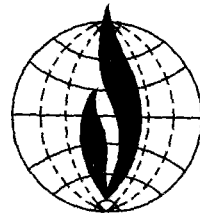


CIJL Yearbook



The Judiciary in Transition

Vol. III

Centre for the Independence
of Judges and Lawyers

August 1994
Editor: Mona A. Rishmawi

1994

YEARBOOK - Vol. III

CIJL

Established in 1978 by the International Commission of Jurists in Geneva, the Centre for the Independence of Judges and Lawyers:

- promotes world-wide the basic need for an independent judiciary and legal profession;
- organizes support for judges and lawyers who are being harassed or persecuted.

In pursuing these goals, the CIJL:

- works with the United Nations in setting standards for the independence of judges and lawyers. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers endorsed by the UN General Assembly;
- organizes conferences and seminars on the independence of the judiciary and the legal profession. Regional seminars have been held in Central America, South America, South Asia, South-East Asia, East Africa, West Africa and the Caribbean. National workshops have been organized in India, Nicaragua, Pakistan, Paraguay and Peru;
- sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries;
- provides technical assistance to strengthen the judiciary and the legal profession;
- publishes a Yearbook in English, French and Spanish. It contains articles and documents relevant to the independence of the judiciary and the legal profession. Over 5,000 individuals and organizations in 127 countries receive the CIJL Yearbook;
- publishes a yearly report on "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers" world-wide.

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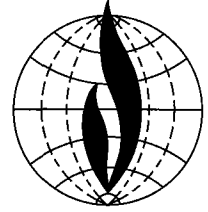
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EDITORIAL

In times of transition, the judiciary needs to be given special attention. This period is essential to restore the balance between the three state authorities, to empower the judiciary to become a separate and equal power. As such, it can fulfil its role as the main protector of human rights.

The Centre for the Independence of Judges and Lawyers (CIJL) actively works to strengthen the judiciary and legal profession throughout the world. During the last year, two countries undergoing important change became the centre of our attention: Cambodia and the Palestinian Territories occupied by Israel since 1967. Although the situations of these countries differ, both engagements posed a positive and serious challenge to the work of the CIJL.

As stated in the report of the Seminar on Judicial Functions and Independence in Cambodia, Part One of this third volume of the *CIJL Yearbook*, most Cambodian judges and lawyers were massacred in the tragic recent past. Hence, the judiciary has been run by a majority of individuals with neither legal education nor training. Over the last decade, the legal system, while having French colonial roots, was seriously affected by the Vietnamese model, which did not respect the judiciary's proper place within the society and state institutions.

A preparatory visit preceded our three-week training Seminar in Cambodia. A background paper, prepared by one of the few lawyers who had the opportunity to test the Cambodian

legal system as a result of his work with the United Nations in Cambodia, helped us to identify central legal concepts that needed to be stressed. As days went by at the beginning of the Seminar, the enthusiastic reaction of the participating Cambodian judges assured us that we were on the right track. While satisfied with the results of the meeting, the CIJL understands that its work constitutes only a modest contribution on the road towards strengthening the Cambodian judiciary. As was correctly stated by the Seminar participants themselves, an institutionalized Cambodian training effort is needed.

We faced a different challenge in the West Bank and Gaza. While the existence of qualified judges is not lacking, the Palestinian judiciary has been seriously weakened by Israeli occupation. The Declaration of Principles signed by Israel and the Palestine Liberation Organization (PLO) in September 1993 encouraged us to visit the Occupied Territories with the aim of strengthening Palestinian judicial independence in the new circumstances. Our visit was composed of two parts: a Mission and a Seminar. The Mission of six experts, organized jointly by the International Commission of Jurists (ICJ) and the CIJL, identified the defects in the legal and judicial system that have negatively affected the independence of the Palestinian judiciary.

The subsequent two-day Seminar, organized jointly with Al-Haq, the ICJ's West Bank Affiliate, aimed at sharing the experience and observations of the members of the Mission with Palestinian lawyers and judges.

The Mission report was published in June of this year and is entitled *The Civilian Judicial System in the West Bank and*

Gaza: Present and Future. In Part Two of this volume of the *CIJL Yearbook*, we publish the statements made by most of the members of the Mission, as well as of some of the Palestinian participants who addressed the forum. The speeches, while reflecting the individual impressions of the members of the Mission, paint a clear picture of how the system of justice has been distorted during Israeli occupation and makes practical recommendations for reform. We plan to continue our engagement.

As is clear from the examples of Cambodia and of the West Bank and Gaza, the CIJL attempts to adapt its assistance techniques, methodology and choice of resource persons to the requirements of each situation. Thanks to the range and depth of legal expertise we have within our circle, this type of adaptation is possible.

The CIJL is encouraged by the establishment in March of this year of a Special Rapporteur on the Independence of the Judiciary of the UN Commission on Human Rights. We warmly welcome the appointment of a member of our Advisory Board, Dato' Param Cumaraswamy, to this post.

Dato' Param Cumaraswamy is a courageous fighter for the independence of the judiciary and the legal profession. A Malaysian advocate, he is a member of the ICJ and the President of LAWASIA. He will hold office for three years. His mandate is outlined in the Resolution of the UN Commission reproduced as a Basic Text in Part Three of this volume.

The creation of a Special Rapporteur means that the issue of judicial independence will be discussed by the UN

Commission. In order to submit our annual report *Attacks on Justice: Harassment and Persecution of Judges and Lawyers* to this forum, it will be produced annually in February. Subsequently, the *Yearbook*, beginning with this volume, is published in August.

This third volume of the *Yearbook* is dedicated to all the judges, lawyers and legal defenders in Cambodia and in the West Bank and Gaza. It is their courage, enthusiasm and aspiration for a better future based on the Rule of Law that brought us to their parts of the world. Thanks are also due to all our international experts who shared their knowledge and experience with their colleagues in Cambodia and the Palestinian Territories. It is the dedication of such individuals to strengthening judicial independence throughout the world that makes our modest contributions possible. I would also like to acknowledge the efforts of my colleague, Mr. Peter Wilborn, in assisting in the preparation of such programmes and in the editing of this volume.

Mona A. Rishmawi
CIJL Director
August 1994

PART ONE :

***SEMINAR ON JUDICIAL FUNCTIONS AND
INDEPENDENCE IN CAMBODIA***

Phnom Penh
5-23 July 1993

REPORT OF THE CIJL SEMINAR ON JUDICIAL FUNCTIONS AND INDEPENDENCE IN CAMBODIA

Phnom Penh, Cambodia
5-23 July 1993

I. INTRODUCTION

Democratic elections in Cambodia were held in May 1993. These elections, the goal of an elaborate United Nations presence in the country,¹ marked the beginning of a new era in Cambodia. While domestic and international optimism for a peaceful future were high, there was universal acknowledgement that a large amount of reconstruction, institution building, was necessary to transform democratic elections into a democratic society.

After the elections, as UNTAC prepared to pull out, it became increasingly clear exactly what institution building meant. Decades of tragedy have wiped out almost all remnants of fundamental institutions in Cambodia, perhaps most notably, the judiciary. As stated by UN Special Representative in Cambodia, Justice Michael Kirby, "The glowing picture of co-operation and support should not disguise the fragile and

1 In 1992 alone, United Nations Transitional Authority in Cambodia (UNTAC) spent US\$ 200 million.

shattered state of human rights in Cambodia.... It remains a country traumatized by the recent past and threatened by the continuing security problems, which present a constant challenge to the building of a civil society. There are especially serious defects in the institution of justice and the practices affecting due process....”²

An independent judiciary is the backbone of any democratic society under the Rule of Law, and this is especially true in Cambodia, where the success of the transition to democracy hinges upon its establishment. As aptly noted by one commentator, “Few tasks in the area of democratic reform are more important than establishing the independence of the Cambodian judiciary.”³ In his first report, the UN Special Representative concluded that the implementation of training programs aimed at the promotion and protection of civil rights and ensuring true independence of the judiciary were priority areas requiring urgent attention.⁴

In this regard, and at the critical juncture following democratic elections, the Centre for the Independence of Judges and Lawyers (CIJL), in cooperation with the Human Rights

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- 2 Special Representative of the Secretary-General, Justice Michael Kirby, on the situation of human rights in Cambodia, "Cambodia -- Unequalled Suffering; Unique Opportunity," a speech to the UN Commission on Human Rights, 2 March 1994.
 - 3 Dolores A. Donovan, *The Cambodian Legal System: An Overview*, 69-107 (1992).
 - 4 Report of the Special Representative, Justice Michael Kirby, E.CN.4/1994/73/Add.1 at 5-6.

Component of UNTAC, held a Seminar on Judicial Functions and Independence in Cambodia, from 5 to 23 July 1993.

The Seminar was a three-week training program for fifty-six potential judges of the Supreme Court and Court of Appeal likely to serve under the elected government. The Seminar aimed to lay the groundwork on which to build an impartial Cambodian judiciary, by introducing and illustrating the concept of judicial independence and by continuing the legal education of participants.

II. THE CONTEXT: The Judiciary in Cambodia

While no recap of Cambodia's tragic past is needed,⁵ it is important to realize the extent to which it affects the very notion of judicial independence. The judiciary, perhaps even more than any other fundamental institution, has suffered greatly throughout Cambodia's history. Following independence, Cambodia based its legal system on the French colonial system that preceded it. Its existence, however, was short-lived. The civil war, from 1970 to 1975, largely disrupted the functioning

5 *See* David P. Chandler, *A History of Cambodia* (2nd ed. 1993). For a brief historical overview *see* Report of the Special Representative, Justice Michael Kirby, E/CN.4/1994/73, at 7-9, quoting Grant Curtis, "Transition to What? Cambodia, UNTAC and the Peace Process," discussion paper, United Nations Research Institute for Social Development (UNRISD), November 1993. *See also* Daniel Breznik, *The Cambodian Road: An Analysis of the Contemporary Cambodian Situation*, a discussion paper prepared for the Australian Section of the International Commission of Jurists (July 1989).

of Cambodian civil society. The situation went from bad to tragic with the rise of Democratic Kampuchea (DK), under Pol Pot and the Khmer Rouge. The legal profession was devastated in the DK drive to rid the country of foreign influence, to annihilate those “who wear glasses.” During the DK reign, from April 1975 to January 1979, not only was there no judicial system of any kind in Cambodia, there were very few members of the legal profession in the country alive.

During the succeeding era of the Vietnamese-controlled People’s Republic of Kampuchea, and after Vietnamese withdrawal in 1989, of the State of Cambodia (SoC), the reestablished legal system followed the socialist model of Vietnam and did not return to its French colonial roots. True to the socialist model, the judiciary was dominated by an omnipotent single branch of government. Until 1988, the Ministry of Justice supervised all facets of the administration of justice and was responsible for “reviewing all judgments rendered by the courts of first instance for factual and legal correctness, and for equity in sentencing.”⁶ While in 1988, the function of review of judicial judgments was given to the newly created Supreme Court, the transfer of appellate jurisdiction was a purely technical matter and the judiciary remained subordinate to the Ministry of Justice.⁷ Furthermore, neither the courts of first instance nor the Supreme Court had the power to interpret laws and executive decrees or the power to review

6 Donovan at 84.

7 *Id.*

them for constitutionality.⁸

The Paris Peace Agreements, signed on 23 October 1991, provided that “an independent judiciary will be established, empowered to enforce the rights provided under the constitution.” An independent judiciary was indeed guaranteed by the Cambodian Constitution, which was drafted as the CIJL Seminar took place and later proclaimed in September 1993. The new Constitution states that “the judiciary shall be an independent power.”⁹

The legal basis for the independence of the judiciary during the transitional period was provided by the *Provisions relating to the judiciary and criminal law and procedure*, adopted by the Supreme National Council on 10 September 1992. According to these Provisions:

1. The independence of the judiciary must be guaranteed in accordance with *The Basic Principles on the Independence of the Judiciary*, adopted by the United Nations. Judges must decide in complete impartiality, on the basis of facts which are presented to them, and in accordance with law, refusing any pressure, threat or intimidation, direct or indirect, from any of the parties to a proceeding or any other person.

