



# General Assembly

Distr.: General  
23 March 2020  
English  
Original: Spanish

## Human Rights Council

### Forty-fourth session

15 June–3 July 2020

Agenda item 3

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

## Independence of judges and lawyers

### Report of the Special Rapporteur on the independence of judges and lawyers

#### *Summary*

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the independence of judges and lawyers, pursuant to Council resolution 35/11.

In the report, the Special Rapporteur sets out to supplement his previous reports on the impact of corruption on the independence and impartiality of members of the judiciary by analysing the specific influence of corruption on public prosecution services and on the effective enjoyment of human rights. Prosecutors, as guarantors of the justice system, have a responsibility to ensure respect for the rule of law based on the obligation to respect, protect and uphold established human rights.

Therefore, irrespective of the organizational model adopted by prosecution services, combating corruption must be among the top priorities of every such service in the world. In this regard, the United Nations Guidelines on the Role of Prosecutors and the United Nations Convention against Corruption serve as the fundamental reference frameworks on which prosecution services should base their efforts to combat corruption and address its impact on human rights.

In the report, the Special Rapporteur presents the current state of affairs and describes the role of public prosecution services in the fight against corruption. He goes on to emphasize the importance of effective international cooperation in achieving the set objectives. The report also highlights a number of good practices and ongoing challenges for prosecution services in respect of cooperation and the fight against corruption.

Lastly, in the light of relevant international standards and the contributions of States and professional and civil society organizations, the Special Rapporteur makes a number of normative, institutional and operational recommendations that will provide the necessary tools to tackle the issue of corruption.



## I. Introduction

1. The present report is the fourth to be submitted to the Human Rights Council by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, pursuant to Human Rights Council resolution 35/11.

2. The broad scope of the mandate of the Special Rapporteur with regard to the question of judicial independence extends to “the nature of potential threats to this independence and impartiality”,<sup>1</sup> according to the general terms used by the former Commission on Human Rights when it established the mechanism of the Special Rapporteur. Over time, and given the growing complexity of human rights agendas and challenges, increasing attention has been paid to the issue of corruption and the ways in which it threatens the upholding of and respect for human rights. As the Special Rapporteur indicated when he presented the broad outlines of his mandate in his first report to the Human Rights Council in 2017,<sup>2</sup> the impact of corruption on the independence of the judiciary in general and of its members in particular is an issue to which he wishes to pay special attention.

3. In all legal traditions, members of the public prosecution service, whether styled as prosecutors, attorneys or by any other title, are a key element of the criminal justice system and hold responsibilities that are critically important. The rule of law cannot be upheld, nor can justice be effectively administered, if justice officials cannot act independently, impartially, objectively and with integrity, autonomy and neutrality in the performance of such a sensitive function that comes with a high level of responsibility. One of the priorities in building institutions and protecting human rights is therefore to strengthen the independence of the judiciary and ensure that it can resist attempts by political authorities or corrupt forces to exert control over it.

4. The present report reflects the Special Rapporteur’s recent efforts to draw on the collective experiences, views, reflections and suggestions of prosecutors, judges, legal experts, academics and representatives of non-governmental organizations. The report focuses on an analysis of the ways in which corruption may hinder the exercise of the functions of prosecution services and, consequently, the legitimate enjoyment of human rights. It complements the analysis of the topic that was begun in the Special Rapporteur’s report to the General Assembly in 2017 (A/72/140).

5. The Special Rapporteur is particularly grateful to Member States and their offices of attorneys general, international associations of prosecutors, civil society organizations and distinguished academics for their commitment and timely response to the call for contributions to the present report.

6. The Special Rapporteur further wishes to thank the Human Rights Clinic of the Human Rights Research and Education Centre at the University of Ottawa for its considerable support in the research and drafting of the present report. He is also grateful to the International Association of Prosecutors and the Ibero-American Association of Public Prosecutors for their support in distributing the questionnaire prepared by him and forwarding the replies from offices of attorneys general in an independent manner.

## II. Overview

7. In his first report in 2017, the Special Rapporteur stressed that corruption undermines the rule of law and the ability of States to promote systems of governance accountable to and compliant with human rights standards.<sup>3</sup> He also recalled the severe impact of corruption on the enjoyment of human rights, as described by former Secretary-

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<sup>1</sup> Resolution 1994/41, para. 2.

<sup>2</sup> A/HRC/35/31.

<sup>3</sup> A/72/140, para. 21.

General Kofi Annan<sup>4</sup> in 2003 and by the current Secretary-General António Guterres<sup>5</sup> in 2018.

8. The destructive effects of corruption on human rights have become apparent as a result of, inter alia, concentration of power and a lack of transparency in public administration. Corruption also has a direct impact on States' obligation to allocate the maximum available resources for the fulfilment of the economic, social and cultural rights of the population, affecting in particular the poorest sectors of society and children.

9. As has previously been stated,<sup>6</sup> corruption has a significant impact on public institutions, reducing their legitimacy and weakening society's confidence in them and in States in general, and consequently impeding their ability to ensure that human rights are protected. These negative impacts include direct and indirect effects on the ability of judges, prosecutors, lawyers and other legal professionals to carry out their professional work and duties in an impartial and independent manner.<sup>7</sup>

10. In 2012, former Special Rapporteur Gabriela Knaul conducted an analysis of the role and status of prosecution services, including a comprehensive assessment of the guarantees protecting their independence.<sup>8</sup> She examined the structural and functional independence of prosecution services with reference to the Guidelines on the Role of Prosecutors.<sup>9</sup> The report highlighted, among other issues, the role and responsibilities of prosecutors, as well as their relationship with other stakeholders with whom they interact within the criminal justice system. Lastly, Ms. Knaul made a careful analysis of the different elements that might influence their independence and impartiality.<sup>10</sup>

11. Another noteworthy initiative, implemented jointly by the United Nations Office on Drugs and Crime and the International Association of Prosecutors, involved prosecutors directly and gave rise to the publication of a report<sup>11</sup> intended to assist and guide States in the review and/or development of international standards for their prosecution services or offices of attorneys general. Among the standards mentioned in that report are the Guidelines on the Role of Prosecutors, as well as the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors issued by the International Association of Prosecutors.<sup>12</sup>

12. During 2019, the Special Rapporteur launched a series of initiatives, seminars and discussions to gather assessments and views; these have been a critical and invaluable source of information and observations in the preparation of the present report. The Special Rapporteur is grateful for all these contributions, which were an essential element in the drafting of this report and in further shaping his work on this topic.

