

# **THE ROLE OF PROSECUTORS IN PROMOTING AND STRENGTHENING THE RULE OF LAW**

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**The Role of Prosecutors in Promoting and Strengthening  
the Rule of Law<sup>1</sup>**

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## **I. Introduction**

1. It is taken as an axiom that there is a relationship between the Rule of Law and a society's internal stability and its ability to manage conflict and prevent crime and terrorism. Where the rule of law is firmly in place and citizens are stakeholders in the political process, conflicts are less likely to degenerate into violent confrontations.
2. The rule of law is a system of principles that relate to the legal governance of societies, but it is not itself a legal system. The rule of law effectively anchors and stabilizes legality, while maintaining a firm connection to social development and change, ensuring that law and legal practices, including criminal justice practices, keep pace.
3. At the institutional core of systems based on the rule of law is not only a strong independent judiciary, but also effective prosecution services with well trained and adequately empowered and equipped prosecutors committed to upholding the rule law and human rights in the administration of justice.
4. There are manifestly many aspects to the role of prosecutors in promoting and strengthening the rule of law. Prosecution services are a vital part of the institutions the actions of which affirm the rule of law by a fair, consistent, impartial and effective enforcement of the law. Without the prosecutors' own commitment to human rights and to upholding the rule of law, the criminal justice system and governing institutions risk falling into disrepute and losing all credibility and moral authority.
5. Prosecution services are also important guarantors of the rule of law inasmuch as they accept the role of combating impunity and ensuring the lawfulness of State actions. They must, among other things, remain vigilant and ensure that the actions of the police, corrections and other law enforcement authorities are lawful and respectful of human rights. They do so, in part, by bringing to the attention of the courts any instance of unlawful or corrupt behaviour by agents of the State or other officials in positions of authority and by vigorously prosecuting such offenders to the full extent of the law. In cases involving the corruption of public officials, their role is particularly important and delicate.
6. This discussion paper reviews some of the issues that can be anticipated by prosecutors in performing their role in upholding the rule of law. It also touches upon some of the issues that have emerged in recent years in relation to the performance of that important function in the context of emergency situations (e.g. counter-terrorist activities), within the regime of international cooperation in criminal matters, and in the context of post conflict reconstruction and peace building initiatives.

## II. What is the Rule of Law?

7. There is no universally accepted definition of the rule of law, but the purpose of this paper is not to argue about definitions. Those who define the rule of law in terms of the broad ends that it serves usually include, although often with different emphasis, the following concepts: a state subordinate to law in order to prevent arbitrariness (i.e. a government that abides by standing laws and respects human rights); fairness, defined in part as equality of all before and under the law; predictable and effective rulings; protection of human rights, and, law and order and/or a duty of the State to protect its citizens.

8. Others approach the question of defining the rule of law by considering its “institutionalized attributes”<sup>2</sup>: legitimacy of law making process; independent and competent judiciary; fair and competent prosecution services bound by law and human rights and capable of effective implementation and enforcement of the law; and, good and efficient law enforcement institutions dedicated to the fair enforcement of all laws and the protection of human rights whose actions are subject to civilian oversight and judicial review. Under the requirements of the rule of law, the laws of a country must be comprehensive, clear, certain and accessible; they must be legitimate (legislatively and politically as well as in the way in which they are applied or enforced) and they must balance stability and flexibility.

9. The report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies reiterates that the “rule of law” is a concept at the very heart of the United Nations’ mission. “It refers”, the report explains, “to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”. The report adds that the “rule of law” also requires “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.<sup>3</sup>

## III. Prosecutions and the Rule of Law

10. The basic role and function of prosecutors vary considerably among legal systems. The extent of their power and authority varies considerably among States. In particular, prosecutors may play a more or less active role in the actual investigation of crime, depending on national law, and as a result their respective relationship with the police may be different.<sup>4</sup> In some

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<sup>2</sup> Kleifeld Belton, R. (2005). *Competing Definitions of the Rule of Law – Implications for Practitioners*. Washington (D.C.): Carnegie Endowment for International Peace, Democracy and Rule of Law Project, Working Paper No. 55, January 2005.

