

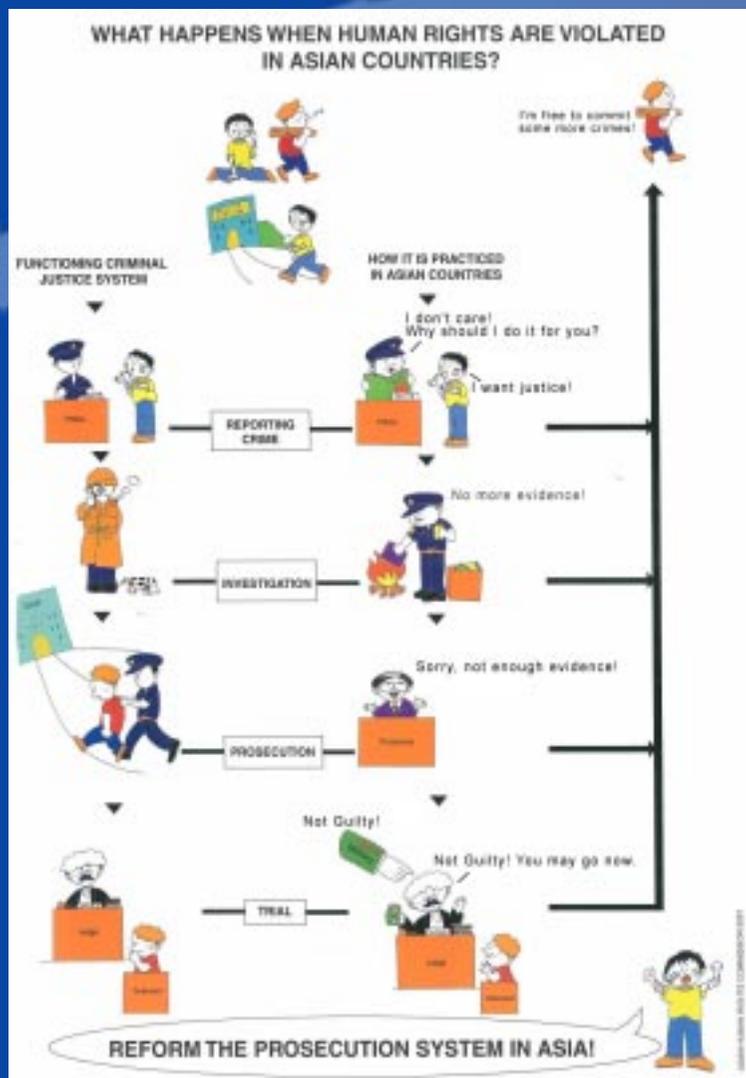
Lesson Series 42

Rule of law: The role of the prosecution in human rights implementation

Summary

The role of the prosecution is to ensure that rule of law is upheld. To carry out this role, they should enjoy institutional independence and effective power. In most countries of Asia however, this is not the case: prosecutors have little power and usually work under the influence of the police and others.

This lesson, the third of a four-part series, examines prosecution mechanisms in various Asian countries, and studies their duties under established legal principles.



Theme: Rule of law: The role of the prosecution in human rights implementation

The Issue

The prosecution mechanism is responsible for ensuring that all law is enforced. When laws are violated and crimes committed, the prosecution must ensure that due process is followed and justice obtained. This is particularly important when it is law enforcement and government officials—those meant to be protecting citizens' rights—who are breaking laws and committing violations.

In order for the prosecution to enforce the law, it must be institutionally independent, particularly from political and judicial influence. In most countries of Asia however, prosecutors enjoy neither this independence, nor effective power to carry out the mandate of their office as stipulated under international legal principles. This inevitably has a detrimental effect on the rule of law and human rights within the region.

The Lessons

This is the third lesson in a four-part series on the rule of law and human rights implementation.

Lesson 1 gives an overview of the prosecution mechanism throughout Asia.

Lesson 2 discusses the role and characteristics of the prosecution as envisaged under international law.

Cover illustration: Asian Human Rights Commission poster, 2001

Lesson 1

With regard to upholding the rule of law and protecting people's rights, the prosecution mechanism has certain primary responsibilities: investigating crimes and complaints to see whether the law has been broken and by whom, prosecuting those responsible for committing crimes, and ensuring that justice is ultimately served by way of a fair trial and the punishment of the perpetrators according to law. However, for various reasons the prosecution mechanism in the majority of Asian countries is lacking in all these responsibilities, as indicated below.

A. Ineffectual prosecution

Investigation

The investigation of crimes and collecting of evidence is crucial to the prosecution of perpetrators, without which there can be no justice. While it is usually the police who are at crime scenes and do the initial investigations, the prosecution department must take some responsibility to ensure that investigations are being done adequately, if at all, and that they are given enough information to proceed with filing charges. The attorney general of Indonesia however, not only refuses to undertake its own investigations, but further disregards investigations conducted by other groups such as the National Human Rights Commission, regarding the 1998 May riots, Trisakti shootings and Samanggi killings, which took the lives of over 1000 people, with many others suffering injury and damage to their property and possessions. The victims of these abuses have been awaiting justice for seven years.

One of the reasons the attorney general refuses to act upon the Trisakti and Samanggi killings is that the Indonesian parliament concluded in 2000 that no violations of human rights had taken place. While this conclusion has been challenged and the parliament is set to reopen the investigation of these incidents, the attorney general's office cannot conclusively accept or infer to such political proceedings. Only judicial bodies have the authority to decide whether human rights violations have occurred or not, and it is the attorney general's responsibility to carry out investigations to this effect...

The indifference and lack of action by the attorney general of Indonesia—the department responsible for bringing criminals to justice—to prosecute the perpetrators of the May 1998 riots and subsequent abuses is a clear violation of domestic and international law, as well as a violation of the prosecution department's own mandate. One of the key roles of the prosecution and judicial institutions is to provide an effective remedy to victims whose rights have been violated. This is done through prosecuting the perpetrators and punishing them in accordance with international legal principles, as well as awarding suitable compensation to the victims. Not only do these actions serve to redress the wrong done to the victims, but in

punishing the perpetrators, a clear message is sent to society that such abuses will not be tolerated. The attorney general of Indonesia however, seems to be sending the message that perpetrators of crimes can walk free, and thereby encouraging future violations [AHRC AS-73-2005, 29 June 2005].