13. The Special Rapporteur launched one such activity in New York in July 2019. Within the framework of the high-level political forum on sustainable development, a side event was organized to examine this issue within the theme of Sustainable Development Goal 16: Peace, justice and strong institutions. For the event, the Special Rapporteur convened a group of experts including the current President of the International Association of Prosecutors and current and former prosecutors and attorneys general from Africa, Asia,

<sup>4</sup> United Nations Office on Drugs and Crime, *United Nations Convention against Corruption*, New York, 2004, Foreword, p. iii.

<sup>5</sup> António Guterres, 10 December 2018, available at <https://www.unodc.org/bolivia/es/Las-actividades-contra-la-corrupcion-son-esenciales-para-construir-la-paz--proteger-los-derechos-humanos-y-garantizar-el-desarrollo-sostenible.html>.

<sup>6</sup> A/72/140, para. 18.

<sup>7</sup> Ibid, para. 97.

<sup>8</sup> A/HRC/20/19.

<sup>9</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990.

<sup>10</sup> A/HRC/20/19, paras. 58–81. In order to avoid duplication, the Special Rapporteur draws attention to the content of that report.

<sup>11</sup> United Nations Office on Drugs and Crime, *The Status and Role of Prosecutors*, 2014, available at [https://www.unodc.org/documents/justice-and-prison-reform/HB\\_role\\_and\\_status\\_prosecutors\\_14-05222\\_Ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/HB_role_and_status_prosecutors_14-05222_Ebook.pdf).

<sup>12</sup> International Association of Prosecutors, *Human Rights Manual for Prosecutors*, 2nd rev. ed., The Hague, 2009, p. 239.

Europe and Latin America. At the meeting, which was entitled “The independence of prosecutors and their contemporary challenges from a global perspective”, a human rights approach was used in assessing prosecution services’ independence from influence or pressure exerted on them by other parts of the State apparatus or by de facto powers. A recurring theme was the threat posed by transnational corruption to the daily work and efforts of prosecution services in modern times and the consequent negative impact on human rights.

14. In November 2019, the Special Rapporteur asked Member States and a number of prosecutors’ associations and organizations to respond to a series of questions about the impact of transnational corruption on human rights and the administration of justice. Thirty-two entities, including Member States and their respective prosecution services, civil society organizations, professional associations of prosecutors and distinguished academics provided information and specialized studies on corruption cases, investigative challenges, the use and benefits of the international cooperation mechanisms established in the United Nations Convention against Corruption (hereinafter referred to as the Convention) and landmark cases in the fight against corruption.

### **III. The central role of the public prosecution service in fighting corruption and upholding human rights**

#### **A. Previous considerations**

15. In his previous reports<sup>13</sup> and activities, the Special Rapporteur has already made reference to the adverse impact of corruption on society as a whole, and specifically on the judicial system, prosecution services and their staff and on human rights in general. He has also emphasized the crucial role that the judicial system, and prosecutors in particular, are called upon to play in investigating and punishing corruption, particularly transnational corruption, which is one of the greatest contemporary challenges and currently affects countless countries.

16. In his first report to the General Assembly, the Special Rapporteur stated that the Convention

should also be seen as a fundamental international instrument for the protection of human rights, and it therefore warrants continued attention from the relevant competent bodies.<sup>14</sup>

The concept he evoked has become reality. The regressive idea that human rights bodies should not concern themselves with the issue of corruption is now regarded as obsolete and has been abandoned.

17. In the context of the United Nations, both the Commission on Human Rights and, later, the Human Rights Council have played an active and central role in the converging spheres of human rights and the fight against corruption. At one time, the Sub-Commission on the Promotion and Protection of Human Rights commissioned a working paper and subsequently established the position of the Special Rapporteur on corruption and its impact on the full enjoyment of human rights, in particular economic, social and cultural rights.<sup>15</sup> The Special Rapporteur on corruption submitted three reports, in 2003, 2004 and 2005 respectively, in which she developed fundamental concepts relating to the connection between corruption and human rights.<sup>16</sup>

18. The Human Rights Council has subsequently issued resolutions on the negative impact of corruption on the enjoyment of human rights. The Council highlighted the “increasing negative impact of widespread corruption on the enjoyment of human rights” and described corruption as “one of the obstacles to the effective promotion and protection

<sup>13</sup> A/HRC/35/31 and A/72/140.

<sup>14</sup> A/72/140, para. 29.

<sup>15</sup> E/CN.4/2003/2-E/CN.4/Sub.2/2002/46, Decision 2002/106, p. 77.

<sup>16</sup> E/CN.4/Sub.2/2003/18, E/CN.4/Sub.2/2004/23 and E/CN.4/Sub.2/2005/18.

of human rights, as well as to the achievement of the Millennium Development Goals and other internationally agreed development goals”.<sup>17</sup> Later, in 2017, the Council referred in another resolution to the complementarity of international legal frameworks for protecting human rights and those for fighting corruption, and issued related recommendations.<sup>18</sup>

19. In a similar analytical exercise, the inter-American human rights protection body, the Inter-American Commission on Human Rights, has pointed out that a number of provisions in the Convention deal with issues relevant to human rights, namely the rules on the recruitment of civil servants based on principles of efficiency and transparency and objective criteria such as merit, equity and aptitude (art. 7), the procurement of goods and services (art. 9), participation of society and criteria relating to transparency, access to information and freedom of expression (art. 13) and measures aimed at ensuring that corruption offences are dealt with more severely by criminal justice systems without violating due process, the presumption of innocence and a series of related rules.

