Yearbook of the International Commission of Jurists 2004

Editor: Ian Seiderman

INTERNATIONAL COMMISSION OF JURISTS

The International Commission of Jurists (ICJ) is a non-governmental organization devoted to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world. It is headquartered in Geneva, Switzerland, and has 82 national sections and affiliated legal organizations. It enjoys consultative status in the United Nations Economic and Social Council, UNESCO and the Council of Europe. The ICJ maintains cooperative relations with various bodies of the African Union and of the Organization of American States.

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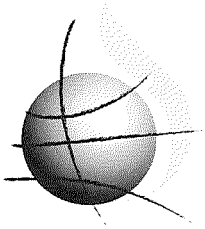
YEARBOOK OF THE INTERNATIONAL COMMISSION OF JURISTS

2004

Editor: IAN SEIDERMAN



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PREFACE TO THE 2004 ICJ YEARBOOK

During the past year, the ICJ has proceeded to tackle vigorously certain of the manifold challenges presently confronting the international human rights movement: The threat to the primacy of fundamental rights posed by counter-terrorism measures, the dereliction of many States in adequately implementing the human rights obligations they have undertaken; the struggle to preserve a rule of law undergirded by the functioning of an independent and impartial judiciary; and the tendencies towards the overall weakening of universal and regional systems of human rights protection. This Yearbook is intended to serve as a conduit for dissemination of information, analysis and guidance to jurists, governments, NGOs and the wider human rights community for use in their own efforts to address these challenges.

The ICJ Yearbook effectively consolidates two former publications – the *ICJ Review* and the Centre for the Independence of Judges and Lawyers' *CIJL Yearbook* – that until 2002 had constituted the ICJ's periodic commentary on questions relating to the protection and promotion of human rights under the rule of law. Following a review of its publication policy, the ICJ took a decision to publish a Yearbook, which will largely encompass material relating to the contemporary areas of work of the ICJ. In addition, the Yearbook will reproduce a selected number of reports, papers and legal materials, prepared during the previous year, as well as primary documents of special topical importance.

The 2004 ICJ Yearbook contains three country reports issued by the ICJ's Centre for the Independence of Judges and Lawyers (ICJ/CIJL). The CIJL, which forms part of the ICJ secretariat, is mandated to promote the independence of the judiciary and the legal profession through the world. The report of a fact-finding mission undertaken in Swaziland concludes that in that country threats to judicial independence in violation of core international human rights standards are routine and fundamental principles regarding the separated powers are not respected. A report on a fact-finding mission to Nepal reveals a deterioration of the human rights situation, with wide-scale instances of secret and arbitrary detention by the armed forces, and a poorly functioning justice system unable or unwilling to carry out core functions, such as processing of *habeas corpus* petitions. A third report, in respect of Tunisia, exposes a pattern of persecution against independent lawyers and a disregard for judicial independence. Attempts by the ICJ to conduct an *in situ* fact-finding mission to Tunisia

were rebuffed, as on two occasions the Tunisian authorities denied ICJ experts entry to the country, turning them back at the airport in Tunis.

The Yearbook reproduces reports of trial observations undertaken in Turkey, Tunisia and Malaysia. In respect of the ongoing retrial of Leyla Zana and three other Kurdish former Parliamentarians, who had previously been sentenced by a State Security Court to 15 years imprisonment, the ICJ/CIJL determined that they were not receiving a fair trial by an independent and impartial tribunal, as the Court was failing to respect the principles of equality of arms and the presumption of innocence. Also in Turkey, the ICJ/CIJL reports on the trial of Filz Kalayci, a lawyer charged with insulting the Ministry of Justice and professional misconduct stemming from a newspaper article she had written on "F-Type" prisons in Turkey. A report on the Tunisian Bar Council case, an observation undertaken jointly with Avocats sans Frontières and the Observatory for the Protection of Human Rights Defenders, reveals a threat to the fundamental right to association by lawyers in that country. A fourth trial observation report relates to the trial of P. Uthayakumar, a Malaysian human rights lawyer, who, the ICJ/CIJL concludes, was prosecuted for the purpose of intimidation so that he would cease from carrying out human rights work.

The Yearbook also contains the ICJ's position paper on recommendations by the Committee presided by Justice Malimath, established to propose reforms to the criminal justice system in India. The ICJ concludes that certain proposals of Malimath Committee amounted to an attack on the judiciary, prosecution and witnesses in criminal trial and sought to preserve the criminal justice system by conferring disproportionate powers to the police.

The five articles in the second part of the Yearbook each contain an analysis in respect of certain of the work areas of the ICJ. Gerald Staberock examines the latest trends and strategies aimed at effective implementation at the national level of international human rights standards. Some of these strategies have been adopted effectively by the ICJ for use in its own national implementation program. Following on from his previous contributions to the ICJ/CIJL regarding the adverse impact of corruption for an independent and impartial judiciary, Justice Robert Nicholson in his contribution evaluates recent international initiatives aimed at addressing corruption in the judiciary.

Federico Andreu-Guzmán gives an overview of the work of the United Nations Commission on Human Rights Working Group mandated to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearances. The Working Group aims to fill a major outstanding *lacuna* in universal human rights protection, so as to contribute to combating the crime of enforced disappearance. Hassiba Hadj Sahraoui provides an analysis of the efforts underway by the League of Arab States to modernise the Arab Charter on Human Rights, which, if successful, could serve to bring a serious human rights protection system to the Arab region. She concludes that great strides have been taken to bring the present draft into conformity with international standards, although some outstanding concerns persist. Ian Seiderman addresses the question of gaps in the international monitoring of State compliance with international human rights obligations while combating terrorism, which constitutes among the greatest of contemporary human rights challenges. He observes that international efforts at monitoring such respect for human rights while countering terrorism have proved wholly inadequate and argues that the establishment of a monitoring mechanism by the UN Commission on Human Rights is a matter of urgency.

Two legal materials are included. First, the text of the *amicus curiae* brief submitted to the European Court of Human Rights in the case of *Senator Lines v. 15 Member States* (of the European Union). The brief argues that States parties to the European Convention on Human Rights should be held accountable for the conduct of international organisations of which they are members and that States should not be allowed to avoid their human rights obligations by transferring powers to international organisations.

The second document, the UN human rights norms for transnational corporations and other businesses, adopted by the Sub-Commission on the Promotion and Protection of Human Rights on 13 August 2003, constitutes the first set of comprehensive international human rights norms specifically applying to transnational corporations and other businesses. The norms may serve to help businesses know and comply with the relevant human rights laws, and will provide a clear road map to action that transcends the conflicting provisions of the various private codes of conduct.

While the commentary and material in the 2004 ICJ Yearbook cover disparate human rights areas, the unifying element that informs and motivates all of them is the call on authorities throughout the world to

honour the "solemn commitment" that all of their States have made repeatedly, including in Vienna in 1993, to "fulfil their obligations to promote universal respect for and observance and protection of all human rights and fundamental freedoms for all...[.]"[1]

Ian D. Seiderman
Editor
February 2004

[1] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, operational paragraph 1.

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EXECUTIVE SUMMARY

From 12-21 January 2003, the International Commission of Jurists' Centre for the Independence of Judges and Lawyers, (ICJ/CIJL), sent a fact-finding mission to the Kingdom of Swaziland. The purpose of the mission was to assess various threats against judicial independence, the rule of law and the administration of justice resulting from an Executive decision to disregard two Appellate Court rulings, an action that directly led to the resignation of the nation's entire Court of Appeal.

In 1973, the former monarch of Swaziland repealed the 1968 Independence Constitution in favour of a form of government that eliminated political parties, restricted trade union activities and stifled civil and political dissent. In the absence of constitutionally entrenched protections, the present Executive gradually eroded the rule of law, restricted press freedoms and undertook unilateral actions detrimental to the survival of the nation.

The legal system in Swaziland is based on a dual system of law whereby local Swazi law and custom, as applied in National Courts, is subordinate to Roman-Dutch law, as applied in Westminster organised Courts. Historically, this dual legal system performed relatively well, however, the ICJ/CIJL delegation was provided with concrete evidence affirming that the present rule of law crisis is rooted in a past whereby the Executive routinely threatens judicial independence where it conflicts with entrenched interests. Periodic attacks on judicial independence in Swaziland have given way to Executive attitudes holding the judiciary, rule of law and the separation of powers in virtual contempt. The most recent example of negative State actions against judicial independence occurred in October and November 2002. At that time, the Attorney General threatened three High Court Justices with immediate dismissal if they did not recuse themselves from a case that involved the abduction of a girl that eventually became the 10th wife of His Majesty. The Director of Public Prosecutions filed criminal charges against the Attorney General for threatening the High Court Justices, however, the State forced him to withdraw the charges.

The rule of law crisis presently besetting the Kingdom of Swaziland originated from a 28 November 2002 statement by the palace-appointed Prime Minister wherein the nation was advised that the government would not recognise two Court of Appeal *judgements*. These judicial rulings followed existing statutory law in concluding that: (a) His Majesty could not override Parliament with Royal Decrees until a new Constitution had been enacted; and (2) the Commissioner of the Royal Swaziland Police was in contempt of Court for refusing to execute judicial orders.

On 30 November 2002, the six Justices of Swaziland's Court of Appeal resigned in protest over the government's public refusal to recognise this Court's rulings. In solidarity, trade union and civil society organisations appealed to the government to follow the rule of law and engaged in strike action. The international community added its voice to this protest by advising the Swazi government that its actions threatened preferential trade arrangements, the loss of which would wreak socio-economic havoc throughout the nation. In the face of domestic and international appeals, the government continued its open attack on judicial independence, the separation of powers and the rule of law. Further tarnishing the image of the Kingdom, the Chief Justice was forced to resign while other judicial officers were dismissed, demoted or threatened with deportation.

The ICJ/CIJL mission delegation found that a small cadre of palace advisers including the Prime Minister, the Attorney General and a host of important political and judicial actors has subverted effective government and the rule of law in Swaziland. These palace advisers constitute His Majesty's Special Committee on Justice, more commonly known as the Thursday Committee, a body which has dedicated itself to the gratification of entrenched interests at the expense of national welfare and the survival of the Kingdom. Possessing neither a formal nor informal or published mandate, members of the Thursday Committee pose themselves as the guardians of justice and operate with unlimited jurisdiction over all matters of national importance. Silencing dissent, the Thursday Committee is the root cause of the open assault against judicial independence and the rule of law in Swaziland.

While the conduct of the Swazi government has indicated little preparedness to accept responsibility for its attacks against judicial independence and the rule of law, the ICJ/CIJL was gratified to learn that, on 31 May 2003, His Majesty King Mswati III released a draft constitution that, while silent on the issue of multi-party democracy, contains a Bill of Rights guaranteeing various human rights and freedoms.

Pursuant to the mandate of the ICJ/CIJL mission to Swaziland, the delegation drafted a series of recommendations designed to assist in

resolving the current rule of law crisis and re-centre the Kingdom on a path towards peace, good governance and the rule of law.

I. INTRODUCTION

From 12-21 January 2003, the International Commission of Jurists, Centre for the Independence for Judges and Lawyers (ICJ/CIJL) sent a fact-finding delegation to the Kingdom of Swaziland for the purpose of gathering information on the state of the judiciary, the administration of justice and attacks against the rule of law. The threefold objectives of the mission were to:

(1) Evaluate the overall state of judicial independence;
(2) Assess the impact of the State's decision to disregard two recent Court of Appeal judgements;
(3) Issue a report with concrete recommendations on the implementation of national and international standards related to the rule of law, judicial independence and the administration of justice.

In late November 2002, the ICJ/CIJL received information that the rule of law was under serious attack in Swaziland. This was the result of a decision by the Swazi Executive to disregard two Appellate Court *judgements*, an action that directly led to the resignation of the entire Court of Appeal. The ICJ/CIJL issued a 4 December 2002 intervention to the absolute monarch of Swaziland, His Majesty King Mswati III that expressed concern with regard to a 28 November 2002 press statement issued by the Prime Minister, Dr. Barnabas Sibusu Dlamini, declaring that the Government would not recognise two Court of Appeal judgements as their effect would be to strip His Majesty of some of his powers. As further justification for this action, the Prime Minister advised that Appellate Court Justices had not acted independently due to "outside influences".

Not responding to the 4 December 2002 intervention, the ICJ/CIJL decided that, in light of the State initiated attack on judicial independence, the separation of powers and rule of law in Swaziland, an urgent fact-finding mission was warranted.

On 16 December 2002, the ICJ/CIJL sent a second intervention to the Kingdom of Swaziland through its High Commission in the United Kingdom. This communication advised of the ICJ/CIJL's intention to engage in a fact-finding mission to Swaziland and requested that meetings with His Majesty, the Prime Minister, the Attorney General and other government officials be facilitated. While in Swaziland, the mission delegation was able to secure meetings with key State officials.

A. Composition and Credentials of the Mission Team

The ICJ/CIJL mission delegation was composed of:

(i) Team Leader

Justice Dr. George Kanyeihamba of the Supreme Court of Uganda; Former Minister of Justice and Attorney General of Uganda; Senior Presidential Adviser on International and Human Rights Affairs; Professor of Law; Chairman of the Legal and Drafting Committee of the Constituent Assembly that developed the Constitution of Uganda; and author of leading texts on constitutional and administrative law and government.

(ii) Member

Professor Michelo Hansungule, Former Dean of the School of Law, University of Zambia; Former Raoul Wallenberg Visiting Professor, University of Pretoria, South Africa; Professor of Human Rights Law, Faculty of Law, Centre for Human Rights, University of Pretoria, South Africa; and author of leading texts on human rights protection in Africa.

(iii) Member

Professor Edward Ratushny, Queen's Counsel; Professor of Law, University of Ottawa, Canada; President of the International Commission of Jurists – Canada; Special Adviser on Judicial Affairs to the Minister of Justice, Canada; and Counsel to the Canadian Judicial Council on matters related to judicial misconduct.

(iv) Rapporteur

Edwin Berry, Legal Officer, International Commission of Jurists – Secretariat, Geneva, Switzerland.

B. Meetings in Swaziland

Throughout the course of the mission, the ICJ/CIJL delegation met with relevant political, judicial and civil society actors including: the Prime Minister; the Deputy Prime Minister; the Attorney General; Members of Parliament; the Chief Justice; Appellate Court Justices, (recently resigned); High Court Justices; Magistrates; National Court representatives; Law Society representatives; lawyers; law school faculty; political opposition representatives; labour union representatives; non-governmental organisations; journalists; and the diplomatic and United Nations communities. Due to a prolonged seclusion related to Incwala ceremony activities, His Majesty

King Mswati III was unavailable to meet with the mission delegation. Both prior to and during the mission, the ICJ/CIJL delegation reviewed relevant jurisprudence, legislation and doctrine concerning Swaziland and the rule of law crisis.

II. SWAZILAND: COUNTRY BACKGROUND

A. General

The Kingdom of Swaziland is geographically situated between Mozambique and South Africa. SiSwati is the official language of the nation, however, English is widely spoken amongst the nation's 1 million inhabitants. Standing alone as Africa's only remaining absolute monarchy, Swaziland is currently ruled by His Majesty King Mswati III, (The Ingwenyama or Lion) and the Queen Mother, (The Ndlovukazi or She-Elephant), with the assistance of an appointed cabinet, a system of formal and informal advisory bodies and over 300 Chiefs.[1]

B. Economy

Possessing a free market economy dominated by private sector interests, the World Bank classifies Swaziland as a middle-income country despite the fact that 66% of this predominantly rural nation live in absolute poverty as measured by the United Nations Development Program. With 10% of the population holding 60% of the country's income, the gap between wealthy and poor is steadily increasing. Comparatively wealthy in mineral resources, the agricultural sector, currently crippled by a severe drought, remains the primary source of income for the vast majority of the population. Exporting soft drink concentrates, sugar, paper and minerals, Swaziland transmits over 50% of its exports to South Africa from whom it receives virtually 100% of its imports.[2]

Growth in Swaziland's industrial and export sectors has been linked to the Kingdom's participation in two United States trade agreements, the Generalised System of Preferences, (GSP), and the African Growth and Opportunities Act, (AGOA). Under these trade schemes, Swaziland's sugar and textile products have access to the free trade markets of the United

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1 See generally, (1) Swaziland – Country Profile, 2002 at http://www.worldinformation.com; (2) Amnesty International, Swaziland – Annual Report 2002 at http://web.amnesty.org; and (3) CIA – World Fact Book – Swaziland, 2002 at www.cia.gov/cia/publications/factbook/geos/wz.html.

2 *Ibid.*

States coupled with preferential price concessions[3] in exchange for State undertakings to uphold the rule of law, respect human rights and maintain good governance and sound economic policies. Approximately 300,000 Swazis benefit under the GSP and AGOA.[4]

C. HIV/AIDS

With a life expectancy of 37 years, Swaziland has increasingly come under threat from the spread of HIV/AIDS with a current infection rate of 38.6%. Possessing a limited health care infrastructure, few doctors trained in combating the virus and an absence of State sponsored programs that provide access to antiretroviral medications, HIV/AIDS will further ravage the Kingdom unless there is a dramatic and immediate shift in public health policy and traditional attitudes that do not sufficiently encourage "safe" sexual practices.[5] In 1999, His Majesty King Mswati III declared that HIV/AIDS was a national disaster, however, the government has been slow to enact substantive public policy measures dedicated to combating the spread of the disease. As late as December 2002, Swazi Senator Walter Bennett, a senior adviser to His Majesty, publicly advised that there was no need for the government to continue "wasting money" on providing medical support to HIV/AIDS sufferers because they contracted the disease from "evil habits and out of choice."[6] Though not reflective of official policy, this unfortunate statement by a senior governmental official has contributed to a generalised social stigma whereby HIV/AIDS sufferers are discriminated against in attempting to obtain public services and in gaining/maintaining employment.[7]

D. Press Freedom

In recent years, journalistic freedom in Swaziland has come under increasing threat. In 2001, the State controlled "Swazi Observer" newspaper and its affiliates were closed and staff dismissed without notice as a result

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3 Preferential treatment in the form of reduced import duties granted without reciprocal trade obligations by developing nations.

4 These figures are based on the number of people employed in the sugar and textile industries and those that indirectly benefit therefrom. See 16 January 2003, *Times of Swaziland* "GSP Loss to Affect 300,000 Swazis".

5 The World Health Organisation has engaged a specialist Dr. Okello of Uganda to assist Swaziland in strengthening its response to the spread of HIV/AIDS.

6 13 December 2002, *The Mail and Guardian Online*, http://www.mg.co.za.

