

Chapter 3: Other Actors in Criminal Proceedings

Part 1: Prosecution Service

Commentary

There are a number of different types of prosecutorial models found around the world. In some systems, the investigation and prosecution of a case are conducted by different actors; the police independently conduct the investigation and then hand over evidence to a prosecutor, who then brings the case before the court. In other systems, the prosecutor is responsible both for prosecuting the case and for directing the police in the investigation of the case. In yet other systems, the prosecutor may work in tandem with an investigating judge and the police in the investigation and prosecution of a case. The prosecutor directs the police in the early stages of the investigation and initiates proceedings, whereupon an investigating judge gathers the evidence and creates a case file (or “dossier”) that is then submitted to the court. Under this system, the investigating judge has broader powers relating to the investigation than a prosecutor does in other systems. For example, the investigating judge may order searches of persons and property and other investigative measures, whereas in other systems the prosecutor would be required to submit a motion and obtain an order from the court.

The drafters of the MCCP debated at length over which prosecutorial model they should adopt. Some experts favored the investigating judge model. They argued that in a post-conflict state, which typically lacks defense counsel, it would be difficult to attain “equality of arms” (this concept is discussed in the commentary in Article 62) and that therefore it would be preferable to have impartial investigating judges, who could protect the interests of both the prosecution and the defense. Those experts who opposed the use of the investigating judge model pointed out that its popularity has been declining for many years, and that many states that had once embraced it had now abandoned it. They also argued that it was better to decentralize power in the investigation and prosecution of criminal cases given the security risks to judges in post-conflict states and the risk of pressure being brought to bear on them by those associated with the accused in cases involving, for example, organized crime or the politically powerful. A third argument against the investigating judge model was that it is overly complex for use in a post-conflict state.

Ultimately, the drafters of the MCCP decided upon a hybrid prosecutorial model whereby an independent prosecutor charged with investigating incriminating and exonerating evidence equally is responsible for overseeing the investigation of a criminal case (which will be conducted by the police under the direct orders of the prosecutor) and for bringing a case before the court. Through the establishment of the

prosecutorial model set out in the M CCP, some concerns about ensuring equality of arms in a post-conflict state are addressed, as the prosecutor is under an affirmative duty to gather evidence both for and against the suspect. The fact that the power to investigate is spread out ensures that no one person is responsible for the entire investigation and therefore reduces the risk of that person being threatened or bribed.

States usually have very detailed legislation in place that regulates their prosecution services. The state's constitution may contain provisions on the prosecution of criminal offenses and the allocation of the power to do so. In addition, there may be specific legislative acts, court rules, or circulars dedicated to the prosecution service. The M CCP primarily addresses the procedural component of criminal law rather than the institutional component. Therefore, the provisions contained in the M CCP are not exhaustive by any means. They merely set out a skeletal framework and provide some basic principles on a prosecution service, just as Chapter 2 sets out a skeletal court system. More detailed legislation is required on matters such as the organization, management, accountability, and operation of the prosecution service; and the qualifications required of its staff and their selection, training, status, and conditions of service. Codes of ethics and provisions on the accountability, integrity and performance of prosecutors are also required.

Reference should be made to the United Nations Guidelines on the Role of Prosecutors; the International Association of Prosecutors' Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors; and the Council of Europe Recommendation (2000)19, or the Role of Public Prosecution in the Criminal Justice System.

Section 1: Organization and Composition of the Prosecution Service

Article 42: Organization of the Prosecution Service

1. The prosecution service is composed of:
 - (a) the office of the chief prosecutor;
 - (b) the office of the prosecutor in [insert area over which the office has jurisdiction];
 - (c) the office of the prosecutor in [insert area over which the office has jurisdiction]; and
 - (d) the office of the prosecutor in [insert area over which the office has jurisdiction].

Commentary

Article 42 provides that an office of the chief prosecutor be established. Other offices of the prosecutor must be established in the state. These offices may be established in the same geographical area as each trial court (see Article 4 of the M CCP), depending on how many trial courts are established.