This lack of investigation by the prosecution becomes a greater liability when the case is proceeded with in court, as occurred in the Bindunuwewa massacre case, Sri Lanka, where all the accused were eventually acquitted by the courts due to a lack of evidence. It is the responsibility of the prosecutor to ensure that persons are not implicated without cause and that cases do not proceed in court without sufficient merit.

On 25 October 2000, more than 25 young Tamils at a rehabilitation centre in Bindunuwewa were attacked and killed by a Sinhalese group. Forty-one persons were charged with participating in the massacre. However, the Sri Lankan courts gradually acquitted all of these persons due to a lack of evidence. The last of these occurred on 27 May 2005 when the Supreme Court acquitted the remaining accused on the basis that the evidence against them lacked merit.

That the massacre took place killing 27 detainees and injuring 14 others is not in doubt. That the modes of killing were ugly and cruel is also not in doubt. That the Sri Lankan government was responsible for the protection of these detainees is also well established. However, just who the actual perpetrators of this heinous crime were, the Sri Lankan justice system has been unable to resolve.

The primary responsibility for this failure lies with the Sri Lankan police, who had the legal responsibility to investigate and provide the necessary evidence to secure a successful conviction. Obviously the investigators failed in their task. There is clearly also a failure on the part of the prosecutors in Sri Lanka; a failure that lies with the attorney general's department itself. The department should not have filed indictments against persons if they did not have sufficient evidence to prove a case successfully before a court. To the accused, it is a great injustice to bring them before a court without sufficient evidence. To the survivors of the massacre and the relatives of the dead, such prosecutions amount to deception.

Successful prosecutions are not possible without a functioning criminal investigation system that is able to conduct professional and thorough inquiries before proceeding to court. Additionally, there must be a prosecuting system that thoroughly measures the evidence before prosecutions are filed [See further: AHRC AS-57-2005, 30 May 2005].

The absolute separation that exists between the criminal investigation and prosecution systems in Sri Lanka is thus highly detrimental. The criminal investigation is solely in the hands of the police, with the prosecution usually having no power to conduct criminal investigations, and being dependent on the information given to them by the police. They are dependent to the extent that only when the police inform them of a given crime or

complaint, can they take any further action in the case. This situation in fact exists in many Asian countries. Given the situation of the policing systems in the region, this does not bode well for the protection of human rights (for more detail, see [HRCS Lesson Series 41](#)). Not only is this problematic when dealing with crimes committed by ordinary people, but it becomes worse when the crimes are committed by law enforcement officials.

In Thailand for instance, the control of the police over the investigation and filing of charges has led to numerous instances of police abuse remaining unaddressed in accordance with either domestic or international legal provisions. These include recent incidents of police shootings as well as the 25 October 2004 killings.

Under section 148 of Thailand's Criminal Procedure Code, a death in custody must be followed by a post mortem autopsy and investigation into the cause of death. Under section 150, three agencies must be involved: the forensic doctor, investigating officer, and public prosecutor. After the autopsy has been completed and report submitted, it is the job of the public prosecutor to approach the court for an inquest, with a view to entering into criminal proceedings if necessary. This process should not be delayed under any circumstances, such as a politically appointed inquiry also being under way. It is the role of the public prosecutor to investigate and prosecute all crimes, including those committed by government officers, without regard to other factors.

The mass killing that occurred on 25 October 2004 in Narathiwat province due to the brutality of police and military officers however, was not so investigated.

After October 25, what has happened? Four doctors from the Forensic Science Institute conducted partial examinations of the 78 victims removed from army trucks, and took samples for further testing. They played a critical part in exposing the scale of the tragedy at a time that the military might have preferred to conceal it. However, full autopsies were not conducted, nor were officials from the police or public prosecutor reported to be present. Questions may then arise as to the consequences of their investigation, and its significance for the role of the public prosecutor.

A commonly held excuse by public prosecutors in many countries in Asia is that where autopsies are botched or police investigations inadequate, they are unable to proceed with the case due to procedural failings or lack of evidence, thereby permitting the perpetrator to escape criminal liability. But this is no excuse. It is the constitutional requirement of a public prosecutor to pursue investigations, obtain the compliance of other necessary agencies, and take the matter into the courts. Failure to do this amounts to failure to do the job altogether. There is no substitute for this role, and under no circumstances should the public prosecutor be obstructed from performing this duty.

So what is the public prosecutor doing in this case? Has an investigation been opened? Have the reports been sought from the forensic doctors? If there is confusion about the procedure relating to the autopsies, have steps been taken to deal with this as quickly and expediently as possible? If there are other agencies opposed to the public prosecutor investigating the case in accordance with the law, how can they be overcome? In short, are the necessary questions being asked to bring

criminal proceedings against those persons responsible for the deaths in custody of October 25? It is the job of the public prosecutor to address these questions and to take a leading role in the business of obtaining answers without further delay, and all other government agencies are obliged to admit to that role...

Deaths in custody and extrajudicial killings of any kind are grievous violations of human rights. They go to the heart of the responsibility of the state and its agents to its people. Deaths in custody of such a large number of people as occurred in Thailand this October 25 are not only morally outrageous, they also challenge the very institutions existing to protect and uphold the rights of all persons of the country under both local and international law. It is therefore the primary responsibility of the public prosecutor to ensure that all deaths in custody and extrajudicial killings are fully examined, the perpetrators identified, and held to account for their actions [AHRC AS-47-2004, 5 November 2004].