8 *Id.*

9 Ch. 9.

2. The judiciary must be independent of the executive and legislative authorities and of any political party. Persons selected for judicial functions must be honest and competent.
3. The principle of the independence of the judiciary entitles and requires judges to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. They must have decent and sufficient material conditions for the exercise of their functions. Judges must receive suitable training and be remunerated adequately to ensure their impartiality and independence.¹⁰

Despite these provisions, at the time of the CIJL Seminar, the situation of an independent judiciary remained as it had been before the Peace Agreements. The changes on paper were not reflected in reality and the problems facing the Cambodian judiciary were enormous. Problems included, to quote from an article on Cambodia that appeared in this *Yearbook* last year: "summary executions and administrative detention; the inability to prosecute offences committed by the police or military, and to summon police and military personnel as witnesses; executive control over the judiciary; and the lack of a system of fair trial and trained lawyers. There is no proper appeal system,

10 *Provisions relating to the judiciary and criminal law and procedure applicable in Cambodia during the transitional period* at sect. 1, art. 1.

and no Supreme Court with the power of judicial review or of examining the validity and legality of administrative actions.”¹¹ Adding to this list of problems was the lack of both trained judges, without which an independent judiciary cannot exist, and of necessary laws and procedure.

III. THE SEMINAR

It is against this sombre backdrop that the CIJL held its Seminar on Judicial Functions and Independence in Cambodia. Recognizing both the importance and the difficulty of its task, the Seminar aimed to lay the groundwork on which to build an impartial Cambodian judiciary. The three-week Seminar brought together fifty-six potential judges of the Supreme Court and Court of Appeals likely to serve under the newly elected government. Working with members of the present and proposed judiciary of Cambodia, the Seminar introduced

11 Basil Fernando, "Cambodia. The Court and the Constitution: A Point of View," 2 *CIJL Yearbook* 65, 84-85 (1993); see also Amnesty International, "Kampuchea: Political Imprisonment and Torture (ASA/23/05/87).

international principles of human rights,¹² the independence of judges and lawyers, and issues of legal substance and procedure.

Participants, Topics and Method of Work

When the workshop was first organized, the nominated participants were sponsored by the SoC government. Following the May elections, the CIJL insisted the Seminar be comprised of potential judges nominated by all eligible political factions. Consequently, *participants came from varied backgrounds and experiences*. While the upper echelon of judges from the preceding regime were present, the majority were not trained legal professionals. Many were teachers who had been chosen by their respective political sponsors after the elections to be judges and magistrates. Most, if not all, participants had received some form of legal education, but from a variety of sources. Participants were asked which legal system they felt had been the predominant frame of reference in the legal

12 Cambodia is a party to numerous international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination; International Convention on the Suppression and Punishment of Apartheid; Convention on the Prevention and Punishment of the Crime of Genocide; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Elimination of Discrimination Against Women; Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees.

education they had received, however long or short — fifteen indicated the French legal system, fourteen the Common Law system, and fourteen the socialist legal system. Participants varied in experience, age, political affiliation, and education. They were united primarily by the desire to learn more about their profession.

Over the three weeks, the CIJL brought seven prominent judges and lawyers representing the world's major legal systems to Phnom Penh to lead the Seminar. The Instructors included: P.N. Bhagwati (former Chief Justice of India; Chairman, CIJL Advisory Board); Marie-José Crespin (Member, *Conseil Constitutionnel* of Senegal; ICJ Member; CIJL Advisory Board Member); Enoch Dumbutshena (former Chief Justice of Zimbabwe; ICJ Vice President; CIJL Advisory Board Member); Jean Germain (President, Court of Appeal of Paris, France); Michael D. Kirby (President, NSW Court of Appeal, Australia; Chairman of the ICJ Executive Committee); Antonio LaViña (Professor of Law, University of the Philippines; Member of Free Legal Assistance Group (FLAG), Philippines); Pablito V. Sanidad (Chairman of FLAG, Philippines, CIJL Advisory Board Member). Mona Rishmawi (CIJL Director), Daniel O'Donnell (Coordinator of the Seminar; former CIJL Director) and Peter Wilborn (CIJL Asst. Legal Officer) organised and participated in the Seminar.

Each Instructor was chosen for his/her area of expertise, and as a group, they covered a vast area of legal experience and distinction, from human rights lawyer to Supreme Court judge. Over the three weeks, they treated a wide range of criminal, civil and constitutional law and procedure in order to further the legal education of the participants and to illustrate how an

independent court functions in different situations. Subjects included, for example, the Rule of Law and the separation of powers, court structure, criminal procedure, appellate court decision making, and judicial review.

As a general rule, and as illustrated below, the Seminar followed a three-level method of work. The three-level approach was designed to maximise participant involvement, as well as to profit from the varied experiences of the Instructors. First, Instructors gave lectures on specific topics. These lectures were followed by discussion in the plenary group. Second, certain topics were discussed in more detail by participants in smaller groups. The plenary group was divided into three Working Groups which discussed issues and reported on them. Third, Instructors conducted role-play and moot-court exercises to further develop the concepts and issues presented. These exercises played a prominent role in the Seminar because they provided practical examples of the issues examined through lecture and discussion. For many participants, these exercises provided a first glimpse at the workings of a courtroom.

The Seminar was divided into three parts. The first part, Judicial Independence and the Rule of Law, introduced the conceptual framework of an independent judiciary. The Rule of Law, the independence of the judiciary, the separation of powers, court systems and structures, and the respective roles of the judge, prosecutor and lawyer were presented. The second part, Law and Procedure, went into legal provisions and demonstrated how they are implemented by an independent judiciary to protect human rights. The third part, Appeal, Comparative Law and Judicial Review, examined the next step

up the judicial ladder and further developed some of the conceptual issues of part one. Of particular focus was the judiciary's function of judicial review of administrative actions. This part also provided a comparative overview of the primary differences between the common law and French legal models. Throughout the three parts of the Seminar, Instructors illustrated how the universal principles of judicial independence are not lofty rhetoric; applied to all stages of the administration of justice, they are the concrete foundation of the Rule of Law and of immediate and practical relevance to Cambodia.

Judicial Independence and the Rule of Law

The Rule of Law and an Independent Judiciary, a lecture by Justice Enoch Dumbutshena, opened the Seminar. Sharing the experience of Zimbabwe, which found itself at independence without an effective judiciary, Justice Dumbutshena showed participants from the outset that their task, although difficult, was not impossible. He went on to list the rights of judges to act free from intimidation and pressure. He continued by stressing the nobility of the profession and the corresponding duty on judges to be courageous and fearless. Independence alone is not enough: "Do your work according to the dictates of your heart and conscience. Justice," he said, "comes from the heart. It is there that it resides."

Justice Dumbutshena's lecture was met with lively discussion, and set the tone for the three weeks that followed. His statement that judges should not be members of political parties was seized upon as the center of the first day's debate. To many, the statement was difficult to understand; participants

were invited to attend the Seminar on the very basis of their political affiliation. Is it possible, some queried, for judges to renounce political affiliation, to bite the proverbial hand that feeds? This discussion led to an introduction to the UN Basic Principles on the Independence of the Judiciary. As stated above, judicial independence is a foreign concept in Cambodia, and is completely unknown in its recent history. Starting from the beginning, using the Basic Principles (available to the participants in Khmer), the concept was presented: “The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”¹³

The Seminar moved from this introduction to the issue of the separation of powers. After a lecture and discussion, the plenary broke into three Working Groups in order to examine the concept in closer detail. Each of the three groups was given a branch of government to discuss. The Working Groups drew up reports of their discussions and these reports were read aloud in plenary.

The Seminar found the reports of Working Groups to be an important tool. Participants took pride in preparing and presenting the reports. The reports are also valuable because

13 UN Basic Principles on the Independence of the Judiciary, art. 2, G.A. Res. 146, UN GAOR, 40th Sess. (1985), reprinted in 25-26 *CJIL Bulletin* 14 (1990).

they give a voice to members of the Cambodian judiciary. In discussing the role of the executive branch, for example, one of the Working Groups summed up the experience of the Cambodian judiciary: "There has been no democracy in this country for the past two decades. The separation of the three powers just occurred in the structure of the law, that is to say, in theory, but it was either not implemented or there was no judicial power at all. Moreover, the executive always uses its influence to seriously dominate the judiciary. For instance, police have no limitation of power in detaining an accused person. They never send the accused to court for trial. They arbitrarily arrest, detain and release. If any judge convicts the police's favorite people, the judge will be physically or psychologically mistreated."¹⁴

Discussing the role of the judiciary in a civil society, another Working Group went straight to the core problems, stating that "Judicial power must not be submissive to the other two powers, the three must be separate from each other and have different functions. To this end, the constitution must clearly provide for an independent judiciary; judges themselves must have real competence in legal matters and must be courageous; judges must be well paid so that they have a good standard of living; a judicial council must be created to administer, nominate, promote, control and defend judges; and the state must have sufficient laws on which judges can base their work."

14 Reports of participants are translated from Khmer.

Another basic topic discussed in the early days of the Seminar was the functions and structures of courts. This session defined courts and mapped out their structure and order. After reaching a general definition of what a court is and of what is to be accomplished in a court, the focus turned to the importance of different, hierarchically ordered, courts. The function of a trial court was presented, and then contrasted with appellate courts. The function of the Supreme Court was discussed, including its power of judicial review of the law. The Seminar followed the framework of courts as provided in the *Provisions relating to the judiciary*.

From there, the Seminar turned to the three actors in the judicial system: lawyers, prosecutors, and judges. Despite the fact that these persons come together to participate in the administration of justice, their respective roles (and corresponding duties, rights, obligations, interests, and goals) are different, and sometimes, opposed. Participants broke into Working Groups, each group examining one of the actors. Once again set in motion by lecture and large group discussion, the Working Groups carried the examination of the issue further, and presented their findings to the whole.

Speaking of defense lawyers, one Working Group stated "We must not forget that the prosecutor is not the representative of the accused person at all. So while seeking justice in front of the courts, for both civil and criminal cases, defence lawyers are needed. Defenders will defend the interests of their clients, the accused, and in doing so assist in the judge's task to seek justice for both parties in the lawsuit. The right to defense must be clearly stipulated in the constitution, where it must provide that: "Every person shall have the right to legal defense of his own

choosing to protect his own rights and freedom, his honour, his property and his reputation in front of the court.”” Stressing their importance to the administration of justice in Cambodia, it was said that lawyers “make war striving for justice.”

Considering the prosecutor, participants broke its role into three stages. “First, the prosecutor exercises the right to represent the state, and with the co-operation of the police, collects evidence concerning an alleged crime or offense. In this process, the prosecutor must ensure that all evidence is valid and not extracted by unlawful means. Second, the prosecutor must bring the case to trial before an independent judiciary, presenting the charge and making the case on the basis of admissible evidence. Third, after trial, the prosecutor pursues the implementation of the verdict. The prosecutor must also investigate prison conditions to ensure that the human rights of prisoners are respected.”

Another Working Group discussed the role of the judiciary. They stated, for example, that, in order to fulfil their function:

- the capacity of judges must be necessarily high in terms of law and morals with the respect of the people;
- judgment and punishment must be based on law. Therefore, it is necessary for judges to respect and firmly implement each stage of legal procedure;
- to avoid partiality, a judge must not be a member of any political party;

- in carrying out his mission to find justice, protect the rights of people, a judge must not discriminate on the basis of race, sex, colour, religion, role, status, or economic situation.

Law and Procedure

Having painted the conceptual broad-strokes of judicial independence and the Rule of Law, the Seminar then turned to fill in the spaces with the substance of law and procedure. The goal was to take the broad principles of roles and functions and apply them to the day-to-day workings of the legal system. Along the Seminar's path towards introducing judicial independence, the legal education of participants was augmented as well. The basics of law and procedure were presented, with a constant focus on how they relate to an independent judiciary. The Seminar used the legal provisions applicable during the transitional period as its basic legal text.¹⁵

The essential topic was the Criminal Process and the Rule of Law. Instructors, Judge Marie-José Crespin, Prof. Antonio LaViña, and Prof. Pablito Sanidad, lectured on basic principles of criminal law and procedure, including for example, the principle of legality, the elements of a crime, and evidence. At this point in the Seminar, participants actively posed questions

15 *Provisions relating to the judiciary and criminal law and procedure applicable in Cambodia during the transitional period.*

and provoked discussion. Far from being the passive students the CIJL had been told to expect, Seminar participants took lectures as the base, and took full advantage of the Instructors to carry discussion to an interactive and advanced level.