Article 43: Composition of the Office of the Chief Prosecutor

1. The office of the chief prosecutor is composed of a chief prosecutor, a deputy chief prosecutor, and general staff.
2. The chief prosecutor, deputy chief prosecutor, and prosecutors are designated by the [insert appointing authority].
3. The general staff are appointed by the chief prosecutor.
4. The role of the chief prosecutor is as the principal official and administrative head of the prosecution service and the office of the chief prosecutor and he or she is responsible for its overall management and ensuring the due exercise of its functions.
5. The role of the deputy chief prosecutor is to serve in the place of the chief prosecutor when the chief prosecutor is unable to carry out his or her functions.

Article 44: Composition of the Offices of the Prosecutor

1. Each office of the prosecutor is composed of a deputy prosecutor, prosecutors of the office of the prosecutor, and general staff.
2. The deputy prosecutor and the prosecutors are designated by the [insert appointing authority].
3. The general staff are designated by the deputy prosecutor.

4. The deputy prosecutor is the principal official of each office of the prosecutor. He or she must report directly to the chief prosecutor with respect to the discharge of functions of the office of the prosecutor.
5. The role of prosecutors is to exercise prosecutorial authority relating to criminal investigations and criminal proceedings of the office of the prosecutor.

Section 2: Duties of the Prosecution Service and Duties of Prosecutors

Article 45: Duties of the Prosecution Service

The duties of the prosecution service are to:

- (a) examine any information on criminal offenses committed in [insert name of state];
- (b) direct and supervise the investigation of criminal offenses and the collection of evidence by the police;
- (c) conduct investigations and prosecutions before the courts of [insert name of state]; and
- (d) undertake such other responsibilities as provided for in the M CCP.

Commentary

Article 45 sets out the broad duties of the prosecution service as the body responsible for investigating and prosecuting criminal offenses and, as part of this, for directing the police in the investigation of criminal offenses. Reference should be made to Article 53 that sets out the corresponding duties of the police to follow the directions of the prosecutor in undertaking investigative measures.

Article 46: Duties of Individual Prosecutors

In the exercise of their duties, prosecutors must:

- (a) extend the investigation of criminal offenses to cover all facts and evidence relevant to an assessment of whether a suspect or an accused is criminally responsible, and, in doing so, to investigate incriminating and exonerating circumstances equally;
- (b) take appropriate measures to ensure the effective investigation and prosecution of criminal offenses in [insert name of state], and, in doing so, respect the interests and personal circumstances of victims and witnesses and take into account the nature of the criminal offense, in particular where it involves sexual violence, gender violence, or violence against children;
- (c) to oversee the lawfulness of the actions of the police in a criminal investigation; and
- (d) fully respect the rights of suspects, accused persons, and other persons under the MCCP and to take affirmative action on every violation of human rights.

Commentary

As discussed in the general commentary to Chapter 3, Part 1, of the MCCP, prosecutors are responsible for examining evidence both in favor of and against a suspect or an accused person. Prosecutors not only are required to act in the interests of the prosecution of a case but also have an affirmative duty to take investigative measures that may reveal exonerating evidence. This is especially important where the accused does not have legal representation.

Paragraph (b) notes the requirement to take into account, in particular, the interests of victims and witnesses in cases concerning sexual violence, gender violence, or violence against children. The MCC sets out a number of such offenses. Part II, Section 3, addresses sexual offenses; Article 105 addresses domestic violence while Part II, Section 5, sets out a number of offenses against children. The commentaries to these articles discuss the fact that sexual and gender violence and violence against children are often inadequately addressed in post-conflict states. In some post-conflict states, victims of gender or sexual violence or violence against children have reported that the police or prosecution service has not taken its allegations seriously. With this fact in mind, Article 74 requires that due regard be given to the victims of these offenses. To enforce this obligation, sensitization and training of prosecutors are prerequisites. It

may also be useful to consider establishing special units within the prosecution service to deal specifically with gender and sexual violence and violence against children. It is also important to consider the provision of victim and witness services such as counseling and medical and psychological assistance. Reference should be made to Article 79 and its accompanying commentary for further discussion.