7 *Supra*, note 1. In an effort to curb the spread of HIV/AIDS, in 2001, His Majesty issued a statement in which he ordered that anyone who engaged in sexual contact with a virgin before marriage was to be punished according to Swazi tradition. HIV/AIDS activists subsequently criticised His Majesty for engaging in the type of behaviour that he sought to abolish.

of the newspaper's refusal to name confidential sources utilised to criticise the monarchy. Press freedoms were also attacked in 2001 when the Swaziland Television Broadcasting Corporation dismissed 31 employees for their involvement in a strike five months earlier. Fears linger that the State may attempt to re-introduce the Media Council Bill, a previously deferred initiative ostensibly drafted to promote responsible standards of journalism while substantively seeking to subjugate freedom of the press to government control. This fear was substantiated on 8 April 2003 when the Minister of Information, Abednego Ntshangase, advised the Swazi Parliament of a new State policy whereby "The national television and radio stations are not going to cover anything that has a negative bearing on government."[8]

E. The Royal Purchase of a Luxury Jet

Faced with the second highest HIV/AIDS infection rate in Africa coupled with severe food shortages, the Kingdom of Swaziland is poised to proceed with the purchase of a 19-seat luxury jet from a private company in Canada. The cost of the jet is equal to almost four times the annual health budget of $20,000,000. A report released by a Swazi parliamentary select committee established to study the royal purchase of the jet concluded that the Prime Minister and three cabinet ministers had acted beyond their constitutional powers in committing national funds to a "dubious project."[9] Despite this report, the appointed Cabinet approved delivery of the luxury jet and justified the purchase as necessary for the King to seek foreign aid and investment. In response to this planned purchase, the European Union withdrew development assistance while the United States warned that the purchase of this unaffordable luxury would jeopardise beneficial trade preferences and donor assistance initiatives as these programs are linked to good governance, respect for rule of law, sound economic policies and economic stability. On 21 March 2003, Swaziland's Parliament voted against the luxury jet purchase, however, the Prime Minister advised that this vote was merely a recommendation that could be disregarded by the monarch. At present, the government has not advised as to whether it will proceed with the purchase.[10]

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8 Radio Swaziland, Mbabane, Swaziland, 17 April 2003, 1700 GMT as re-reported on Reuters News Service at http://wwwb.rbb.reuters.com.

9 *Africa Online*, "Showdown Looming Over Royal Jet" 19 March 2003, http://www.africaonline.com.

10 Reuters News Service, 21 March 2003 at http://wwwb.rbb.reuters.com.

III. POLITICAL HISTORY AND SYSTEMS OF GOVERNMENT

A. The 1968 Independence Constitution

During the late 1960's, the British colonial authority gradually responded to Swazi pressure for political reform through the establishment of a constitutional monarchy featuring His Majesty King Sobhuza II, the father of the present King, as the head of State. Achieving full independence in 1968, the Westminster styled *Constitution of the Kingdom of Swaziland*[11] contained an expansive Bill of Rights, subjected the King to the principle of parliamentary supremacy and instituted a firm separation of powers between the Executive, Legislative and Judicial branches of government.

B. The 1973 Proclamation of His Majesty King Sobhuza II[12]

Asserting that the Westminster style of government was incompatible with the Swazi way of life, on 12 April 1973, His Majesty King Sobhuza II repealed the 1968 Constitution, dissolved Parliament, assumed all powers of government and banned political parties and trade unions. Despite the repeal of the Constitution, the *1973 Proclamation* retained certain constitutional provisions relating to the Courts, their methods, the security of judges and the administration of justice. From 1973 to 1978, His Majesty King Sobhuza II ruled Swaziland without an elected Parliament, enacting laws though Royal Decrees and Royal Orders in Council.

C. The 1978 Establishment of the Parliament of Swaziland Order

In enacting the *1978 Establishment of the Parliament of Swaziland Order*,[13] legislative power previously held by the King was nominally returned to the Swazi people. Of great import to the present rule of law crisis facing Swaziland, the *1978 Order* declared that the monarchy could not issue further Royal Decrees until a new Constitution was entrenched. While a new Constitution was promulgated on 13 October 1978, it was not formally presented to the people and thus did not come into force. Despite the aforementioned prohibition, the Swazi monarchy has continued to govern through the use of Royal Decrees. As rooted in the *1978 Order*, the promulgation of laws in Swaziland may stem from three sources: (1) Acts of Parliament; (2) King's Orders in Council, operative when Parliament is not in session; and (3) Royal Decree, upon the entrance into force of a new Constitution.

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[11] Hereinafter the *Constitution*.
[12] Hereinafter the *1973 Proclamation*.
[13] Hereinafter the *1978 Order*.

D. State Institutions for Governance

While His Majesty King Mswati III holds ultimate political authority in Swaziland, according to unwritten customary norms and colonialist laws that remain in force, His Majesty exercises power in consultation with the Queen Mother, Her Majesty Queen Ntombi, a Westminster style Parliament, district Chiefs and a body of informal advisers.

When King Sobhuza II restored nominal legislative power to the Swazi nation through the *1978 Order*, he introduced a "Tinkhundla", a traditional system of African government, ostensibly designed to blend Western democracy with traditional structures of government. As reformed in 1992 by His Majesty King Mswati III, the Tinkhundla may be defined as a number of delineated areas or constituencies, presently numbered at 55 that put forth candidates standing for election to a bicameral Parliament. All candidates must receive the approval of His Majesty prior to standing for election.

Swaziland's bicameral Parliament consists of 55 publicly elected and 40 monarch appointed Members of Parliament. In the House of Assembly, the fifty-five elected members sit with ten monarch-appointed members. The Senate consists of 20 monarch-appointed members and ten members elected by the House of Assembly. The monarch personally selects the Prime Minister and Cabinet and may appoint whomever he sees fit to this body, regardless of whether they originate from the ranks of the elected or appointed Members of Parliament. While Parliament sits for a five-year term, it may be dissolved at His Majesty's pleasure. Laws duly promulgated by the Parliament must receive the King's assent, which may, in whole or in part, be withheld.

Ostensibly representing a traditional process of grassroots political discussion as blended with Western democracy, the framework underpinning the Swazi Parliament ensures that individuals sympathetic to His Majesty are more likely to hold parliamentary office. This is due to the fact that His Majesty must approve electoral candidates, and Chiefs, who owe allegiance to the monarchy, select candidates on the local level. Further, in order for elected Members of Parliament to deliver gains to their constituents, they have to curry the favour of those in power and thus do not tend to engage in actions that may offend the monarchy. With political power concentrated wholly in the hands of His Majesty, numerous civil society organisations have called on the monarch to distribute political power in order that national interests may be shaped through popular representation.

E. Regressive Law, Decree Number Two

Despite domestic calls for political reform, the intention of Swazi authorities to comply with such demands may be inferred from His Majesty's 22 June 2001 advancement of Decree Number 2. Severely restricting fundamental rights while supporting virtual impunity for Executive action, salient points of this proposed law included:

Strict limits on judicial jurisdiction to challenge Executive actions;

A prohibition against judicial challenges concerning the appointment, removal or functions of district Chiefs;

The creation of criminal offences for non-violent political expressions of anti-State views. Those convicted of "offending the dignity or office of the King or the Queen Mother" were liable to face ten years imprisonment;

The unchallengeable State power to ban any newspaper, magazine or book for any reason that does not have to be made public; and

A reinstatement and extension of the *Non-Bailable Offences Order* that obliged Courts to refuse bail to any person charged with any of a number of common law or statutory criminal offences.

Severely restricting the rule of law and basic human rights, intense domestic and international condemnation of Decree Number 2 prompted His Majesty to rescind this law.

F. The Constitutional Review Process

Under domestic pressure to reform and modernise the political process, in 1996, His Majesty appointed a 30 member Constitutional Review Commission[14] to examine the suspended 1968 Constitution, engage in civic education to determine societal concerns and draft a new Constitution for Swaziland. Constituted with individuals unrepresentative of Swazi society under the leadership of Prince Mangaliso Dlamini, the CRC's terms of reference barred the receipt of social, political and civic group submissions, conducted its deliberations in the absence of effective public scrutiny and was hobbled by internal conflict that caused approximately one third of its original membership to resign. In 2001, the CRC published a report and issued a private draft constitution to His Majesty that recommended a constitutionalised strengthening of His Majesty's Executive powers, a

[14] Hereinafter the CRC.

continuation of the ban on political parties and a proviso that, in the face of conflicts between international human rights standards and Swazi customs, the latter should reign. Strong domestic and international condemnation of this draft constitution suspended its promulgation.

In February 2002, through Royal command, Prince David Dlamini, the Ambassador of Swaziland to Scandinavia, was appointed to head a new 16 member CRC drafting team. Prince Dlamini held consultations with Commonwealth representatives and received expert submissions[15] from a host of domestic organisations, however, CRC deliberations were neither public nor transparent. Unfortunately, the ICJ/CIJL delegation was advised that CRC members had been subject to negative pressure by political actors who have an interest in seeing Swaziland remain an absolute monarchy. Despite these obstacles, the CRC produced a draft constitution that was released by His Majesty on 31 May 2003. While silent on the issue of multi-party democracy, the draft constitution contains a Bill of Rights that guarantees various human rights and freedoms.[16]

IV. THE LEGAL SYSTEM IN SWAZILAND

A. The Dual System of Law

The legal system in Swaziland is partly based on Roman-Dutch law,[17] as applied in English organised Courts, and traditional Swazi law and custom, as applied in Swazi National Courts. Historically, this dual legal system performed relatively well with the Roman-Dutch High Court and Court of Appeal applying Swazi customary law when called upon and/or where appropriate.

As confirmed by Section 3 of the 1905 *General Administration Act*, where a conflict arises between Swazi law and custom and the Roman-Dutch law, the latter shall prevail:

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15 At a November 2002 constitutional conference, Lawyers for Human Rights, (Swaziland), submitted a constitutional blueprint that recommended a constitutional monarchy, an expansive Bill of Rights and a strong separation of powers between the Executive, Legislative and Judicial arms of government.

16 "Democratic Gains in New Constitution", 2 June 2003 in AllAfrica.Com, http://allafrica.com/stories/200306020818.html.

17 Swaziland's Roman-Dutch law is a system of interesting parentage. When the British established a national Court system, they introduced an essentially English form of procedure, however, they decided that the substantive law to be administered was to be the Roman-Dutch law already prevailing in South Africa. See generally, Lobban M., "Southern Cross, Civil Law and Common Law in South Africa" *English Historical Review*, November 1998.

> "The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland..."

Further, Section 11 of the 1950 *Swazi Courts Act* provides that Courts shall administer:

> "Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland."

Finally, Section 6(1) of the 1950 *Swazi Administration Act* provides that:

> "The Ngwenyama, (King) and every chief shall perform the obligations imposed on them by this Act, and generally maintain order and good government among Swazis residing or being in the area over which his authority extends; and for the fulfilment of this duty he shall have and exercise over such Swazis the powers of this Act conferred in addition to such powers as may be vested in him by any other law, or by Swazi law and custom for the time being in force, providing such Swazi law and custom is not incompatible with any other law..."

Swaziland thus conforms to the principle that Swazi law and custom is subordinate to Roman-Dutch law. For example, in *Ngwenya v. The Deputy Prime Minister and the Chief Immigration Officer*, 1973, the Court of Appeal struck down *The Immigration (Amendment) Act*, for improperly utilising Swazi law and custom to detract from the powers of the High Court in matters of citizenship.

B. National Courts

Most citizens in Swaziland encounter the domestic legal system through traditional bodies formally known as National Courts that administer unwritten Swazi law and custom. The criminal jurisdiction of National Courts is limited to petty offences such as theft, assault and violations of traditional Swazi law and custom such as the practice of witchcraft. On criminal conviction, maximum sentences are limited to 10 months imprisonment and/or fines of up to 120 Emilangeni, (the equivalent of 14 USD). Civil jurisdiction is limited to cases involving a monetary value not exceeding 1,000 Emanaganni, (the equivalent of 125 USD). Court Presidents, without legal training/education, fulfil judicial functions and are usually Elders appointed by the monarchy. Cases are dispensed with in a relatively efficient manner as defendants are not permitted counsel, rules of legal procedure are not employed and case proceedings are not recorded. Civil and criminal findings may be reviewed by traditional authorities that theoretically should include appeals up to His Majesty or the Queen Mother.

C. Industrial Courts

Industrial Courts in Swaziland are vested with exclusive jurisdiction over labour matters that include unfair dismissal, contractual labour agreements and labour union actions/strikes. Employed on a fixed term two-year contract, the incumbent Judge President of the Industrial Court, Justice Nderi Nduma, does not enjoy tenured service, however, recent Industrial Court rulings demonstrate that this Court has, in practice, maintained its independence. Rulings from the Industrial Court may be appealed to a three Justice panel of the High Court and then to the Court of Appeal, if necessary.

D. Magistrate's Courts

Dispensing Roman-Dutch law, Magistrate's Courts are governed by the 1938 *Magistrate's Courts Act* whereby the criminal jurisdiction of top level Magistrate's Courts encompass all criminal offences except treason, murder, sedition, offences relating to coinage and currency, rape and any conspiracy or attempt to commit any of these offences.[18] Civil jurisdiction is limited to cases involving a monetary value not exceeding 1,000 Emanaganni, (the equivalent of 125 USD), and to matters not involving the dissolution of a marriage, estates and determinations as to mental capacity. On criminal conviction, top level Magistrate's Courts may impose maximum sentences of up to ten years and/or fines of up to 2000 Emilangeni, (the equivalent of 250 USD). Civil and criminal findings may be reviewed by the High Court and up to the Court of Appeal, if necessary. Thirteen legally qualified Magistrates serve Swaziland on the bench of Magistrate's Courts.

E. The High Court

Of the five Justices of Swaziland's High Court, two were appointed by His Majesty on the basis of fixed-term contracts whose terms and conditions were negotiated directly with the King. This appointment process violates several principles of international law concerning judicial independence. Under Article 26 of the *African Charter on Human and Peoples' Rights*,[19] ratified by the Kingdom of Swaziland in 1995,

> "States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

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18 *Magistrate's Courts Act*, 1938, s.70 (3).

19 Hereinafter *African Charter*.

Under the 1998 *Latimer House Guidelines for the Commonwealth Concerning Parliamentary Supremacy and Judicial Independence*,[20]

> "Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.
>
> The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary
>
> Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.
>
> Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.
>
> As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained."

Under Chapter IX, Part III of the 1968 *Constitution*, the Judicial Services Commission[21] was authorised to appoint, exercise disciplinary control and remove High Court and Court of Appeal judicial officers in Swaziland. Through the *1973 Proclamation*, the JSC was abolished only to be re-established in 1982, under the *Judicial Services Commission Act*, with severely circumscribed powers to appoint, discipline and remove judicial officers.

Under Section 104 of the 1968 *Constitution*, a provision that continued in force by virtue of the *1973 Proclamation*, the High Court is empowered with unlimited civil and criminal jurisdiction to hear and decide matters brought before it. Appeals from High Court decisions proceed directly to the Court of Appeal. With regard to the jurisdiction, power and authority vested in the High Court, according to section 2 of the 1954 *High Court Act*, (Swaziland),

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[20] Hereinafter *Latimer House Guidelines*. The guidelines were developed during a Joint Colloquium on Parliamentary Supremacy and Judicial Independence held at Latimer House in the United Kingdom, from 15 – 19 June 1998. Over 60 participants representing 20 Commonwealth countries and 3 territories attended the conference.

[21] Hereinafter JSC.

> "The High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa."

Referring to the *Constitution of the Republic of South Africa*, Act 200 of 1993, section 96 states:

> "96(2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.
>
> 96(3) No person and no organ of state shall interfere with judicial officers in the performance of their functions."

That the High Court of Swaziland possesses and exercises the jurisdiction, power and authority vested in the Supreme Court of South Africa is confirmed by section 9(2) of the 1970 *Interpretation Act*, (Swaziland), which states,

> "Where a law confers a power, jurisdiction or right... unless the contrary intention appears, that power, jurisdiction or right may be exercised ..."

F. The Court of Appeal

Until 30 November 2002, the Court of Appeal in Swaziland was composed of six retired South African Justices[22] that held two to three-week sessions during April and November of each calendar year. According to saved provisions of the 1968 *Constitution* that continued in force, the Swaziland Court of Appeal possesses unlimited civil and criminal jurisdiction to hear and determine appeals from Courts of Swaziland.[23]

The mission team learned of concerns with regard to the composition of the Swaziland Court of Appeal in that it contains retired South African jurists who may not understand local Swazi customs and traditions. As a view postulated by the Swazi government, the ICJ/CIJL delegation noted that, until the present time, the South African nationality possessed by members of the Court of Appeal raised no serious State or societal concern. The Swazi government appointed each and every member of the Court of Appeal and prior to the present crisis. Appellate Justices were well regarded and possessed positive relations with the Swazi government. Although a strong centre of dissent against Executive action, holdings of the Court of Appeal were not openly criticised by the government. Indeed, despite the

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[22] The 1968 *Judiciary Act* authorises appointments to the bench from all Commonwealth countries.

[23] Section 111. See also *The Court of Appeal Act*, s.1, 6 and 14.

nationality of the Appellate Court Justices, their objectivity, impartiality and allegiance to the rule of law had never been questioned.

If members of the Swaziland Court of Appeal were to be replaced with Swazi-based Justices, potential conflict of interest situations would abound as the Appellate Court sits for six weeks per year while the national legal profession only numbers approximately 100 lawyers. Were the Court of Appeal to consist entirely of Swazi based Justices, these Justices would most likely engage in private practice for a majority of the year, taking time out to perform judicial duties. As such, on assuming their duties as Appellate Justices, they would preside over matters where inevitably, they would be either closely associated or have a direct interest in the outcome, thereby creating a conflict of interest.

G. Judicial Resources

The lack of an independent Court budget, trained support-staff and case management techniques humbles the efficiency of the Roman-Dutch judicial system in Swaziland. Functioning with neglected judicial libraries and case law digest reports that were last issued in 1986, the Court registrar is forced to distribute judgements to the entire legal profession, a practice that forces *stare decisis* to depend on the memory of individual practitioners and Justices. Essential stationary, fax ink and equipment repairs have further contributed to severe case backlogs with the result being that defendants may languish in prison for years awaiting trial. Although implored to rectify this situation through additional judicial appointments and increased funding, the government has not been forthcoming with positive action.

Under *The Latimer House Guidelines*,

> "Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.
>
> Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary."

Failing in its responsibility to provide adequate funding for the Roman-Dutch Court system, the government has criticised these Courts for being inefficient in comparison with the National Court, (customary court), system. This criticism does not reflect the fact that National Courts adjudicate over relatively simple offences, do not operate under formal

rules of procedure, ban professional advocates and do not record their *judgements*.

H. Historical Threats to the Rule of Law and Judicial Independence

Members of the Swazi government provided assurances to the ICJ/CIJL delegation that, prior to the current rule of law crisis, there had been no conflicts between the Executive and Judicial arms of government in Swaziland. Questioning the validity of this assertion, the ICJ/CIJL delegation was provided with concrete evidence, affirming that the rule of law crisis is indeed rooted in a past whereby the Executive threatened judicial independence whenever it conflicted with entrenched interests. The following examples are illustrative:

(1) In 1973, the government attempted to deport a *de facto* opposition Member of Parliament on the grounds that he was not a citizen of Swaziland. In *Ngwenya v. The Deputy Prime Minister and The Chief Immigration Officer*, the Court of Appeal held that Mr. Ngwenya was a citizen of Swaziland and thus could not be deported. In response, His Majesty King Sobhuza II created an informal tribunal that overruled the Court of Appeal;

(2) During 2000, labour unions defied an Industrial Court Order by proceeding with a nationwide strike. Against this action, the Swazi government launched Court proceedings that, if successful, would have imprisoned strike leaders. On technical grounds, the Industrial Court dismissed the application, however, rather than appealing this ruling, late one night, police summoned those parties associated with the adjudication of the labour dispute to a meeting before an informal palace advisory body, His Majesty's Special Committee on Justice. Before the Prime Minister, the Deputy Prime Minister, the Attorney General, the Minister of Justice, Chiefs and other palace advisers, charges were read out against the Chief Justice, the Judge President of the Industrial Court and the Director of Public Prosecutions. Acting as an ad hoc prosecutor, the Attorney General attempted to try the de facto defendants for the political crime of "biting the hand that fed them." Found guilty, the accused were advised that they should remember that they were in the employ of the Government. No further disciplinary action was taken against the Chief Justice, the Judge President of the Industrial Court and the Director of Public Prosecutions.

