SOUTH AFRICA

The criminal justice system and the protection of human rights: the role of the prosecution service

In February 1998 the Parliament of South Africa, through its Portfolio Committee on Justice, began debating a vital piece of legislation which is intended to increase the accountability of the country's troubled prosecution service. The National Prosecuting Authority Bill, drafted in terms of Section 179 of the Constitution of the Republic of South Africa, 1996, has as its broad purpose the balancing of independence and accountability in the prosecution of crimes by the State. The Bill, if passed into law, will most immediately affect the position of the currently-serving Attorneys-General. Achieving the necessary balance will be a difficult matter, but is crucial to setting the prosecution service on the right course at a time of widespread public concern at the capacity of the criminal justice system to deal with high levels of crime. This lack of confidence in the capacity of the police, the prosecution service and the courts to address the crisis is reflected in the alarming rise in support for the restoration of the death penalty and the incidents of violent "self-help justice" which have occurred in different parts of the country.

In October 1997 Amnesty International, in the belief that the draft National Prosecuting Authority Bill could potentially result in improvements to the functioning of the criminal justice system and thereby to the protection of human rights, forwarded comments and recommendations on the Bill to the South African Government and the Chairperson of the parliamentary Portfolio Committee on Justice. In the same month a representative of the organization presented the submission to the Truth and Reconciliation Commission (TRC), during its three-day hearings in Johannesburg on the role of the legal system in the human rights violations which took place under the former Government.The views put forward reflected the results of an inquiry conducted by Amnesty International earlier that year. On 3 February 1998 the organization sent its submission formally to the Portfolio Committee on Justice in the context of the Committee's public hearings on the Bill scheduled for mid-February.

The submission, which is printed on pages 5-36 below, looks at the importance of the draft legislation in the context of aspects of the previous history of the Office of Attorney-General and after reviewing the specific crisis which had developed in the province of KwaZulu Natal over prosecution decisions taken in political violence cases. The recommendations in Amnesty International's submission were made in light, also, of the United Nations (UN) Guidelines on the Role of Prosecutors, which were "formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings".

As noted in Part II of the submission, the proposed legislation will apparently reverse the consequences of the 1992 Attorney-General Act which had made these law officers independent of the control of the Minister of Justice. Prior to 1992 the Attorney-General exercised authority and performed functions of the office subject to the control and direction of the Minister. This earlier period had been characterised by the possession and use by the Attorneys-General of extraordinary powers, for instance, with respect to the withholding of bail and the detention and compulsion of witnesses. In this and other respects the Attorneys-General appeared to be indistinguishable from the then Government in its use of the law to persecute its opponents, a situation which must inevitably have contributed to the profound alienation from and distrust of the criminal justice system on the part of the majority of South Africans. The 1992 Act, hastily passed by the then Government during its negotiations with formerly banned opposition parties, gave the Attorneys-General full authority to prosecute on behalf of the State and reduced the role of the Minister to that of coordinating their functions. The Act imposed few obligations on them for reporting to the Minister or the Parliament, and created cumbersome and inadequate procedures for the suspension or removal of an Attorney-General.

At the TRC's October 1997 hearings, former and currently-serving Attorneys-General for the most part denied that they had made decisions on prosecution matters at the direction of the Minister of Justice prior to 1992, but said they had only been implementing the existing laws. At the same time and somewhat paradoxically, they emphasised the importance of their independence from the Minister as provided under the 1992 legislation. In meetings with members of South Africa's organized legal profession and human rights monitors in early 1997, Amnesty International's representatives encountered strong skepticism of the merits of this independence created for the Attorneys-General by the former Government on the eve of the negotiated political transition. As the non-governmental Human Rights Committee noted in a press article in 1995, despite allegations that the Attorneys-General were failing to serve the interests of justice there were no remedies against that failure, "no way to ensure that the day-to-day exercise of power, which concern[ed] matters of vital public concern, [was] not being abused".[1]

[1]Cited below in note 59

In relation to this very concern, Amnesty International had investigated the controversies which had emerged in the province of KwaZulu Natal over the investigation and prosecution of those responsible for grave violations of human rights. As noted in Part I of the submission below, the conflict which developed between the provincial Attorney-General and those involved in the investigation of these crimes was exacerbated by the lack of any appropriate means of adjudication and accountability. For a province which had been so long battered by political violence and undermined by a politically-manipulated law enforcement agency, the failure of the prosecution service to confront this situation effectively and impartially deepened the crisis. In a situation where the police had a poor reputation as investigators of crime, the effects of which were compounded by political bias, the traditional division of labour between the police and the Office of the Attorney-General needed to be re-evaluated. There was need for a more strategic and multi-agency approach to the investigation and prosecution of politically-motivated crimes. As reported below, Amnesty International concluded from its discussions with concerned individuals and organizations that the Office of the Attorney-General had failed to take such an approach. Furthermore, as was evident in a number of high-profile cases which had been investigated by the nationally-appointed Investigation Task Unit, this failure in certain instances effectively obstructed those investigations and prevented a prosecution approach which together may have led to the resolution of a number of cases of political killings linked to hit-squads operating in the province.[2]

[2]On 29 October 1997 after Amnesty International's representative had presented the organization's submission at the TRC's legal hearings, the Attorney-General for KwaZulu Natal, Advocate Tim McNally, present at the hearings, requested the right to question the witness. His ensuing questions appeared directed to establish mainly (1) that the representative lacked credibility on the grounds that she was not a lawyer; (2) that the courteous exchange between himself and Amnesty International's representatives in February 1997 was not reflected in the submission; (3) that he had cooperated with the Investigation Task Unit, as shown by his agreeing to second two members of staff to the Unit, and had apologized to Advocate Carl Koenig for having temporarily removed his authority to prosecute; and (4) that the Unit, including its commanding officer, Lieutenant-Colonel Frank Dutton, were in full agreement with him on the question of not calling certain witnesses to the prosecution during the trial of former General Magnus Malan and 19 others. With respect to the first point, the submission both reflects the findings of Amnesty International's representatives from their February 1997 inquiry and was prepared in close consultation with one of Amnesty International's Legal Advisers at its International Secretariat in London. On the second issue, the organization's representative acknowledged to Advocate McNally that he had indeed conducted the meeting in February in an open and courteous manner, but Amnesty International had to reach its final conclusions based on all of the evidence it had gathered. Regarding the third area of concern, the Attorney-General's agreement to second staff to the Unit would seem to have shown a willingness to cooperate with it. However, as Amnesty International's representative said in reply, the consequences of this secondment did not seem to have had much impact on the process of reaching final decisions on prosecution or the conduct of proceedings. Finally, on the substantial issue of the calling of certain witnesses in the Malan trial, Amnesty International continues to maintain the position as stated in its submission (at pages 22-25 below).

Amnesty International has attempted to obtain a transcript of the exchange between its representative and Advocate McNally, but has been advised by the TRC that to date they have been unable to recover it due to recording difficulties.

The National Prosecuting Authority, which would be established if Parliament were to pass the proposed legislation, could be a focus, as noted in Part I of the submission below, for developing more strategic approaches on crimes identified as national priorities, for injecting more accountability into the criminal justice system, for raising standards of professionalism among the staff of the prosecution service, and for providing a means to deal with complaints about decisions on prosecution or the conduct of a prosecution. At the same time, it will be vital to achieve in the legislation a balance between independence from political interference and accountability to the political process for the investigation and prosecution of crime. In light of the seriousness of the concerns expressed to Amnesty International during its inquiry in 1997, the organization in its October submission had recommended that there should be parliamentary hearings on the proposed legislation.

Amnesty International's recommendations on the draft National Prosecuting Authority Bill, elaborated in Part II of the submission below, include, in brief, that

1. In the appointment of the National Director of Public Prosecutions (NDPP), the President should act on the recommendations of a committee which is clearly beyond political influence and designed to ensure the highest qualifications of the office holder.
2. To help protect the independence of the office the term of appointment should be beyond the term of the President and there should be no provision for reappointment.
3. The procedures and grounds for suspension of the NDPP should be consistent with Articles 21 and 22 of the UN Guidelines on the Role of Prosecutors and Section 179, in particular Section 179 (4), of the Constitution.
4. The functions of the NDPP should include the requirement to act at all times consistently with Article 13 of the UN Guidelines which, inter alia, requires prosecutors to carry out their functions impartially and to act in the public interest.
5. To enhance the accountability of the office the NDPP should be obliged to table in the national parliament annual reports and a list of case-related reports and publish in the Government Gazette any prosecution policies or directives issued by the NDPP.
6. The legislation should indicate the full scope of the NDPP's power to "review" a decision on prosecution by a provincial Director of Public Prosecutions (DPP). The NDPP should be required to provide full, written reasons for decisions taken in such a review, and to place them before Parliament.

7. A stricter safeguard in this review process could be considered, involving the NDPP allocating the case file to an independent prosecutor for review.
8. With respect to the provincial DPPs, the same recommendations on the appointment process, term of office, and grounds and procedures for suspension or dismissal of the NDPP should also apply at the provincial level.

The following pages contain the full text of Amnesty International's submission together with an appendix, the United Nations Guidelines on the Role of Prosecutors.

THE CRIMINAL JUSTICE SYSTEM AND THE PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA: THE ROLE OF THE PROSECUTION SERVICE

Comments and recommendations on the draft National Prosecuting Authority Bill, 1997, in the contexts of the controversies surrounding the role of the Office of the Attorney-General for KwaZulu Natal and other concerns.

Amnesty International, October 1997

Since South Africa's first non-racial elections of April 1994 there seems to have developed a widely acknowledged national crisis of confidence in the capacity of the criminal justice system to deal with the high level of non-political crime, as well as with continuing incidents of political violence in KwaZulu Natal and elsewhere. Amnesty International has publicly expressed its concern about the resurgence of support for the death penalty and incidents of violent "self-help justice" - dramatically so in the Western Cape Province - which appear to reflect a despair in the capacity of the police, the prosecution service and the courts to address effectively rampant criminality.[3] This crisis was explicitly acknowledged in the May 1996 *National Crime Prevention Strategy* document produced by an interdepartmental team, including the Departments of Correctional Services, Justice, and Safety and Security among others. At paragraph 4.11.1 they note that

> *"Along with the absence of effective victim empowerment strategies and victim aid services, the historically rooted problems with the popular credibility of the law enforcement agencies and the slow process of building public confidence in the criminal justice system as a whole, has contributed to a vicious cycle of defence and revenge through mechanisms of private and informal justice. This may take both the socially constructive forms of community policing...as well as the more sinister forms such as vigilantism, gang formation, and the establishment of private para-military groups. These latter developments have contributed to spirals of revenge and retribution and have often been transformed into criminal operations in their own right. The magnitude of the destabilising impact of developing sub-economies based on the trade in arms, contract murder and protection cannot be overstated."*

These concerns are undoubtedly motivating the development of an important piece of legislation which is likely to be debated by the national Parliament in 1998. In

[3] As for instance in *Southern Africa: Policing and human rights in the Southern African Development Community (SADC)*, AI Index: AFR 03/02/97 (April 1997); *An open letter to all members of the Constitutional Assembly of South Africa*, TG:AFR/53/96.01 (1 February 1996); Address by Pierre Sané, Secretary General of Amnesty International, Transvaal Northern Technikon, Shoshanguve, South Africa, 9 November 1995, and in various interviews with broadcasting and print media during visits to South Africa.

forwarding to the Parliament our comments and recommendations on the draft National Prosecuting Authority Bill, Amnesty International hopes to contribute to a legislative process which could result in improvements to the functioning of the criminal justice system and thereby the strengthening of human rights in the country. The organization also hopes that the newly legislated authority will provide an appropriate structural solution to such situations of conflict, for instance, which had emerged in the province of KwaZulu Natal from 1995 over the investigation and prosecution of those responsible for grave violations of human rights. Amnesty International undertook an inquiry into this particular controversy and in Part I of this memorandum we report on the results of that investigation, as a vehicle for illustrating the need for improved accountability within the prosecution service. Part II of this paper contains Amnesty International's recommendations on the draft National Prosecuting Authority Bill.

