CSVR
The Centre for the Study of Violence and Reconciliation

CSVR Transitional Justice Programme

Post Truth and Reconciliation Commission (TRC) Alternative Prosecution Policy Framework For Political Violence of the Past

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This framework document is an attempt by CSVR, in association with other stakeholders, to formulate a prosecution policy regarding past political violence. Bryant Greenbaum, a human rights lawyer based in Cape Town, was contracted to draft the framework policy. For comment or questions contact Hugo van der Merwe at hvdmerwe@csvr.org.za or Bryant Greenbaum at bryantgreenbaum@hotmail.com.

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7) Conclusion: the way forward
    i) Criminal prosecutions
    ii) Restorative Justice (victim empowerment and ex-combatant reintegration)

1) Background to CSVR's alterative prosecution framework

CSVR would like to build consensus with government and non-governmental entities on a framework for prosecutions for political crimes of the past. Currently, there have been few prosecutions for past apartheid era political violence and little public consultation regarding the investigatory and judicial process related to these. This has been despite a number of the existence of the following government policies and legal initiatives:

a) The coming into force of the *NPA Prosecution Policy*'s *Directives Relating to Prosecutions of Criminal Matters Arising from Conflicts of the Past and which were Committed before 11 May 1994* (the Directives);
b) An ongoing judicial review application concerning the above *Directives* by various victims of gross violations of human rights and various non-governmental organizations, including CSVR, as the *Directives* permit impunity from prosecution, selective prosecution and a lack of transparency regarding NPA prosecutorial processes and decision making, and;
c) The finalization of a presidential/parliamentary pardon process to review applications for pardons from persons who believe their actions were politically motivated and took place before 17 June 1999.

With the above in mind, CSVR is facilitating dialogue on the formation of a prosecution framework taking into consideration the views and preferences of the following constituencies:
a) South African apartheid victims;
b) South African ex-combatants;
c) Restorative justice and transitional justice organizations;
d) South African government departments and policy makers.

Finally, CSVR proposes that prosecutions for political crimes of the past should be prioritized in accordance with the reforms and suggestions raised in this framework document, namely: the need for a systematic approach to prosecutions to avoid political interference; an approach that benchmarks superiors and apartheid State perpetrators; contingencies for the KZN situation; and the need to ensure victim, community and public participation in the prosecutorial process.

2) General benefits and challenges to prosecutions for past political violence

i) Benefits of prosecutions
a) Criminal prosecutions provide for retribution in accordance with constitutional and international human rights standards. Retribution is judicially defined as "the imposition of an *appropriate* sentence" when considering the seriousness of the crime and the culpability of the offender.[1] Gross violations of human rights must necessarily involve considerations of retribution.[2]
b) Criminal prosecutions promote the rule of law, constitutionalism, and a human rights culture.

c) Criminal prosecutions promote public confidence in the criminal justice system.

ii) 'Challenges' to prosecutions

[1] SS Terblanche *Guide to Sentencing in South Africa* (2007) at 168.
[2] *S v De Kock* 1997 (2) *SACR* 171 (T) at 192e.

a) Government does not have a public 'strategic plan' and significant dedicated resources to deal with prosecutions for past political violence for current, identifiable, cases with sufficient prima facie evidence that could result in convictions.[3]

b) At this time, due to investigative constraints in the National Prosecuting Authority (NPA) and South African Police Services (SAPS), and the current nation building agenda of the Government, *all* prima facie cases involving gross violations of human rights will not be investigated and prosecuted. Therefore, choosing suitable cases for investigation and prosecution will necessarily involve difficult policy considerations.

c) Due to the nature of the adversarial criminal justice system in South Africa, the facts and circumstances surrounding gross violations of human rights may not be revealed in investigations and court processes due to evidentiary rules and the due process rights of accused persons. For example, Section 31(3) of the *Promotion of National Unity and Reconciliation Act* provides that unsuccessful amnesty applicants are protected against self-incrimination and that "any incriminating answer or information obtained or incriminating evidence directly or indirectly derived from questioning... shall not be admissible as evidence against the person concerned in criminal proceedings...."