The stalled investigation into the recent death of Sunthorn Wongdao is another example of the control assumed by the Thai police, with little room for the prosecution to manoeuvre. Sunthorn was found dead in Bang Yai district, Nonthaburi province, on 21 May 2005. Sunthorn is said to have hidden in a house after being accused of shooting his wife and father-in-law in Bang Khunthien district, Bangkok. Police from that district claim that after they surrounded the house, Sunthorn committed suicide rather than surrender. But Sunthorn's brother believes that the police killed him. Investigators from the Central Institute of Forensic Science support this view; neither the condition of the victim's body nor the crime scene suggested a suicide. In fact, the victim had four bullets through a lung and one through his head. The gunshot wounds appeared to have been fired by another person at close range. Furthermore, the crime scene had allegedly been tampered with. The body of the victim seemed to have been turned over, and evidence organised to suggest a suicide. The police however, continue to insist that it was a suicide, thus stalling the investigation.

The decision as to whether the forensic pathologists—whose job it is to examine a case purely on the basis of scientific facts and give an opinion that can be backed by these—are right in concluding that the victim's wounds could not have been caused by a suicide must be left to the courts, not the police. It is ridiculous for the police to claim that they are in a position to accept or reject the views of independently operating forensic pathologists. To do so is an affront to criminal justice and to scientific investigation of crimes.

To get the matter before a judge however, it must go through the police. If the police prefer for a case not to arrive in court in a manner upon which it may be properly judged, they may take steps to obstruct it. This is a grave defect in how criminal investigations are conducted in Thailand. Particularly in relation to alleged extrajudicial killings such as this, the power enjoyed by the Thai police in pursuing or neglecting cases is an enormous barrier to the exercise of basic criminal justice. In fact, this power completely subverts the whole judicial process [See further: AHRC AS-64-2005, 16 June 2005].

Delays in prosecution

Another common defect of the prosecution system throughout Asia is the considerable delay in indictments and hearings taking place. For Sri Lankan rape victim Rita, not only has this delay meant that the perpetrators continue to enjoy their liberty, but also that she has had to prolong her suffering with the numerous hearings.

Rita was a grade ten student when she was brutally raped by two young men, Rameez and Piyal Nalaka on 12 August 2001. Rita was forcibly abducted by the two men as she was walking home after attending Sunday mass and confirmation classes at St. Patrick's Church in Talawakelle at about 2:00pm on August 12. She was raped by both men inside a vehicle and dropped off near the Hindu Kovil in Talawakelle at about 6pm that evening.

From a poor estate-worker's family, Rita does not speak Sinhalese. With great difficulty however, she managed to report the incident to the police and identify the perpetrators, who were then arrested. Rita was taken to the Kotagala Hospital and later to the Nuwara Eliya Hospital for a medical check-up and was discharged from the hospital on August 16. The suspects were held in police remand until August 28.

A public protest was held in the town of Hatton on August 26, demanding justice for Rita.

When the case was brought to court on August 28, although Rita's lawyer objected to bail for the perpetrators, the police did not object, influenced by political pressure. The judge thus ordered bail for the accused after a heated argument between the two counsels.

Since then Rita's case was heard in the magistrate court of Nuwara-Eliya numerous times between August-November 2002 and was finally committed to the high court in November 2002. These numerous hearings—a means to delay the case and harass the complainant—caused repeated suffering to Rita. After all this, the case was never called at the high court. The attorney general's department was contacted on 26 July 2003 regarding the case, to which they responded on 19 January 2004, stating that they will take action. Needless to say, nothing has yet been done. It is the prosecution's duty to ensure that the right to fair trial—which includes speediness and effectiveness—is upheld.

Furthermore, in this case the Sri Lankan prosecution may also be guilty of working under influence, and thus not being independent and impartial. It is alleged that the perpetrators of the rape are affluent persons who are using their position and wealth to manipulate the delays; Rita's case (No 32151) was returned by the registrar of the Nuwara-Eliya Magistrate Court on the request of the attorney general's department on 22 October 2004 when it was being prepared to be sent to the Badulla High Court, while other cases from the same magistrate court have already been referred to the high court. There are also suspicions that someone is trying to misplace the file and cause additional delays [See further: AHRC UP-82-2004, 21 December 2004; UP-16-2004, 13 April

2004 and UA-33-2001, 6 September 2001].

In the Philippines as well, delays in cases are common and are a result of either direct or indirect actions by the prosecution. A recent case taken up by the Asian Human Rights Commission (AHRC) illustrates the problems clearly. Five young men, who were arrested, tortured and illegally detained in 2003, are still awaiting a verdict from the court, as their trial has been continuously postponed or cancelled over the last two years.

Tohamie Ulong (minor), Ting Idar (minor), Jimmy Balulao, To Akmad and Esmael Mamalankas were arrested on 8 April 2003, in separate joint police and military operations in connection with the Davao International Airport (DIA) and Sasa Wharf bombings in Cotabato City.

Upon arrest, they were tortured into admitting involvement in the bombings. They were blindfolded, subjected to electric shocks, beaten, and experienced dry and wet methods of suffocation. They were then illegally detained at the headquarters of the Criminal Investigation and Detection Group (CIDG 12) in Davao City for several months before being turned over to the city jail.

Even then, no trial was conducted due to the slow progress in the conduct of reinvestigations and the prosecutor's unclear declaration of probable cause. Under Philippine law, before a case can go on trial the prosecutor should establish 'probable cause'. It was only in the latter part of 2004 that the victims were arraigned. A pre-trial was set for 2 December 2004, but was postponed.

Since December 2004, the pre-trial has been postponed on several occasions. On 4 January 2005, it was postponed due to the existence of two sets of suspects in the same case. The judge had to order the City Prosecution Office (CPO) to decide who among them would be tried first. On 7 January 2005, the CPO decided that the five torture victims would undergo trial before the new suspects.

On 18 January 2005, the hearing was cancelled due to the absence of the prosecutor who was in hospital. Succeeding postponements occurred as the prosecutor had not yet established 'probable cause'. Finally, on March 31 Judge Paul T. Arcangel of the Regional Trial Court Branch 12, Davao City ruled that probable cause existed, and a trial should be proceeded with.

The next hearing, set for June, was also postponed, as the complainant represented by the CIDG 12 in Davao City and its witnesses failed to appear at the hearing because they did not receive a notice or subpoena from the court. The most recent hearing was scheduled for July 25, which was again postponed for the same reason: the prosecutor's failure to ensure the appearance of the complainants and witnesses at scheduled hearings.