Part I : The Criminal Justice System and the problem of impunity for perpetrators of human rights violations in KwaZulu Natal

> "*The Natal Law Society notes with concern the comments of the Presiding Judge, Mr Justice Hugo, in acquitting General Malan and his co-accused, regarding the conduct of the prosecution by the Attorney-General, Mr McNally.*
>
> *In order for the public to have full confidence in the Administration of Justice, it is vital that cases with a high political profile such as the Malan case, are fully ventilated before the Courts. It is disturbing, in these circumstances, that the Judge should have seen fit to criticise the prosecution for not calling several state witnesses, who could have corroborated the evidence of the three main state witnesses. In addition, the Judge referred to the failure of the State to call any evidence to justify certain of the charges against the accused.*
>
> *While the Natal Law Society is satisfied that, on the evidence tendered, the decision of the court is correct, it is alarmed that, notwithstanding a finding by the Judge that the KwaMakhutha massacre was carried out by Inkatha supporters trained by the SADF [South African Defence Force] in Caprivi, the State was unable to secure a conviction against anyone for the offence."*
>
> (Statement released by the Natal Law Society in the wake of the acquittal of the accused in the so-called Malan trial[4] by the Supreme Court in Durban, October 1996)

[4]*The State versus Peter Msane & 19 Others*, Supreme Court of South Africa, Durban and Coast Local Division, Case No. CC1/96.

In February 1997 two Amnesty International representatives visited South Africa to inquire into allegations of bias in decision-making and in the conduct of prosecutions by the office of the Attorney-General for KwaZulu Natal, in relation to cases of political violence including where the authorities may have been implicated.The outcome of the trial of former General Magnus Malan and 19 others, who had been charged with murder and conspiracy to murder in connection with the 1987 massacre of 13 people in KwaMakhutha township near Durban, had served to re-awaken a long-standing controversy surrounding the conduct and motivations of the Attorney-General, Advocate Tim McNally, who had prosecuted the accused in the Malan trial.[5] Whatever the reality of the allegations, Amnesty International viewed with concern the public expressions of a lack of confidence in the effectiveness and impartiality of the criminal justice system in a province that has been battered for some ten years by political violence and undermined by a politically-manipulated law enforcement agency shown to have been implicated in the violence. As noted in another context,

> "The rule of law in a democracy requires the public's ongoing consent and confidence in order to survive. Any widespread unease with the essential fairness of [the] justice system can cripple it. Perception becomes reality when suspicion of injustice is allowed to fester. The system must be capable of quickly and convincingly resolving any such doubts".[6]

[5]Advocate McNally has been the Attorney-General for this province since December 1992.

[6]Stephen Owen, *Discretion to Prosecute Inquiry Commissioner's Report,* Province of British Columbia, Canada, November 1990, Vol.1, p.111. Mr Owen, then Ombudsman for British Columbia, was the sole commissioner in this inquiry.

This observation is certainly applicable to South Africa with its legacy of a criminal justice system which had been skewed to serve the interests of political repression for many decades. The failures or worse of the criminal justice system in KwaZulu Natal (formerly Natal and the "homeland" of KwaZulu) have been at the heart of many complaints made to Amnesty International by human rights lawyers and monitors, survivors as well as witnesses to human rights violations, members of political parties and other concerned individuals.[7] They identified as a major factor in the prolongation of the violence the absence of effective investigations and prosecutions of known perpetrators, with the paucity of prosecutions being largely attributed to problems of will and capacity amongst the police. As noted during the course of one judicial inquiry, "this failure or inability to bring perpetrators to account is itself a substantial contributory cause to further violence because it encourages the view amongst perpetrators of violence that they can continue their actions with impunity".[8] Furthermore, the consequences of these failures in criminal investigations and, inevitably, in prosecutions, was to encourage a belief in many residents that it was "better to take the law into their own hands and to turn to acts of retribution rather than to rely on the police for protection and justice".[9]

Concerns regarding the role of the police in investigations

In a criminal justice system traditionally based on a division of labour between the police, who have responsibility for investigating crime, and the Office of the Attorney-General with its discretion to decide on the basis of a police investigation "docket" if there is a basis for prosecuting any person, any inadequacies in the police investigations will have a direct impact upon the decisions taken by the Attorney-General. This will especially be the case where the Attorney-General does not use the discretion which has been available to the office to direct the police to undertake further investigations to close gaps or otherwise improve the quality of evidence in a

[7] Amnesty International has reported and commented on these concerns particularly in *South Africa: Political Killings and Torture in KwaZulu Natal* (May 1996); *Amnesty International Delegation in South Africa Issues Call for Urgent Steps to End Killings in KwaZulu Natal* (November 1995); *South Africa State of Fear: Security force complicity in torture and political killings, 1990-1992* (June 1992).

[8] *Interim Report of the Wallis Sub-Committee of the Goldstone Commission*, 31 August 1993, p.12. The Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, chaired by Mr Justice Richard Goldstone, was established in 1991 and held hearings in different parts of South Africa including in KwaZulu Natal.

[9] *Submissions and recommendations concerning the investigation of unrest related offences, the administration of justice and other aspects relating to the violence in Natal - 1 December 1992,* prepared by the Legal Resources Centre (Durban), p.2.

docket. In this regard the styles of the Attorneys-General have varied, with consequences for the administration of justice.

In KwaZulu Natal, as elsewhere in the country, the police have had a poor reputation as investigators. The current police leadership has acknowledged this situation publicly and in meetings with Amnesty International's representatives since 1994. The high proportion of Criminal Investigation Department (CID) officers with no formal training and often working under poor conditions has contributed over the years to a reliance upon coercive, "confession-oriented" investigations and on informants. These problems have been compounded by the past political use of the police and the under-resourcing of policing in black residential areas.

The incompetence and bias of the former KwaZulu "homeland" police force, which in 1995/6 was incorporated into the South African Police Service, was particularly notorious and the subject of adverse comment by judges and magistrates presiding in trials and inquests, by commissions of inquiry and by members of the Office of the Attorney-General, among others. The area of jurisdiction of the KwaZulu Police included densely populated black townships in Greater Durban, as well as rural areas falling under homeland control. In his second interim report for the Goldstone Commission, Advocate Malcolm Wallis reviewed the evidence relating to five incidents of murder and other crimes in which members of the KwaZulu Police were themselves involved in illegal or potentially illegal conduct. The KwaZulu Police had been charged with the responsibility for the investigation of these matters. In each case, Advocate Wallis concluded, "the investigation [was] characterised by neglect, delay, disregard of elementary procedures and a failure to bring offenders to book. In [one] case...no investigation at all was undertaken".[10]

The then Deputy Attorney-General, Advocate Chris Macadam, in a letter forwarded to the Wallis Committee, summarized the problems with the standard of investigation of murder cases in the Greater Durban area by the KwaZulu Police. He noted, among other problems, vague and incomplete witness statements with no attempt to corroborate their accounts or follow-up on issues they might have raised in their statements, no proper examination of the scene of crime, failure to hold identification parades, loss of evidence, and the failure of investigating officers to bring accused, witnesses or exhibits to court on request. As a result of these flaws, he found, "dockets have to be extensively queried by this office".[11]

[10] *Second Interim Report of the Wallis Subcommittee of the Goldstone Commission*, February 1994, p.15.

[11] Letter dated 7 September 1993.

In one case which was concluded in the Supreme Court in 1995, two suspended KwaZulu Police officers and one other person were convicted on six counts of murder. The trial judge, Mr Justice Nick van der Reyden, commented that initially he had viewed the conduct of the original police investigation as incompetent, a systematic failure of the investigation by the KwaZulu Police into four of the murders and that, to all intents and purposes, no investigation had taken place. However, having now heard the uncontroverted evidence of the accused that they had acted under orders from higher authorities, the court could now see it as the intentional impeding of the proper investigation into the killings.[12]

In a separate case arising from the torture and murder of eight men attempting to distribute election pamphlets in the Ndwedwe area north of Durban in April 1994, the trial judge commented while delivering his judgment

> "There are, however, certain other things I wish to say before I finish my judgment on the merits, and that is that we are alarmed and distressed at what appears to have been - we may be wrong in this - a failure to follow up all possible leads. We know that the old man... was present throughout. He must have seen all that happened. It may be that he is now dead and not available as a witness, but we would have otherwise have expected him to give evidence. There is the chief's so-called brother...who came to the office with accused No.5 and there are various people named by accused No.5 as having been present. We have had no information placed before us as to what happened to them, whether they were arrested, put on an identification parade, or anything of the nature.

[12]Summary of the Judge's comments in *The State versus Romeo Mbambo, Brian Gcina Mkhize and Israel Hlongwane* (North Eastern Circuit Local Division Court Case No. CC123/94) for the murder of a police officer, who had been attempting to investigate politically-motivated killings, and five others. The Judge, who delivered his final ruling in the Durban Supreme Court, said that "this is a case of exceptional seriousness, which would have justified their imprisonment for life...had it not been for mitigating factors...and the fact that the accused acted on instructions from people of higher authority". He said that it was the duty of the authorities to investigate the allegations made by the defendants. "If those authorities do not take the relevant action, I will call for the full transcript of these proceedings to be forwarded to the Minister of Justice and the Minister of Safety and Security" (The Star, Johannesburg, 30 August 1995).

> There is also the evidence of the chief...who said that when this was going on the security guards were a matter of a few yards away. Have statements been obtained from them, or were statements obtained from them then? To do so now, at the time [the new prosecutor] came into the case, would be hopeless. It had to be done in April and May of last year. We do not know."[13]

The Investigation Task Unit and the Attorney-General

Faced with these kinds of legacies and the continuing political violence in KwaZulu Natal, the new minister responsible for the police in President Mandela's Cabinet, Mr F. S. Mufamadi, appointed an Investigation Task Unit (ITU) in August 1994. The ITU was instructed to investigate, among other things, alleged hit-squad activity within the ranks of the police. In September 1994 its mandate was extended to include the investigation of allegations that African National Congress (ANC)-aligned "self-defence units" were involved in organized violence in the Midlands area of the province. The ITU, which included detectives and civilian support staff, were to report to the Minister of Safety and Security through an Investigation Task Board (ITB) composed of three lawyers. In this respect they operated outside police ranks and controls. In addition to the ITB's legal supervision, the ITU received the support and advice of one and sometimes two state advocates seconded from the Office of the Attorney-General. Two European governments seconded senior police officers to the ITU to be present as observers with full access to the Unit's operations.

[13]Judgment delivered on 13 October 1995 in *The State versus Bongani Shangase, Siyabonga Msomi, Sifiso Nzama, Sithembiso Mngoma, Qhaphela Buzuyise Dladla*, Supreme Court of South Africa, Durban and Coast Local Division, Case No.CC95/95, pp. 44-45. Three prosecutors had been involved in this case, the last one of whom, Deputy Attorney-General Macadam, had been, as the Mr Justice Wilson noted, "pitchforked into the trial halfway through, and [had] endeavoured to close some of the loopholes [in the initial preparation of the case]" (pp.36-37).

