article 2
of the International Covenant on Civil and Political Rights
Vol. 7, No. 1 March 2008 ISSN 1811 7023

focus

prosecutions *in* Asia

Cambodia · Philippines · Sri Lanka
Bangladesh · Nepal

any person whose rights or freedoms are violated shall have an effective remedy, determined by competent judicial, administrative or legislative authorities

The meaning of article 2: Implementation of human rights

All over the world extensive programmes are now taking place to educate people on human rights. As a result today there exists a vast number of persons and organisations firmly committed to human rights; more than at any other time in the history of humankind. Yet human rights continue to be monstrously violated.

It is time for the global human rights movement to examine why it may not yet be achieving real improvement in the global human rights situation. One factor hindering honest examination is the belief that improvement of knowledge about human rights will by itself end human rights violations. This is a myth based on the corresponding belief that education is itself capable of improving things.

In reality human rights can only be implemented through a system of justice. If this system is fundamentally flawed, no amount of knowledge—no amount of repetition of human rights concepts—will by itself correct its defects. Rather, these need to be studied and corrected by practical actions. Hence research and intimate knowledge of local issues must become an integral part of human rights education and related work.

article 2 aims to do this by drawing attention to article 2 of the International Covenant on Civil and Political Rights, and make it a key concern of all partners in the global human rights community. This integral article deals with provision of adequate remedies for human rights violations by legislative, administrative and judicial means. It reads in part:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Sadly, article 2 is much neglected. One reason for this is that in the 'developed world' the existence of basically functioning judicial systems is taken for granted. Persons from those countries may be unable to grasp what it means to live in a society where 'institutions of justice' are in fact instruments to deny justice. And as these persons guide the global human rights movement, vital problems do not receive necessary attention. For people in many countries, international human rights discourse then loses relevance.

Other difficulties also arise with article 2. One is the fear to meddle in the 'internal affairs' of sovereign countries. Governments are creating more and more many obstacles for those trying to go deep down to learn about the roots of problems. Thus, inadequate knowledge of actual situations may follow. A further and quite recent disturbance is the portrayal of national human rights institutions and their equivalents as surrogate agencies for dealing with article 2 related issues. Some state parties may agree to new national human rights institutions taking on this role because they know that by doing so they may avoid criticisms of a more fundamental nature.

Thus after many years of work, the Asian Legal Resource Centre began publishing *article 2* to draw attention to this vital provision in international law, and to raise awareness of the need to implement human rights standards and provide effective remedies at the local level in Asia.

Relevant submissions by interested persons and organizations are welcome.

Contents

Public prosecuting in Cambodia

Dr Lao Mong Hay, Senior Researcher;
Sarada Taing, Assistant Researcher
& Anne-Laure Proisy, Intern,
Asian Human Rights Commission, Hong Kong

Cambodia adheres to international human rights norms and standards as part of its obligations under the Paris Peace Agreements of 1991 that ended war in the country, and under the constitution it promulgated in 1993. Under this constitution, Cambodia is a pluralistic, liberal democracy under a constitutional monarchy. There is a separation of powers with an independent judiciary. Cambodia guarantees all human rights recognized in all relevant international human rights instruments, and the judiciary is entrusted with the task of protecting all these rights.

As a former French colony, Cambodia has adopted the inquisitorial civil law system of justice with pervasive vestiges of communist legal theory and practices of the 1979-1992 period, and also the small legacy of the 1992-1993 administration of the country by the United Nations Authority in Cambodia (UNTAC).

Very few laws have served as the basis for this system. One is the criminal law that was initiated by UNTAC and adopted in 1992 by the Supreme National Council of Cambodia, known as the UNTAC Law (formally, Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period). The others include the Law on Criminal Procedure (the SOC Law) and the Law on the Organisation of Courts, both of which were enacted in 1993 by a warring faction known as the State of Cambodia (SOC). This was a pro-Vietnamese/Soviet communist warring faction and which had at its command the government apparatus in most of the country but ceded key powers to the United Nations during the transitional period.

The authors wish to thank H.E. Ang Vong Vathana, Minister of Justice, Cambodia, for having facilitated this study and to all unnamed judicial officers, lawyers and court observers, including the police commissioner, who spared time to share their knowledge and experiences for the benefit of this study.

The system has undergone changes with the enactment in 2006 and the coming into force in 2007 of the newly adopted Japanese-sponsored Code of Civil Procedure and French-sponsored and modeled Code of Criminal Procedure (CCP). Training workshops are being held for police officers and magistrates to familiarize them with the CCP, but it remains debatable as to whether or not the vestiges and practices of the SOC Law will disappear soon. The enactment some time in the future of the new Law on the Organization of Courts and the Law on the Statutes of Judges will add more impetus to these changes, and the justice system will have a structure and functioning more worthy of its name.

This article is based on the legislation currently in force and about to be in force; formal and informal interviews with a number of judicial officers, lawyers and court observers and a police commissioner; and court observation over recent years. The description of the actual work of prosecutors, judges and the police is based on interviews with them and other sources. The article should is a cursory narrative introduction to, rather than a comprehensive analytical presentation of, the Public Prosecution Service (PPS) in Cambodia, with emphasis on the power and role of prosecutors in the criminal process up to the courts of first instance.

The article makes scant references to criminal justice systems in other countries. It is limited to dealing mainly with this particular service under the present system of justice in Cambodia and its expected development under the CCP. It covers briefly the criminal justice system in the first part and prosecutorial power in the second part. In the subsequent parts it looks in more depth at the working relations between the PPS and the police; those between the PPS and judges at the investigating and trial stages; the PPS and the trials; the police and their reports; and the independence or political control of PPS. The article attempts to look at the directions in which the PPS could move in view of the new codes and laws and in the opinions of the people the research team has contacted.

The present system

Since UNTAC left in 1993 until now Cambodia has had until a system of justice composed of three levels of courts. At the bottom there are the courts of first instance, one in the capital of each of its 22 provinces or municipalities. They are provincial or municipal courts. One of these courts of first instance is the military tribunal with jurisdiction over military offences, although there is no definition of a military offence in law or jurisprudence (despite the wishes of some judicial officers to have one) and so at times, for political reasons, this tribunal's jurisdiction has been extended to ordinary criminal offences. Higher up there is a Court of Appeal for the whole country and over it the Supreme Court, which is the court of final appeal. At the moment, there is only one court of appeal, but the CCP has provisions to bring more into effect.

> "The criminal justice system is based on judicial inquiry conducted by prosecutors and judges"

Like the courts of first instance, the Court of Appeal adjudicates on the legality of acts under examination and on factual evidence substantiating these acts, while the Supreme Court concentrates only on the legality and procedural aspects of the judgments of the Court of Appeal. The Supreme Court has no jurisdiction over constitutional issues. It has no power of judicial review. This is the jurisdiction of the Constitutional Council, which interprets laws and oversees the constitutionality of laws and acts government. This Council also serves as the court of final appeal for electoral offences, which are under the jurisdiction of the National Election Committee and completely outside the purview of the justice system.

Judges in all courts, including the Supreme Court, adjudicate according to law and their consciences and have no power to interpret laws and refer to cases in other jurisdictions to make their decisions. They cannot make laws, and so far there is virtually no jurisprudence in Cambodia.

All these courts have jurisdiction over all lawsuits including administrative ones. There are no separate civil, criminal, or administrative justice systems, or even chambers, though the creation of two specialized tribunals, one for labour disputes and the other for commercial disputes, is being considered. A court can hear a criminal case and a related civil action for damages and can convict the accused and award damages to victims altogether at the same time in a single judgment, though victims of crimes can take civil actions in civil courts.

The entire system is placed under a judicial body called the Supreme Council of the Magistracy (SCM), which is modeled on the French Conseil Superieur de la Magistrature or Superior Council of the Magistracy, but does not have the same composition. It is responsible for the nomination and discipline of judges and prosecutors and guarantees independence of the judiciary. It has nine members. The king is its chairman. The minister of justice, president and prosecutor general of the Supreme Court, and president and prosecutor general of the Court of Appeal are *ex-officio* members. The three other members are elected from among judges and prosecutors.

The ministry of justice is responsible for the administrative and logistical affairs of all courts, and the nomination of court clerks and other personnel. It runs the SCM secretariat. Like its French counterpart, this ministry has a judicial general inspectorate department whose functions include investigation into complaints against judicial officers and other court personnel. It also has a department of prosecution institutions, whose tasks include investigation into complaints against prosecutors.

The criminal justice system is an inquisitorial system based on judicial inquiry conducted by prosecutors and judges. The system comprises the police, PPS, judicial inquiry, courts and prisons. Judges and prosecutors are judicial officers. New and

younger ones have received the same training at the Royal Academy for Judicial Professions. Judges can become prosecutors and vice versa. Judges can conduct investigations but they cannot be trial judges for cases they have investigated. They are called investigating judges. The police are under the ministry of interior and have several branches, two of which are the administrative police and the judicial police. Only the judicial police can arrest and detain criminal suspects and conduct criminal investigations.

"The police conduct investigations, gather evidence and bring offenders before the prosecutors of the court of the province where a crime has been committed"

Apart from the National Police, the Military Police are under the Ministry of National Defence. Military police officers are also judicial police officers. Equivalent to the *gendarmerie* for French rural areas, the Military Police in Cambodia are more militaristic than their French counterparts. They are deployed everywhere and can duplicate the work of the National Police, though in law they should not. They are better armed and inspire more fear than the National Police.

Besides these two police forces, a certain number of other government officials ranging from public prosecutors and investigating judges (when working on criminal cases) to provincial governors, and down to chiefs of commune (lowest level of territorial administrative unit) are also made judicial police officers. Altogether with the National Police and the Military Police, there are 10 different groups of judicial police officers under the SOC Law as amended. The CCP has removed prosecutors and investigating judges from the list of judicial police but has extended this list to 14 groups of officials.

Both the SOC Law and the CCP have adopted the *actio populis* principle whereby members of the public besides victims, people close to victims, police officers and other officials with jurisdictions over criminal offences can file criminal complaints to the police or prosecutors of courts of first instance which will start off public or criminal actions (SOC Law art. 56, CCP art. 40). A public action can also commence when the police catch an offender committing a *flagrante delicto* offence or when the commission of crime comes to the knowledge of a prosecutor.

Under the CCP, a victim can file a civil action and a criminal suit to an investigating judge and all police officers have a duty to receive complaints and denunciations of criminal offences. The same code makes it mandatory for all public authorities and officials to immediately report criminal offences that they have known in the performance of their duties to the police or the prosecutor of the court of their province or municipality, while under the SOC Law there is no such obligation.

The police conduct investigations, gather evidence and bring offenders before the prosecutors of the court of the province where a crime has been committed. They can arrest the suspect if the latter is caught red-handed, detain him for investigation (for 48 hours maximum) and bring him before the prosecutor, whereupon the prosecutor conducts a preliminary investigation (SOC Law arts. 55 & 56, CCP art. 40).

After directly receiving a complaint or denunciation or police report on an offence, the prosecutor may file a case without processing (a non-suit) or may indict the offenders, notifying the complainant of the decision to file a non-suit decision within two months. The plaintiff can appeal the decision (SOC Law art. 59, CCP art. 41). However, this non-suit has no *res judicata*, that is, a public action can be taken in light of new evidence or if the appeal is upheld. In practice, certain plaintiffs have appealed the prosecutor's non-suit decisions and the Court of Appeal has upheld some of these appeals.

> "The arrangements of a typical courtroom in Cambodia show the differences in status and position of the court actors and their bearings on the rights of the accused"

Once the prosecutor has brought criminal charges against the offenders, the case is sent to a judge for investigation. This judge can detain the accused or release him on bail. Once his investigation has been completed, this judge can drop the charge and release the accused or send the case file together with all evidence back to the prosecutor. If there is evidence to substantiate the charge, the case is then sent to the president of the court who assigns a judge to try the case. The trial judge examines the case file and fixes the date of the trial hearing.

Under the inquisitorial system, trial hearings are characterized by brevity. The trial judge is active. The prosecutor lays charges, questions the defendant and cross-examines witnesses. A court clerk is there more to read statements to the police than to record the proceedings. The defence counsel, who is mandatory only in felonies, makes submissions, questions his client and cross-examines witnesses. He is very much inferior to the trial judge and the prosecutor, even to the court clerk.

The trial hearing ends with the final words from the defendant who invariably pleads for leniency when they realising guilt. The trial judge then withdraws to his room. Normally, he comes back to the courtroom shortly after to announce his judgment. For instance, in one case observed, the trial judge announced gave his decision 20 minutes after the conclusion of the hearing and sentenced the two defendants to 20 years' imprisonment. The prosecutor then executes this judgment.

The arrangements of a typical courtroom in Cambodia show the differences in status and position of the court actors and their bearings on the rights of the accused. The courtroom is modeled on the French version that existed in Cambodia prior to the communist days. The courtroom has a trial judge desk elevated at the highest level in the middle at one end. Lower down, in front of that desk, on either side of the judge there are the prosecutor's desk on the right of the trial judge and the court clerk's desk on the left. Lower down directly on the floor and next to the clerk's desk, there is the defence lawyer's desk. There is a place in the middle in front of the trial judge. Facing the judge in the middle of that space, on the floor and at the level between the clerk's and the lawyer's desks, stands a curved bar behind which the defendant stands while being tried. Because of its shape this bar is called the "horseshoe". Behind the defendant in the rest of the room there are benches for defendants to sit

while waiting, and for the defence staff, public and journalists. There is no specific room for witnesses. They wait outside the courtroom to be called in turn to testify.

Australian technical assistance has brought some changes to the courtroom's arrangements. The trial judge's desk is still elevated, but the clerk's, prosecutor's and counsel's desks are at the same level on the floor, with the clerk's desk right in front of the trial judge's desk, leaving the prosecutor's and the counsel's desks facing squarely with each other from either side. The defendant's horseshoe bar still remains in the middle.

> "Many people, even among members of the judiciary and the legal profession, see public prosecutors as representing the government, not the state or society as a whole"

Prosecutorial power

Many people, even among members of the judiciary and the legal profession, see public prosecutors as representing the government, not the state or society as a whole, and to them it is legitimate for prosecutors to receive and execute government orders.

The CCP has improved on the SOC Law and dispels this erroneous perception. According to the SOC Law, the purpose of a public action was to "condemn all acts disrupting the order and peace of the society as prescribed by law" and "endeavors to prevent their recurrences by imposing on perpetrators punishment prescribed by law" (SOC Law art. 3). Now the CCP gives a clearer meaning and purpose, to "examine the existence of a criminal offense, to prove the guilt of an accused person, and to punish a convicted person according to law" in an action that is "brought by prosecutors for the benefit of the general society" (CCP arts. 2 & 4).

Both the SOC Law and the constitution give the PPS exclusive power to prosecute and conduct prosecutions (Constitution art. 131). The criminal justice system adopts the principle of legality of prosecution. Action leading to prosecution of offenders is mandatory following the commission of an offence; any settlement out of court is prohibited, and if the court knows of an offence any failure to take that action is itself deemed an offence punishable with disciplinary measures or imprisonment between six days to one month. The CCP adopts instead the principle of opportunity whereby it is expressly provided for in separate laws that criminal actions may also be ceased by (1) a settlement with the state; (2) the withdrawal of civil complaint in a case where a civil complaint is a condition required for the laying of criminal charges; and (3) the payment of a lump sump or an agreed fine (CCP art. 8). This will bring significant change. On the one hand, it will give more room to the prosecutor to decide whether to prosecute a suspect or not and to find alternative settlements. As a consequence courts will have fewer cases to deal with and will be more efficient. But on the other hand it will create opportunities for abuses, corruption and pressure on weak parties or victims of crime to accept payments in the prosecutorial stage.

> "The authority of the prosecutor-general of the Court of Appeal is the most extensive and covers not only his subordinates but also all prosecutors of the courts of first instance across the country"

The PPS is pivotal to the criminal justice in Cambodia, yet it is not organised as any distinct entity or department with its own structure and organization, although there is a hierarchy among public prosecutors: (1) the prosecutor-general, deputy prosecutor-generals and prosecutors of the Supreme Court all have their jurisdiction within that court only; (2) prosecutor-generals, deputy prosecutor-generals and prosecutors of the courts of appeal; and (3) prosecutors and deputy prosecutors of the courts of first instance. The number of these prosecutors and deputy prosecutors at each of these courts of first instance currently ranges from one to six.

The authority and jurisdiction of the prosecutor-general of the Court of Appeal (there is only one such court now) is the most extensive and covers not only his subordinates but also all prosecutors of the courts of first instance across the country. Prosecutors of these courts must immediately inform him and the minister of justice of any serious crime which has come to their knowledge. The prosecutor-general's authority is even firmer when he handles all complaints against their actions or non-suits and also their appeals, for instance against the decisions of investigating judges or trial judges.

Public Prosecution Service & the police

Both the SOC Law and CCP endow the PPS with extensive power over the police. Under the SOC Law the prosecutor-general supervises and the prosecutor of the court of the first instance guides all operations of the police under their respective jurisdictions, but the law is silent over the forms that these should take. The CCP places the police firmly under the authority of the judiciary. The police "perform their duties supporting the judiciary" and "receive or ask for orders from the judicial authorities only" (CCP arts. 56 & 70). They are placed under the supervision and control of the prosecutor-general who has power to summon any chief of police unit to discuss issues related to the functioning of that unit, to assign to police officers duties that are necessary for the good management and functioning of the police, to inspect police units at any time, to participate in interrogations, and to supervise the application of the rules of detention, especially the respect for legality and administration of detention centres. Chiefs of police units and officers must obey his orders, and he has power to take disciplinary actions against police.

A prosecutor or an investigating judge must report any misconduct committed by a police officer to the prosecutor-general, who may then notify this misconduct to the minister of interior (for national police officers) or minister of national defence (for military police officers) to take disciplinary action, and these ministers must inform him of the action they have taken against the concerned officer. When he finds an officer's misconduct so serious that it affects the performance of his duties, the prosecutor general has power to prohibit the concerned officer from performing his or her duty for up to five years or indefinitely.

Prosecutors of the court of first instance also have wide powers. Under the SOC Law they have power to conduct by investigations into *flagrante delicto* cases. In these cases the prosecutor has power to issue warrants to arrest and interrogate suspects. He has power to prevent any person from leaving the scene of a crime, if necessary with an order of detention not exceeding 24 hours. Once preliminary investigation has been completed, he sends the case file to an investigating judge. If such a judge has received the same case and is present at the scene of crime, this judge will take over the investigation right from there and then.

> "The prosecutor has extensive power over the police in his jurisdiction, and also over civil servants and public agents who have been delegated power by separate laws to inquire into some offences"

Under the CCP, the prosecutor has extensive power over the police in his respective jurisdiction, and also over civil servants and public agents who have been delegated power by separate laws to inquire into some offences. He has power to lead and coordinate the operations of police officers, except when the latter are under the authority of investigating judges; to delegate power of investigation to these officers and revoke this delegated power; to visit the investigation site and give necessary instructions to the police officers; to inspect a judiciary police unit at anytime; to participate in police interrogations, and to supervise the application of the rules of detention, especially the respect for legality and administration of detention centres.

When he receives a complaint, a police officer must either immediately investigate or send the record on the complaint to the prosecutor to act upon, but before making any inquiry he may request advice from the prosecutor. When he receives a denunciation that has been proven to be accurate beyond reasonable doubt he must inform the prosecutor and seek his advice. In any case, no police officer can file a criminal case without taking any public action, regardless of any settlement between the offender and the victim, and hiding or withholding a record or evidence from court is a punishable offence (CCP art. 75).

Police officers must report cases of flagrant felony or misdemeanor to the prosecutor who, if deemed necessary, may visit the site of a crime to supervise the police inquiry. In an emergency, he may authorise police officers to operate in any territory of the entire country. To conduct a search, police officers must obtain authorization from the prosecutor. In their inquiry of *flagrante delicto* cases, they may order any person to appear and listen to any person who can provide them with the relevant facts. In case of refusal to appear they must inform the prosecutor, who may order such a person to appear. With this order they may use police forces to coerce that person to appear.

Police officers may remand in custody a person who is suspected of participating in the commission of an offence. They may also remand in custody a person who is in a position to provide information relating to the relevant facts and who refuses to do so, provided they have secured written approval from the prosecutor. They must immediately report this custodial action

with all evidence leading to it to the prosecutor. The maximum duration of custody is 48 hours. Police officers must seek the approval of the prosecutor if they need to extend this custody. They cannot extend this custody for more than 24 hours.