(3) In *Zwane v. Swaziland Government*, 2002, (judgement on contempt action), an applicant successfully argued before the Industrial Court that a specific employment transfer within the civil service should be halted. In response, as reported in an official government publication, Prime Minister Dlamini disregarded the Court Order in the name of political

expediency.[24] Countering this violation of judicial independence through contempt of Court proceedings, the Judge President of the Industrial Court, Justice Nderi Nduma stated that,

> "the Honourable Prime Minister, set law enforcement officers on a self-destructive mission to subvert the authority and dignity of His Majesty's court. The executive arm of government resulted to self-help, oblivious and regardless of the consequences to the tenets of the rule of law which is the shibboleth of any modern democracy. In doing so, the Honourable Prime Minister became the complainant, prosecutor and judge in his own cause contrary to the tenets of natural justice."

Justice Nduma continued that,

> "a modern government has three arms namely the Executive, the Legislature and the Judiciary. The executive powers of government are vested in Their Majesties and as lawfully delegated to the Prime Minister, the Cabinet and the Civil service including the law enforcement agencies. The Legislative Powers are vested in members of the House of Assembly and the senate whereas the Judicial authority is vested in the Chief Justice, the judges of the High Court and the Industrial Court, the Magistracy and other courts of the land. This is a trinity that has endured the test of time under the well-known principle of separation of powers. The trinity is the very foundation of the rule of law that has served the Kingdom of Swaziland since its independence."

Incessant attacks on the Swazi judiciary gave way to Executive attitudes that held the judiciary, the rule of law and the separation of powers in virtual contempt. Within this context *L. Dlamini v. Q. Dlamini and Sikondze*, discussed below, is emblematic of how the Swazi government readily violates the rule of law and judicial independence whenever these democratic constructs attempt to restrain entrenched interests.

(4) Zena Soraya Mahlangu was born on 29 June 1984. Under Swazi law, all women, even those over the age of 18, are classified as minors. According to Zena Mahlangu's mother, Ms. Lindiwe Dlamini, on 9 October 2002, Zena Mahlangu disappeared from her secondary school.[25] Lindiwe Dlamini subsequently discovered that His Majesty King Mswati III ordered the abduction of Zena Mhlangu to make her his 10th wife. Under Swazi law, males are entitled to engage in polygamous relationships, however, the manner in which Zena Mhlangu was abducted violated Swazi law and custom.[26] After several attempts to contact her daughter were thwarted,

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24 *Swaziland Today*, Vol. 8 No.: 5, 08 February 2002, published by the Public Policy Coordination Unit in the Office of the Prime Minister.

25 *Dlamini v. Dlamini and Sikondze*, (High Court), 2002, (Founding Affidavit).

26 *Ibid.* As Zena Mahlangu is of Ndebele origin, under Swazi law and custom, she could not be taken for royal duties without the consent of her mother and paternal uncles. Further, as Zena Mahlangu has a twin brother, namely, Musa Sydney Mahlangu, also born on 29 June 1984, according to Swazi law and custom, the monarch must not take a twin as his bride.

Lindiwe Dlamini brought an application before the High Court seeking Zena Mhlangu's release. According to Swazi custom, such a legal challenge was unheard of as His Majesty is accorded the authority to determine whether virgins please him enough to be betrothed.

Before three Justices of the High Court, Chief Justice Stanley Sapire, Justice Stanley Maphalala and Justice Jacobus Annandale, the Attorney General, Phesheya Dlamini, applied for standing as His Majesty's representative. This application was refused as the monarchy is protectively barred from appearing in Court, however, the Attorney General was allowed to submit information before the Court through an *amicus curiae* brief. At no time did the brief submitted by the Attorney General suggest that the High Court lacked jurisdiction to deal with this matter and even went so far as to advise that Zena Mahlangu should obtain a legal representative.

On 30 October 2002, the Attorney General, escorted by the uniformed Head of the armed security forces, Major General Sobantu Dlamini, the Commissioner of Police, Edgar Hillary, and the Commissioner of Correctional Services, Mnguni Simelane, confronted Chief Justice Sapire and Justices Maphalala and Annandale on the steps of the High Court. During the confrontation, the Attorney General threatened the three Justices that, should they not recuse themselves from hearing the application of Lindiwe Dlamini, they were expected to proffer letters of resignation to His Majesty. In response, on 31 October 2002, Chief Justice Sapire advised an open Court that, despite the threat issued by the Attorney General, he and his colleagues would continue with the case and not resign as they were duty-bound to ensure that justice was done.

On 1 November 2002, the Attorney General issued a formal written threat that restated the contents of his 30 October 2002 threat to the High Court and added that,

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Swaziland is party to the *Convention on the Rights of the Child* and the *African Charter*. As a member of the United Nations, Swaziland is bound by the *Universal Declaration of Human Rights*. These instruments protect children against abduction, slavery and abuse while enshrining their rights to education, liberty, privacy, dignity and moral safety. Articles 7, 12, 16, 20, 26 and 27 of the *Universal Declaration of Human Rights* provide that all human beings, including children, are entitled certain fundamental and inalienable rights. Through articles 16, 19, 20, 28 and 37 of the *Convention on the Rights of the Child*, children are provided with non-negotiable rights to education, privacy, dignity and freedom of association and movement. Under articles 17, 18 and 19 of the *African Charter on Human and People's Rights*, the protection and promotion of children's rights to education, morals and traditional values are emphasised in accordance with global human rights standards. As a member of the African Union, Swaziland dedicated itself to attaining the highest global standards of human rights and to combat national cultural norms repugnant to such natural and fundamental liberties.

> "(i)n case your resignation letters are not received as stipulated, the office of the Attorney-General is under strict instructions to submit the relevant instruments for your removal from office."

After a review of the Attorney General's threatening letter and having interviewed relevant parties, the Director of Public Prosecutions, Lincoln N'garua, formally charged the Attorney General with obstructing the course of justice, attempting to defeat or obstruct the course of justice, contempt of Court and sedition. A subsequent statement issued by His Majesty distanced him from the acts of his Attorney General, advising that the monarch had no knowledge of, and did not mandate the Attorney General to, threaten the three Justices of the High Court.

On 6 November 2002 it was announced that Zena Mhlangu and His Majesty were officially engaged. This led to an agreement whereby Lindiwe Dlamini's lawsuit was indefinitely adjourned. The charges against the Attorney General, however, remained in force. On 11 November 2002, the Attorney General refused to appear in Court. The next evening during a late night meeting, palace advisers and government officials threatened the Director of Public Prosecutions to either withdraw the charges against the Attorney General or face dismissal. Placed in an intolerable position, Lincoln Ng'arua provided notice of his resignation contingent on receiving proper compensation from the government. The government denied that officials intimidated the Director of Public Prosecutions, however, they subsequently advised that they were contemplating the re-opening of a motor vehicle accident investigation involving the Director of Public Prosecutions that the police had closed years earlier.

On 19 November 2002, the government placed advertisements seeking applications for a new Director of Public Prosecutions. That night, Lincoln Ng'arua and his staff were locked out of their offices after an apparent break-in. Upon gaining entry, Mr. Ng'arua discovered a security camera video that captured the Attorney General, the Minister of Justice and a member of the Swazi National Council engaging in black magic style rituals during the course of the break-in. In response to questioning from the ICJ/CIJL delegation, the Attorney General justified the crime by advising that the offices were State property and officials had to gain entry for an undisclosed reason.

In late November 2002, the government halted proceedings against the Attorney General and in doing so directly supported an overt attack against judicial independence and the rule of law. This attack continued into 2003 as, on 14 April 2003, Lincoln Ng'arua was replaced by Mumcy Dlamini as the Director of Public Prosecutions.

In its conduct towards the Director of Public Prosecutions, the government of Swaziland violated sections 4 and 5 of *The United Nations Guidelines on the Role of Prosecutors*[27] in that,

> (4) States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
>
> (5) Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.

V. CATALYSTS FOR THE RULE OF LAW CRISIS

A. Minister of Home Affairs et al. v. Fakudze et al. (Evictions case)

Eighty percent of the inhabitants of Swaziland reside on communal land under the authority of 300 Chiefs that continue their reign at the pleasure of the monarch. Violent land disputes coupled with conflicting demands from those who claim that they were lawfully appointed as district Chiefs are common. From the rural villages of Macetjeni and neighbouring Kamkhweli, Chief Mliba Fakudze and Chief Mtfuso Dlamini built a loyal following based on numerous development initiatives that enhanced the quality of village life. Disrupting the status quo in 2000, King Mswati's older brother, Prince Maguga Dlamini, persuaded His Majesty to relieve Chief Fakudze and Chief Mtfuso Dlamini of their titles in order that the Prince could be appointed in their stead. Stripped of their chieftainships, Chief Fakudze and Chief Mtfuso Dlamini refused to pledge allegiance to the new village head, a move that preceded violent village conflicts. In an effort to quell dissent, the army restored order by forcibly transferring 200 residents resisting the chieftaincy of Prince Dlamini to an open field, without shelter and basic necessities, 100 kilometres away from their villages. The displaced villagers were offered the opportunity to return, however, this was contingent on recognizing Prince Dlamini as their Chief. Rejecting this offer, the villagers brought an action before the High Court seeking an order that would allow them to return to their land. Such action represented a turning point in the history of Swaziland as national customs traditionally restrained His Majesty's subjects from challenging royal orders.

Following numerous hearings and interlocutory proceedings, the Court of Appeal allowed the displaced residents of Macetjeni and Kamkhweli to return to their villages on the grounds that the eviction order under which

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

they were removed was defective.[28] Despite this ruling, the Commissioner of the Royal Swaziland Police, Edgar Hillary, repeatedly barred the execution of the Court Order citing reasons related to public security. In following this course of action, Police Commissioner Hillary violated section 7(3) of the 1957 *Police and Public Order Act*, which reads,

> "Every member of the [Police] Force shall promptly obey and execute all orders and warrants lawfully issued to him by any competent authority."

In response to such Court Order defiance, the Commissioner of Police was held in contempt of Court and committed to a 30-day term of imprisonment, however, Edgar Hillary refused to comply with this order and advised that "only God can arrest me".[29] Insulting the Courts by refusing to enforce a judicial Order, the response of the government to *Minister of Home Affairs et al. v. Fakudze et al.*, coupled with its response to *Gwebu and Bhembe v. Rex*, detailed below, constitute the most explicit attack on judicial independence and the rule of law in the history of the Kingdom.

B. Gwebu and Bhembe v. Rex (Non-Bailable case)

On 26 November 2002, the Appellate Court of Swaziland ruled on an action concerning two accused rape suspects that challenged the validity of Royal Decree number 3 of 2001, a law that denied bail to persons charged with such crimes. In ruling, the Court of Appeal found that, under Swazi law, there was no legal basis under which Swazi Kings could rule by Decree. The Court's reasoning was grounded in the *1978 Order*, an instrument enacted by His Majesty King Sobhuza II. As previously indicated, under the provisions of this instrument, the power of Swazi Kings to rule through Decree was removed until a new Constitution was entrenched. While a draft constitution was promulgated on 13 October 1978, it was not formally presented to the people and thus did not come into force. As such, the Court of Appeal found that a King may only decree laws if mandated to do so and King Sobhuza II explicitly removed this power until a new constitutional framework was established. "That a King's decree can only be made once a new constitution is in place remains an essential requirement," Judge President Charles Leon wrote in the 25-page *Gwebu and Bhembe v. Rex* ruling. Rather than invalidating all laws in Swaziland enacted through Royal Decree, the Appellate Court advised that, in future, they would invalidate such Decrees on a case by case basis.

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[28] The Court found that the law under which the residents were evicted, the 1998 *Swazi Administration Order*, had been invalidly promulgated by the terms of its empowering law, Decree Number 1 of 1998.

[29] United Nations Office for the Coordination of Humanitarian Affairs, Integrated Regional Information Network for Southern Africa, "Weekly Round-Up" 29 November 2002.

Court of Appeal Justices advised the ICJ/CIJL delegation that, prior to their rulings in *Gwebu and Bhembe v. Rex* and *Minister of Home Affairs et al. v. Fakudze et al.*, they were summoned before His Majesty and, in an act perceived to be disrespectful and insulting, were made to wait for six hours before the King received them. On obtaining an audience, an unprecedented tirade was launched against the Appellate Justices who were accused of attempting to undermine the monarchy. Further, in a direct attack on the rule of law, judicial independence and the separation of powers, His Majesty ordered the Justices to not rule against the government in *Gwebu and Bhembe v. Rex* and *Minister of Home Affairs et al. v. Fakudze et al.* In response, the Appellate Court Justices advised His Majesty that they had yet to render *judgement* in these matters and their rulings were not open for discussion.

VI. THE STATE RESPONSE TO MINISTER OF HOME AFFAIRS ET AL. V. *FAKUDZE ET AL.* AND *GWEBU AND BHEMBE V. REX*

On 28 November 2002, Prime Minister Dlamini publicly announced that the government would not recognize the Court of Appeal *judgements* in *Gwebu and Bhembe v. Rex* and *Minister of Home Affairs et al. v. Fakudze et al.* as the rulings sought to strip His Majesty King Mswati III of powers accorded to Swazi Kings since "time immemorial." The full text of the Prime Minister's speech, as broadcasted by Radio Swaziland is as follows:

> "The Government wishes to express its disappointment at the recent *judgements* of the Court of Appeal in respect of Decree No. 3 of 2001, and the contempt of court case against the police. The effect of the Court of Appeal's *judgements* would be to strip the king of some of his powers, and the government is not prepared to sit idle and allow judges to take from the king's powers which were granted to him by the Swazi nation.
>
> Contrary to what has been said in one of the two *judgements*, the Court of Appeal is in effect emasculating the legitimate authority of the king, an authority which has been accorded to Swazi kings since time immemorial. A decree in the Kingdom of Swaziland is by definition neither debatable nor negotiable. The judges of the Court of Appeal themselves have not acted in accordance with our domestic law when saying that decrees are null and void. Their *judgement* in fact challenges their own appointment itself made under decree.
>
> Furthermore, the government takes the view that the *judgements* are not in the interest of the country, and in particular that measures such as the removal of the non-bailable offences legislation and the return of the people to Macetjeni and KaMkhweli would lead to chaos and anarchy.

Regarding the 1973 King's proclamation to the nation, it is the government's view that no judge can question the decision of King Sobhuza II made nearly 30 years ago, a decision with which the Swazi nation has been satisfied over a very long period of time. Decisions such as that should not be questioned in courts.

Furthermore, the Court of Appeal judges made certain disparaging remarks about King Sobhuza II. The government rejects this and wishes to state that Swazis themselves will renounce any attempt to rewrite Swazi history in this respect.

It is government's belief that the judges of the Court of Appeal have been influenced by forces outside our system, (ie. South Africa), and that they have not acted independently. While government deplores these *judgements* of the Court of Appeal, it recognises that judges are human and, therefore, subject to error.

In summary, therefore, government does not intend to recognise the two *judgements* of the Court of Appeal. The laws of this country will remain as they are. In other words as if the *judgements* of the Court of Appeal judges in this respect were not effective. Therefore, it needs to be emphasised that the non-bailable offences legislation remains in force. There will be no release of individuals detained in prison for an offence to which that legislation relates. The appropriate government agencies have been duly informed and have been instructed to ignore the Court of Appeal's ruling.

Similarly, government does not accept the *judgement* of the Court of Appeal in respect of the actions of the commissioner of police and his officers who acted properly and in accordance with Swazi law and custom. The nation shall not allow itself a situation of lawlessness that could definitively lead to bloodshed if the evicted persons were to be allowed to return to the areas concerned. Therefore, the *judgement* in this regard will not be obeyed. The government agencies responsible for implementing the Court of Appeal *judgement* have, therefore, been instructed not to comply with it.

This statement should not be viewed as interference with or contempt for the rule of law. It should be acknowledged that we are currently in a transitional stage and government's position on the above issues will be addressed in the new Constitution which the Swazi nation now eagerly awaits. The non-bailable offences legislation was introduced by his majesty the king responding to the clear wishes of the Swazi nation as has been the case with the other decrees.

It is known that his majesty is currently in seclusion and his wisdom is greatly needed in addressing the situation that has arisen. Therefore, we are all expected in the meantime to respect our culture and custom, and its regard for peace, tranquillity and security during this period while we await his majesty's direction."

In meeting the ICJ/CIJL mission team, Prime Minister Dlamini advised that the parliamentary Cabinet authorised the statement condemning the two Court of Appeal *judgements*, however, Cabinet members contradicted this assertion. Indeed, Cabinet and State-controlled press sources confirmed that, in response to the Court of Appeal *judgements*, Cabinet had resolved

to clarify the holdings through outside legal sources, however, this body neither supported nor authorised the Prime Minister to proceed with his 28 November 2002 statement to the nation.

VII. THE EN MASSE RESIGNATION OF THE COURT OF APPEAL

On 30 November 2002, the six Justices of Swaziland's Court of Appeal resigned in protest of the government's public refusal to recognise rulings in *Gwebu and Bhembe v. Rex* and *Minister of Home Affairs et al. v. Fakudze et al.* In resigning, the Appellate Justices categorically stated that they would not reconsider their position unless the Prime Minister's statement was unconditionally withdrawn, an apology issued and the government undertook to follow the aforementioned *judgements*.

Although the Prime Minister's announcement that the government would not abide by the rulings in *Gwebu and Bhembe v. Rex* and *Minister of Home Affairs et al. v. Fakudze et al.*, Justices of the Court of Appeal advised the ICJ/CIJL delegation of their view that the root of the crisis lay squarely on the shoulders of Attorney General Phesheya Dlamini.

Prior to 2001, only qualified legal counsel who had practiced for ten years could hold the office of Attorney General. Phesheya Dlamini was admitted as an attorney of the Swaziland High Court in 1997. In an attempt to validate his 2001 appointment to the position of Attorney General, His Majesty issued a Royal Decree designed specifically to confirm Phesheya Dlamini's appointment by weakening the ten-year practice requirement to a period of six years. As Phesheya Dlamini had only practiced for four years, his appointment as Attorney General continues to contravene Swazi law. Under the *Legal Practitioners Act,* it is within the discretion of the Attorney General to commence disbarment proceedings. As legal adviser to the government and His Majesty, the Attorney General has used the power granted to him under this Act to remove and intimidate legally qualified resistance to the monarchy. The ICJ/CIJL mission team was advised that the threat of disbarment has been repeatedly employed by the Attorney General to divide and frustrate the Law Society of Swaziland and its membership.