All those accused of crimes have the right to a speedy and effective trial, and it is the prosecutor's duty to protect this right. Any obstacles in the protection of this right are in violation of the law. In addition, the prosecutor also has the duty to investigate all allegations of torture and initiate consequent proceedings [See further: AHRC

UP-92-2005, 2 August 2005 and UA-69-2005, 26 April 2005].

Yet another reason for the delay in prosecution in many countries can be attributed to the lack of infrastructure and personnel. In its recent written statement to the 61st session of the UN Commission on Human Rights, the Asian Legal Resource Centre (ALRC) noted that in India,

5. ...Often many courts do not have sufficient prosecutors to represent cases as and when they are taken up. In a local Magistrate Court in Wadakkanchery, Kerala State for instance, prosecutions were stalled for years due to the fact that the only prosecutor available was on deputation from another court. Only when this officer had enough spare time would he turn up at the Wadakkanchery court. By the end of one year the number of criminal cases pending disposal before the court was so large that it will take several years to clear off these cases, given the fact that every year the number accumulates to the existing backlog...

9. The lack of basic infrastructure within the entire justice system is another crucial issue that causes delays and inefficiency. When a prosecutor's office wants to communicate with a particular police station, there is no mechanism available other than the initiative of the prosecutor to spend from his own pocket or to make the interested party pay for this communication if the entire proceedings are not to be stalled. This lack of basic infrastructure not only results in the delay of proceedings but is also a root cause for corruption [ALRC, 'Delayed justice dispensation system destroying rule of law in India', E/CN.4/2005/NGO/107].

Witness protection

Threats to witnesses in order to protect the accused are common in many Asian countries. Protection is more crucial when persons are witnesses and/or victims of crimes committed by law enforcement agencies. Unfortunately, few countries are able to provide effective protection to its citizens. While the Philippines law provides for witness protection, it is not being enforced.

In a May 31 letter to the Asian Human Rights Commission (AHRC) Police Director of the Directorate for Investigation and Detective Management at the national police headquarters Marcelo Ele Jr admits that the main obstacle to solving two recent killings in Camarines Norte, Luzon is the lack of witnesses. In the case of Ernesto Bang, an organiser in a peasant organisation who was shot dead at the door of his house on May 10, "Relatives of the victim... are no longer interested in filing the case due to the absence of a witness", Ele states. As for Joel Reyes, a political party organiser who was shot dead by a gunman posing as a passenger in his tricycle, "no witnesses had come out in the open for fear of reprisal".

In a May 30 letter, Paquito Nacino, regional director of the Commission on Human Rights in Tacloban City, Visayas, revealed that it had set aside its investigations into three murders there for the same reason. According to the Commission, a witness to the March 14 killing of human rights lawyer Felidito Dacut "is nowhere to be found". Meanwhile, the relatives of peasant

movement leaders Fr. Edison Lapuz and Alfredo Malinao, who were killed in a May 12 shooting in Leyte have been “uncooperative and shown unwillingness to make any written statements”. The wife of Fr. Lapuz, who witnessed his killing, “requested to give her more time to decide [about complaining] as the assailants are still unknown to [the family]”.

A wife hesitates to complain about the killing of her husband in cold blood; a person runs for his life after the murder of his colleague and friend; a man is shot dead in a public street and no one can be found to identify the murderer. What is going on? Although provisions exist for witness protection in the Philippines, clearly they are not working. Republic Act 6981 guarantees that witnesses will be given the necessary protection, security and benefits. The Department of Justice is the agency responsible for arranging witness protection. So why isn't it doing its job? [AHRC AS-74-2005, 30 June 2005]

Sri Lanka however, does not have a witness protection programme and it has been stated that in 85 per cent of criminal cases, witnesses do not show up as they fear for their lives. This fear is founded on the recent killings of several witnesses and complainants against the police:

Gerald Perera was killed just a few days before he was to give evidence in a police torture case. The culprits have now been arrested—three police officers who are the accused in the torture case.

Another torture victim, Channa Prasanna, in whose case an inquiry was being conducted, was kidnapped and narrowly escaped a murder attempt. While two cases regarding these incidents were ongoing in the Magistrate Court of Negombo, a further attempt was made on his life at midnight as he was sleeping, but Channa awakened and was able to run away. Complaints have been made regarding this as well.

In the case of Lalith Rajapakse, there were numerous threats on his life and he is at present in hiding, while there is a police guard to protect his family and neighbor ULF Joseph, who was also threatened with death for helping the torture victim.

Amarasinghe Morris Elmo De Silva, who was allegedly tortured by some officers of the Ja Ella police station, had to flee the country due to threats to him and his wife because of a case filed against the perpetrators at the Negombo High Court.

Despite the numerous appeals and complaints in the above cases, government agencies have failed to provide adequate witness protection ensuring the security and well being of the victims. They have also failed to interdict the officers against whom inquiries are pending. The brutal and criminal behavior of such officers is thus allowed to take place with impunity, while the personal security of citizens is callously abandoned [AHRC AS-05-2005, 26 January 2005].

It is thus essential for there to be adequate witness and victim protection in order for prosecutions to be successful. Furthermore, it is the prosecutor's responsibility to ensure that if and when threats are made against those involved in legal proceedings, the perpetrators are punished.

B. Abuse of power

Prosecutors must be independent and impartial and must focus on achieving justice, particularly when dealing with crimes committed by law enforcement officials, which are graver in nature and consequence. When their work is based not on legal principles but on political or other influence, they are abusing their power; unfortunately, this is a common occurrence within the region, as indicated by the following case taken up by the Asian Human Rights Commission in 2004, from West Bengal, India.

Partha Majumdar disappeared on 5 September 1997 after witnessing the shooting of Mr Suresh Barui in Akrapur, West Bengal by police officers from the Habra police station. During the police firing, Partha was injured in his leg and was taken away by the police. In the days that followed, the victim's family made all efforts to locate him, to no avail; the police claimed that Partha had never been arrested by them.