<sup>3</sup> United Nations (2004). Report of the Secretary-General to the Security Council. *The Rule of Law and Transitional Justice in Conflict and Post Conflict Situations*. August 23, 2004. S/2004/616, p.4.

<sup>4</sup> See: Take, J.P. (2005). *The Relationship between Public Prosecutors and the Police in the Member States of the Council of Europe*. Conference of Prosecutors General of Europe – 6<sup>th</sup> Session, Council of Europe, Budapest,

jurisdictions, a large proportion of the prosecutions are carried out by police officers. In some countries, prosecutors are elected and in others they are appointed.

11. The quality of the legal training offered to professional prosecutors, their agents, and others involved in prosecuting crime also varies greatly from one State to another and may require strengthening. As was reiterated in the preamble to the United Nations Guidelines on the Role of Prosecutors, it continues to be important for States to “ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality”<sup>5</sup>. In brief, there are a number of very difficult practical issues with respect to the capacity and the ability of prosecution services to effectively carry their function under the principles implied by the “rule of law”.

12. The essence of the role of prosecutors in upholding the rule of law is captured in part by the Guidelines on the Role of Prosecutors. They affirm that:

“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.

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.”<sup>6</sup>

12. To maintain the integrity of the prosecution function and ensure that it can play its crucial role in upholding the rule of law, States must ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, undue interference or unjustified exposure to civil, penal or other liability. Political and other forms of interference with the impartial and fair execution of the prosecution function are in direct contradiction with the principles of the rule of law.

13. Times have changed, new challenges have emerged and, with them, a new host of questions and issues about the role of prosecutors in the global village. The complexity of several investigations and, in many instances, the shortcomings of law enforcement agencies have forced prosecutors to play a more direct role in the investigation of serious crimes. The role of prosecutors in general has evolved. In a sense, there is a slow convergence towards a more strategic role, a more proactive role in defining crime control policies, in advising the legislator,

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May 29-31, 2005. Also: Council of Europe (2005). *Replies to the Questionnaire – Relationship between Public Prosecutors and the Police*, Strasbourg, May 13, 2005. (<http://www/coe.int/prosecutors/>)

<sup>5</sup> United Nations (1990). *Guidelines on the Role of Prosecutors*. Eight, United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990.

<sup>6</sup> Ibid.,

and in directing investigations. Prosecutors are now often members of inter-disciplinary teams, alongside with specialists from other disciplines, and they are expected to exercise new leadership skills. In many instances, the complexity of social interactions and the appearance of new technologies have led to the implementation of complex procedural safeguards which have added to the difficulty of the tasks of prosecutors.

14. In many States, prosecutors are now called upon to play a more publicly visible role and their action and inaction can often be instantly reported in the media. They must not only strive to act fairly and efficiently, but they have to be increasingly concerned that they are publicly “seen to be doing so”, as their actions and decisions are reported through the often deforming lenses of the media.

15. The increased complexity of the role of prosecutors has led to numerous calls to increase the capacity of prosecution services. Strengthening the rule of law, in fact, has emerged as a focus of development efforts in recent years and activities have focused on concrete goals of strengthening legal infrastructure, including strengthening the prosecution and investigation functions of criminal justice systems.<sup>7</sup>

#### **IV. Accountability and Transparency**

16. According to the Guidelines on the Role of Prosecutors, “(i)n countries where prosecutions 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.” In many States, prosecutors continue to have some broad discretionary powers, which are balanced by a requirement for greater public accountability.