"The police are not happy with their subordination to the prosecutors"

The prosecutor or police officer concerned may ask a doctor to examine an arrested person in police custody at any time and, if necessary, the prosecutor may visit the site to verify the conditions of the arrested person. At the expiry of the period of police custody, the arrested person must be handed over to the prosecutor and brought immediately before him or released. In *flagrante delicto* cases, the duration of the police inquiry of a flagrant offense must not be more than seven days from the date of the occurrence of an offense and must be conducted continuously. At the end of that time, the police must send their report and all exhibits to the prosecutor together with the arrested person.

The prosecutor has the same power over the police in preliminary investigations conducted either at the discretion of the police or at his instruction. The prosecutor who has knowledge of events potentially leading to a commission of a criminal offence can instruct police officers to conduct a preliminary inquiry.

By subordinating the work of the police to the judiciary, the CCP brings about a big change. This was agreed upon not very long before the CCP was debated in the National Assembly (lower house).

The police are not happy with their subordination to the prosecutors. In communist days they had superiority in law and in practice. Under the SOC Law, the police investigated criminal offences, gathered evidence and brought offenders before the competent courts of first instance. In *flagrante delicto* cases, they had power to arrest suspects, interrogate them, detain them for up to 48 hours before handing them over to the prosecutor of the competent court of first instance, conduct searches, confiscate all exhibits, and assign experts to assist. They could also make arrests in execution of court orders or warrants. The SOC Law stipulated that all operations of the judiciary police were under direct guidance of prosecutors and supervision of the prosecutor-general but was silent on the prosecutors' and prosecutor-general's specific roles and on their disciplinary power over police officers.

Informal encounters with judicial officers during trial observations over recent years and during a recent field study have revealed that there has been no uniformity in the guidance and supervision of these officers. There is general acknowledgment by judicial officers that the police are dominant: a legacy of the communist days.

According to one prosecutor, in the 1980s police were very much on their own and courts were effectively their subordinates. The police then had "superpowers" to arrest and detain suspects for as long as they wanted. Courts always based their decisions

on police reports and conclusions. They did not have power to enforce the law by themselves. In those days, judicial officers felt their security was threatened when confronting police.

"According to one senior prosecutor, the police had not accepted that they were under prosecutorial supervision"

After the adoption of the SOC Law in 1993, prosecutors went with the police to conduct investigations or make arrests. They closely supervised police, which was very necessary when the police had little or no training in law. They had to train police officers in interrogation and in the constitution of case files to submit to court. It was a difficult task for prosecutors when the police did not understand their role under the new law. The same task was even more complicated when the police were placed under the ministry of interior, and courts were created and organized in consonance with the SOC Law, well after the creation of the ministry.

According to one senior prosecutor, the police had not accepted that they were under prosecutorial supervision as stipulated in article 36 of the SOC Law, and had insisted on operating under article 6 of the UNTAC Law, which was silent on prosecutorial guidance and the prosecutor-general's supervision. According to the same source, the prosecutor-general and prosecutors had not been able to visit prisons even though they had power to do so under the UNTAC Law.

The dominance of executive power over the judiciary resulted, for instance, in the prime minister's order in 1999 to re-arrest a certain number suspects and accused released by some courts, and again in his "iron fist policy" in 2005 that was purportedly to rid the judiciary of corruption. These two moves, announced in public with a vehement tone against the judiciary as a whole, were taken when the police had not been happy with the lack of cooperation from courts in combating crimes and releasing of criminals that the police had arrested. For their part, judicial officers claimed that the police had not submitted sufficient evidence to substantiate those crimes and that there were doubts about the culpability of the suspects and accused. Individual self-interests and corruption have aggravated frictions between police and judicial officers.

By contrast, another senior prosecutor asserted that during his career he had never had any difficulty to exercise his power over the police under his jurisdiction. He said that he had always worked closely with the police. He trained them to understand criminal procedure clearly to ensure their smooth cooperation. When the police did not conduct investigations professionally or failed to follow procedure, he informed their police commissioner or the ministry of interior with a view to getting them punished or taking disciplinary measures against them. A police officer committing any crime was convicted like an ordinary person, he insisted. He further said that he had often made impromptu visits to police cells or prisons, and when any suspect had been detained beyond the legally permitted period, he released the person immediately.

> "Police rarely obey orders from prosecutors unless prosecutors are not corrupt—which is rare"

This positive picture of the prosecutor's work may be exaggerated and this prosecutor was himself suspected of corruption a few years ago. He may also have been able to assert his power over the police as according to a leading lawyer he is a powerful member in the elite of the ruling Cambodian People's Party. This lawyer said that prosecutors in general are not independent and they do not want to make the police unhappy. In practice, police have more power than prosecutors or judges because police can make a lot more money, especially through corruption, and their living standard is higher than that of prosecutors. Besides, the police force is strong and armed, and prosecutors depend on the police force for investigation. Police rarely obey orders from prosecutors unless prosecutors are not corrupt—which is rare. The same lawyer said that prosecutors rarely make visits to suspects in police custody.

It is common knowledge that prosecutors could not do anything against the police when the latter arranged a settlement between offenders and victims and did not send a case to court as required under the SOC Law. Nor could they do anything when the police arrested suspects without warrants. Prosecutors have typically preferred to ignore all these wrongdoings. Furthermore, they also preferred to ignore suspects' complaints of police torture or ill treatment.

A powerful police commissioner denied allegations that the police had more power than prosecutors and wished that there could be more cooperation from the prosecutor. He said that if the prosecutor spotted any inadequacy in police investigation and evidence, the prosecutor should inform them and get them to conduct further investigation and gather more evidence. That commissioner said that the prosecutor had deals with suspects and took bribes to release them without informing the police. According to him, prosecutors have reported police officers' misconduct or faults to the ministry of interior with a view to getting them punished with demotion. He pointed out that the ministry of interior had had a General Inspection Department, responsible for the performance and conduct of the police. However, according to a senior official of that ministry, the department had had no set of rules and procedures for the inspection of police work and their performance.

The police commissioner claimed that the force had to date received better training in criminal procedure and it was wrong to say that police officers are still ignorant of the law. This improvement is a result of continued technical assistance and training provided by French and Australian experts over many years, and the creation and functioning of two police training schools. Judicial officers have also received continuous training.

Prosecutors contacted claimed that they have conducted investigations after receiving complaints or denunciations, but they were silent when asked to give a rough percentage of cases they investigated. A junior prosecutor claimed that the number of complaints directly filed to the prosecutor in his province had

increased over recent years as the venue was more widely known and the public had more trust in prosecutors than in police officers. But still he himself sent back such cases to the police for investigation. It was simply impossible for the prosecutor and his two deputies to cope with a fraction of the thousands or so cases every year.

> "An investigating judge cannot conduct any investigation without a requisition letter or submission from the prosecutor of his court"

Public Prosecution Service & investigating judges

After prosecutors start judicial inquiries they are taken over by investigating judges. The work of the investigating judges has an overwhelming bearing on the fate of any accused and can be considered as the heart of criminal justice in Cambodia. Both the SOC Law and the CCP endow the investigating judge with enormous power. The CCP makes investigation by an investigating judge mandatory for all felony cases and optional for misdemeanor cases. The SOC law says simply that the prosecutor has power to bring misdemeanors directly to court for trial if all evidence has been gathered to substantiate the case against the accused without sending those cases to an investigating judge. In practice, and under the SOC law, almost all crimes go to an investigating judge.

The CCP has extended the prosecutor's power. In misdemeanor cases, the prosecutor conducts interrogation of suspects as in felony cases, but has power to summon the accused to appear before the court of first instance or issue an order for direct hearing for *flagrante delicto* offences punishable with imprisonment from one to five years, all without those cases going to an investigating judge. According to a senior prosecutor, this venue has not been used when judges prefer to hear cases that have been investigated by investigating judges.

The role of prosecutors remains pivotal at this crucial and final stage of judicial inquiry prior to trial. This role is common to both the SOC Law and CCP, but the latter contains more details and gives prosecutors more power. To start with, an investigating judge cannot conduct any investigation without a requisition letter or submission from the prosecutor of his court. This judge must refer a complaint by a victim (civil party) against an offence other than the one he is investigating—or a new criminal offence he has discovered during his investigation—to the prosecutor for a new submission or requisition letter for investigation before he can proceed to look into those offences (SOC Law art. 71, CCP art. 124). At any time during an investigation the prosecutor can ask the investigating judge to interrogate anyone whom he believes will be useful to the case, and can appeal the investigating judge's silence over his request. He has the right to examine the case that is being investigated. He can participate in any interrogation by asking questions and listening to the answers, especially in the interrogation of an accused person. The SOC Law is silent over the latter three aspects of the prosecutor's role in this judicial inquiry and in current practice prosecutors are never present during the interrogations of investigating judges.

“Conflicts frequently occur between prosecutors and investigating judges over the release of accused persons from detention and non-suit orders”

An investigating judge conducts all investigations that are useful to ascertaining the facts that will lead to the conviction or acquittal of the accused (CCP art. 127). He has power to accuse any persons specified in the prosecutor's initial submission or requisition letter; to issue rogatory letters to other judges or police officers ordering them to conduct investigations on his behalf; power to interrogate the accused, to hear civil parties and witnesses; to order search and seizure or to listen to phone conversations; to issue subpoena, summons and arrest warrants; to temporarily detain the accused and order their release; to request expert witnesses; to issue detention warrants; to place a person under judicial supervision; to authorize the prosecutor and lawyer to interrogate the accused and victims (civil party); to terminate an investigation, and to issue warrants of settlement for trial or non-suit orders when an investigation is terminated.

However, an investigating judge is not entirely free in the exercise of this power. Prosecutors have power to appeal against all warrants issued by investigating judges with which they are not happy, at the Investigation Chamber of the Court of Appeal (SOC Law art. 94, CCP art. 266). The investigating judge must seek the opinion of the prosecutor before issuing an arrest warrant, and before releasing an accused from detention at his own initiative or at the request of the accused. For his part, the prosecutor also has power to request the release of the accused from detention and if the investigating judge does not heed his request he can appeal for such release to the Investigation Chamber. The prosecutor can request the investigating judge to place a person under judicial supervision and can request him to drop or change this measure, and can appeal for such a measure to the Investigation Chamber.

When his investigation is terminated, the investigating judge sends the case file to the prosecutor for examination. If the prosecutor deems that a new investigation is necessary, he requests it. If he agrees to terminate the investigation, he requests that the accused person be called to appear in court for trial or to issue a non-suit order.

In practice, in all courts there are generally more investigating judges than prosecutors, so they have more time to conduct their investigations and get to know the case files better than prosecutors. However, since they are also trial judges, their time is limited. Furthermore, like prosecutors they are short of resources, especially transport, with which to conduct investigations at the scene of crimes. They interrogate the accused and hear witnesses in their offices. They mostly rely on police reports including witness statements to the police.

Prosecutors are not in practice also involved in investigations of investigating judges, but conflicts frequently occur between prosecutors and investigating judges over the release of accused persons from detention and non-suit orders. Self-interests and corruption aggravate these conflicts. It is very common that in

cases with political elements prosecutors are opposed to the release of the accused or to non-suit orders issued by investigating judges. The accused bear the consequences, as detention continues while those conflicts are adjudicated in the Court of Appeal and the Supreme Court, as is currently the practice (not in the Investigation Chamber as yet).

> "The defence counsel is very much inferior to the trial judge and the prosecutor, and even to the court clerk"

Public Prosecution Service & trial

There is no trial by jury in Cambodia. Under the inquisitorial system, trials that last a full day are rare, and rarer still are the ones that last several days. The trial judge is not a neutral arbiter who is guiding the hearing and asking questions only for clarification. Under the SOC Law and CCP he is the central court actor, asking questions directly to the defendant and witnesses with a view to determining guilt or innocence (SOC Law art. 132, CCP art. 325). Yet in practice his questions are based on examination of the case file with all the evidence that the investigating judge has gathered, and they typically overlook the presumption of innocence and lead towards a finding of guilt rather than innocence.

When the trial judge opens the hearing he informs the accused person of the charges and begins questioning. He asks questions that are supposedly conducive to ascertaining the truth. Then the prosecutor and defence lawyers are allowed to question the accused. The trial judge listens to the statements of civil parties, defendants, victims, witnesses and expert witnesses according to the order in which he believes that they are useful. He can listen to the statements of police officers or the police agents who conducted investigations.

The prosecutor and lawyers can ask questions to all those participants in a hearing, but in reality it is the trial judge, rather than the prosecutor, who cross-examines witnesses. There is, however, no uniformity of practice in the courts. Some trial judges request the prosecutor to lay the charges against the accused, give him more say and allow more equality between the prosecutor and defence counsel. Others are more forceful and allow less power to the prosecutor and less say to the defence.

The defence counsel is very much inferior to the trial judge and the prosecutor, and even to the court clerk, who is there to read police reports and statements to the police and record the proceedings at the same time. In general, the defence counsel, like the trial judge, examines the case file and bases his submissions upon it. He conducts little additional investigation. Furthermore, court-assigned lawyers have no time with which to prepare for cases and are little more than a formality to meet the requirements of the law. Sometimes they are assigned no more than half an hour before a trial begins. In court defence counsel is invariably reluctant to challenge or object to the trial judge for fear of jeopardizing his client's interests by making the judge unhappy.

> "Hearings are mostly formalities to verify and confirm guilt"

If a defendant is found guilty, the judgment includes both the conviction and the sentence in the verdict. It is rare for a trial judge to take days to announce a judgment. Most are brief and contain hardly any reasoning. A full version of a judgment is drafted days later and signed by the clerk and the trial judge. The defence counsel has no part in its drafting. If there is an appeal against the judgment it is this that goes to the court of appeal.

That judges announce their judgments within a short a time after the conclusion of a hearing is proof that they prepare their judgments beforehand, and that hearings are mostly formalities to verify and confirm guilt. The outcome of the trial cannot be expected to differ much from what has already been decided by the investigating judge and agreed upon by the prosecutor before that case is sent for trial. It cannot be expected either that the prosecutor will easily change his mind or drop the charge when he has agreed with the investigating judge that there is a case. Furthermore, the frame of mind of the trial judge will have already been influenced or shaped by examination of the case file. The entire criminal process seems to be loaded against the accused all the way.

The prosecutor has responsibility to execute the court judgment or appeal within a prescribed period of time. It should be added that under a 1997 order from the ministry of justice he is also responsible for the execution of judgments in civil cases and has power to mobilize the police force to assist. However, in practice many a time he entrusts this task to one of his clerks. This poses a problem when the execution meets with resistance. For instance, in 2005 a court clerk was entrusted with a judgment to evict hundreds of families from their dwellings, and utilised nearly 200 armed police officers for this purpose, whereupon five villagers were shot dead and many more were wounded. This should have raised questions about the prosecutor's or his clerk's ability to command such a force, and of the responsibility of both when such violence and fatalities occur. There are no specific guidelines for the execution of court judgments, especially when a force of such size is needed.

Judicial police & the validity of their reports

Police reports continue to carry great weight in court, although judges base trials on case files which investigating judges have constituted and which they have examined prior to trial. Both the SOC Law and CCP recognize the validity of police reports in court. These two laws in essence say that, in principle, police reports serve only as information that judges are not obligated to believe, but they must be considered valid until evidence to the contrary is presented (SOC Law arts. 41-43). In practice, such reports together with statements of the suspect or accused and witnesses before the police are read in court, and are accepted as corroborating evidence when witnesses do not appear or have not been made to appear in court for cross-examination as required by law.

The credibility accorded to police reports has affected the rights of suspects and the accused when there are no adequate measures against police abuses. The SOC Law is basically silent on these rights. The UNTAC Law is subject to the interpretation and whims of individual police officers as it says that "no one may be detained…more than 48 hours without access to a defence counsel, an attorney, or another [authorized] person" (UNTAC Law art. 10). A leading lawyer said that this provision was a Catch 22: to be able to counsel and defend a client, a lawyer must have a signed request for his service from that client, a request which is impossible to have when the lawyer cannot have access to that client if they are in police custody in the first place.

"The credibility accorded to police reports has affected the rights of suspects and the accused when there are no adequate measures against police abuses"

The CCP is no better at guaranteeing and protecting the rights of suspects in police custody within the first hours of arrest. It says that "where the period of twenty four hours from the starting date of the police custody has elapsed, the detainee may meet with a lawyer or other person who is selected by the detainee, provided that the selected person is not involved in the same offense" (CCP art. 98). After that period the person can have custodial legal advice, but just for 30 minutes. Nor does the CCP guarantee the suspect's access to a medical examination while in police custody; he is at the mercy of the prosecutor or the custodial police officer (CCP art. 99). The suspect has no right to inform his family when in police custody. Furthermore, neither the SOC Law nor CCP makes it mandatory for prosecutors, investigating judges or trial judges to examine the physical and mental state of suspects or accused when they are brought before them to check whether they might have been subject to torture or other ill treatment while in police custody.

There are cases of suspects making confessions under duress and also of deaths in police custody. In 2005 a woman was tortured to death while in police custody in Phnom Penh. In 2006 six police officers were convicted and jailed for her murder. More recently, an investigating judge found a police officer responsible for the death of a suspect in police custody and filed a complaint against him. So far, according to that judge, no public action has been taken against the police officer.

It remains to be seen whether under the CCP with better training, better organization, better supervision and guidance, visits to places of detention by the prosecutor general and prosecutors, more explicit sanctions and a police force law in the near future, the rights of suspects and accused will be any better guaranteed and protected.

Independence of the Public Prosecution Service

The constitution makes the PPS an integral part of the judiciary, independent from the other branches of government. It is not a distinct entity or department, but it has its own units located within each courthouse. The prosecutor-generals of the Supreme Court and the Court of Appeal and the prosecutors of courts of first instance all have the same rank as—but are

independent from—the presidents of their respective courts. Prosecutors belong to the body of magistrates (judges), and in their respective careers prosecutors can become trial judges and trial judges can become prosecutors. All magistrates (judges and prosecutors) are nominated by the king on recommendation of the Supreme Council of the Magistracy (SCM), which is responsible for the nomination of all magistrates, their discipline, and the independence of the judiciary. Recently, all magistrates are subjected to the same code of ethics that the SCM has adopted.

"Prosecutors invariably receive orders from senior government officials"

There is a body of opinion among prosecutors that favours independence from the magistracy and has resisted attempts by the ministry of justice to place prosecutors under its administrative hierarchy as in France. The same body of opinion also favours the independence of the SCM. However, in practice, the communist legacy remains very strong and has hindered any move towards achieving judicial independence. Judicial officers either do not deny that they are under political control or admit to it. All the SCM members, except the king and chairman, are members of the ruling CPP, with one, who is president of the Supreme Court, being a member of the CPP steering and central committees. The SCM has no secretariat of its own. The ministry of justice is running one for it, which very much mars its independence. Most of the magistrates, if not all, belong to the CPP. The control and discipline of the party over their activities are almost as strong as in communist days.

Under the SOC Law, prosecutors must report any serious felony or misdemeanor to both the prosecutor general and minister of justice and follow instructions from them (SOC Law art. 55). Under the CCP, the minister has power to denounce a criminal offence that comes to his knowledge to the prosecutor general or prosecutor of a court of first instance and give a written order to prosecute the offenders or to take any other action that the minister judges appropriate; the minister cannot, however, order them to file a case without processing (CCP art. 29).

Prosecutors invariably receive orders from senior government officials, especially the powerful ones, to take criminal action for their benefit, for that of the ruling party or that of the government. The most common orders are notice letters from the Office of the Prime Minister to prosecutors to suspend the execution of final court judgments in favour of losing parties, especially in land disputes. On 14 July 2007, the leading Khmer-language newspaper, *Reaksmei Kampuchea*, was critical of a "hasty" execution of a Supreme Court judgment by the prosecutor to take possession of a house in defiance of a letter requesting the suspension of execution from the justice minister, and without waiting for a notice letter from "the highly respected Prime Minister" and another letter of intervention to the same effect which the king had sent through the Supreme Council of the Magistracy.

The Prime Minister's order to rearrest suspects and the accused in 1999, and his "iron first" policy supposedly to rid the judiciary of corruption in 2004, and the ensuing criminal action against some prosecutors and judges for allegedly taking bribes from suspects and accused, are gross violations of the independence of the judiciary and its members, prosecutors included.