## B. Challenges in the protection of human rights

20. Corruption is now becoming one of the major obstacles to achieving the Sustainable Development Goals by 2030 and ensuring the resulting exercise of human rights.<sup>19</sup> Among the diverse impacts of corruption, one that stands out is its effect on State institutions, directly affecting their legitimacy and, in particular, the area of administration of justice. No matter which form it takes, corruption always comes at a price, which is ultimately paid by the population and their human rights.

21. Corruption takes many forms, including new ones such as bribery, embezzlement, money-laundering and tax evasion, to name a few.<sup>20</sup> It generally takes place when private sector entities or individuals partner with public sector entities or individuals in order to win contracts, sell products and generally enable unscrupulous public officials to obtain private benefit from public resources. Creative and effective interaction between States and the international community is crucial. It is essential to strengthen, boost and lend legitimacy to judicial institutions by ensuring the independence of judges and prosecutors.

22. The impact of corruption on human rights is a pernicious issue that merits, and is already receiving, increased attention. Traditional views are being overcome, for example that corruption has little or no relevance to the field of human rights, that it is already sufficiently addressed by other bodies or, worse, that it does not in any way fall within the remit of human rights bodies. The Special Rapporteur does not share this narrow and limiting view, which is very similar to one held several decades ago that restricted the scope of human rights to civil and political rights.

23. Work in this area is broad and complex. It involves the performance by States of several fundamental functions, including the duty to prevent and the obligation to investigate and punish, matters which fall under the direct competence of the human rights bodies.

24. In terms of prevention, using a human rights perspective, central issues include “transparency, affidavits, laws on access to public information and external controls”,<sup>21</sup> that is, a set of positive institutional or normative obligations that States must meet. The responsibility to investigate, prosecute and, where appropriate, punish acts of corruption is derived both from national law and from international treaties, in particular the Convention. The judicial authorities and the public prosecutor’s office both have a role to play here, as

<sup>17</sup> A/HRC/RES/21/13.

<sup>18</sup> A/HRC/RES/35/25.

<sup>19</sup> United Nations Office on Drugs and Crime, *Las actividades contra la corrupción son esenciales para construir la paz, proteger los derechos humanos y garantizar el desarrollo sostenible*, 10 December 2018, available at <https://www.unodc.org/bolivia/es/Las-actividades-contr-la-corrupcion-son-esenciales-para-construir-la-paz--proteger-los-derechos-humanos-y-garantizar-el-desarrollo-sostenible.html>.

<sup>20</sup> A/72/140, para. 72.

<sup>21</sup> Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73, para. 28.

both are crucial institutions in the spheres of investigation, prosecution and punishment, while maintaining respect for guarantees of due process.

25. This approach presupposes the operation of a justice system which includes a public prosecution service that plays a central role in tackling corruption by acting with independence, integrity and neutrality in guiding investigations, formulating charges and collecting evidence, among other functions, concepts and processes. If the system fails to perform its functions or is itself corrupt, a vicious circle of impunity begins and can lead to further acts of corruption and human rights violations.

### C. Prosecutors: key players in tackling corruption

26. The Special Rapporteur endorses the analysis contained in the report of the former Special Rapporteur, Gabriela Knaul,<sup>22</sup> on prosecutors and prosecution services, and in particular the references to the general standards applicable to the independence and impartiality of prosecutors and the performance standards set out in the Guidelines on the Role of Prosecutors and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.

27. Prosecutors and judges have a central role in the functioning of the rule of law. In most legislation systems, prosecutors play an indispensable role in the investigation of offences, as well as in decision-making processes that may lead to criminal proceedings and the corresponding sanctions. As the Special Rapporteur has stated on other occasions, situations of bias and corruption result in a violation of article 14 of the International Covenant on Civil and Political Rights, which stipulates that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>23</sup>

28. In accordance with international standards, the functions and activities of the public prosecution service are to be performed on the basis of the obligation to respect, protect and uphold established human rights.<sup>24</sup> The guiding principles, which take account of the global nature of the issue of corruption, expressly state that prosecutors must give due attention to the prosecution of corruption offences committed by public officials. One of the main functions of the prosecution services is therefore to combat this phenomenon.<sup>25</sup>

29. Institutional and social responsibility for investigating and punishing corruption falls to judges and prosecutors who are part of an impartial justice system based on respect for the law and human rights. Since the functions of prosecution services include the duty to act on behalf of society as a whole and to defend the public interest, high standards of conduct, neutrality, fairness and professionalism must prevail. In selection and appointment processes, care must be taken to ensure that the criteria of merit, suitability and transparency are paramount.

30. The Special Rapporteur wishes to emphasize that citizens' confidence in the ability of their law enforcement and judicial institutions to deal with corruption cases and situations is often linked to an effective capacity to investigate and punish the perpetrators. The victims of corruption are an integral part of the process. As an essential element of the principles of participation, transparency and non-discrimination, they must therefore be heard at the investigation and trial stages and provided with appropriate forms of reparation.

31. Human rights defenders, on the other hand, tend to be key players in pushing for investigations into cases of corruption, which has often led to their becoming targets for violence. Particular attention and, where appropriate, protective measures, should be put in place for them in order to prevent reprisals for reporting acts of corruption.

<sup>22</sup> A/HRC/20/19.

<sup>23</sup> A/HRC/35/31, para. 100.

<sup>24</sup> Guidelines on the Role of Prosecutors, guideline 12, and Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, art. 1 (h).

<sup>25</sup> Guidelines on the Role of Prosecutors, guideline 15.