In January 1998, the West Bengal High Court ordered the West Bengal Human Rights Commission (WBHRC) to undertake an investigation of the family's claims. The WBHRC recommended the West Bengal Government to instruct the Criminal Investigation Department (CID) to initiate a case against those responsible for Partha's disappearance. The CID began investigating this case, but it did not make any serious effort to arrest the accused. Instead, 11 accused police officers were granted anticipatory bail on 12 December 2000 without any objection from either the CID or the public prosecutor, even though their charges were non-bailable: they were charged with abduction in order to murder under Section 364/201/34 of the Indian Penal code. Since then, the main accused Mr Sunil Halder is now the Additional Superintendent of Police, Malda, Murshidabad district. The other accused officers are working as outpost officers-in-charge in Jadavpur, Bali, Magrahat and Kaorapukur, West Bengal.

After several preliminary hearings, on 4 September 2004 the additional District and Sessions Judge, 1st Court at Barasat, North 24 Parganas finally decided that the 11 officers should be tried. Partha's family alleged that during those hearings the prosecutor deliberately made mistakes regarding the date of the incident and the names of the places in the legal documents, to create confusion and delay. Furthermore, the prosecutor did not object to the defense counsel appearing for the accused being state government empanelled advocates, even though under domestic law public prosecutors are prohibited to represent the police in a private capacity.

Partha's family also stated that in court on September 4, the prosecutor allegedly threatened the victim's mother and elder brother in court. In response, Partha's brother, Mr Dipankar Majumdar, submitted a complaint to the Calcutta High Court. Although the division bench of temporary Chief Justice Altamash Kabir and Justice Ashit Kumar Bishi ordered the removal of the public prosecutor and security for the complainants, nothing has been done [See further: AHRC UA-171-2004, 14 December 2004 and UP-35-2005, 31 March 2005].

Politicization

One of the main reasons that such abuse of power is so common within prosecution mechanisms throughout Asia is the high level of political and other influence exercised upon them. This is particularly noticeable in the appointment of senior prosecutors. The Prosecutor General in India for instance, is a political appointment, nominated by the ministry of justice. While the ruling party is in power, its members are thus assured of having their interests represented in any criminal prosecution. Their exit from power has usually come to mean the resignation of their appointees, although this is now being challenged. The assistant public prosecutor's office, responsible for attending to prosecutions in court, is also subjected to political influence, whether involving appointments or the carrying out of duties.

It was through this process that the state government of Gujarat was able to ensure that the public prosecutors in the Gujarat massacre trials of 2002 were political supporters. In its written statement to the UN Commission on Human Rights in 2004, the ALRC noted that

3. ...the authorities in Gujarat have demonstrated how utterly the system can be brutalized to further violate the rights of victims. In Gujarat, the same police force responsible for the atrocities has been charged with investigating the cases going to trial, and the government responsible for what occurred has been appointing the prosecutors. Although the National Human Rights Commission explicitly recommended that the Government of India permit independent agencies to investigate the cases, hear the trials in other states and provide witness protection, these recommendations were unheeded. Only in September 2003 did the Supreme Court state that it has 'no faith left' in the Gujarat government's handling of the cases arising out of Gujarat. It appointed a former solicitor general to sit as special advisor to the court in the Gujarat trials, and in November 2003, the Court stalled the proceedings in ten cases, including some of those mentioned above, while considering whether they should in fact be heard outside the state [ALRC, 'India: Genocide in Gujarat', E/CN.4/2004/NGO/40].

While in Sri Lanka such overt politicization does not exist at the level of public prosecutors in magistrate courts, the attorney general's department—which deals with severe crimes at the high courts as well as the supreme court—is largely influenced by politicians as well as police officers. For this reason, issues such as custodial torture and extrajudicial killings are only superficially addressed by the office, if at all. Additionally, it is the attorney general's office in Sri Lanka that represents or assists the state in international forums, for instance at a UN Human Rights Committee meeting.

Such political influence is made more effective by the poor conditions of the prosecution mechanism in most countries, including low pay and benefits and a lack of career prospects. The fact that public prosecutors in most Asian countries work for a fixed wage regardless of the cases they deal with or their outcomes further adds to the lack of accountability in their work; the prosecutor's office will rarely appeal against an acquittal in a criminal case, and it will just as rarely be challenged after an acquittal.

In response to this callousness, there is an increasing application at Indian courts for the appointment of special prosecutors by way of a *writ of mandamus* (judicial act allowing for private attorneys to prosecute a specific case).

In order to overcome all these obstacles to carrying out its mandate effectively, the prosecution mechanism must be institutionally independent. It must enjoy the same independence as enjoyed by the judiciary, instead of being constrained by political factors, if it is to work towards improving human rights within the region.

Questions For Discussion

1. What is the role of the prosecutor in upholding the rule of law in your country?
2. Discuss the prosecution mechanism in your country with regard to the following:
 - a. What legal powers do they have;
 - b. What role do they play in criminal investigation; and
 - c. Are they institutionally independent?
3. What remedies are available to citizens when the prosecution fails to carry out its duties?
4. In light of the above, how could the role of the prosecution mechanism be strengthened?

Lesson 2

Having seen the state of prosecution throughout the Asian region, it is important to study the role the prosecution mechanism *should* be playing in establishing effective rule of law and human rights under international legal principles. The primary sources of these will be the UN Guidelines on the Role of Prosecutors (Guidelines) and article 14 of the International Covenant on Civil and Political Rights (ICCPR), both of which can be found in the appendices.

A. Roles and characteristics of the prosecution

Guidelines, para 4

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles [equality before the law, presumption of innocence and the right to a fair hearing], thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime...

The prosecution mechanism has two primary functions: maintaining the rule of law and upholding fair trial. These functions must be undertaken with complete independence and accountability, based solely upon legal principles.