d) Legislatively mandated 'plea and sentence agreements', which can be finalized without victim approval, are necessary in light of current constraints on the criminal justice system.[4] Nonetheless, although victims' requests can be disregarded in 'plea and sentence agreements' at the discretion of the NPA, a *'rebuttable presumption'* still exists in law and policy which proposes that victims' interests are pertinent and important.[5] In addition, NPA binding policy dictates that minor complainants and relatives of homicide victims must be consulted before 'plea and sentence agreements' are presented to the court for approval while other victims'/dependents'/complainants' access to consultations are dependant on the discretion of the NPA.[6]

3) '*Classes*' of offenders of '*gross human rights violations'* [7] that must be investigated and possibly prosecuted

Investigations and prosecutions for past political violence necessarily involve the following **identifiable** and **prosecutable** '*classes*' of perpetrators who previously committed gross human rights violations:

a) Persons who did not qualify for amnesty at the Truth and Reconciliation Commission (TRC);
b) Persons who publicly advised the TRC that they would not abide by the it's jurisdiction and for whom available evidence against them amounts to a *prima facie* proof of guilt;

[3] The *NPA Strategy 2020* does not mention post-TRC prosecutions as a departmental obligation or action in need of medium to long term planning.

[4] Esther Steyn 'Plea-bargaining in South Africa: current concerns and future prospects' 2 *SACJ* (2007) at 206.

[5] See section 105A(1)(b)(iii) of the Criminal Procedure Act No 51 of 1977; paragraphs 10, 11 and 16 of the Directives of the National Director of Public Prosecutions dated 14 March 2002 concerning section 105A of the Criminal Procedure Act; and section 6(c) of the National Prosecuting Authority' Prosecution Policy.

[6] Ibid.

[7] A 'gross human rights violation' is defined by the *Promotion of National Unity Act*, section 1(1), as: "killing, abduction, torture or severe ill-treatment of any person; or any attempt, conspiracy, incitement, instigation, command, or procurement to commit" the aforementioned.

c) Persons whose names arose in TRC proceedings as committing crimes, who did not apply for amnesty, and for whom the TRC evidence amounted to a *prima facie* proof of guilt[8];
d) Persons who have been identified by third parties in 'plea and sentence' and/or 'indemnity agreements' and for whom the evidence against them amounts to a *prima facie* proof of guilt; and,
e) Persons who have been identified by the National Intelligence Agency, the NPA and/or SAPS and for whom the evidence against them amounts to a *prima facie* proof of guilt.

In addition, it is also important to note that:

a) Individual victims or offenders may approach the NPA with information and requests for investigations regarding currently unidentifiable or identifiable perpetrators[9];

b) The Independent Complaints Directorate may find that the absence of a police investigation or an incomplete police investigation was/is improper and direct that an appropriate investigation should occur, which may lead to the identification of a perpetrator; and,

c) Members of Parliament and Political Parties may bring constituency concerns involving past political violence to the Houses of Parliament and its Committees.

4) Processes/policies currently in place for past political violence prosecutions

i) Processes and role-players
To begin, "the initial issues to be resolved by the Directorate [of Public Prosecutions] are whether to request further investigation by the police, or to institute a prosecution, or to decline to prosecute."[10] This decision is guided by the following processes and policies:

a) The *NPA Prosecution Policy* including the *Directives Relating to Prosecutions of Criminal Matters Arising from Conflicts of the Past and which were Committed before 11 May 1994*. The *Policy* enumerates evidentiary and procedural binding guidelines for all types of criminal prosecutions, while the *Directives* provide for procedures and criteria for the specific issue of prosecutions of past political violence during the apartheid era. As mentioned previously, the Directives are currently being challenged in Court and depending on the outcome, changes to the criteria and procedures may occur.

b) Interventions suggested by the Justice, Crime Prevention and Security Chief Directorate (JCPSCD) of the Policy Co-Ordination and Advisory Services (PCAS) of the Presidency, which in turn guide policies of Cabinet Committees and the Directors General Clusters. Previously, the JCPSCD "facilitated the finalization of

[8] M Bennun *'Some procedural issues relating to post-TRC prosecutions of human rights offenders'* 16 *SACJ* (2003) at 19 notes that "the special significance of the proceedings and findings of the Committee on Amnesty is that they may include references to, and findings about the criminal liability of, individuals other than the applicants themselves, and in respect of whom prosecutions must now be considered."