In some legal systems, prosecutors are under a “duty to prosecute,” meaning that they have no discretion about whether to prosecute a particular case if the facts reveal a reasonable suspicion that a criminal offense has taken place. This obligation is not contained in the MCCP. There are specific and defined instances set out in the MCCP where a prosecutor may decline to prosecute a particular case through not initiating a formal investigation under Article 96 or through discontinuing an ongoing investigation under Article 98. The prosecutor has some discretion, although this is structured and clearly delineated in the MCCP and is checked in certain instances by the chief prosecutor in accordance with Guideline 17 of the Guidelines on the Role of Prosecutors, which reads: “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 waiver of prosecution.” Reference should be made to Articles 96 and 98 and their accompanying commentaries.

Section 3: Independence and Impartiality of the Prosecution Service and of Prosecutors

Article 47: Independence of the Prosecution Service

1. The prosecution service must be independent.
2. Independence entails:
 - (a) institutional guarantees of insulation from pressure; and
 - (b) guarantees of actual as well as the appearance of unbiased adjudication.

Commentary

Guideline 4 of the United Nations Guidelines on the Role of Prosecutors requires that states ensure “that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper influence or unjustified exposure to civil, penal or other liability.”

Just as judicial independence is multifaceted, so too is prosecutorial independence, including institutional or functional and individual aspects. Paragraph 2(a) sets out the required institutional or functional independence of the prosecution service. Paragraph 2(b) provides for the personal independence of prosecutors. Guideline 6 of the United Nations Guidelines requires that reasonable conditions of service, adequate remuneration, and, where applicable, tenure, pension, and age of retirement of prosecutors all be set out by law or published rules or regulations. These conditions are fundamental elements of ensuring the personal independence of prosecutors. This paragraph also underscores an important point: independence must be assessed from both an objective and a subjective perspective.

Article 48: Insulation from Pressure

1. Prosecutors must perform their duties independently and in accordance with the applicable law and their solemn declaration.
2. No state entity, private or public organization, or national or international organization or person may influence, seek to influence, or appear to influence prosecutors.
3. Prosecutors must also be independent from pressure from within the prosecution service.

Commentary

The insulation of the prosecution service as a whole and the individual prosecutors within it are crucial elements of prosecutorial independence set out in Article 47(2)(a) as recognized in Guideline 4 of the United Nations Guidelines on the Role of Prosecutors. A prosecutor must carry out his or her duties in accordance with the applicable law and the solemn declaration that he or she makes upon being appointed a prosecutor. Prosecutors must be insulated from two types of pressure: external and internal. External pressure means pressure from external entities, for example, the executive, the legislative, an international organization, or a private person. Internal pressure is exerted from within the prosecution service.

Article 49: Impartiality of Prosecutors

1. Prosecutors must act without prejudice and without improper influence of a direct or indirect nature from any source or for any reason.
2. Prosecutors must uphold the appearance of impartiality by excusing themselves when reasonable to do so under Article 50. A prosecutor who should but who does not excuse himself or herself under Article 50 must be disqualified under Article 51 on the basis of lack of impartiality.
3. Prosecutors must not engage in activities or maintain interests in activities or entities that affect their impartiality.

Commentary

Guideline 13(a) of the United Nations Guidelines on the Role of Prosecutors requires that prosecutors carry out their functions impartially. The concept of impartiality requires that a prosecutor act without favor, bias, or prejudice in the adjudication of a criminal case. A prosecutor who holds a bias or prejudice relating to a person who is party to the proceedings (e.g., the accused person) or who has personal knowledge of the disputed facts of the case cannot be considered to be impartial. Moreover, a prosecutor must not have a vested interest in a case. A vested interest occurs where the prosecutor has an economic or other interest in the outcome of the case or where he or she has a spousal, parental, or other close family, personal, or professional relationship or a subordinate relationship with any of the parties.

As alluded to in Paragraph 3, a prosecutor must act to ensure that there exists neither actual nor perceived partiality, meaning he or she must be both objectively and subjectively impartial. A prosecutor may objectively appear not to be impartial where he or she partakes in certain activities outside the scope of his or her work or where, for example, the prosecutor has expressed opinions, through the media, in writing, or in public actions that, objectively, could adversely affect his or her required impartiality. In some instances, prosecutors are barred from certain extra-career activities in order to secure the perception of objective independence. This prohibition usually does not include teaching but may include involvement in certain business activities.