17. Given the limited resources at their disposal and the rapidly increasing costs of prosecution, prosecutors must frequently make decisions based in part on cost considerations as opposed to strictly legal ones. The frequently high cost of international cases, the complexity of cases and sometimes also of the evidentiary material involved render a certain amount of discretionary decision-making in these matters probably inevitable. Rule of law considerations must nevertheless guide these decisions, and that can present some difficult challenges for prosecution services and their managers. Prosecutorial decisions, particularly where there is room for considerable discretion, creates room for corruption and discrimination, unless these decisions are subjected to public scrutiny and open to judicial review.

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<sup>7</sup> Some of these efforts focussed narrowly on building a legal infrastructure have been criticized for their lack of impact and for failing to deal with the much more difficult social and cultural reforms that are required. In recent years, it has been clear that changes in legal systems alone will not bring about the rule of law in societies where the traditional and cultural values necessary to support it are not present. See: Golub, S. *Beyond the Rule of Law Orthodoxy – The Legal Empowerment Alternative*, Washington (D.C.): Carnegie Endowment for International Peace, Working Paper No. 41, October 2003. Also, Carothers, T. (2003). *Promoting the Rule of Law Abroad – The Problem of Knowledge*. Washington (D.C.): Carnegie Endowment for International Peace, Working Paper No. 34, January 2003.

18. Transparency in prosecutorial decision-making, to the extent possible under national law and consistent with the principles of the rule of law, is necessary to reveal and mitigate the potential shortcomings of prosecutorial decisions. Furthermore, fair, just and credible prosecution practices can also be encouraged through the development of prosecutorial policies, the identification and publication of prosecutorial priorities, as well as the encouragement of public input. All aspects of prosecutorial policies, tactics and strategies clearly cannot be in the public domain, because publicity may defeat their original purpose. However, some level of transparency, at least at a general level, can certainly be an antidote to the misuse of discretionary powers in ways that are problematic or weaken the principles of the rule of law and thereby undermine the legitimacy of the legal system. Finally, empirical studies, independent review and the publication of findings on the use of prosecutorial discretion can also offer a basis for a healthy measure of public scrutiny and discussion.

## **V. Fighting Transnational Organized Crime**

19. Most conventional crimes do not raise the same concerns for the rule of law as the activities of transnational organized criminal groups do. Organized criminal groups undermine human rights, subject individuals and communities to high levels of violence and fear, but they also actively work to subvert democratic processes, including through influencing law enforcement, the prosecution and the judiciary and the outcome of elections. A transparent and well-functioning prosecution service along with an independent and efficient judicial system is a crucial means to limit the influence of organized crime and the social damage it causes.

20. Organized crime and high-level corruption offences tend to be crimes of the powerful. These offenders often have the power and influence to manipulate or distort the application of the law, legal proceedings or even the making of laws to gain unfair advantages or to avoid criminal liability or prosecution for their offences. This can erode the rule of law in deep and persistent ways and affect the basic legitimacy of legal, economic and political institutions. Upholding the rule of law and strengthening the integrity of the criminal justice system, including prosecutorial services are a major element of a State's response to transnational organized crime.

## **VI. Preventing Corruption**

21. The debilitating effect of corruption on the rule of law is all too obvious. Preventing and fighting corruption is one of the most important ways in which prosecutors protect the rule of law and the integrity of social and economic institutions. The 1990 Guidelines on the Role of Prosecutors specify that:

“Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human

rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.”<sup>8</sup>

22. As noted in the discussion paper on international cooperation, power and political interference are issues affecting the effectiveness and speed of a requested State’s assistance to prosecutors in other jurisdictions. The integrity of actors in criminal justice agencies, the judiciary and legislative bodies, as well as in the private sector is indispensable for a legitimate and effective crime control effort domestically and globally<sup>9</sup>. The establishment and publication of priorities, guidelines, and ethics codes are essential toward awareness, transparency and accountability with respect to prosecutors, those assisting prosecutorial work and targets of prosecution.

23. Continuous training of key personnel also contributes to the creation of workgroup cultures in which the risks of abusive, inconsistent or unfair prosecutorial actions are appreciated. In other words, prosecutorial personnel ought not to lose sight of the damage to their own work in future caused by improper actions even against defendants for serious crimes. Such risks are quite apparent in the course of recent counter-terrorism policies and practices.