The senior police officer heading the work of the ITU was Lieutenant-Colonel Frank Dutton, whose exemplary detective work had been singled out by the presiding judge in the trial of five police officers for the killing of 11 people at Trust Feed, Natal.[14] The ITU's work was in many respects a a continuation of investigations which had begun under the auspices of the Goldstone Commission after 1991 and the Transitional Executive Council in the months prior to the April 1994 elections. Lieutenant-Colonel Dutton and some of the other detectives in the ITU as well as one of the seconded state advocates, Carl Koenig, had been involved in these earlier investigations.

It was to be anticipated, given the nature of its brief, that the ITU and its individual members would experience hostility and obstruction from different quarters, including from within the police and other sectors of the security forces and intelligence services. The Inkatha Freedom Party (IFP), then still locked in mortal conflict with the ANC and its allies, frequently accused the ITU of bias and refused to co-operate with its investigations.[15] However, it was the difficult relationship with the province's Attorney-General which was to prove the most debilitating for the work of the ITU. Many aspects of the unfolding conflict between them are well-known, but are summarized here as they form the background to Amnesty International's inquiry.

[14]In his ruling in the Pietermaritzburg Supreme Court in April 1992 against the five officers found guilty of murder of 11 people, the judge commented extensively on the cover-up involving officers of the South African and KwaZulu Police. He noted the "extreme irregularity" of the interventions of one of these officers, who, in 1990 and 1991, had been given responsibility for investigating political killings and allegations of police misconduct. The judge commented positively on the work of (then) Captain Dutton and Warrent Officer Wilson Magadla who had taken over the case in July 1991 and battled against the police hierarchy to ensure that the police officers involved in the killings were brought to justice.

[15]In the highly politically polarized context of KwaZulu Natal, creating an investigation body which is generally accepted as impartial has proven very difficult. The IFP, through its then Secretary General, raised its concerns regarding the ITU with an Amnesty International delegation in November 1995. Their concern was mainly one of bias in the focus of the investigations, but at the same time they made it clear that they were not prepared to co-operate with the ITU. The problem thus became something of a vicious circle. From Amnesty International's point of view, the Government has an obligation constitutionally and under international human rights law to ensure respect for the right to life of all persons within its territory or jurisdiction. Where there exists grounds for believing that members of the security forces are involved in politically-directed assassination squads, then the Government has an obligation to ensure that effective, independent investigations take place. Inevitably, because of the history of the military and police support for Inkatha in its conflict with ANC-aligned organizations before the 1994 elections, the ITU would be involved in investigating the activities of certain IFP members. In interviews with Amnesty International neither of the European police observers who monitored the ITU's operations concurred with the allegations of bias made against it.

The tensions between them emerged into the public domain in September 1995 when the Attorney-General issued a press statement noting his decision not to prosecute in a case which had been investigated by the ITU. The case concerned an alleged conspiracy to murder a KwaZulu Police officer, Captain Masinga, and involved eight people, some of whom held public office. The Attorney-General's statement named the suspects, gave details of the allegations against them, and named the key witness and the member of the ITU, Advocate Carl Koenig, who had apparently recommended the prosecution of the suspects. His stated reasons for refusing to proceed with the prosecution related mainly to his view on the credibility of the named witness. Prior to the publication of this statement the ITB had urged the Attorney-General not to release it on several grounds, including the likelihood that it would increase the danger to people who had made statements to the police in the matter, that it contained inaccuracies, and, were the case to be pursued in the future, it might prejudice the prospects for a successful prosecution. However, with the release of the statement to the media, the ITB felt compelled to reply publicly, reiterating their concerns and their confidence that there existed a *prima facie* case against the suspects.[16]

Two days after the ITB issued its press release the Attorney-General faxed a letter to Advocate Koenig at the Magistrate's office in Durban where he was involved in a bail hearing connected with an ITU case. In the letter the Attorney-General stated that "I have decided to suspend your appointment as prosecutor with immediate effect and until further notice....Recent events have brought into sharper focus for me the fact that you are no longer answerable to me as Attorney-General."[17] However, after several days of public discussion and controversy, the Attorney-General and members of the ITU and ITB met and apparently resolved some of the issues between them. In a joint statement issued on 6 September 1995, they noted, among other things, that the Attorney-General had lifted his suspension of Advocate Koenig as a prosecutor and that he would reconsider his decision in the Masinga case upon receipt of further representations from the Board and Unit.

[16]Media Statement by the Attorney-General, Natal (Adv. Tim McNally) on Hit Squad Police Docket (1 September 1995); Media Statement by the Investigation Task Board (ITB) on Hit Squad Police Docket (2 September 1995).

[17]The letter is dated 4 September 1995.

The ITU and ITB were not alone in experiencing difficulties with the office of the Attorney-General. In August 1995 about 70 members of the legal profession had met in Durban to discuss what they perceived as a crisis within the criminal justice system in the context of the serious socio-political conflict and violence prevailing in KwaZulu Natal. The lawyers present represented the Legal Resources Centre, the National Association of Democratic Lawyers, the Community Law Centre, Lawyers for Human Rights and the Black Lawyers' Association. The group also included non-human rights litigation lawyers who shared similar concerns. In their discussions they focussed particularly on what they saw as the failure of the office of the Attorney-General to make an impact on the situation. They expressed the opinion that the Attorney-General himself had "exhibited a reluctance to vigorously investigate and prosecute those currently and formerly involved in the commission of serious political offences".[18] Those at the meeting acknowledged the severe problems arising from the poor quality of police investigations, compounded by, especially in the case of the KwaZulu Police, a biased approach to law enforcement and crime investigation. However they felt strongly that there were additional factors at work which were contributing to "the growing loss of confidence in the office [of the Attorney-General]... and in the ability of the incumbent to carry out his duties effectively and impartially".[19]

[18]Pp.3-4 of *Report on the Attorney General of KwaZulu Natal*, 16 September 1995. The report was submitted subsequently to the State President, the Minister of Justice and the parliamentary Portfolio Committee on Justice in connection with hearings relating to the prosecution service.

[19]P.4, *idem*.

In an introductory note to their lengthy memorandum arising from their meeting, the lawyers expressed their belief that these factors contributing to this loss of confidence included the prior employment history of the Attorney-General;[20] the factors relating to the "biased nature and poor quality of investigation by the police force, particulary the KwaZulu Police", and "Advocate McNally's attitude and relationship with the Investigation Task Unit", and the "failure of the Attorney-General to prosecute those people in high office in the police and in government who are and who have been involved in the commission of serious crimes". In the view of the lawyers, this failure involved an actual reluctance to institute proceedings against high-ranking suspects. As

[20]Here the lawyers were referring to Advocate McNally's role in two inquiries into allegations of police involvement in death squads. In 1989 he took part in an official inquiry at the request of the then President F W de Klerk, after newspapers published damaging claims made by former Security Police Captain Dirk Coetzee and another officer, Almond Nofomela, that they had taken part in officially-sanctioned killings of government opponents while serving as members of a special security police unit based at Vlakplaas near Pretoria. Advocate McNally, then Attorney-General for the Orange Free State, and a senior police officer, Lieutenant-General A B Conradie, undertook an inquiry and handed in a report to the President on 28 November 1989 (*Verslag Van Ondersoekkomitee Insake Bewerings Van Almond Nofomela)*. The President refused to make the report public, but its contents became known a year later after the Johannesburg Supreme Court subpoened the State to make it available in connection with a libel case brought by the police against certain newspapers. The "McNally Report" concluded that the allegations were without substance, and that Dirk Coetzee and Almond Nofomela were motivated respectively by grievances against the police and a desire to escape the death penalty. The report showed little by way of independent research undertaken to corroborate the allegations and, at the same time, a willingness to accept at face value the denials of then currently serving police officers implicated in the alleged murders. (One of those officers, Eugene de Kock, is now serving life imprisonment after being convicted in the Pretoria Supreme Court on multiple counts of murder and other crimes, some of which the McNally Report had briefly considered and dismissed.) In 1990, under mounting public pressure, President De Klerk ordered a judicial inquiry to be chaired by Mr Justice L Harms and with lead Counsel, Advocate McNally. As Amnesty International noted in its report, *State of Fear*, in light of the conclusions of the 1989 inquiry, "it is difficult to see how the government could expect Mr McNally to conduct an impartial investigation into allegations of police "death squad" activity for the Harms Commission so soon after he had concluded in a previous investigation that such activity did not exist" (p.17). An international human rights law expert, Professor John Dugard of the Witwatersrand University, commented after the contents of the 1989 report became public knowledge that Advocate McNally should have recused himself or should never have been allowed to lead evidence because he had already reached his conclusions. "Without reflecting on the Harms Commission at all, I will find it hard to accept any finding [it makes] on police death squads" (cited in Jacques Pauw, *In the heart of the whore: the story of apartheid's death squads*, Halfway House: Southern Book Publishers, 1991, p.143). As shown by subsequent judicial proceedings and commissions of inquiry, including that of the Truth and Reconciliation Commission, some of the police in the Harms Commission's investigation team were themselves implicated in the alleged crimes. Not suprisingly then the Harms Commission found no evidence for the existence of police death squads, dismissing as uncorroborated much of the evidence of Dirk Coetzee and others whom the Judge found to be lacking in credibility and driven by personal motivations (*Report of the Commission of Inquiry into Certain Alleged Murders*, September 1990, pp. 69-178). Human rights lawyers who had represented at the hearings families of murdered or "disappeared" victims of the suspected death squad complained afterwards that the Commission's Counsel and investigators showed little inclination to attempt to corroborate the claims of Dirk Coetzee and the other "whistle blowers" and took a narrow approach to each of the incidents under investigation. Indeed much of the corroborating evidence which was eventually presented to the Commisson came from those representing the victims (see *WHO LIED ? A discussion of the findings of the Harms Commission of Inquiry,* Independent Board of Inquiry into Informal Repression, Johannesburg).

substantiation of their concerns, the lawyers then outlined incidents which they saw as illustrating the Attorney-General's attitudes on certain issues and a pattern of decision-making in political violence and police abuse cases in KwaZulu Natal.[21]

[21] *Report on the Attorney General of KwaZulu Natal*, pp.4-5 and *passim.*

From 26 to 28 September 1995 the country's Attorneys-General appeared before a joint sitting of the multi-party Portfolio Committee of the National Assembly and the Select Committee on Justice of the Senate. The hearings had several broadly stated objectives, including making the Offices of the Attorneys-General accountable to Parliament, allowing the office holders an opportunity to raise problems and make recommendations, and providing an opportunity for the public at large to raise any problems relating to the prosecuting authorities.[22] Advocate McNally was among those Attorneys-General who gave evidence, although not under oath. He was questioned extensively on decisions which his office had taken in a number of cases connected with political violence or police abuses. It was a tense and, in the end, inconclusive exchange which demonstrated, as much as anything, the difficulty for a parliamentary committee in a short hearing to determine whether or not there is evidence of a pattern of improper decision making.[23]

The momentum which appeared, in August and September 1995, to have been gathering towards some kind of impeachment process against Attorney-General McNally had fallen away by November when he proceeded to indict senior military, police and political figures on conspiracy and murder charges. The case was connected with the 1987 massacre of 13 people in KwaMakhutha township outside Durban and had been investigated by the ITU. However, the ensuing trial, commonly referred to as the "Malan trial", which was prosecuted by the Attorney-General, resulted in the acquittal of all of the accused by October 1996. The comments made by the presiding judge in his ruling regarding the conduct of the prosecution, including the failure by the State to call certain key witnesses, reopened the public controversy over the Attorney-General's attitudes and competence. In addition, soon after the conclusion of the trial, the Attorney-General declined to prosecute in a number of other matters investigated by the ITU, including in the case against 13 individuals accused of orchestrating hit-squad killings in the Esikhawini area, and in the case against a former Commissioner of the KwaZulu Police accused of obstruction of justice in relation to an investigation into an arms cache found in the KwaZulu Legislative Assembly building. The exchange of letters between the Attorney-General and the ITU and Board showed wide differences in their assessments of these cases. At the same time these differences were aired through exchanges reported

[22]Letter from the Chairperson, Portfolio Committee on Justice, to the Director-General, Department of Justice, 6 September 1995.