32. In the preparation of the present report, the information and analysis gathered at the various meetings held in 2019 and the contributions from States, prosecution services and organizations specializing in the field indicate that corruption practices have become more complex and have had an enormous impact on institutional work, both in terms of judicial systems *sensu stricto* and in connection with the specific area of responsibility of prosecution services.

33. It is important to note that, despite often adverse contexts, there are also a considerable number of successful criminal cases in which high-powered individuals from the political and financial spheres are being investigated, prosecuted and convicted for serious offences relating to transnational corruption. However, the Special Rapporteur notes that although several high-profile cases have been resolved effectively, endemic institutional, normative and operational challenges persist and have contributed to the obstruction or failure of many very important investigations. This not only encourages corruption, but also weakens criminal justice systems and impacts the public prosecution service and, more widely, leads to institutional conditions that are not conducive to the upholding of human rights.

## IV. Prosecutors and the obligation of international cooperation

34. The independence of prosecution services falls within the general scope of judicial independence enshrined in article 10 of the Universal Declaration of Human Rights. This is an obligation that has been developed in the Guidelines on the Role of Prosecutors and which must be upheld. It is not a privilege to be granted or not as States see fit.<sup>26</sup>

35. In the extensive list of obligations States enter into under the Convention, which has been ratified by 186 countries, two core aspects stand out with regard to the role and responsibility of prosecutors: the independence and integrity of prosecutors, and international cooperation. The two aspects are interrelated, and independence is central to them.

### A. Independence, integrity and international cooperation

36. Independence and integrity are established in the Convention as components that are essential to ensuring viable cooperation among States to investigate and punish corruption.<sup>27</sup> In that regard, article 11 refers to two specific aspects, firstly, “the independence of the judiciary and its crucial role in combating corruption”, and secondly, the obligation of States parties to take “measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary”. The two principles, that is, independence and integrity, are established in the Convention as being relevant to both judges and prosecutors. The members of public prosecution services can thus be valid and legitimate key actors in the international fight against corruption as long as they remain independent and are afforded measures by the State to strengthen their integrity.

37. Mutual legal assistance is one of the main obligations set forth in the Convention, and is contained in the longest and most complex article of this international treaty.<sup>28</sup> The elements of “investigations, prosecutions and judicial proceedings” in relation to corruption

<sup>26</sup> A/HRC/35/31, para. 24.

<sup>27</sup> “Article 11. Measures relating to the judiciary and prosecution services

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.”

<sup>28</sup> Art. 46.

offences are described in a long list.<sup>29</sup> The other particularly powerful obligation deriving from the Convention concerns joint investigations.<sup>30</sup> Under most domestic legislation, prosecutors and prosecution services are responsible for any action taken.

38. Mutual assistance and cooperation imply, in their own right, an effective exchange of information and institutional efforts. According to the experts who attended the seventh open-ended intergovernmental expert meeting to enhance international cooperation under the Convention, guidance, templates and information are useful in facilitating the formulation of effective international cooperation requests.<sup>31</sup>

39. This is directly aligned with the Guidelines on the Role of Prosecutors as a conceptual framework for the independence and integrity of prosecutors, which are the fundamental preconditions set forth in article 11 of the Convention as the basis for establishing prosecutors as legitimate interlocutors with respect to mutual assistance and joint investigations. The main objective set out in the Guidelines, of which there are 24, is precisely to assist Member States in “securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings”, as stated in the preamble. The Guidelines are supplemented by the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors of the International Association of Prosecutors and supported by the United Nations Commission on Crime Prevention and Criminal Justice.

40. The above-mentioned instruments, together with the analysis contained in the report submitted by the Special Rapporteur in 2012,<sup>32</sup> set out the guarantees and minimum standards that must be observed by prosecution services and respected by other institutions as conditions ensuring their independence and impartiality. These include areas related to professional qualifications, selection and training, status and conditions of service, freedom of expression and of association, the role of prosecutors in criminal proceedings, discretionary functions, alternatives to prosecution, relations with other government agencies or institutions and disciplinary proceedings.

41. In the sphere of cooperation, there are several criminal matters that to a large extent concern prosecutors, namely extradition, the transfer of sentenced persons, mutual legal assistance, the transfer of criminal proceedings and cooperation in law enforcement and joint investigations.

42. These are not ancillary or incidental elements of the Convention; rather, they are essential matters which are closely related to the powers of prosecutors. Following an assessment it conducted in 2017 to review the reports submitted by countries during the first cycle of the mechanism to evaluate the implementation of the Convention,<sup>33</sup> the United Nations Office on Drugs and Crime found that in matters of international cooperation

countries generally regard the bilateral and regional frameworks by which they are bound as “priority” legal bases for extradition and mutual legal assistance on corruption-related offences.<sup>34</sup>

43. Under this normative and conceptual logic, the actions of prosecution services must be based on objectivity, impartiality, coherence and respect for the law and aligned with

<sup>29</sup> Ibid.

<sup>30</sup> Art. 49.

<sup>31</sup> CAC/COSP/EG.1/2018/4, Report of the seventh open-ended intergovernmental expert meeting to enhance international cooperation under the United Nations Convention against Corruption, held in Vienna on 8 June 2018, para. 18.

<sup>32</sup> A/HRC/20/19. See also the report of the 23rd Annual Conference of the International Association of Prosecutors, held in Johannesburg, South Africa. The report addresses particular issues of prosecutorial independence and is available at <https://www.iap-association.org/Conferences/Annual-Conferences/23rd-Annual-Conference>.

<sup>33</sup> Chapter VII of the Convention regulates the mechanisms for implementation. Article 63 (1) establishes a Conference of States Parties to the Convention to “promote and review” its implementation.

<sup>34</sup> United Nations Office on Drugs and Crime, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed., 2017, p. 211.



international human rights standards and norms, thus establishing the necessary means to ensure that the assigned functions are carried out in a transparent and responsible manner and that cooperation is viable.<sup>35</sup>

## **B. Challenges for prosecution services in the area of international cooperation**

44. A recurring theme in the submissions received from prosecution services in the preparation of the present report was the challenges faced in achieving effective international cooperation that meets the standards set out in the Convention.

