investigative and prosecution services of one State with the investigation and prosecution services of another. The differences in legal traditions, legal systems, language, culture and the peculiar requirements of international treaties and conventions require a legal expertise and knowledge that many prosecutors will not readily possess.[151,152]

[150] Organisation for Economic Co-operation and Development, "Anti-Corruption Specialisation of Prosecutors in Selected European Countries" (Vienna, 2011), p. 17 provides an example of international legal cooperation through mutual legal assistance:

> While there are prosecutors specialized in mutual legal assistance, it is an instrument, which can be used by specialized anti-corruption prosecutors as well. International instruments and recommendations contain a number of standards for prosecutor's offices concerning international cooperation. They commonly list the forms of assistance that can be provided, the rights of the requesting and requested States relative to the scope and manner of cooperation, the rights of alleged offenders and the procedures to be followed in making and executing requests.

[151] See UNODC, Manual on Mutual Legal Assistance and Extradition (Vienna, 2012), chapter II, para. 15:

> All people, legal practitioners included, are products of the society and legal norms within which they live. Lawyers and the judiciary, of course, have the added dynamic of having studied the law of their country and then gone on to practise it, usually without giving much thought to the legal traditions or systems of other nations. Mutual legal assistance and extradition requests put that legal and societal knowledge deficit in sharp relief, sometimes with negative results.

[152] See also International Association of Prosecutors, "Mutual legal assistance: best practice series No. 4", "Basic guide to prosecutors in obtaining mutual legal assistance in criminal matters" and "Prosecutorial guidelines for cases of concurrent jurisdiction making the decision: 'Which jurisdiction should prosecute?'", accessible to the members of the International Association of Prosecutors through the Association's website or upon request.

The solution to this challenge is to ensure that prosecutors have a basic knowledge of how international legal assistance works and the skill to allow them to prepare a draft outgoing mutual legal assistance request. There should also be protocols put in place, preferably through prosecution guidelines, that provide guidance to the prosecutor regarding contacting the central authority who will assist and forward the outgoing request to the requested State. The guidelines should at a minimum articulate the following in order to be instructive to prosecutors who are engaged in obtaining international legal assistance:

- Reference to the domestic legislation that authorizes mutual legal assistance or extradition
- The role of the central authority in international legal cooperation
- The contact points (names, e-mail, etc.) of the central authority
- The protocol for prosecutors to initiate a mutual legal assistance or extradition request

Prosecution services should also consider outreach efforts with a view to creating a culture of international cooperation where informal networks of communication can be used to provide assistance and guidance to one another. Such informal networks can be valuable in understanding the legal systems of other jurisdictions and allows for enhanced cooperation when it is required on a more formal level. If there are situations that the law allows for prosecutors to contact one another with a view to furthering international legal assistance then they should be encouraged to do so. One of the objects of the International Association of Prosecutors is to further such cooperation and contact.

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