Article 50: Excusal of a Prosecutor on Account of Lack of Impartiality

1. A prosecutor must not participate in a case if he or she:
 - (a) is a victim of the criminal offense;
 - (b) is a relative of the judge, defense counsel, the victim, the counsel for the victim or the suspect or accused; or
 - (c) has taken part in the proceedings as a defense counsel or a counsel for the victim or has been examined as an expert witness or witness.
2. A prosecutor may not participate in a case where, apart from the instances set out in Paragraph 1, his or her impartiality might reasonably be doubted on any ground.
3. Where the impartiality of a prosecutor is compromised or is in doubt, the prosecutor must make a request to the chief prosecutor to be excused from participating in a particular case.
4. A prosecutor seeking to be excused from his or her functions must make a written request to the chief prosecutor, setting out the grounds for the request.
5. The chief prosecutor must treat the request as confidential.
6. The chief prosecutor must deliver a decision on whether the requesting prosecutor will be excused from the particular case in question.
7. Where a request for disqualification is granted, the chief prosecutor must assign a new prosecutor to the case and ensure that the prosecutor who is the subject of the request takes no further part in the case.
8. All actions of the prosecutor who has been disqualified that were taken before he or she was excused by the chief prosecutor are deemed valid until the time when he or she is excused by the chief prosecutor.

Commentary

Article 50 provides a mechanism for a prosecutor who believes that his or her impartiality—real or perceived—is in doubt to excuse himself or herself from the case. Paragraph 1 lays out specific instances, based on the general principle set out in Article 49 (and similar to those contained in Article 17 on judicial impartiality), in which a prosecutor must excuse himself or herself on account of a lack of impartiality, either real or perceived. Paragraph 2 provides a general residual provision covering other circumstances in which the impartiality of a prosecutor may be doubted.

Article 51: Disqualification of a Prosecutor on Account of Lack of Impartiality

1. A suspect, an accused, or his or her defense counsel, or a judge may at any time object to the participation of a particular prosecutor in a case where the prosecutor's impartiality is in doubt.
2. A request for disqualification of a prosecutor does not suspend the proceedings.
3. A written sworn statement must be prepared that states the grounds upon which the request lies. Any relevant evidence must be attached to the statement.
4. The written sworn statement must be submitted to the chief prosecutor.
5. The prosecutor whose impartiality is doubted is entitled to present written submissions to the chief prosecutor.
6. The chief prosecutor must determine whether to grant the request on the basis of the written sworn statement and the evidence accompanying it and the written submissions of the prosecutor in question, if any were presented.
7. Where the request is granted, the chief prosecutor must assign a new prosecutor to the case and ensure that the prosecutor who is the subject of the request takes no further part in the case.

Commentary

Where a prosecutor does not involuntarily excuse himself or herself from a case in which there is actual or perceived partiality on his or her part, Article 51 provides a mechanism for a suspect or accused person or any judge to file a request for the disqualification of the prosecutor on the grounds of lack of impartiality. The request is filed with the chief prosecutor, who is responsible for determining the validity of the claim. This form of disqualification should not be confused with removal from office, which involves a prosecutor being removed permanently on the grounds of "serious misconduct" or "stated misbehavior," for example. Under Article 51, the prosecutor is disqualified from acting in the course of his or her duties only with regard to the particular case in question. Depending upon the circumstances, the issues of lack of impartiality raised during the course of the proceedings may be grounds for further disciplinary action or even permanent removal. The issue of permanent removal from office is normally dealt with in a code of ethics or a separate piece of legislation outside of the criminal procedure code.

Part 2: Defense Service

Article 52: Defense Service

The competent legislative authority must establish a mechanism to provide free legal assistance to indigent arrested persons and accused in accordance with Article 67 and Article 68.

Commentary

Article 52 requires that a defense service be established to provide free legal assistance to those who cannot afford it. The purpose of Article 52 is to highlight the necessity for a defense service and to emphasize that it should be part of the criminal justice system, just as the prosecution service is. Many argue that in post-conflict states most of the focus of institutional reform is on courts and the prosecution service, with less attention being paid to the defense service. Given the importance of a defense service for the proper administration of justice, the drafters of the MCCP decided to require that one be established. Article 54, however, does not specify what such a service should look like, because of the variations that exist around the world.