[23]Mail & Guardian, 29 September to 5 October 1995, and views expressed to Amnesty International by legal and official sources, February 1997. In April 1997 the Portfolio Committee on Justice did produce a report as a result of the hearings, containing a number of recommendations for improving the functioning of the Offices of the Attorneys-General. The report recommended that regular hearings should be held to promote accountability of Attorneys-General to the Parliament. (Human Rights Committee, Human Rights Report, April 1997, p.8.)

by the media, with the Convenor of the ITB declaring in frustration that there seemed now "little prospect of organized political violence being exposed and stopped through the administration of justice".[24] The Minister of Justice was drawn into the public controversy, reportedly suggesting that there may be need for the President to appoint a "special attorney-general" to handle political violence cases in KwaZulu Natal. The Attorney-General replied that there was nothing under the current legislation which gave the Minister power to do this.[25] In the following months the ITU, before its closure in March 1997, continued with its investigations but did not attempt to submit further cases to the Attorney-General.

Amnesty International's February 1997 inquiry and conclusions

[24]Investigation Task Board, Media Statement, 14 November 1996; see text below for further comment on the cases involved and note 9 with accompanying text above.

[25]The Star, Johannesburg, 28 November 1996.

It was in connection with both the provincial and national-level problems that the organization's representatives, who included Mr Stephen Owen Q.C., then Deputy Attorney General for the Province of British Columbia, Canada, took the opportunity to make inquiries about proposed legislation intended to restructure and make more publicly accountable South Africa's prosecution service.[26] During the course of their visit they held discussions with the Minister of Justice, the Minister of Safety and Security, the Legal Adviser to the President, the Chairperson of the Portfolio Committee on Justice, the Attorney-General for KwaZulu Natal, advocates and attorneys who have worked as prosecutors and deputies in the Attorney-General's office, representatives and members of the Natal Law Society, the General Council of the Bar, the Black Lawyers' Association and the National Association for Democratic Lawyers, the Investigation Task Board, Judges of the Constitutional Court, the Truth and Reconciliation Commission, human rights monitors and lawyers who have represented clients from across the political spectrum.

General concerns and recommendations

A number of issues and conclusions emerged from these discussions. There was broad agreement that the criminal justice system, including the prosecution service, is in a state of crisis. Various reasons were cited for this situation, among them:

- low morale, poor skills and under-resourcing, as well as fragmentation of the prosecution service, with experienced people tending to leave for private practice;
- the lack both of public accountability of the prosecution service and availability of effective remedies when controversies arise;
- the inadequate resources, low level of skills, capacity and will in the police service, which is responsible for investigating crime, compounded by the history of the political use of the police, under-resourcing of policing in black residential areas, and police reliance upon informants and extracted confessions;
- a lack of strategic approach, for the most part, in the handling of crimes indentified as national priorities;
- the further damage to the system caused by the lack of public confidence in it and consequent reluctance, for example, to co-operate as witnesses or in other ways with investigation processes;
- the impact of political processes involving amnesties for perpetrators of political crimes.

[26] As Deputy Attorney General for the province, Mr Owen was the senior non-political official responsible for criminal justice, crown civil litigation and the administration of the courts.

A number of those whom Amnesty International's representatives met expressed fears that, in view of the deeply entrenched nature of the problems and with the Government under intense pressure to address the crime situation, there would be a drift towards sacrificing human rights and the principles in the constitution in the search for short-term solutions to the crisis. This danger is all the more likely as the country heads towards the general election in 1999.[27]

A team approach

As a way of addressing some of the legacies of the past and the continuing deficiencies, many of those interviewed saw a necessity for rethinking the traditional division of labour between the police and the prosecution service, preventing what one person described as "self-defeating buckpassing" between these two agencies. A team approach, involving co-operation at an early stage between police investigators and members of the Attorney-General's staff, could assist in raising the quality of evidence gathered in preparation for a trial, particularly in a case involving complexities or matters of particular national concern. Early close coordination could help preserve the chain of evidence, ensure proper legal guidance and the proper handling of witnesses and taking of statements. As one former prosecutor commented, as an issue of principle there is little difference in the Attorney-General or prosecutor receiving the investigation case docket one week later or eight months later, except that in the latter situation defects from the loss of evidence or the mishandling of witnesses were far harder to remedy. Another former prosecutor, who had been involved in the trial of police officers accused of involvement in a massacre, saw his early and close working relationship with the investigating officers as an important factor in the successful outcome from the trial. It was hopeless, he said, for prosecutors to continue to receive the case docket on the day a trial is set to begin. Their lack of familiarity with the case and resulting difficulties with witness evidence, among other aspects, were very important factors in the failure of so many prosecutions. However he added that, in adopting a strategy of working more closely with the investigating officer in the preparation of a case, care needed to be taken to ensure that the prosecutor did not become a witness in the matter under investigation.

[27] A 1997 report produced by the Centre for Policy Studies apparently expresses similar concerns. A spokesperson for the Centre, Louise Stack, in commenting on the report referred to the ill-preparedness of state prosecutors, whom she described as 22-year-old law graduates with six months' experience who contended with a work overload and conducted cases which were often defended by senior defence advocates. She warned that "the poor functioning of the criminal justice system is helping to erode the rule of law. If the Government cannot exercise its monopoly over the use of force by demonstrating its ability to protect citizens' personal security, this might lead to the constitution losing its meaning for the average citizen" (The Star, Johannesburg, 25 September 1997).

In relation to this possible difficulty, a team approach between the police and prosecutors should respect the differences in their respective roles and responsibilities at different stages in the investigation and prosecution processes. During the investigation stage, it is the police who are in authority in making decisions on the assessment of evidence to determine whether it raises reasonable suspicions of wrongdoing. At this stage, the prosecutor plays a support role providing legal advice as to the admissability and sufficiency of evidence in any subsequent prosecution. Once the decision to prosecute has been made, the lead passes to the prosecutor who draws on the police as witnesses to the evidence. Respecting these differences protects the prosecutor against being called as a witness in a prosecution arising from the investigation.

Setting priorities, encouraging the development of specialized skills in relation to priority crimes, sharing of information across cases so that linkages and patterns could emerge, were seen as more likely to occur where a cross-agency team approach was taken. A former prosecutor told Amnesty International's representatives that by linking up the ballistics evidence in a number of cases involving weapons offences and murders, he had been able to identify a pattern which led him to identify the perpetrator in 21 politically-motivated killings.

The advantage of a cross-agency co-operative approach was more marked, Amnesty International was told, where crimes crossed provincial boundaries, requiring national level solutions and investigation approaches. For instance, in relation to the pre-1994-elections political violence, involving members of law enforcement, intelligence and military agencies based in different provinces and orchestrated at a high level, few results could be expected from any investigation confined to locally-based police investigators. And the danger of a cover-up was always present, as was vividly shown by the initial investigation into the 1988 Trust Feed massacre and the early investigations into the murders which formed the basis for the prosecution of the Esikhawini hit-squad members.[28] A positive precedent frequently cited to Amnesty International for a holistic and active approach was that set by the Attorney-General in Pretoria in relation to the investigation and prosecution of former security force members involved in so-called "third force" killings and other crimes.[29] Several Deputy Attorneys-General worked closely with investigators in the preparation of the case against former police counter-insurgency operative, Colonel Eugene de Kock, who was

[28]See notes 10 and 11 above.

[29]The work of the office of the Pretoria Attorney-General had resulted from the initial investigations by a nationally-coordinated team including the Attorney-General and local and foreign police investigators which had been set up in the wake of the publication of the March 1994 report by the commission of inquiry chaired by Mr. Justice Richard Goldstone.

convicted in 1996 on multiple counts of murder, attempted murder and other crimes. Other cases involving security force and other suspects in "third force" crimes are in preparation. It is possible, though, that more and speedier results could have been achieved from the parallel investigations in the Eastern Cape, KwaZulu Natal and the former Transvaal Province, if there had existed a capacity for national level coordination of the prosecution service which is fragmented between 12 different jurisdictions in which the Attorneys-General have complete discretion.

Ad hoc appointments

Focusing on a different aspect of the problem, Amnesty International found that there was quite broad support, as a possible solution to the under-resourcing and lack of public confidence in the service, for the *ad hoc* appointments of members of the private Bar as prosecutors in special cases. Such cases could include those where the accused persons hold positions of public responsibility and have a capacity to influence the investigations or prosecution proceedings. The "special" or "independent" prosecutors could be used in those cases involving political and other sensitivities, to help protect the independence of the decision-making process and the conduct of proceedings from real or perceived political or other improper interference. Members of the private Bar could also be brought in to work with a team of investigators and lawyers from the prosecution service as advisors in the assembling and prosecution of complex cases. In the view of some, this approach would have been appropriate in the Malan case. At the same time the periodic involvement of members of the private Bar could help raise standards of professionalism and morale within the prosecution service. Members of the private Bar would need to be encouraged to see this involvement as a form of public service and be expected to undertake the work for reduced fees. Thought would have to be given to where authority for these *ad hoc* appointments should be located and the criteria used for the appointments to avoid politicization. It would seem necessary to develop neutral criteria and have the appointments made by an independent body. Finally, there were some who saw that this possible solution could only be useful if harnessed to processes intended to raise the level of skills and professionalism amongst police investigators themselves.

Police training and resources

Regarding the police, the Minister of Safety and Security, Mr F. S. Mufamadi, assured Amnesty International's representatives that his ministry is trying to address the deficiencies in resources and skills, as well as other historical legacies. He referred to steps being taken to establish a joint detective and prosecutor academy, accountable to the Director-General: Justice and the Commissioner of Police, and with foreign government assistance. At a practical level, he saw the creation of the Investigation Task

Unit in 1994, with its civilian oversight component, as an important example of the team approach and as a way of breaking the cycle of impunity in KwaZulu Natal. In particular, the involvement of experienced lawyers in the civilian board was a necessary safeguard, as the Unit was tasked to investigate crimes in which elements of the police were involved as perpetrators. It was necessary now to redeploy the Unit's officers to other tasks within police ranks, as he saw politically motivated crimes of violence as just one of a number of national priority areas requiring a collaborative approach and the kind of skills which members of the Unit had developed. The underlying philosophy and strategy, he noted, was dealt with extensively in the *National Crime Prevention Strategy* document which placed an emphasis on developing a coordinated approach across the criminal justice system as a whole towards crime prevention and raising public confidence in the effectiveness and legitimacy of the system.