Some participants, having studied the legal provisions of criminal law and procedure governing the transitory period in Cambodia, noticed crucial omissions in the legal provisions — no provision, for example, concerning unintentional manslaughter or injury. Participants wondered, and rightly so, how such gaps in the existing law were to be filled. Other difficult and essential questions centered on how the judiciary and the criminal law should treat the question of impunity of individuals alleged to have committed crimes during Cambodia's past. How does the notion of national reconciliation affect judicial independence? Another stream of questions centered on the role of experts in criminal proceedings. How are they to be paid and chosen?

In this phase of the Seminar, however, the primary method of work shifted from lectures and discussions to practical role-play and moot-court exercises. Although these types of exercises were unfamiliar to participants, they responded enthusiastically to the chance to try out their knowledge and increasing level of expertise. The exercises did not bog down in legal niceties, nor did they require a high degree of legal sophistication. Instructors lectured on the basic issues involved, and then allowed participants to apply them in designed exercises.

The first role-play isolated the issues of the pre-trial rights of the accused. The topic was introduced by Prof. Sanidad, a

well-known human rights attorney from the Philippines, and his colleague and compatriot, Prof. LaViña. Using their extensive experience in human rights training, the two brought the tone to the most practical and direct level. Basing their examples on the laws applicable in Cambodia during the transitional period, as well as on international human rights law, (all documents were made available in Khmer), pre-trial rights, including the presumption of innocence, the right to remain silent, the freedom from torture, right to counsel, habeas corpus, etc., were discussed. In the role-play exercise, representatives from the three Working Groups, became judge, prosecutor, and defense lawyer and dealt with many of these issues relating to a fact scenario concerning a habeas corpus petition.

The next issue was the rights of the accused during trial. The same method of work was used and effort was made to focus on basic legal issues particularly relevant to the Cambodian experience. The role-play exercise concerning trial procedure and rights raised issues such as the collection of evidence, confession under duress, and the role of the police.

These exercises were then integrated in a moot-court exercise. Participants took a case, based on a fact scenario involving an alleged violation of the *Provisions relating to the judiciary*, to court. Participants were once again divided into three Working Groups. Each Working Group conducted its own trial and was further sub-divided into judiciary, prosecution, and defence teams to prepare for the case. Both prosecution and defence teams interviewed witnesses, followed by consultation among members of the prosecution team regarding criminal charges and witnesses to be presented, and among members of the defence team regarding plea and witnesses to be presented

and arguments to be made in court.

The trials of the three Working Groups took place simultaneously, each supervised by an Instructor. The prosecution read the charge, followed by the plea of the defence, and opening statements by both sides. Testimony of prosecution witnesses and subsequent cross-examination was followed by the presentation of the testimony of witnesses for the defense and cross-examination. Both sides were given the opportunity to make closing arguments.

The judges of the three groups presented their verdicts to the plenary session. Two of the groups ruled similarly, in favor of the defendant, the other, led by a senior judge, ruled in favor of the state. This decision sparked extensive discussion and debate.

This section of the Seminar, with its emphasis on practical examples of law and procedure, gave rise to many questions about the day-to-day administration of courts. A session was devoted to a lecture by Mr. Basil Fernando, Chief, Investigation and Monitoring Unit, UNTAC, on court administration and record-keeping.

Appeal, Comparative Law and Judicial Review

The third portion of the Seminar was dedicated to an examination of the function of higher courts. Participants of the Seminar were either presently or potentially judges in the Court of Appeal and the Supreme Court of Cambodia. As mentioned above, in Cambodia's recent past, the Ministry of Justice exercised review over trial court decisions. The Seminar

focused on the role of the courts to perform this function.

The primary method of work during this portion of the Seminar returned to lecture and subsequent discussion. This format allowed the group to cover the material effectively and Instructors were able to modify their approach in response to the type of questions that were asked. Furthermore, at this point in the Seminar, participants needed no formal framework to get involved; questions were posed by almost all of them.

The first subject that was discussed was the right to appeal and the function of appellate courts. Justice Michael Kirby, President of the Court of Appeal of New South Wales, Australia and Judge Jean Germain, President of the Court of Appeal at Paris, France, examined the issue in both the common law and French legal contexts.

Participants seized upon the opportunity of having judges from both systems before them, taking the issue of comparative law deeper. Appellate court structure and procedure were illustrated in detail by the two Instructors. The discussion went into the differences between the systems, particularly those concerning judicial independence and appeal procedure.

This discussion provided the first opportunity for Cambodian judges, present and potential, to examine and compare the two major legal systems side by side. Roughly the same number of participants claimed each as their primary source of legal education. Some of the older members of the judiciary had some knowledge of the French language and recollection of the French legal system. Younger participants tended to have greater familiarity with the English language and the common law model. The competition between the two

models, and the inherent tension between the French and English language, was a sensitive point both in Cambodia and in the international community. The Seminar and its Instructors took no position on this question, and strove to provide as much information as possible on each system, as well as on other, including mixed, models, and to respond to the questions of participants. In fact, the extended examination of comparative legal systems served to better highlight what they have in common, in particular concerning the right of appeal, and, in general, the respect for international human rights law and the independence of the judiciary.

The Seminar's last area of consideration was the role of the Supreme Court and of judicial review. Justice Bhagwati, former Chief Justice of India, lectured on how the Supreme Court functions as a check on the other branches of government to ensure the respect for human rights and the fair administration of justice. Justice Germain added to the issue from the French perspective, elaborating on the role of the *Conseil Constitutionnel*. Judging from comments by participants, the concept of the judiciary ruling against actions by the executive branch was foreign to Cambodian experience. Participants, for example, highlighted the effective impunity granted to the police. Participants, however, suggested ways in which this will be prevented in the future. The Seminar returned, driven by the discussion, back to where it had begun — the absolute necessity for an independent judiciary to uphold and protect the Rule of Law.

Final Declaration of Participants

On 23 July, the Seminar closed. The Closing Ceremony included concluding remarks by representatives of UNTAC and its Human Rights Component, Justice Bhagwati, and Ms. Sam Kanitha, Vice-Minister, Ministry of Justice. The fifty-six Participants made a Final Declaration (attached as Annex One to this report) emphasizing the importance of the complete separation of powers in Cambodia. They stated that the judiciary should be free not only from direct pressure, but from all forms of intimidation, harassment, and persecution. The Final Declaration stressed the importance of the presumption of innocence and that judges should not be members of political parties. In the Final Declaration, the participants also listed their problems and shortcomings, and provided possible ways to remedy them.

IV. CONCLUSIONS

Instructors and outside observers were struck by the high level of energy and dedication of the participants. Over the three weeks, participants of all ages and backgrounds proved to be hardworking and serious. Together, they expressed their steadfast goal to establish an independent judiciary in Cambodia. The Seminar on Judicial Functions and Independence was a successful first step to work together with the Cambodian judiciary to establish just that. While an

enormous amount of work remains to be done,¹⁶ there is no lack of potentially excellent judges in Cambodia.

The priority of CIJL Seminar was to bring information directly to the men and women who are the present and potential judges of Cambodia. Directly following elections, in the first days of a new Cambodia, the Seminar brought legal expertise to those who will determine the future. The goal was empowerment of the judiciary through information, access and exposure.

This approach is most clear concerning the potential influence of the common law, French and other legal models. Instructors of the Seminar were chosen from among different legal systems, traditions, and backgrounds. The Seminar advocated the importance of Cambodia forming its own legal system drawing on the substance, procedure and language best suited for Cambodia. As illustrated throughout the proceedings, both the common law and French systems offer advantages and drawbacks in light of Cambodian experience. The Seminar strove to give participants a clear understanding of these issues. Overall, the Seminar maintained its emphasis on what these systems have in common — the Rule of Law, the fair administration of justice, and the guarantee of judicial independence.

16 A list of recommendations concerning judicial independence from the Report of the Special Representative, Justice Michael Kirby, E.CN.4/1994/73/Add.1 at 9-11, is reproduced as Annex Two.

ANNEX ONE

Final Declaration of Participants of the Seminar on Judicial Functions and Independence

Phnom Penh, Cambodia
5-23 July 1993

First, we would like to thank His Excellency the Minister of Justice who allowed us to attend the Seminar.

We would also like to thank the Centre for the Independence of Judges and Lawyers (CIJL), and Justice Bhagwati and his colleagues who came to our country to organise this Seminar on Judicial Functions and Independence.

Excellencies, ladies and gentlemen,

This Seminar takes place at the moment when Cambodia is preparing its new Constitution and reforming the structure and organisation of its administration. These changes are happening in order to comply with the international standards of democratic countries, to fit with the real situation of our country, to promote the complete respect for human rights. This is the first time in our history that such a Seminar has taken place.

The seminar was conducted over the last three weeks without any disruption and in a very conducive and cooperative climate. We are grateful for the participation of professors from

countries such as Zimbabwe, Senegal, Philippines, Australia, France, India, Palestine, and the U.S.A. These professors have so much experience in the fields of laws and of the judiciary, and they came to provide us with information about very important topics that gives necessary advantages to our country during the present circumstances.

All these professors and experts made very clear comments about the separation of powers in countries adopting the democratic system, in which the three powers are completely separate from each other. They stated clearly that judicial power must not be under the control of the other two powers, and absolutely not. The judiciary shall perform independently, without any interference from the other two powers or any pressure, intimidation or interference from any other power. The judiciary must be a uniform system within the statute of the law working only for the judicial power, and which will place it in a position that is irrelevant with a governing body, which is out of its own structure. Every individual judge, in his jurisdiction shall make out his decision based on the provisions of the laws and his own conscientiousness — with neither irritation nor fear, without distinction to social status, color, sex, religion, race. This means by respecting the basic human rights of every person in society.

To make sure that we reach this objective, each individual judge must have the qualities of honesty, fairness, good moral living, truthfulness, wisdom and profound knowledge of the law. Judges must strictly abide to the provisions of law.

All judges must have good living standard with high

salary, and having privilege in their jobs, that means that nobody, no authority apart from the hierarchy of the judiciary authority can remove them from their functions.

The judiciary, and the individual judge, must not be a member of any political party, and must not receive any of its influence or pressure from any such political party. Judges must always apply the principles of presumption of innocence towards all accused persons until, and if, they are found guilty by the court, where judgement is pronounced. The rights of the defendants must be assured by defence counsel.

All the principles mentioned above are not only our aspiration, but that of Cambodian society as a whole.

But, up until now, the judicial system of Cambodia still meets difficulties. We have not established yet a judicial system which is in compliance with international standards, because our court of appeal exists only on paper. We don't have enough basic material resources, and we still have insufficient judges to set up the above court.

The new constitution of Cambodia is now being drafted. In its articles, all the necessary principles relating to the independence of the judges, the conditions for removing judges from office, the basic human rights must be included. It must also provide in the article of the constitution about the creation of a bar association to coordinate with the judiciary and to contribute in seeking justice for the society.

Therefore, to reach the goals as cited above, we would like to raise the following proposals. It is requested that the CIJL continues:

- to help Cambodian judges so that they could get their independence and gain their profound knowledge on the subject of law;
- to help in the building of a law center to provide for training judges for the future of the judiciary of Cambodia;
- to arrange the possibility of Cambodian judges to take study trips and to participate in other seminars about laws and judiciary in other developing countries in the world;
- to arrange with other international organisations to provide to the Cambodia judiciary the documents of laws and on the judiciary and other necessary and modern materials and scientific instruments; and
- to assist in having the Cambodian judiciary recognized by international judges' organisations.

Finally, we would like to thank once again the CIJL and all of its colleagues for giving their best to help expand our wider knowledge in such a special mission to Cambodia.

Thank you.

ANNEX TWO

The report of UN Special Representative on Cambodia, Justice Michael Kirby, included Recommendations concerning the establishment of an independent judiciary. They are reproduced here to help focus efforts to assist the legal profession of Cambodia in the future.