> "In practice judicial inquiry in Cambodia is a cloak which prosecutors, investigating judges and trial judges throw over police investigations"

Conclusion

Criminal justice in Cambodia as framed both by existing laws and the Code of Criminal Procedure is based on judicial inquiry, and prosecutors are assigned a pivotal role and endowed with power to engage themselves in every stage of the criminal process from the preliminary investigation to the execution of court judgments and visits to prisons and detention centres: conducting their own investigation; getting the police to do it for them; issuing arrest, search and seizure warrants; supervising and guiding work of the police in the investigation of crimes; verifying police reports before indicting suspects; bringing flagrante delicto misdemeanor cases to court when there is sufficient evidence to substantiate a crime; commissioning investigating judges to conduct thorough investigations; participating in interrogations of accused persons and witnesses; giving investigating judges instructions if necessary; approving or appealing the decisions of these judges to bring cases to trial or to issue non-suit orders or release accused persons from detention; prosecuting the accused in court and appealing against court judgments; executing court judgments, including in civil cases; mobilising the police force for assistance in their own investigations or execution of court judgments, and visiting prisons and other places of detention.

With a total of 93 prosecutors to cope with some 30,000 complaints a year, low professional skills, meager resources, entrenched power and dominance of the police, and political control prosecutors have a Herculean task to fulfill all these roles. From the minister of justice down to junior deputy prosecutors and judges, hope for any better performance on the part of prosecutors, judges and the police is pinned on training in the Code of Criminal Procedure. This training itself is already a mammoth task, especially for persons whose appointment in communist days was based on party loyalty, not on legal education. To bring the police and ruling elite under the law—and the police under the authority of the Public Prosecution Service—is a tall order and one that has not been taken seriously since 1993.

In practice judicial inquiry in Cambodia is a cloak which prosecutors, investigating judges and trial judges throw over police investigations when using their reports as the evidence of the court. This dependence on police inquiries has enabled and will continue to enable the police to dominate the judicial system, as in the communist days. This dominance will decline

only if the number of prosecutors and investigating judges can be made to increase, their training and experience be improved, and their resources also be expanded.

Perhaps, at the same time, the Public Prosecution Service should be confined to supervising the legality of police investigations and judicial inquiry, and to strict prosecution work. Prosecutors should not get directly involved in pre-trial investigation and judicial inquiry. Let the judicial police and investigating judges take care of these two crucial stages of the criminal process. Furthermore, visits to police and other detention places and prisons should be relegated to other agencies, in keeping with the French proverb, "Qui trop embrasse mal étreint", or "He who grasps at too much loses everything".

article 2 goes quarterly

article 2 is now into its eighth year. Initially, it was envisaged as a bimonthly publication complementing *Human Rights SOLIDARITY*, and about the same size: around 32 pages per edition.

However, it quickly evolved into something much bigger, and has over time become the host of many sizeable and groundbreaking reports on significant human rights and rule of law issues in Asia, including most recently, 'Burma, political psychosis & legal dementia' (vol. 6, no. 5-6, October-December 2007). A number of these special editions and reports have exceeded a hundred pages in length.

For this reason, the Asian Legal Resource Centre has decided to publish *article 2* quarterly. Each edition will continue to take the same concentrated and original approach to a key human rights issue or country in Asia as has come to characterise the publication. But by reverting to four editions per year we envisage being able to release even larger and more in-depth studies.

The first edition of *article 2* as a quarterly is a focus on the prosecution system—an integral but often overlooked element in the protecting of human rights—in five countries around Asia: Cambodia, the Philippines, Sri Lanka, Bangladesh and Nepal.

Comments and submissions from readers are, as always, welcomed.

Prosecution in the Philippines

Danilo Reyes, Programme Assistant,
Asian Human Rights Commission, Hong Kong

The public prosecutor in the Philippines is actively involved in the investigation of crimes and can commence an investigation upon receiving a report from a law-enforcement agency or a private party.

Coordination between the prosecutors and the police in principle ensures that the evidence collected stands up to judicial scrutiny even at the early stages of a case. Courts rely heavily on the evidence submitted by the prosecution panel, which comprises the work of both the police and prosecutor. The panel is also obliged to ensure that witnesses appear in court as required, evidence is stored correctly, and that there are no undue delays from the side of the prosecution that may upset the hearing schedule.

Although the prosecutor has direct control in prosecuting all criminal actions, private prosecutors are also allowed once they get approval from the Chief State Prosecutor (CSP) or a Regional State Prosecutor (RSP) (Revised Rules of Criminal Procedure, rule 110, section 5). Once given permission, a private law practitioner can act either as lead prosecutor or assistant prosecutor. This authority will last until the trial is completed, unless it is revoked.

Probable cause

Paramount to the prosecutor's role is to establish at the initial stages that a "probable cause" exists that a crime has been committed. This requires close coordination with investigating agencies—the Philippine National Police (PNP), the National Bureau of Investigation, and quasi-judicial bodies empowered to conduct investigation.

Where a prosecutor finds probable cause, the respondent must be informed of the case. This is done by way of a subpoena or formal notice giving the respondent an opportunity to reply to the allegation within ten working days from the time of receipt of the notice, unless an extension is sought. In practice, respondents often are not notified that a case is pending against them. They may not receive the notice or subpoena, particularly if living in a remote area.

Failure to submit a reply means that the respondent has waived his right and the prosecutor may resolve the complaint based on the documents and evidence they have on hand. The prosecutor resolves the complaint by writing a resolution which contains findings on whether or not a criminal offense has been committed and on which, if any, charges should be filed in court.

"In cases involving public officers, police and the military, prosecutors are required to forward the resolution to the Ombudsman for Military and Other Law Enforcement Offices"

The prosecutor may decide whether or not to call both parties to appear for preliminary investigation, or summary hearing. The purpose of a summary hearing is to stipulate the facts and confirm the accuracy of the information before going to trial: for instance, the name and identity of the accused, in order to prevent wrongful prosecution. It does not consider the merit of the complaint or the substance of the allegations.

In writing the resolution, the prosecutor decides either to dismiss or endorse the filing of formal charges for trial. If dismissing the complaint, the resolution should contain an argument finding "no probable cause". If the filing of formal charges is recommended, the resolution must convince a supervising prosecutor that there is a "probable cause" and that there are grounds for a well-founded belief that the crime has been committed. Only then are charges filed in court.

Appeal against prosecutor's findings

Even though the prosecutor has filed charges in court, a petition for review of the prosecutor's findings can still be made. All petitions for review of resolutions must be filed with the RSP concerned, who shall resolve them with finality in certain cases (Department of Justice [DoJ] Circulars 70 & 70-A, 2000). The appeals should be made within 15 days from receipt of the resolution. Only one motion for reconsideration is allowed. Once the resolution is deemed final, charges are then filed in court. As there are no policies or guidelines to limit the period within which a review of a resolution on appeal should be completed, this inevitably leads to delays in the filing of charges in court.

In cases involving public officers, police and the military, prosecutors are required to forward the resolution to the Office of the Ombudsman for Military and Other Law Enforcement Offices. The ombudsman has the power to either endorse or to reverse the prosecutor's resolution (Joint Circular with DoJ Circular 1, 1995). If the ombudsman decides to endorse the filing of charges, the ombudsman also has responsibility to appoint or deputise a prosecutor to take charge of the case; however, in practice public prosecutors are automatically treated as deputised.

There are no specialised prosecutors working for the ombudsman on cases involving officials. This creates problems, because sometimes a prosecutor who has resolved that a complaint against the military be dismissed is later deputised to prosecute the case. That the same prosecutor is called to resolve a case and then prosecute it contrary to the resolution is a consequence of the shortage of prosecutors.

Inquest proceedings

Prosecutors have a heavy burden to oversee police investigations in cases involving inquest proceedings (DoJ Circular 16 on New Rules on Inquest). Each police station or headquarters should in principle also have designated inquest prosecutors to process inquest procedures with a schedule of assignments for their regular inquest duties.

"Prosecutors have a heavy burden to oversee police investigations in cases involving inquest proceedings"

Inquests proceedings follow in cases where persons are arrested without the benefit of an arrest order or warrant, or are caught in the act of committing a criminal offence. The purpose of the inquest proceedings in these cases is that while the state acknowledges the law enforcers' authority to arrest and detain persons without a warrant, the state must also ensure that these persons are not unlawfully detained, and that they are not denied due process. The inquest establishes whether the evidence is sufficient enough to seek court approval to keep the person in detention.

The inquest requires the prosecutors to resolve the complaint the police filed in a prescribed period, which varies depending on the gravity of the offense. Cases punishable with light penalties must be resolved in 12 hours; those punishable with correctional penalties within 18 hours; and those punishable by afflictive or capital penalties, within 36 hours. If the inquest prosecutor fails to complete the proceedings in the prescribed period then the person must be released.

However, inquest prosecutors and police routinely fail to comply with these time requirements and unlawful detention beyond the periods stipulated is common, particularly in cases attracting lesser penalties. The misunderstanding that has grown among the police is that they can detain anyone without a warrant for 36 hours, regardless of the nature of offence. Some police ignore the time periods altogether, arguing that once a person is subjected to inquest they should not be allowed to leave custody until it is completed, no matter how long it takes.

National Prosecution Service

Presidential Decree (PD) 1275 of 1978 established the National Prosecution Service under direct supervision of the secretary of the DoJ. It is empowered to investigate and prosecute all crimes described by the Revised Penal Code (RPC), investigate administrative cases against its own officers, prepare legal opinions or queries about violations of the RPC and other laws, and to review appeals to resolutions of cases by prosecutors.

The CSP is the head of the NPS. Five Assistant Chief State Prosecutors (ACSPs) have oversight over divisions of the NPS, namely: Inquest and Special Concerns; Preliminary Investigation and Prosecution; Review and Appeals; Administrative, Personnel Development, and Support Services; and Disciplinary, Field Operations, and Special Concerns.

"Inquest proceedings are carried out by inquest prosecutors on cases involving persons arrested without the benefit of an arrest order"

The Inquest and Special Concerns Division conduct inquests and examine criminal complaints filed directly with the prosecutor's office. As mentioned earlier, inquest proceedings are carried out by inquest prosecutors on cases involving persons arrested without the benefit of an arrest order (as prescribed by the DoJ Circular 16). This division too is responsible for appearing in meetings called by the law enforcement agencies, and related activities.

The Preliminary Investigation and Prosecution Division is responsible for the conduct of investigation and prosecution of cases once they are filed with the Office of the Chief State Prosecutor (OCSP), or those cases filed under inquest proceedings. It has oversight over the proper conduct of preliminary investigation and the prosecution of cases in courts.

The Review and Appeals Division evaluates and reviews appeals made or petitions filed for review on final resolutions of prosecutors, as described above.

The Administrative, Personnel Development and Support Services Division handles career improvement and continuing legal education for the NPS. However, the prosecutors' development training is for the time being integrated into other private entities or training programmes offered by the judiciary. The NPS does not have its own development program for prosecutors. For the most part, continuing legal education is lumped together with the Mandatory Continuing Legal Education programme of the Integrated Bar of the Philippines and the University of the Philippines Law Center. This programme requires all lawyers, not only prosecutors, to undergo continuing legal education to enable them to keep abreast of recent law and practice. Other programmes include those of the National Prosecutor's League of the Philippines, but are privately organized and funded, and voluntary.

The Disciplinary, Field Operations and Special Concerns Division has as its mandate the conducting of investigations and preparing of resolutions on administrative charges against prosecution and support staff. It coordinates and monitors the activities of the prosecution staff in different levels all over the country and is also involved in legal research and providing opinions on proposed legislation by the DoJ.

The OCSP has a total of 119 State Prosecutors, while 14 Regional State Prosecutors, 96 City Prosecutors, 79 Provincial Prosecutors and 1,801 Assistant Provincial Prosecutors all over the country are also under its supervision. The number of prosecutors though varies in each province or city depending on its size. Previously, PD 1275 allowed for the regionalising of prosecution functions. The RSP once exercised direct supervision and control over prosecution staff within the same region—for instance, transfer of assignment and dismissal—but later these responsibilities were recalled. The operation and functioning of the NSP is now mostly centralised.

Salary and budget problems

The national government pays the prosecution and support staff from the DoJ's annual appropriation. Only clerks, stenographers and other subordinate employees in the offices of provincial and city prosecutor's offices are paid from the budget of the province or city where they are assigned. The salary scale is governed by the Salary Standardization Law (Republic Act [RA] 6758), which is the law determining the salary of every government employee and public official. Currently, the lowest-ranked prosecutor (Prosecutor I) receives 22,521 Pesos (USD 550) monthly; middle-ranks, (Prosecutor II & II), 23,422 and 24,359 Pesos, and for top ranks (Prosecutor IV), from 25,333 to 28,875 Pesos.

> "Low wages and a heavy workload mean that there are always vacant positions for prosecutors"

These salaries are low compared to lawyers working in private practice and in firms. However, proposals to increase salaries to encourage more applicants and to dissuade prosecutors from going into private practice have met with obstacles because of the Salary Standardization Law, under which it is necessary to increase the salaries of government employees across the board or be subjected to complaints of discrimination in favour of one category of public servants as against the others.

To address this problem some Local Government Units are allocating funds to give additional allowances for prosecutors assigned in their localities. For instance, the city of Mandaluyong in Metro Manila gives 10,000 Pesos more to prosecutors regardless of rank. The city of Manila allocates an additional 25 per cent of the basic salary for all prosecutors regardless of rank. Others allocate lesser amounts while in some places prosecutors are not receiving anything extra at all.

There are concerns that the additional payments offered in certain localities undermine the credibility and independence of prosecutors, particularly in cases where local executives have personal or political interests and treat prosecutors as their legal consultants rather than independent state officers. Also, the payments create inequality among prosecution staff of the sort that the Salary Standardization Law was aimed at preventing.

Low wages and a heavy workload mean that there are always vacant positions for prosecutors. Many apply to become judges—who have higher salaries and benefits—and some go into private practice.

In 2002, the average caseload of each of the 1,769 prosecutors was 851.86 cases. This figure includes preliminary investigations, cases for trial, and those for legal opinion and other assistance to be rendered. According to the United Nations Development Programme, the NPS at that time processed an average of 450,000 preliminary complaints a year and has about 850,000 criminal cases in various courts (Strengthening the other Pillars of Justice through reforms in the Department of Justice, Diagnostic Report June 2003).

"Delays in prosecution discourage victims from filing complaints"

The overloading of cases is aggravated by the lack of sufficient resources for prosecutors to perform their duties effectively. Because the budget is under the direct supervision of the DoJ, to request increases is difficult. Also, the prosecutor's office is usually in the local Hall of Justice, where courts are also located. The office and its equipment has since 2000 been the property of the Supreme Court, which since then has administered court buildings. This may explain why from 1999 and 2001 there were no budget appropriations for capital outlay, including for the maintaining of information technology and office equipment like fax machines and photocopiers. Some prosecutors use their own personal computers or other equipment for their work.

At least 90 per cent of the budget allocated for the NPS is intended for personnel. Even though the DoJ appropriates additional funding for the functioning of the NPS, still the budget available with which to carry its duties is extremely low. In 2001, each prosecutor obtained an average budget for maintenance, operating, and other expenses of only 14,641 Pesos, or 1,220 Pesos per month.

Prosecution failings

Although filing a complaint with the prosecutors' office is not very difficult, the chances that it will be dealt with promptly and lead to a conviction are low; thus, most victims of human rights abuses in the Philippines do not bother to file complaints at all. Delays in prosecution discourage victims from filing complaints but are not widely discussed. Lack of effective independence, heavy reliance on the police, insufficient resources, acts of omission by personnel and a general lack of accountability all undermine confidence in the work of prosecutors.

Lack of effective independence

As the NPS is directly under the secretary of the DoJ, who is a presidential appointee, there are concerns that prosecutors could be used to target government critics. The power of the secretary extends to each single criminal case being handled. The secretary may decide whether a case is filed in court or not or to reject appeals on the case in question. The secretary can remove prosecutors from individual cases and order them not to appear at a trial.

The DoJ also issues rules and memorandums on how cases are to be prosecuted. For instance, on 20 August 2002 it issued a memorandum to hasten the prosecuting of cases by authorising "PNP station commanders or their representatives, especially those assigned in far-flung provinces, to prosecute criminal cases" themselves with authorisation from the prosecutor's office (Circular 40, 2002). At time of writing there are no known cases of police directly prosecuting cases in the courts, but in a press release the National Police Commission announced that it is completing a handbook with guidelines on this.

Department of Justice, Manila

20 August 2002

MEMORANDUM CIRCULAR NO. 40

TO: ALL REGIONAL STATE PROSECUTORS, PROVINCIAL AND CITY PROSECUTORS AND THEIR ASSISTANTS.

SUBJECT: AUTHORITY OF PNP STATION COMMANDERS TO PROSECUTE CRIMINAL CASES.

In the interest of the service and in line with the government's commitment to further speed up the administration of justice, you are hereby directed to authorize PNP Station Commanders or their representatives, especially those assigned in far-flung provinces, to prosecute criminal cases, pursuant to the Revised Rules of Criminal Procedure, as amended, December 1, 2000, which reads:

"Sec. 5 Who must prosecute criminal actions.- All criminal actions commenced by a complaint or information shall be prosecuted under the direction and control of the prosecutor. However, in Municipal Trial Courts or Municipal Circuit Trial Courts when the prosecutor assigned thereto or to the case is not available, the offended party, any peace officer, or public officer charged with the enforcement of the law violated may prosecute the case. This authority shall cease upon elevation of the case. This authority shall cease upon actual intervention of the case to the Regional Trial Court. xx (Rule 110)."

In connection therewith, the authority of a PNP Station Commander to prosecute a criminal action is subject to the following conditions, viz:

1. The public prosecutor has a heavy work schedule, or there is no public prosecutor assigned in the province or city;

2. The PNP Station Commander is authorized by the Regional State Prosecutor (RSP), Provincial or City Prosecutor;

3. The authority must be in writing;

4. The authority of the PNP Station Commander must be approved by the court;

5. The PNP Station Commander shall continue to prosecute the case until the end of the trial unless the authority is withdrawn or otherwise revoked by the RSP, Provincial or City Prosecutor; and

6. In case of the withdrawn or revocation of the authority of the PNP Station Commander, the same must be approved by the court.

Strict compliance is hereby enjoined.

SGD

HERNANDO B. PEREZ
Secretary

"Addressing the shortage of prosecutors by giving the police authority to prosecute cases is bound to create more serious consequences than the lack of resources itself"

The police record of filing fabricated charges based on false evidence or forced testimonies should have caused alarm in the justice department, prosecution service and government. Yet the DoJ is moving in the direction of granting police even more leeway for such abuses by giving them the legal authority to prosecute in lieu of the NPS.

One reason that the memorandum may have been circulated is that police officers have in practice long appeared in court on behalf of the prosecution. Legal professionals reveal that as far back as the 1970s and 80s police were appearing for the prosecution in criminal cases in remote provinces and municipalities where prosecutors were unavailable, which is allowed under the Rules of Criminal Procedure. The mentality that police can serve as prosecutors is widespread among the legal community, which explains not only why the practice has gone on but also why the memorandum was brought into effect.

Addressing the shortage of prosecutors brought on by the heavy workload and low salaries by giving the police authority to prosecute cases is bound to create more serious consequences than the lack of resources itself.

Failure to do onsite investigations and perform other basic functions

Prosecutors are supposed to supervise onsite police investigations into suspicious deaths (DoJ Circular 16, section 16); ensure that postmortem examinations are performed, and that the chain of custody of material evidence is properly documented. But in reality inquest prosecutors do not usually take part in onsite investigations, except in high-profile cases. Instead they depend on the results of police investigations, particularly those of the Scene of the Crime Operatives, the police unit charged with forensic investigation and gathering of evidence. They also do not usually try to verify whether or not the information and evidence of police investigators is accurate or obtained lawfully, and even if they require the police to produce further evidence, it is still the same police unit who filed the original report that will investigate further.

The case of land reform activist Enrico Cabanit is illustrative. Cabanit was shot dead in April 2004 in Panabo City, Mindanao. No prosecutor came to supervise the police investigation or take charge of the evidence. It was later learned that the camera used by the police to take photographs of the crime scene was not functioning. The lethal bullet produced by the police investigator also did not match the findings of the forensic experts who conducted a follow-up investigation. The police proceeded to close the investigation by maintaining that one of the suspected murderers was thereafter also killed in a separate incident.

The prosecutor's failure to document the chain of custody over evidence means that nobody is held to account when items are destroyed or stolen. Break-ins at police stations and thefts of

evidence are commonplace yet officers are not held accountable because the responsible persons are not identified for want of proper records.