45. From the responses to the questionnaire circulated by the Special Rapporteur, it appears that most prosecution services recognize that the international cooperation provided for under the Convention has had a positive impact on the coordination of investigations. However, from reading the reports, several areas of mutual assistance emerge as requiring improvement in order to render the prosecution of corruption offences more efficient and effective:

- (a) Time frames for procedures;
- (b) Mechanisms for undertaking inquiries abroad;
- (c) More efficient and agile coordination;
- (d) Institutional will to prosecute corruption-related offences;
- (e) Joint investigations;
- (f) Common guidelines for identifying evidence.

46. With specific regard to investigations of transnational corruption, prosecution services identified several normative, institutional and operational challenges, particularly with regard to the coordination of investigation files.

47. In the normative sphere, there is a need to update and modernize substantive and procedural elements of criminal legislation in order to ensure that there are suitable rules allowing for effective investigations while simultaneously upholding in full the human rights of the victim or injured party and/or the alleged perpetrator, as well as the guarantees to which they are entitled. Differences in normative matters such as the classification of corruption-related offences and the range of penalties, the time frames applied in formal channels for international cooperation mechanisms, respect for human rights and limited knowledge of the multilateral tools designed to promote investigation and prosecution practices in all jurisdictions are among the factors that limit the ability to conduct successful criminal investigations and prosecutions.<sup>36</sup>

48. A significant number of prosecution services also highlighted misuse of jurisdiction or procedural immunity, which often hinders or prevents the investigation and potential punishment of high-level public officials for conduct that constitutes the offence of corruption.

49. In addition, they pointed out that obstacles to investigation in this area are greater when the requested country does not comply with minimum human rights standards to protect victims or complainants, which has on many occasions prevented mutual assistance in criminal matters.

50. Some prosecution services stated that, despite Member States' recognition of the international obligation to facilitate asset recovery, they still face difficulties in that regard, owing in particular to the lack of regulations governing search, monitoring and recovery processes in respect of the property or resources under investigation.

<sup>35</sup> A/72/140, paras. 97–106.

<sup>36</sup> Report of the Africa-Europe Prosecutors Conference on International Judicial Cooperation on Investigation and Prosecution of Human Trafficking and Migrant Smuggling, Sharm el-Sheikh, Egypt, 18–20 September 2018.

51. At the institutional level, one of the challenges some prosecution services still face is to gain institutional respect from other branches of government or the State as regards the services' independence and autonomy. Actions that could weaken prosecution services, undermine the public's perception of the impartiality of criminal investigations or encourage political or de facto powers to interfere in the work of the public prosecution service are particularly important. The lack of financial independence has also resulted in a lack of human resources, which has hampered the ability of prosecution services to launch and conduct investigations within reasonable time frames.

52. The lack of autonomy and functional independence not only undermines the credibility of prosecutorial authorities and public confidence in the administration of justice, but also provides cover for potential corrupt practices. Independence, however, must not lead to a lack of accountability,<sup>37</sup> which is especially important in systems where the public prosecution service is fully independent and is not subject to any oversight by the executive or legislative branches.<sup>38</sup>

53. Like judges, prosecutors are automatically disqualified from working on cases in which they have, or might appear to have, a personal or biased interest. The European Commission for Democracy through Law (Venice Commission) of the Council of Europe considers that, given their high level of responsibility, prosecutors can be subject to certain conditions and restrictions aimed at ensuring consistency, impartiality and integrity in their decision-making.<sup>39</sup>

54. Public perception of potential bias in their actions provokes scepticism vis-à-vis anti-corruption activities and undermines the legitimacy of the administration of justice and the effectiveness of public institutions. It is therefore not enough for prosecution services to take action against corruption; their efforts must also be communicated to the general public.<sup>40</sup>

55. Civil society organizations told the Special Rapporteur that in various jurisdictions, prosecution services do not have effective accountability mechanisms through which to inform the public of the progress or outcomes of investigations into transnational corruption. They also highlighted the lack of access to periodic reports on the outcome of investigations, some of which are not published, as well as the absence of statistics showing the number of cases that the judicial system has handled and the rulings that were made, especially in those cases where there is a national interest.

56. The accountability of prosecution services is not something that in itself can be understood as affecting their independence and autonomy. The obligation to provide accountability is especially important in those systems where the public prosecution service is fully independent and is not subject to any oversight by the executive or legislative branches.<sup>41</sup>

57. At the operational level, differences in normative matters such as the classification of corruption-related offences and penalties, the time frames applied in formal channels for international cooperation mechanisms, respect for due process and human rights or limited knowledge of the multilateral tools to promote investigation and prosecution practices in all jurisdictions are among the factors that limit the ability to conduct successful criminal investigations and prosecutions.<sup>42</sup>

58. The provision of specialized training for prosecutors, experts, police officers and other public officials involved in criminal investigations and in the human rights-based administration of justice as a whole is a constant challenge for prosecution services. Due to the novel nature of the tasks that await them and the new forms of corruption that are

<sup>37</sup> A/HRC/17/30/Add.3, para. 18.

<sup>38</sup> A/HRC/20/19, para. 84.

<sup>39</sup> CDL-AD (2010)040, para. 17.

<sup>40</sup> It is therefore important to set up communication units within prosecution services to inform the public about the outcome of their efforts.

<sup>41</sup> A/HRC/20/19, para. 84.

<sup>42</sup> Report of the Africa-Europe Prosecutors Conference on International Judicial Cooperation on Investigation and Prosecution of Human Trafficking and Migrant Smuggling, Sharm el-Sheikh, Egypt, 18–20 September 2018.

emerging, specialist programmes are required that incorporate a human rights-based approach. Such programmes must also ensure that prosecutors and their staff are able to use the tools they need to achieve high standards in investigative outcomes and to increase the number of substantive and procedural outcomes and of solid investigations in which respect for human rights standards and due process is guaranteed in the collection of evidence.