4. Judicial independence and the rule of law

26. A code of judicial practice or other law should be adopted providing the effective assurance of judicial independence and integrity in Cambodia. Such law should provide:

(a) That judges should not consult or have contact with any ministerial official concerning particular cases, except in open court and with the approval of both parties or their representatives. The alleged practice of judges consulting with the Ministry of Justice in private about the determination of cases either before, during or after trial should cease forthwith;

(b) That judges should not accept any gift, present gratuity or benefit of any kind from, or on behalf of, any litigant in their court whether before or after decision. A gift before decision which may influence the decision deprives a party of the fundamental human right to be judged by a manifestly independent and impartial tribunal, and may amount to corruption. A gift after decision,

even if it did not influence the decision, may create an impression in the losing party and the community that the judge was influenced by the hope or prospect of such a benefit;

(c) A procedure which is just to the complainant and the judge for the investigation of complaints against judges in respect of the performance of their judicial duties; and

(d) A procedure for the removal from office of judges found, by appropriately stringent standards, to be guilty of corruption or misconduct in a way relevant to their office or found to suffering from a proved incapacity to perform judicial functions.

27. The present salaries of judges of municipal and provincial courts (reported to be USD 20 per month) are wholly inadequate. They do not provide sufficiently for the sustenance and support of a judge and his/her family. Such low salaries make it almost impossible for judges to be independent. They expose judges to the temptation of corruption and the necessity to rely on gifts, etc. which are incompatible with judicial office. Means should be urgently found to provide judges in Cambodia with salaries and other benefits of office sufficient to remove the exposure of judges to temptations of corruption. Such means would serve to recognize the difficulty and importance of the work of judges in building a society based on the rule of law. Without an incorruptible judiciary, the rule of law

will not take root in Cambodia.

28. All Cambodian judges should be supplied, upon appointment, with:

(a) Copies of the Constitution of Cambodia, the international human rights instruments to which Cambodia is a party and other relevant materials, in Khmer and in any United Nations official languages as desired; and

(b) Copies, in Khmer and any United Nations official languages as desired, the relevant principles for the independence of the judiciary, including the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Milan, Italy in 1985 and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985 and the draft declaration on the independence of justice.

29. The Cambodia office of the United Nations Centre for Human Rights should continue to cooperate with the judiciary in the facilitation of:

(a) Translations into Khmer of basic texts, including the above;

(b) Workshops for the instruction and updating of judicial education on basic constitutional and human rights law; and

(c) Supplies to courthouses throughout

Cambodia of basic texts and relevant information. The possibility of a human rights newsletter for the judiciary, Government and NGOs should be considered, if funds permit.

30. The judiciary cannot perform its high constitutional function without proper salaries, facilities, equipment, staff and other resources. Judges complained to the Special Representative about the lack of rudimentary resources, including the paper necessary to record judicial decisions. Such provisions should be provided without delay.

31. The recommendation of the seminar on administration of justice for senior officials nominated by the Ministries of Justice and the Interior, organized by the Cambodian office of the United Nations Centre for Human Rights, 11-17 January 1994, that the courts be given appropriate budgetary allocations for their functions, is strongly endorsed. The Cambodia office of the United Nations Centre for Human Rights should also explore ways in which the equipment and basic facilities available to judges could be improved without delay and make recommendations to this end for a later report by the Special Representative.

32. The Cambodia office of the United Nations Centre for Human Rights, in discussion with the Supreme Council of the Magistracy, once established, should explore with the Ministry of Justice the feasibility of implementing a scheme of

judicial mentors. Under such a scheme, judicial officers from other countries with a tradition of incorruptibility and independence could participate as resource persons in judicial chambers. They could also work with relevant ministries, officials involved in the legal system and NGOs, by providing advice and information on analogous solutions from their countries and by drafting legal documents, codes of practice, etc.¹⁷

17 Report of the Special Representative, Justice Michael Kirby, E.CN.4/1994/73/Add.1 at 9-11.

PART TWO :

SEMINAR

***TOWARDS AN INDEPENDENT
PALESTINIAN JUDICIARY***

THE INTERNATIONAL COMMISSION OF JURISTS
(ICJ)

THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND
LAWYERS (CIJL)

IN COLLABORATION WITH
AL-HAQ

Bir Zeit University
20-21 December 1993

A. THE ROLE OF THE JUDICIARY

THE INDEPENDENCE OF THE JUDICIARY AND THE RULE OF LAW

Adama Dieng *

The independence of the judiciary is the backbone of the Rule of Law. Some people have in fact said that there can be neither human rights nor democracy without an independent judiciary. The independence of the judiciary is a precondition of the Rule of Law.

There are conditions and principles without which the Rule of Law cannot be sustained. These conditions and principles are, first of all, the separation of powers, a principle which must be defended not only in relations between the legislature, the executive, and the judiciary, but also in areas in which the complete concentration of power may occur. The second is the independence of judges, the legality of administrative action and the control of legislation and administration by independent judges. Finally, there is need for a Bar Association which maintains its independence from the authorities and which is devoted to defending the Rule of Law.

The notion of the Rule of Law is, therefore, intended in particular to force the administration to respect the law. Legislation passed by parliament, which represents the

* Secretary-General of the International Commission of Jurists (ICJ).

electorate, is the instrument through which the people's sovereignty is imposed on the administration, preventing it from becoming an autocracy. As an abstract principle of general application, the law guarantees freedom, equality and security to the individual by imposing respect for stable norms on state bodies, and reduces the risk of arbitrary initiatives.

The measures that will be taken by the public authorities become, to a certain extent, predictable and acquire a sort of permanent character, the consequences of which can be calculated by the individual in advance.

This does not mean, however, that the Rule of Law is a static notion. You may be familiar with the Delhi Declaration of the International Commission of Jurists (ICJ), which was adopted in 1959 at the first Congress ever held by the ICJ in a third world country. At that Congress, it was clearly stated that the Rule of Law is a dynamic concept which emphasises not only civil and political rights but also economic, social and cultural rights.

In a modern and democratic society, the objective of the Rule of Law should not be simply to maintain peace in a frozen or paralysed state, rather it should have the dynamism of life and should adapt itself to the constant process of transformation which characterizes all living organisms. Law as a feature of the transformation and growth of human society is intended to ensure that this process takes place in an orderly and non-violent fashion, while at the same time contributing to greater justice. In order to avoid recourse to rebellion, it is imperative that the Rule of Law be based on the principle of justice, where the freedom of the individual is guaranteed.

I will make here a reference to the preamble of the Universal Declaration of Human Rights, and I quote: "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights be protected by the Rule of Law." Of course, to do so ultimately depends on the existence of an enlightened, independent and bold judiciary which takes upon itself the task of promoting human rights.

But what does an independent judiciary mean? I refer to the 1959 Delhi Congress. It was during that Congress that the ICJ described the conditions that must govern the existence of an independent and impartial judiciary.

Since then, the ICJ has continued to elaborate such norms, at both the domestic and the international level. For example, the ICJ was instrumental in the adoption of the United Nations Basic Principles on the Independence of the Judiciary. According to the definition which was drawn up by the ICJ in 1981, independence of the judiciary means that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper inferences, inducement or pressure, direct or indirect, from any quarter or for whatever reason.

Along those lines, we also elaborated a certain number of principles, which include for instance the prohibition of punitive transfer of judges, the question of salaries, the freedom of expression of judges, the freedom of association, and so forth.

At present, I would like just to stress several important aspects affecting judicial independence. The first one is the

selection process of the judiciary and the first question to be posed with regard to the independence of the judiciary is: "Can there be independence when the power to nominate judges or to grant them promotions is left entirely in the hands of the executive power?" *A priori*, the answer to this question is negative. But with regard to democratic countries this, however, may be somewhat qualified since in a democratic country the executive power is at least accountable to the people for its acts, via the Parliament. But nevertheless, it is sufficient to refer to the dilemma provided in the French constitution of 1958, which in article 64 states that the President of the Republic is the guarantor of judicial independence, while at the same time stipulating in article 66 that the judicial authority is the guardian of individual freedoms. Ironically, this amounts to saying that the head of the executive is the guarantor of individual freedoms.

There has been quite substantial debate regarding the difference between authority and power. The insidious substitution of the principle of placing powers in a hierarchical order of their separation, such as the principle found in the previous French constitution, modifies the constitutional role of the judiciary. The judiciary now finds itself reduced to be nearly a judicial authority. One of our colleagues, Louis Joinet, who is a French judge, correctly remarks, and I quote: "This constitutional change was the starting point of progressive reinforcement of executive tutelage of the judiciary."

Among the manifestations of judicial subordination which Mr. Joinet mentions is the poor guarantee of tenure. He states that judges are encouraged to leave their posts at the earliest opportunity as it is the only way to obtain promotion with the

corresponding increases in rank and remuneration. Paradoxically, immunity from dismissal can become a sanction rather than a guarantee. The secure magistrate is most often the one to whom all advancement has been refused.

Recently, there has been a debate regarding the High Council of the Judiciary, both in France and in Senegal. The High Council of the Judiciary's composition and powers have risen and continue to rise. I would like to quote a very instructive statement made by the French President, Mr. Mitterand, in November 1990, when French judges demonstrated at the Place Dauphine. In a speech made to the Court of Cassation, he disparaged the idea of reform of the High Council of the Judiciary in the following terms, and I quote: "Must we resort to the major undertaking implicit in a modification of the constitution in order to ensure the independence of the judiciary?" President Mitterand, addressing the judges, said that "those who seek to break any link with the head of state would wish to do so but then I ask you, who would be the guarantor of your independence in our Republic?"

Professional bodies, on the pretext of protecting judges against any potential abuse by the authorities, are continually subjected to the control of Parliament and public opinion, unaccountable powers which would be given sway over the judiciary. The question of the separation of executive and judicial powers is of the utmost importance. Of course, fortunately or unfortunately, the High Council of the Judiciary remains a paradox because although it operates as one of the main tools with which the independence of the judiciary is maintained, it also poses a major threat to this independence.

Now I would like to turn to the question of the judicial budget, because I think that beyond the selection process, this is also an important issue to be addressed. It is a source of concern and also a factor which violates the independence of the judiciary. Because if the question of the finances is left in the hands of the executive, it is likely that the executive may threaten the independence of the judiciary by reducing the amount which is needed to enable the judiciary to function properly.

It is important to develop a system in which financial autonomy will be guaranteed to the judiciary, and we suggest that every constitution should assign the direct administration of judicial funding to the judiciary itself, with provisions for assistance from competent technical bodies. This funding should be used by the judiciary to assure judges' pay, as well as the material needs generated by the administration of justice – court buildings, office furniture, publications, etc.

Having visited during these last few days some of the Palestinian courts, we were to some extent shocked by the state of poverty. It was brought to our attention that most of the furniture dated from before 1948. It is important for tomorrow, when an independent judicial system is set up, that full autonomy be given to the judiciary so that it can itself administer its funding and make itself responsible for the judges. It is also important that the sum which is allocated to the judiciary be in accordance with the financial resources and standard of living in each country, so that judges are able to have a decent level of income commensurate with the dignity of their office, and so that their immediate needs do not run counter to their independence.

Indeed, we were shocked by the level of the salaries paid to the judges today in the Occupied Territories, and we think that tomorrow, in an independent Palestinian state, the judges should be given a reasonable salary, so that not only will it be attractive to lawyers to join the bench but also it can be an important tool to avoid corruption in the judiciary.

To conclude, I would like to point out that in Benin, I met a judge who was very concerned about the low level of his salary. He said to me: “Look, I am not even in a position to buy medicine for my child who has malaria, and think what I can do if somebody comes before me and enables me to save my child, I will certainly be tempted to accept what he offers me as a gift” (not to mention as a bribe). This illustrates how important a good salary is.

It is also important that judges be prepared to organise themselves as a collective body, because when we talk about the independence of the judges it should be seen from two perspectives: the independence of the judges as individuals, and the independence of the judges as a collective group, being the judiciary. In some countries, like in Sudan, we remember a day where the judges collectively went on strike because they refused to bend under pressure from the executive. In Yemen, last year, there was also collective action by the judiciary. The same happened in Mali. When the judges act collectively, they become stronger, more independent and this puts the executive or the legislature in a position which will further protect the independence of the judiciary. It is also important that the judges develop a strong tool of solidarity. That is where, for instance, the Centre for the Independence of Judges and Lawyers tries to increase networking amongst judges from all

around the world, so that once a judge is harassed in his own country, judges from the rest of the world act in solidarity with him.