## **VII. Action against terrorism: Upholding the Rule of Law in emergency situations**

24. In his speech to the Counter Terrorism Committee of the Security Council on 7 March 2003 the UN Secretary General emphasized the need “ (...) to develop an international programme of action, founded on an unshakeable commitment to upholding the rule of law. As terrorism involves the calculated use of violence in violation of the law, our response to terrorism should aim to ensure the rule of law (...)”.

25. Terrorism and extremism of all kinds threaten both the rule of law and the fundamental freedoms of civilians and entire societies. At the same time, the manner in which counter-terrorism efforts are conducted can have serious implications for the rule of law. The determination of Member States to take strong action against terrorism has raised a number of issues in relation to the protection of human rights. It has reemphasized the need to ensure that, in adopting measures aimed at preventing and controlling acts of terrorism, States adhere to the rule of law, including the basic principles, standards and obligations of criminal and international law which define the boundaries of permissible and legitimate State action against terrorism and the various forms of serious crime in which terrorists and other criminal groups are involved. The global fight against terrorism raises a number of issues and difficult challenges for prosecutors.

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<sup>8</sup> *Guidelines on the Role of Prosecutors*, adopted by the 8<sup>th</sup> UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Guideline No. 15.

<sup>9</sup> The UN Convention against Transnational Organized Crime requires that States take effective action for the prevention, detection and punishment of corruption by public officials, including adequate independence to avoid undue influences (see art. 9. para.2). The UN Convention against Corruption builds on such provisions and emphasizes the independence of the judiciary and its crucial role in combating corruption. It more specifically mandates measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary and prosecution services (see art. 11).

26. The high moral ground State actors enjoy might be lost when their methods are (or are widely perceived as) arbitrary, baseless, discriminatory or illegal. Instead of defending against terrorism, practices that effectively discriminate, alienate or mistreat individuals or groups for which extremist movements claim to speak are likely to generate sympathy or support for militancy. Counter-terrorism practices that lose their legitimacy and torpedo fundamental rights, freedoms and principles undermine security instead of enhancing it.

27. The United Nations General Assembly, in its resolution 59/195 of 20 December 2004,<sup>10</sup> emphasized the need to enhance effective international cooperation in combating terrorism in conformity with international law, including relevant State obligations under international human rights and international humanitarian law. In September 2003, the United Nations Office of the High Commission for Human Rights published the *Digest of Jurisprudence of the United Nations and regional organizations on the Protection of Human Rights while Countering Terrorism*<sup>11</sup>. The goal of this initiative was to provide prosecutors and other legal professionals, policy makers and others with a vision of a counter-terrorism strategy that fully respects human rights and the rule of law. The United Nations Human Rights Commission has entrusted its Sub-Commission on the Promotion and Protection of Human Rights with the elaboration of detailed principles and guidelines concerning the promotion and protection of human rights when combating terrorism.

28. The Council of Europe adopted and published a set of Guidelines on Human Rights and the Fight against Terrorism.<sup>12</sup> They reaffirm that:

“All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision”<sup>13</sup>

29. Other principles cover the absolute prohibition of torture, the protection of personal data collected or processed by the authorities, the protection of privacy, the protection of persons suspected of terrorist activities who are arrested or detained, legal proceedings and restrictions to the right of defence, the principle of “non-refoulement”, or the principles that should guide the extradition of people suspected of terrorist activities.

30. The Council of Europe Guidelines recognize that, in a situation of public emergency such as those that may be created by terrorist acts and other major crimes, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation. However, the Guidelines make it clear that:

<sup>10</sup> General Assembly resolution 59/185 on *Human Rights and Terrorism*.