The requirement to establish a defense service derives from Article 67 and Article 68 of the MCCP. In line with international human rights norms and standards, Article 67 requires that where an arrested or an accused person does not have sufficient means to pay for legal assistance, and where it is in the interests of justice to do so, free legal assistance will be provided to the person. Article 68 sets out a number of instances where free legal assistance is mandatory, such as where the accused is a child, is mute or deaf, or displays signs of mental illness or other mental disabilities; where the person is accused of a criminal offense that carries a potential penalty of fifteen years' or more imprisonment; or where a person is subject to a request for extradition. State practice varies as to when the right to free legal assistance begins to apply ("attaches"). In some systems, free legal assistance is provided only when formal charges have been rendered against a person, in other words, only when the person goes from being a *suspect* as defined in Article 1(43) to being an *accused* as defined in Article 1(1). (The transformation from a suspect to an accused may take place pursuant to an indictment or the filing of police charges against a person, depending on the particular legal system in place. Under the MCCP, a suspect becomes an accused where an indictment is presented to the court under Article 195 and later approved by the court at a confirmation hearing under Article 201.) In other systems, free legal assistance is provided from the moment a person is arrested and held in detention, prior to the rendering of formal charges or an indictment. The latter model is the one that has been adopted in

the MCCP. Reference should be made to Article 67 and its accompanying commentary for further discussion.

Each post-conflict state should determine what its defense service will look like based on the state's unique situation, its resources, any preexisting mechanisms, and the need to ensure "equality of arms" (discussed in the commentary to Article 62). This commentary discusses a variety of options and their advantages and disadvantages.

Few states provide free legal assistance fully and consistently. The difficulty of doing so is exacerbated in post-conflict states struggling to establish, rebuild, or reform institutions and lacking adequate human and materiel resources to provide high-quality legal aid to all who need it, especially those who come from marginalized groups. Despite the scale of the challenge, every effort must be made to establish a legal aid system. Two mechanisms are generally used to provide free legal assistance: *legal representation* and *legal advice*. *Legal representation* is provided to an arrested person or the accused person by a qualified lawyer, who has the ability to advocate for the person in court. *Legal advice* may be provided by a lawyer, of course, but it may also be provided by a range of other actors, for example, paralegals, who are not lawyers by profession but who are trained to advise in criminal matters.

Turning to legal representation first, it is preferable that an arrested or accused person be represented by a qualified lawyer. Various methods are used around the world to provide free legal assistance, or legal aid, to indigent persons. Many states have legislation that sets forth the mechanisms for provision of legal aid. One method for providing legal aid is through the "list model" or "panel model," while another is through a "defense unit" or the "public defender model." In the first model, counsel is selected from a list of lawyers who have been found to meet specified criteria set out in legislation. Counsel may be paid at an hourly or daily rate or by a flat fee set according to the nature of the case. In the second model, lawyers are hired by the state as full-time, salaried employees of a permanent defense unit led by a full-time chief.

Some experts consulted in preparation of the MCCP expressed a strong preference for the establishment of a fully funded and independent defense unit, such as those units established for the Special Court for Sierra Leone and the Special Panels for Serious Crimes in East Timor. These experts argued that the right to "equality of arms" demands that if a fully funded, independent, and adequately resourced prosecution service of the kind set out in Chapter 3, Part 1, of the MCCP is established, then an equally financed and equally independent defense unit should also be set up. They further argued that the establishment of such a unit signals an institutional commitment to the defense function. A defense unit model may prove less expensive to administer than other models; the experience of the ad hoc tribunals shows that in a list system it may be difficult to avoid delays, to control costs, and to prevent questionable practices such as the splitting of fees with clients' families. Maintenance of a defense unit, moreover, fosters the development of defense practitioners whose skills are tailored to the court before which they appear. Defense unit lawyers can cultivate an institutional memory that seldom develops in a list system, in which attorneys appear before the court in a sporadic and uncoordinated fashion. The head of a defense unit, meanwhile, not only oversees the work of defense unit staff but also acts as an advocate for the defense bar in administrative discussions regarding the workings of the court. For post-conflict states considering the introduction and establishment of a dedicated

defense unit, a model worth studying is that instituted at the Special Court for Sierra Leone.