Also it is significant to reference section 20(7)(b) of the *Promotion of National Unity and Reconciliation Act*: "Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first mentioned person." Bennun asserts therefore, that secondary parties, co-principle offenders, commanders and those who aided, abetted, counseled, procured, incited, attempted and conspired are also criminally liable if they did not themselves obtain amnesty and that evidence in one person's amnesty application can be used in the criminal trial of another accused.

[9] 2005/06 *National Prosecuting Authority Annual Report* at 49 confirms that "on an ongoing basis the Priority Crimes Litigation Unit (PCLU) receives requests from victims to look into cases where amnesty has been refused or not applied for."
[10] Bennun (op cit n5) at 1.

outstanding matters from the TRC processes... and assisted in developing and implementing proposals to support law enforcement agencies in securing the safety of all citizens."[11]

c) Interventions suggested by the National Security Council (NSC) Director General, "which address matters of national security."[12]

d) Interventions by the National Intelligence Coordinating Committee.

ii) Financial and organizational constraints

a) The Priority Crimes Litigation Unit (PCLU) of the NPA, pursuant to Presidential Proclamation and the *NPA Act*, has been mandated to manage and direct the investigation and prosecution of "crimes determined by the NDPP", which by way of an NDPP Directive, include "prosecutions of persons who were refused or failed to apply for amnesty in terms of the TRC processes."[13] Currently, the NPA confirms that the PCLU's workload is "straining its present capacity to the hilt" and "it is clearly evident that the PCLU needs to create new prosecutorial, research and support posts, and be allocated larger premises and operational equipment, to continue to professionally handle its usually high profile responsibilities."[14]

b) The PCLU utilizes the investigative services of SAPS and the NPA's Directorate of Special Operations (the Scorpions). The Scorpions' mandate, jurisdiction and institutional placement in the NPA are currently being reviewed in light of the *Khampepe Commission* findings and this could affect their role and participation in PCLU prosecutions in the future. In addition, SAPS also has financial and organizational constraints that affect its availability for PCLU prosecution related investigations.

c) The Criminal Assets Recovery Account (CARA), a fund administered by the NPA, which contains all money and property forfeited to the State as a result of proceeds or instrumentalities of crime, pursuant to the *Prevention of Organized Crime Act*, partially subsidizes PCLU's TRC missing persons' investigations.[15] CARA can also take requests to assist the PCLU prosecutions and/or NGO work surrounding this issue.

d) The Presidents Fund, an account administered by the Department of Justice to assist with TRC victim and community reparations and memorializations, could be used to assist with financial disbursements for 'victim/witness prosecutorial assistance', 'victim-lead investigations' and 'victim private prosecutions'. Previously, "regulations have been drafted and submitted to the executive authority for approval for the payment of travel and subsistence allowances to a limited number of persons appointed by the family of the victim to be present at the exhumation[s]."[16]

5) Obligations of the National Prosecuting Authority (NPA) with regards to prima facie cases of gross violations of human rights of the past

[11] 2006/*07 Annual Report of the Presidency* at 36.
[12] Ibid.
[13] 2004/05 *Annual Report of the NPA* at 63.
[14] 2006/07 *Annual Report of the NPA* at 43. With regards to personnel the *2004/05 and 2005/06 Annual Reports of the NPA* confirm that until mid-2004 the PCLU only had a Special Director and two Deputy Directors. By late 2004 a senior state advocate was allocated and a contract worker was retained to perform all of the Unit's administrative functions. Furthermore in 2006 two senior state advocates were seconded to the PCLU. The current professional staff of the PCLU as of 3 May 2007, as confirmed in the *Parliamentary Justice Committee* is "around six advocates" who, in addition to TRC matters, must also coordinate prosecution cases involving nuclear non proliferation, chemical and biological non proliferation and mercenary activities.
[15] Ibid at 60.