<sup>11</sup> UNOHCHR (2003). *Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism*. <http://www.unhchr.ch/html/menu6/2/digest.doc>

<sup>12</sup> Council of Europe (2005). *Human Rights and the Fight against Terrorism – The Council of Europe Guidelines, Strasbourg, March 2005*.

<sup>13</sup> *Idem*. “II – Prohibition of arbitrariness”.

“States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.”

31. The International Bar Association, based on the work of its Task Force on International Terrorism<sup>14</sup>, also issued a set of principles on the suppression of terrorism within the framework of international law. The two fundamental ones are:

“The threat of terrorism should not be used by States as a reason to disregard fundamental norms of international law.”

“States should not use the fight against terrorism as a pretext to adopt measures which unlawfully restrict the rights to freedom of expression, religion, opinion.”<sup>15</sup>

32. “All measures taken by States to combat terrorism must be lawful” also according to the Council of Europe Guidelines<sup>16</sup>. The implications of these principles for the role of prosecutors are clear in terms not only of a duty to comply with international standards, but also in terms of an obligation to ensure the lawfulness of all actions taken by the State and its agencies against terrorism.

33. The International Commission of Jurists, in the Berlin Declaration (August 2004), acknowledges the threat to human rights posed by terrorism, but also emphatically reminds States, lawyers and jurists that, during times of crisis, prosecutors have a particularly heavy responsibility to ensure that rights are protected.

“In addition to working to bring to justice those responsible for terrorist acts, prosecutors should also uphold human rights and the rule of law in the performance of their professional duties (...). They should refuse to use evidence obtained by methods involving a serious violation of a suspect’s human rights and should take all necessary steps to ensure that those responsible for using such methods are brought to justice. Prosecutors have a responsibility to tackle impunity by prosecuting persons responsible for serious human rights violations committed while countering terrorism and to seek remedy and reparation for victims of such violations.”<sup>17</sup>

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<sup>14</sup> International Bar Association (2003). *International Terrorism: Legal Challenges and Responses*. A Report of the International Bar Association’s Task Force on International Terrorism. London: I.B.A

<sup>15</sup> International Bar Association (2003). *The IBA Task Force Principles on Suppressing Terrorism within the Framework of International Law*. London: I.B.A.  
[http://www.ibanet.org/images/downloads/HRIROL\\_TTF%20Principles.pdf](http://www.ibanet.org/images/downloads/HRIROL_TTF%20Principles.pdf)

<sup>16</sup> *The Council of Europe Guidelines, No. III, Lawfulness of anti-terrorist measures*”.

<sup>17</sup> International Commission of Jurists (2004). *The Berlin Declaration. The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*. August 28, 2004, p. 4.

34. A person accused of terrorist activities must benefit from the presumption of innocence and has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law. Exceptional measures may be required during legal proceedings relating to acts of terrorism. The Council of Europe guidelines, for instance, acknowledge that the imperatives of the fight against terrorism may justify certain restrictions to the right of defence.<sup>18</sup> The prosecution, in such cases, must ensure that the restrictions to the right of defence are strictly proportionate to their purpose and that compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance.

### **VIII. International Criminal Justice**

35. With the globalization of social issues, the trend towards crime becoming more transnational in nature and the consequent need for strengthened international cooperation in law enforcement, the functions and actions of prosecutors also transcend national borders. International cooperation is a pre-condition of success for many if not most serious investigations and prosecutions. This has confronted prosecutors with some specific challenges resulting from the tension between on the one hand the requirement to exchange information, intelligence and crime data in order to ensure the successful investigation of transnational crimes, and on the other hand varying levels of protection afforded in different States to the privacy and other rights of the individuals concerned. In fact, prosecutors involved in international task forces and in facilitating mutual assistance in criminal matters or responding to foreign requests for extradition are keenly aware of the difficult challenges which emerge out of operational collaboration initiatives where two legal systems and two different approaches to the rule of law are confronted on a daily basis.