VIII. JUDICIAL DEFENCE AGAINST STATE ATTACKS ON THE RULE OF LAW

Despite the Swazi government's statement that it would not recognize the Court of Appeal ruling in *Gwebu and Bhembe v. Rex,* on 30 December 2002, the Attorney General brought a High Court application seeking a declara-

tory order to the effect that, as Decree No. 3 was invalid by virtue of *Gwebu and Bhembe v. Rex*, Decree No. 2, the law that further restricted the exercise of fundamental rights while providing virtual impunity of Executive action, was operational. In ruling on this application, three Justices of the High Court responded to the government's 28 November 2002 statement, or in their words, the "diatribe... that reflects a total misunderstanding and misconstruction of the Court of Appeal *judgement*"[30]:

> "To suggest that the Judges of the Court of Appeal have "not acted in accordance with domestic law when saying that Decrees are null and void" and that "it is Government's (sic) belief that the Judges of the Court of Appeal have been influenced by forces outside our system and that they have not acted independently" is a scandalous and scurrilous statement, which questions the probity, integrity and the dignity of the learned judges."

Further, the High Court commented that the government's statement was,

> "Contemptuous of the court and reflect(s) the Executive's disdain of Court Orders not to its liking. [It violates] the dignity, repute and authority of the Courts. Furthermore, the statement calls upon officials, who are according to the statutes of this kingdom enjoined to comply with or to enforce Court Orders, not to. That the whole body of existing legislation must be jettisoned for the sake of political expediency is a cause for grave concern."

The High Court advised that it would refuse to entertain both present and future legal applications from the Swazi government until the Prime Minister unconditionally retracted the objectionable statement, apologised to the Court and complied with the Court of Appeal rulings. Further, the High Court offered the following warning to the government,

> "A Government that publicly and unabashedly declares that it will defy Court Orders, whatever the purported justifications; and there are none *in casu*, must be ashamed to stand tall in the Community of Nations, Continental and regional. Such conduct deserve(s) to be frowned upon. Governments must be exemplary in both word and behaviour. For a Government to make such a bald declaration and be quick to warn its citizens not to do so is hypocrisy of the highest order. It is an exemplification of the phrase, "Do not as I do, but do as I say." "

IX. DOMESTIC REACTION TO THE RULE OF LAW CONTROVERSY

A. General Population

Coping under conditions of poverty, the effects of drought and the burdens associated with the second highest HIV/AIDS infection rate in Africa, in

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[30] *Gwebu and Bhembe v. Rex*, Case No. 3699/02, (19 December 2002 *Judgement*).

the eyes of the general population, the rule of law crisis facing Swaziland is subordinate to the satisfaction of basic needs. Within this environment, the crisis has done little to affect the love that the Swazi people hold for the monarchy. This affection, however, is dedicated to the institution rather than the individual presently holding reign and towards whom there is mounting anger. Contributing to this anger are those exclusive advisers of His Majesty who have not warned him to heed the cries of his loyal subjects to engage in meaningful political reform.

B. Civil Society Organisations

While civil society organisations are relatively weak and inactive in Swaziland, the rule of law crisis has served to galvanise many organisations against State efforts to strengthen its power by emasculating the judicial arm of government. Despite open State threats against such organisations, Lawyers for Human Rights (Swaziland), has been particularly vocal in advising the nation that,

> "(t)he government is hell bent to deliberately mis-inform the nation about the *judgements* by contending that the Court of Appeal sought to challenge the King's powers to administer customary law and make law by decree. All the court was concerned about is the interpretation of the law; the constitutional law of Swaziland, and in doing so found that his majesty lacks authority to promulgate law by decree... (T)he contention that government maintains its stand to endorse the unchallengeable authority of His Majesty to administer Chieftainship matters and or promulgated Royal Decrees suggest that government is keen to make the King an absolute autocrat with unlimited inhibition.[31]"

Although requests by Lawyers for Human Rights (Swaziland) for an audience with His Majesty, the Prime Minister and the Attorney General went unanswered, this organisation has both repeatedly and publicly attempted to convince the government to respect the integrity and reputation of the judiciary and the rule of law.

In direct response to the rule of law crisis, a potentially powerful civil society lobby group, the Swaziland Coalition of Concerned Civil Organisations, was formed with a manifesto calling for an end to the abuse of State power, adherence to the rule of law and the institution of good governance practices to restore the positive image of the Kingdom. Comprised of central business, trade union and religious groups,[32] this coalition of so

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31 16 January 2003, *Times of Swaziland*, Lawyers for Human Rights (Swaziland) Press Statement.

32 Members include the Federation of Swazi Employers, the Swaziland Chamber of Commerce and Industry, the Association of the Swaziland Business Community, the Swaziland Federation of Trade Unions, the Swaziland Federation of Labour, the Church, the Law Society, the Co-ordinating Assembly of Non-Governmental Organisations and the Swaziland National Association of Teachers.

many disparate organisations is unprecedented and may serve as a powerful force for political change.

C. Trade Unions

Under the terms of the 1996 *Industrial Relations Act*, trade union activities and freedoms have been severely restricted. Targeted for State harassment that has included police raids on the homes of prominent union representatives, the ill-treatment of unarmed demonstrators/striking workers by security forces and arrests of prominent trade union officials, the Swaziland Federation of Trade Unions, (SFTU), and the Swaziland Federation of Labour (SFL), have persevered as powerful socio-political forces in Swaziland.

In response to the rule of law crisis, the SFTU and SFL scheduled a 19-20 December 2002 mass strike despite official warnings that the government would deal with strike action "swiftly and decisively". Advising that the rule of law crisis created an illegal and uncertain environment that retarded economic development, the strike action was supported by the Swazi business community. On 19 December 2002, over 1,000 protesters gathered in Mbabane, the capital of Swaziland to demand a return to the rule of law and protest State interference in the judicial system. Though the turnout was relatively low, the protest action drew domestic and international attention to the national crisis. Further labour stay-away action was undertaken on 4-5 March 2003 with the largest street marches and public protests seen during His Majesty's reign. While the government remained unmoved, labour representatives asserted that the mass action was a turning point for the country and an indication to the government that the Swazi people were against its anti-rule of law policies.

D. Opposition Political Parties

Banned as un-African and un-Swazi under the terms of the *1973 Proclamation*, underground political parties critical of official policies have continued to organize. In 1988, the People's United Democratic Movement, (PUDEMO), emerged to clandestinely criticise the government and call for democratic reform. Given its status as an illegal organisation, members of PUDEMO have remained vulnerable to arbitrary detentions, politically motivated prosecutions, ill treatment and harassment. In August 2002, Mario Masuku, the leader of PUDEMO was acquitted of sedition charges alleging that he advocated for revolution and insulted King Mswati III during a peaceful November 2000 protest. On previous occasions, Mr. Masuku has been detained, prosecuted and acquitted of treason and sedition. The instant acquittal, which followed a lengthy trial, was a

vindication of the accused and his right to participate in non-violent political activities. It was also confirmation of the integrity of the judicial process.

Supporting the reinstitution of the rule of law and political reform, PUDEMO has called for the resignation and arrest of the Attorney General for his "outrageous behaviour in attempting to subvert the administration of justice."[33] On 25 April 2003, PUDEMO gave King Mswati III a seven-day ultimatum to respond to a call for organised democratic elections, the removal of all oppressive laws, the drafting of a legitimate constitution and an affirmation that the independence of the judiciary would be respected. In the absence of a positive response, PUDEMO is set to engage in a rolling program of action that will include border blockades and civil demonstrations. The ICJ/CIJL mission delegation believes that if the general call of the Swazi people for reform is not heard and implemented, future events may be uncontrollable.

X. INTERNATIONAL REACTION TO THE RULE OF LAW CONTROVERSY

A. South Africa

On 03 November 2002, South African judicial authorities condemned Swazi Prime Minister Sibusiso Dlamini's government for announcing that it would ignore Court of Appeal *judgements*. Writing on behalf of Southern African Development Community[34] Judges, Chief Justice Arthur Chaskalson and Deputy Chief Justice Pius N. Langa issued a public statement concerning events in Swaziland:

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33 Reuters News Service, 25 April 2003 at http://wwwb.rbb.reuters.com.

34 Hereinafter, SADC. The SADC was formerly known as the Southern African Development Co-ordination Conference (SADCC), which was established in July 1979 to harmonise economic development amongst countries in Southern Africa. The Declaration and Treaty establishing SADC was signed in 1992. A Declaration and Treaty establishing a new SADC confirmed that member States are expected to act according to the following principles:
- Sovereign equality of all member States;
- Solidarity, peace and security;
- Human rights, democracy, and the rule of law;
- Equity, balance and mutual benefit;
- Peaceful settlement of disputes.

The headquarters of the SADC are located in Botswana but each member state has responsibility for overseeing an economic sector. Diplomatic missions of member states also act as SADC diplomatic representatives in a number of key countries in Europe, the Far East, and North America.

> "The decision of the government of Swaziland to ignore the *judgements* of its highest Court is in effect a declaration that the government of that country does not respect the role of the courts and the judiciary and does not consider itself to be bound by the law. When that happens courts are not able to discharge their duties of upholding the law without fear or favour. Citizens are no longer protected by the law and there is a grave risk of lawlessness and arbitrary action.
>
> The conduct of the government of Swaziland left the Judges of Appeal with no choice other than to resign, and unless appropriate action is taken urgently to correct what has been done, other judges and magistrates will be placed in an impossible position in which their authority and independence will be questioned.[35]"

Reinforcing the position taken by SADC Justices, the SADC Lawyers Association advised that the rule of law crisis facing Swaziland was not simply a domestic issue as the independence of the judiciary and the respect of the rule of law are fundamental to the economic and social stability in the region. Further, the Lawyers Association unequivocally advised that Judges should be independent from government interference so that they can adjudicate on matters in a fearless and objective manner.

On 19 December 2002, Nkosazana Dlamini-Zuma, the Foreign Minister of South Africa, advised that his nation, the largest trading partner to Swaziland, was not a policeman and would not intervene in Swaziland's rule of law crisis unless requested to do so by the Swazi government.

B. The United States and the Commonwealth

James McGee, the United States Ambassador to Swaziland, advised the ICJ/CIJL delegation that the Kingdom's position that the Court of Appeal did not understand Swazi law and custom was as an excuse to subvert the rule of law and as a result, the government had "lost total control." Colin Powell, the United States Secretary of State, advised the Swazi Prime Minister that the Kingdom's AGOA and the GSP trade benefits with Washington hinged on the Government's commitment to reform. Such a loss would deprive the Swazi economy of 62,500,000 USD and wreak socio-economic havoc throughout the nation.[36] Expressing similar concerns, on 12 March 2003, the Secretary-General of the Commonwealth, Don McKinnon, warned His Majesty to uphold the rule of law or face expulsion from the Commonwealth.

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35 3 December 2002 "Statement by the Chief Justice and the Deputy Chief Justice of South Africa concerning events in Swaziland."

36 16 January 2003, *Times of Swaziland* "GSP Loss to Affect 300,000 Swazis".

C. The European Union

Standing as Swaziland's largest donor, the European Union, (EU), has committed itself to providing the nation with 30 million Euros in development aid over the next five years. Further assisting development, the EU provides Swaziland with beneficial access to its markets for Swazi agricultural products. Through the *Cotonou Agreement*, a successor to the *Lomé Convention*, Swaziland is exempt from paying tariffs for most of its agricultural exports to the EU. While a major objective of the *Cotonou Agreement* is poverty reduction, emphasis is also placed on democratic principles that include the rule of law, respect for human rights, and good governance. In the event that these principles are violated, sanctions may be imposed. The Swazi government has been advised that the proposed purchase of the private jet and disregard for the rule of law threatens EU-Swazi trade relations, a loss that would greatly contribute to the further impoverishment of the nation.

D. The United Nations

On 4 December 2002, the United Nations Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, expressed grave concern over the deterioration of the rule of law in Swaziland. The Special Rapporteur found that the Swazi government's failure to honour decisions of the constitutionally constituted courts violated international law. He also viewed the crisis with grave concern for the South African region as it could affect the New Economic Partnership and Development Initiative, a program of action dedicated to the redevelopment of the African continent. In an effort to resolve the rule of law crisis, the Special Rapporteur urged the Swazi Prime Minister to revoke his 28 November 2002 press statement, respect the *judgements* of the Court of Appeal and restore the rule of law in Swaziland.

XI. CONTINUING ATTACKS ON THE RULE OF LAW AND JUDICIAL INDEPENDENCE

On 4 December 2002, in an attempt to influence the Court of Appeal to return to the bench, the Swazi government announced a 60 percent salary increase and additional professional allowances to all High Court and Court of Appeal Justices. Court of Appeal Justices categorically replied that they would not reconsider their resignations until the Prime Minister's 28 November 2002 statement was withdrawn, an apology issued and Appellate Court *judgements* reinstated.

The Swazi Prime Minister and the Attorney General advised the ICJ/CIJL delegation that the Judge President of the Court of Appeal should approach the King as part of wider consultations dedicated to resolving the rule of law crisis. Immediately following the Prime Minister's 28 November 2002 statement, the government attempted to hold consultations with the Chief Justice, Judge President of the Industrial Court, Court of Appeal Justices and the Head of the Law Society, however, these consultations were refused by all parties except for Chief Justice Sapire.

Appellate Court Justices advised the ICJ/CIJL delegation that the Attorney General went so far as to say that the Court of Appeal was guilty of a dereliction of duty and rule of law violations as they did not consult the King prior offering their resignations from the bench. A 17 January 2003 issue of *Swaziland Today*, a government newsletter, advised that, in an effort to resolve the rule of law crisis, the Prime Minister had consulted various stakeholders, however, no consultations were held with members of the legal community.[37]

Opening the Houses of Parliament on 7 February 2003, His Majesty King Mswati III avoided mention of the on-going rule of law crisis and declared only that, "We abide by rule of law, and we will continue to do so." His Majesty's address was followed by a 17 March 2003 declaration by the Prime Minister wherein he stated that the Court of Appeal had no authority to repeal Swazi laws. The Prime Minister further commented that Courts were duty bound to offer advice, however, they could not undertake the substantive action referenced in *Gwebu and Bhembe v. Rex.*

On 1 April 2003, Magwagwa Mdluli, a former Minister for Natural Resources was appointed as the new Minister of Justice. In his first appearance before the Swazi Senate, His Honour Mdluli advised of his opinion that the Roman-Dutch Courts were anti-government. Expected to take a hard line in the showdown between the monarchy and the judiciary, two days after His Honour Mdluli's appointment, Swaziland's highest judicial officer, Chief Justice Stanley Sapire, resigned after being threatened with demotion. On 4 April 2002, His Majesty appointed Justice Jacobus Annandale as the acting Chief Justice while demoting Justice Thomas Masuku, a staunch rule of law advocate, to a lower Court. Justices Josiah Matsebula and Stanley Maphalala remain on the High Court despite being at the forefront of criticism against the government for subverting the rule of law. In protest over the forced removal and demotion, the Swaziland Law Society resolved that lawyers should refuse to appear before the new Chief Justice.

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[37] *Swaziland Today, The Voice of the Swaziland Government*, vol. 9, no.: 1, 17 January 2003.

In a further move that confirms the continuing nature of open attacks against the rule of law in Swaziland, two senior members of the Law Society including its President, Paul M. Shilubane, have been threatened with deportation for holding dual citizenship. Mr. Shilubane has been a vocal critic of State efforts to eliminate the rule of law in Swaziland. The Law Society of Swaziland serves as Swaziland's bar association and represents the interests of its approximately 100 registered members. Constituted under the 1964 *Legal Practitioners Act*, all persons admitted and enrolled as legal practitioners in Swaziland are obliged to become members of the Law Society. Under the *Legal Practitioners Act*, the objects and functions of the Law Society include:

(i) Representing the views of the profession;
(ii) The initiation and promotion of reforms and improvements in any branch of law, the administration of justice, the practice of law and in the formulation of legislation;
(iii) Upholding the integrity of legal practitioners;
(iii) Maintaining and enhancing the prestige, status and dignity of the legal profession; and
(iv) Dealing with all matters relating to the interests of the profession and the protection of those interests.

Under *The Latimer House Guidelines*, "an independent, organised legal profession is an essential component in the protection of the rule of law. The executive must refrain from obstructing the functioning of an independent legal profession...". Clearly, through continuing Executive actions that threaten the rule of law, the government of Swaziland has violated the *Legal Practitioners Act* and does not share the vision embodied in international principles applicable to Swaziland.

Subsequent to a 17-18 May 2003 meeting between the government and former Court of Appeal Justices, the Justices issued a statement wherein they agreed to continue discussions with the State provided that all individuals granted bail by the Courts were released within 48 hours. The Attorney General issued a companion statement advising that the government unconditionally retracted the 28 November 2002 statement that Judges of the Court of Appeal were influenced by external forces in their work and that they were not independent. On 20 May 2003, the Prime Minister advised that the State would not release suspects grained bail by the Courts and would not implement the judicial reform recommendations submitted to government by the former Justices of the Court of Appeal as "the country has a better way of dealing with such issues."[38]

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[38] "Nothing Changes, Says PM", 19 May 2003, *The Swazi Observer*. See also, *The Times of Swaziland*, 20 May 2003.

XII. REAL POLITICAL POWER IN SWAZILAND

In times of crisis, Swazi Kings have historically gathered and relied on the collective wisdom of hundreds of Chiefs, Princes and Princesses. Breaking with tradition, His Majesty King Mswati III currently exercises power through consultations with numerous individuals and palace advisory bodies that include:

A. The Queen Mother

His Majesty consults the Queen Mother, Her Majesty Queen Ntombi, on all matters of national importance. The Queen Mother grounds her opinions through a body of traditional advisers from her royal residence and the King's court.

B. Cabinet

The appointed Parliamentary Cabinet includes the Prime Minister, Deputy Prime Minister, Attorney General and Minister of Justice. This appointment process ensures that Cabinet exercises power at His Majesty's pleasure. Dependent on the monarchy, in real terms, the political power of Cabinet is illusory.

C. The Standing Committee of the Swazi National Council

The Standing Committee of the Swazi National Council is a 29 member palace appointed advisory body composed of individuals ostensibly intended to represent various clan, cultural, class and minority interests in Swaziland. Serving at His Majesty's pleasure, the Standing Committee possesses no power independent of its relationship with King Mswati III.

D. His Majesty's Special Committee on Justice

As an absolute monarch, His Majesty is free to consult any adult member[39] of Swazi society and/or royal advisory bodies on matters of importance to the nation. From numerous sources, the ICJ/CIJL delegation was advised that, His Majesty's Special Committee on Justice, commonly known as the Thursday Committee,[40] is a royal advisory body of considerable importance in Swaziland.

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[39] It was traditional practice in Swaziland for the King to consult adult male members of the Swazi nation, and in fact, he could summon any male, at any time, for consultation. This practice was altered by His Majesty King Sobhuza II to include adult women among those to which the King could consult.

[40] So named as it assembles Thursday mornings and is granted an audience with His Majesty on Thursday afternoons.

(1) Membership

Constituted neither through legislation nor Royal Decree, the membership of the Thursday Committee is fluid. Present members include: Moi Moi Masilela,[41] the Attorney General, the Minister of Justice, the Commissioner of Police, the Commissioner of the Anti-Corruption Unit, the Commissioner of Correctional Services, the Director of Public Prosecutions, former Chief Justice Sapire, representatives of different ethnic clans and families and members of the Judicial Services Commission. Prime Minister Dlamini is the Committee's Chair.