No further inquiries

Prosecutors do not typically investigate further when there are challenges to a resolution of "probable cause", largely because they depend heavily on the information provided by police investigators, particularly in cases not falling under the inquest procedure. So if there are questions of credibility and accuracy of the information and evidence submitted, they are not in a position to undertake further investigations and make strong assertions about the reliability of evidence. Some prosecutors then merely resolve to recommend the case for filing and let the judge decide.

"Prosecutors do not typically investigate further when there are challenges to a resolution of probable cause, largely because they depend heavily on the information provided by police investigators"

Although the Rules on Criminal Procedure require that prosecutors oblige police investigators to submit further evidence or information where necessary, in practice they do not usually do so. They either accept or reject the report, regardless of the fact that they have the authority to demand additional material. Thereafter, cases get stuck in court because police are unable to produce documents needed for the case and are finally dismissed for lack of sufficient evidence.

For instance, Haron Buisan was arrested due to mistaken identity in December 2005 in General Santos City, Mindanao. His family and fellow villagers provided documentary evidence to show that he was not the man wanted for a robbery as his name and identity differed from the person the police were seeking. Nevertheless, the prosecutor held him for trial by depending on the police report without any further inquiries. The victim was charged and is in jail awaiting trial.

Getting away with delays

Prosecutors are required to resolve complaints within ten days after receiving the affidavits of both the complainants and respondents (Rules of Court, rule 112, section 3[c]), but in reality it may take months or even years to do so. The lack of prosecutors and overloading of cases means that prosecutors escape sanction from the courts.

Once the prosecutor issues his resolution and the filing of charges in court is endorsed, an arraignment is scheduled for the accused to enter a plea. Under the Speedy Trial Act, from filing of complaint to arraignment 30 days are permitted, from the entry of a plea to the date of trial, another 30 days, the trial itself another 180 days, and a decision handed down by the court within 90 days after that. All in all, a case should be completed within 11 months. However, many cases drag on for years. Some arraignments alone take years to complete, during which time the accused are detained. Judges also postpone and reset the hearing dates of trials as a result of the nonappearance of witnesses, defense lawyers or prosecutors.

> "A prosecutor handling the complaints of five torture victims, the "Abadilla Five", took five years and even then was unable to resolve them"

Endemic delays and a lack of accountability for them have enormous consequences for the accused. For instance, after Pegie Boquecosa was arrested in Maasim, Sarangani in September 2002, the prosecutor handling his case failed to resolve the complaint of murder that the police filed for nearly three years. The prosecutor's inability to resolve the case didn't stop him from filing repeated requests before the court for continued detention of the suspect.

In another case, it took a prosecutor handling the complaints of five torture victims, known as the "Abadilla Five", five years to do her work and even then she was unable to resolve them. The complaint, which was filed by the Commission on Human Rights in June 1997, dragged on for years because the prosecutor lost court documents that she took home, in violation of procedure. However, the loss of documents alone cannot explain the delay, as it took place long after the case had been pending with her. The prosecutor faced an administrative charge of negligence and was removed from the case. But the administrative complaint against her before the OCSP has not progressed and she has reportedly continued to carry on her duties. Meanwhile, after the OCSP took over the case, it resolved to dismiss it. Over ten years on, the complaint is now the object of appeals by one of the victim's legal counsel.

There are also double standards in the implementation of the courts' rule allowing respondents ten days to submit affidavits before a prosecutor resolves a complaint. While police investigators may request prosecutors to grant them an extension should they require more time to gather evidence, or should they be ordered by the prosecutors to do so, in some cases prosecutors files charges in court and the court subsequently issues arrest orders without respondents having been properly informed or even knowing that they have been charged in court, thereby denying them the opportunity to make a reply to the charges against them.

For example, a court issued arrest orders for theft and trespassing against hundreds of farmers in Bondoc Peninsula, Luzon on the prosecutor's recommendation following a complaint from an influential landowner whose landholdings were the subject of a dispute with the farmers. The poor farmers were not aware that complaints had been filed against them before the prosecutor's office. The prosecutor nevertheless resolved the complaint based solely on the landowner's complaint.

Jurisdictional problems

Under the Comprehensive Agrarian Reform Law of 1988 (RA 6657), the Department of Agrarian Reform (DAR) has "exclusive original jurisdiction over all matters involving the implementation of agrarian reform" (section 50). But despite this law, the prosecutor routinely takes cases involving land reform disputes. For instance, the above case against the farmers in Bondoc Peninsula should have been under jurisdiction of the

DAR; however, the prosecutor nevertheless resolved the complaint and the judge also issued arrest orders based on the prosecutor's findings. The case has been challenged on lack of jurisdiction and the appeals process is continuing.

> "Disputes arise over the authority of prosecutors to handle cases involving labour disputes, which are under the authority of the Department of Labour and Employment"

Similarly, a landlord filed a complaint of forcible entry against 21 farmers and their families in Balasan, Iloilo with the prosecutor's office. The farmers were living on the land and tilling it as they had claimed ownership under the land reform law. Once again, the matter should have been under the exclusive authority of the DAR but instead the prosecutor accepted and resolved the complaint by recommending the filing of charges against the 21 farmers in court. The landlord was emboldened after charges were laid and brought in armed men to forcibly drive the farmers off the land. Once again, a lengthy appeals process is challenging the authority of the prosecutor and local court over the case.

Likewise, disputes again arise over the authority of prosecutors to handle cases involving labour disputes, which are under the authority of the Department of Labour and Employment to accept, arbitrate and hear.

For instance, when eight workers were arrested and detained at the police station in Rosario, Cavite in September 2006, the prosecutor accepted two complaints filed by the police for possession of subversive documents and trespassing. The prosecutor subjected the workers to inquest proceedings, although the documents in question were reading materials on labour rights and the supervisor had permitted the workers to occupy a space at the factory. The prosecutor dismissed the complaint of possessing subversive documents for lack of evidence but recommended the filing of charges for trespassing, without regard to a regulation requiring prosecutors to obtain "clearance from the Ministry of Labor [now the Department of Labour and Employment] and/or the office of the President before taking cognizance of complaints for preliminary investigation and the filing in court of the corresponding information of cases arising out of or related to a labor dispute" (Ministry Circular 15 , 7 June 1982). Although the workers had claims pending for unpaid wages and benefits in an insolvency hearing in court, the prosecutor nevertheless resolved the complaint of trespassing filed by the police without investigating further whether the complaint was related to the ongoing labour dispute and court proceedings. The prosecutor also denied a petition filed by the victims' legal counsel arguing lack of jurisdiction. The case was eventually dismissed.

One reason that prosecutors take on such cases is due to vague provisions of law regarding jurisdiction where there is an element of crime in disputes that come under the authority of quasi-judicial government departments. Prosecutors may prefer to just file complaints and leave it to the court to decide rather than have to do so themselves, thus needlessly increasing the number of cases in the courts. This is particularly true where the complainants are wealthy and powerful landholders or employers

who are fighting off peasant groups and labour unions. By contrast, prosecutors may handle similar types of complaints from workers or farmers with a different set of standards. For instance, when one of the eight workers in Rosario, Cavite filed a complaint of grave threat against one of those who arrested and charged them for trespassing, the prosecutor refused to accept it, saying that he could not tolerate a complaint motivated by "revenge" against the arresting officers. Thus it was possible for the police to file charges despite the prosecutor's questionable jurisdiction, but the complaint of a victim seeking a legal remedy for the alleged threats of security officers was dismissed out of hand. Under the rules of criminal procedure, complaints can only be dismissed—either for lack of jurisdiction or lack of grounds to continue with the investigation—within ten days after being filed with the prosecutor's office (rule 112, section 3). Notwithstanding, this prosecutor arbitrarily denied the workers their right to file a complaint by dismissing it even before looking into the merit of their complaint and without the possibility of review.

"One reason that prosecutors appear in court unprepared without fear of consequences is that the Speedy Trial Act exempts the absence of the accused or essential witnesses in computing delays"

Ill-prepared for trial

Prosecutors often appear in court without adequate preparation of themselves and others. It is the prosecutors' responsibility to ensure that matters concerning the trial are well organised in order to proceed on schedule. Where they fail to do this, the presiding judge must postpone hearings, yet they do not face sanctions for the lack of preparation.

One reason that prosecutors appear in court unprepared without fear of consequences is that the Speedy Trial Act exempts the "absence or unavailability of the accused or any essential witnesses" in computing delays in the trial of cases (section 10[b]). Therefore, prosecutors can deliberately delay a trial by not presenting witnesses, or be unconcerned by their failure to do so for whatever reason.

Take the case of three men facing charges of alleged possession of explosives and firearms in General Santos City during April 2002. When they were arrested, the police allegedly planted evidence and tortured them to admit to the offences. The trial has dragged on for years due to the prosecutors' failure to ensure that witnesses or police investigators appeared on trial, including after the police investigator handling the case was transferred to another post. The continuing delays have been aggravated by the frequent replacement of prosecutors handling the case. For instance, on 1 August 2007 the case was postponed because the prosecutor appearing in court was new and his predecessor had been promoted to the position of judge in the same court, whereupon he excused himself from hearing the case because he was the former prosecutor. On the last scheduled hearing, the newly appointed prosecutor once again asked from the presiding judge to defer the trial since he has to review all the documents.

Acting as mediator

Prosecutors are not permitted to act as mediators in criminal cases, but in practice they do so, particularly in cases involving bad debts, in order to reduce court dockets and decongest the courts of creditors seeking to use them as de facto collection agencies. Thus prosecutors have become intermediaries in such cases. In fact, there have been recommendations and suggestions to explore mediation as means of reducing court dockets. This is a dangerous trend that could eventually affect cases involving human rights violations, but so far the government seems keen on the idea of mediation as alternative means to resolve criminal cases.

"Prosecutors are not permitted to act as mediators in criminal cases, but in practice they do"

Ultimately the government's obligation is to ensure that the prosecution service has the money, people and means to function effectively, to ensure that it performs the specific duties with which it is mandate, rather than those that are outside of its responsibility and rather than cutting corners for want of resources or for other reasons.

Conclusion

Prosecutors play a major role in seeing that victims of human rights abuses have access to remedies, particularly under Philippine law. Where they do not perform their role properly, they become a major obstacle, rather than aid, to redress. Where the government recognises problems in the prosecution system but fails to make the necessary reforms, it too is in breach of its obligations and is a threat to human rights. To date, despite many recommendations from legal professionals and legislators for reform of the NPS, the government has been negligent in not giving them sufficient attention.

In the Philippines today, security forces accused of perpetrating gross abuses, including extrajudicial killings, forced disappearances and torture, are rarely prosecuted and enjoy impunity in large part to the prosecutor's failures and concomitant loss of faith among victims of abuses in the justice system. Some of the things that the government needs to do to rectify this situation are as follows.

a. The NPS must be allowed to exercise its power independent from the DoJ, funded and staffed sufficiently from outside the department.

b. A comprehensive and public study should be conducted into the extent to which the existing policies and guidelines for prosecutors are actually complied with, especially concerning the requirements that they be involved in police investigations, with a view to making further proposals for change.

c. There should be periodic publicly reported evaluations of the work done by the prosecution service to allow for more concerned persons to get involved in discussions about reforms.

d. A special evaluation should be undertaken into the efficiency of the internal complaint mechanism of the service so as to better identify and weed out incompetent prosecutors.

e. The order allowing police officers to prosecute cases with authority from the prosecution service should be revoked and instead adequate pay and other remunerations be paid to prosecutors to ensure that the service has the staff that it needs to do its job as mandated.

f. The rightful jurisdiction of prosecutors in handling certain types of cases, particularly those involving labour and land disputes, should be clarified and adequate guidelines given so that prosecutors are unable to usurp the jurisdiction of other quasi-judicial bodies in hearing cases.

The Kafkan metamorphosis of Sri Lanka's Attorney General

Basil Fernando, Executive Director,
Asian Human Rights Commission & Asian Legal
Resource Centre, Hong Kong

The Attorney General (AG) of Sri Lanka, C R de Silva, on 18 June 2007 issued a letter to the Chairman of the International Independent Group of Eminent Persons (IIGEP) retaliating to two public statements (see appendices 1 & 2) made by the IIGEP on some serious shortcomings in the manner in which the Presidential Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights is being conducted.

The AG claimed that his letter (see appendix 2) was written "in view of the serious harm and prejudice caused by your Public Statements to the Commission of Inquiry and to the Attorney General's Department".

The criticisms to which the AG had objected were that the Presidential Commission has suffered needless delays, that the AG's department has a conflict of interests in its participation in the Presidential Commission's proceedings, that the presentation of facts by counsel from the AG's department on some earlier dates at the Presidential Commission have not been impartial, and that it is not correct to portray the Presidential Commission as being capable of dealing with the human rights violations in the country. The IIGEP had thus recommended that the commission speed up its work, be allowed to use independent lawyers, and not be used to claim that there is more robust monitoring of human rights abuses in Sri Lanka, either through local measures or through the presence of international human rights monitors.

This is a revised version of a statement issued by the Asian Human Rights Commission (AHRC) in 2007, AS-143-2007 (27 June 2007), in response to a letter from the Attorney General of Sri Lanka to the International Independent Group of Eminent Persons who had been invited by the government to observe the work of a presidential commission on recent alleged gross human rights abuses. The group has now withdrawn from Sri Lanka citing the failures of the commission to come up to international standards: see appendices 3 and 4 to this article for its statement and further discussion.

> "The AG's department is both unwilling and incapable of dealing with the gross abuses of human rights taking place in the country"

To anyone familiar with the work of the Presidential Commission and the AG's department, the IIGEP's criticisms were nothing if not understatements. Several local and international human rights groups have for some years described the rule of law in Sri Lanka as utterly collapsed. The Asian Human Rights Commission (AHRC) had for one clearly stated throughout that the purpose of appointing the Presidential Commission was merely to create an impression before the international community that something was being done about alleged grave violations of human rights when in fact the country's criminal investigation system is both unwilling and incapable of dealing with these violations. The AHRC had also categorically stated that the AG's department itself is both unwilling and incapable of dealing with the gross abuses of human rights taking place in the country. What is more, it has over the years repeatedly stated that Sri Lanka is now among the most lawless places in the world and that none among the police, prosecution under the AG's department or the judiciary is willing to do anything about it.

This unwillingness, and the strange reaction of the AG to the IIGEP, is complicated by admissions from the AG's department that things are in a bad way. A former Attorney General, K C Kamalasabeyson, in a lecture delivered in 2003 said:

> Today a victim is reluctant to visit the Police Station. There are complaints that when an offence is reported prompt action is not taken by the police. Investigations at times do not proceed in the correct direction. I am personally aware of an instant where the investigators persuaded the father of the deceased who was murdered to consult a soothsayer to ascertain the description of the murderer.
>
> No amount of law could remedy this situation. The mere passing of laws and opening or maintaining of police stations are not sufficient. The system itself has to be refined and fine tuned at all levels. [Full text of lecture in appendix 5.]

The present AG, while he was solicitor general, headed a committee appointed by the Ministry of Justice, Law Reform and National Integration with the purpose of recommending how to amend the practice and procedure in investigations and courts, with a special focus on curbing crime and eradicating the procedural delays that exist in administering criminal justice in Sri Lanka. This report candidly admits to grave inadequacies in the AG's Department and recognises the extent of delays in the judicial process:

> Inadequacies in the practice and procedure in the administration of criminal justice have been identified as one of the main factors contributing to delays in the dispensation of criminal justice in the country.
>
> The rapid escalation of crime, increasingly committed in an organised manner with violence, impunity and considerable sophistication, thereby resulting in the loss of public confidence in the criminal justice system, has highlighted the need to review the existing criminal justice framework in Sri Lanka.

In light of such observations coming from the AG's own department, his objections to the criticisms from the IIGEP seemed to be politically motivated, rather than legally grounded. Ironically, his letter thus confirmed exactly what the AHRC and other human rights defenders had been insisting upon for some years.

> "Has the role of the AG in Sri Lanka substantially changed from that of a liberal-democratic system to that of a totalitarian one?"

What is the actual role of the AG?

That the AG wrote his letter to the IIGEP "on behalf of the government of Sri Lanka" raises fundamental questions about his role. Has his role as chief legal advisor to the government and head public prosecutor now also metamorphosed into being a political spokesman and press officer? Under totalitarian regimes, public prosecutors have the job of proving that whatever the government has done or omitted to do is right and for the benefit of the people; the task is political rather than legal. The prosecutor under Stalin's rule, the show trials in Maoist China and the present-day courts in Burma are all examples of this function.

So has the role of the AG in Sri Lanka substantially changed from that of a liberal-democratic system of government to that of a totalitarian one? And if so, what are the broader implications? These questions are not merely rhetorical. They lead us to important inquiries into the constitutional development of Sri Lanka.

The first constitution of independent Sri Lanka was that of a liberal democracy. However, in 1972 and 1978 there were attacks on its basic principles, especially on the separation of powers. While in 1972 the terminology of separation was retained, the independence of the judiciary was in fact substantially undermined in favour of the legislature. The 1978 Constitution undermined both the legislature and judiciary in favour of the executive.

This constitutional change had a direct bearing on the role of the AG. Since 1978 whoever has taken the post has been expected to do the executive's bidding, and several have done so quite willingly. Perhaps only the most recent retiree tried to assert the independence of his department to some extent. But even he was powerless when it came to the prosecution of cases against officers protected by the regime, as demonstrated in the failure to prosecute those accused of thousands of disappearances in the south alone. Instead of prosecuting, the AG's department has been assigned to attend meetings of United Nations agencies charged with defend the government against allegations of human rights abuses.

Consequences of the 1978 Constitution for the AG

Under the first constitution of Sri Lanka, the notion of the AG's duty as chief legal advisor to the government required that the job be done with "complete objectivity and detachment". That idea was only possible to uphold under a liberal democratic form

> "The provisions of the 1978 Constitution regarding the powers of the executive contradict the provisions of the same constitution regarding the independence of the judiciary"

of government, which has written into its institutional relationships the independence of certain departments that carry out key functions. In that setting, an AG can provide advice to the government based on law, not politics or other external factors. The government is of course under no obligation to accept this advice. However, what this arrangement does not allow a government to do is to instruct or coerce the AG to give the advice that it wants to hear. Twisting the law to make an executive decision appear constitutional or legal when it is not is outside the role of an AG in a liberal democracy.

A former Supreme Court justice, K M M B Kulatunga, published a book in 2004 entitled *Disorder in Sri Lanka*. One chapter in the book is 'Attorney General as advisor to the government and as guardian of the public interest'. The author takes for granted that the 1978 Constitution provides a near complete legal provision for the safeguarding of the independence of the judiciary. Earlier, Dr. M J A Cooray wrote a book entitled *Judicial role under the constitutions of Ceylon / Sri Lanka*, published in 1982, which also assumed that the 1978 Constitution was based on liberal democratic principles and that it protected the independence of the judiciary.

Both authors falsely assumed that because the 1978 Constitution uses the language of liberal-democratic government that it is a liberal-democratic constitution. Nothing is further from the truth. Constitutional provisions cannot be judged by terminology alone. The parts of the constitution must be weighed against one another to understand how they operate in reality.

The provisions of the 1978 Constitution regarding the powers of the executive in fact directly contradict the provisions of the same constitution regarding the independence of the judiciary. As the constitution had as its primary purpose the introducing of an all-powerful executive presidency, the independence of the judiciary could no longer be allowed as envisaged in the first liberal-democratic model. Either the powers of the president had to be subordinated to the judiciary and thus brought within the framework of liberal democracy or the president had to overpower the judiciary and make it subservient to the executive's interests. The latter is what happened.

Where liberal-democratic government is replaced with authoritarian government, as happened in Sri Lanka after 1978, the objectivity and detachment of an AG also is no longer feasible. But because some constitutional scholars, lawyers, judges and even international experts want to believe that Sri Lanka has some form of liberal-democratic government to which the AG must conform, the AG too tries to live up to this image, including in his letter to the IIGEP:

> According to the Sri Lankan law, the Attorney General is the principle legal officer of the criminal justice system of the country. His role is quasi judicial in nature, and statutorily defined.

This is general principle is iterated by everyone writing on the subject; however, what the AG omits to say is that it was radically altered by the 1978 Constitution.

