

Prosecution

Prosecutions are another element (or pillar) of transitional justice. The term “Prosecutions” typically refers to criminal trials of those alleged to be responsible for human rights violations or other crimes. Prosecutions focus on individual criminal responsibility – that is, they focus on holding individual people accountable for crimes that they commit. In the context of mass human rights violations, prosecutors frequently emphasize the investigation and trial of those considered most responsible for the violations (e.g. commanders, more senior political or military officials, those who issued orders or devised plans that included human rights violations, etc.). Prosecutions may help restore victims’ dignity and public confidence in the rule of law by combating impunity.

In recent years, the Prosecution’s element of transitional justice has been understood to include other types of proceedings or initiatives that contribute to perpetrator accountability. Some now also include cases seeking to hold States accountable for violating human rights obligations set forth in treaties to which they committed (such as the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) as Prosecutions.

In addition, because it is not always possible to bring cases against those who committed human rights violations immediately after the violations occur, mechanisms have been created to investigate alleged human rights violations, preserve evidence, and prepare case files for use against individual perpetrators. When it does become possible to try one of the perpetrators for whom a file has been prepared, the expectation is that the file will be shared with the prosecutor. The International, Impartial and Independent Mechanism (IIIM) for Syria and the Independent Investigative Mechanism for Myanmar (IIMM) are two examples of such investigative mechanisms, and they are generally also considered to be part of the Prosecution’s pillar.

What are the purposes of prosecutions?

Prosecutions have several purposes. They:

- respond to victims’ demands for justice by punishing those responsible for violations and acknowledging the victims’ suffering;
- uphold the rule of law by fulfilling the legal obligation to provide remedy for victims;
- condemn violations and impunity, assure a fair objective process, and serve as a deterrent;
- determine individual responsibility as opposed to collective guilt;
- establish an accurate historical record, revealing what happened and why; and
- symbolize the beginning of a new chapter in a nation’s life marked by social justice and the rule of law.



What are the different mechanisms of prosecutions?

Prosecutions may be conducted by international courts, national courts, or mixed/hybrid courts.

International Courts

International courts take one of two forms—ad hoc or permanent. As a response to reports of mass human rights violations, the UN Security Council established two ad hoc international criminal tribunals. In 1993, it established the International Criminal Tribunal for the former Yugoslavia (ICTY) to address violations accompanying the breakup of Yugoslavia. In 1994, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR) to prosecute those most responsible for Rwanda's 1994 genocide. The successes and challenges of the temporary ad hoc tribunals laid the groundwork for the development of a more permanent solution: the International Criminal Court (ICC). In 1998, 120 countries signed the Rome Statute, the Court's founding treaty. By 2002, the Rome Statute took effect upon ratification by 60 states, officially establishing the ICC. The Rome Statute identifies the most serious violations of international human rights and humanitarian law for the purposes of exercising jurisdiction. These violations are grouped within the categories of genocide, crimes against humanity, war crimes, and the crime of aggression.

National Courts

National courts make up a state's domestic judicial system. Many view national courts as the preferred forum for the prosecution of past human rights violations because they demonstrate a country's effectiveness in applying the law within its own judicial and cultural context. Holding a trial in the country where violations occurred may prove easier and more efficient than holding it in international or hybrid courts.

Mixed/Hybrid Courts

Prosecutions for international crimes have more potential for impact when they are conducted in the society where the crimes occurred. However, societies emerging from conflict or in transition may lack the political will or resources needed to prosecute these crimes, and legal systems may be in disarray. Even sophisticated legal systems that deal mainly with ordinary crimes may lack the capacity to effectively address international crimes. These problems may require international assistance that draws on best practices from elsewhere; for instance, assistance through "hy-brid" courts or tribunals composed of both international and domestic justice actors. Examples of hybrid courts include the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, and the Extraordinary Chambers in the Courts of Cambodia.

Universal Jurisdiction

Universal jurisdiction is a legal principle that permits a state to conduct criminal proceedings for certain crimes regardless of where the crimes took place or whether those involved are citizens or nationals of that state. The principle of universal jurisdiction acknowledges that some offences are so egregious that they are considered crimes against the whole international community and, thus, are of universal concern. In some situations, these prosecutions may provide the only opportunity to promote accountability. Several European countries have opened universal jurisdiction cases against foreign nationals alleged to be responsible for international crimes committed in the nationals' home countries. In most instances, prosecutors or investigative magistrates have brought these cases forward with the assistance and/or pressure of human rights NGOs and victims' groups from the countries where the alleged violations took place. Countries such as Belgium, Germany, the United Kingdom, Spain, Argentina, and Australia have pursued prosecutions through universal jurisdiction.

What is the relationship between truth commissions and prosecutions?

Information collected by a truth commission may be useful to those investigating cases for prosecution while the commission is still operating, immediately after its conclusion, or many years later. Generally, a truth commission should be viewed as complementary to judicial action. Even where prosecutions are not immediately expected, it is important that truth commissions conduct their work keeping in mind the possibility of future prosecutions. When prosecutions eventually do take place, a truth commission's report and its other records might be relied upon as background materials and/or to provide leads to witnesses. Even if a truth commission's report does not point to specific perpetrators, the commission's information can reveal patterns of violations, show institutional involvement and/or illuminate command structures and the responsibility of those at the top of political or military institutions.

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