(2) Function and Source of Power

Possessing neither a formal nor informal or published mandate, the functions of the Thursday Committee are relatively unknown, however, the ICJ/CIJL delegation was advised that this body subverts Parliament in holding substantive political power over all matters of national importance that affect entrenched interests in Swaziland. Operating with unlimited jurisdiction and posing themselves as the guardians of justice, the Thursday Committee has introduced a cast of powerful actors into Swazi politics that reject the rule of law as a threat to the power of His Majesty. Ignoring issues that affect the Swazi nation in favour of appeasing entrenched interests, the Thursday Committee and those beholden to them have benefited most from the rule of law crisis as it has effectively granted them impunity of action. Controlling access to His Majesty, progressive voices have been silenced as un-Swazi.

(3) Dissent

Applying checks and balances necessary to the exercise of State power, the Thursday Committee has moved against Roman-Dutch Court Justices and the Director of Public Prosecutions as enemies of His Majesty. In this, judicial decisions adverse to entrenched interests are manipulated as being contrary to State interests. Prior to the Court of Appeal rulings in *Gwebu and Bhembe v. Rex* and *Minister of Home Affairs et al. v. Fakudze et al.*, the government, as controlled by the Thursday Committee, launched subtle attacks against the judiciary in order to ensure compliance with Executive interests. Effectively controlling the appointment and removal of High Court Justices, the Thursday Committee has also attempted to manipulate the salaries and contractual conditions of High Court Justices to ensure

[41] Moi Moi Masilela, is one of the most influential advisers to His Majesty King Mswati III. A former footballer and natural orator, Mr. Masilela enjoys His Majesty's confidence as his parentage includes a potent royal medicine man and the sister of His Majesty King Sobhuza II. Mr. Masilela holds membership on most if not all royal advisory bodies.

compliance. Through such manipulation, the Thursday Committee achieved limited success in co-opting former Chief Justice Sapire to occasionally sacrifice judicial independence in favour of Thursday Committee membership. Through clandestine threats and intimidation, Chief Justice Sapire, as he then was, recused himself from High Court proceedings that threatened entrenched interests and, at times, acted in a less than impartial manner when presiding. In one notable example, during a High Court hearing of *Minister of Home Affairs et al. v. Fakudze et al.*, the former Chief Justice found against State interests. Subsequently summoned before the Thursday Committee, the former Chief Justice returned to the bench and attempted to overturn his own ruling, an action disallowed by the Court of Appeal. Despite these lapses, the former Chief Justice was despised by various members of the Thursday Committee as, through numerous judicial pronouncements, he staunchly defended judicial independence and the rule of law.

Effectively removed from office on 3 April 2003, Chief Justice Sapire was replaced by Justice Jacobus Annandale who was recruited from South Africa in 2001 on a fixed, short-term contract with preferential terms. Viewed as a pro-State apologist, Justice Annandale was appointed to the bench under the signature of Moi Moi Masilela.

Ruling in favour of the State without proper legal justification, former Chief Justice Sapire compromised well-recognised principles of international law. His successor, Justice Annandale, would be well advised to conduct himself in accordance with the *Bangalore Principles of Judicial Conduct*,[42] which state,

Principle 1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

Principle 1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative

[42] *The Bangalore Principles* establish standards for ethical conduct of Judges. They are designed to provide guidance and afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the Executive, the Legislature, lawyers and the general public to better understand and support the judiciary. These principles presuppose that Judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the Judge. The Principles were drafted by the Judicial Group on Strengthening Judicial Integrity, which was composed of legal experts and Justices representative of a wide diversity of legal traditions from around the world.

branches of government, but must also appear to a reasonable observer to be free therefrom.

Principle 1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

Principle 2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

Principle 2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

Principle 3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

Principle 4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and *judgement* as a judge.

Principle 5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

No Justice can remain on the bench when the government of the day is free to determine which judgements will be followed. Such State actions compromise the judicial process and within this environment, it is unfortunate that Justice Annandale accepted an appointment as Chief Justice of the High Court.

(4) Justification for the Rule of Law Crisis

Traditionalist sectors led by the Thursday Committee have emphasised that the present rule of law conflict was caused by a clash between Swazi customary law and Roman-Dutch law. In this, the prevailing State attitude holds that the unwritten traditional structure should prevail over the Roman-Dutch law that has operated in Swaziland in a fair and impartial manner since independence. Further, this position flies in the face of written law and practice whereby Swazi law and custom is subordinate to both common and statutory law.

Past practice in Swaziland also confirms that Swazi law and custom is subordinate to the common and statutory law. For example, in the case of *Sobhuza II v. Allister Miller* of 1926 -53, "painful as it was, King Sobhuza II abided by the *judgement* of the Privy Council where he had appealed in an attempt to get back the 2/3's of land which was then in the hands of white settlers."[43] As borne out through practice, the contention that the present rule of law conflict was caused by a clash between Swazi-customary law and modern/western culture and law is thus misdirected, without basis and intentionally misunderstands Court of Appeal *judgements* and the general hierarchy of national laws. The root of the conflict is in the mosaic of Swazi politics.

XIII. THE IMPACT OF THE RULE OF LAW CRISIS ON THE WORK OF THE CONSTITUTIONAL REVIEW COMMISSION

It seems no coincidence that the State-sponsored rule of law crisis in Swaziland is unfolding at a time when the constitutional reform process has reached a critical stage. Indeed, the recent conduct of the Swazi government is not consistent with its supposed commitment to the development of an enduring constitutional text that will protect human rights, the rule of law and judicial independence. On 19 April 2003, His Majesty justified his reign as an absolute monarch when, during an Easter vigil, he advised of his belief that he has a divine mandate from God. Further, His Majesty advised 400 gathered religious leaders that,

> "(a)lthough the whole world is preaching democracy, it does not mean we have to follow them as (d)emocracy is not good for us because God gave us our own way of doing things.[44]"

His Majesty also warned that national food shortages made Swazi citizens vulnerable to the negative influence of those advocating multi-party democracy.

The ICJ/CIJL delegation was gratified to learn that, on 31 May 2003, His Majesty King Mswati III released a draft constitution that, while silent on the issue of multi-party democracy, contains a Bill of Rights guaranteeing various human rights and freedoms.[45]

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43 16 January 2003, *Times of Swaziland*, "Stand by what is Rights Lawyers Urge King".

44 Reuters News Service, 20 April 2003 at http://wwwb.rbb.reuters.com.

45 "Democratic Gains in New Constitution" 2 June 2003 in AllAfrica.Com, http://allafrica.com/stories/200306020818.html.

XIV. INTERNATIONAL STANDARDS

Of the major international human rights treaties, Swaziland is a party only to the *Convention on the Elimination of All Forms of Racial Discrimination* and *the Convention on the Rights of the Child.* Swaziland is not a party to either *the International Covenant on Civil and Political Rights* or the *International Covenant on Economic, Social and Cultural Rights* (and, consequently, none of their *Optional Protocols*). Swaziland has not ratified the *Convention on the Elimination of All Forms of Discrimination against Women,* the *Convention against Torture* and *either of the Optional Protocols to the Convention on the Rights of the Child.*

In the African system, Swaziland has ratified the *African Charter on Human and Peoples' Rights* and the *Convention Governing the Specific Aspects of Refugee Problems in Africa.* Furthermore, it has signed but not ratified the *African Charter on the Rights and Welfare of the Child.*

Apart from the obligations arising from international and regional treaties, internationally accepted standards regarding the independence of the judiciary and other legal professionals are as follows: the 1980 *United Nations Principles on the Independence of the Judiciary*; the 1990 *Basic principles on the Role of Lawyers*; the 1990 *United Nations Guidelines on the Role of Prosecutors*; *The Bangalore Principles of Judicial Conduct*; and *The Latimer House Guidelines.*

XV. RECOMMENDATIONS OF THE ICJ/CIJL TO RECTIFY THE RULE OF LAW CRISIS IN SWAZILAND

A. Reform of the Legal System

1. The Review of National Legal Standards

The spirit of constitutionalism must be breathed into Swaziland. A lasting solution to the difficulties besetting the country lies in the development of a constitution which incorporates international human rights standards such as those contained in the African Charter on Human and Peoples' Rights to which Swaziland is a party. The ICJ/CIJL was gratified to learn that, on 31 May 2003, His Majesty King Mswati III released a draft constitution that, while silent on the issue of multi-party democracy, contains a Bill of Rights guaranteeing various human rights and freedoms.[46]

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[46] "Democratic Gains in New Constitution" 2 June 2003 in AllAfrica.Com, http://allafrica.com/stories/200306020818.html.

The alleged clash between customary law and Roman-Dutch law is false as Swaziland formally accepted that the former is subordinate to the latter. This legal hierarchy must be reaffirmed.

Swazi law and custom must be codified as its exact content remains unclear and is subject to varying interpretations.

2. Withdrawal of Attacks on the Rule of Law

Recent news reports indicate that the Government has partially withdrawn its statement of 28 November 2002. This is indeed a very positive development. However, the Government must go further and demonstrate it will respect all future orders of the courts by complying with those rulings that currently remain outstanding.

3. Guarantees Ensuring Judicial Independence

Judicial independence is a pre-requisite to the rule of law and must be protected by the Constitution. Constitutional guarantees should enable judges to exercise their functions freely from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

The government must protect judicial independence by not requiring Judges to serve on either formal or informal Executive decision making bodies such as the Thursday Committee.

Contrary to a public declaration of the Prime Minister, the High Court and Court of Appeal possess the power to declare legislation unconstitutional and of no legal force or effect.

a. Judicial Appointment, Discipline and Removal

The Judicial Services Commission, (JSC), as established under Chapter IX, Part III of the 1968 *Constitution* to independently recommend appointments, exercise disciplinary control and recommend the removal of judicial officers in Swaziland, should be reconstituted. It should be empowered to recommend the terms and conditions of service for Justices and other judicial officers and ensure that judicial appointments are based on merit with appropriate provision for the appointment of Swazi-based Justices. The appointment process should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary. The JSC should have direct access to His Majesty to directly avail him of its recommendations and the appointing authority should act

in accordance with its recommendations. In cases where a Justice is at risk of removal, the JSC should institute a procedure whereby the Justice will have the right to: (1) be fully informed of the charges; (2) be represented at a hearing; (3) make a full defence; and (4) be judged by an independent and impartial tribunal which should consist of a majority of peers. Grounds for removal of a judge should be limited to either an inability to perform judicial duties and/or serious misconduct. The deliberations and recommendations of the JSC should be transparent through publication in the government gazette.

b. Code of Judicial Conduct

A competent, independent and impartial judiciary is essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law. It is crucial that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system. To this end, the Swazi judiciary should develop a Code of Ethics and Conduct as a means of ensuring independence, impartiality and accountability. This Code should include provisions that mandate Justices to: perform their judicial duties without favour, bias or prejudice; exhibit and promote high standards of judicial conduct to reinforce public confidence; and minimise occasions on which it will be necessary for them to be disqualified from hearing or deciding cases. The *Bangalore Code of Judicial Conduct* can serve as a model.

c. Judicial Tenure and Remuneration

Judicial appointments should be permanent until a mandatory retirement age or with the expiry of term of office where such exists. Whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure. The current state of affairs in Swaziland where salaries are established on an ad hoc and arbitrary basis is unacceptable. Reasonable contractual conditions of service for judicial officers should be established by law and administered by the JSC.

d. Funding for the Judicial System

Appropriate support staff, resources and equipment are essential to the independent and proper functioning of the judiciary. Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Case law reports, discontinued in 1982, should be reinstituted. Funding for the Courts, once voted for the judiciary by the legislature, should be protected from alienation or misuse.

The allocation or withholding of funding should not be used as a means of exercising improper control.

4. Resignation of the former Chief Justice

The circumstances surrounding his resignation cause grave concern. Although the tenure of the former Chief Justice was served in very difficult circumstances due to pressure from the government, in many respects, he effectively served Swaziland for a long period of time. As such, it would have been appropriate for the former Chief Justice to have resigned or retired with honour and dignity together with his retirement benefits, if any, intact.

5. Acting Chief Justice of the High Court

A Chief Justice should avoid all inappropriate connections with, and influence by, the Executive. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

The ICJ/CIJL delegation was encouraged to find that the High Court is composed of well qualified, principled and courageous Swazi Justices, any of whom would be well-qualified to be appointed as the Chief Justice of Swaziland. Such an appointment would eliminate allegations by unprincipled elements that foreign Justices are unfamiliar with Swazi law, tradition and custom.

6. The Status of Magistrate's Courts

The State should pay particular attention to improving the professional status of Magistrate Court Justices who are presently regarded as civil servants and whose Courts are under-resourced.

7. The Review of Legal Education

Swazi authorities should conduct a comprehensive review of the administration of justice with regard to legal education. Increased resources should be devoted to the development of legal training.

8. Support for the Law Society of Swaziland and Civil Society Organisations

The Executive must refrain from obstructing the functioning of an independent legal profession. In particular, harassment and intimidation of the Law Society and other members of the legal profession should immediately cease.

The Law Society and civil society organisations should be allowed to play a key role in the dialogue for enhancing good governance and the rule of law. Adequate funding and resources should be made available to these organisations to assist them in the discharge of these functions.

B. Political Reform

1. Strengthening Legitimate Institutions

The Swazi Government should desist in promoting political conditions that have the net effect of threatening the survival of the Kingdom. This requires an immediate strengthening of State political power structures in order to restore domestic and international confidence in the political process. The legitimate institutions of government should replace informal advisory bodies as the vehicle for public decision-making. Abuse of power is easy when it is exercised through clandestine, informal and unaccountable bodies. They also provide an opportunity for unscrupulous individuals to make decisions based upon personal allegiances and power. It is important that the roles of these institutions and offices be more clearly established and defined. The Constitutional Review Commission will provide an opportunity to clarify and strengthen such bodies with a view to making it clear where public decision-making rests. The success in executing reforms will require the strong support and leadership of His Majesty King Mswati III.

Parliamentary procedures should be enacted to provide for public accountability with regard to the responsible exercise of Executive power. Procedures for the preliminary examination of proposed Royal Decrees and parliamentary legislation should be adopted and published in order that political issues are both communicated to and debated by the public.

2. Enhancing the Relationship of the Government with the Judiciary

Attacks on the judiciary have emanated from the highest office in government, the Prime Minister. It is important that the Prime Minister be supportive of the judiciary in order to enhance public confidence in judicial independence and the rule of law. The current attitude of several high-ranking office holders toward the judiciary undermines the government and is wholly inappropriate to holders of office. If these office holders continue to flout the law and refuse to enforce court orders, they should be removed.

C. Regional and International Mechanisms

The African Commission on Human and Peoples' Rights should assist in promoting and protecting the rule of law by demanding that Swaziland submit its overdue State report. Furthermore, the African Commission should invoke article 58(1) of the *African Charter* to bring the rule of law crisis in Swaziland to the attention of the Heads of State of the African Union.

Non-governmental organisations in Swaziland should utilise the right of individual complaint under article 55 of the *African Charter* to assist victims of abuses in Swaziland to bring their cases before the African Commission. Such cases could cite Swaziland before the African Commission for violations of judicial independence pursuant to article 26 of the *African Charter.*

The United Nations Special Rapporteur on Judicial Independence, who has denounced the current situation, should continue to focus on the current crisis. Other United Nations mechanisms such as the *UN Special Rapporteur on Freedom of Expression* and the *UN Special Rapporteur on Human Rights Defenders* should be invited to Swaziland.

D. Ratification and Compliance With International Instruments

Of the major international human rights instruments, Swaziland is a party only to the *Convention on the Elimination of All Forms of Racial Discrimination* and *the Convention on the Rights of the Child.* Swaziland is not a party to either *the International Covenant on Civil and Political Rights* or the *International Covenant on Economic, Social and Cultural Rights* (and, consequently, none of their *Optional Protocols*). Furthermore, Swaziland has not ratified the *Convention on the Elimination of All Forms of Discrimination against Women,* the *Convention against Torture* and either of the *Optional Protocols to the Convention on the Rights of the Child.*

Swaziland has ratified the *African Charter on Human and Peoples' Rights* and has signed but not ratified the *African Charter on the Rights and Welfare of the Child.*

The ICJ/CIJL urges the Swazi Government to implement all those treaties to which it is a party. Furthermore, the ICJ/CIJL recommends that the Swazi Government ratify all international and regional treaties to which it is not a party and ensure their implementation at the national level.

Governing non-treaty standards that the Government should respect are: the *United Nations Principles on the Independence of the Judiciary,* the *United*

Nations Basic Principles on the Role of Lawyers, the *United Nations Guidelines on the Role of Prosecutors,* the *Bangalore Principles of Judicial Conduct* and the *Latimer House Guidelines.*

XVI. CONCLUSION

The ICJ/CIJL has taken notice that within the context of an HIV/AIDS epidemic and chronic food shortage, effective government in Swaziland has been subverted by individuals that sacrifice national welfare and the survival of the monarchy in favour of their own interests. Silencing dissent, they have engaged in an all out assault on judicial independence and the rule of law. Government assertions to the contrary have remained unconvincing and the State has not demonstrated the political will to accept responsibility for the crisis and engage in a process of political reform. The resignation of the Court of Appeal in protest at State attacks on judicial decisions and the ensuing crisis within the legal profession and civil society should alert the Kingdom to the dangerous long-term consequences of its actions and serve as a signal that meaningful reform is urgent. As recently stated by Lawyers for Human Rights, (Swaziland), quoting Robert Kennedy:

> "Robert Kennedy succinctly put that government must respect the law on 8 June 1966 in an address to the Johannesburg Bar and he said, "The lawyer understands the rule of law. He knows that law begins with its observance by government. For in the words of Justice Brandies of our Supreme Court, 'government is the potent, the omnipotent teacher. For good or ill, it teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt of law. It invites every man to become law unto himself. It invites anarchy. To declare that in administration of the criminal law the end justifies the means, would bring terrible retribution'. This the lawyer knows, and therefore he has the special responsibility to uphold the rule of law and make it the voice of progress and justice, a repository of ancient ideals and a channel of peaceful change towards those ideals.[47]"

Despite the recent statement of the Prime Minister advising that the government would not implement the judicial reform recommendations submitted to government by the former Justices of the Court of Appeal, the ICJ/CIJL is hopeful that, with the enactment of a new constitution, the Kingdom of Swaziland will respect the independence and dignity of Judges and restore the rule of law.

We are grateful to all who assisted and gave of their time to the successful completion of this mission.

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47 16 January 2003, *Times of Swaziland,* Lawyers for Human Rights (Swaziland) Press Statement.

ANNEX "A"

Intervention – ICJ/CIJL Alarmed at Attacks on the Rule of Law

4 December 2002

His Majesty King Mswati III
Office of the King
PO Box 1
Lobamba, Swaziland

Fax:+ 268 404 2669

Your Excellency,

The International Commission of Jurists (ICJ) consists of jurists who represent all the regions and legal systems in the world working to uphold the rule of law and the legal protection of human rights. The ICJ's Centre for the Independence of Judges and Lawyers (CIJL), is dedicated to promoting the independence of judges and lawyers throughout the world.

We are deeply concerned that the Government's disregard for decisions of Swaziland's Court of Appeal has caused six judges of that court to resign. As you are aware, the six South African judges of the Court of Appeal resigned on Saturday in protest over a Government decision to ignore two court judgements they issued. In addition, we have received information that Swaziland's lawyers may also strike.