The proof of this is to be found in the work of the AG today. For example, as the "principle legal officer of the criminal justice system of the country" he cannot do anything to prosecute perpetrators of gross human rights abuses, what is the significance of his role? If he relies solely upon police officers, who decide what crimes to investigate and what to ignore, or investigate badly, are they not the ones making the decisions about how the criminal justice system functions? Can he be anything more than a mere bystander who may choose to prosecute in a few cases that fall into his hands, after the real decisions have been made by others?

"From the position under the original constitution of giving legal advice to the government with objectivity and detachment the AG has been tasked with legitimising the illegal acts of state"

The means by which decisions have been taken so as to prevent prosecution have since 1978 become quite sophisticated and manifold. One has been through emergency regulations that make crimes guaranteed and investigations virtually impossible. For instance, regulations empower a police or military officer to dispose of dead bodies, so the duty to bring all suspicious deaths to the notice of a judicial magistrate is removed and persons can be disappeared without a trace. Under a liberal democracy, when such regulations are drafted the AG would be obliged to provide legal advice in order to demonstrate that such emergency regulations are contrary to law. However, after 1978 the AG's department in Sri Lanka did not play this critical role but instead either directly or indirectly assisted in preparing and endorsed such regulations.

Kafkan metamorphosis

From the position under the original constitution of giving legal advice to the government with "complete objectivity and detachment", since 1978 the AG has been tasked with legitimising the illegal acts of state. The AG's ardent defence of the Presidential Commission, as well as the participation of officers from his own department in that body, remains a clear demonstration of the extent to which the AG is now serving as an apologist for the executive rather than a legal advisor, thus in his letter to the IIGEP he stresses that

> With the view to supporting the independent Commission in fulfilling its mandate, the Government of Sri Lanka, its agencies and public servants remain available and ready to assist the Commission in whatever manner.

This statement gives rise to the question that if indeed there is such readiness then why do gross human rights abuses persist in Sri Lanka all the time? Or perhaps his statement should be read to mean that in fact no such grave abuses are taking place, that the reporting of such incidents and the state's failure to address them is exaggerated, and that everything is under control. If indeed this is how it should be understood, as it appears

to be (there is no satisfactory answer to the former question), then it is evident that the AG has metamorphosed into a completely different being from that of half a century ago.

> "The AG's department has been transformed from the great role that it was once expected to play into—legally speaking—that of a verminous insect"

The great writer Franz Kafka wrote a story entitled 'The Metamorphosis'. In it, Gregor Samsa, a travelling salesman, wakes up one morning to discover that he has somehow changed into a gigantic bug. Like him, the AG's department of Sri Lanka has been transformed from the great role that it was once expected to play into—legally speaking—that of a verminous insect. The only difference between Kafka's character and the AG is that whereas Samsa recognised his predicament, the AG—outwardly at least—continues to deny his.

Rather than describe Sri Lanka in the fantasy language of liberal democracy, we would do better to talk of it as a failed dictatorship. In 1978 the fantasy was to develop a strong authoritarian power through the executive president. However, even this much could not be achieved. The result today is neither liberal-democracy nor totalitarianism; it is anarchy.

Appendix 1: First statement of the IIGEP

On 1 June 2007, we, the International Independent Group of Eminent Persons (IIGEP), submitted our first Interim Report to the President of Sri Lanka. The report contains our observations and concerns about the President's Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights (the Commission).

We reported to the President that the Commission has so far made hardly any noticeable progress in investigations and inquiries since its inception in November 2006. Moreover, since our formation in February 2007, we have identified and raised a number of concerns with the Commission and the Government of Sri Lanka. We remain concerned that current measures taken by the Government of Sri Lanka and the Commission to address issues such as the independence of the Commission, timeliness and witness protection are not adequate and do not satisfy international norms and standards.

Independence: We are concerned about the role of the Attorney General's Department as legal counsel to the Commission. The Attorney General's Department is the Chief Legal Adviser to the Government of Sri Lanka. Members of the Attorney General's Department have been involved in the original investigations into those cases subject to further investigation by the Commission itself. As such, members of the Attorney General's Department may find that they are investigating themselves. Furthermore, it is possible that they be called as material witnesses before the Commission. We consider these to be serious conflicts of interest, which lack transparency and compromise national and international standards of independence and impartiality that are central to the credibility and public confidence of the Commission.

We are concerned that the Commission's finances are managed by the Presidential Secretariat. The Commission does not have financial independence enabling it to exercise control of its human resources and operations. In particular, the Commission should be allocated sufficient funds to secure the permanent confidentiality, safety and integrity of its victim and witness protection scheme.

Timeliness: We are concerned that the Commission did not commence even preliminary investigations and inquiries until May 2007, despite being constituted six months earlier in November 2006. To date, internal processes have not been transparent; no detailed work plan has been announced; essential staff have not yet been fully recruited; investigative and witness protection units are not functioning; and significantly, evidence already known to be in the possession of Governmental bodies relating to the cases has not been gathered and transmitted to us. Such unnecessary delays undermine public confidence in the ability of the Commission to carry out its mandate in a timely manner.

Witness protection: We are concerned that there are no adequate victim and witness protection provisions under Sri Lankan law. We are of the view that witness protection is absolutely essential in order to investigate serious violations of human rights that are within the Commission's mandate. Appropriate legislation that accords with international norms and standards should be enacted and implemented as soon as possible to protect victims and witnesses.

We regret that the Commission still has no functioning victim and witness protection mechanism. In the absence of appropriate legislation, an effective scheme or functioning protection unit, we fail to understand how the Commission could have invited the public, as it did as recently as 14 May 2007, to come forward and give evidence. As the Commission is operating without witness protection legislation, it is unable to guarantee the safety and security of witnesses. Summoning and examining potential victims and witnesses may create fear in their minds about safety and security, deterring them from coming forward to give evidence.

Mandates: The Presidential Warrant limits the scope of the Commission to a retrospective and fact finding role. The core work of the Commission is to obtain information, investigate and inquire into alleged serious violations of human rights arising since 1 August 2005, including 16 specific cases; and to examine prior investigations into these cases. The Commission is required to make findings and report to the President on the facts and circumstances pertaining to each case; the descriptions, nature and backgrounds of the victims; the circumstances that may have led to, or resulted in, those persons suffering such deaths, injury or physical harm; the identities, descriptions and backgrounds of the persons and groups responsible for the commission of deaths and other acts;

> "Internal processes have not been transparent; no detailed work plan has been announced; essential staff have not been recruited; investigative and witness protection units are not functioning; and evidence already known to be in the possession of Governmental bodies has not been gathered and transmitted"
>
> *—IIGEP on the Presidential Commission*

measures of reparation to be provided to the victims; and recommendations in order to prevent the occurrence of incidents in the nature of those investigated and any other recommendations considered as relevant.

> "Public statements from State officials are creating the misleading impression that the Commission and IIGEP have wide mandates and powers and resources to address ongoing alleged human rights violations in Sri Lanka; this is not the case"

The IIGEP, comprising of 11 Members, has been invited by the President to observe the investigations and inquiries of the Commission, in order to ensure transparency and observance of international norms and standards. The IIGEP does not have a mandate to conduct independent investigations and inquiries; nevertheless, we are open to all persons who wish to provide information and evidence on the cases under review by the Commission. Although we are obliged by the Presidential Invitation to transmit third party information to the Commission, it would not be right for us to disclose any information without the consent of the third party, or which may impair the safety or security of such third parties until we are satisfied that effective, functioning and credible witness protection measures are in place.

We regret that public statements from State officials are creating the misleading impression that the Commission and IIGEP have wide mandates and powers and the resources to address ongoing alleged human rights violations in Sri Lanka. This is not the case. In the current context, in particular, the apparent renewed systematic practice of enforced disappearance and the killings of Red Cross workers, it is critical that the Commission and IIGEP not be portrayed as a substitute for robust, effective measures including national and international human rights monitoring.

P N Bhagwati
Chairman, IIGEP
11 June 2007

Appendix 2: Second statement of the IIGEP & response of the AG

Further to our previous public statement of 11 June 2007, we, the International Independent Group of Eminent Persons (IIGEP) are concerned that the conduct of the President's Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights (the Commission) is inconsistent with international norms and standards. Failure to take corrective action will result in the Commission not fulfilling its fact-finding mandate in conformity with those norms and standards.

Central to our concerns is the role of the Attorney General's Department in the Commission.

On 27 February 2007, we raised these concerns with the Chairman of the Commission, stating that the conflict of interest arising from the involvement of the Attorney General's Department in the Commission compromises national and international principles of independence and impartiality that

are central to the credibility and public confidence of the Commission. We urged the Commission to reconsider the role of the Attorney General's Department and to appoint independent counsel in its place. On 12 May 2007, the Commission conceded that the IIGEP's concerns of a conflict of interest were valid. This understanding was confirmed in writing by the IIGEP on 13 May 2007.

> "During the initial sessions of investigation and inquiry the IIGEP observed examples of a lack of impartiality [on the part of the AG]"

Contrary to this understanding, on 14 May 2007 the Chairman of the Commission publicly announced that the Attorney General's Department was to make a statement outlining the nature of the case currently under investigation and would lead evidence of witnesses. Despite further representations by the IIGEP on this issue, to date the role of the Attorney General's Department remains unchanged.

During the initial sessions of investigation and inquiry, conducted between 14 and 29 May 2007, the IIGEP observed examples of a lack of impartiality. Prior to the presentation of any evidence, when publicly outlining the case, counsel from the Attorney General's Department stated as fact matters which are controversial in the case. Furthermore, the witness was improperly led, material questions were not asked by the counsel from the Attorney General's Department and information relied on by the witness and the Attorney General's Department was not made available to the IIGEP. The Commission does not seem to have taken sufficient corrective measures to ensure that its proceedings are transparent and conform with international norms and standards of independence, impartiality and competence.

Throughout these initial sessions, the Commission heard one witness' full testimony and part of a second witness' testimony. Taking evidence in this manner will not, in our opinion, reveal the information and evidence necessary to identify perpetrators of human rights violations and enable the Commission to achieve its mandate in a timely manner.

P N Bhagwati
Chairman, IIGEP
15 June 2007

Response from the AG

In November 2006, based on a previously agreed set of terms of reference His Excellency the President took steps to invite eleven (11) eminent persons to form the 'International Independent Group of Eminent Persons' (IIGEP) to observe investigations and inquiries due to be conducted by the Commission of Inquiry (COI) established to investigate and inquire into alleged serious violations of Human Rights occurring in Sri Lanka since 1st August 2005. The mandate of the IIGEP is to observe and comment on the investigations and inquiries conducted by the COI, with regard conformity with international norms and standards. The Government of Sri Lanka is pleased to note that, the international community commenced

nominating eminent persons to serve in the IIGEP, only after they were satisfied regarding the terms of reference of the COI and the IIGEP.

> "The Government of Sri Lanka is of the view that it is inappropriate for the IIGEP to propose the setting up of an international monitoring mechanism to address ongoing alleged Human Rights violations"
>
> *—Reply of AG to IIGEP*

Following invitations having been extended to the international community, nominations were received, and the International Independent Group of Eminent Persons was established on the 10th of February 2007, with the last nomination being received on the 9th February 2007. Thus, the Commission could effectively commence their work only from the 12th of February 2007, on which date the Commission held its first plenary meeting with members of the IIGEP. Had the COI commenced investigations and inquiries prior to the establishment of the IIGEP, the international observers could not have observed the functioning of the COI.

The Government is aware that, the COI spent its initial months for the development of internal systems, rules of procedure and recruitment of necessary staff. Now that such internal requirements have been met, the government is pleased to learn that the Commission is in a position to proceed to investigate and inquire into cases on the schedule of the warrant of the COI. Since early May 2007, the COI has commenced investigating into the incident involving the murder of 17 workers of ACF.

The Government of Sri Lanka remains committed to provide necessary financial and other resources to ensure that the COI functions smoothly and efficaciously giving effect to its mandate. Already a considerable sum of money has been allocated by the Presidential Secretariat to the COI. Up to now the Presidential Secretariat has allocated to the Commission the entire sum of money requested by the Commission based on an approved budget. Once the COI develops and submits to the government its budget for the remaining period, the Presidential Secretariat will provide necessary funds to the Commission for its future activities. The Government of Sri Lanka remains totally committed to fund the victims and witnesses assistance and protection programme of the Commission. Furthermore, the government has accelerated an initiative to enact national legislation pertaining to providing assistance and protection to victims and witnesses.

With the view to providing the Commission greater operational flexibility, the government has initiated a process aimed at amending the Commissions of Inquiry Act. The proposed amendments are to go before Parliament very shortly.

The Government of Sri Lanka is of the view that, in view of the terms of reference of the IIGEP, it is inappropriate for the IIGEP to propose the setting up of an 'international monitoring mechanism' to address ongoing alleged Human Rights violations. The mandate of the IIGEP is to observe the functions of the COI and comment on compliance with international norms and standards, and to also propose correctional action to be taken by the COI. The Government expects that the IIGEP would make

observations and recommendations in terms of its mandate as contained in the letters of invitation and accepted by Members of the IIGEP.

The Government of Sri Lanka wishes to avail itself of this occasion to reiterate its expectation that at least one out of the eleven eminent persons be present in Sri Lanka to observe the investigations and inquiries of the COI.

> "The IIGEP has observed the poor attendance of interested parties, such as the families of victims and civil society, in the sessions of inquiry and questions the level of publicity the Commission has given to the public inquiries"
>
> *—IIGEP on the Presidential Commission*

Appendix 3: Presidential Commission's public inquiry process so far falls short of international norms and standards

IIGEP Statement, 6 March 2008

In November 2006, H.E. the President of Sri Lanka appointed a Commission of Inquiry (the Commission) to investigate and inquire into 16 incidents of alleged serious violations of human rights that arose in Sri Lanka since 1 August 2005. The President subsequently also invited eleven persons of international repute to form the International Independent Group of Eminent Persons (the IIGEP)i. The IIGEP was called to observe the work of the Commission and to comment on the transparency of its investigations and inquiries, and their conformity with international norms and standards. The President also invited the IIGEP to make recommendations for redress. The IIGEP was established when the last Member's nomination was approved by the Government of Sri Lanka in February 2007. It held its fifth quarterly plenary meeting in Colombo on 17-19 February 2008, in order to review its Members' observations and conclusions over the period from mid-December 2007 to mid-February 2008.

Observations on the Public Inquiry Phase

The most important development since the IIGEP's last public statement, dated 19 December 2007, is the commencement of the Commission's public inquiry phase on 5 January 2008. The IIGEP welcomes this move by the Commission. During the November 2007 Joint Commission/IIGEP Session, the Commission advised the IIGEP that there would be no public inquiry until Parliament passed the amendments to the Commissions of Inquiry Act (1948). (Subsequently, the "Commissions of Inquiry (Amendment)" Bill was passed on 7 February 2008. The amendments related primarily to the investigative powers of a Commission and the ability of a Commission to sit without its full membership.) In contrast with the in-camera investigations the Commission has been carrying out so far, public inquiries are expected to be held in the full view of any interested parties and particularly those most concerned, the surviving victims and the families of victims.

The IIGEP has observed the poor attendance of interested parties, such as the families of victims and civil society, in the sessions of inquiry and questions the level of publicity the Commission has given to the public inquiries. The notices in

the newspapers were relatively small in size and need to be recurrent or continuous to achieve sufficient impact. It should be possible for representatives of the Commission to make personal contact with interested parties, particularly the surviving victims and the families of all victims, to ensure that these people are made aware of the intended hearings. The IIGEP has also suggested that the Commission consider holding public inquiries outside Colombo, closer to the areas where the incidents under review took place, in order to improve the accessibility of potential witnesses to the Commission.

> "All the issues examined by the Commission should have been considered during the criminal investigation process; it is clear that the original investigation was flawed and incompetent"

The Commission has, as of 17 February 2008, held six public inquiry sessions into the case of the killing of five youths in Trincomalee on 2 January 2006. During these sessions, three witnesses appeared before the Commission.

The Commission summoned the Trincomalee Magistrate to testify in his capacity as the investigating Magistrate who attended the crime scene on 02 January 2006. Following intervention from the Judicial Services Commission, the Registrar of Trincomalee Magistrates Court attended the Commission of Inquiry session in his place and read out the contents of the Magistrate's report.

The IIGEP is concerned that this intervention prevented the Commission from hearing direct testimony from the Magistrate regarding police action at the crime scene and his initial evaluation and instructions.

In the sessions of 5 and 7 January 2008, the Police Inspector, responsible for carrying out the original investigation, appeared as a witness and during his testimony made statements about the Police and the Armed Forces present at the scene around the time of the incident. During the inquiry of 10 January 2008, the Judicial Medical Officer testified that, in his opinion, if one of the deceased victims had been brought to the hospital immediately after the attack, he could have been saved.

The IIGEP emphasizes the point that all the issues examined by the Commission should have been considered during the original criminal investigation process. It is clear that the original investigation was flawed and incompetent. Specifically, the quality of statements taken from police and service personnel was inadequate in detail and depth, and reflected negatively on the competence and thoroughness of those in charge of the original police investigation. It appears that little or no effort was put into tracing and identifying eye witnesses from a number of local citizens known to have been in the vicinity on the evening of the incident causing the death of the five youths in Trincomalee. The Commission needs to ask the question: why were the flaws in the original police investigations undetected, ignored, or possibly abetted by the responsible Government authorities? In the search for truth and justice in this case, it is imperative that the testimony of the security forces personnel and police witnesses heard by the Commission to date is fully

and adequately exposed and tested. The general public, surviving victims, family representatives and others must have the opportunity to judge the credibility of some of the witnesses. It is also essential for them to be able to observe the working of the Commission and be encouraged to do so.

The Commission, in response to the IIGEP's last public statement, stated that "no agency or individual shall be excluded from investigation or inquiry if such an investigation or inquiry is merited on the basis of material before the Commission". The Commission has so far failed to implement this assurance in practice with State bodies and agencies.

The public hearing phase was suspended on 14 January 2008 and did not resume until 15 February 2008. The IIGEP is once again concerned about the slow pace of inquiries, considering that the Commission has already heard and gathered testimonies from these same witnesses in its in-camera investigation phase.

The IIGEP has informed the Commission about several material witnesses who have approached the IIGEP and expressed their willingness to give evidence to the Commission, from as far back as in August 2007. The IIGEP has urged the Commission to take concrete steps to include these critical witnesses in the current inquiry and is seeking to agree with the Commission on procedures that would permit this to happen, while protecting the safety of witnesses.

The Commission has indicated that the inquiry stage would yield more positive developments. Yet, to date, and notwithstanding the spirited efforts of the Commission's independent legal counsel of the Unofficial Bar in leading the questioning, its inquiries have largely been conducted in the same manner as the Commission's investigation sessions and have, so far, proved largely ineffective in unearthing useful or actionable evidence affecting the current case.

Witness Protection

Protection for witnesses is indispensable for the success of the Commission. The IIGEP observes that sufficient efforts are still not being made to ensure the protection and safety of all those involved with the inquiries and investigations of the Commission. Without a comprehensive system of victim and witness protection, and demonstrated Government competence and willingness to implement such a system, critical witnesses are unlikely to come forward. Perhaps more than any other factor, this impediment inhibits any effective future pursuit of the filing of indictments, convictions, and appropriate accountability for the alleged grave human rights violations under review.

As recently as January 2008, the IIGEP was dismayed to find a newspaper article, citing a source within the Commission, identifying the possible whereabouts of witnesses. The IIGEP has stated in writing to the Commission that, similarly to a previous instance, the publication of such information about witnesses,

"The IIGEP was dismayed to find a newspaper article, citing a source within the Commission, identifying the possible whereabouts of witnesses"

undermines the purpose of the Commission's work and constitutes a potentially dangerous breach of confidentiality. The cornerstone of all witness protection programs is confidentiality, without which the integrity of the program can be permanently damaged.

> "The IIGEP has decided that it will terminate its operation in Sri Lanka, after due consideration and for fundamental reasons"

Financial Independence

Issues around the Commission's insufficient budget and lack of financial independence have recently re-surfaced in the media. The IIGEP already commented on the Commission's lack of financial independence in its 11 June 2007 public statement. The IIGEP further brought the matter to the attention of the President in a meeting in August 2007. The IIGEP can only reiterate the vital importance that the Commission be sufficiently funded on the one hand, and that it hold its own purse strings on the other. Financial independence is vital for the successful functioning of the Commission and its capacity to provide effective witness protection and assistance.