Many other experts consulted during the drafting of the MCCC were of the view that, given resource constraints in many post-conflict states, it may be necessary to examine alternative and more pragmatic solutions in order to realize the right to free legal assistance. Setting up a defense unit takes time, they noted. They also argued that there should be no automatic presumption that one model is better than the other; which model of legal aid is appropriate for a given country should be determined according to that country's specific circumstances. Some countries opt against a dedicated defense unit and prefer a well-managed panel program overseen by a legal aid board. Moreover, use of a defense unit model may pose significant problems. If the number of staff lawyers is small, and the accused are many and interrelated, it will be difficult to avoid conflicts of interest in the course of representation. Lawyers not employed by the defense unit may feel shut out; in turn, the exclusion of such lawyers may hamper efforts to build the capacity of the criminal justice system.

In post-conflict situations where lawyers are scarce or untrained to handle serious criminal cases, a hybrid system, in which a defense unit works in tandem with a list of lawyers, might provide a solution to these problems. Even if this model is contemplated at some future time, in the immediate term a list system may be the only option available if accused persons are to have some legal representation.

Other models might also be contemplated, especially where resources are extremely limited. These options relate more to the provision of legal advice than legal representation (which may be rendered only by a qualified lawyer) as they involve the provision of advice by nonlawyers. In some states, such as Malawi and Kenya, and in some post-conflict states, such as South Africa and Sierra Leone, paralegal aid schemes have been established by non-governmental organizations, with nonlawyers being trained in criminal law and procedure in order to provide legal advice to arrested, detained, or accused persons. In some places, the state has agreed to allow paralegals to enter prisons and detention facilities to advise detainees and convicted persons. Permission has also been granted in some states for paralegals to sit in on police interviews and to provide independent advice to arrested or detained persons. One of the main functions of paralegals is to make persons aware of their rights through education. Paralegals also play a role in teaching arrested or accused persons how to conduct themselves in court in order to represent themselves and ensure that their rights are adequately protected. Legal education by paralegals has been pioneered in many inventive ways, such as the establishment of mock courts in prisons and through role playing. Paralegals also attend court during hearings or at trial, and although they cannot speak before the court, they can advise the arrested or accused person.

Paralegal aid schemes have proved a highly successful and resource-saving means of delivering legal advice where the state-run legal aid system is not functional or is incapable of delivering legal aid to all arrested or detained persons. In other systems, law students under the supervision of a qualified mentor handle certain aspects of a criminal case. Depending on the system, they may have standing to appear in court.

In post-conflict Kosovo, there was initially no formal system of legal aid in criminal cases. If a person appeared before the court, the court could appoint an attorney from one of the private lawyers who were part of the Chamber of Advocates, but per-

sons in detention had no means of seeking representation from a lawyer unless they knew of a lawyer and could pay for his or her services. When the United Nations Mission in Kosovo (UNMIK) was established, a list system was set up and a roster of attorneys posted at police stations so that arrested or detained persons could contact an attorney before they appeared in court. UNMIK later created a Criminal Defense Resource Centre to provide defense lawyers with research and technical assistance, especially with regard to making arguments based upon international human rights standards and to defending clients charged with war crimes, crimes against humanity, and genocide.

In determining how to implement and make effective the right to free legal assistance in a post-conflict state, national-level planning is crucial. The decision on which mechanism to introduce should not be undertaken without first consulting with lawyers and the judiciary as well as with the public, non-governmental organizations, civil society groups, and other interest groups. The level of funding required to establish, operate, and maintain adequate and competent legal aid systems should be carefully considered, as should the number and qualifications of the personnel required. Whatever legal aid mechanism is established, adequate training of personnel is vital. Where a defense unit or a list system of legal aid is established, a code of conduct for those providing legal aid must be developed.

Where the defense unit or the list system is introduced, a post-conflict state must consider the competence of the lawyers it engages. International human rights law requires that the lawyer represent the arrested or accused person *effectively* at all critical stages of criminal proceedings. (See *Artico v. Italy* [1980], 3 European Human Rights Report [EHRR] 1, paragraph 33, which observes, with particular regard to right to counsel, that the European Convention on Human Rights “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective,” and ruling that an accused who was deprived of benefit of appointed lawyer’s services did not receive assistance guaranteed by article 6[3][c] of the convention.) Principle 6 of the United Nations Basic Principles on the Role of Lawyers requires that a lawyer providing free legal assistance to an indigent arrested person or accused person “must be a lawyer of sufficient experience and competence commensurate with the nature of the offense to them in order to provide effective legal assistance.”