Regarding the en masse resignation of the judges, Prime Minister of Swaziland, Dr. B.S.S. Dlamini, declared in a press statement issued on 28 November that,

"...Government does not intend to recognise the two judgements of the Court of Appeal. The laws of this country will remain as they are – in other words, as if the judgements of the Court of Appeal judges, in these respects, were not effective."

The Prime Minister also states that,

"The effect of the Court of Appeal judgements would be to strip the King of some of his powers and Government is not prepared to sit idle and allow judges to take from the King powers which were granted to him by the Swazi nation...The Court of Appeal is, in effect, emasculating the legitimate authority of the King – an authority which has been accorded to Swazi kings since time immemorial"

He adds that,

"It is Government's belief that the judges of the Court of Appeal have been influenced by forces outside our system and that they have not acted independently."

We are alarmed at these statements emanating from the highest quarters of Government which indicate profound disregard of fundamental international principles on the separation of powers and the independence of the judiciary. Disregarding the decisions of judges- who are charged with upholding the law – on the ground that they "emasculate the legitimate authority of the King" points to a serious breakdown in the rule of law.

We remind you of the 1985 United Nations Basic Principles on the Independence of the Judiciary which state respectively in Principles 1 and 4 that,

It is the duty of all government and other institutions to respect and observe the independence of the judiciary.

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision.

We ask that immediate steps be taken to remedy this situation and ensure respect for the decisions and independence of the judiciary, thereby upholding the rule of law.

Yours sincerely,

Louise Doswald-Beck
Secretary General

cc: Dr. S B Dlamini, Prime Minister of Swaziland,
Government House, PO Box 395,
Mbabane, Swaziland

Fax: +268 404 3943

Hon. Abednigo Ntshangase,
Minister of Foreign Affairs and Trade
Ministry of Foreign Affairs and Trade,
PO Box 518, Mbabane, Swaziland

Fax:+ 268 404 2669

ANNEX "B"

Swaziland – International Commission of Jurists to Visit Swaziland

Independence of Judges & Lawyers – Newsroom
10 January 2003

An ICJ delegation will visit Swaziland from 12-20 January to gather information on the functioning of the judiciary and legal profession. The ICJ is particularly concerned by a recent Government decision to disregard two rulings of the Court of Appeal. In protest, six South African judges of the Appeal Court resigned.

Swazi officials justified their defiance of the judiciary by alleging that judges of the Court of Appeal "have been influenced by forces outside the [Swazi] system and have not acted independently."

The ICJ mission will examine the relationship between the monarchy and the judiciary in Swaziland, as provided under law, and as demonstrated through practice. The mission team will seek to meet with the King, Government officials, members of the judiciary, lawyers, parliamentarians, academics and other members of civil society in order to undertake a full and fair evaluation of the state of judges and lawyers. The ICJ will publish a report containing its findings and recommendations to the Government.

The ICJ delegation is composed of three international experts: Justice George Kanyeihamba of the Supreme Court of Uganda; Professor Michelo Hansungule, a Raoul Wallenberg Visiting Professor at the University of Pretoria, Centre for Human Rights; and Professor Edward Ratushny of the Faculty of Law, University of Ottawa and President of ICJ-Canada. The Rapporteur will be Edwin Berry, Legal Officer, ICJ Secretariat.

The ICJ will be undertaking some of its mission activities in tandem with the International Bar Association (IBA) which will also will be conducting a mission in Swaziland.

ANNEX "C"

Swaziland: Attacks on the Rule of Law Continue

Independence of Judges & Lawyers – Newsroom
23 April 2003

With the Legal System on the verge of collapse, King says that democracy is not good for his country.

The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) today expressed its deep regret at the unabashed disrespect for the rule of law and the erosion of the integrity of the legal system in Swaziland.

The CIJL/ICJ is disappointed to learn that King Mswati reportedly told worshippers at an Easter service on 19 April that "Although the whole world is preaching democracy, it does not mean we have to follow them." He added, "Democracy is not good for us because God gave us our own way of doing things."

Swaziland has been besieged by resignations of judges and protests by lawyers. Most recently, Chief Justice Stanley Sapire of the High Court resigned from his position. The Chief Justice can only be replaced by an appellate court judge, however, this is impossible as all such judges resigned *en masse* in November 2002. Other recent developments which undermine the justice system include the move to demote Justice Thomas Masuku; threats to deport the President of the Law Society, Mr. Paul Shilubane, on grounds that he holds dual citizenship; and recent protests by members of the Law Society.

"We are extremely concerned that these latest developments have brought the justice system in Swaziland to a halt," said Linda Besharaty-Movaed, CIJL/ICJ Legal Adviser. "King Mswati is ruling as if he has a mandate from heaven. He has virtually destroyed any semblance of respect and protection for the judiciary and the rule of law" she added.

The dysfunctional nature of the justice system in Swaziland is largely the result of the country's ambiguous constitutional order. Although the Constitution of 1968 was repealed by a proclamation of the King in 1973, numerous subsequent decrees have created an environment of legal uncertainty. Further compounding this problem, was the formation of a shadowy body referred to as the "Thursday Committee" which has largely

usurped the powers of the Judicial Services Commission, the constitutional body charged with overseeing the administration of the judiciary. The CIJL/ICJ sent a fact-finding mission to Swaziland in January to gather information on the role of the judiciary and legal profession. A report will be issued shortly.

The lack of a clear separation of powers, stemming from an environment of constitutional uncertainty severely undermines the administration of justice in Swaziland and violates international human rights standards such as the *UN Principles on the Independence of the Judiciary*.

NEPAL

PREFACE

The report of the International Commission of Jurists' (ICJ) fact-finding mission to Nepal, which took place from 27 to 3 February 2003, was initially released in June 2003. The ICJ has decided to reissue the report in the wake of a sharp deterioration in the general human rights situation in Nepal, which has followed upon the collapse of the cease-fire and negotiation process between the Government and the Maoist rebels. According to a report released at the end of October by the Nepal-based non-governmental Informal Sector Service Centre (INSEC), some one thousand persons have been killed in the two months since the cease-fire was suspended on 27 August.

The cease-fire had been announced on 29 January during the ICJ visit to Nepal and was followed by three rounds of negotiations, the most recent of which took place in August. The talks apparently broke down over the core question of the status of the Constitution. The Maoists, who favor the abolition of the monarchy and the establishment of a republic, were pressing for the election of an assembly tasked to draft a new Constitution. The Government insisted upon proceeding under the existing Constitution, although it seemed willing to entertain the possibility of constitutional amendments that would not affect the status of the monarchy. Aside from the substantive issues, the negotiations seemed to take place in an atmosphere of mutual distrust. It was reported, for example, that Government negotiators had agreed at one point to confine the Royal Nepalese Army (RNA) to within five kilometers of barracks, but that the Government subsequently reneged upon this commitment in the face of staunch objections from the Army. Both sides increasingly leveled accusations against one another of breaching the cease-fire agreements.

On the political front, a stasis has set in, whereby a government consisting of unelected officials continues to serve at the appointment of the King. Since King Gyanendra dissolved Parliament in October 2002, no elections have been held despite the Constitutional requirement that elections be held within six months of parliamentary dissolution. The ICJ in its report warned that Nepal seemed to be slipping from a constitutional towards an absolute monarchy, and developments since the visit have only served to reinforce this conclusion. On 30 May, amidst a waive of popular protest, Prime Minister Lokendra Bahadur Chand resigned and the King replaced

him on 4 June with Surya Bahadur Thapa, a royalist and four-time prime minister from the Rastriya Prajatantra Party. The major political parties had by consensus pressed for Madhav Kumar Nepal, of the United Marxist Leninist party (UML) to succeed Prime Minister Chand, as interim Prime Minister, but this proposal was disregarded by the King. The main political parties have continued to insist that Parliament should be reinstated or a new government should be created consisting of ministers from amongst these parties.

The human rights situation has drastically deteriorated, with numerous cases of extra-judicial killings and disappearances reported and the RNA apparently acting beyond effective civilian control and accountability. In a notorious incident, on 17 August a unit from the RNA summarily killed at least 19 unarmed persons in Ramechhap District. An independent inquiry set up by the National Human Rights Commission (NHRC) and headed by former Supreme Court Justice Krishna Jung Rayamajhi confirmed the army responsibility for the killings. The initial response of RNA officials, including the Advocate General, was to attack the NHRC and accuse it of bias. The RNA has consistently failed to investigate or punish Army personnel accused of human rights abuses, despite the numerous well-founded allegations. On 10 October 2003, the ICJ wrote to King Gyandera requesting that the Minister of Law and Attorney General use the NHRC findings as a basis for investigating and prosecuting the responsible RNA personnel in ordinary, not military, courts.

A human rights accord, proposed during the course of negotiations by the National Human Rights Commission, aimed to establish five regional offices to perform human rights monitoring and receive advisory assistance form the UN Office of the High Commissioner for Human Rights. The ICJ believes that this accord constitutes a firm basis for carrying out urgent human rights reforms and should be implemented with or without a political settlement.

The ICJ has requested the Government to comment upon its fact-finding report. Although assured by officials that an official response would be forthcoming, none has so far been received. The Government has apparently failed to implement any of the 38 recommendations contained in the report. The ICJ hopes that the reissue of this report will assist in providing new impetus for the Government to fulfil its human rights obligations and to restore the rule of law in Nepal.

November 2003

EXECUTIVE SUMMARY

The International Commission of Jurists (ICJ) and its Centre for the Independence of Judges and Lawyers (CIJL) conducted a fact-finding mission in Nepal from 26 January to 3 February 2003. The purpose of the mission was to examine human rights and the functioning of the administration of justice in the country in the context of a prevailing Constitutional crisis and armed conflict between the Government and the Maoist insurgency.

During the visit, the mission team met with senior political leaders, including the Prime Minister; the Home Minister, also serving as Minister of Justice; military and police officials; members of the National Human Rights Commission and the National Women's Commission; the Chief Commissioner of the Commission for the Investigation of Abuse of Authority; Judges of the Supreme, Appellate and District Courts, including the Supreme Court Chief Justice; officers of the Nepal Bar Association; lawyers; officials from political parties; diplomats; non-governmental organisations; and victims of human rights abuses.

The mission took place against the backdrop of an ongoing seven-year armed insurgency waged by Maoist rebels. In November 2001, following the collapse of peace talks, a nation-wide emergency was declared and the Army was called up to confront the insurgency. The King promulgated an ordinance giving the Government expanded powers of arrest and detention, which was subsequently adopted by Parliament as the Terrorism and Disruptive Activities Act (TADA). In October 2002 the King dissolved the Parliament and appointed a new government. During the ICJ/CIJL visit, a cease-fire was announced. A renewed process of negotiations between the Government and Maoists has since commenced.

Although the mission noted certain positive aspects, such as an independent superior judiciary, and a vibrant, though politicised, bar and civil society, its overall impression was of a country undergoing a crisis in the rule of law and little political will to address a grave human rights situation. The integrity of the Nepalese Constitution itself is under severe strain, with the King having failed to call new elections within the mandated six-month time frame following the dissolution of Parliament. The present Government is composed of largely unelected figures from outside the major political parties or the dissolved parliament. The mission considers that Nepal is perilously close to slipping from a constitutional to an absolute monarchy.

Nepal has ratified the six principal human rights treaties and these instruments are directly incorporated in law. However, there is general unawareness among a large proportion of the Government, bar and bench of the applicability of the human rights treaties, and they have not substantially been implemented in judicial or administrative practice. The practice of arbitrary detention is widespread, particularly in cases related to the insurgency, and the adoption of TADA has effectively legitimised this practice. The remedy of habeas corpus is often ineffective, as persons whose release is ordered are often rearrested immediately upon securing their liberty. The Government on a number of occasions has altogether disregard judicial orders for release and thereby undermined judicial authority in the country.

The Army holds a significant number of persons in detention without legal authority, but with de facto connivance or acquiescence by Ministers at the highest levels of government. Those detained are held incommunicado, beyond access to lawyers, relatives or the courts. Torture of such detainees is routine. A number of lawyers have been arbitrarily detained and tortured, simply because of association with their clients.

A large number or cases of enforced disappearances and extrajudicial killings have been documented. There is near total impunity for officials of the Army, Armed Police Forces and police who engage in serious human rights violations including torture, unlawful killings and war crimes. Gender and caste discrimination remain a substantial problem, both in law and practice.

National institutions that address human rights concerns are weak and ineffective. The National Human Rights Commission appears unable or unwilling to look into the vast majority of cases it receives and may not be fully independent. Human Rights cells recently established in the Army, Armed Police Forces, and police have thus far been wholly ineffective, and their establishment appears to be a mere cosmetic gesture.

Courts are under-resourced, and lower courts typically fail to receive judgements of the Supreme Court in a timely manner, if at all. The Supreme Court appears to be taking preliminary steps to address the serious problem of judicial corruption.

Access to justice for citizens of Nepal is sorely lacking. In at least 13 Districts, there were no courts in operation, leaving a number detainees stranded indefinitely in detention. More than half of all detainees, many of whom face lengthy prison sentences, go unrepresented by counsel.

Judges rarely inquire into the means by which statements of defendants have been obtained.

Defendants passing through the criminal justice system often do not receive a fair trial. Most evidence used for conviction consists of "confessions", a large proportion of which have been extracted through torture or other ill-treatment. Torture itself has not been made a specific crime, as required by the Convention against Torture, and perpetrators of torture are seldom prosecuted. Existing torture compensation legislation has not served victims well and does not provide for individual responsibility of perpetrators.

The mission has issued 38 recommendations for implementation by the Government of Nepal and assisting bodies and agencies.

Human rights concerns are squarely before the negotiators in the present peace talks and any accord is expected to contain a human rights component. With or without a peace agreement, human rights monitoring is urgently needed throughout the country.

INTRODUCTION

This report contains the findings of a Mission to Nepal sent by the International Commission of Jurists (ICJ) and its Centre for the Independence of Judges and Lawyers (CIJL). The mission's mandate was to examine the functioning of the administration of justice in Nepal, including the existing legal framework and actual practice, and to evaluate the effectiveness of judicial and administrative implementation of international standards. The mission also sought to evaluate the impact of recent Nepalese law and practice on the fulfilment of Nepal's international human rights obligations. Some of the particular areas of question and concern were whether there existed effective means to challenge unlawful or arbitrary detention, such as *habeas corpus;* the implications of the Terrorist and Disruptive Activities (Control and Punishment) Act (TADA) and other legislation used in context of countering the ongoing Maoist insurgency; the practice of torture of detainees by the authorities and the adequacy and effectiveness of means to prevent and remedy incidents of torture and other ill-treatment; the extent to which judges were willing or able to carry out their professional functions independently and impartially; allegations of harassment of lawyers in the country, including cases of arbitrary detention and violent assault. The Mission also sought to gather information with a view to determining, on a preliminary basis, Nepal's capacity building needs in the area of administration of justice.

The members of the mission team were Justice John Dowd, A.O. (Australia), (Supreme Court of New South Wales, Australia; President ICJ Australian Section (Head of the Delegation); Michael Ellman (United Kingdom) Solicitor and Officer of the Board of the International Federation for Human Rights (FIDH); and Paul Harris (Hong Kong), Barrister, Founding Chairman, Hong Kong Human Rights Monitor. They were accompanied by two members of the ICJ legal staff, Ian Seiderman and Hassiba Hadj-Sahraoui, who also served as mission rapporteurs.

By letter dated 16 December 2002, the ICJ Secretary-General, Louise Doswald-Beck informed the Permanent Representative of Nepal to the United Nations in Geneva, Ambassador Shambhu R. Simkhada, that the ICJ wished undertake a mission to Nepal. At a meeting in Geneva on 17 December, the Ambassador indicated to the Secretary-General that the ICJ would be welcome to visit Nepal. He also gave assurances of the full co-operation of the authorities in arranging appointments with relevant Government officials.

The ICJ would like to express its gratitude to the Government of Nepal for extending its full and active co-operation with the Mission in Nepal. The ICJ is also deeply appreciative of the efforts of the Advocacy Forum, a Nepalese non-governmental organisation composed of lawyers focusing on human rights, and the ICJ Nepal National Section for their assistance in facilitating the mission.

I. CONDUCT OF THE MISSION

The mission held meetings in Kathmandu with senior Government officials, judges, lawyers, police officials, non-governmental organisations, national institutions, and diplomatic personnel from 26 January to 3 February. The mission also visited Nepalgunj, in the Western Region of Nepal, on 29-30 January. A summary of these meetings follows below.

A. Government Ministers

Toward the end of the visit, the mission met separately with the Prime Minister, Mr. Lokendra Bahadur Chand and the Home Minister and Justice Minister, Mr. Dharma Bahapur Thapa (holding both portfolios). We put to the ministers a number of the central concerns that had arisen as a consequence of our inquiries during the course of the visit and presented to them lists of a number of the persons we believed to have disappeared or were being held in unacknowledged detention.

The Prime Minister affirmed his Government's overall commitment to promoting a human rights culture in Nepal and as evidence pointed to the establishment of human rights cells within the Army, the Armed Forces Police and Police. He also conceded that there was an outstanding need for personnel in various governmental services to receive expert advice and training in human rights. However, to the mission's regret, the Prime Minister was quick to advance the perceived exigencies of countering the Maoist insurgency as an excuse for the grave human rights situation and for the inadequacies of the Government in redressing the situation. He openly acknowledged that the Army was continuing to detain persons unlawfully. Contradicting the assertions made to us by Army officers, the Prime minister contended that the army had received no authorisation from the Government to carry out such detentions. Despite being charged with constitutional responsibility for overseeing the Army, the Prime Minister appeared not to accept it as his obligation to end this widespread practice through instructions to the Army and other security forces, instead opting to conceptualise the problem as one of individual cases that he might look into.

Mr. Dharma Bahapur Thapa holds both the posts of Home Minister and Minister of Law, Justice and Parliamentary Affairs. The mission was deeply troubled by this Minister's approach to the human rights situation, whereby he blithely defended the Government's practice of immediately re-arresting persons who are released pursuant to court orders. The Minister told us that such persons were "too dangerous" to be released, despite a judicial determination that there was no basis for their detention. He also declined to acknowledge that torture was at all practised in Nepal, even though we came across numerous cases of convincing evidence of torture, including of lawyers, and almost all other Government and non-governmental sources had indicated to the mission the existence of a grave problem in this regard. The mission met the Secretary of the Ministry of Law, Justice and Parliamentary Affairs, Mr. Udaya Nepali Shrestha. The Secretary informed the mission that he in fact effectively ran the Ministry on a day-to-day basis, as the Minister himself was almost invariably occupied with his duties at the Home Ministry. Indeed, the Secretary suggested that the merging of these portfolios might pose a conflict of interest for the Minister. In response to queries regarding serial instances of official defiance of judicial orders, the Secretary assured the mission that the independence of the judiciary was well respected in Nepal and that any problems regarding the Government's respect of judicial orders simply resulted from "misunderstandings".

The Mission also met with a Spokesman for the Ministry of Foreign Affairs, Mr. Gyan Chandra Acharya, who has since taken up a post as Ambassador

to the United Nations in Geneva. The mission informed Mr Acharya that it considered that the country would be well served by the establishment of an office of the UN High Commissioner of Human Rights, which would carry dual monitoring and advisory functions. Mr. Acharya expressed his desire to accept technical assistance from the international community in the human rights area and affirmed his desire to address the extensive delays of the Government in submitting its periodic reports to the supervisory organs of the six major human right treaties.