59. Lastly, owing to new trends in information technology, programmes aimed at prosecutors and their staff must be implemented. It is essential that they are up to date in the use of technologies and tools employed in criminal investigations, especially those used by experts in prosecution services to obtain scientific evidence.

## **V. Good practices and ongoing challenges for public prosecution services in the area of cooperation and the fight against corruption**

### **A. Landmark cases involving international cooperation**

60. Based on the information received, the Special Rapporteur has taken note of sustainable actions and policies that have given rise to good practices and sometimes led to success both in cooperation during investigations and in the prosecution and sentencing of perpetrators.

61. Recently, coordinated efforts by public prosecution services in different countries have produced significant results in the fight against transnational corruption by making use of mutual legal assistance and, occasionally, by conducting joint investigations. This light at the end of the tunnel must be harnessed to guide the expansion of such practices, which promote the exercise of those obligations and powers set forth in the Convention designed to protect those whose rights have been affected.

62. The investigation in the “Lava Jato” case, for example, which involved offences allegedly committed by Brazilian construction companies in Latin America and other regions, is an emblematic and ongoing example of effective international judicial cooperation between judges and prosecutors from a number of States and territories. The fact that there has been effective cooperation between prosecution services in different countries and territories in investigating corruption on different continents is a milestone in itself. In addition to joint investigations, the substantive progress resulting from such cooperation has also led to initiatives to encourage plea bargaining in return for information.

63. As of September 2019, the Brazilian judiciary, for example, had sent 384 requests for cooperation to 61 countries. Conversely, Brazil and its prosecutorial and judicial institutions had received 497 requests for information and cooperation from 39 countries or territories, including 191 from Peru and 110 from Switzerland. The majority of the requests made by Brazil were submitted to Switzerland and the United States of America. As a result, valuable information was obtained on financial and banking movements involving money obtained unlawfully, that is, on the connections used in transnational corruption processes as a whole.<sup>43</sup>

64. Some prosecution services also mentioned the positive impact of assistance on their efforts to fight corruption, mainly with regard to the exchange of information and the coordination of administrative measures during the course of investigations in other regions. For example, following international cooperation between Oman and Switzerland in 2019, the Swiss authorities provided assistance that enabled Oman to recover seized assets that had been obtained through bribery and money-laundering.<sup>44</sup>

<sup>43</sup> Legal Adviser to the International Cooperation Unit of the Attorney General’s Office of Brazil, September 2019.

<sup>44</sup> Questionnaire sent by Oman to the Special Rapporteur in response to the request made to countries for the preparation of the present report.

65. The Special Rapporteur wishes to recognize the relevant work carried out by the International Commission against Impunity in Guatemala until 2019. An investigative cooperation body that was set up by the United Nations and the Government of Guatemala, the Commission was competent to investigate and collaborate in the prosecution of various crimes, including corruption, in accordance with national legislation.<sup>45</sup> The Commission is one of the most relevant anti-corruption initiatives implemented to date. It was an international body with political, organizational and financial independence, composed of judges, prosecutors and law enforcement officers from more than 20 countries. In the 12 years of its existence, it played a key role in the identification and prosecution of officials, business owners and drug traffickers for corruption offences.

66. The Special Rapporteur would also like to place on record his recognition of the significant contribution of the Mission to Support the Fight against Corruption and Impunity in Honduras, which not only focused on relevant cases involving public and private corruption networks and achieved successful outcomes, but also made contributions to reforming and strengthening institutions to prevent the scourge of corruption from continuing to undermine the credibility of the authorities and the political system. The Special Rapporteur condemns the decision taken in January 2020 not to renew the Mission's mandate.<sup>46</sup>

67. Considerable progress has also been made in Europe in the fight against international corruption. The European Union Agency for Criminal Justice Cooperation (Eurojust) promotes and enhances the coordination of investigations and prosecutions, as well as cooperation between authorities of the member States. The Agency's usefulness has been highlighted by prosecution services, particularly in connection with specific knowledge required for the typical operation of cases investigated by prosecution services.

68. The Agency's tasks include assisting prosecutors and other investigators from the European Union in cases of serious crime that might affect two or more member States or that might be brought to trial as a result of operations conducted and information provided by the authorities of member States, the European Union Agency for Law Enforcement Cooperation (Europol), the European Public Prosecutor's Office and the European Anti-fraud Office (OLAF).

69. According to the European Parliament,<sup>47</sup> the European Public Prosecutor's Office is expected to be operational at the end of 2020 or in early 2021. The Office will be independent and take charge of the investigation, prosecution and administration of justice in connection with offences against the budget of the European Union, including fraud, corruption and cross-border value added tax (VAT) fraud above €10 million.<sup>48</sup>

## **B. Judicial integrity and prevention of corruption in prosecution services**

70. Article 11 of the Convention is of particular importance, as it calls on States to take measures to strengthen integrity and prevent corruption within the judiciary, without prejudice to its independence. Furthermore, the Convention provides for States to take measures to the same effect in those places where the prosecution service does not form part of the judiciary but enjoys similar independence.

71. Corruption or inaction has a general impact on the rule of law, as well as specific effects on institutional entities such as prosecution services if their independence is impaired and fundamental rights are weakened as a result. If decision-making by public

<sup>45</sup> International Commission against Impunity in Guatemala, Final Report, *El legado de la justicia en Guatemala*, 2019, available at [https://www.cicig.org/wp-content/uploads/2019/08/InformeLegadoJusticia\\_SI.pdf](https://www.cicig.org/wp-content/uploads/2019/08/InformeLegadoJusticia_SI.pdf).

<sup>46</sup> See [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-003/20](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-003/20).

<sup>47</sup> Regulation (EU) 2017/1939 of 12 October 2017 of the Council of the European Union implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office entered into force on 20 November 2017. The European Parliament adopted the draft Council regulation in its legislative resolution of 5 October 2017.