Allow me to turn to issues directly related to the present situation in the Occupied Territories. One of our colleagues, a distinguished vice-president of the ICJ, used to say that no one could claim the title of judge if, sitting in his office, he didn't look out the window to see what was happening in his society. I think that this notion is very important. Judges and lawyers need to take into their hands that responsibility tomorrow, when Palestinians have their own constitution, their own judges, and their own lawyers.

Indeed, the discussion we have had regarding principles and laws is an important discussion which should have taken place a long time ago. I came here with an excellent book which was published by the ICJ and Al-Haq in August 1980. It was one of the first looks at the civilians courts of the West Bank and the Rule of Law. In those days, it was clear that the judiciary was the only national institution that continued to function in the Occupied Territories. In 1980, most military orders were kept secret. At the international level, however, the focus has been on the Israeli military courts. This is really the first time in history that an examination of the civilian courts is being made.

I think that this examination will enable us to identify the difficulties and problems, and without prejudice to our final conclusions, we can already say that the legal system in the Occupied Territories is totally distorted. We hope that with the expertise and the contributions of each of us and of the

Palestinians, the ones who are really concerned, we will be in a position to work hand in hand to build a new solid and strong judiciary in Palestine.

The most important thing is to provide in the constitution for the establishment of the judicial power and a judicial council. As to the composition of this Council, there are various models, but I think Palestinians will be in a position to choose a form suited to the Palestinian situation which will enable it to function without interference from the executive. This means, for instance, that Palestinians shall not have the head of the state as the head of the council of the judiciary. We have been fighting in our countries to get rid of the system whereby our President heads the Judicial Council, as inherited from the French model. We have also to think about a system that could function in a manner through which Palestinians may escape any type of manipulation. We should always bear in mind that the executive has a tendency towards autocracy, so it is our duty to protect ourselves.



THE PALESTINIAN COURTS AND HUMAN RIGHTS

Raji Sourani *

Palestinian courts and human rights is an important issue that requires a whole seminar. Nevertheless, I will attempt to give a preliminary presentation and a humble introduction to serve as a basis for a more developed discussion later on.

Palestinian courts have played a distinguished historical role in protecting Palestinian human rights. The legal history of Palestine began during the Ottoman period and continued through the British Mandate. The Palestinian Constitution was written in 1922, while additional laws were introduced later during the 20s, 30s, and 40s.

In 1948, a forced and politically motivated separation occurred within the Palestinian judicial system. The laws that were applied in the Gaza Strip differed from those applied in the West Bank and East Jerusalem.

Following the Israeli occupation of the West Bank and Gaza in 1967, one military court system was applied in the two areas whereas the civil system remained separated. As a result,

* Director, Gaza Centre for Rights and Law, an affiliated organisation of the International Commission of Jurists (ICJ).

Jordanian law remained in force in the West Bank and Palestinian law was applied in the Gaza Strip.

Historically, the Palestinian Court system consisted of four parts; three of which operated in Palestine itself: the District Court, the Magistrate Court and the High Court. There was also a Court of Appeal that sat in Britain during the Mandate period.

I will concentrate my presentation on the situation of the Gaza Strip where some progress had occurred. This progress, however incomplete, was historically related to the Palestinian judicial system.

Palestinian law continued to be accurately applied in Gaza after 1948. The original court system was preserved, including the District Courts, Magistrate Courts, and High Court. In addition, there was an Appeal Court, which dealt with administrative matters, as well as issues related to measures taken by the authorities.

Surely, a qualitative development occurred to the functions of the Gaza Strip courts after 1948. All the judges were Palestinian and they were able to fulfil their functions while enjoying some judicial independence. The Palestinian Constitution included articles which protected the independence of the judiciary in the Gaza Strip.

On the eve of the 1967 war, a proposal was introduced by a group of Palestinian specialists to the Legislative Council. It aimed to preserve the Palestinian judiciary and to guarantee its independence. Unfortunately, the proposal did not become law due to the political developments in the region.

During the Israeli occupation, authorities repeatedly and methodically intervened in all aspects of Palestinian life by way of military orders, consequently damaging the judicial system.

The High Court of Appeal, whose mandate included dealing with complaints against the authorities, was frozen. In addition, court fees were disproportionately raised and became a big burden on the people.

Also, several court jurisdictions were transferred to the Legal Officer of the military authorities so that many cases, especially those that concern land, could not be dealt with without his permission. Other civil jurisdictions were transferred from the civil to the military courts, including traffic violations, drugs and tax matters. The role of the judicial system was thus undermined.

Another important issue which undermined the judicial system of the Gaza Strip as well as the West Bank is the lack of enforcement for local court decisions. In other words, criminals who are sentenced by local judges to prison terms are often freed by the military soon after.

When a judge in Gaza once complained to the military authorities about this, he was told that his function was to give out the sentence while execution should be left to the authorities. There have been hundreds of cases where court decisions were never enforced.

Nonetheless, Palestinian judges maintained their integrity and tried to preserve the Rule of Law as their guide and inspiration.

I recall that, during the Intifada, Gazan lawyers held a strike that continued for eleven months, from December 1987 to November 1988, refusing to appear before the Military Courts. The authorities then issued an order allowing Israeli lawyers to appear before the civil courts in the Gaza Strip. I mention with pride that Judge Khalil Shayah rejected this unprecedented decision and refused to accept the Power of Attorney from an Israeli lawyer.

The civil courts and the judges in the Gaza Strip applied Palestinian laws: laws which were introduced during the Turkish Occupation of Palestine and the British Mandate, in addition to amendments introduced by the Egyptian administration. Most practising lawyers and judges believe that there is a strong basis in these laws for future Palestinian legislation. This does not mean that these laws are ideal. Any law needs to grow and develop. The trend should be to develop Palestinian laws after eliminating all the military orders that disfigured them.

Another issue to be dealt with is a set of guarantees for the independence of the judiciary. The Palestinian Constitution in the Gaza Strip, which was adopted in 1962, contained many valid and effective concepts for the independence of the judiciary. But the system needs reconstruction in order to apply it effectively in all the Occupied Territories. As I mentioned, most jurists see in the Palestinian laws a basis for future legislation. Also, most legal guarantees should be redrafted and based on legal grounds so that the Palestinian judicial system would be allowed to play its role in the civil society.

As we all know, the judicial system is an important factor that cannot be overlooked during the process of building a civil society. It is high time that we lay the cornerstone for an independent Palestinian judicial system as part of an independent Palestinian state.

LEGISLATIVE PROTECTION OF HUMAN RIGHTS NORMS

Michael Ellman *

There are manifest breaches of human rights norms in the laws that are applied in the Occupied Territories and it has to be ensured that this does not happen in the future Palestinian State. Under the Declaration of Principles on Interim Self Government Arrangements, there is provision for the establishment of a Palestinian–Israeli Commission, a joint commission to look into the legal set–up. The PLO has set up a legal committee in London to draw up a constitution, and there may be other committees here in Palestine or elsewhere, but the position seems to be rather unclear.

Thus, I am very concerned that Palestinian judges, lawyers, human rights workers should prepare for their future state: initially in the fields of control which are provided for in the Declaration of Principles, and subsequently, in the rest of the control areas of the Palestinian State in the near future.

It is very urgent that all of the judges, lawyers, human rights workers in Palestine should get together to examine the law as it is at present, and to work out a way of harmonising the

* British Solicitor since 1962; member of “Justice”, the International Commission of Jurists’ (ICJ) Section in the United Kingdom.

law in the West Bank and in Gaza with international human rights norms; getting rid of the military orders which are contrary to human rights norms. I would only insist on the urgent need to go through all the military orders as well as the rest of the law – British, Jordanian and any other laws – and see which military orders and other provisions have to be abolished, and which have to be modified or adopted in part or in whole, because there should not be a legal vacuum.

Certainly, the Legislative Council must be the organ to propose laws in the future, but Palestinians cannot wait for it to go through every sector of law. They have to have something ready to put into place in 1994, or whenever the date is that they have effective control over different parts of their national life. This is why they must set up urgently a commission of Palestinian lawyers, judges and other representatives, from all parts of the Territories to go through these laws.

I have asked about and discussed how many files there are before the Palestinian courts at the moment, and I learned that since the Intifada and the resignation of the police there are very many fewer civil cases before the courts, and also a slight diminution in criminal cases because the military will not produce the persons whom the prosecutors want to accuse. But in the future in a normal state the courts will probably have a great deal of work to do and so the whole matter of reviewing current laws will have to be discussed, so I don't think we can make any precise recommendations on that.

Even the initial legal set-up in Palestine must be subject to international human rights law. Palestinians have suffered enough from the absence of human rights in the past and they

are still suffering, thus they must not be the violators of human rights law in the future. A democratic society must incorporate the Rule of Law, otherwise it becomes a lawless society, a society like Nazi Germany, or other dictatorships.

International human rights law is based on customary law supplemented by treaties and conventions, namely, the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

I would like to go briefly through some of the provisions of these Covenants, particularly the Covenant on Civil and Political Rights. Article 1 of that Covenant deals with the right to self-determination, which is obviously the principal right that Palestinians are struggling for. Article 2 provides that everybody should have an effective remedy in the domestic courts, even against State officials, to ensure that they can enjoy their rights which must be determined by the competent judicial, administrative and legal authorities.

Article 4 limits the measures that may be taken by a State if it has to declare a state of emergency. I hope that it will not be necessary to have a state of emergency in Palestine as people have suffered enough from states of emergency, but it is vital to provide limits on what the government can do if it declares a state of emergency.

Articles 6–11 deal with the right to life, freedom from torture, cruel, inhumane or degrading treatment, or punishment and slavery. I would mention at this point that there is also the

Convention Against Torture of 1984 which, it is to be hoped that a future Palestinian state might ratify, but that is a thing for the future.

There are also provisions for liberty and security of the person and provisions that if a person is arrested he or she must be given the reasons for the arrest, and there are provisions for the treatment of prisoners who have been arrested. This is particularly important because in the Declaration of Principles there is an insistence on a strong Palestinian police force. If a strong police force will exist, Palestinians must also have strong rights for the citizens to defend themselves against that police force if they act arbitrarily.

Article 12 provides for freedom of movement within the territory and that is rather important because there will be a divided territory between the West Bank and Gaza.

I have deliberately left out Article 3 which is a difficult one for this area because it provides for equal rights of men and women. People are almost unanimous that there should be no change in those courts that determine personal status. However, I said almost unanimous; there is a number of representations to the contrary but the great majority of judges and lawyers didn't want to interfere with these courts. I do feel, however, that if at all possible, certain changes should be brought in. For example, bringing the religious courts within the same building as the civil courts, and having a control by a Court of Cassation over the head of all courts to ensure that religious courts do not overstep their powers.

I would like to suggest that Palestinians might also institute independent courts as an option for cases where people

have different religions or no religion at all. This is important because the equal rights of men and women come not only in the International Covenant on Civil and Political Rights but also in the Covenant on Economic, Social and Cultural Rights, providing for the equality in enjoyment of these rights. There are also of course the Convention on Political Rights of Women of 1953 and the Convention on the Elimination of All Forms of Discrimination Against Women of 1979.

Furthermore, article 14 provides for what the French call "droit de la défense": the right to an independent judiciary, the right to independent lawyers who shall be free from threat or harassment of the sort we have heard about, the right to a fair and public hearing of any criminal charge or indeed of civil claims, and the right to presumption of innocence of any accused person.

Article 14 (3) specifies clearly the rights of a person charged with a crime to be informed promptly, in detail, in a language he understands, of the charges against him, to have adequate time and facilities for the preparation of his defence, to communicate with a lawyer chosen by him, to be tried without undue delay in his presence, to examine witnesses, and to have the free assistance of an interpreter.

Article 15 provides that there should be no retrospective criminal legislation. Articles 15 and 16 provide for the privacy and the right to recognition as a person and articles 18 and 19 provide for the freedom of thought and religious belief, and particularly freedom of expression for all people.