Conclusion

The IIGEP has decided that it will terminate its operation in Sri Lanka. It has taken this decision after due consideration and for fundamental reasons. The President charged the IIGEP to observe the proceedings of the Commission of Inquiry, to offer suggestions, and to assess the conduct of these proceedings against international norms and standards. The Eminent Persons conclude that they have accomplished all that is possible within the constraints of the prevailing situation. They no longer see how they can contribute further to the protection and enhancement of human rights in Sri Lanka and have regretfully decided to bring to an end their activities in this country.

The Eminent Persons have all come to Sri Lanka a number of times and met a large variety of personalities involved in the process of protection and promotion of human rights. They have visited different locations in the country where alleged violations have taken place and have diligently followed the proceedings of the Commission. The IIGEP representatives, a group of highly qualified Assistants to whom the Eminent Persons have delegated authority, have been following the investigations and inquiries on a full-time basis in Colombo and in the field. The IIGEP is satisfied that the activities and reports of their representatives have met the highest standards of quality and professionalism.

In keeping with both the letter and the spirit of its mandate, the IIGEP has made substantial suggestions and observations - in its Interim Reports to the President and in direct contact with the Commission and with representatives of the Government of Sri Lanka (GoSL). Most of these suggestions have been ignored or rejected. Official correspondence directed to the IIGEP has too often been characterized by a lack of respect and civility. While the IIGEP has repeatedly been accused of going beyond its mandate and of interfering with national decision-making, this has never been its intention or the reality. The Eminent Persons

have always respected the authority of their interlocutors, be they commissioners, judiciary, parliamentarians, civil servants or ministers, and the limits of their mandate.

The IIGEP's next and concluding report to the President and subsequent public statement will detail the Eminent Persons' observations and conclusions, substantiated by the evidence available. In summary, the IIGEP concludes that the proceedings of inquiry and investigation have fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries. The IIGEP has time and again pointed out the major flaws of the process: first and foremost, the conflict of interest at all levels, in particular with regard to the role of the Attorney General's Department. Additional flaws include the restrictions on the operation of the Commission through lack of proper funding and independent support staff; poor organisation of the hearings and lines of questioning; refusal of the State authorities at the highest level to fully cooperate with the investigations and inquiries; and the absence of an effective and comprehensive system of witness protection.

"The IIGEP has time and again pointed out the major flaws of the process: first and foremost, the conflict of interest in particular with regard to the role of the Attorney General's Department"

The Eminent Persons are fully aware of the overall context in which the Commission is operating, which makes its activities, however diligent, incapable of eliciting the kind of facts that would be necessary to ensure that justice is seen to be done. Underlying it all was the impunity that had led to the prior fruitless investigations that, in turn, led to the setting up of the Commission. There is a climate of threat, direct and indirect, to the lives of anyone who might identify persons responsible for human rights violations, including those who are likely to have been committed by the security forces. Civilian eye witnesses have not come forward to the Commission. Security forces' witnesses preferred to make themselves look incompetent rather than just telling what they know. Accordingly, it is evident that the Commission is unlikely to be in a position to pursue its mandate effectively. These inherent and fundamental impediments inevitably lead to the conclusion that there has been and continues to be a lack of political and institutional will to investigate and inquire into the cases before the Commission. The IIGEP is therefore terminating its role in the process not only because of the shortcomings in the Commission's work but primarily because the IIGEP identifies an institutional lack of support for the work of the Commission.

Beyond these considerations, the IIGEP is of the opinion that there has not been the minimum level of trust necessary for the success of the work of the Commission and the IIGEP. The IIGEP model may be unique. However, experiences associating national and international persons and processes in the past, with the view to harmonizing national practice with international norms and standards, have always relied on confidence and trust for their success. The IIGEP does not see how its continued engagement with the process could change this situation. The

Eminent Persons hope, nevertheless, that their concluding observations and recommendations will assist the Commission of Inquiry, the Government of Sri Lanka and all the courageous people of Sri Lanka to achieve the full implementation of the rule of law and respect for fundamental human rights.

"The announcement by the IIGEP quitting the Presidential Commission comes as no surprise" —*AHRC*

The IIGEP consists of the following 11 Eminent Persons: Justice P.N. Bhagwati (India) (Chairman), Judge Jean-Pierre Cot (France), Mr. Marzuki Darusman (Indonesia), Mr. Arthur E. "Gene" Dewey (USA), Prof. Cees Fasseur (Netherlands), Dr. Kamal Hossain (Bangladesh), Prof. Bruce Matthews (Canada), Mr. Andreas Mavrommatis (Cyprus), Prof. Sir Nigel Rodley (UK), Prof. Ivan Shearer (Australia) and Prof. Yozo Yokota (Japan).

Appendix 4: IIGEP's quitting is no surprise, but what next?

Asian Human Rights Commission, AHRC-STM-058-2008, 7 March 2008

The announcement by the International Independent Group of Eminent Persons (IIGEP) that they are quitting the Presidential Commission of Inquiry comes as no surprise at all. The surprise is as to why the IIGEP agreed to be part of this process in the first place. The Presidential Commission was so obviously an eye-wash and the IIGEP was only called upon to give respectability to a very deliberate design to subvert the process of law for which purpose alone this Commission was appointed.

Why the international community and the members of the IIGEP itself were unable to see through this devious scheme at the very outset is a matter that deserves some reflection. Indeed, some reflection on the matter can also throw light on why the international community has so far been unable to have a clear view of what is happening in Sri Lanka and why impunity has become such an entrenched practice within the country. The Asian Human Rights Commission has repeatedly pointed out that impunity in Sri Lanka is a matter of state policy, whether the violations that are dealt with are from the South, North or the East, and that this policy has been entrenched through consistent practice since 1971.

When the state relies entirely on the military and the police for the suppression of all persons and organisations which it believes should be suppressed, the same state cannot pursue a policy that will discourage the military and the police from pursuing their targets as ruthlessly as possible. When the state sanctions, and in fact commands its armed forces to act in the manner it wishes, irrespective as to whether they observe the restraints that are expected to be observed even in the midst of a conflict, the same state cannot be expected to take any credible action in order to ensure that its forces act within the accepted norms and standards. As the former defense minister, Ranjan Wijeratne told parliament, "These things cannot be done according to the law". In Sri Lanka that short sentence sums up

the state policy used for suppressing elements that the state believe should be suppressed, whether they be Sinhalese, Tamils or Muslims.

> "The very foundation of the law in Sri Lanka has changed for the worse"

The very foundation of the law in Sri Lanka has changed for the worse. The 1978 Constitution transformed Sri Lanka into an authoritarian state with the executive president having powers equal to an absolute monarchy. With that the structure and ideology of the state changed. The conduct of all affairs, including those dealing with the conflicts takes place within this framework.

The agents of the international community itself wanted to have a more simplified version of the reality. They treated the Sri Lankan conflict as a simple conflict that, if the Sri Lankan government and the LTTE could agree upon some measures could easily be resolved. In taking this view they failed to understand the complexity of this problem in Sri Lanka, the history of the challenge faced by the rule of law and democracy in the country and the collapse of state institutions.

One particular issue alone can illustrate the naivety with which the international community has regarded the Sri Lankan crisis; this is the issue of the 17th Amendment to the Constitution. The Constitution should be the supreme law of the country if that country is a democracy. From 2005 up to now the government of Sri Lanka has deliberately refused the appointment of the Constitutional Council thereby creating a situation within which the 17th Amendment to the Constitution was relegated to the dustbin. No amount of local and international pressure was able to make any change to this situation. Under such circumstances for the IIGEP or its promoters to think that the Sri Lankan government would take their advice seriously on how to conduct investigations into human rights violations which it has itself directly or indirectly authorised was, to say the least, sheer naivety.

Reading the dispatches from the spokesman for the government in replies to the call for inquiries into human rights violations leaves no doubt that the government was fully aware that to conduct inquiries into military operations and at the same time continue to allow them free reign were two incompatible strategies.

What is needed is a comprehensive understanding of the problem of Sri Lanka which is not just an ethnic crisis. It is a total crisis of the entire legal fabric of the country and the political system. What is required from both local and international initiatives is to create space to deal with the entire issue through a comprehensive plan of action based on an understanding of the actual situation.

This is not just a task that the democratic movement and the human rights community face in Sri Lanka only similar problems are faced in many places around the world. An attempt to understand the Sri Lankan crisis in depth may help to find

more serious approaches to deal with problems which are matters of life and death, not only to large sections of the population but to a nation as a whole.

> "A critical review by those involved in the IIGEP as well as others who have watched this extremely sad episode can help in deepening understanding"

We hope that the bitter lessons learned by the IIGEP in Sri Lanka will lead to humble reflections about where the very strategy itself was flawed. A critical review by those involved in the IIGEP as well as those others who have watched this extremely sad episode can help in the deepening of the understanding of the theoretical nature, as well as the practical nature in dealing with the issues of justice in conflict situations. Mere calls to end impunity or making generalized recommendations are of little use. Concrete studies leading to specific suggestions that can form the basis for realistic plans-of-action is what is needed, not only to deal with the acute crisis in Sri Lanka but also to deal with other similar situations.

Appendix 5: Balancing rights of the accused with rights of the victim

The 13th Kanchana Abhayapala Memorial Lecture by Attorney General K C Kamlasabayson, 2 December 2003 (Published in The Island, 5 February 2003)

It is my privilege to deliver the Kanchana Abhayapala memorial lecture 2003. Although, I cannot match the intellect of many of the eminent speakers who have delivered the said lecture in the past, I accepted with humility the invitation extended to me by Sarvodaya, not only because the suggested topic was something that appealed to me as an extremely important one, particularly in today's context, but also because I could not refuse the request that was made by an organization which has always espoused the cause of justice and fair play. May I therefore take this opportunity to thank the organisers for their kind invitation.

As a lawyer, it is only natural that my presentation should be based on law. However, I also wish to approach it on a broader basis, i.e. from the point of view of the society in which we live and the practical realities that surround our criminal justice system.

I must emphasise that the views I express today are personal to me and I do so, prompted by the increasing in the crime rate and the lack of sufficient and effective provisions in our law in relation to victims of crimes.

I do not consider it necessary or relevant to bring out the legal distinction between a suspect and an accused. Suffice to say that whenever reference is made to either of these persons there is invariably a victim.

A person who is suspected or accused of a crime enjoys several constitutional and legal protections. These are contained in Chapter III of our Constitution and several other legislative enactments including the Code of Criminal Procedure Act, No. 15 of 1979.

In Chapter III of the Constitution, which deals with fundamental rights, article 13 provides that no person shall be arrested except according to procedure established by law and that such person shall be informed of the reason for his arrest. It further provides that any person held in custody or detained shall be brought before the judge of the nearest competent court and shall not be further held in custody except upon and in terms of the order of such judge. A person charged with an offence shall be heard in person or by an attorney-at-law at a fair trial by competent court. This article also sets out that every person shall be presumed innocent until he is proved guilty.

On the other hand the Code of Criminal Procedure Act contains several safeguards accorded to the accused commencing from his arrest to the conclusion of the trial. In this process the law also contains several provisions that would ensure a fair trial for the accused. In other words in the context of the provisions both in the constitution and the Code of Criminal Procedure Act, a fair trial would mean a trial often tilted more in favour of the accused than the victim.

> "When one embarks on balancing the rights of the accused with the rights of the victim in the administration of justice, one could see the scales tilted more in favour of the accused than the victim"
>
> *—Former Attorney General K C Kamlasabayson*

A victim means a person who has suffered harm, including physical or mental injury, emotional suffering, or economic loss through acts or emissions in violation of the criminal laws. This definition was formulated at the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. This definition when expanded would include a multi-victim perspective. That is to say where appropriate it includes the immediate family members or dependent of the direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Today I wish to deal with the direct or immediate victims and those who suffered as a result of their intervention. In our system the criminal justice process involving the arrest, trial, conviction and punishment of the accused have little relevance to the victim. Action is taken in the name of the state and not on behalf of the victim. There are no enforceable provisions in the constitution that are designed to effectively protect a victim of crime.

In this background when one embarks on balancing the rights of the accused with the rights of the victim in the administration of justice, one could see an imbalance with the scales tilted more in favour of the accused than the victim.

The study of victimology involves both the study of the victim and of the offender. There is much work being done in this field by many organizations. But there is still much doubt as to the extent to which it has helped or assisted the victim in many jurisdictions. I was intrigued by the fact that the word "victimology" does not appear in the Oxford English Dictionary or in the encyclopedia; nether did I find this word in the modern Encarta. Perhaps this reflects the negative attitude of the state organisations towards victims of crime.

Let us examine the rights of a victim.

> "I am aware of an instance where the investigators persuaded the father of the deceased to consult a soothsayer to ascertain the description of the murderer"

It is the responsibility of the state to protect and safeguard the property and persons of every citizen. Where a crime is committed against a citizen, it could be said that the state has failed in effectively discharging its responsibility. The rights of a victim must naturally flow from this failure. It is in this context that the state has a greater responsibility towards such a victim.

The victim has the right to demand from the state that the offender be punished and the state must ensure that there is an effective and efficient mechanism to meet this end. This cannot be achieved by merely enacting laws. Today a victim is reluctant to visit the police station. There are complaints that when an offence is reported, prompt action is not taken by the police. Investigations at times do not proceed in the correct direction. I am personally aware of an instance where the investigators persuaded the father of the deceased who was murdered to consult a soothsayer to ascertain the description of the murderer.

No amount of law could remedy this situation. The mere passing of laws and opening or maintaining of police stations is not sufficient. The system itself has to be refined and fine tuned at all levels. In our country we have an overloaded court system and it is to the credit of our judges that the system has not been short circuited and exploded due to the overload. The overload is clearly due to the increase in the crime rate, correspondingly the increase in the crime rate is due to the shortcomings in the law enforcement system of the country. There is a total erosion of the rule of the law. It is this system that requires to be refurbished.

It is the right of the victim to see that there is speedy justice but I have pointed out that our courts are overworked. It is almost impossible to provide for speedy justice.

These are some of the general observations. They all clearly point towards the pathetic plight of a victim of crime. Often he is victimised at two stages. First in the hands of the offender and then in the hands of the state agencies. This agony continues when he repeatedly visits the court. There are several postponements. In the witness box he is often harassed by the counsel. His suffering continues unabated. Having suffered in the hands of the principle offender, the victim instead of being comforted and protected by the state machinery is in fact harassed. This feature makes the balancing exercise difficult if not impossible. In this background one could identify a clear duty on the part of the state to ensure that there is no secondary victimization.

How could this be achieved?

Let me repeat the proverbial golden thread that runs through the fabric of our legal system. The accused is presumed to be innocent until proven guilty. By this rule the law focuses its attention on the accused whilst placing a heavy burden on the

prosecution to prove its case beyond reasonable doubt. The law in its wisdom has concluded that even though many who are guilty may be freed, no innocent person should be wrongly convicted; thus, the presumption of innocence. Yet, this presumption in its application, if not properly approached, could lead to injustice, not for the offender, but for the victim. By saying this I am not for a moment seeking to dilute a finer principle of law for the sake of securing a conviction at all cost. What I wish to demonstrate is that this principle of law with no corresponding rights for the victim to seek effective justice for the wrong done to him has invariably resulted in miscarriage of justice.

"Law with no corresponding rights for the victim to seek effective justice for the wrong done to him has invariably resulted in miscarriage of justice"

Law and order are integral parts of a civilized society. The victim plays a vital role in the administration of justice. His role is twofold: (a) it is personal, for the reason that it is the victim who had suffered in the hands of the offender and is therefore entitled to seek justice for the wrong done to him; (b) the victim, by exposing the wrong done to him through the established mechanism helps the state to perform its duties of maintaining law and order.

When a crime is reported, the state in the discharge of its duty becomes the party whilst the victim assumes the role of a witness. Official action taken against the criminal by the state is taken on behalf of the republic, not the victim. A person whose interests are damaged by a criminal must initiate a civil suit to recover damages. A New York Times book, Crime & Criminal Justice, explains this as follows:

If I am hit on the head by a robber, or if my television set is stolen in a burglary of my home, the fine, imprisonment or other punishment imposed on the offender only satisfies my vague need for revenge and for social order. So far as getting my doctors bill and hospital expenses paid, or getting a new television set, the state's official action is irrelevant.

In our adversarial system a victim passes through four stages. Firstly, a crime is committed against him. Secondly, he reports the crime to the police. Thirdly, the crime is investigated and fourthly, if there is evidence the offender is prosecuted. At all these stages the victim has a role to play.

At the first stage the victim is exposed to the crime and is normally pushed to the second stage where he or some other person is required to make a statement to the police. The investigations commence thereafter. Let us pause at this stage. As I have already pointed out, criminal investigations are governed by the Code of Criminal Procedure Act. The victim is invariably the complainant. It is he who activates the legal process. Investigations are carried out by the police. There is unfortunately a perception, often justified, that the secondary victimization of the victim commences at the stage he visits the police station to make a complaint.

> "It is extremely necessary that our investigators acquire the required skills and techniques and above all realise the importance of their role"

What is important is that not only his complaint should be recorded promptly, but the investigations should commence without undue delay. It is in this context that the state must take remedial steps to enhance the competence and skills of the police officers in the field of investigations. Furthermore, the scientific and technical developments should be introduced into our system. Very often we hear delays in the Government Analyst's Department. This department is overburdened and requires to be better equipped. Above all, it is important that the law enforcement agencies involved in criminal investigation understand and appreciate the role of a victim and his/her sufferings.

We often speak of the police force. One must not loose sight of the fact that it is a service and not a force. I am aware that there are guidelines. But this is not enough. The officers concerned must consciously believe that it is their duty to protect and safeguard the interest of the victim.

Victims of torture in the hands of law enforcement authorities often find it difficult to take their cases forward. There is an increase in the incidence of torture and is something that must necessarily be dealt with effectively by the state. Investigations into such allegations should be left in the hands of a specialized and independent unit and every endeavour must be made to ensure speedy trial.

There are several unsolved crimes. I do not for a moment contend that every crime that is committed could be solved. A clever criminal may not leave any evidence and unsolved crimes are nothing new in the society. But what is alarming is the increase in the number of such cases. From a layman's point of view, some of the crimes, particularly murders that remain unsolved could have been solved. This is not being done either due to the ineffectiveness of the investigators or other reasons best known to them. It is in such instances, that the society loses faith in the system.

Once the investigations are concluded, depending on the gravity of the crime, the case is referred to the Attorney General's Department. Here again there is a backlog and a further delay. My several attempts to increase the cadre have consistently failed. But this excuse is of no consolation to a victim who has suffered. We are seeking to overcome logistical problems by periodically assessing the workload and the disposal rate and by establishing specialized units to expedite at least certain categories of cases.

I do not consider it necessary to frame laws to remedy the defects that I just pointed out. The remedy lies in the hands of the law enforcement authorities and the state. It is extremely necessary that steps are taken to ensure that our investigators acquire the required skills and techniques and above all realise the importance of their role in civil society.

The final stage is where the offender is prosecuted. As I have already pointed out, our courts are overworked. At another forum I expressed the view that unless there is a drastic increase in the number of judges, the secondary victimization of the victim would continue unabated. Today, there are literally hundreds of cases that come up everyday in a magistrate's court. On the other hand there are high courts where cases are postponed by ten to twelve months. No amount of legal reform could remedy this situation. What is important is to ensure speedy justice by establishing more courts. The constitution provides for the appointment of Commissioners of High Court as a temporary measure. This is an important provision which should be invoked to meet the present crisis. It may also be appropriate to invoke this provision for the purposes of expeditiously disposing cases of torture and sexual offences.

"There are literally hundreds of cases that come up everyday in a magistrate's court; on the other hand there are high courts where cases are postponed by ten to twelve months"

The legal ethics demands that the prosecutors should not meet and discuss their cases with the complainant. The complainant and the other lay witnesses are not permitted to peruse the statements made by them to the police. Whilst I see the danger in witnesses being coached, in view of the delays that are experienced in our courts, provision should be made to enable the witnesses to refresh their memories by perusing the statements made by them. This may not appeal to the defence lawyers. Yet, in the present context, where it takes years for a trial to come up in court there does not appear to be a viable alternative. Surely, an offender cannot benefit through the lapse of time and in may event on witness should be put to a memory test for the purposes of securing an acquittal.

An aggrieved party including a victim is permitted legal representation in a court of law. This was confirmed by the Supreme Court. However, in a criminal trial the victim's representative plays a minimal role and merely assists the prosecutor. It may well be that if an active role is granted to the counsel of the victim, the victim's counsel and the prosecution could be at cross purposes. However, in my view, the victim's counsel should be permitted, as of right, to make submissions on the question of sentence.