Maintaining rule of law

Prosecutors are responsible for the enforcement of all existing law, as well as proposing new laws or amending old ones when necessary. If the law defines crimes but persons who violate that law are not prosecuted, then the law itself has no meaning. Equality before the law and equal treatment by the law is one of the root principles of international law and prosecutors must ensure it is upheld—all those who violate the law must be held accountable, be they police officers, government officials or ordinary citizens, just as all those who seek redress before the law must be treated equally.

For prosecution to occur there must be competent officers with legal power to prosecute. This legal power should be combined with actual facilities for conducting such prosecutions. However, the role of the prosecutors in maintaining the rule of law goes further than just the prosecution—they are responsible for maintaining the rule of law from the time of investigation to the time of conviction or acquittal.

This maintenance must be done without influence from the executive government, the judiciary or the police. The prosecution must make its own decisions guided only by the law and it must also ensure that other

justice mechanisms are doing the same.

Upholding fair trial

ICCPR, article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Fair trial is not only a basic human right recognized under international law, but also essential for the effective prosecution of human rights violations, the punishment of the perpetrators and the delivery of justice to the victims. The principle of fair trial encompasses all that is related to a fair trial before the trial in court actually occurs, such as the investigation of the crime and the collecting of evidence. It comprises positive and negative obligations. The positive aspect involves ensuring that all investigations into crimes and complaints are carried out properly, the necessary indictments filed and cases prosecuted according to the law. The negative aspect involves not implicating individuals without sufficient cause, not allowing cases to proceed in court without sufficient evidence and eliminating any abuse of power within the prosecution mechanism.

Pre-trial; investigation

Guideline 11

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

Investigations are a crucial part of the prosecutor's duty. Without investigations, there cannot be adequate collection of evidence and naming of suspects. Furthermore, given the dire situation of the police investigations in the majority of Asian countries, it is imperative that the prosecution conduct their own impartial investigations, and supervise those conducted by the police. These must include post mortem examinations and forensic science inquiries as well as speaking to witnesses and having access to all relevant documents.

Though the function of criminal investigation and the function of prosecutions are different and should be independent from each other, there is still a significant link between the two. Any prosecution based on faulty investigations will most likely fail due to a lack of evidence; investigators can sabotage prosecutions either due to their ignorance and neglect or due to deliberate acts in not collecting available evidence. Thus, prosecutors should have legal capacity to review evidence and to direct the investigations in some manner so as to prevent faulty investigations.

Based on these investigations, it is the job of the prosecutor to file indictments or direct the police to do so. Following this is the prosecution of the case itself. It is important to ensure that the investigation, indictment and prosecution all occur in the shortest time possible; delays in any of these amount to a delay in justice and further violation of victims' rights.

The criminal investigators also have the ability to fabricate cases. In such instances, prosecutors have the duty to probe the evidence and to guarantee the basic rights of people by preventing such fabricated cases, as mentioned in guideline 14. In the context of countries where there are very grave abuses by the investigators, who are in fact policemen, this function of the prosecutors can prevent severe miscarriages of justice and pain caused to innocent citizens. The prosecutors have also the duty to be fair to those who they prosecute. All norms and rules relating to fairness and the rights of the accused persons should be adhered to.

It is very important for prosecutors to check police investigations and ensure no illegal methods are being used, particularly torture. Guideline 16 emphasizes that if prosecutors come across information that torture or other illegal practices have been used to procure evidence, they must disallow the use of such evidence, inform the court and take action against the perpetrators. Article 14(3)(g) of the ICCPR further states that no one shall be compelled to testify against themselves or to confess to guilt.

Trial

The principle of the presumption of innocence is an essential one in the fight for justice. Article 14(2) of the ICCPR states that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". While this principle is predominant during the trial itself, it must also be upheld in the pre-trial stages. As noted by the Human Rights Committee in General Comment No. 13, the principle of innocence means that

the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial [<http://www.ohchr.org/english/bodies/hrc/comments.htm>].

The principle of innocence, as well as all other principles involved in ensuring due process of law during the trial stage must be upheld by the prosecutor, who is bound to maintain the rule of law. This responsibility to the law also means that the prosecutor should not strive for a conviction; while a case should be firmly and fairly presented, there must be some restraint in how it is advanced. This is because the prosecutor is the representative not of any ordinary party to a controversy, but of a state. The state's obligation to govern impartially is as compelling as its obligation to govern at all, and therefore, its interest in a criminal prosecution must be that

justice is done, not that it shall win a case.

Another important principle to be upheld is article 14(3)(b) of the ICCPR, which provides that everyone is entitled to “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. This is strengthened by 14(3)(d), which says that all those accused of a crime must be provided legal assistance, without payment if they cannot afford it.

During the trial, the prosecution must also ensure that if the accused are being detained, their conditions of detention are not in violation of international or domestic law.

Similarly, the prosecution should also take the responsibility of providing adequate protection to witnesses and complainants. Witness testimony is usually essential in successful prosecutions, particularly in human rights violations. For this reason, they are also particularly vulnerable to attacks and intimidation by the perpetrators, as indicated in Lesson 1. A lack of protection will undoubtedly affect whether witnesses will come forward or not to testify and ensure the successful prosecution of the perpetrators; the conviction rate in Sri Lanka is a mere four per cent, largely due to the failure of witnesses to appear in court. Furthermore, when the prosecution is made aware of the fact that witnesses and complainants have been threatened, it must take effective action against the perpetrators.

B. Relationships with law enforcement and accused

Guideline 20

In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

The unique position of the prosecutor within the criminal justice system necessitates a working relationship with other parts of the system; the better the relationship, the better the working of the system as a whole. However, it is crucial to note here that all these relationships must be based solely on legal principles. The purpose of the relationships is to pursue justice, which must be foremost in the mind of the prosecutor.

Law enforcement agencies

With regards to the police, it is important for the prosecution to have a relationship with them to ensure cooperation and collaboration, as mentioned above, regarding criminal investigations. However, such a relationship will also reduce the likelihood of police errors as well as ensure that as soon as the police receive any complaints or begin investigations, they inform the prosecution department or seek their advice. Regardless of the relationship though, it is the role of the prosecution to ensure that the police are working within the confines of the law and

that due process is being followed.