[16] 2006/07 *Annual Report of the President's Fund* at 4.

a) To provide a public 'strategic plan' outlining plans for NPA investigations and intended prosecutions, concerning the aforementioned '*classes*' of alleged perpetrators mentioned in this framework document, as government departments are obligated to have public 'strategic plans' for the Treasury's Medium Term Expenditure Framework (MTEF). It is well established that a large number of offenders did not avail themselves of the TRC process; therefore prosecutorial led investigations into politically motivated crimes of the past will necessarily involve significant departmental resources that need to be accounted for in the MTEF process.[17]

b) To ensure that the NPA 'strategic plan' provides for prosecutions, to the full extent possible, taking into consideration victims' preferences and with appropriate consideration and weight given to the need for individual and community reparations and the incarceration of offenders.

c) To undertake objective, systematic investigations of the aforementioned '*classes*' of offenders so as to avoid speculations of political interference and prosecution biases. After completion of these investigations, by class of alleged perpetrators, findings should be made available to the public and a list should be available that outlines cases currently under investigations and cases that have been closed. This will ensure victims/complainants and the public are properly informed of NPA progress and intentions regarding prosecutions for past political violence.

d) Adherence to the below referenced prosecution priorities, namely: open justice; victim consultation when 'plea and sentence agreements' are undertaken; immediacy; contingencies for the KZN question; benchmarking superiors and State actors; and ensuring political non-interference in the prosecutorial process.

6) Prosecution priorities

i) Basic requirements of prosecution process

a) According to the principle of open justice, court proceedings, including all pre-trial and trial processes, should normally be open to the public as a general rule of law.[18] Exceptions to this rule are rare in South Africa.[19] Due to the specific nature and history of political violence in South Africa there is a need for open justice to facilitate accountability, victim empowerment, prosecutorial impartiality and national reconciliation.

b) *'Plea and sentence agreements'* in cases of *'gross violations of human rights'* should not be accepted by the judiciary without submissions/affidavits on victims' reviews of the sentencing dispensations. With this in mind, the judiciary has legislative discretion to reject agreements if they are not procedurally and substantively fair, and victims of *'gross violations of human rights'* have rights to be consulted in the agreement process pursuant to legislation and binding NPA policies.

ii) Immediacy

a) Elderly accused perpetrators and victims of past political violence are dying and therefore the NPA is denying victims the opportunity for justice and accountability. Furthermore, it is suggested that, generally, the senior superiors and commanders, who would have gradually been promoted to positions of higher responsibility, are now of advanced age and in ill-health, as opposed to the foot soldiers.

b) Advanced age and ill-health of perpetrators is regarded as a mitigating factor when deciding if offenders should be incarcerated, but should not be a factor in deciding whether to prosecute.

[17] The NPA noted in a 22 March 2006 *Parliamentary Select Committee* meeting that it is possible that "...special courts would [need to] be established [for post-TRC prosecution cases] since these cases were high priority and should not be prolonged."
[18] *S v O'Connell* 2 *SACR* (2007) 28 (CC) at 43.
[19] Ibid at 45.

c) As time passes, there are evidentiary concerns due to deceased or elderly witnesses' memory loss and their collaboration of dated statements and due to missing documentation and evidence.

iii) The KZN question

a) In Section 3.2.4.of the *Report of the Amnesty Task Team*[20] it is noted that the "arms caches that have not yet been discovered and the Kwa-Zulu Natal (KZN) problem" are noted concerns.

b) It is estimated that as many as 20,000 people were killed from 1984 to the present in relation to political violence in KZN with more than half of the fatalities occurring after 1990 after the National Party lifted the ban on liberation movements.[21]

c) Research indicates that current persistent political violence in KZN, that has killed more than 2,000 people since 1994, is linked to unresolved investigations into past political violence.[22]

d) In light of the above, it is suggested that should prosecutions follow in KZN they should be undertaken within a limited and defined time period so that community instability is not heightened.

iv) Pursuing state actors over liberation actors

a) It is reasonable to differentiate between State actors and liberation struggle actors and to place an emphasis on prosecutions of state actors.

b) Prioritising state actors is necessary because cases involving the former executive, police and military branches are likely to be more expensive and resources intensive than dealing with individual gross violations of human rights. More specifically, proving complicity and actions of state officials involves a review of complex state processes and institutions rather than simply proving individual criminal responsibility and culpability.

c) Furthermore, apartheid was defined as a crime against humanity by the United Nations and therefore its planners and senior facilitators should be investigated and prosecuted in advance of liberation actors who were combating this internationally condemned state policy.