Developing an effective balance between accountability and independence

The government's intention to address some of these problems through giving legislative content to the provision in the Constitution for a national prosecuting authority was viewed, on the whole, positively. The new authority which would be created under the legislation could be a focus for developing more strategic approaches on crimes identified as national priorities, for injecting more accountability into the system, for raising standards of professionalism among the staff, for providing a means to deal with complaints about decisions on prosecution or the conduct of a prosecution - as an alternative to an unsatisfactory parliamentary process, such as occurred in 1995. However, the important but difficult task of reaching a balance between independence from political interference and accountability to the political process for the investigation and prosecution of crime was a concern most frequently commented upon, particularly among members of the organized legal profession and some human rights monitors. There was acknowledgment that the prosecution service country-wide lacked credibility, partly as a result of the history of its use against political opponents of the former government and the notoriety of some Attorneys-General and prosecutors for the vigour with which they prosecuted political cases. And there was skepticism of the merits of the independence created for the Attorneys-General by the former government on the eve of the negotiated political transition.[30] This perspective on the past notwithstanding, there was a strongly articulated concern to ensure that the new authority possessed an independence from politicians regarding decisions on prosecution, even while more accountability needed to be built in on issues of policy, budget and related matters. Other points frequently raised included the need to have a non-political appointment process, a strictly limited term, objective grounds for dismissal, full definition to be given in the law

[30]See comments below on the 1992 Attorney-General Act.

for the new authority's powers of review and a requirement for any directives to be given in writing with full reasons. The seriousness of these concerns expressed to Amnesty International, in a context where there is an urgent need to address the crisis of legitimacy and low public confidence in the criminal justice system, suggest the advisability of holding public hearings when the draft legislation is tabled in parliament.

Problems relating to the handling of political violence cases in KwaZulu Natal

In addition to these reflections and concerns which have a relevance to the country as a whole, observations were made to Amnesty International on some of the issues peculiar to the functioning of the criminal justice system in KwaZulu Natal. In this province the politicization of the police has been very marked, compounding the already considerable problems created by their underlying lack of investigation skills and the shortage of resources. The former "homeland" police were seen as particularly problematic, with respect to problems of both bias and competence. A Deputy Attorney-General noted that it had been difficult also to obtain co-operation across jurisdictional lines between the two police forces. These circumstances made close and early involvement by members of the Attorney-General's staff in the investigation process particularly necessary, a view strongly held by all of the former prosecutors met by Amnesty International. There seemed to be wide agreement among them and many of the others interviewed that the current provincial Attorney-General has been predisposed to maintaining a strict division of labour between the police and his department in the investigation and prosecution of cases. At least one former prosecutor complained that the Attorney-General discouraged an active team approach in political violence cases. In his comments to Amnesty International, the Attorney-General said that in his experience over many years the police had shown little interest in having prosecutors "interfere" with their work. As for currently they seemed to be reluctant to do anything without pressure from the prosecutor.[31]

[31]Interview with Attorney-General Tim McNally and Deputy Attorney-General Ross Stuart by Amnesty International, Pietermaritzburg, 24 February 1997.

A related issue raised by the former prosecutors and others concerned a lack of any apparent strategic approach by the Office of the Attorney-General to the handling of political violence cases. No specific circulars or guidelines seemed to have been issued which might have encouraged members of staff to look for patterns within and between cases and to develop prosecution strategies accordingly. As noted above, some former members of staff did attempt on their own initiative to adopt such an approach, but it is likely that their efforts could have been enhanced if encouragement had come from the top. In addition, several former prosecutors described situations where apparently less urgent civil matters were given greater priority than the speedy trial of accused in cases involving multiple murder. Amnesty International's representatives did not gain the impression from their discussion with the Attorney-General that he had issued guidelines other than general circulars and seemed in fact to minimise the role of the criminal justice system in reducing political violence. He noted the difficulties in gathering solid evidence, particularly where attacks occurred at night, and commented that "our role is exaggerated. The players who can stop [the violence] are the politicians". While it is undoubtedly true that political party leaders have a crucial responsibility to discipline their members, in the context of a province which has experienced at least 12,000 politically-related deaths and the destruction of homes, livelihood and psychological well-being for many thousands of others since 1985,[32] the apparent lack of interest or initiative in urgently and systematically tackling a class of serious crime seems bizarrely complacent, if not actually constituting an abandonment of his responsibilities as Attorney-General.

The conflict which developed between the Attorney-General and the Investigation Task Unit and Board seems partly to have arisen through differences in approaches to the investigation and prosecution of crime, notwithstanding the former's agreement to second staff to the ITU. By its very nature, the ITU broke down the traditional divisions of labour by providing police investigators with legal supervision and advice on an ongoing basis. Furthermore, the ITU, following on the work of previous inquiries, attempted to identify the networks and enabling mechanisms which they believed were authorising and facilitating the activities of individual killers, with a view to the eventual prosecution of these higher level actors. The conflict in approaches emerged starkly in a number of cases.

The *Mbambo* case

[32] Human Rights Committee, "Special Focus Political Violence and Justice in KwaZulu-Natal", Human Rights Report, March 1997, p. 17. Approximately 4,902 of these deaths occurred between January 1993 and December 1996. Sources for the monthly, annual and cumulative figures include the South African-based non-governmental organization, the Human Rights Committee (prior to 1994 the Human Rights Commission) and the South African Institute of Race Relations.

In one such case, that of *The State versus Romeo Mbambo, Brian Gcina Mkhize and Israel Hlongwane*, the Attorney-General had authorised a prosecution of the accused on six counts of murder after refusing a request from investigators, then attached to the Goldstone Commission, to delay the prosecution to allow for further investigations into allegations made by the accused that they had acted on higher orders. The three accused were part of a group of men who had been trained secretly by the then South African Defence Force (SADF) in the Caprivi and later incorporated into the KwaZulu Police. It was the allegations made by two of the men in statements to the police after their arrest in November 1993 that prompted the Commission's investigators, Lieutenant-Colonel Dutton and Advocate Koenig, and several others connected with the investigations to approach the Attorney-General to recommend that the arrested men should be used for further investigations into those suspected of orchestrating the violence. The Attorney-General refused this request.[33]

The prosecution went ahead in late 1994 and was conducted by a member of Attorney-General's department, Mr James de Villiers. In his opening address, the prosecutor told the Court that the cases before it were common law crimes of murder and that there was no political involvement. The accused, however, in their evidence in mitigation, persisted in their version that they had acted under instruction from senior political and police officials whom they named. The presiding judge, Mr Justice N van der Reyden, was led to query the State's view, noting at one point that

> "All the evidence up to this stage, uncontested evidence, indicates that even Nathi Gumede's murder was committed on orders from higher authority, and you are still trying to show the contrary...that this murder was not committed on higher authority. Is that what you are trying to prove?"[34]

[33]Interview with the Investigation Task Board by Amnesty International, February 1997. They felt that the Attorney-General's refusal to allow a widening of the investigation reflected his view that there was no orchestration of the violence or politically-motivated hit squads in operation. In its Interim Report dated 6 December 1993, the Goldstone Commission, in referring to the recent arrest of members of the KwaZulu Police and associated evidence, commented that this development "establishes the high probability that a hit squad consisting of five KZP policemen has been responsible during 1992 and 1993 for the murder of no less than nine people including leaders and members of the ANC...From the police investigation it emerged that the persons suspected of operating in the hit squad had received training from the South African Defence Force in the Caprivi in 1986" (paragraphs 2.1 to 2.4).

[34]Extract from the trial record, pp. 1431-1432. cited in *Report on the Attorney General of KwaZulu Natal*, 16 September 1995, p.17. See note 9 above.

The prosecutor replied in the affirmative, saying that this view was based on "previous inconsistent statements [by the accused] and probabilities". Earlier he had told the Court that the State would not subpoena those named by the accused.[35] This decision left the Court without the benefit of hearing the evidence of those who had been accused by the defendants of having identified targets and ordered the killings carried out by the defendants. Nevertheless, as already noted, the judge concluded that

> "The issue of sentencing must be approached on the basis that the kidnapping and all the murders were committed by the accused on instruction from persons in authority and in the execution of hit-squad activities...The present case is confirmation of speculation that hit-squads are one of the problems contributing to violence in this country and particularly in KwaZulu-Natal".[36]

Commenting on the initial investigations, he noted that "the lack of proper investigations into these murders tends to support the version that the murders were committed on instructions as part of hit-squad activities". He called for a thorough probe into the allegations, adding that if this was not done, he would forward the transcripts of the trial record to the national ministers of justice and safety and security.

[35]The Attorney-General, however, did insist that the ITU make available a witness, Daluxolo Luthuli, who was then out of the country under a witness protection program, in order that he should give evidence on behalf of the State against the three accused. Luthuli was co-operating with the ITU as a potential state witness in connection with investigations into a number of matters which they expected to come to trial. Accordingly the ITU and Board appealed against this request, concerned that the Attorney-General's use of this witness in the sentencing phase of the *Mbambo* trial could potentially jeopardise his value as a state witness later on "in key prosecutions" which, they argued, would "have the real potential of exposing and stopping certain hit squad networks". The Attorney-General nonetheless insisted, stating that "[I]t is important to call Luthuli to rebut the political overtones ascribed to the killings by the accused [in *Mbambo*]". (Letter from the Attorney-General to the ITU, 3 August 1995; Letter from the Investigation Task Board to the Attorney-General, 7 August 1995; Letter from the Attorney-General to the Investigation Task Board, 11 August 1995.) Luthuli gave evidence on 21 August 1995, but without the effect which the Attorney-General had hoped, as his evidence-in-chief supported the claims of the accused. He was, however, later not called by the Attorney-General as a witness for the prosecution in the Malan trial apparently because of certain "discepancies" which had emerged in his evidence under cross-examination in the *Mbambo* proceedings. See further below.

[36]Reported in The Star, Johannesburg, 30 August 1995.

The ITU continued with its own investigations into the allegations made by Gcina Mkhize and his co-defendants. The investigation was overseen by Advocate Shamila Batohi, who had been seconded to the ITU from the office of the Attorney-General. The ITU delivered a report on the case to the Attorney-General in October 1995. In view of concerns which he apparently expressed regarding the acceptability of Daluxolo Luthuli, Gcina Mkhize and Romeo Mbambo as State witnesses, the ITU undertook further investigations to corroborate their evidence and address certain discepancies between their statements. Their second report was delivered to the Attorney-General in about June 1996. The suspects identified and recommended for prosecution included high-ranking police officers and members of the IFP who also held public office. They were accused of involvement in a conspiracy in relation to a number of murders and attempted murders in the North Coast area of the province.[37]According to the ITB, the report was studied on the Attorney-General's behalf by a member of staff, James de Villiers, who, as noted above, had prosecuted Gcina Mkhize and his co-defendants in 1994/5. In the Board's view, he was not in a position to review the report and seven associated police dockets impartially because of his role in that trial.

On 24 October 1996 the Attorney-General informed the ITU that he had decided not to prosecute any of the suspects in connection with the incidents referred to in the report and dockets. As explanation for this decision he stated that "the allegations in the relevant police dockets rest on the evidence of accomplices [who]...made statements to the Goldstone Commission. All three of these witnesses claim in subsequent statements that they lied in material respects to that commission. There are major discrepancies between the statements of the accomplices as well as between the statements made by individual accomplices at different stages." He concluded by noting that he was satisfied that "there is no *prima facie* case and no reasonable prospect of successful prosecution being instituted."[38]

In a reply which they released to the press, the ITB conceded that there would have been some difficulties in the prosecution of this case, but argued that there was "sufficient consistency in [the witnesses'] versions relating to the essential elements of the offences in question, which was corroborated in part by objective evidence, to put the suspects on their defence in a court of law". In their view "the place for the testing and assessment of the evidence against the suspects was in a court of law".[39]

[37]Interview with the Investigation Task Board by Amnesty International, February 1997.

[38]Letter from the Attorney-General to the ITU, dated 24 October 1996. The letter referred them to Mr De Villiers for any further inquiries.