It is the right of the victim to give evidence without fear. Our courts have always protected this right whenever complaints are made. However, it is the responsibility of the state to further this right by providing modern methods, e.g., adequate legal provision for examination and cross-examination of victims of sexual abuse through modern methods. This has proved to be very effective in the west where in child abuse and rape cases victims are not physically present in court but are examined through electronic and multimedia. This has become necessary for the reason that despite the safeguards contained in the Evidence Ordinance, complainants, mainly victims of sexual abuse and rape are often harassed by the defence lawyers in cross examination.

> “Is it more important to build roads spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?”

Very often the accused is acquitted due to lack of evidence and the law says that he cannot be charged again for the same offence. An attempt is being made in England through the Criminal Justices Bill 2002 to enable the appellate courts to review such cases, provided that there is new and compelling evidence and that in all the circumstances, in the interest of justice, the court considers that a re-trial should be ordered. We too should seriously consider enacting similar provisions so that an accused does not get away merely due to initial lapses in the investigations.

Another important feature that requires consideration is the need for an efficient witness protection scheme that would ensure that witnesses are not intimated and threatened. No doubt this would involve heavy expenses for the state and amendments to the law. I will only pose a simple question. Is it more important in a civilized society to build roads to match with international standards spending literally millions of dollars rather than to have a peaceful and law abiding society where the rule of law prevails?

In my presentation, I have in no way sought to diminish the rights of the offender. Criminal justice is permeated by the notion of balance. The system is meant to ensure that an innocent suspect is not unfairly prosecuted or convicted. On the other hand it is designed to strike a balance, in that the interest of the victim in having the perpetrator prosecuted and punished is protected. What I wish to emphasize is that unless the object of our criminal justice system is properly translated into reality, viz., in that the actual offender is expeditiously tried and punished, there could never be a just society in which law and order could prevail.

The disposable prosecutors of Bangladesh

Md. Ashrafuzzaman, Programme Assistant,
Asian Legal Resource Centre, Hong Kong

Bangladesh does not have permanent prosecution service. Rather, the nation has so far lived with a disposable prosecution system, although there is no question that it needs a permanent one. Whenever a new party has taken over government, all prosecutors have been removed from their offices, and new group has replaced them.

Appointments

The prosecution wing in every district consists of the posts of Public Prosecutor (PP), Government Pleader (GP) and Special Public Prosecutor (SPP). All these law officers are accompanied by assistants, whose numbers vary depending on the number of courts they must cover, and the size and population of the district.

There are no particular rules to appoint prosecutors in Bangladesh. The recruitment process is based on the political choice of the ruling political party of the day. The local parliamentarian, influential political leader associated with the ruling party or bar association leader with political affiliations, or perhaps all of these, make lists of lawyers to serve as prosecutors. They send these lists to the Ministry of Law, Justice and Parliamentary Affairs through the office of the local deputy commissioner, who is the ex-officio district magistrate, or directly to the ministry by 'selectors', depending on the extent of their power and influence. The government appoints prosecutors from among those recommended.

Younger and less-experienced lawyers seek appointment as prosecutors through personal and political channels. Those persons with the right connections can get one for free, but otherwise a down payment is needed, or guarantee of suitable repayments later. Thus, prosecutors often have inadequate knowledge of law and experience in legal practice but are pronounced in their political biases. By contrast, On the other hand, senior lawyers are reluctant to serve as prosecutors because of the lack of facilities and remuneration.

> "There are few criteria for selection [of assistants to the attorney general] and little screening"

However, under the present military-backed interim government a slightly different type of procedure has been followed. In some cases, interested lawyers have sent applications to the offices of deputy commissioners to seek positions and the government has made its choices after inquiries conducted through intelligence agencies as well as in view of the relationships between the applicants and officials in related agencies. Thus the political affiliations of some prosecutors are less pronounced than before, although they are still screened in order that they are proven reliable for the government's purposes.

The president appoints the attorney general under article 64 of the Constitution and sections 492 to 495 of the Code of Criminal Procedure. The appointee must have the same qualifications as a judge of the Supreme Court, and serves the president. However, in reality the president has no power to select the appointee but merely formally approves the government nominee, who is selected for the same sorts of political reasons as ordinary prosecutors.

The additional attorney general, assistant attorney general and a number of deputies serve the attorney general. As in other cases, there are few criteria for their selection and little screening. The only real condition is that they be lawyers capable of pleading cases individually. Nor is neither any specific recruitment process, like the holding of an examination for interested applicants.

The case of Khodad Khan Pitu

The absence of special procedures to screen and appoint prosecutors became all too evident in the case of Khodad Khan Pitu, a lawyer of the Naogaon District Bar Association who was appointed as Public Prosecutor of Naogaon on 13 June 2007. The District Magistrate of Naogaon appointed him without any official permission from the Ministry of Law, Justice and Parliamentary Affairs.

It subsequently came to light that Khan was an accused in a criminal case relating the assassination of a leader of a pro-Islamic student organization, Azgor Ali, at the Rajshahi University, under trial in the Rajshahi Session Judge's Court. Khan claimed that he was not aware of the murder case against him, although he admitted that he had been discharged from another murder case. Moreover, at time of appointment Khan was also an accused in another criminal case regarding violation of electoral rules, under trial in the Magistrate's Cognizance Court of Naogaon.

In defence of his boss Sajal Samaddar, Additional District Magistrate of Naogaon, claimed that the district magistrate is able to appoint temporary public prosecutors according to his ex-officio power under section 17 of the Law Report Manual. He maintained that they had been unaware of the cases against Khan at the time of his appointment and only learned about them through the news reports. A probe committee later found the reports to be true.

Private versus public practice

Public prosecutors use their positions to advance their private practices, which results in unseemly events in court such as the appearance of a group of witnesses without any prosecutor on hand to examine them or prosecutors who have not prepared for a hearing who confuse and intimidate their own witnesses. Unsurprisingly, such cases result in acquittals. There are also frequent complaints of prosecutors (especially SPPs) who having won a hearing in the lower court where they have pleaded for the state reappearing in the appellate court representing the other party as a private lawyer.

Ironically, one cause of public prosecutors' ill discipline and tendency to engage in private practice when they are supposed to be working for the state is that they are independent. They cannot be sanctioned or punished if they fail to appear at their offices or in court. Only assistant and additional prosecutors are liable to their immediate superiors.

> "The conviction rate in all courts of Bangladesh is only around 10 per cent: the reasons include the political and transitory nature of the prosecutors' work and postings and their disposition towards private practice"

Criminal investigation procedure

The most common preliminary step in seeking criminal justice in Bangladesh is to lodge a complaint with a police station in the jurisdiction where the offence allegedly occurred. Thereafter, police must investigate, collect evidence, obtain warrants, arrest the alleged criminals and produce them before the relevant court. Such cases are referred to as GR cases: those on the Government Register.

However, lodging complaints with police stations is oftentimes difficult for the poor and politically weak, especially if the complaints relate to wealthy and politically connected persons. The offenders or persons in league with them will invariably make arrangements with the police, even before a complaint is made, to block the victim.

In such cases, the other option is to lodge a complaint directly to a magistrate's court. The court can then order the officer-in-charge of the relevant police station to "take necessary steps" or "take legal steps followed by inquiry" or "register as a complaint following inquiry". Such cases are identified as CR cases: those on the Complainant Register.

CR cases are fraught with difficulties, as the police will usually thwart the investigation unless they have no personal interests in the outcome and the victim is now prepared to pay more than the other party to succeed. They may issue a final report, closing the inquiry without trial, or issue a report that will not stand up in court.

The case of Shafikul Islam

The conviction rate in all courts of Bangladesh is only around 10 per cent. The reasons for this include the political and transitory nature of the prosecutors' work and postings, their predisposition towards private practice, and the obstacles posed by the police.

The case of Shafikul Islam is informative. Shafikul was a schoolboy who on 25 August 2000 was allegedly murdered by his stepbrothers and sisters and their relatives in Bhagalpur village in Narayanganj district. According to Shafikul's relatives, his paternal aunt had left her ancestral lands to him since she did not have any children of her own. The murder had thus been motivated by jealousy and spite.

Shafikul's mother, Sakerun Nesa, lodged a murder case against the alleged perpetrators with the Sonargaon police station. Sub Inspector Nazrul Islam was assigned to investigate. However, according to Sakerun, the investigating officer was bribed and did not record the witness statements correctly, instead preparing a report that would allow the suspects to walk free. The magistrate of the Cognizance Court of Narayanganj also allegedly framed the charge in a faulty manner, thereby weakening the case.

During the trial, the public prosecutors of the Narayanganj Session Judge's Court changed several times. They were absent from the court when evidence was taken from witnesses and were indifferent to the trial process. Judges also took leave and showed no interest in speeding the case.

Meanwhile, the accused had been released on bail and had threatened Sakerun that they would kill her too, coming to her house on many occasions. At last she became extremely disappointed and lost hope of getting justice.

At this point, someone suggested to her to apply to the Ministry of Home Affairs for the case to be transferred from the Narayanganj Session Judge's Court to the Speedy Tribunal of Dhaka, which has been appointed to try 'sensational criminal cases' in a speedy manner.

The ministry approved her application and the case was transferred to Speedy Tribunal-4. On 16 April 2007, the tribunal refused bail for one of the accused while the others remained free and again went to threaten the victim's mother.

According to a prosecutor handling the case at the tribunal, the investigating police and prosecutor in Narayanganj had clearly collaborated to fix the case and get the accused off the hook. He concurred with the assertion of the victim's mother that the police had not recorded witness statements correctly and had framed the charges in a defective manner, recording them under both section 302 and 364 of the Penal Code (murder and kidnapping), when as the dead body had been recovered the charge should have been under section 302 alone. However, he noted that already the court had recorded the depositions of 12 witnesses for the prosecution without either judges or prosecutors pointing to the defects of the charges.

The prosecutor in Narayanganj also caused undue delays to the processing of the case before the Speedy Tribunal, not sending the case diary to the SPP's office for more than a month. As the tribunal must complete its work within 135 working days, the tribunal prosecutor had to call the prosecutor of the Narayanganj Session Judge's Court to receive the case diary, and was told

that the prosecutor had not received a copy of the gazette notification for transfer of the case to the Speedy Tribunal-4 of Dhaka. The tribunal prosecutor had to make a photocopy of the notification, which he had received, and send it by courier to Narayanganj.

"Under the Code of Criminal Procedure, the government assigns police to conduct the prosecution in the magistrate's courts"

As regards to the role of the police, persons who should have been included in the investigation report as accused were in fact made witnesses for the prosecution, while many persons who should have been listed as witnesses were ignored completely. The police investigation report did not properly record the full sequence of events, and the information given in the report below the standards set by the Evidence Act.

After more than seven years, Sakerun's struggle for justice ended on 4 November 2007 with the acquittal of all the alleged perpetrators except her stepson, who was given life imprisonment: i.e. 14 years in jail. However, her lawyers are afraid that he may also be acquitted by the High Court Division as soon as the appeal is adjudicated, due to the inconsistencies in the investigation reports and prosecution process.

Police as prosecutors in magistrate's courts

Under sections 492(2) and 495 of the Code of Criminal Procedure, the government assigns police to conduct the prosecution in the magistrate's courts, which deal with around 70 per cent of all cases in the country:

> Section 492 (2). The Chief Metropolitan Magistrate or the District Magistrate, or subject to the control of the District Magistrate, the Sub divisional Magistrate, may, in the absence of the Public Prosecutors, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case.
>
> Section 495. Permission to conduct prosecution: (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below the rank to be prescribed by the Government in this behalf but no person, other the Attorney General, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Government in this behalf, shall be entitled to do so without such permission.
>
> (2) Any such officer shall have the like power of withdrawing the prosecution as is provided by section 494 and the provision of that section shall apply to any withdrawal by such officer.
>
> (3) Any person conducting the prosecution may do so personally or by a pleader.
>
> (4) An officer of police shall not be permitted to conduct the prosecution if he taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

A police officer at the rank of sub inspector normally deals with the prosecution of cases before the court, although these officers do not have law degrees or training in prosecution; they are just transferred from a police station to the job, sometimes as punishment.

"In cases that are tried with police as prosecutors, the battle is imbalanced"

In cases that are tried with police as prosecutors, the battle is imbalanced because the prosecution either fails to prove the charges or the accused are convicted on faulty evidence and reasoning and are acquitted on appeal.

The case of Abul Kalam Azad

The acute problems associated with having police serve the dual role of prosecutors can be seen clearly in the case of Md. Abul Kalam Azad.

Azad, a 33-years-old small businessman having two shops selling household aluminium goods in Khalishpur, Khulna city, was tempted by the field officers of an NGO-based bank, BRAC Bank, to take a loan to improve his business. Following frequent offers by the officials of the BRAC Bank, Azad agreed to mortgage the deed of his home, which had an approximate value of 600,000 Taka (USD 8500), for which he received a 300,000 Taka loan on 10 April 2005 under a 'Medium-Term Loan' programme. Before granting the loan the bank insisted that Azad put his signature on two blank checks, despite having the deed of his house as security.

After receiving the loan, Azad was asked to repay it by monthly installments of 17,700 Taka. He calculated that the money to be repaid to the bank would be at an interest rate of nearly 38 per cent and insisted that the bank limit the interest rate to the agreed rate of 15 per cent.

In response, the BRAC Bank lodged charges of deception and breach of trust against him under sections 406 and 420 of the Penal Code on 13 December 2005, at the Gulshan police station in Dhaka, although the loan dealings were under the jurisdiction of Khulna city, more than 300 kilometers away. In the complaint, Md. Mizanur Rahman, an officer of the bank, alleged that Azad received money from the Head Branch of the BRAC Bank situated under the Gulshan police station in Dhaka and was refusing to repay. Sub Inspector Anisur Rahman submitted an investigation report with the Chief Metropolitan Magistrate's (CMM) Court (now Chief Metropolitan Judicial Magistrate's Court) on 28 January 2006, bringing the charges against Azad, who had meanwhile been paying money to the bank without knowing about the case against him and in 19 installments had repaid 336,300 Taka.

On 25 September 2006, the Khalishpur police arrested Azad at his shop, following an arrest warrant issued by the CMM Court of Dhaka. He was detained in the Khulna District Jail for 23 days and then transferred to the Dhaka Central Jail where he was detained for five days. During the period of 28 days in detention he submitted a petition for bail; however, the court did not grant it: only on October 23 did the CMM Court of Dhaka grant bail.

Having been released from jail, Azad paid a further 85,736 Taka to the bank. According to his lawyer, this should have discharged him from the charge; however, the police who were serving as the prosecution did not understand the legal points. The

magistrate also was ignorant about the application. The court has lingered on the case by using the excuse that the complainant, who had by then switched his job from the BRAC Bank to a governmental department, has to appear. Azad was meanwhile has been forced to commute from Khulna to Dhaka for the ongoing hearings.

Neither the police investigation report nor prosecution police has at any point suggested that it may not have been Azad who had lied but rather that it may have been the BRAC Bank, nor have they raised any questions about the fact that the incident occurred far outside the jurisdiction of the Gulshan police station.

Azad has had to sell one of his shops in order to pay the expenses associated with the trial. The case is still pending with the court. Although the case could be closed at any time, the lack of legal knowledge among both the prosecuting police and the lack of interest and ability of the magistrate have caused it to be prolonged indefinitely.

Conclusion

The authorities of Bangladesh must ensure reforms to the prosecution system as well as the institutions related to the criminal justice system in compliance with the international standards and norms. To this end they should:

1. Establish an independent and permanent prosecution service rather than a disposable one under executive control and train all persons recruited to it.

2. Make specific rules on recruiting of prosecutors to the service through an independent and transparent process.

3. Design a system to monitor and assess the performance of prosecutors and make further improvements to the service.

4. Ensure that prosecutors and the service receive adequate remuneration, equipment and support.

5. Use an Internet network and public information database with access to documents relevant to ongoing trials for the parties to those cases and with general information on events and issues of public importance.

6. Set up an audio-visual documentation system for prosecutions and the proceedings of trials.

7. Install close circuit cameras (CCTV) to monitor activities of court staff and record malpractices and corrupt dealings.

8. Remove the authority of police to act as prosecutors.

9. Inaugurate an independent criminal investigation department comprising of police, lawyers and forensic experts with ample facilities and regular trainings.

10. Introduce a 'One Stop Service Centre' to the courts where parties can receive quality legal support, especially in the drafting of complaints, making of primary inquiries, arranging of medical examinations and recording of testimonies.

Criminal justice in Nepal

Kamal Pathak, Focal Person, Asian Human Rights Commission, Kathmandu, Nepal

A country's criminal justice system is based primarily on the ideals envisioned by the constitution of that country. An independent criminal justice system was established in Nepal along with the new constitution in 1990. That constitution upheld the concept of a fair and an impartial criminal justice system. However, laws enacted after 1990 were not implemented properly or evenly.

After the April 2006 uprising, Nepal in 2007 enacted a new interim constitution, which was prepared in consultation with all major political parties. It is dedicated to the sovereignty of the people and designates the prime minister as the head of state in the place of a king. The concept of equality in justice, with fair and impartial investigations, is again upheld by the interim constitution of Nepal. It aspires for a free and fair criminal justice system, and thus anything contradictory or inconsistent with this aspiration can be deemed unconstitutional.

Criminal justice agencies

The police and office of the attorney general are the most important actors in bringing cases for prosecution before the judiciary of Nepal.

Police

The police are under the general supervision and control of the Ministry of Home Affairs. The cabinet appoints the inspector general of police and other senior police officers. The police are subdivided into the Nepal Public Police Force, Armed Police Force, Guard Police Force, Riot Police Force and Traffic Police Force.

Crime investigating is carried out by the Crime Investigation Department (CID), which is headed by an assistant inspector general of police, under the Nepal Public Police Force, Nepal Police Headquarters.

The CID has police officers organised across five regions, 14 zones, and the 75 districts in Nepal. The regional police offices are each headed by a deputy inspector general of police, and the

Zonal Police Offices are under the command of senior superintendents of police. The district level police offices are under the command of superintendents of police or deputy superintendents of police. The District Police Offices are local investigating bodies with a mandate to investigate cases in their territory. They are the most widespread investigating units, however, not all the districts have separate CIDs. They may also lack experts and important resources for effective and immediate investigation. Regional Police Offices on the other hand are supervising and coordinating bodies that are not directly involved with investigations. They serve as the middlemen between district units and the Central Crime Investigation Department at Nepal Police Headquarters in serious cases.

The CID is divided into units according to the nature of crimes and in order to make the investigating system easier and more systematic: Crime Investigation Groups, National Level Dog Section, Narcotic Control Unit, Crime Investigation School, Crime Research Branch, Foreign Branch, Anti-Terrorist Branch and the Scientific Resources Coordination Branch. The Foreign Branch is divided into three sub-sections: Foreign Politics, Interpol, and Telex. The Anti-Terrorist Branch is divided into internal and external terrorist sections. The Scientific Resources Coordination Branch deals with criminal behaviour, fingerprinting, photography and forensic science. The Crime Research Branch includes the Central Women's Cell, Records Section, Research Section, Crime Investigation Information Section and White Collar Crime Section. Some of these branches, like the Women's Cell, were set up only in recent years. The cell now exists in major cities, including Kathmandu, Biratnagar and Pokhara. Likewise, the Special Crime Investigation Team has been set up to comprise of experts to be called upon in cases where immediate and urgent investigation is required.

Attorney general

The prosecution of crimes is the attorney general's constitutional responsibility. Article 135(2) of the Interim Constitution of Nepal 2007 states that the attorney general should represent the government in cases wherein the rights, interests, or concerns of the government is involved. This article further states that the Attorney General has the power to make the final decision as to whether or not to initiate proceedings in any case on the behalf of Nepal's government in any court or other judicial authority. Article 134(1) states that the attorney general should be the chief legal advisor to the government and advise government officials in all matters regarding constitutional and legal affairs.

Section 17 of the State Cases Act 1993 bequeaths the power of deciding whether or not to initiate judicial proceedings against a suspect to the district government attorney. Therefore, the attorney general functions as the sole prosecutor in Nepal.

> "The Office of the Attorney General in Kathmandu is the highest authority; there are 16 Appellate Prosecutor's Offices, and 75 District Prosecutor's Offices to carry out the work of the attorney general"

The Office of the Attorney General in Kathmandu is the highest authority. The Appellate Prosecutor's Offices correspond to the Appellate Courts, and the District Prosecutor's Offices work alongside the district courts. There are 16 Appellate Prosecutor's Offices, and 75 District Prosecutor's Offices to carry out the work of the attorney general.