A post-conflict state with a dearth of qualified lawyers may want to consider amending its law to allow for representation by foreign lawyers, who could supplement the local pool of lawyers. In post-conflict East Timor, the Solomon Islands, and Cambodia, provision was made to allow foreign lawyers to act as defense lawyers. However, in other post-conflict locales, such as Liberia and Kosovo, the use of foreign lawyers was vehemently opposed. It goes without saying that any foreign lawyer working in a post-conflict state needs to be fully competent in the types of cases he or she will handle and fully knowledgeable about the applicable law.

Part 3: The Police

General Commentary

In some states, the police are wholly responsible for the investigation of an alleged criminal offense and the storage of evidence. Once the police investigation is over, the police hand over all evidence and the file to the prosecution service. The prosecution service then decides whether or not there is strong enough evidence to mount a prosecution. If there is enough evidence, the prosecution service is responsible for bringing the case before the court. In other states, the police play a still crucial but less independent role in criminal investigation. The police may act under the direction of either a prosecutor or an investigating judge who is responsible for the creation of the case file and storage of evidence. Under the MCCP, the police act under the direction of the prosecutor in the case.

As part of the Model Codes project, a Model Police Powers Act has been created; it is contained in volume III of the *Model Codes for Post-Conflict Criminal Justice*. Many police acts contain a mixture of administrative and organizational provisions (e.g., provisions concerning the organizational structure of the police force, promotion, holidays, storage of weapons, and wearing of uniforms) in addition to setting out police powers and duties. The Model Police Powers Act, however, does not contain any administrative or organizational provisions. Instead, it deals solely with police powers and duties. It first covers the broad duties and powers of the police with regard to the maintenance of public order and criminal investigation, and then presents detailed provisions on the execution of police powers with regard to public order. The execution of police powers relating to criminal investigation is contained not in the Model Police Powers Act but in the MCCP. Part 3 of Chapter 3 of the MCCP elaborates more fully on the broad criminal investigation duties and powers of the police set out in the Model Police Powers Act. These powers are also elaborated upon in other parts of the MCCP. For example, the power to search premises and seize items is addressed in Articles 118–121; the power to question suspects in Chapter 8, Part 3, Section 1; the power to conduct a search of a suspect in Articles 122–125; and the power to conduct a physical examination of a suspect in certain defined instances in Article 142.

Article 53: Duties and Powers of the Police Relating to Criminal Investigation

1. The police are under a duty to investigate criminal offenses and must take all measures without delay to:
 - (a) prevent the concealment or loss of evidence;

- (b) locate the perpetrator of a suspected criminal offense;
 - (c) prevent the perpetrator or any accomplice from hiding or fleeing;
 - (d) detect and preserve traces or other evidence of a suspected criminal offense and objects that might be used as evidence; and
 - (e) collect all information that may be of use in criminal proceedings.
2. The police are also under a duty to make a written record or official note of:
 - (a) all actions taken in the investigation of a suspected criminal offense;
 - (b) facts and circumstances that are pertinent to the investigation; and
 - (c) all evidence or objects that have been gathered or found in the course of the investigation.
 3. In order to perform the duties set out in Paragraph 1, the police have the powers set out in the M CCP, the Model Police Powers Act and under the applicable law.

Commentary

Paragraphs 1 and 2: The Model Police Powers Act (MPPA) sets out the general duties of the policing authority including the duty of the policing authority to prevent, detect, and investigate criminal offenses. Paragraph 1 above elaborates upon the specific duties inherent in the broad duty outlined in the MPPA. In addition, Paragraph 2 requires that policing officials make an official note or written record of all actions taken in the investigation of a criminal offense and of any evidence gathered. This is especially important given the prosecutorial structure contained in the M CCP, whereby the prosecutor, directing the police, relies on the police to carry out the investigation and gather evidence. Once recorded, the details regarding the investigation or the evidence must be handed to the prosecutor to be put in the case file or, in the case of evidence, to be stored by the prosecutor.