[39]Media Statement, 25 October 1996. As it is, the allegations and suspicions have continued to be aired in the hearings of the Truth and Reconciliation Commission and in the media.

Amnesty International is not in a position to say from any scrutiny of relevant documents whether or not there were sufficient grounds for believing there was a reasonable prospect for a successful prosecution in this case. The Attorney-General, in his comments to Amnesty International's representatives, emphasised his doubts about the witnesses, but also added, in relation to one of the high-ranking suspects, a concern that "the community" would be led to believe that the Attorney-General's decision to prosecute must mean that he is guilty. For "higher status" persons the consequences of wrongful prosecution are greater, he said. In Amnesty International's view, however, it seems likely that if a different stance had been taken by the Attorney-General on this case in 1994, there would have been opportunity then for a more extensive and timely investigation, possibly leading to the resolution of a larger number of cases than the six for which Gcina Mkhize and his co-accused stood trial and a full exposure in the courts of the evidence relating to those who allegedly directed the activities of the Caprivi trainees. Such an outcome would also have reassured the surviving victims and families affected by the operations of the hit squad. Moreover, the Constitution and national law impose upon the prosecution the same strict burden of proof in all cases, regardless of rank, to overcome the presumption of innocence.

The Light Machine Gun case

In another case decided by the Attorney-General in October 1996, he declined to prosecute Lieutenant-General R. During, the former Commissioner of the then KwaZulu Police, on charges relating to illegal weapons which were found in the storeroom of the KwaZulu Legislative Assembly in September 1993. Among the weapons found was an FN (MAG) Light Machine Gun, a spare barrel and a large quantity of ammunition. Commissioner During appointed an investigator and ordered a fingerprint examination to be made of the storeroom. Following the intervention of the Secretary to the Chief Minister of the then KwaZulu Government, Mr S. Armstrong, Commissioner During stopped the investigation. The weapons cache was removed. When the ITU became involved later in an investigation of this incident, they were unable to trace the weapons. From an examination of relevant records they found no evidence that any person within the KwaZulu Government or police force had authority to possess such a weapon and ammunition. In the view of the ITU and Board, the action of Commissioner During in stopping the investigation was criminal and a particularly serious matter, taking into account his position of authority over the police. They recommended that he be charged with defeating the ends of justice.

Although the case was dealt with by one of the Deputy Attorneys-General, the Attorney-General publicly supported the decision not to prosecute, while noting that he had not personally read the docket nor had he been personally involved in the

decision-making process.[40] The reasons provided for declining to prosecute on this particular charge were two-fold: firstly, that "[t]here is no evidence to suggest that Lt Gen During or any of his subordinates were defeating or obstructing the course of justice" and "[i]n fact During set in motion the investigation regarding the origin of the machine gun and the ammunition"; secondly, "[t]he explanation of During that he received instructions from Armstrong must be accepted".[41]

In reply, the ITB drew attention to the contemporaneous use of such highly lethal illegal weapons in acts of violence in the province and the evidence which emerged in the trial of Colonel Eugene de Kock regarding the flow of ex-SADF machine guns from Namibia via De Kock's police unit into Natal prior to the 1994 elections. For this and other reasons outlined, "[i]t is quite evident that this matter is not an isolated one and the pursuance of it may have led to the exposure of those behind the supply of weapons to hit-squads in the region". It was unacceptable, the Board stated, for a commissioner of police to stop the investigation in question. He was not obliged to and should not have accepted the instructions of the Secretary from another government department.[42]

The Malan case

[40]The Attorney-General informed Amnesty International in February 1997 that he could not personally handle the thousands of dockets which come into the system in the course of a year. There was a system, he said, for allocating cases to staff at different levels within the prosecution service. However, he stressed that he has overall responsibility.

[41]Letter from the Attorney-General to the ITU, 18 October 1996; Media Statement by the Attorney-General: Natal (Adv Tim McNally), Ulundi Police Docket Concerning Light Machine Gun, 13 November 1996.

[42]Letter from the Investigation Task Board to the Attorney-General, 13 November 1996; Investigation Task Board, Media Statement, 14 November 1996.

The Attorney-General's decisions in these matters came shortly after the final collapse of the prosecution case against former General Magnus Malan and 19 other accused in the Durban Supreme Court. In acquitting the remaining accused on all counts,[43] the presiding judge, Mr Justice J. Hugo, made critical observations on aspects of the conduct of the prosecution in this case. He noted the State's reliance almost exclusively on three accomplice witnesses, whose deficiencies he scathingly detailed.[44] He repeatedly drew attention to the State's failure to call certain witnesses in connection with the alleged conspiracy,[45] and to lead evidence either on the nature of the military training which had been provided by the Defence Force in Caprivi to some of the accused[46] or in clarification of some of the crucial terms used in the documentary evidence submitted by the State.[47] He also made some criticial remarks about the conduct of the investigation preceding the trial.[48]During the course of the trial he had commented a number of times on these and other gaps in the prosecution's case.The Court had "little doubt that the deceased at Kwa Makhutha were gunned down by people who were members of the trainees recruited by Inkatha and trained in the Caprivi,"[49]but found that the State had not proven beyond a reasonable doubt that any of the accused had been involved in the killings.

[43]The accused, who included both serving and former senior military and police officers and officials and members of the IFP, had been each charged with 13 counts of murder in connection with the 1987 massacre in KwaMakhutha and alternative charges of conspiracy to murder opponents of the IFP (arising out of the planning and establishment of Operation Marion by the military in response to the request by the former Chief Minister of the KwaZulu Government for a para-military capacity). Some of the accused had been discharged at an earlier stage in the trial.

[44]*The State versus Peter Msane & 19 Others*, trial record, Vol.57, pp.4384 and at numerous points throughout the ruling.

[45]*Idem*, as for instance at pp. 4389, 4409, 4480, 4489, 4526, 4527, 4529 in relation to Colonel Van den Berg.

[46]*Idem*, as for instance at pp.4458, 4459, 4469, 4484, 4485, with consequences for the Court's assessment of the lawfulness of that training and the intentions of those involved in it.

[47]*Idem*, as for instance at pp.4473, 4474, 4475, 4476, 4477, 4478, 4483, 4520 through 4524, regarding the interpretation of the word "offensive" used in the military and other official documents submitted to the Court and referring to one of the sub-groups trained in the Caprivi. The Court noted that the State had tendered no expert evidence on this point to counter the "innocent" interpretation provided by defence witnesses.

[48]*Idem*, pp.4385 and 4386, for instance, where he criticizes the investigators for using "cut and paste" computer technology to copy part of one witness statement to another, although he noted that the result was "innocuous"; pp.4388 and 4423, where he criticizes the failure to hold an identification parade and attacks the head of the ITU for being a "complacent" witness.

[49]*Idem*, at 4452 of judgment.

The outcome of the trial provoked a storm of public comment and criticism, including expressions of bitter frustration from relatives and others close to the victims of the 1987 massacre, among them a brother of the intended target in the attack who told journalists,

> "Those who died were innocent children who knew nothing of the struggle. They were murdered, yet it seems no-one killed them....South African law has always been like that; I never had confidence in the judicial system. Perhaps people who are taking the law into their own hands are right. South African law doesn't favour victims, it favours murderers. It seems that truth is not absolute; it depends on how you argue in court".[50]

[50]Reported in the Sunday Tribune, Durban, 13 October 1996 and The Independent, London, 12 October 1996.

It was evident to Amnesty International's representatives from their meetings with members of the legal profession and others in February 1997 that the conduct and outcome of the trial and the associated public controversy had created a considerable amount of unease. Some commented that the Attorney-General, as a result of the parliamentary hearings and the media's scrutiny in 1995, may have felt under pressure to prosecute a case which he may not in fact have understood or believed in and certainly failed to present convincingly to the trial court, particularly in relation to the conspiracy charge.[51] Concern was expressed also that the legal advisers who had been involved in the investigation of the case and had a close knowledge of the evidence were marginalised by the Attorney-General during the course of the trial. The failure by the Prosecutor to call certain witnesses important for the State's case was most frequently commented upon.

It is certainly worrying, from a reading of the judgment, to note the number of times Mr Justice Hugo drew attention to the inability of the Court to reach conclusions on important issues as a result of certain witnesses having not been called. At one point in his ruling he commented:

> "I shall permit myself yet a further interposition with some comments at this stage about the witnesses that were not called by the State. Colonel van den Berg who, on the evidence before us, could have corroborated [state witness] Opperman as to the acquisition of the firearms from Ferntree [military base]was not called. He could also have assisted in the interpretation of some potentially very incriminating documents of which he was the author. He was available and he was not called.
>
> Colonel Blaauw, the original senior Staff Officer of Operation Marion, who could have supported all three of the witnesses as to the nature of the training and in general about the creation of the trainee force, was not called, despite his availability.
>
> [Daluxolo] Luthuli, the political commissar and the fons et origo of the whole investigation was not called, despite his potential to provide corroboration of all three of the witnesses on matters as crucial as the selection of targets and the identity of the accused that were selected to perform the operation at KwaMakhutha. Not only was he available but we have been given to understand that he was under the witness protection program at all relevant times.

[51]Since his appointment at the end of 1992 as Attorney-General for the province of Natal, Advocate McNally had prosecuted in only one case prior to undertaking the Malan case, as he noted in his meeting with Amnesty International's representatives in February 1997. The defendants in the Malan trial were represented by seven sets of attorneys and 14 counsel.

> Other witnesses whose names appear on the indictment in the list of witnesses could have supported the accomplices in one way or another but were not called. Some of these were not accomplices nor co-conspirators in any sense and would not have been subject to the cautionary rules that I have already referred to. Based on the evidence that we did hear they should have been able to provide objective support for the State on various aspects of the case."[52]

Members of the ITU and Board were adamant in their comments to Amnesty International's representatives that the failure to call these witnesses, including expert witnesses, was contrary to their advice and that, at all relevant times, they had been in a position to produce these witnesses when called to give evidence.[53] The trial judge clearly saw these witnesses as essential to the State's case. Amnesty International is not in a position to know if the Court, having heard their evidence, would have reached a different conclusion in relation to the culpability of the accused for the killings in 1987. But, in so far as every effort was not made to provide the Court with the necessary evidence to enable it to establish the truth of where responsibility lay, the State failed in its obligations.

In conclusion, the controversy which developed around the conduct and outcome of this trial, which we have only briefly touched on here, and the bitter public exchanges which ensued between the Attorney-General and those who have been most intimately involved in the lengthy investigation and preparation of the case, in the context of all that had gone before it, point to the urgent need for some appropriate means for adjudication and accountability. It is vital for the province, as well as the country as a whole, to ensure that public confidence in the system of justice is restored.

[52] *The State versus Peter Msane & 19 Others,* at pp.4389-4390.

[53] Interview with Investigation Task Board and Investigation Task Unit members, February 1997, and in interviews by telephone subsequently with Advocate Koenig and Lieutenant-Colonel Dutton, both deployed with the United Nations in Europe.

Part II: Amnesty International's recommendations on the National Prosecuting Authority Bill

International Standards

Before discussing the purpose and content of this Bill, it is useful to bear in mind the United Nations (UN) Guidelines on the Role of Prosecutors, [54] which were

[54] Adopted by consensus by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders on 7 September 1990. A copy of the Guidelines is attached to this document.

"formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings". The draft legislation refers to the need for the content of the Guidelines to be made known and promoted amongst members of the prosecution service. They include among their recommendations regarding the prosecutor's role in criminal proceedings the following principles:

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

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

- *In the performance of their duties, prosecutors shall:*

  (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
  (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
  (c) Keep matter in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
  (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Article 13).