<sup>48</sup> European Parliament, thematic fact sheets on the European Union, *Judicial cooperation in criminal matters*, 2019.

prosecution services is influenced, neutralized or co-opted by circumstances unrelated to the exercise of their professional activities, a culture of impunity develops.

72. There is no single system or model that can shield public prosecution services from the impact of corrupt practices.<sup>49</sup> While it is true that corruption tends to be prevalent in those countries where the concepts of separation of powers and the independence and integrity of judges and prosecutors are less entrenched, it is the view of the Special Rapporteur that the margin of discretion that prosecutors have in interpreting and resolving issues within their competence makes them a prized target for corruption.

73. Some countries, for example, have specialized units to process any complaints received and, where appropriate, recommend their closure or dismissal.<sup>50</sup> These units can only carry out their work effectively if there is a protocol in place and appropriate oversight of cases that are dismissed. Otherwise, their work might be used as an excuse to obtain undue incentives and create opportunities for corruption within the prosecution services.<sup>51</sup>

74. Persons who are willing to put their personal, group or partisan interests before those that should govern the public prosecution service pose a danger to its proper functioning and, by extension, to the rule of law and respect for human rights. Where the public prosecution service is subordinate to the executive branch, guarantees against external pressure are all the more necessary in order to shield it from undue political influence.<sup>52</sup>

75. Several prosecution services reported that they had ethics or good governance codes or commissions in place to ensure the full, efficient and transparent management of the work of prosecutors, in addition to guidelines on ethical behaviour and conflicts of interest designed to help identify, investigate and, where appropriate, punish cases of unreported conflicts of interest, as well as violations of the principles of justice, integrity, impartiality, non-abuse of power, independence, confidentiality and respect for the law. Despite significant progress, however, a large number of prosecution services still have no ethics commission or code in place.

76. *Prevention programmes.* Strategies for preventive and disciplinary monitoring plans have been designed and implemented in several public prosecution services to identify, investigate and punish possible acts of corruption within prosecution services. A noteworthy example in this regard is the “Bolsillos de Cristal” strategy used in Colombia and which is designed to ensure transparency in the conduct of public officials. The purpose of the strategy is to eradicate high-profile corruption practices, including in the administration of justice, which naturally includes judges, judicial services centres, prosecution services and the judicial police.

77. *Procedural manuals.* Some prosecution services have also developed manuals for the investigation of corruption offences and guidelines on ethical behaviour and conflicts of interest, as well as good practices for internal work dynamics and the safeguarding of information and filing systems. Among the principles that guide the activity of prosecutors are justice, integrity, impartiality, non-abuse of power, independence, confidentiality and respect for the law.

78. *Declaration of assets and interests.* In some jurisdictions, in order to comply with the obligations set out in article 11 of the Convention, prosecutors are required to declare their own assets and interests, as well as those of their spouse or partner and children. In order to build confidence in public prosecution services, Member States need to make greater commitments to transparency with regard to prosecutors’ assets.

79. *Internal oversight.* In the fight against corruption, it is essential to create special prosecutor’s offices for the investigation, prosecution and punishment of corruption-related

<sup>49</sup> Owing to the confidential nature of the information received by the Special Rapporteur, it is not possible to name particular countries.

<sup>50</sup> For example, Chile has a unit that handles non-complex cases, and Guatemala has a fast-track processing unit.

<sup>51</sup> Fundación para la Justicia y el Estado Democrático de Derecho, Due Process of Law Foundation and Justice Studies Center of the Americas, *Estándares internacionales sobre la autonomía de los fiscales y las fiscalías*, Mexico, 2017, p. 38, available at [http://www.dplf.org/sites/default/files/estandares\\_fiscales\\_diagramacion\\_v3.pdf](http://www.dplf.org/sites/default/files/estandares_fiscales_diagramacion_v3.pdf).

<sup>52</sup> Venice Commission, CDL-AD (2010)040, para. 83.

offences, as well as special prosecutor's offices for internal affairs to review the conduct of public officials in cases of possible improper practices.

## **VI. Conclusions**

80. There is evidence of the destructive effects of corruption on human rights and on institutional structures arising from concentration of power and a lack of transparency in public administration. Corruption also has a direct impact on States' obligation to allocate the maximum available resources for the fulfilment of the economic, social and cultural rights of the population, affecting in particular the poorest sectors of society and children.

81. In all legal traditions, members of the public prosecution service, whether styled as prosecutors, attorneys or by any other title, are a key element of the criminal justice system and hold responsibilities that are critically important in the fight against corruption. Justice cannot be effectively administered if justice officials cannot act independently, impartially, objectively and with integrity, autonomy and neutrality in the performance of such a sensitive function that comes with a high level of responsibility. One of the priorities in building institutions and protecting human rights is to strengthen the independence of the judiciary and ensure that it can resist attempts by political authorities or corrupt forces to exert control over it.

82. The Convention is the fundamental universal legal and institutional instrument for addressing corruption and thereby contributing to the creation of conditions conducive to upholding human rights. Following its adoption in 2003, a rich and inexorable process of convergence and growing interaction began between the fight against corruption and protection for human rights. In essence, this has arisen first and foremost because a legitimate institutional framework that establishes respect for human rights and has independent judicial systems is vital in order to address corruption and its various manifestations in public institutions.

83. The independence and integrity of judges and prosecutors is one of the substantive aspects and, at the same time, a central and clear rule of the Convention. The viability of the fundamental rules of the Convention in crucial areas such as international judicial assistance and joint investigations would be seriously undermined if prosecution services lacked the independence and integrity that are essential to their domestic and international legitimacy.