B. Military and Armed Forces Police

The mission met with the Deputy Inspector and Advocate General of the Royal Nepalese Army, BA Kumar Sharma, and two associates in the Army's recently established Human Rights Cell, Lieutenant Colonel Ramindra Chettry and Deepak Gurung. Most of the activities undertaken by this unit to date appeared to fall within the area of human rights training, although we were assured that a monitoring and investigative function was central to its mandate. The officers conceded to the mission team that the Army did hold persons in unacknowledged detention without charge and access to family and lawyers and in contravention of Nepalese legislation. They insisted that they had been granted special dispensation to do so from the highest levels of governmental authority, including the Prime Minister. They were, however, unable or unwilling to provide the mission with any written instructions or orders legally underpinning this putative authority. The Advocate General promised to investigate specific cases submitted to him by the mission, but this commitment has remained unfulfilled.

The mission called on Gyanendra Raj Rai, Deputy Inspector General and Head of the Human Rights Cell of the Armed Police Forces. The Armed Police Forces, consisting of some 15000 personnel, had been established in 2001 as part of the emergency response to the Maoist insurgency. It was tasked to assist both the Royal Nepalese Army and the Nepalese Police in carrying out their respective counter insurgency operations. The Human Rights Cell was a nascent unit and most of their projects were of a prospective character. The Deputy Inspector was unable to present the mission with rules of engagement. He denied that the APF was detaining people, although we received information from a number of sources insisting that the APF had been responsible for widespread torture and instances of extrajudicial killing.

The mission paid a surprise visit to the Chisapani Army Barracks in Nepalgunj, Banke district, as it had learned that upwards of 100 persons were being held by the Army in Banke in secret detention, with a substan-

tial proportion of these detained at these barracks. Although the mission failed to gain admittance to the barracks, the junior officer who spoke to us conceded that "seven or eight" detainees were presently held. The Chief District Officer told us that he had not been informed of any such detentions, nor had the Army transferred custody of the detainees to his civilian authority as required by law.

C. Police Adviser

The mission met with Richard Miles, an advisor to the police sponsored by the United Kingdom Department for International Development (DFID). Mr. Miles, a former assistant chief constable in the United Kingdom, confirmed the appraisals we had heard repeatedly regarding the widespread use of police torture. He noted that the police frequently encountered substantial political interference in their work. Corruption was prevalent and there was a near complete absence of financial accountability. He reported that practice in the preparation of case files and record keeping was appalling. A principal reform needed was to link recruitment and promotion to merit. Police needed training on evidence-gathering techniques, although the infrastructure was not appropriate yet for high-tech methods.

D. Judiciary

The Mission visited the Supreme Court of Nepal and met with the Chief Justice (Kedar Nath Upadhaya), Justice Arbinda Nath Acharya, Justice Hari Prasad Sharma, the Registrar, Shree Prasad Pandit and the Joint Registrar, Ram Krishna Timilsena. The Justices informed us that they had experienced no overt pressure or threats to their independence. They expressed concern, however, that in a number of cases, especially those involving public interest litigation, the Government had been slow to adhere to the court rulings. The Justices also highlighted problems of serious delays in judicial proceedings, especially in respect of civil litigation. They expressed dissatisfaction at the advent of special courts under the TADA legislation, and were confident that the ordinary judiciary had the capacity to adjudicate cases arising out of the civil conflict. The Justices acknowledged that a certain degree of corruption obtained within the judiciary of Nepal, but they indicated that they were unable accurately to gauge its extent. The mission brought to the Justice's attention a serious problem regarding the administration of justice in a number of districts, namely that there were no courts operating in these regions, even though there were persons held by police and Army. The Judges seemed unable to formulate a means by which to address this alarming situation. On the day after its visit, the

mission was pleased to learn of the announcement by the Supreme Court that they were empanelling a team of senior judges to visit some of the outlying districts, with a view to looking into this problem as well as allegations of judicial corruption.

The Mission also visited two Appellate Courts, for Patan and Banke Districts. At Patan, the mission met with the Chief Judge Khil Raj Regmi and Judge Mohan Siraula, who had also formerly served as a judge at the special court established under TADA, as well as the Court Registrar. In contrast to repeated complaints registered to us by lawyers, these judges seemed satisfied that *habeas corpus* cases were being handled properly by the police. They suggested that their main difficulties were a lack of human resources and the cumbersome requirements of judicial process. They indicated that court staff were unable to gain access to remote areas affected by the insurgency.

In Banke we met with the Acting Chief Judge, Rajendra Koirula and Judges Komal Nath Sharma, Judge Dihirendra Bista and Judge Krishana Prasad Babyal. These judges acknowledged the problem of torture. One Judge noted that police officers sometimes usurped court authority and they highlighted the problem of the falsifying of records by police officers. They considered themselves powerless to issue charge warrants vis-à-vis Army activities, although they said that they were well aware of cases of unacknowledged detention by the Army. The Judges seemed unaware of their authority to rely on international human rights treaty standards, even thought these standards form part of Nepalese domestic law.

The mission visited District Court Judges in Kathmandu Judges O.P. Mishra, S.P. Ghimire and Bhatt and Registrar Mr. K.D. Adhikari. In Nepalgunj, the mission met with Chief District Court Judge Prem Bahadur, Judge Karunanidhi Sharma and the Registrar, Lekh Nath Paudel. The judges informed the mission that there were cases in which the Government had not carried out court orders and some lawyers were unlawfully detained. However, they did not consider their independence impeded. One judge recognised that the "police are not treating people humanely", but seemed unaware of the duty of these judges to investigate cases of torture.

E. Bar

The mission team participated in a round table meeting of the Nepal Bar Association, attended by eight prominent members including the President and the Secretary of the Bar Association, and the former Minister of Law

and Justice (see annex I). These lawyers expressed a number of serious concerns, including the widespread instances of arbitrary arrests; the ineffectiveness of *habeas corpus* petitions; the Government's strategy of re-arresting persons whose release had been ordered by the courts; the denial by the authorities that detained persons were being held in custody; the problem of detention by the Army, despite its having no legal power to detain persons; the persecution, including arrest and torture of lawyers who are identified with their clients, particularly in the case of Maoist suspects; and the problems of rampant corruption throughout the court system.

The mission also observed a protest demonstration on 31 January sponsored by the Nepal Bar Association, at which some 300 lawyers participated. The lawyers were demonstrating generally against the defiance by the Government of court orders and the particular case of five colleagues who were held despite orders from the Supreme Court for their release.

F. Joint Consultative meeting

The mission attended a human rights consultation session organised by the Advocacy Forum in Nepalgunj . Some 27 persons were present, including the Chief District Officer of Banke District, three Judges from the Banke District Court, the District Court Registrar, the Inspector of the District Police Office, a District Police Officer, the President and Secretary of the Nepal Bar Association Appeal Court, the President of the Nepal Bar Association District Court Unit, Advocates from the Nepal Bar Council, an advocate from the Centre for the Victims of Torture (CVICT), advocates from the NGOs HURON, CeLLrd and CAPCORN, the Editor of Nepali Express Newspaper, a reporter from Kantipur Daily, a reporter from Channel Nepal, and lawyers from the Advocacy Forum.

This meeting presented an opportunity for all sectors responsible for the administration of justice to discuss and debate the human rights situation. On the positive side, it was noted that local government was gradually becoming aware of the obligation to provide legal detainees with basic needs and prisoners were becoming increasingly cognisant of their basic rights. However, multiple problems were reported: torture allegations were often not registered by police or judges; many lawyers had been and remained unable to visit detainees; detainees were often unaware of fundamental rights, including the right to a lawyer; police and judges rarely asked for medical examinations to be carried out; detainees were released and immediately rearrested under TADA; the Army detained persons unlawfully and were not subordinate to civilian authority; bail was only available for those accused of minor offences and those who could afford

the unduly high amounts set; prisons were overcrowded; judges believed that they could not inquire into allegations of torture. The Superintendent of Police for the District indicated that torture allegations were exaggerated.

G. National Institutions

The mission met with members of the National Human Rights Commission (NHRC), including the Chairman, Justice Nayan Bahadur Khatri, members Dr. Gauri Shankar Das, Ms Indira Rana and the Acting Secretary, Kedar Prasad Poudyal. The mission learned that the NHRC had broad jurisdiction to hear individual complaints of human rights abuse and to carry out investigations, but were only competent to make non-binding recommendations and, accordingly, lacked power of enforcement. Most of the complaints presently received were said to arise from the insurgency and many involve cases of disappearances. Present NHRC projects include "responding to crisis project" and monitoring. The mission also discussed the case of two girls allegedly raped by officers of the armed forces, which had recently been publicised by Amnesty International. The mission was appalled to learn that the NHRC apparently had accepted the girls' retraction of the allegation and much of the Army account in the case, despite the fact that the retraction had been made after they and their family had been visited and subjected to intense pressure by army officers.

The mission also met the recently appointed NHRC National Rapporteur on Trafficking in Women and Children, Dr. Renu Raj Bhandari. The appointment, supported by the UN Task force against Trafficking, was the first of a thematic expert to be established by the NHRC. We learned that trafficking was an enormous problem and that the legislation against trafficking was poorly implemented. The Rapporteur informed us that she was hoping to establish a complaint mechanism.

The mission met with members of the National Women's Commission, including Prativa Rana (Vice-Chairperson), Uma Shah, and Maha Laxmi Upadhya. The Commission, established in March 2002, is a monitoring body aimed at ensuring that international instruments and national law concerning women are implemented. It had recently conducted visits and carried out surveys in 53 Districts with a view to producing its own statute, which would have to be approved by Parliament. The draft contained no enforcement mechanism.

The mission met with the Chief Commissioner of the Commission for the Investigation of Abuse of Authority (CIAA), Surya Nath Upadhyay and the

Secretary, Madhab Prasad Ghimire. The CIAA, established under article 97 of the Constitution, is composed of five Commissioners appointed by the King upon recommendation of the Constitutional Council and accountable to Parliament. The CIAA has no jurisdiction over military personnel and judges, but may investigate court staff. (Jurisdiction to discipline judges resides with the Judicial Commission). The Chief Commissioner told us that while the CIAA maintained jurisdiction over the police, he had focused his own efforts primarily upon corruption, not human rights abuses. He did not consider himself to have jurisdiction over abuse or corruption in the Army, and believed separate agencies should be established for that purpose.

H. Political Parties

The Mission met with representatives from the two largest political parties, Mr. Jhala Nath Khanal, Standing Committee Member and Chief of Department for International Relations Communist Party of Nepal (Unified Marxist-Leninist) and Mr. Narahari Acharya, Nepali Congress party. Both party representatives expressed disillusionment with what they perceived as unconstitutional usurpation of power by the King and selection of ministers from outside the Parliament and main political parties. Both representatives called into question the legitimacy of the existing Government.

I. Non-Governmental Organisations

In addition to the extensive interaction with the mission's facilitating organisation, Advocacy Forum, and the ICJ Nepal Section, the mission met with a number of representatives of non-governmental organisations.

The mission met with the General Secretary of the Informal Sector Service Centre (INSEC), Mr. Subodh Pyakurel. INSEC is a leading human rights NGO operating throughout the country. The General Secretary provided the mission with a substantial study it had carried out on human rights throughout the country, including testimony from victims. He alleged that the Government had failed to comply even with the already restrictive terms of TADA. Since emerging from barracks two years ago, the Army, unaccustomed to dealing with a counterinsurgency, had cast suspicion upon virtually every villager in affected areas of participation in Maoist activities. The result had been a spate of extrajudicial executions. For their part, the Maoists had compensated for their shortfall in weaponry by instilling generalised terror in the population. Police had taken reprisals upon lawyers and human rights activists seen as defending Maoists. The General

Secretary believed that the establishment of human rights cells in the armed forces was a positive sign, but the gesture fell substantially short of the large scale reforms needed to address the human rights crisis.

The mission met with the Chairperson of the Human Rights and Peace Society (HURPES), Mr. Krishna Pahadi. HURPES was said to have 2500 active members in the country. It advocates a general policy of non-violence. It had held human rights training seminars in some 41 districts. He expressed concern that most Nepalese people were sandwiched between the Army and the Maoists, and indicated that presently the Maoists had lost control of their militias, making discipline difficult.

The mission visited the Centre for Legal Research and Resource Development (CeLLRD), which is connected with the Kathmandu School of Law. There it met Professor Yub Raj Sangraul, Director of the School of Law and Kishor Silwal, Director of CeLLRD. Professor Sangroula gave the mission a thorough briefing on the legal history of Nepal and the challenges it faced in reforming its antiquated legal codes and judicial structures. He noted that much of the procedural legal content in Nepal is derived from civil law. In 1963 Nepal moved to an adversarial model, resulting in a hybrid system. He stressed that the primary difficulty in achieving such reform rested not in the paucity of material resources, but in entrenched attitudes and lack of training and education of judges and lawyers in contemporary legal developments. He also indicated that with the dissolution of the Constitution and the arrogation of powers to the King and his hand-picked ministers from outside the parliament, the Constitution had effectively ceased to exist. There had been a large political vacuum left, whereby the monarchy and the Maoists were the only players wielding effective power.

J. Victims

The mission met individually with several victims of human rights violations, including three lawyers, many of whom were reluctant to have their identity revealed for fear of reprisal. Some of these cases are highlighted in the report. These meetings produced vivid and credible testimony, corroborating accounts consistently conveyed to us by other sources of arbitrary detention, torture, and harassment of lawyers and human rights defenders.

Finally, the mission met with a number of diplomatic personnel from donor countries and the European Commission with a view to gathering information on the present donor activities vis-à-vis the administration of justice and to see where needs for capacity building remain.

II. HISTORICAL AND POLITICAL BACKGROUND

Nepal is the world's only Hindu kingdom. A landlocked country sandwiched between India and Tibet, it has an area of 147,181 square km and a population of about 25 million. It is among the world's poorest countries, with a per capita income of US$220 in 1998 and more than half the population earning less than US$1 per day. Most Nepalis live in rural areas and subsistence agriculture is the main occupation. Population growth is rapid. This high growth rate and the resulting pressure on land in a mainly agricultural country is a major contributory factor to Nepal's many economic, social and political problems.

Geographically Nepal can be divided into the Terai, the flat land bordering India which is physically part of the Indo-Gangetic Plain; the Pahad or hill region, in which the capital Kathmandu is located; and the high Himalaya Region, which contains eight of the world's ten highest mountain peaks, including Mount Everest.

Apart from agriculture, the mainstays of the Nepali economy are manufacture of garments and carpets; tourism (currently in deep recession because of Nepal's unstable political situation); overseas aid; and remittances from Nepalis working abroad. Nepal's small amount of industry is mainly located in the Terai.

Ethnically the people of Nepal are a mixture of Indo-European peoples originating from India and Tibeto-Burman people originating from the Himalayas. Broadly speaking the former are Hindus while the latter are Tibetan Buddhists. Nepali, a Sanskrit based language related to Hindi, is the national language and is generally understood.

Nepalis are divided by caste as well as ethnicity. Although inter-caste marriage now occurs in the cities, in rural areas rigid caste distinctions are still a dominant feature of life. Throughout Nepal's modern history political power has been held by Brahmins of Indo-European origin from the Pahad region. Of the Tibeto-Burman groups, the Gurungs, Rais and Limbus are noted for their military prowess and form the bulk of Gurkha recruits and of the Nepali Army, while the Sherpas are famous for their mountaineering skills. Other ethnic groups include the Tamangs of the Himalayas, the Newars of the Kathmandu valley and the Thakurs. Discrimination against dalits (untouchables) remains a major feature of Nepali life.

Prior to the 18th century Nepal was a collection of small principalities, many ruled by Rajputs originating from India, and the three kingdoms of the

Malla dynasty, Kathmandu, Patan, and Bhadgaon (modern Bhaktapur). From 1742 the ruler of the Gorkha principality, Prithvi Narayan Shah, conquered neighbouring states. To counteract his enhanced power, the Malla rulers brought in forces lent by the British East India Company. When these were withdrawn in 1769, Prithvi Narayan Shah was able to conquer the Malla kingdoms and unite Nepal as one state with the capital at Kathmandu. His descendants remain the hereditary kings of Nepal today. In 1814 Nepal fought a war with the British East India Company as a result of which it was forced to cede much of the Terai by the Treaty of Suguali in 1816. However, much of this territory was returned to Nepal in 1868 as a British reward for Nepali support during the 1867 uprising (the "Indian Mutiny"). The British were so impressed by the military skills of the Nepalis in the 1814 War that they began recruiting Nepali mercenaries, known as Gurkhas, into their Army, beginning a tradition which continues to the present day.

From 1816 to 1951 Nepal was officially closed to foreigners. Although the Shah dynasty reigned throughout this period, from 1846 they were reduced to figureheads as real power was seized by a nobleman from Western Nepal, Jung Bahadur Rana, who established a system of hereditary Prime Ministers, the Ranas. Under their rule, Nepal was closed, autocratic, conservative and hierarchical.

After World War II the achievement of independence by India and the Communist Revolution in China followed by the Chinese seizure of Tibet led to political upheaval in Nepal. In late 1950 King Tribhuvan, assisted by India, seized power from the Rana Prime Minister and established a Government consisting of both Ranas and commoners from the Nepali Congress Party ("NCP"), a party led by B.P. Koirala and loosely modelled on the Indian Congress Party. Nepal gradually re-opened its doors to the outside world, establishing diplomatic missions with other nations. However the Ranas have remained powerful and influential. Both the present King Gyanendra and his brother, the late King Birendra, married members of the Rana family.

Politically, from 1951 to 1990 successive monarchs attempted to retain effective power and to resist pressure to restrict themselves to the role of constitutional monarchs. A democratic constitution provided for elections, which were held in 1959, resulting in victory for the NCP. However, in 1960 King Mahendra had the Cabinet arrested and assumed total control of the country. In 1962 he introduced a system of non–party government known as Panchayat. Local panchayats (councils) chose representatives to district panchayats, which in turn chose some members of the National Panchayat.

However power remained with the King, who appointed 16 of the 35 members of the National Panchayat, and appointed the Prime Minister and the Cabinet of his choice.

In 1972 King Mahendra died and was succeeded by his son, Birendra. Gradually rising discontent with the Panchayat system erupted in violent riots in 1979, and in response the King announced a referendum on the future of the Panchayat system. A referendum was held in 1980 and resulted in a vote of 55 percent in favor of the Panchayat system. Following this vote King Birendra made modifications to the Panchayat system which gave it a more democratic appearance. The District Panchayats were abolished, and the majority of members of the National Panchayat were directly elected with a five-year term. The number of members of the National Panchayat appointed by the King was reduced to 20, and the National Panchayat elected the Prime Minister. In addition, certain constitutional rights were guaranteed. Yet behind this semi-democratic façade the King wielded almost complete power and the Panchayat operated as a rubber stamp for his decisions. The military and the police were almost wholly unaccountable, censorship was strict, and torture and arbitrary arrests were widespread.

In 1989 the opposition parties formed a coalition to fight for multi-party democracy with the King as constitutional head. In 1990 a "people power" movement known as the Jana Andolan gathered momentum. The King initially responded with force, and several hundred people died when police fired into crowds. However as a result in part of pressure from foreign aid donors the King in April 1990 announced the end of the Panchayat system, the introduction of multi-party democracy, and his acceptance of the role of constitutional monarch.