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

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

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

- *In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to co-operate with the police, the courts, the legal profession, public defenders and other government agencies or institutions (Article 20).*

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

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

The draft legislation responds to section 179 of the Constitution of the Republic of South Africa, 1996, which has as its purpose the balancing of independence and accountability in the prosecution of crimes by the State.[55] As such it must also be viewed within the context of the history of the Office of Attorney-General in South Africa.

[55] **179 (1)** There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of -
(a) a National Director of Public Prosecutions, who is head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
(3) National legislation must ensure that the Directors of Public Prosecutions -
(a) are appropriately qualified; and
(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
(5) The National Director of Public Prosecutions -
(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and, after consulting with the Director of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
(b) must issue policy directives which must be observed in the prosecution process;
(c) may intervene in the prosecution process when policy directives are not complied with; and
(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
(i) The accused person.
(ii) The complainant.
(iii) Any other person or party whom the National Director considers to be relevant.
(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

Previous history of the Office of the Attorney-General

(7) All other matters concerning the prosecuting authority must be determined by national legislation.

From 1926 until 1992, an Attorney-General exercised authority and performed the functions of the office "subject to the control and directions of the Minister [of Justice], who could reverse any decision arrived at by an attorney-general and could himself in general or in any specific matter exercise any part of such authority and perform any of such functions".[56] During this period, according to academic scholarship, the Minister of Justice, who was also a member of the cabinet, usually refrained from interfering with the decisions of an attorney-general "where the national interest [was] not involved" (emphasis added).[57] Clearly, however, suppressing the activities of opponents of *apartheid* rule after 1948 was construed by the government of the day as being in the "national interest", a fact which was reflected in the extraordinary powers granted to successive ministers of justice under security legislation.[58] So it was, in turn, with the authority granted to the Attorneys-General in the prosecution of government opponents charged with political crimes under statutory or common law in this period. They possessed extraordinary powers, for instance, with respect to the withholding of bail and the detention and compulsion of witnesses; and in their willingness to use these powers and to proceed on the basis of confessional evidence extracted under duress; in their practice of charging accused with a multiplicity of (political) offences arising out of substantially one offence often resulting in heavier sentences; in these and other respects they appeared "in many instances...[to be] handmaidens of the government".[59] The failure of the Attorneys-General, on the whole, to distinguish their role from those who wielded political power and to conduct their functions impartially and without discrimination must inevitably have contributed to the profound alienation from and distrust for the criminal justice system on the part of the majority of South Africans.

In 1992, in the context of difficult political negotiations with formerly banned opposition parties, the National Party Government rushed through Parliament a bill to make the Attorneys-General independent of the control of the Minister of Justice. The government's motivation for passing the Attorney-General Act (No. 92 of 1992) has been strongly criticized as reflecting its "fear of what future prosecutors would do [more] than any real desire to secure independent status for the attorney-general"and as lacking any

[56] *"The Attorney-General: Man or Marionette"*, by Advocate Chris Nicholson [now judge of the High Court, Natal Provincial Division], 1993 , p. 6, referring to the various enactments of the Criminal Procedure Act from 1926.

[57] John Dugard, Human Rights and the South African Legal Order, Princeton UP, 1978, pp 11-12.

[58] See, for instance, *Political Imprisonment in South Africa*, Amnesty International, 1978, AI Index: PUB 81/00/78, and the authors noted below.

[59] Nicolson, *op cit*, pp. 7,16; Dugard, *op cit*, pp. 114-116, 254 - 267; Anthony Mathews, Freedom, State Security and the Rule of Law, Sweet & Maxwell, London, 1986, pp.96f.

credibility.[60] The Act is still in force, but is scheduled to be repealed in its entirety once the National Prosecuting Authority Bill is passed into law.

Under section 5(1) of the 1992 Act, the Attorneys-General are given "the authority to prosecute on behalf of the State in criminal proceedings in any court in the said area any person in the name of the Republic in respect of any offence in regard to which any court in the said area has jurisdiction". The authority of the Minister is reduced to that of co-ordinating the functions of the Attorneys-General. The Minister may request an Attorney-General to provide him with information or a report on any case, matter or subject handled by that Attorney-General, and "provide him with reasons for any decision taken by the Attorney-General concerned in the performance of his duties or the exercise of his functions" (Section 5(5)). There is nothing in the Act which indicates the reciprocal obligations of an Attorney-General, other than a yearly obligation to "submit to the Minister a report on all his activities during the previous year". As indicated, for instance, by the report of the Attorney-General: Natal for the January to December 1995 period, which was provided to Amnesty International's representatives in February 1997, these reports can be quite bland statistical accounts of staffing, number of cases handled and so forth.

The legislation allows for an Attorney-General, who is appointed by the State President, to remain in office until statutory retirement age (65) and possibly for up to two further years. Other than this there is a carefully circumscribed process under which the State President "may" suspend an Attorney-General and, subject to certain conditions, remove him from office "for misconduct" or on account of continued ill-health or "on account of incapacity to carry out his duties of office efficiently". The State President must inform parliament within 14 days of the decision to suspend and the reasons for doing so. If the parliament petitions for the State President to restore the suspended Attorney-General to office, he must do so. If no petition is forthcoming, the State President then confirms the suspension and removes the Attorney-General from office. The parliament can initiate the process by petitioning the State President to remove an Attorney-General on the same grounds as noted above. If so petitioned, the State President must remove that Attorney-General from office.

[60]Nicholson, *op.cit.*,pp.15-16, adding that "there is much [for them] to fear from the revelations arising out of the death squads which roved the country and may still be active". Another human rights lawyer, Richard Spoor, commented bluntly that "The Attorneys-General Act of 1992 was part of a package of last-gasp apartheid legislation calculated to ensure that the prosecuting authorities could continue in office, free from any interference by the new democratic government. In the name of prosecutorial independence it entrenched in office the then attorneys-general for the rest of their working lives. In democratic systems this type of independence guaranteed by security of tenure is only granted to high court judges." The Star, Johannesburg, 17 June 1997. As noted in Part 1 above, this skeptical view was also conveyed to Amnesty International in February 1997 by members of the organized legal profession, even where there was concern regarding the impact of the National Prosecuting Authority Bill.

These procedures for the removal of an Attorney-General are fraught with difficulty and have not been exercised since 1992. They do not appear to be consistent with Articles 21 and 22 of the UN Guidelines. Notwithstanding the inconclusive parliamentary hearings on the Attorneys-General in September 1995, the renewed crisis of confidence that year, and subsequently, in the Office of the Attorney-General for KwaZulu Natal revealed the damaging consequences from the system's lack of any quick, convincing and fair means of settling public unease and doubts. As noted by two members of the South African non-governmental Human Rights Committee, "...we find ourselves in the undesirable position where, despite allegations that [Attorneys-General] are failing to serve the interests of justice, there are no remedies against that failure.... Although there are general mechanisms for accountability, there is no way to ensure that the day-to-day exercise of power, which concerns matters of vital public concern, is not being abused."[61]

The National Prosecuting Authority Bill, drafted in terms of the final Constitution, represents an attempt to locate a balance between accountability and independence within the prosecution service.

The National Prosecuting Authority Bill, 1997[62]

The proposed National Prosecuting Authority Bill creates a National Director of Public Prosecutions (NDPP), appointed by the President and responsible to Parliament through the Minister of Justice. Specifically it provides for the NDPP, with the concurrence of the Minister of Justice, to issue prosecution policy directives, to intervene in the prosecution process when policy directives are not complied with, and to carry out other functions indicated under section 179 of the Constitution. The Bill also provides for the appointments of provincial Directors of Public Prosecutions (DPP), currently the provincial Attorneys-General, and other Directors, as decided by the President.

Qualifications and Appointment Process for the NDPP

The draft law requires the National Director of Public Prosecutions, as well as other officials under the terms of the Act, to take an oath or make an affirmation affirming that he or she will *"uphold and protect the Constitution of the Republic and the*

[61]Jeremy Sarkin and Suzie Cowen, "Attorneys-General must be accountable", in Mail & Guardian, Johannesburg, 13 October 1995.

[62]The comments following relate to the Fourth Departmental Draft: Working Document, dated 30 July 1997.

fundamental rights entrenched therein and enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law".

These important principles and obligations should be matched by a process for the appointment of the NDPP which ensures that the office, from the start, is placed beyond any suspicion of political interference affecting its integrity.

Section 6 provides for the appointment of the National Director of Public Prosecutions (NDPP) who must be a legally qualified person, with the right to appear in the High Court and having at least ten years' experience in the application of the law and "such experience as, in the opinion of the President, renders him or her suitable for appointment as the National Director". The section does not refer explicitly to an appointment process other than by referring to section 179 (1)(a) of the Constitution in terms of which the President has the power to appoint the NDPP. While this provision cannot be altered by the legislation, it would be appropriate as an administrative process for the President to act on the recommendations of a committee which is clearly beyond political influence and designed to ensure the highest qualifications of the office holder. The need for such an independent advisory body is indicated also by the additional discretion given the President under *section 6(c)* of the draft law. Such a committee could be the current Judicial Services Commission; or a committee composed of such persons as the Chief Justice, Presidents of the Bar Council and Association of Law Societies, the Minister of Justice and representatives of non-governmental organizations. An all-party committee may be another option, although if such a committee were making a series of appointments there would be the danger that they may barter political favours for different positions. There is another possibility, a committee representing civil society, an option pursued prior to the appointment of the members of the Truth and Reconciliation Commission. However, this could present a real difficulty in identifying a full-range of interest sectors and representatives of each which would be universally accepted.

Whatever appointment process is decided upon and indicated accordingly in the legislation, it should be adopted as a means of enhancing public confidence in the office and the capacity of the appointee to conduct him or herself "in good faith and without fear, favour or prejudice and subject only to the Constitution and the law". In the long-run, it would be advisable to amend the Constitution to ensure some mechanism is entrenched to provide independent advice or review in connection with the appointment of prosecutors.

Appointment Term for the NDPP

Section 7 limits the period of appointment to a maximum of seven years. To help protect the independence of the office the term of appointment should be beyond the term of the President and there should be no provision for reappointment, as currently envisaged under *section 7(2)*. A term of longer than seven years or a reappointment risks politicizing the incumbent. The NDPP should be expected to deal with major, controversial cases throughout the term of office and this can lead to personalizing and politicizing of the position around what might be unpopular decisions. Also not allowing for a reappointment avoids any perception of the tailoring of decisions to favour reappointment towards the end of term. It also provides for the opportunity for fresh approaches and thinking on a regular basis.

Section 7 (4) allows the President to extend the term of the NDPP up to two years beyond the age of retirement. As a safeguard there should be some specified criteria indicated as guidance to the President. Similarly, it is not clear what purpose will be served by providing the President with the discretion, without any specified criteria, to determine the length of the initial appointment of seven years or less. This provision may have a negative impact on the operational independence of the office.

Section 7(10) also gives the President the power to appoint "any fit or proper person" to act as the NDPP during any period when the NDPP is absent or unable to perform his or her functions. As interim arrangements could possibly be necessary for significant periods of time for a variety of reasons, it would seem wise, in the interests of the operational independence of the office, to provide for, under *section 5(2)*, a Deputy National Director of Public Prosecutions. The Deputy should be appointed on the same basis and through the same process as recommended above for the NDPP.