When it comes to the courts, guideline 10 states that “the office of prosecutors shall be strictly separated from judicial functions.” This is to ensure the independence and impartiality of the prosecution mechanism, which must however, inform the courts of all relevant matters. While it is the court that must ultimately decide on the outcome of a case, it can only do so based on the case in front of it; this will largely depend upon the work of the prosecution. Furthermore, it is the responsibility of the prosecutor to keep the court informed regarding violations committed by the police or others during the course of the case.

Accused

As mentioned in section A, the law provides for many rights for those accused of crimes. It is the prosecutor’s duty to ensure that these rights are protected. However, again, the prosecutor must also remember that he is a public official, and as such must undertake his duty impartially, with a view to obtaining justice.

Questions For Discussion

1. What are the domestic legal provisions regarding the mandate of the prosecutor in your county?
2. Are there provisions regarding the discipline of prosecutors who fail to carry out their duties in accordance with the law?
3. In your opinion, are the international provisions mentioned in the lesson adequate? If not, what would you add/amend?
4. Discuss how such legal provisions can be practically implemented.

Appendix I: Freedom of expression in Asia (E/CN.4/2005/NGO/37)

—A written statement submitted by the Asian Legal Resource Centre (ALRC) to the 61st session of the UN Commission on Human Rights, April 2005.

1. Discussion on freedom of expression usually centres on violations such as censorship, self-censorship, attacks on journalists, attacks on publications and the like. Little attention is paid to the suppression of freedom of expression through the legal process itself. This is because in developed democracies the legal system guarantees freedom of expression and offers various avenues for persons or groups who feel that their rights relating to freedom of expression have been violated to find redress. However, this is not the situation in most countries in Asia, where the legal system itself creates many obstacles for freedom of expression. Furthermore, defects in the legal system, when manipulated unscrupulously - either by the executive or the judiciary - can also create huge obstacles to freedom of expression and cause silence and submission among the people. In this statement, the Asian Legal Resource Centre (ALRC) wishes to examine a few of these obstacles.

2. Diminishment or curtailment of the freedom of lawyers to carry out their functions can virtually paralyse the freedom of expression in a society. When freedom of expression is violated lawyers have to canvas the matter before the courts. When matters are raised before courts, all violators are put on notice that their violations are under legal scrutiny. Once the lawyers raise questions after professional research and establishing the real grounds on which they go to court, their pleadings also provide good material for the media to take up the same issues. Thus, serious debate on all matters relating to freedom of expression in the courts takes place through the mediation of lawyers. If by direct or indirect means lawyers are prevented from playing their roles in the most effective and sophisticated manner, freedom of expression will be undermined.

3. There are many modes by which legal actions for the protection of freedom of expression can be curtailed by tampering with the rights of lawyers. One is to limit the remedies available in the law so that the capacity of lawyers to handle such matters is likewise limited. There are many countries in which the role of the lawyer is confined to minor criminal or civil matters, such as property or commercial disputes, and there is no room for public law. There are other countries where this role does exist but only marginally. This is the case in most former European colonies. Even though there may be constitutional expansion for legal canvassing against freedom of expression through bills of rights or other provisions introduced through the constitution, the actual capacity that exists for canvassing such matters is limited and is often also circumscribed by procedural limitations and habits in courts that were established through long years of practices under more limited legal remedies.

4. Worse still are the deliberate attempts to intimidate lawyers. Such intimidation can take many forms. The pretext of dealing with the workload of courts speedily may be intended to create an impression of professional lawyering as an obstruction to the speedy administration of justice. Lawyers are pressured to limit their interventions

and surrender some of their basic professional freedoms on the pretext of court efficiency. If this pressure continues for long enough, as has happened in several countries in Asia, many lawyers also become demoralised. Opportunism may also grow in the legal profession itself, causing some lawyers to exploit the situation and unscrupulously subvert the basic practices of their profession and cause its degeneration.

5. Another way of silencing lawyers is to take legal action against them so that they are unable to practice either for a short time or indefinitely. While rules against unprofessional practice are essential to the functioning of any profession, such regulations must be applied only according to the best traditions of the profession itself. If the rules are used against lawyers on flimsy grounds over an arbitrary manner, this will have a chilling effect on the profession as a whole. When a lawyer feels that her dignity as a professional lawyer has been diminished and that she can get into serious problems if she practices her profession in the manner required normally, then she may withdraw from performing her duties and accept a lesser role. For example, if the rules against lawyers are issued with ease, then a lawyer can only assume that she might be the next target. In these circumstances the whole profession is affected psychologically. What remains thereafter as a profession is only the external façade but not the profession as it should be.

6. This same effect can also be brought about by the easy use of contempt of court proceedings. Such proceedings can become an instrument for intimidation when one or two persons are punished without due process and all the requirements of law. The message is passed to the entire profession that it is a dangerous thing to be a good lawyer. Then lawyers stop taking controversial cases and do not advocate unpopular causes. Many will cease to take a brave position even in normal cases.

7. By these and other means lawyers can be silenced. They may still remain vociferous and complain of the indignities they suffer within private circles. However, in the courts, the real arena in which they are expected to play their role, they will humbly submit themselves to an oppressive ethos. They thereby only lend support to a process that has partly or completely lost legitimacy. The very professionals that have the legal capacity to expose the hypocrisies through which various crimes and gross violations of rights take place become silent partners to the death of freedom of expression. This tremendously important means for suppressing freedom of expression needs to be documented and opposed, not primarily for the sake of lawyers, but for the sake of preserving the people's freedom of expression.

Appendix II: Reform of the criminal investigations and prosecutions systems is the real key to reducing crime in Sri Lanka

—Asian Human Rights Commission, 11 January 2001

The recent decision of the Sri Lankan government to re-introduce the death sentence adds to the already very bad human rights record of the country. The argument that the increased crimes rate requires the reintroduction of the death sentence does not stand up to examination. There are fundamental failures in the criminal investigations and prosecution system in Sri Lanka that allow criminals to remain free, however serious their crimes. The Hangman can become a substitute for proper criminal investigators and competent prosecutors.