Articles 21 and 22 provide for freedom of association and peaceful assembly. Article 23 provides the right to marry and

found a family which is described as the natural unit of society, with equality between the parties during and at the dissolution of the marriage.

Article 24 provides for the right of the child, and there is a separate convention also on the Rights of the Child, and finally, article 25 provides for the democratic rights of the people to take part in public affairs, to vote and to be elected as well as to have access to public service. These are obviously very important guidelines to enable the Palestinians to control their own leadership and the rights of all Palestinians as provided or ambiguously provided under the Declaration of Principles. Economic, Social and Cultural rights have also to be taken into account. Now, in the early stages, the Palestinian people will not be able to sign or ratify these Covenants until they become a full State, but there is no reason why they should not incorporate them into their domestic law, and hopefully into their constitutional law as their basic law. Then, as soon as they are recognised as a full State, they should ratify the Covenants which will oblige the government to make five annual reports to the United Nations Human Rights Committee, which can check up whether the government is observing its human rights obligations.

I also hope that the Palestinians will ratify the Optional Protocol which entitles individual citizens to bring complaints against the government if there are any breaches of human rights.

HOW TO BUILD A JUDICIARY THAT PROTECTS HUMAN RIGHTS

Paul Gomez *

There are rules which must be observed and applied in order to have an independent judiciary. These rules are obvious for democratic nations and are well-known by all those who have respect for human rights. During our mission, we observed that these rules were not being respected and that in order to avoid future mistakes, it is important to record this fact. A democratic judicial system is founded firstly on its autonomy from all authority at all stages of its functioning, and secondly on controls over its functioning. The independence of a judicial system is demonstrated in two ways, in the selection of judges and lawyers, and in the exercise of the functions of judges.

The selection of the judges must not be made by any executive or administrative authority or any other power. The appointment must be made by an independent body composed of judges, lawyers, members of parliament, similar to the Council which formerly appointed the judges in this country. The same is true for lawyers, who must be selected according to the standards established by their professional association. At

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present, judges and lawyers are appointed by an authority which is not at all independent of the executive. We have heard the criticisms made by judges and lawyers about this system.

The first thing that needs to be done is to create a Judicial Council and to give to the Council and to the Bar Associations the power to select and appoint judges and lawyers. It is important to give disciplinary powers to these bodies because judicial review must be made by a body as independent as those it appoints. Moreover, the accused judge and lawyer must be aware of the charges against him and be able to present his own defence. I can say that in France the lawyers involved in disciplinary matters can appeal a decision of their Bar to the Court of Appeal.

The Judicial Council must be clearly set out in the constitution. This is what happened in France. However I must warn you against one thing: should you wish to modify the Judicial Council, you will find it very difficult to do. In France, we are currently faced with the problem that we have been planning to change the constitution for the last ten or fifteen years, and it has created so many political difficulties that we have not been able to. Nevertheless, I do think that even the mere mention of a Judicial Council in the constitution will provide an essential guarantee.

As for the Constitutional Court, I don't consider the French *Conseil Constitutionnel* to be part of the judicial system: it judges the law itself and not the individual cases or conflicts between persons. But personally, I feel it to be indispensable that you have a Constitutional Court.

Finally, the selection of judges and lawyers must be made from fully qualified persons. Unhappily we have heard a number of criticisms of the inadequacy of the training of judges and lawyers. The Universities of Nablus and Bir Zeit have now or will soon have a school of law and plan to give special training to future judges and lawyers.

The independence of the judiciary must be maintained during the exercise of their functions. The first and the most important rule is that no authority can compel a judge to leave his post at any time in his career: it is a life appointment. To ensure this, it is necessary that judges be protected from complaints from any source. We have seen the important role which a Judicial Council must play in matters of discipline. Moreover, a judge cannot be transferred, even to a higher post, without his agreement. That is the reason these facts are denied by the military' authorities who give only cases of professional reasons.

The independence of the judicial system must be respected throughout the trial. Firstly, everybody must be able to apply to a judge at any stage of the trial; it is not possible for a Palestinian to seize the High Court of Justice in the West Bank without first obtaining a special permit. In this connection, judges and lawyers have pointed out that fees are very high, and have increased, which discourages litigants from using this mechanism. That fact is undoubtedly a grave breach of the independence of the judiciary. The rule to seize the jurisdiction must be defined and clearly known in advance.

Secondly, to enable a judge to act from the beginning to the end of a file, nobody can withdraw a file from his

jurisdiction before his delivery of judgement. If the litigants accuse the judge of bias, the withdrawal of the file must be made only at the order of another, higher jurisdiction, and then only after the hearing. During our mission, this point was the object of contradictory opinions. On the one hand, many lawyers and several judges have either by themselves or in response to our questions pointed out that several files in all the districts had been withdrawn or had not been presented to the judges. On the other hand, the civil, military and even judicial authorities asserted to the contrary; the explanation given is that all the files affecting security in its widest sense either fall within the competence of military courts, or within the competence of civilian courts, but because they represent important cases and because civilian courts lack the means to make the necessary investigations or execute them, the files are sent to military courts.

In the case of land affairs, the explanation is that most of the lands of the West Bank have not had a first registration and are under the competence of the military objections committee. We presented these explanations to those who assert to the contrary and they maintain their assertions. It seems to me that the explanation is that the term "security" is not clearly enough defined, hence cases involving security are assessed by military authority.

The independence of the judicial system must be respected during the judge's investigation. The lack of police sometimes prevents the judge from investigating. Furthermore, we were told that the judge may be prevented from searching for evidence and presenting witnesses. In criminal cases, some think that it would be necessary to create an examining

magistrate, as in the French system. I can say that this system certainly gives great efficiency in the search for the facts and evidence. Moreover, a number of rules of control of the judges must be established. In France there is great debate on this subject and a lot of professionals, myself included, believe that it would be better to entrust investigation to the prosecutor and that the courts should have control over the most important acts, those which concern the respect for human rights, imprisonment and so on.

The independence of the judiciary must be respected in order to execute the sentence of the court. For this, it requires means which do not exist in the West Bank and the Gaza strip. In other words, a number of judgments cannot be executed. Several cases have been mentioned to us in which condemned persons have been released immediately after being sentenced to terms of several years imprisonment and have threatened the judge who pronounced the sentence. This is an important violation of the law and of the independence of justice.

We have seen the problems resulting from the lack of independence of the judiciary. If all the fundamental rules we have just mentioned are respected, it is important to bear in mind that the judiciary is a power, and as every power is open to abuse, in order to build a judiciary which respects human rights and fundamental rules of democracy, several controls must be binding within the jurisdiction itself and also over and above all jurisdictions. In such jurisdictions the lawyers play an essential role. It is they who at every level of proceedings have the ability to check if the law is being respected, if the rules of procedure are being respected. They must have the power at any time to request respect of the law where they believe there

has been a breach, to defer the case to the appeal jurisdiction. For this, lawyers must receive complete training, and above all, be independent and free from threats and intimidation. We have seen that the universities of Nablus and Bir Zeit could assure this training. We have seen also the importance of respect of the disciplinary rules.

As concerns the judiciary, it is better that it be composed of three judges, but I have seen that this is not the tradition in the Jordanian judiciary, and the system of a single judge works properly in several countries in the world. It makes it all the more necessary that lawyers be independent and effective.

Another important principle is that judges may not sit more than once on the same case. This problem would arise where a judge of first instance is appointed to the Court of Appeal. Necessarily, a number of judgments he has made will come to the Court of Appeal. In no case can he participate in the judgement of the Court of Appeal. In France we go to great lengths to ensure the respect of this rule. I have had a case at the Court of Cassation where a judge who had in first instance named an expert to investigate facts. He had not participated in the judgement at first instance, but had later participated in the judgement at the Court of Appeal in the same case. We quashed the judgement of the Court of Appeal for this reason.

The jurisdiction must have resources in order to function properly. Everyone has said to us that at present, the judges and lawyers retiring are not being replaced. This system endangers the functioning of justice. In the same vein, the functions of judge and prosecutor must be kept separate. We have seen that in such jurisdictions, the same magistrate could function as

prosecutor. In our opinion, this confusion of roles must be avoided. I should say just a word about the prosecution. The question is to know if the functions of a prosecutor may be carried out by a magistrate or not. In France, the prosecutor is a magistrate, the Minister of Justice can give him orders but only orders to prosecute – he cannot give the order not to prosecute. In my personal opinion – I stress personal opinion – this system has many drawbacks because it is very difficult for the litigants to understand that a magistrate can receive orders from the executive power. Moreover, in France, the prosecutor has the right to say informally that he is not in agreement with what he has been asked, and return on order. This right is recognized in the statute of prosecution. I stress that it is my personal opinion, which is not shared by the majority of magistrates in France, that it is preferable to avoid giving the function of prosecution to magistrates.

Concerning control by another jurisdiction: the Court of Appeal. I think that the judicial system here at present could guarantee and allow the litigants to have the possibility to check the first judgement. The most important failure in the West Bank is the absence of a Court of Cassation. This is the jurisdiction at the top of the whole judicial system which has an irreplaceable part, because it controls the application of the law by all other jurisdictions and secondly, contributes to the solutions given by these jurisdictions. The absence today of such jurisdiction has calculable effects on the way in which such jurisdictions have worked since its abolishment. All the persons we met during our mission (except one) were favourable to the creation of such a court. It is necessary, at this point, to state that either the Court of Cassation gives the final

judgement, or it returns the case to another court. This procedure, enforced in France, has the drawback of extending litigation, but also the advantage of placing a check on the judgement of the Court of Cassation. In France, sometimes the Court of Appeal resists decisions of the Court of Cassation, and very rarely the Court of Cassation changes its own opinion.

We have also gained the impression that it would be a good thing to give the Court of Cassation the ability to judge administrative cases. In France, since the nineteenth century, we have had two High Courts: the Court of Cassation for civilian and criminal affairs, and the *Conseil d'Etat* for administrative cases. Many think that this dual system is problematic: we have been obliged to create a third jurisdiction in order to judge the conflicts between the two High Courts. This costs much time and money to the litigants. I believe that a single court of Cassation competent in all matters, including rendering the public service accountable is the best solution.

My conclusion is firstly that the judicial system of this country, of course without the changes which have occurred since 1967, is rather well-adapted for it. I am talking about the separation between religious and civilian courts, and also about the different levels of jurisdictions. A Court of Cassation (including certainly a number of adaptations) will be necessary. We have talked about the separation of jurisdiction in civil and criminal matters, the need for juvenile jurisdiction or for commercial jurisdiction. All these things must be done. The fact is that the main structure must be preserved.

My second and final conclusion is that most of the principles of an independent judiciary are not now respected,

with the result that the confidence of litigants, judges and lawyers is lost. It is indispensable as soon as possible to implement the means to restore a judicial system in which judicial independence is respected.

B. THE ROLE OF LAWYERS

THE ROLE OF LAWYERS AND THEIR BAR ASSOCIATIONS

Fali Nariman *

In the last two days there has been one wish of mine: I wish I knew Arabic. How much one loses if one doesn't know or speak the language.

I come from a country where there are fourteen regional languages. Earlier in my career as a trial court lawyer, we were used to having witnesses who spoke in a language different from the language of the court. Just how difficult it was will be illustrated in the following true story: years ago, when I was very young at the bar, I was cross-examining with enthusiasm a witness who spoke only Gujarati, which was not the language of the court. And at every point he was telling lies, even on irrelevant points, and the judge was so fed up with him that he told the translator, "Tell him not to tell unnecessary lies." The translator, in the same voice, told the witness, "Look here, the judge is saying only tell lies when it is necessary." So you see how much can be lost in a translation. But we are fortunate today – at least I am, since I have not lost much in the translation.

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I am truly amazed at what the Palestinian Bar Associations, which are very small compared to ours, have achieved. They only remind me of a very important thing that was said by a great literary character, Mr. Ralph Emerson. He said: "In this world nothing great is ever achieved without enthusiasm." And the Palestinian Bar Associations, with their 450 non-striking lawyers, have achieved a great deal, despite great adversity. But as has been said, lawyers have this shadow of the Occupation - they live under it, and they cannot forget it.