Judiciary

Nepal does not have a separate criminal trial court or a criminal bench. According to the current interim constitution, the Supreme Court is the highest court; lower on the judicial hierarchy are the Appellate Courts and the District Courts.

The Supreme Court is a writ jurisdictional court whereby a single bench hears writ petitions and other subsequent hearings are heard by a divisional bench or a full bench as befits the gravity of the case. Decisions of the Supreme Court are final unless there is a flaw in the interpretation of the law or non-observance of past precedents whereupon any case disposed is subjected to review. The prime minister appoints the chief justice in the Supreme Court upon recommendation from the judicial council.

Appellate Courts hear cases as one body or in the form of a divisional bench. The Court of Appeal has the right to exercise and hear writ petitions (excluding writs of certiorari, quo warranto and prohibition). Like the Supreme Court, it does not have a large bench.

District Courts are courts of first instance. There is one for each district and all cases, whether civil or criminal, are subjected to hearing by a single bench. Section 7 of the Judicial Administration Act provides the District Courts with the first instinct of jurisdiction on all kinds of cases within their territory. The jurisdiction includes the power to conduct a trial, take necessary proceedings and or make a judgment.

Criminal investigation and prosecution

Filing of First Information Report

The victim, the victim's relatives or any individual who is aware of a crime can lodge a case at the nearest police station to where the offence has been perpetrated or is likely to be perpetrated. The State Cases Act requires that the complaint, the First Information Report (FIR), be lodged with evidence and information about the alleged perpetrators. The FIR should contain the area and date of commission of the crime, the names of the actual culprits, their actions, evidence and other descriptions regarding the offense.

The State Cases Act provides that if a verbal report is made by anyone, the officer-in-charge of the police station should keep the record in the form of writing as narrated by the person. The police officer should then read out what he has written before the complainant and then keep it in the register book with the person's signature.

If police authorities refuse to file an FIR, the State Cases Act permits the complainant to approach a higher police authority if it exists in the place, or the office of the Chief District Officer (CDO). In the event that the CDO also refuses to register the FIR, then a complainant can go to the Appellate Court or Supreme Court.

It is the prime responsibility of the police to accept an FIR and lead the investigation. But in reality the police regularly refuse to register complaints when the accused are high-level state officials. There are also instances in which police and even the CDO have refuse to register complaints against state security forces or leaders of the Communist Party of Nepal (Maoist). The victims have then moved to Supreme Court.

> "Even if an FIR is registered after a court order, the delay in investigation and obvious reluctance of the police to make inquiries greatly hamper prospects for justice"

The cases of Arjun Lama & Maina Sunuwar

The story of what happened to Arjun Lama illustrates the problems of registering an FIR in Nepal.

On the afternoon of 19 April 2005 Maoists abducted Arjun Bahadur Lama, 48, during a ceremony. According to those who witnessed subsequent events, they marched him through villages in the Kavrepalanchowk district before he disappeared. He was killed in late June 2005.

Advocacy Forum supported the family in filing an FIR but the police in Kavre refused to register it, fearing reprisals from the Maoists. As required by law, the complainants moved to the CDO, but he also refused to register the case. A writ of mandamus was filed in the Supreme Court on 16 July 2007, demanding an order for the police to register the FIR and start impartial investigations and prosecution. At time of writing the case is still pending before the court.

Even if an FIR is registered after a court order, the delay in investigation and obvious reluctance of the police to make inquiries greatly hamper the prospects for justice. In this respect the case of Maina Sunawar is illustrative.

On 19 January 2004, a group of 15 uniformed Royal Nepalese Army (RNA) soldiers took Maina Sunuwar, 15, from her home in Kavrepalanchowk district (see *article 2*, vol. 3, no. 6, pp. 26-28). The next day security forces denied having arrested Maina. Her mother's inquires were denied until April 2004, when she was informed at RNA headquarters in Kathmandu that Maina had been killed. It required another year of sustained international pressure before the army proceeded with an internal inquiry, which mildly sentenced the perpetrators. It wasn't until 13 November 2005, under pressure from the Office of the UN High Commissioner for Human Rights, that the police proceeded with investigations. Her body was discovered illegally buried at the Panchkal army camp. She had been tortured to death, but no further investigations were conducted.

> "Most arrests do not follow legal provisions"

Her family, with legal support from Advocacy Forum, lodged a writ of mandamus at the Supreme Court on 10 January 2007 seeking an order to complete the investigations. It required an additional three Supreme Court orders and another year before police completed a charge sheet in February 2008. The case has spent over four years in the legal system and to date only charges have been filed.

Arrest and interrogation

The investigating police can arrest a suspect according to the information received. Article 24 of the Interim Constitution of Nepal 2007 reads that no suspect should be detained in custody without being informed of the grounds for arrest. Similarly, section 14(1) of the State Cases Act also states that an arrestee should be told why they are being put under arrest. Furthermore, clause 121 of the section on Court Management of the new Civil Code of Nepal prescribes that the arresting officer deliver a notion of the grounds of arrest to the person before detention.

However, most arrests do not follow these legal provisions. Few are made after delivering a notice of the grounds of arrest to the persons. Moreover, suspects are usually immediately handcuffed and detained without any interrogation. The police also fail to provide arrest warrants in most cases and do not give the suspects access to lawyers as required by law. Around 80 per cent of defense lawyers interviewed by Advocacy Forum claim that they are not given access to detainees immediately after their arrest.

Police can in fact arrest persons without warrants according to the nature of the case, but must produce them before court within 24 hours, excluding the period of journey. However, a recent survey of arrestees reveals that around 38 per cent are not taken to court within this 24-hour period.

According to section 9(1) of the State Cases Act, the interrogation of a suspect should be carried out in the presence of a government attorney. However, 44 per cent of arrestees interviewed in 2007 had none present.

Furthermore, section 9(2) of the act says that if any person is suspected or surely known to possess important information about a crime and if they are trustworthy then the investigating police officer should further question the person and document the statement in the written form. The government attorney thereafter authenticates the statement by signing it. Unfortunately, under the current system the investigating police officers often force the accused to accept allegations and fabricate documents through the making of these records. According to the Evidence Act 1974, any statement made by the accused cannot be accepted if the accused was forced or tortured to give it. Nonetheless, the police often use torture as a tool to force a confession or accept an allegation.

The case of Puradi Prasad Pandy

What happened to Puradi Prasad Pandy exemplifies the problems of arrest without warrant and concomitant abuses, including torture, while in detention.

> "The notion that an individual is innocent before being proven guilty is not part of the thinking of police officers in Nepal"

On 16 December 2006 Puradi Prasad Pandey, 20, a farmer living in Kalikot district, was arrested on the charge of killing Khat Devkota. It was rumoured that Maoists had killed Devkota for drunkenness and slander, but his body was found near Prasad's home, and the police arrived with a deed of public inquiry and arrested Prasad, severely torturing him during interrogation before subsequently releasing him. This routine was repeated twice in the following days. According to Prasad, the police did not supply him with any kind of arrest letter and family members were refused access to him while in custody.

With the help of Advocacy Forum, Prasad lodged a Torture Compensation writ petition on 23 February 2007 in the District Court of Kalikot. The police and Maoists have repeatedly threatened Prasad's life if he does not withdraw the petition.

Prasad's case illustrates how the notion that an individual is innocent before being proven guilty is not part of the thinking of police officers in Nepal.

Search and Seizure

If an investigating officer has reasonable cause to suspect that the person interrogated may have material evidence in their possession, whether objects or another individual, the police officer can search for and seize the evidence. The law requires that only female police officers search women, or that they are searched in the presence of another woman. According to section 10(2) of the State Cases Act, the investigating police officer must submit a written request to another police office to search and seize, and when searching a person or place must have present an official at least at the rank of assistant sub-inspector. The section also states that the police officer in charge of the search should prepare a detailed statement of all the material relating to the crime including the place and date of the search and make two copies: one of which must be given to the concerned person and one that should be kept in the office file.

Clause 172 in the section on Court Management of the new Civil Code also states that there should be a probable cause to conduct search and seize and that the police officer needs to inform the person of the reason for the search. The search should also be conducted in the presence of two or more witnesses of good character. They may be independent and responsible residents of the area, or representatives from the concerned municipality or the village development committee. Upon completion of the search, the officer must make a list of all things seized and the places they were respectively found, with signatures from the witnesses.

Prosecution

"The police have responsibility to carry out the investigation related to crimes, while the public prosecutor has authority for prosecution"

The State Cases Act 1993 is critical to the prosecution of suspects. The prosecution begins after the investigating police officers prepare reports of their findings and submit them to the concerned government attorneys. The police can request to terminate the investigation on the grounds that there may be a lack of adequate evidence with which to prosecute the suspect. However, the government attorneys make the final decision as to whether or not to prosecute. The police have complete responsibility to carry out the investigation related to crimes, while the office of public prosecutor has sole authority for prosecution on such cases.

A charge sheet is framed after the prosecutor has compiled all the documents and evidence against the accused. Section 18(1) of the State Cases Act states that the prosecutor, upon examination of the case file shall if it is deemed appropriate submit the charge sheet to the competent judicial authority. If there are no reasonable grounds to justify the submission of a charge sheet, the prosecutor can return the case file together with the evidence to the police.

The charge sheet must state the specific allegation based on the evidence and cite appropriate laws and punishment sought. It must also include the name and residential address of the accused, details of the FIR regarding the crime, description of the crime, allegations made and evidence supporting them, and amount of compensation (if any) that should be given to the aggrieved party.

Adjudication

The judicial process begins only after the prosecutor has submitted the charge sheet to the court. Generally, the trial of a criminal case is carried out by the District Court of the concerned territorial jurisdiction.

However, there are other provisions that allow quasi-judicial institutions to conduct trials and pass sentences. For instance, a custom office may proceed on the crimes underlined by the Import and Export (Control) Act. Many crimes under such legislation allow administrative offices to conduct investigations, prosecute and adjudicate simultaneously.

Trial

The main legal instruments governing the procedures relating to the trial of criminal cases are the section on Court Management of the new Civil Code, the Judicial Administration Act 1991, District Court Regulations, and Evidence Act 1974.

The trial process can be divided into three parts: the bail hearing, post-bail hearings and final hearing.

Bail hearing

When the charge sheet is filed, the judicial trial process begins at once. The accused is produced and the charge sheet presented to the court. The charge sheet is registered and the statement

of the accused is recorded before the judge. The judge then considers bail. This is the first time that bail is available for the suspect; there are no institutions in place that allow a suspect to be released on bail while in police custody.

> "Hearings are often greatly prolonged by the difficulties of the prosecution in producing witnesses"

The sitting judge rules whether or not to grant bail depending on the nature and severity of the charges, and a number of subjective factors. For any offence which is punishable by more than a three-year sentence, bail will be refused provided that the evidence submitted with the charge sheet provides grounds to reasonably establish the detainee's involvement in the crime. For lesser charges, bail may be offered at the discretion of the sitting judge. Typically bail will be granted with a bond of land, cash, or other property. In rare cases where the charges are not severe, bail may be offered without a bond. The amount of the bond is typically outside the means of many citizens, who either do not own property of sufficient value or are unable to appraise the value of the property they do own. Thus, only wealthy detainees are typically able to afford to be released on bail.

An accused who is not granted bail or is unable to produce the required bond is returned to custody to await the trial date. In the event that the accused is convicted of the crime, the days spent in custody while awaiting trial will be counted against the sentence.

Post-bail hearings

There are two provisions for re-evaluating a defendant's bail orders if bail was initially denied.

If the original court, upon hearing witnesses testify to depositions made during the investigation, deems that depositions that affected the initial bail hearing were false then bail will be re-evaluated.

Alternatively, there may be a post-bail hearing in an Appellate Court, where the accused or representatives of the accused submit to the court a petition to reverse the order of the lower court. The higher court may review the decision of the lower court and correct a bail order if finding it defective. However, this happens very rarely because many detainees are unaware of this provision and go to trial without being represented by a lawyer.

The exhibits are then confirmed and the testimonies of witnesses and expert witnesses are heard. Unlike courts in many other countries, witnesses in Nepal are heard before, not during, the final hearing. These hearings are often greatly prolonged by the difficulties of the prosecution in producing witnesses.

Final hearing

After all the witnesses have been heard, the final hearing is scheduled. It begins with the opening statement of the prosecutor wherein the charges against the accused are supported with facts and evidence and sentencing is demanded as per the charge sheet. Next, the defense offers supporting facts and evidence in

favour of the accused person. The prosecution is entitled to a final closing argument, rebutting this defense. Finally, the court passes a verdict, deciding on both the facts of the case and the sentence. Since Nepal has no jury system, the judge is the sole arbiter.

"The judge is given great discretionary power to decide the type of punishment and length of imprisonment"

If the accused is convicted of the crime the judge gives a sentence. There are very few formal regulations for sentencing. The judge is given great discretionary power to decide the type of punishment and length of imprisonment. In theory the judge considers the aggravating or mitigating circumstances, and background and culpability of the convicted person when determining the sentence. However, since there are no specific formulae, there is great inconsistency from one court to the next. But on the whole there are few judges who think in terms of reform of convicts and as such severe punishments are frequently imposed for relatively simple crimes.

The law guarantees the right to appeal. An appeal must be registered within 70 days of the sentence. This right is exercised after virtually all convictions and so the appeal process is greatly prolonged by the overload of cases on the Appellate Courts.

Criminal justice problems and possible solutions

The following points are considerably abbreviated from the conclusions of three studies: an Advocacy Forum survey of judges, lawyers, politicians, detainees, convicts and victims on the problems with the criminal justice system in 2007; the Center for Legal Research and Resource Development's Baseline Survey of the Criminal Justice System of 2003; and a report of Penal Reform International in association with the Centre for Victims of Torture, Nepal from 2000. The Advocacy Forum study finds that despite considerable political changes since 2006, few of the problems identified in the earlier reports have been remedied, and few of the recommended reforms have been effectively implemented.

The major problems with the criminal justice system in Nepal are:

1. The insensitivity of police officers, government attorneys, trial judges and lawyers to the importance of fair and free trials.

2. A prevailing culture of impunity that allows for corrupt and criminal acts among officials without fear of reprimand.

3. Numerous discrepancies in domestic laws, which remain vague, inconsistent, or in conflict with Nepal's international commitments.

4. Institutionalised torture and illegal detention.

5. Insufficient objective norms in law regarding bail, sentencing and identification of bogus cases.

6. Exclusive authority of police over all facets of criminal investigations.

7. Police noncompliance with court-ordered investigations into police affairs.

Some possible means to address these problems are through better legislation, more evidence-based investigations, better checks and balances inside institutions,

> "Public prosecutors can assist in forcing change by filtering out obviously bogus cases, or those that are manifestly based on self-incrimination"

Legislation

A comprehensive and uniform criminal code is long overdue. Existing laws are either far too vague—as regarding bail requirements and sentencing procedures—or are in conflict with other laws or international standards: the Compensation of Torture Act for instance fails to criminalize torture as required by Nepal's ratification of the UN Convention against Torture in 1991. Under the Compensation of Torture Act, 1996, torture is not defined as a criminal act, and at worst "institutional action" is taken against perpetrators, which falls far short of what is envisaged by the international treaty.

A project to draft a comprehensive code was initiated as early as 1973, but was never instituted. As Nepal looks forward to a new era of democracy, now is an opportune time to construct a comprehensive criminal code that rationalizes the numerous legislative inconsistencies, specifies objective standards, and firmly applies international norms.

Evidence-based investigation

A fair and free trail is dependent on adequate evidence obtained by scientific means or provided by witnesses via thorough torture and coercion-free investigation. To change the existing confession-based investigative practices into evidence-based investigative practices police must be appropriately trained and equipped. Such work must be combined with an effort to reform the police image: Advocacy Forum's survey found that around 40 per cent of crime victims do not report to police for a want of trust.

To support and necessitate these changes, judges and government attorneys must refuse to allow self-incrimination, or dismiss any case when the accused person's constitutional or human rights have been violated. For courts to do this, judges must specifically ask detainees if they have been tortured during their detention, as per the requirements of the Evidence Act 1974. Advocacy Forum's study found that only 37 per cent of accused were asked whether or not they had been tortured. There must also be significant changes in the torture compensation act, which at present requires a medical checkup, but fails to necessitate that an independent practitioner performs it. A total of 31 per cent of accused persons interviewed reported that they did not receive a health checkup at all.

Public prosecutors can also assist in forcing change by filtering out obviously bogus cases, or those that are manifestly based on self-incrimination. By refusing to allow cases with insufficient

or inappropriate evidence to go to the courts, the prosecutors will remove a huge burden from the courts time, and force police investigators to perform more thorough investigations.

"Government attorneys should be incorporated into the investigation process"

Government attorneys should be incorporated into the investigation process, and the investigation should be thorough and systematic. Currently, investigators often have an insufficient understanding of scientific techniques, and evidence is lost for this reason. Investigators must be specialized and separate from other police authorities. Education and training that teaches systematic investigation procedures is needed, whether scientific equipment is available or not.

Checks and balances

Until perpetrators of human rights offences, particularly high ranking officials, are punished harshly for their illegal actions, the culture of impunity will remain and there will be very little incentive to change. The establishment of more effective checks and balances and internal investigative measures is essential to check impunity.

Currently, the Police Act places the power of investigation, prosecution and adjudication solely under the administration of the Special Police Tribunal, which includes a police officer as one of its members. This system provides no safeguards to ensure impartial proceedings, and thus is susceptible to corruption and injustice. To ensure accountability, the practice of self-investigation, prosecution, and adjudication must be discontinued, and a new separate and impartial institution be formed to perform these functions. The Police Special Court should be under the supervisory control of the Supreme Court. Furthermore, its jurisdiction should be limited to offences involving a pecuniary penalty, while all other sentencing is the duty of the ordinary courts.

To prevent torture, interrogation must be carried out in the presence of a lawyer for the detainee. If the suspect cannot afford one, this service should be provided by the state. Private rooms should be available for consultation with legal counsel, and police should supply the defence attorney with the documents needed to appear in court.

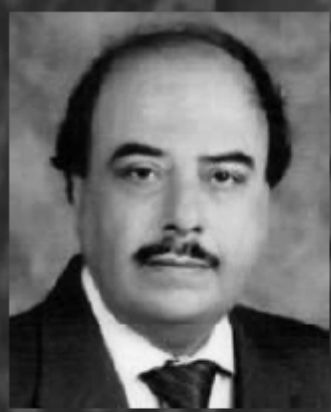
Final thoughts

No criminal justice system is incorruptible. While reforming legislation, using more scientific evidence and improving checks and balances may help to create a workable and just system, it is ultimately the people working within the system that shape it. Thus, a fair criminal justice system will only be realized by promoting progressive thinking, punishing corruption or criminal action, and appointing to significant positions individuals that make human rights and the rule of law their uppermost priorities. Improvements should at all times foster respect among police and other officials for individual rights, from the lowest-ranking police officer to the inspector general.

New publication: *The State of Human Rights in Eleven Asian Nations 2007*

The State of Human Rights in Eleven Asian Nations – 2007






Bangladesh • Burma • Cambodia
India • Indonesia • Nepal • Pakistan
Philippines • Republic of Korea
Sri Lanka • Thailand

AHRC

ASIAN HUMAN RIGHTS COMMISSION

Available online at: www.ahrchk.net/pub

In this issue of *article 2*

FOCUS: Prosecutions in Asia

ISSN 1811702-3

Printed on recycled paper

article 2 is published by the Asian Legal Resource Centre (ALRC) in conjuction with *Human Rights SOLIDARITY*, published online by the Asian Human Rights Commission (AHRC).

ALRC is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. ALRC seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.

ALRC invites submissions to ***article 2*** by interested persons and organisations concerned with implementation of human rights standards in the region.

For further details, email the editor: editor@article2.org

Back issues of *article 2* available online:

www.article2.org

Annual Subscription Fee (4 issues)

Hong Kong HK$250
Asian Countries US$35
Outside Asia US$50

Asian Legal Resource Centre
Floor 19 , Go-Up Commercial Building
998 Canton Road, Mongkok, Kowloon
Hong Kong SAR, China
Tel: +(852) 2698-6339
Fax: +(852) 2698-6367
E-mail: editor@article2.org
Website: www.article2.org