36. Measures to reinforce the rule of law need not be characterized as impediments to international cooperation. A State's commitment to the rule of law and the protection of human rights should not be negotiable or bartered against some international cooperation concessions in fighting transnational crime or terrorism. In fact, a commitment to the rule of law can enhance international cooperation in criminal matters. As was emphasized in a report of the International Bar Association on the subject of terrorism, measures to enforce the rule of law and adherence to international human rights standards are also directly relevant to enhancing mutual assistance and international cooperation.<sup>19</sup> For instance, a State is more likely to cooperate with another in an extradition matter, if it has assurances that the accused will have the right to a fair trial and to due process.

37. In cases involving international cooperation in criminal matters, their commitment to the rule of law imposes on prosecutors a duty of vigilance. In matters of extradition, mutual legal

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<sup>18</sup> The Guidelines refer to restrictions to the right of defence with respect, for example, to arrangements for access to and contacts with counsel, arrangements for access to the case-file, or the use of anonymous testimony.

<sup>19</sup> This is a point that is also made in "Principle 5 – International Cooperation" of the *IBA Task Force Principles on Suppressing Terrorism within the Framework of International Law*, see *supra* note.

assistance, or joint investigations, prosecution services retain an obligation to ensure the lawfulness of all actions taken in the name of cooperation.

### **A. Extradition**

38. The Council of Europe Guidelines make it explicit that extradition should not be granted, when there are serious reasons to believe that the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment<sup>20</sup>, or when that person has suffered or risks suffering denial of justice in the requesting State. In the latter case, there is an important role for prosecutors who have a duty to establish whether there is indeed a risk of denial of justice or torture. They must also determine whether an extradition request has been submitted for purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions.

### **B. Participation in Joint Investigative Bodies**

39. The role of prosecutors in joint investigation bodies and the extent of their involvement in these joint investigations vary considerably from one State to another. There are also some practical problems in the organization of joint investigations, including the lack of common standards and accepted practices, issues around the actual supervision of the investigation, and the absence of mechanisms for quickly solving these problems.<sup>21</sup> One of the main obstacles to the creation of such joint investigative bodies is the absence of a specific legal framework within which such teams can be established and are expected to operate. In the absence of the required framework, at the national and international levels, the lawfulness of these practices may often come into question.

### **C. The Collection and Exchange of Personal Data.**

40. The sharing of information and intelligence between security and law enforcement agencies is increasingly perceived as an important means to prevent terrorist acts and other major criminal offences. Efforts to increase these exchanges have produced some appreciable results, but they have also raised a number of issues. In many instances, the domestic and international legal frameworks governing these exchanges are insufficient. Some progress is being made at the bilateral, sub-regional and regional levels to ensure that current exchange mechanisms meet the needs of judicial and law enforcement cooperation, while providing the necessary safeguards for the protection of personal data and individual privacy rights.<sup>22</sup>

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<sup>20</sup> As noted in the international cooperation paper, what constitutes inhuman or unacceptable treatment varies from State to State. Some countries refuse extradition in cases where the suspects are subject to capital punishment or life imprisonment, if convicted.

<sup>21</sup> See Schalken, T. and M. Pronk (2002). "On Joint Investigation Teams, Europol and Supervision of their Joint Actions", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10/1, 70-82.

<sup>22</sup> See for example, the Commission of the European Communities (2004). *Proposal for a Council Decision on the Exchange of Information from the Criminal Record. Brussels, 13.10.2004- 2004/0238 (CNS)*.

#### **D. The Use of New Investigative Methods**

41. New technological developments and modern methods of investigation have created new issues with respect to the legitimacy of these methods and the protection of the rights of the individuals involved in the course of an investigation. In all jurisdictions, even those where prosecutors do not directly supervise or oversee criminal investigations, prosecutors have a duty to ensure that these methods are used lawfully and in accordance with applicable human rights standards.