Suspension and Removal of the NDPP

The procedures and grounds for suspension should be consistent with Articles 21 and 22 of the UN Guidelines on the Role of Prosecutors and Section 179, in particular 179(4), of the Constitution.[63] The use of "misconduct" in *section 7(6)* of the Bill is likely to mean that the NDPP is failing to carry out statutory responsibilities in a responsible manner and this should perhaps be defined specifically in the Act. The only other ground for removal which is likely to be necessary is the inability to carry out statutory responsibilities due to mental or physical incapacity. The reference to incapacity to carry out duties "efficiently" is either redundant with misconduct or unhelpfully vague and could allow for political manipulation.

[63]See citation above.

Regarding procedures for removal of the NDPP, there should be some reference to a hearing before Parliament, a Parliamentary Committee or a Judicial Inquiry Commission to ensure natural justice and procedural fairness through such elements as standing, cross-examination, opportunity to lead evidence, and full reasons for the decision. An impeachment procedure in the Parliament should require a two-thirds majority vote and clear criteria. The inclusion of these safeguards will bring the law into line with Articles 21 and 22 of the UN Guidelines and Section 179 of the Constitution.

Functions and Powers of the National Director of Public Prosecutions and the Accountability of the Prosecution Services

Together with section 179 of the Constitution (see above), *section 8(1)* provides a generally appropriate and effective means for the NDPP to hold the prosecution services accountable, help direct resources towards identified priority areas, and raise the standard of professionalism within the service. The constitutional provision gives the NDPP the authority to determine prosecution policy (with the concurrence of the Minister and in consultation with the provincial directors), to issue policy directives and intervene where not complied with, and to review a decision to prosecute or not to prosecute after consultations with the relevant provincial director and receipt of representations. It would be important to include in the draft legislation a requirement that, in considering such representations, the NDPP should act at all times consistently with Article 13 (a) and (b) of the UN Guidelines which requires prosecutors in the performance of their duties to:-

> "(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; [and]
> (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect...."

Section 8 of the draft law, among other provisions, gives the NDPP the discretion to conduct investigations into a prosecution or a prosecution process or directions or guidelines issued by a provincial director, and to require reports from a provincial director with respect to a case, a prosecution or other specified matters. The NDPP will also have discretion to bring proceedings including criminal proceedings in a competent court.The NDPP will be obliged to liaise closely with the provincial directors, the prosecutors, the legal professions and institutions in order to foster common policies and practices and cooperation in the handling of complaints. Other obligations include the development, in consultation with others, of a code of conduct for prosecutors and training programs. The NDPP will be obliged to assist the provincial directors and prosecutors in "achieving effective and fair administration of criminal justice" and in

bringing to their attention the UN Guidelines and promoting "their respect for and compliance with the [guidelines] within the framework of national legislation".

Under *section 8 (1) (k)*, the NDPP is obliged to prepare a comprehensive report annually on matters relating to the range of responsibilities in this section and submit it to the Minister of Justice. This responsibility is elaborated in *section 19*, whereby the NDPP is obliged, on request, to provide the Minister of Justice with reports regarding any case, matter or subject dealt with by the NDPP and a Director and provide reasons for any decision taken by a Director in the exercise of his or her powers. The NDPP is also obliged to provide the Minister with information regarding prosecution policy and policy directives, as indicated under section 179 of the Constitution. Finally, the NDPP is obliged to submit to the Minister any report from a Director with regard to any matter relating to the prosecuting authority. While constitutionally the Minister of Justice has final responsibility over the prosecuting authority and must therefore be the recipient of these reports, it would seem important for the accountability of the office itself that, at the very least, the annual report from the NDPP should be tabled in the national parliament. As it stands, the draft law leaves it in the discretion of the NDPP to submit any report on matters relating to the prosecuting authority to Parliament if he or she deems it necessary. Some reports on current prosecutions would be too sensitive to make public, however, and there may be need for some conditions on confidentiality, even with respect to Parliament. Nevertheless, perhaps a list of such case-related reports could be tabled in Parliament.

It is helpful for reasons of the wider accountability of and public confidence in the NDPP that *section 8(2)* obliges the NDPP to publish in the government *Gazette* "as soon as practicable" and to table in Parliament any prosecution policies and directives he or she may issue.

On a final related point, the NDPP, as noted above, has the power to "review" a decision by a provincial Director to prosecute or not to prosecute in a particular matter, and to intervene in a prosecution process where policy directives are not being complied with. This power of review, to judge from comments made to Amnesty International by members of the Bar Council, the Law Society and other lawyers, includes the power to examine and override a decision to prosecute or not to prosecute. They saw it as advisable to include in the legislation a full reference to the scope of this power of review implied in the Constitution. The full import of this right of review highlights the great importance of ensuring the best possible appointment process for the NDPP, as already noted above, and the inclusion of other safeguards to prevent abuse of this power. In so far as the NDPP is appointed as an impartial person and is in effect at the top of the chain of command within the prosecution service, this sensitive function could perhaps be appropriately exercised, but the NDPP should be required to provide full, written reasons which must be published and placed before Parliament at the earliest appropriate

opportunity. However, in appropriate cases, publication could be delayed so as not to prejudice a proceeding.

A stricter safeguard regarding the exercise of this function could be considered, involving a more "horizontal" review process. If the necessary criteria are met, the NDPP could order the relevant file to be removed (perhaps subject to judicial review) from the DPP or prosecutor and given to an independent prosecutor for a determination on whether or not to prosecute. Victims could have a say in the process.[64]

Finally, in exercising this function, the NDPP should bear in mind the principles in the UN Guidelines, including Article 14, which states that "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded".

Appointment of Directors and Deputy Directors of Public Prosecutions

The appointment of DPPs regarding selection, term, extension and removal should be the same as for the NDPP, given the importance of their role and the necessary exercise of independent authority in most cases.

Section 9 provides for the President to appoint a Director of Public Prosecutions (DPP) in each of the nine provincial divisions of the High Court, the Witwatersrand Local Division of the High Court and potentially in respect of any other local division of the High Court. Since the Constitution is silent on this aspect, there should be nothing to prohibit the legislation including the requirement that the President, in making these appointments, should act on the recommendations of a committee which is clearly beyond political influence and designed to ensure the highest qualifications of the office holder. This may be helpful to emphasize the non-partisan nature of the appointments. *Section 9 (3)* obliges the President to make the appointments "in consultation with the Judicial Services Commission". So also with *section 11*, consideration should be given to having the NDPP, in consultation with the relevant DPP, appoint the Deputy DPPs, rather than the Minister of Justice, to avoid any appearance of partisanship. This would also serve to emphasise the administrative reporting responsibility of the Deputies to the NDPP rather than to a politician. However, there could also be parliamentary scrutiny of the appointments.

[64]See in this connection the recommendations for ensuring prosecutorial independence made by Amnesty International in relation to the establishment of an International Criminal Court (*The International Criminal Court Making the right choices - Part II Organizing the court and guaranteeing a fair trial*, July 1997, pp.21-22, AI Index: IOR 40/11/97).

The importance of employing transparent procedures in the appointments of the Directors of Public Prosecutions is highlighted by the provisions covering the existing Attorneys-General. Under *section 27* anyone holding the office of Attorney-General when the new Act comes into effect becomes a "Director", defined to include Directors as contemplated under *section 2(c)* (referring to Director: Office of Serious Economic Offences), *9(1)(a)* (referring to the floating DPPs attached to the Office of the NDPP), *9(1)(b)* and *(c)* (referring to Directors of Public Prosections in each of the privincial and in any local division of the High Court). *Section 27* permits the President to determine to which of these offices the Attorneys-General/Directors will be appointed.

Under *section 10* the President, in appointing the DPPs, will determine the duration of their term in office up to but not exceeding seven years, including in the case of those holding the office of Attorney-General when the Act comes into effect. A second term prior to retirement age is possible. The concerns and recommendations noted above regarding the term of appointment for the NDPP apply in large measure here, as it is important to ensure that the appointments of the DPPs and their terms of office are made in a uniform, non-partisan manner and unrelated to the term of office of the President.

Regarding the grounds and procedures for the suspension or dismissal of a DPP, the same concerns and recommendations made above in relation to *section 7* for the NDPP apply here also.

Powers and Functions of the Directors and Deputy Directors of Public Prosecutions

In addition to the normal functions currently carried out by the provincial Attorneys-General, the draft law usefully makes explicit the DPP's role in directing investigations. As is evident from the approach taken by the current Pretoria Attorney-General on "third-force" cases, Attorneys-General or their delegates have had the discretion to play a more interventionist role in coordinating with police investigators the investigation and preparation of complex cases. As has already been noted above in Part 1 of this memorandum, there is significant support for this approach, particularly in relation to crimes of national concern. *Section 13(1)(e)* gives a DPP the power to "supervise, direct and co-ordinate specific investigations...." Under *subsection 3*, the DPP may issue directions or guidelines in relation to, presumably, the handling of particular cases and may specify that the DPP should have referred to him or her matters involving particular offences or a class of offences. Under *subsection 5* a provincial police commissioner would also be obliged to act on a request from a DPP for further investigations in relation to particular cases.

Floating Directors of Public Prosecutions

The draft legislation provides for the appointment of Directors of Public Prosecutions additional to those appointed to the provincial divisions of the High Court. *Sections 2(b)* and *5(2)(b)* provide for the appointment of two or three DPPs to the office of the National Director of Public Prosecutions. The President has the power to appoint them, under *section 9(1)(a)* and *9(3)* in consultation with the Judicial Services Commission. It is envisaged, under *section 13(8)*, that they will work under the direction of the National Director of Public Prosecutions who may request them to undertake any functions and exercise any powers as indicated in *section 8(1)*, that is, the full range of duties, functions and powers assigned to the National Director.

In addition the President has the discretion, under *section 9(1)(d)*, to appoint one or more Directors of Public Prosecutions "to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by notice in the *Gazette*". Under *section 13(9)*, these Directors shall operate subject to the directions of the National Director. However, if their duties and powers include those assigned under the law to the provincial Directors, they must act in consultation with the relevant provincial Director.

Under *section 14* the provincial Directors have the authority to delegate to any person who has the right to appear in the High Court the authority to institute criminal proceedings, and to conduct on behalf of the State, as a prosecutor, any prosecution in criminal proceedings in any court within the area of jurisdiction of such Director. A person delegated as a prosecutor under this section may also be assigned to the office of the NDPP or of a provincial Director, as contemplated under *section 9(1)(d)* above. Where so assigned, the person may exercise any of the powers or carry out any of the functions attributed to the NDPP or a provincial Director under the Act.

It is not clear on the face of the Bill, and therefore may lead to unnecessary suspicions, what the role of the extra DPPs would be. Perhaps the intention is to create additional resources to allow for the the handling of matters of systemic concern, such as those relating to political violence, violence against women and children, organized crime and drug traffiking. As a symbolic matter, the use of DPPs for these *ad hoc* positions may add confusion or unnecessary aggravation to the Provincial DPPs. The use of the term "special prosecutors" may be preferable. They could be appointed also to handle matters where there is potential for real or apparent improper interference with a conduct of prosecutions, a model which is used in other jurisdictions. The NDPP and not the President should have the authority to assign them to avoid any danger of political assignment or perception that assignments were being made on political grounds.

AFR 53/01/98
Appendix

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Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

[Image]

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

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

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation, Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

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

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,
Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the

recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

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

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

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

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

Qualifications, selection and training

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

2. States shall ensure that:

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

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

Status and conditions of service

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

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

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

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

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional

qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of expression and association

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

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

Role in criminal proceedings

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

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

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

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

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

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

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

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

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

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

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

Discretionary functions

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

Alternatives to prosecution

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

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

Relations with other government agencies or institutions

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

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege

that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

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

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

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

[Image]