Therefore, when we speak of the role of lawyers, we cannot forget the climate and the society in which they live. Lawyers, in a sense, are a class apart. Why? Because a lawyer never stops learning. I had a leader in Bombay, Sir Jamshandi Kangha, a man of fantastic intellect, with a great memory, who at 93 said "I am still learning the law." That is the great quality of lawyers. We never can stop learning.

The second reason lawyers are a class apart is a disadvantage: there is no job security. As a professor of mine used to tell us in the law college: "For lawyers, God pays, but not every Saturday." Talking of job security, we have a beautiful Jewish synagogue in Kochin, one of the oldest in Asia, where, as young men, some of us had visited. There was a man sitting outside the building. When we went again five years later, he was still sitting there. So some of us asked him "Why are you sitting here?" He said "I am paid to sit here." "Who pays you?" we asked. He said "The Rabbi pays me to sit here." "And pays you how much?" He answered, "10 Rupees a month". "Is that enough?" we asked. His answer was "No. But I have been told by the Rabbi to wait for the Messiah, and the job security is complete." He keeps waiting, still.

Lawyers, however, must also be a part of the society in which they live. People in my country, look up to lawyers, despite our many failings. Whenever a public issue arises, an issue of human rights or of interference, the people want to know what is the stand of the lawyers? What is the stand of the Bar Association? This is a matter of great pride, and is our only badge of fame.

Despite the problems of military occupation, I was very glad to hear from the President of the Gaza Bar Association that Palestinians are looking toward the future. That is really what we have to do. Because what will the Palestinians do when the military occupation ends? Who will they blame?

The new role of lawyers and judges in Palestine, in my humble opinion, as leaders of society, is to keep the new leaders under constant surveillance and constant check. In my country, unfortunately, we have the tendency of touching the feet of the great. Everybody comes down and touches your feet if you are a great person. I say to the participants in this Seminar: never touch anybody's feet. You have your own feet to stand on, and every individual, your future politicians, your future leaders, must be continuously supervised and held accountable. This includes judges as well. And it is only if society has respect for you that it will respond and listen to what you say. But if you behave like the rest of them, then lawyers as a class, not as individuals, will lose the respect of their fellow men.

It is not enough to gain independence - we found that out in India. We had the British on our necks for a hundred years; they were not half as bad, I assure you, as your occupying power. But we were a subjugated colonial people. We fought

for our freedom and we gained it. Regrettably, we now find that the heroes of yesterday are not so great today. Governing a country is much more difficult than gaining independence.

Today, most Palestinians are very bothered about the Palestinian/Israeli Accords. Some say it's hopeless, some say it's useless, some say it's not enough. But I say to them, please discuss it and point out its deficiencies, but at the same time, please realize that the main task is not achieved only by gaining independence.

The first five years of Palestinian independence are the most insecure. I remember the example of Bangladesh. In 1972, when I was Solicitor-General in the Government, the then Law Minister of Bangladesh came to us in Delhi. He wanted a draft of a new constitution. We all sat down for hours together, and we drafted a beautiful constitution, the best one can imagine, better even than ours. But what happened? Within a year, the great hero of the country, Mujib Arrahman, became totally unpopular and was assassinated.

Military rule by, God forbid, Palestinians in Palestine would be much more disastrous than the military rule of Israelis in Palestine. It is that which Palestinian lawyers and judges have to work on and think about. They must call their leaders to account at every single stage, because the heroes of yesterday are the dictators of today and tomorrow.

I will never forget what a very brave judge in Bangladesh, Justice Hussein, told us eight years ago when we went there. When the President, who was a good friend of Justice Hussein and who, incidently, has just been deposed, took over he called Justice Hussein. He wanted a new constitution. So he said,

“My friend, please draft a new constitution”. And Hussein replied, a little fearfully but respectfully: “You know, my dear President, years ago in Calcutta, there was a famous playwright and there were two equally famous actors, both acting in different parts, both entirely different in their techniques. And whenever someone asked that playwright to write a play, he would say: ‘For which of those two actors would you like me to write this play?’ So, Mr. President, do you want me to write a play for you?”

Every person, when he comes into power, wants a constitution which he can manipulate. Palestinians should never allow this to happen. When Palestinians gain independence, they will be told that Palestine is a poor country, that they have to bring themselves up in the world, and that they must have strong rule, and so on. Many people fall for that. Once they fall for it, they will not recover for many years. I give you one more example, the example of Pakistan. Ayub Khan was a great dictator for the first year of his rule. But as always happens, after the first year, he became as corrupt as the rest of them. He told the Supreme Court, “I have taken over because of military necessity. Please ratify my *coup d'état*.” And the judges said, “Yes, he is right.” There is a doctrine of necessity in international law, a very dangerous doctrine which says that when times are bad, when it is absolutely necessary, even constitutions can be abrogated. The Supreme Court put its seal of approval on it in a famous case known as Dhoso’s case. They lived to regret it. Ayub Khan said he would hand back power and call elections in one year; elections were not called for twenty years.

So, lawyers should never rationalize tyranny. We had a fake emergency in June 1975 in India. Mrs. Gandhi had lost her election petition in a High Court, and she was prohibited for six years from contesting elections, participating in elections, or sitting in Parliament. That's the law. She could have appealed to the Supreme Court, but there were a group of lawyers who advised her. They said: "You have to impose an Emergency." So they got the President to sign a Proclamation of Emergency. All the opposition leaders were put in jail. This was all done in the interest of the country, the wider interest of security.

I have not come here to advise. In fact, I cannot forget when I was very young, when I passed out of college, the guest at my convocation was Lord Morrisson, Foreign Minister, Home Secretary, one of the most brilliant orators of his time. Somebody asked him, after his speech: "Mr. Morrisson, tell us, what is the best form of government for us Indians now? We already have a constitution, we're already trying to work it". And he very quietly said, "My dear young gentleman, I have been in Bombay for only two days and I am not an American."

Now, I have nothing against Americans, I like them and I have great friends amongst them. But an American will tell you a solution at the drop of a hat. So I say, with all humility, that I have been here two days, and I can only share what I know, from my own upbringing, from my own background. All the principles that one can think of are already there, they are beautifully put in this blue book, *The Independence of Judges and Lawyers: A Compilation of International Standards (CIJL Bulletin, vol. 25-26)*. In it, you will find, among other things, the Basic Principles on the Role of Lawyers and the Basic Principles on the Independence of the Judiciary. These texts

were created after great thought, so Palestinian lawyers should not think of repeating such effort, because they cannot do it better than this. While this book is printed by the CIJL, the principles have been adopted by the United Nations. Lawyers should not only ensure that these Principles are part of their of their laws, they must be willing to fight to protect and promote them.

Please remember, it is not enough to have principles incorporated in your law. Speaking of independent judges is not enough. Judges must act independently. Look at India between June 1975 and March 1977 when we had a political emergency, during which our fundamental human rights under the constitution were suspended. One of these rights was incorporated in Article 21 which said “No one shall be deprived of his life or liberty except in accordance with procedure prescribed by law.” Unfortunately, in our constitution at that time, this article could be suspended during an emergency and it was so suspended in June 1975. Draconian measures were introduced, very strong laws enabled the government to put into prison all political leaders of the opposition. When this law was challenged, our Supreme Court, by a majority of four to one, said, “What are we to do? Liberty is given to you by Article 21, but that Article is suspended. So liberty is the gift of the law and by law it can be suspended or taken away.” This was a monstrous decision, and one of the most shameful decisions of our Supreme Court.

It is not enough to have provisions. It is necessary for the judges to stand up to the government and to ensure that human rights are not violated.

Today, Palestinians' human rights are violated by an occupying power. Tomorrow, hopefully, or at least in five years, Palestine will become an independent state. And the greatest enemy of human rights will be the Palestinian state itself. Therefore, it is imperative for all judges to appreciate that it is not enough to be brave when the going is good, but it is important to be seen to be brave when the going gets tough. And this confrontation is the test of a truly independent judiciary.

Every executive government in every part of the world regards the judiciary as a needless appendage to government. The judiciary is blamed, for example, for setting criminals free. But then this is where an independent judiciary shows its true mettle and courage. Only because judges have to realise as they do in the Occupied Territories, that words used in a written constitution only convey ideas and their meaning changes with changing circumstances. Therefore, I shared an example of my own country, where we don't have a military occupation, but where we had, unfortunately, an emergency for two years.

Today, Palestinian lawyers are brave, they are fighting against an occupying power. But there will come a time when they will have to be unpopular and fight their own Government. The Government will say the same things that the Israelis are saying. It will tell lawyers that they are a danger to the security of the State. Then all these brave judges will be needed, and I have no doubt that they are brave. Palestinian lawyers and judges don't require too much reading, they just require a lot of backbone in order to see that their country, which is hopefully becoming independent in a short time, will continue to be independent.

The first five years are the worse. I have not studied in great detail the Declaration of Principles. But the issue today is that something is better than nothing. Palestinians start with something so that, ultimately, they will have what they will wish for in the future: a firm democracy. But that; they will only have with a strong will of the people, with Bar Associations who will have to change their tack, change their attack, train their searchlights, not on the Israelis, but on their own people. And only then will they truly be a democratic republic. They will truly be persons who deserve to have an independent judiciary and an independent Bar.

I would like to give an example of how our courts deal with torture. In the future, Palestinians may ratify the Optional Protocol to the International Covenant on Civil and Political Rights and be able petition the Human Rights Committee in Geneva. And the Human Rights Committee will solemnly give a report. It will all take a couple of years, and nothing great will happen in the long run. Ultimately, it is a political thing; nominees of governments sit there. It is to their own courts that Palestinians will have to look for redress.

I have an example, as I said. In 1992, an alleged smuggler died during an interview with the Foreign Exchange Authorities. The newspapers reported it and some of us filed a petition in the Supreme Court. Under our constitution, when you allege a breach of a fundamental right, particularly of a right to life and liberty, you are entitled to go directly to the Supreme Court.

The Supreme Court entertained the petition immediately. It called upon the District Judge of Delhi to investigate this

incident, and gave him all powers under the Court so he could summon witnesses. After two weeks he made a report, and it was found that the alleged smuggler had died due to torture whilst in the custody of the Director of Investigations of the Foreign Exchange Regulations Act.

The Court accepted the District Judge's report that there was torture, held the Government responsible, ordered the prosecution of the three officers of the Foreign Exchange Office, and directed the Government to pay *ex gratia* to the wife of the alleged smuggler a certain amount of rupees, without prejudice to her right to file a suit for damages in a proper court.

That is just one instance. If Amnesty International comes in and says there is torture in India, or there is torture in Palestine, yes, of course there is torture. Human beings are human beings all over. Palestinians will have torture, even after they gain independence. The police authorities are still the police authorities in every part of the world, and they function a little brutally, some more brutally than others.

So, it is not mere torture or the manner in which the executive deals with the lawyers that counts. What is important is: do Palestinians have avenues of redress? This is where lawyers come into their own. This is where lawyers have to stand up and be counted. This is where lawyers get respected by their communities even if they have to go on strike occasionally, as they do in my country. My opinion, however, is they have no business to strike because our profession is a service-oriented profession. We are serving a cause of the public. And if we don't serve the public and stand back and say: "We object to the Israeli occupation, we object to the

British occupation, we won't do a thing" then what will the people do, where will they go? What redress will they have, assuming they have a right of redress?

Palestinian lawyers will ultimately draft excellent laws. There will be people to advise them what laws to have and how to update them. They have the Basic Principles, and they can't better the best. But please permit me to tell a story which one of my senior colleagues in the ICJ, John Humphrey, relates in a book which he wrote after retiring (he is today an Honorary Member of the ICJ). John Humphrey was the first Director of Human Rights at the United Nations and was one of the participants in the drafting of the Universal Declaration in 1948, with Mrs. Roosevelt, who was the chairman. Mrs. Roosevelt was an indefatigable worker. Many of the members of that committee used to say, repeating what her husband used to say: "Oh Lord, make Eleanor tired"! But Eleanor was never tired, she was a magnificent woman. When they completed the Universal Declaration, Eleanor Roosevelt produced a bottle of wine which her uncle, the great Theodore Roosevelt, had given to her years before. And the French member, René Cassin, who was a committee member, was asked, because he was a Frenchman, to open the bottle of wine. With great aplomb he opened it. They all poured the wine around and everybody began to drink. Eleanor never drank, so she didn't realize that the wine had turned to vinegar. It had been kept so long that the wretched wine had turned to vinegar, it was just horribly sour stuff. Nobody said anything.