42. As was noted in the best practice survey conducted by the Council of Europe, as part of its Octopus Programme, “(...) it is not primarily the technical, but foremost the ethical and legal (including constitutional) barriers to such activities that are the subject of very intensive discussion, controversy and sometimes strong objections, in many contemporary democratic societies”.<sup>23</sup>

43. Prosecutors must obviously be very vigilant in their use of evidence obtained through such “modern” methods. In addition, international cooperation in the field of covert investigations tends to take place in a juridical vacuum.<sup>24</sup> The legal basis for cooperation in criminal matters for officers acting under cover or an assumed identity is not always very strong.<sup>25</sup> For prosecutors, there are questions around the admissibility of evidence collected in other States through methods that are not necessarily acceptable in their own State as well as the use of evidence obtained by officials in another State in violation of the law of that State. The verification of the legitimacy of evidence obtained as a result of international police cooperation, for example, is not without procedural and practical difficulties for the prosecutors.

#### **IX. The Role of Prosecutors in Tackling Impunity**

44. Ending impunity is a fundamental aspect of the rule of law. The tackling of impunity is an obligation which falls to a large extent on the shoulders of prosecutors and prosecution services. Tackling impunity for human rights abuses wherever they arise, not only reinforces respect for the rule of law at the national level, but also consolidates the concept at the international level.<sup>26</sup>

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<sup>23</sup> Council of Europe (2004). “Interception of Communication and Intrusive Surveillance”, in *Combating Organised Crime, Best Practice Surveys of the Council of Europe*, Strasbourg, Council of Europe Publishing, pp. 77-104.

<sup>24</sup> The International Bar Association’s Task Force on International Terrorism has recognized the growing importance of law enforcement cooperation and recommended that States develop a multilateral convention on cooperation between law enforcement and intelligence agencies setting forth the means, methods, and limitations of such cooperation, including the protection of fundamental human rights. (International Bar Association (2003). *International Terrorism: Legal Challenges and Responses*. A Report of the International Bar Association’s Task Force on International Terrorism. London: I.B.A., p. 140).

<sup>25</sup> For instance, the matter is dealt with in the new European Union’s new convention on mutual legal assistance.

<sup>26</sup> Secretary-General (2004). *Strengthening the Rule of Law – Report of the Secretary-General*, General Assembly, Fifty Ninth Session. A/59/402, October 1, 2004, p. 3

45. Prosecutors have a specific role to play at the national level in addressing crimes of concern to the international community as a whole, such as genocide, war crimes and crimes against humanity. Within the International Criminal Court itself, the office of the prosecutor plays a pivotal role in the initiation of an investigation and prosecution. After a situation has been referred to a Prosecutor, he or she must, under Article 15 of the Statute of the International Criminal Court, first identify the potential cases and in each specific case determine whether an investigation should be initiated and, subsequently, whether someone should be charged with a crime.<sup>27</sup>

## **X. Reaffirming the Rule of Law in Conflict and Post-conflict Societies**

46. In an address to the General Assembly, United Nations Secretary General Kofi Annan expressed the widely-held belief that “(i)t is by reintroducing the rule of law and confidence in its impartial application that we can hope to resuscitate societies shattered by conflict”.<sup>28</sup>

47. The need to rebuild the capacity of national justice sector institutions, including as a matter of priority the capacity of prosecution services, and filling the rule of law vacuum evident in so many post-conflict societies has become a frequent preoccupation of the international community and the United Nations in the last decades. Transitional justice must offer a full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.<sup>29</sup> In post-conflict situations, prosecutors are often called upon to play a key role in reconstruction, peace building, capacity building, and transitional justice processes which contribute to an essential reaffirmation of the rule of law.

48. The role of prosecutors in the context of post-conflict situations consists not only of their responsibility to prosecute war crimes and other serious crimes and abuses of human rights, but also in rebuilding justice institutions. Where societies are undergoing the painful process of transition from conflict or widespread human rights abuse, prosecutors have a crucial role to play in the institutionalization of accountability processes (tribunals, truth commissions, etc.) and in instigating and supporting their fair operation.<sup>30</sup> The strengthening of the rule of law and the reform of criminal justice institutions are part of the process of post-conflict reconstruction. Within that difficult context, the actions of prosecutors are at the heart of efforts to restore public confidence in the impartial, efficient and fair application of the law.