The present situation of increased crimes must be blamed on the criminal investigation authorities and on the prosecuting department which in Sri Lanka is the Attorney General's department. However, the relationship between these two departments themselves is inherently defective. As it exists now, criminal investigation is entirely the function of the police and if they fail to investigate, the prosecutors can wash their hands by saying that there is no evidence with which to prosecute. While this situation remains, all that the hangman can do is to send a few poor people to the gallows as a deterrent to others. This will only be a further mockery of justice in a country where justice is fast becoming a distant dream.

We instead call upon the government of Sri Lanka to seriously address the defects in the justice system that make the increase in crime possible and the increase in serious crime inevitable. The most vulnerable place in the system is the absolute separation between the criminal investigation function and the prosecuting function that exists. Without ending this separation, crimes will not only increase but more serious crimes will escape prosecution.

The reasons for such separation are as follows.

1. To end the absolute Gap that exists in Sri Lanka between the criminal investigation function and prosecution function:

The system as it stands now is for the police to investigate crimes and, in serious offences, to present the file to the Attorney General's department, which may thereafter prosecute the case. If the police do not investigate a crime or do so very badly, there is hardly anything that the prosecutor can do, except to say that there is no sufficient evidence to prosecute. Thus, the ultimate responsibility to prosecute a crime rests with the police. If the vicious circle that produces the 'no evidence' argument is to be broken, it is necessary to build a link between the prosecutors and the investigators from the very inception of a case. This would mean that from the receipt of the first complaint up to the finalization of investigations the prosecutors would be informed of the investigations and could take suitable steps to guide them.

2. To bring the Sri Lankan law into line with the developments of other common law countries:

The Sri Lankan practice of absolute separation between prosecutors and investigators is based on 19th century British practices. However in all of the major common law countries, including the United Kingdom, United States, Australia and India, no such separation exists. In these countries the prosecutor's departments have extension offices in all areas and the police departments coordinate their activities from the very inception of such inquiries. It would be useful for Sri Lanka's law drafters, legislators and the legal profession as a whole to study the developments that have taken place in other common law jurisdictions. In Civil law (the French system), the link between prosecution and investigation has always existed through the function of the investigation judge.

3. To create professional prosecutors:

The present practice of conducting prosecutions through the attorney general's department deprives the country of the development of professional prosecutors. Under the present set-up, lawyers in the Attorney General's department spend a few years in prosecution work and then shift into other work. The Attorney General's department has many functions and its lawyers shift from one to another. However, the acquirement of professional prosecuting skills takes a long time, as with any other serious profession. Besides, this allows individuals the option to enter and stay in this profession for a long time. In any profession, personal aptitudes and choice are important. This also has an impact on training. If the prosecutors are going to be in this profession for only a short time, there is no purpose investing in training for them. However, modern day prosecuting involves a high level of training and specialization. The mere fact of being an attorney-at-law is no sufficient qualification to be a competent prosecutor of serious crimes.

4. To create institutional habits within the prosecuting system:

Professional habits are made with difficulty. The credibility of any institution of professionals will depend on the way, these habits are formed and transmitted. The present system as it operates through the attorney general's department is not conducive to development of such professional habits and to ensure a continuity to a tradition of proper conduct of prosecutions.

5. To address the problem of increase in crime:

The government admits that there is a vast increase in crime. The only real answer to this is proper criminal investigation and certainty of prosecution for all crimes. The system as it exists now fails to do this. It is an unavoidable fact that the system needs to be corrected.

6. To deal with crimes committed by law enforcement agencies:

It was just few months back that about 26 persons were massacred in the presence of about 60 armed police. Each day bring reports of crimes in which law enforcement officers are involved. Over 30,000

disappearances have put the countries among those with the worst records in the world. It is simply ludicrous to leave these crimes to be investigated by the police alone. The repeated argument that comes up is that there is not enough evidence to prosecute these crimes. The evidence depends on competent investigations, which in turn depend on proper systems of accountability. To allow the present system of separation between prosecutions and investigations to continue is to connive with crimes done by law enforcement agencies.

7. To answer international criticism;

The United Nations' report of the Working Group on Enforced or Involuntary Disappearances (25-29 October 1999) (E/CN.4/2000/64/Add.1) issued on 21 December 1999 and presented to the UN Commission on Human Rights Session in April 2000 contains, among other things, the following recommendations:

- “(a) The Government should establish an independent body with the task of investigating all cases of disappearance which occurred since 1995 and identifying the perpetrators;
- (b) The Government should speed up its efforts to bring the perpetrators of enforced disappearances, whether committed under the former or the present Government, to justice. The Attorney-General or another independent authority should be empowered to investigate and indict suspected perpetrators of enforced disappearances irrespective of the outcome of investigations by the police;”

In a statement from 2000, AHRC summed up the central problem relating to prosecution of those responsible for the disappearances in Sri Lanka as follows:

- “It is an elementary principle of Criminal Law that the investigation into crimes determines the prosecutions. Because of the lack of criminal investigations into cases of disappearance in Sri Lanka, the cases cannot be prosecuted. Thus, the first step towards any real prosecutions of these cases must be to begin criminal investigation.
- ”As the police were mobilized to cause the disappearances, it is not possible to investigate through this apparatus. Thus, an independent body for conducting criminal investigation must be the first step towards the carrying out of prosecutions.”

Thus the failure of the criminal investigation and prosecution system is now a well known fact world-wide. Sri Lanka has even been classified as one of the most dangerous places on earth. There can be no real answer to these criticisms until the defects inherent in the system, particular the absolute separation between criminal investigations and prosecutions, are done away with.

Appendix III: Guidelines on the Role of Prosecutors

—Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors, Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

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

Qualifications, selection and training

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

2. States shall ensure that:

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

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

Status and conditions of service

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

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

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

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

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

Freedom of expression and association

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

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

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.

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

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

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

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

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

(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

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

15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

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

Discretionary functions

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

Alternatives to prosecution

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

avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

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

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

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

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

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Appendix IV: International Covenant on Civil and Political Rights

—Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.