84. A legitimate institutional framework that establishes respect for human rights and has independent judicial systems is vital in order to address corruption and its various manifestations in public institutions. In the context of the United Nations, both the Commission on Human Rights and, later, the Human Rights Council have played an active and central role in the converging spheres of human rights and the fight against corruption.<sup>53</sup>

## **VII. Recommendations**

85. It is important to further promote and develop in the United Nations the convergence between human rights and the fight against corruption, taking into account the impact of corruption on the enjoyment of human rights. The complementarity of international legal frameworks in the areas of human rights and the fight against corruption must continue to be promoted and strengthened.

86. Irrespective of the legal or institutional model, fighting corruption must be one of the main priorities of all prosecution services, which must act independently and neutrally and adopt a human rights perspective and a focus on protecting victims and human rights defenders.

87. The responsibility to investigate, prosecute and, where appropriate, punish acts of corruption is derived both from national law and from international treaties, in particular

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<sup>53</sup> A/HRC/RES/21/13 and A/HRC/RES/35/25.

the Convention. The judicial authorities and the public prosecutor's office both have a role to play here, as both are crucial institutions in the spheres of investigation, prosecution and punishment, while maintaining respect for guarantees of due process. It is therefore essential that respect for the institutional and financial independence and autonomy of prosecution services is guaranteed.

88. The Guidelines on the Role of Prosecutors are of particular importance for the functional and institutional independence of prosecution services. Their application and ongoing dissemination are vital. The Guidelines are complemented by the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.

89. Public confidence in the institutions responsible for the administration of justice must continue to be increased by strengthening their capacity to effectively investigate and punish perpetrators of corruption. The actions of prosecution services must be based on objectivity, impartiality, coherence and respect for the law and aligned with international human rights standards and norms such as the Guidelines, thus establishing the necessary means to ensure that the assigned functions are carried out in a transparent and responsible manner and that cooperation is viable.

90. Prosecution services must have specialized anti-corruption units. These units must have the necessary technical and financial autonomy to enable them to conduct independent and reliable investigations.

91. In the normative sphere, there is a need to update and modernize criminal legislation, on both substantive and procedural matters, in order to ensure that, within the conceptual framework of the Convention, there are suitable rules allowing for effective investigations while simultaneously fully upholding the human rights of the victim or injured party and/or the alleged perpetrator, as well as the guarantees to which they are entitled.

92. At the institutional level, there is a need to strengthen the institutional respect of other branches of government or the State for the independence and autonomy of prosecution services. This should include adequate budgetary resources to ensure that their independence and autonomy is not affected. Independence, however, is not at odds with transparency, accountability, affidavits, laws on access to public information and external controls.

93. It is essential to develop specialist programmes to ensure that prosecutors and their staff are able to use the tools they need to achieve high standards in investigative outcomes and the management of modern technologies and criminal investigation tools and guarantee respect for human rights standards and due process in the collection of evidence.

94. At the operational level, progress must be made in closing the regulatory gaps in matters such as the classification of corruption offences and penalties, the time frames applied in formal channels for international cooperation mechanisms and respect for due process and human rights. This must be accompanied by specialized training for prosecutors, experts, police officers and other public officials involved in criminal investigations using a human rights-based approach, which poses a constant challenge for prosecution services.

95. States that do not yet have a specific code of ethics for the public prosecution service are urged to adopt one, in accordance with the international principles and standards that should govern the way the service performs its functions. Such a code should make it possible to identify, prevent and punish practices that threaten the independence and integrity of the prosecution service and provide for preventive measures designed to strengthen those attributes.

96. In order to strengthen the international cooperation between prosecution services provided for in the Convention and to render it more effective, some areas and procedures must be refined, such as the differences in processing time frames, the mechanisms used to undertake inquiries abroad, the strengthening of joint investigations to avoid duplication of effort and common guidelines for identifying evidence.

97. The victims of corruption are an integral part of the process. As an essential element of the principles of participation, transparency and non-discrimination, they must be heard at the investigation and trial stages and provided with appropriate forms of reparation.

98. Human rights defenders tend to be key players in pushing for investigations into corruption cases, which has often led to their becoming targets for violence. Particular attention and, where appropriate, protective measures, should be put in place for them in order to prevent reprisals for reporting acts of corruption.



## Annex

### List of States and entities that responded to the questionnaire

#### A. States

Armenia. Attorney General's Office  
 Azerbaijan. Permanent Mission to the United Nations  
 Canada. Public Prosecution Service  
 Chile. Attorney General's Office  
 Colombia. Permanent Mission to the United Nations  
 Costa Rica. Public Prosecution Service  
 Cuba. Attorney General's Office  
 Denmark. Office of the Military Prosecutor General  
 Estonia. Attorney General's Office  
 Hungary. Permanent Mission to the United Nations  
 Ireland. Director of the Office of the Attorney General  
 Italy. Ministry of Foreign Affairs and International Cooperation  
 Jordan. Permanent Mission to the United Nations  
 Kyrgyzstan. Permanent Mission to the United Nations  
 Lithuania. Attorney General's Office  
 Luxembourg. Attorney General's Office  
 Maldives. Attorney General's Office  
 Mauritius. Permanent Mission to the United Nations  
 Mexico. Prosecutor General's Office  
 Morocco. Permanent Mission to the United Nations  
 North Macedonia. Permanent Mission to the United Nations  
 Oman. Prosecutor General's Office  
 Panama. Attorney General's Office  
 Poland. Attorney General's Office  
 Portugal. Attorney General's Office  
 Republic of Moldova. Attorney General's Office  
 Serbia. Permanent Mission to the United Nations  
 Slovakia. Attorney General's Office  
 Spain. Attorney General's Office  
 Switzerland. Office of the Attorney General  
 Turkey. Attorney General's Office  
 Uruguay. Attorney General's Office  
 Yemen. Yemen Judges Club

**B. International, civil society and academic organizations**

Centre for Peace and Human Rights, Central University of Venezuela

Ibero-American Association of Public Prosecutors

International Association of Prosecutors

International Commission of Jurists

Stefan Voigt, Director, Institute of Law and Economics, University of Hamburg

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