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<sup>27</sup> Friman, H. (2001). “Investigation and Prosecution”, in R.S. Lee (Ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, pp. 493-538, p. 494.

<sup>28</sup> Address of the Secretary-General of the United Nations, Kofi Annan, to the General Assembly (21 September 2004). [www.un.org/apps/sgstate.asp?nid=1088](http://www.un.org/apps/sgstate.asp?nid=1088) .

<sup>29</sup> Secretary-General (2004). *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies – Report of the secretary-General*. Security Council, S/2004/616, 23 August 2004.

<sup>30</sup> See, for example, Stromeyer, H. (2001). “Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor”, *The American Journal of International Law*, Vol. 95: 46, pp. 46-63.

## XI. Conclusions

49. What are some of the key challenges that prosecutors face in this rapidly changing world? The discussion during this workshop on the role of prosecutors in upholding and enhancing the rule of law will offer practitioners an opportunity to examine together some of the challenges that they face in discharging their duty as prosecutors under the principles of the rule of law. They will examine ways of constantly reconciling these new developments with their own commitment to the rule of law and the protection of human rights.

50. In matters of international cooperation, rules protecting the sovereignty of States are often rightly perceived as an impediment to international cooperation. The opposite side of that coin is that these same rules often also offer individuals the last line of protection of their rights by allowing them to rely on a State's commitment to the rule of law and human rights.

51. Rule of law principles must be fully respected in matters relating to the extradition of offenders. Particular attention needs to be paid to the right to due process and the prohibition against refoulement. Evidence should always be secured in a way that ensures that torture and illegality is fully avoided. In the long term, international cooperation is weakened when some of its methods are brought into question. Prosecutors have a duty to denounce and deter such practices.

52. In addition to their necessary efforts to guarantee the lawfulness of the actions of all components of the criminal justice system and other State agencies, the prevention of corruption, the tackling of impunity and the development of a strong capacity to carry effective and fair prosecutions are the most important ways in which prosecutors can contribute to enhancing the rule of law.

53. Contributing to the protection of victims and their fair treatment is another aspect of the prosecutor's function under the general principles of the rule of law. It deserves special attention in the context of post-conflict reconstruction initiatives, the prosecution of crime against humanity, kleptocratic practices, terrorist acts and organized crime activities. Prosecution services have a duty to cooperate with each other in protecting victims and their rights, particularly when the crimes and abuses of power have created multiple victims in different countries.

54. The obligation to the rule of law is not an obstacle to the effective fight against terrorism or any other form of crime. In emergency situations, such as those that may be created by terrorist activities that threaten the life of a nation, a State may have to adopt extraordinary measures temporarily derogating from certain standards and obligations.<sup>31</sup> In such cases, the derogation should be strictly to the extent required by the exigencies of the situation, as well as

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<sup>31</sup> Guideline # 15 of the *Council of Europe Guidelines on Human Rights and the Fight against Terrorism* refers to these necessary derogations. However, as mentioned previously, the same guideline stipulates, at paragraph 2, that "States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law".

within the limits and under the conditions set by international law. The circumstances that justified the temporary derogation should be reviewed on a regular basis, so that they may be lifted as soon as they are no longer necessary.

55. This paper has highlighted the fact that, throughout the world, the role of the prosecutor is evolving rapidly. At the same time, the prosecutor's duties and responsibilities with respect to the rule of law and human rights are becoming more complex. Participants in the workshop may therefore also wish to discuss further ways to assist each other in developing strong and capable prosecution services, unhindered by undue political interference, unintimidated by organized crime or terrorist groups, engaged in effective international cooperation, and committed to upholding the rule of law and protecting human rights.

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