All your documents, all your declarations, all your laws, they are all very good, but for God's sake, look into them constantly. See that they don't get sour like that wine in the

bottle that Eleanor produced. They have to be updated, they can't be kept in cupboards for people to say: "See, we have a magnificent set of laws." You lawyers have to know them and implement them .

I will conclude with one more story. There was a Russian, a Cuban and an American with his lawyer travelling in a railway compartment. The Russian took out a bottle of vodka, took a swig at it and said: "We Russians, we make the best vodka in the world" and he threw the bottle of vodka out of the carriage window. The Cuban, who was smoking his cigar, said: "I am from Cuba. We Cubans make the best cigars in the world" and he threw his cigar out of the window. The American didn't say a word. He picked up his lawyer and threw him out of the window.

So, ladies and gentlemen, if you don't want to be that lawyer, you have to be competent and dedicated, lawyers of integrity, as I see that you are.

LAWYERS IN THE WEST BANK

Ali Guzman *

First, I would have preferred if another title had been chosen for this workshop — perhaps “Towards an Active Palestinian Judiciary” would have been more appropriate. The current title gives the impression that the Palestinian judiciary will not be independent. We presume that there will be an independent judiciary in the future.

West Bank lawyers fall under two categories: striking and practising lawyers. The number of lawyers in the West Bank is 450; 256 of whom have remained on strike.

We have one lawyer for every 2700 persons. In Jordan, by contrast, there is one lawyer for every 1750 persons. And in Israel, there is one lawyer for every 385 persons. These statistics clearly show the link between social development and the need for lawyers in society. The ratio is affected by the conditions of each society.

We have to address the issue of the organization of the profession. As you all know, our colleagues on strike follow the Jordanian Bar Association. The practising lawyers, on the other hand, follow the Arab Lawyers Committee.

* President of the Arab Lawyers Committee.

The Arab Lawyers Committee was established in 1980 for the purposes of creating a body to represent the practising lawyers in the West Bank and to take care of their problems. Since the establishment of the association, there have been a lot of problems. First of all, there is a wish that all practising lawyers belong to a body based on by-laws. In 1986, the Israeli military authorities issued a military order that created a committee to supervise lawyers' entry into the association. This has led the practising lawyers to go to the High Court to get a decision to freeze the military order. The Israelis claimed that the creation of a lawyers' association would affiliate it to the Palestine Liberation Organization (PLO). Accordingly, there have been a lot of problems in the organization of the profession: the position of the striking lawyers, problems with the Israeli authorities, the Israeli claim that we are a front for the PLO, and so forth.

Many of you know that we went to our colleagues in the Gaza Bar Association, and we tried to co-ordinate with them. We were not able to do so. This requires a lot of courage and sacrifice. It is not clear that lawyers, both who are striking and those who are practising, and also those in the Gaza Strip, are able to build a judicial system that is strong and independent and that guarantees an active legal profession.

According to Military Order No. 35, Israeli lawyers were to appear in West Bank courts during a limited period of six months. But then Military Order No. 248 allowed Israeli lawyers to continue to appear in West Bank courts without a limitation of time. This has caused a lot of people to lose their rights, especially in land cases. The military authorities claimed that there was a need for this order because of the lawyers'

strike. While the reason is no longer valid, the authorities kept the order in place.

Despite these obstacles, however, lawyers in the West Bank have been active. We have demanded that the occupying authorities respect international law. We demanded that the authorities cancel the military orders which gave them legislative powers, allowing them to amend the laws that were applicable before the occupation and to violate the rights of the people.

We asked that they cancel the military orders that give control over the land. We asked them to reconsider court fees. We had an active role in society, particularly with regard to detainees.

We also worked with some social institutions and negotiated between others. We had a distinguished role during the Uprising. The lawyers during that period did not seek financial benefit. We worked on a voluntary basis. We worked for a long period with nominal fees. We had small financial benefit which did not correspond to wages of labourers.

Thirty-two lawyers were arrested during that period and many of us faced difficulties, particularly with land cases. We were the first to demand that the authorities be held responsible for their own actions. We exposed the policies of the occupying authorities, and brought the voice of the oppressed to the world.

I would like to address our hopes for the future. The independence of the judiciary, and the right of defence, are the basis of democracy. Without an independent judicial system, there is no freedom of expression. The protection of judges is

very important. They should be able to practice their role in a way that honours the profession. They should be protected from the executive authority. The profession should be developed in accordance with technological advances. We should demand respect for human rights.

LAWYERS IN GAZA

Fraih Abu Middien *

I would like to point out that in the Gaza Strip we did not have the same problems in relation to the lawyers' Bar as in the West Bank.

After 1948, the lawyers' profession continued to function. In 1955, there was a decision to reduce the training period. There was a small number of lawyers and a need for more. We are still suffering from that decision. The training period of lawyers, which used to be two years, was reduced to one year. This has left us with a big problem.

The Bar Association started with 20 lawyers, and by 1967, most lawyers became members. The by-laws were taken from Ottoman law. The Association could not address many of the problems faced by lawyers. It could only discipline lawyers. Yet it acted as an umbrella under which activities took place.

Before the Uprising, work in the military courts was much more organised, due to the small number of detainees. This does not mean that the lawyers' work in the military courts is not substantial. However, if you look at the work of the

* President of the Gaza Bar Association; "Minister of Justice" of the Palestinian Authority.

military courts you mainly see plea bargaining between lawyers and the authorities. In the 60s and 70s there were many who argued against this trend. After the Uprising, however, things changed. We did not have real legal work in the military courts.

In the past six or seven years, there have been ten acquittals. Plea bargaining has affected the profession. The training period was very short and some lawyers lacked qualifications. There was not a lot of interaction between trainees and lawyers. The profession was affected by the increasing number of new lawyers. This was the result of the large number of university graduates. The Bar Association used to provide the lawyers with some money. The Uprising attracted and polarised lawyers towards different political trends.

Seventy percent of lawyers need training. We have asked lawyers to spend one year in an office and then go to court. The Bar Association has collaborated with other centres to design training programs. We believe that lawyers are still not adequately qualified compared to Arab standards.

The Bar Association was able to offer financial aid to lawyers. Every 6-8 months, we gave lawyers £1000 to visit prisons. There were thousands of prisoners in Ansar III. The detainees were not allowed family visits and the lawyers were their only connection with the outside world. They were insulted and harassed. We went winter and summer.

We now want to look ahead, and to add guarantees and means of protection. Of the 450 lawyers in the Gaza Strip, we will send 50 to the police. A large number will remain. Quality is more important than quantity. Some people think that two

years training period for lawyers is too short and that three years is needed.

We hope that the future will bring the unification of laws and the rebuilding of the profession.

PART THREE :

Basic Text

*Resolution 1994/41 of the UN Commission
on Human Rights Creating a Special Rapporteur
on the Independence of the Judiciary*

55th meeting
4 March 1994
(adopted without a vote)

**1994/41. Independence and Impartiality of the
Judiciary, Jurors and Assessors and the
Independence of Lawyers**

The Commission on Human Rights,

Guided by articles 7, 8, 10 and 11 of the Universal Declaration of Human Rights, and articles 2, 4 and 26 of the International Covenant on Civil and Political Rights,

Convinced that an independent and impartial judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice,

Bearing in mind the Vienna Declaration and Programme of Action (A/CONF.157/23), in particular paragraph 27 of part I and paragraphs 88, 90 and 95 of part II,

Recalling its resolutions 1989/32 of 6 March 1989, 1990/33 of 2 March 1990, 1991/39 of 5 March 1991, 1992/33 of 28 February 1992 and 1993/44 of 5 March 1993,

Recalling also General Assembly resolution 45/166 of 18 December 1990, in which the Assembly welcomed the Basic Principles on the Role of Lawyers and the Guidelines on the

Role of Prosecutors adopted by the eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and invited Governments to respect them and to take them into account within the framework of their national legislation and practice,

Bearing in mind the principles contained in the draft Declaration on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1), prepared by Mr. L.M. Singhvi, the importance of which was noted by the Commission on Human Rights in its resolution 1989/32 of 6 March 1989,

Noting both the increasing frequency of attacks on the independence of judges, lawyers and court officials and the link which exists between the weakening of safeguards for the judiciary and lawyers and the gravity and frequency of violations of human rights,

1. Welcomes the final report on the independence of the judiciary and the protection of practising lawyers (E/CN.4/Sub.2/1993/25 and Add.1), prepared by Mr. Louis Joinet, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities;
2. Endorses the recommendation of the Sub-Commission, as contained in its resolution 1993/39 of 26 August 1993 to create a monitoring mechanism to follow up the question of the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officials, and

the nature of potential threats to this independence and impartiality;

3. Requests the Chairman of the Commission to appoint, for a period of three years, after consultation with the other members of the Bureau, a special rapporteur whose mandate will consist of the following tasks:
 - (a) To inquire into any substantial allegation transmitted to him or her and report his or her conclusions thereon;
 - (b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned;
 - (c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers;
4. Urges all Governments to assist the Special Rapporteur in the discharge of his or her mandate and to transmit to him or her all the information requested;
5. Requests the Special Rapporteur, starting with the fifty-first session, to submit a report on the activities connected with his or her mandate;

6. Requests the Secretary-General, within the limits of the resources of the United Nations, to provide the Special Rapporteur with any assistance needed for the discharge of his or her mandate;
7. Decides to consider this question at its fifty-first session;
8. Recommends the following draft decision to the Economic and Social Council for adoption:

"The Economic and Social Council,

Taking note of Commission on Human Rights resolution 1994/41 of 4 March 1994, endorses the decision of the Commission to confirm the proposal of the Sub-Commission to create a monitoring mechanism to follow-up the question of the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officials, and the nature of problems liable to attack this independence and impartiality, and recommends that this take the form of a special rapporteur whose mandate will consist of the following tasks:

- (a) To inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;
- (b) To identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical

assistance when they are requested by the State concerned;

- (c) To study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers;

The Council also approves the request of the Commission to the Secretary-General to provide the Special Rapporteur with all the assistance necessary for the completion of his or her task."

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**The Independence of Judges and Lawyers:
A Compilation of International Standards**

A Special Issue of the CIJL Bulletin (No. 25-26, April-October 1990).

Available in English, French and Spanish, 123 pp.

15 Swiss francs, plus postage.

This compilation brings together for easy reference the most important international norms concerning the independence of the judiciary and the legal profession. Included in the bulletin are both instruments approved by the UN and those promoted by leading organizations of judges and lawyers, including: the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers; the UN Draft Declaration on the Independence of Justice (Singhvi Declaration); and the International Convention for the Preservation of Defense Rights.

**Attacks on Justice. The Harassment and Persecution of Judges and Lawyers
June 1992 - June 1993**

A CIJL Study

Available in English, 224 pp.

15 Swiss francs, plus postage.

The fifth annual report of the Centre for the Independence of Judges and Lawyers reports that at least 352 jurists in 54 countries were targets of persecution as they carried out their work during the year June 1992 to June 1993. Of these, 32 were killed, three disappeared, 34 were attacked, 81 received threats of violence, 95 were detained, and 107 suffered reprisals for carrying out their professional duties. Country by country, the report also describes the legal system and structural shortcomings as they affect the independence of the judiciary.

**The Civilian Judicial System in the West Bank and Gaza:
Present and Future**

A CIJL/ICJ report on a Mission to the Occupied Territories in December 1993.

Available in English, French and Arabic, 136 pp.

25 Swiss francs, plus postage.

This report examines the history, structure and functioning of the Palestinian civilian judicial system and discusses how this system has been distorted during Israeli military occupation. The report is divided into two parts: 1. Under Israeli Military Rule, which describes Israeli interference in the proper administration of civilian justice in the Occupied Territories and the impact of more than 2500 Israeli Military Orders, and makes recommendations for the immediate future; and 2. Under a Palestinian Authority, which discusses the gradual transfer of power in the Gaza Strip and the Jericho Area during the Interim Period established by the Israel/PLO Accords and advises on criteria for the building of a new legal system under Palestinian authority.