d) Finally, "National Liberation Movements may be able to claim rights and will be subject to international obligations even in the absence of control of territory or express recognition by their adversaries [pursuant to Article 1(4) of the 1977 Protocol 1 to the Geneva Conventions]."[23] In this regard, the African National Congress (ANC) undertook to apply the Geneva Conventions and its Protocols making a declaration to the depository of the Swiss Federal Council pursuant to Article 96(3) of the 1977 Protocol 1 to the Geneva Conventions.[24]

e) Irrespective of (d) the Apartheid Government by way of judicial pronouncements and legislation deliberately denied liberation political prisoners the privileges and rights under intentional law that should have been afforded to them after the ANC recognized the Geneva Conventions and the Protocol.[25] In this regard, "in the post-Sharpeville period of the early 1960's the incarceration of political detainees and sentenced political prisoners became a significant permanent feature of South African prison life.... [and] the only response that the

[20] The Report was disclosed as part of the legal challenge to the existing National Prosecuting Authority prosecution guidelines pursued by CSVR and others.

[21] R Taylor *Justice Denied: Political Violence in Kwazulu-Natal after 1994* 101 African Affairs (2002) at 473.
[22] Ibid.

[23] A Clapham *Human Rights Obligations of Non-State Actors* (2006) at 273
[24] Ibid.
[25] Ibid at 274.

South African government could offer was to deny that it held political prisoners at all [and classifying them as security detainees]."[26] Because political prisoners were classified as security detainees they were not supervised by the Red Cross and they were often subject to long term detentions for interrogation, without trial or legal counsel, which often resulted in death.[27]

f) In light of the foregoing, Liberation leaders were forced to react to the Apartheid State's disregard for international humanitarian law by unlawfully disrupting disobedience within their own township/homeland communities and by unlawfully confronting other Black political parties with violent attacks. Again, this was necessary as liberation fighters were incarcerated en masse as 'security detainees' as opposed to political detainees with rights under international humanitarian law. The Liberation struggle would therefore have been conducted differently if the Apartheid State acted in accordance with international humanitarian law and allowed Red Cross supervision of political detainees.

v) Superiors versus foot soldiers

a) The International Criminal Tribunals for Rwanda and Yugoslavia (ICTY an ICTR) and the International Criminal Court (ICC) all prioritize prosecutions of superiors who are most responsible.

b) In addition, "it is settled both in ICTY and ICTR jurisprudence that the definition of a superior is not limited to military superiors; it may extend to *de jure* or *de facto* civilian superiors."[28]

c) Furthermore, "a superior-subordinate relationship requires that it be found beyond a reasonable doubt that the accused was able to exercise effective control over his or her subordinates. Under the effective control test, superiors, whether military or civilian, must have the material ability to prevent or punish criminal conduct."[29]

vi) Political non-interference

a) Reference is made throughout this framework document to the need for a transparent, systematic approach to prosecutions based upon prosecutorial reviews of classes of alleged offenders, for whom prosecution is evidentially possible.

b) This approach will assist with ensuring overt political non-interference in case selection and when the NPA institutes or withdraws charges.[30]

7) Conclusion: the way forward

i) Criminal prosecutions

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[26] D Van Zyl Smit *South African Prison Law and Practice* (1992) at 33.
[27] Ibid at 280.

[28] ICTR Appeals Chamber *Kajelijeli v. The Prosecutor* ILM Vol 44 Sept 2005 at 1129 paragraph 85.
[29] Ibid at paragraph 86. Also note the references to command responsibility in the Statute of ICTY Section 7(3), Statute of ICTR Section 6(3) and Statute of ICC (the Rome Statute) Section 28.
[30] The Kenyan Section of the International Commission of Jurists in *Reinforcing judicial and legal institutions: Kenyan and regional perspectives* concurs that de-politizing the prosecution process requires transparency and a systematic approach when it states:

> "where the AG or DPP seeks to institute or withdraw criminal charges against an individual, his/her actions must be subject to judicial scrutiny requiring justification especially where the case in issue has attracted wide public interest and where certain fundamental questions such as the rule of law and fundamental rights are in issue. In complete opposition to the transparency view, some have wrongly supported non-disclosure of motives arguing that in exercising *nolle prosequi* powers for instance, where the AG or DPP may terminate a prosecution whether commenced by his/her office or a private party does not require him/her to give reasons. This approach is clearly inimical to at least one tenet of constitutionalism – that requiring accountability within constitutional limits of public functions. It is equally at variance with the practice in major commonwealth jurisdictions."

a) Criminal prosecutions are part of the Government's chosen course of action for dealing with political violence of the past.

b) The Government has no public 'strategic plan' for dealing with prosecutions for past political violence for current identifiable cases with sufficient prima facie evidence.

c) In light of (a) and (b) CSVR acknowledges that prosecutions play an important and legitimate role in addressing past human rights violations and civil society input is vital in the development of appropriate 'NPA Prosecution Policy/Directives' and 'NPA strategic plan.'

d) When the incarceration of convicted offenders is not appropriate, prosecutions can be concluded with community service diversions[31] or suspended sentences[32]/correctional supervision orders[33]. In this regard, it is possible to divert perpetrators before trial into community service programmes and/or to sentence offenders by way of suspended sentences/correctional supervision sentence. In turn, these sanctions could result in admissions of guilt, judicially sanctioned deprivations of liberty and sentencing conditions that require victim reparations and community service.

ii) Restorative Justice (including victim empowerment and ex-combatant reintegration)
Endeavors to add restorative justice initiatives to complement prosecutions for past political violence should also be undertaken with the view that these programmes can add long-term value to the entire criminal justice system and in the future they can be transferable to all criminal cases. Possible programmes that could benefit the entire criminal justice system and the prosecution of past political crimes include:

a) Setting up an independent pubic body/commission to deal with victims' rights, pardons and miscarriages of justice. A similar model exists in the United Kingdom with the *Criminal Cases Review Commission* (CCRC). The CCRC is an independent, publicly funded, body whose role is to administratively review possible miscarriages of criminal justice and to then take selected cases to an Appeal Court when there *"is a real possibility that a conviction, finding, verdict or sentence would not be upheld."* This model would be helpful when prosecuting past South African political violence because political interference in the prosecution process would be reviewable to a higher court thereby protecting indigent defendants', victims' and public interests. In this regard, unlike the NPA and the defence, who have a direct right of appeal when a conviction or sentence is unlawful, victims/complainants/witnesses and the public have no right of judicial appeal/review. A review commission could therefore act in the public interest, and in furtherance of victims' rights, when NPA and the defence decisions would likely not be upheld by an appeal court, for example when extremely lenient 'plea and sentence agreements' are finalized.[34] This model could also add value to the current criminal justice system as many offenders do not have adequate legal representation and/or are awaiting trial in prison without a proper review of their detention orders and sentences.

b) Diversion programmes that remove perpetrators from the criminal court system on certain conditions, can be relevant in transitional justice contexts due to the communal nature of political violence. For example, between 1984 and 1989 some 450 people were necklaced in South Africa and this crime often involved many offenders, abettors, instigators and bystanders. Many of these offenders, abettors, instigators and bystanders did not apply

[31] Diversion is a process whereby a criminal matter is removed from court proceedings pending prosecution if diversion conditions, such as community service, are met. There is no specific legislative prescription for diversion, but it occurs informally in child offender matters by way of postponement of sentence or remand of a matter to a future date. Diversion may be applicable to transitional justice matters as the criminal justice system is not equipped to deal with matters of mass, political, communal, violence.
[32] Section 297 of the *Criminal Procedure Act.*
[33] Section 276 of the *Criminal Procedure Act.*
[34] Although the court at first instance must approve the initial 'plea and sentence agreement' it may not do so judicially and therefore a review might be necessary. For example the Kenyan Section of the International Commission of Jurists (op cit 29) confirms that in Africa, unfortunately, "the courts have not, and still do not always subject *nolle prosequi* requests to necessary scrutiny that would unearth improper motives."

for amnesty at the TRC, and although all of these actors are criminally responsible, their culpability may differ and therefore many of them may be suitable for criminal diversionary programmes.

In addition, community service diversion may also be appropriate when gross violations of human rights must be disposed of numerously, within a limited time period and within the rule of law. This may be the case in KZN or Khutsong, for example, where prosecutions for past acts of political violence can involve numerous alleged offenders and onlookers and there is a need to avoid a prolonged judicial intervention that can heighten community instability.

Victim-offender mediation programmes, either as diversion or as complementary to prosecutions, should also be considered as relevant interventions for addressing broader needs relating to healing, reintegration and truth recovery. Where victims express an interest in direct dialogue with the perpetrator, access to such services should be facilitated by the criminal justice system.