Since 1990 Nepal has been a multi-party democracy characterised by weak and unstable governments prone to collapse. The early optimism of the years immediately following the Jana Andolan were followed by widespread disillusion with the ineffectiveness of successive democratic governments and their inability to bring about meaningful improvement to Nepal's social and economic conditions. From 1990 to 1994 the governing party was the NCP under the leadership of Girji Prasad Koirala. In the following general election, the NCP was defeated by the United Marxist-Leninist Communist Party (UML), which had been the largest opposition party. A UML Government took office with Man Mohan Adhikary as Prime Minister, making Nepal the world's first Communist monarchy. After a brief period, Parliament was again dissolved in 1994 and in the ensuing election no party

gained an overall majority. Several years of unstable coalition government ensued, with five governments emerging over a five-year period.

It was during this period of instability that the present Maoist insurrection began. A Maoist party called the United People's Front (UPF) had contested the 1991 general election, winning nine seats. A rift subsequently occurred in the UPF leadership, leading to the establishment of the United People's Front (Bhattarai) under the leadership of Dr Baburam Bhattarai. This party combined with the Communist Party of Nepal (Maoist) founded by Pushpa Kamal Dahal, commonly known as "Prachanda", and in February 1996 insurgent activity started under the leadership of Dr Bhattarai and Mr Prachand, who declared a "People's War".

The immediate reason given by the Maoists for this declaration was the failure of the NCP Government of Sher Bahadur Deuba to respond to a memorandum listing 40 demands, including the abolition of royal privileges, the promulgation of a new constitution and abrogation of the Mahakali treaty regulating relations between Nepal and India relating to water, electricity and the common border. The movement attracted a degree of popular support as a reaction to rampant corruption, poverty, and the caste system.

Since February 1996 the Maoist have engaged in violent insurgency involving killing of police, public officials and ordinary civilians. The Maoists have been responsible for torture, bombings, kidnapping, extortion and intimidation. They have been active in more than 50 of the country's 75 districts, and are particularly strong in the western districts of Rolpa, Dolpa, Kailali, Kalikot, Jajarkot, Jumla and Accham, and in the eastern district of Sindhuli. The Maoists have killed scores of members of other political parties. They are said to have made teachers one of their primary targets and to have killed 28 members of the Nepal Teachers Association. In some districts the Maoists have effectively supplanted the authority of the central Government, which is able to mount, armed incursions but does not have firm control of territory outside a few command centres. In these districts buildings symbolising central government authority, including courts, have often been destroyed by the Maoists, who operate instead their own so-called "People's Courts".

In May 1999 the NCP gained a Parliamentary majority in the general election, raising the prospects for renewed political stability. However the previous pattern of short-lived governments continued, under Krishna Prasad Bhattarai from 31 May 1999 to 17 March 2000; G.P. Koirala from

20 March 2000 to 19 July 2001; and Sher Bahadur Deuba from 23 July 2001 to October 2002.

On 1 June 2001 Crown Prince Dipendra shot and killed nine members of the Royal Family including his father King Birendra, his mother Queen Aishwarya, and a younger brother of the King, before shooting himself. It was alleged that he did so because he was angered by his mother's disapproval of his choice of bride. Some suspected a political motive, but no firm evidence was adduced to support this hypothesis. The King's surviving brother Gyanendra succeeded to the throne. Gyanendra's accession to the throne was greeted with serious public unrest. In an attempt to assuage this unrest a commission of inquiry was set up into King Birendra's death. The matter remains controversial and sensitive.

In the latter part of 2001 peace talks were held between the Government and the Maoist rebels. The talks and the accompanying cease-fire broke down on 23 November 2001, followed by an attack by the Maoists on police and Army posts in 42 districts. The authorities responded on 26 November by declaring a nation-wide emergency and for the first time deploying the Army, rather than the police. (In February 2002 the Parliament extended the state of emergency) The King also announced the Terrorism and Disruptive Activities Ordinance 2001 (TADO) making legal provision to control terrorist and disruptive activities and provide improved public security. This ordinance was superseded by the similar Terrorist and Disruptive Activities (Control and Punishment) Act 2002 passed by Parliament on 4 April 2002.

The promulgation of a state of emergency resulted in suspension of many fundamental rights, such as freedom of expression and speech, freedom of assembly, freedom against arbitrary detention, right to privacy and right to constitutional remedies. Habeas corpus was preserved. The police were granted, and employed, wide powers to arrest any person suspected of being involved in terrorist activity. The Maoists were declared a terrorist organisation under the TADO, and anyone thought to be a Maoist sympathiser was likely to be detained as a terrorist. At an all-party meeting on 17 May 2002, the political parties opposed a decision of the prime minister to further extend the state of emergency. On 22 May, the Prime Minister asked the King to dissolve the Parliament and call elections. The state of emergency lapsed on 28 August 2002. However violence showed no sign of decreasing and may have increased after that date, with reports of hundreds being killed in clashes between the Army and actual or suspected Maoists.

More than 5000 people were arrested in the period of the state of emergency, including lawyers, teachers, journalists and human rights activists. During the emergency period, the Government also instituted some cosmetic measures aimed at addressing human rights concerns, such as establishing a National Women's Commission (March 2002), a human rights cell in the Army (July 2002) and a Dalit Commission mandated to improve the conditions among the "lower" caste communities (August 2002).

In October 2002 the King dissolved Parliament and dismissed Sher Bahadur Deuba, on grounds of "incompetence" and replaced him with Lokendra Bahadur Chand, who had previously been Prime Minister under the Panchayat system. A subsequent court challenge to the dissolution of Parliament led to a finding that the action was constitutional. Grave doubts continue however as to the constitutionality of the dismissal of Prime Minister Deuba.

A series of bloody encounters between the armed forces and the Maoists during 2002, during which neither side appeared to gain a clear military advantage, was followed on 26 January 2003, during the present mission, by the assassination in Kathmandu of the Inspector General of the Armed Police.

At this grave juncture a cease-fire and talks between the Government and the Maoists were unexpectedly announced on 29 January 2003. The talks were on-going as this report was in preparation, led by Social Development Minister Mahendra Singh Pun for the Government and Baburam Bhattarai for the Maoists. The Government agreed to withdraw international police warrants and awards for the arrest of the Maoists and to cease designating them as terrorist. On 13 March 2003 a code of conduct was agreed. Both parties undertook "to cease from armed and provocative activities" and also agreed on fair access to the state run media. The Government also agreed to the release of Maoists detainees. The Maoists, in turn, appeared to be softening their demand that the monarchy be abolished.

As this report was being prepared, two sessions of negotiations had been held, but significant progress appeared elusive. The major political parties declined to engage in the process and insisted that the Government as presently constituted was illegitimate and not competent to negotiate the country's future. A dispute has apparently arisen between the Government and Maoists after the Government appeared to renege on an agreement according to which a number of Maoist leaders were to have been released

from detention and the Army was to be confined to within five kilometres of their barracks.

Regarding negotiations on the human rights concerns, a draft agreement is to be tabled for consideration, which will commit both the Government and Maoists to agree to guarantee protection for a number of enumerated rights. The agreement envisions giving the National Human Rights Commission the pre-eminent role in monitoring compliance with the agreement through five regional offices that are to be established.

III. THE CONSTITUTION AND LEGAL SYSTEM

A. The Constitution

Nepal did not have a written constitution until 1948, at which time a constitution was promulgated by the last Rana Prime Minister that did not substantially challenge the prevailing Rana order. A democratic constitution based on the British Westminster model was adopted in 1959 and was subsequently replaced by King Mahendra's "Panchayat" Constitution in 1962. Both the 1959 and 1962 constitutions enumerated fundamental rights to be protected, but neither instrument provided for any mechanism for enforcing those rights. The rights provisions were therefore generally ineffective and ignored.

Nepal's present Constitution came into effect on 9 November 1990 (2047 by the Nepal calendar), a few months after the "Jana Andolan" revolution. It mandates a democratic Government with separation of powers, a constitutional monarchy, and constitutionally guaranteed protection of human rights. Most significantly, for the first time in Nepal's history, it provides expressly for constitutional review of laws to ensure their compatibility with the Constitution. Under article 88, "any citizen of Nepal shall be entitled to file a petition in the Supreme Court for the declaration of any Nepal law or any part thereof as void due to its inconsistency with the Constitution on grounds of unreasonable restriction imposed in the enjoyment of fundamental rights conferred by the Constitution or on any other ground." The Supreme Court has jurisdiction, if it finds the impugned law to be inconsistent with the provisions of the Constitution, to declare it void and inapplicable either *ab initio* or from the date of its decision. This provision of the Constitution is in active use and, in a number of cases, parts of laws have been struck down as unconstitutional, a notable example being part of the citizenship law in the case of *Meera Gurung v. Immigration Department* (1995).

Turning to the substantive provisions, the Constitution recognises religious diversity, but entrenches Hinduism as the national religion. Article 2 provides that the Nation consists of the people of Nepal "being united by a bond of common aspirations and faith in the independence and integrity of the nation, irrespective of religion, race, caste or tribe." However, article 4 states that "Nepal is a multi-ethnic, multi-lingual, democratic, independent, indivisible, sovereign, Hindu and a constitutional Monarchical Kingdom." Article 6 provides that Nepali in the Devanagari script shall be the official language, but provides that all languages spoken as mother tongue in various parts of Nepal are the languages of the nation.

Part II concerns citizenship and provides that citizenship is passed by patrilineal descent, or by naturalisation based on 15 years residence and knowledge of Nepali, or by two years residence in the case of a descendant of a citizen of Nepal. A child born in Nepal of unknown parentage is deemed to be a son of a citizen of Nepal. This anachronistic provision as to passage of citizenship by patrilineal descent only is patently gender discriminatory and in breach of Nepal's international obligations under the International Covenant on Civil and Political Rights and the Convention on the Elimination of Discrimination against Women. We also consider that it provides a constitutional underpinning and reinforcement to pervasive discriminatory attitudes towards women in Nepali society. The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) has similar reservations in this regard. In 1994, "the Committee express[ed] its concern over the situation of women who, despite some advances, continue to be de jure or de facto the object of discrimination as regards marriage, inheritance, transmission of citizenship to children...." These concerns were repeated in CEDAW's 1999 report.

Part III, containing Articles 11 to 23, guarantees fundamental rights.

Article 11, entitled Right to Equality, provides that all citizens shall be equal before the law, and no person shall be denied equal protection of laws. No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race, sex, caste, tribe or ideology or any of them. The state shall not discriminate against citizens on grounds of religion, race, sex, caste, or ideology. Special provisions may be made by law to protect or promote the interests of women, children, aged or disabled persons or those who are economically or socially backward. No person shall be discriminated against on the basis of caste as an untouchable or be denied access to any public place or be deprived from the use of public utilities, and any act in violation of this provision shall be punishable by law.

It is obvious from even the most cursory acquaintance with Nepal that while Article 11 may reflect an official aspiration, it is widely breached and that discrimination on grounds of caste and sex form a pervasive feature of Nepali life. CEDAW noted in its 1999 observations that "the Government has not taken sufficient action...to amend prevailing discriminatory laws" and it was concerned by the retrograde views of the Supreme Court, which had stated "that if any laws do not conform with culture and tradition, society will be disrupted."

Despite the express constitutional prohibition on caste discrimination, the mission received information according to which in neither 2001 nor 2002 were there any Dalits ("untouchables") employed in positions traditionally closed to them, such messengers or tea servers, in any Government office in Kathmandu. Even in respect of positions not closed, there is a general practice of employment discrimination towards Dalits. Likewise, although the Constitution guarantees equal remuneration, there is no equal pay legislation and equal pay is the exception not the rule. The ICJ hopes that the establishment of a Governmental Dalit Commission, expressly charged with improving the status of Dalits, and the National Women's Commission will go some way toward ameliorating such discrimination and the debilitating effects it has on affected groups.

In its 2001 observations on the periodic report of Nepal to the Convention on the Elimination of all forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination (CERD) "note[d] that the non-discrimination clauses in article 11 of the Constitution do not cover all the grounds provided for in articles 2 and 26 of the Covenant. It is particularly disturbed by the fact that the principle of non-discrimination and equality of rights suffers serious violations in practice and deplores inadequacies in the implementation of the prohibition of the system of castes. The persistence of practices of debt bondage, trafficking in women, child labour, and imprisonment on the ground of inability to fulfil a contractual liability constitute clear violations of several provisions of the Covenant. The Committee remains concerned at the existence of caste-based discrimination, and the denial which this system imposes on some segments of the population of the enjoyment of the rights enshrined in the Convention."

Article 12 guarantees freedom of thought and expression, freedom of assembly, freedom to form unions and associations, freedom to move and reside in any part of Nepal, and freedom of profession or occupation. Article 13 prohibits censorship. The difficulties relating to press freedom are discussed in Chapter 4 below.

Article 14 provides for rights regarding criminal justice. It prohibits retrospective criminalisation or penalisation; double jeopardy, self-incrimination as well as torture or cruel, inhuman or degrading treatment of those in custody. It provides that no person who is arrested shall be detained in custody without being informed at the earliest of the grounds of such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice. Our inquiries indicate that this provision is widely ignored.

We were informed by certain Government officials that there was little or no torture in police custody in Nepal and informed by practising lawyers and NGOs that such torture was commonplace. Our conclusion is that torture is indeed widespread. (See following chapter 4 on serious breaches of human rights.)

Article 15 prohibits preventive detention without sufficient grounds and provides that anyone so detained shall be entitled to compensation. Article 16 provides for a general right for any person to "demand and receive information on any matter of public importance. Article 17 guarantees the right to private property and no expropriation without compensation. Article 18 guarantees to every community in Nepal the right to conserve and promote its language script and culture, and to provide mother tongue primary education. Article 19 guarantees freedom of religion. Article 20 prohibits slavery or trafficking in human beings. Article 21 prohibits exile. Article 22, entitled Right to Privacy, provides that the person, house, property, documents, correspondence or information belonging to any person are inviolable "except in circumstances laid down by law".

Article 23 provides the right to proceed in accordance with Article 88 (see above) for the enforcement of the rights guaranteed in Part III of the Constitution.

This part of the constitution thus guarantees most of the internationally recognized civil and political rights. Moreover, although some such rights are not directly constitutionally guaranteed, such as a general right to a fair trial in all its aspects, Nepal has ratified the six principal international human rights instruments. (However, it has as yet failed to ratify the Statute of the International Criminal Court.) Under Nepali law, such international treaties, once ratified, are directly applicable as part of domestic law without the need for any municipal legislation (Nepal Treaties Act, Section 9). On paper, therefore, Nepal has a comprehensive code of human rights protection. However, as indicated in the examples given above, many of these rights clearly have failed to be safeguarded in practice.

Part IV of the Constitution contains the "Directive Principles of the State" (Article 25) and State Policies (Article 26). The principles contain a general commitment to promoting the welfare of the population, economic development, justice, participation in governance, and international comity. The 16 policies are more specific, and include protection of the environment, promotion of opportunities for women, raising the standard of living of "backward" communities, accelerating rural development, providing free legal aid, and working for peace in international relations.

Part V concerns the monarchy. Article 27 states that "His Majesty is the symbol of the Nepalese nation and the unity of the Nepalese people. His Majesty shall abide by and protect this Constitution for the best interest and progress of the people of Nepal." Article 31 exempts the King from the jurisdiction of the courts, while making it clear that this does not exempt his Government or any public official. Part VI provides for the appointment of a Raj Parishad or Council of State by the King, to meet if the King dies or becomes incapacitated.

Part VII deals with the executive. Article 35 provides that the executive power shall be vested in the King and the Council of Ministers and that the powers of the King are to be exercised by and with the advice and consent of the Council of Ministers submitted through the Prime Minister, except those specifically mentioned as to be exercised by him personally or in some other manner. Article 36 provides that the King shall appoint as Prime Minister the leader of the Parliamentary party having a majority in the House of Representatives and that the Prime Minister shall be responsible to the House of Representatives.

Part VIII contains prescriptions regarding the legislature and provides for a bicameral legislature. The House of Representatives consists of 205 members elected by universal franchise from single member geographical constituencies, with the ratio of seats allocated to each district intended to reflect the population. The maximum term of the House of Representatives is five years. The National Assembly consists of 60 members, 10 of whom are nominated by the King from among distinguished persons who have rendered eminent service in different fields of national life; 35, including at least three women, elected by the House of Representatives by single transferable vote proportional representation (STV); and 15 members elected by STV by an electoral college consisting of chairmen and deputy chairmen of village, town and district local authorities. Members of Parliament are required to be aged over 25 for the House of Representatives and over 35 for the National Assembly. Ministers may take part in the proceedings of either House but only vote in the House of which they are

members. Article 62 provides free speech protection for Parliamentary debate, but makes it clear that there is no Parliamentary immunity against arrest on a criminal charge. Part IX of the Constitution sets out the legislative procedure for passage of bills. Part X deals with finance, and prohibits the levying of taxes except in accordance with law.

Part XI concerns the judiciary. Article 84 provides that the judicial power shall be exercised in accordance with the provisions of the Constitution, the laws for the time being in force, and the established principles of justice. Article 85 provides that the courts shall consist of the Supreme Court, Appellate Courts and District Courts, as well as such other courts and tribunals as may be established from time to time. There is a prohibition on a court or tribunal being constituted for the purpose of hearing a particular case. The articles which follow contain detailed provisions as to the appointment, qualifications and conditions of service of judges. Judges are appointed on the recommendation of a Judicial Services Commission (Article 94) consisting of the Chief Justice, the Minister of Justice, the senior most judge of the Supreme Court, the chairman of the Public Service Commission, and the Attorney-General. All judges have security of tenure. A Supreme Court judge may only be removed by a two-thirds resolution of the House of Representatives. A judge of the appellate or district court may only be removed by the Judicial Council provided for by Article 93, consisting of the Chief Justice, Minister of Justice, two most senior judges of the Supreme Court, and one distinguished jurist to be nominated by the King. The remuneration, privileges and conditions of services of the judges may not be altered to the detriment of the incumbent (Articles 86 and 91).

Part XII of the Constitution establishes the Commission on the Investigation of Abuse of Authority (CIAA) to investigate both corruption and other forms of abuse of authority by persons holding public office. One unusual aspect of the CIAA's remit, contained in the Commission on the Abuse of Authority Act, 1991, is that it does not encompass the judiciary. A bill to extend its remit to the judiciary was withdrawn in Parliament in 2001 as a result of opposition from the judiciary. The judiciary have expressed concern that its independence might be threatened by such an investigative power. One solution which has been canvassed is that the CIAA should have power to mount such investigations, but only after prior approval from the Judicial Council (see further chapter on the judiciary below).

Other parts of the Constitution provide for the Public Service Commission, the Electoral Commission, and the office of the Attorney-General, who is the Chief Legal Adviser to the Government.

Part XVIII contains only Article 115, which provides that if a situation of grave emergency exists due to war or external aggression or armed revolt or extreme economic depression, whereby the sovereignty and integrity of the Kingdom of Nepal or the security of any part of the country are threatened, the King may by proclamation declare or order a state of emergency in all or part of the kingdom. The emergency must be approved by Parliament within three months and lapses in any event after six months. This power was invoked by the Government in November 2001 after the first peace talks with the Maoists collapsed.

Article 116 (art XIX) makes provision for amendment to the Constitution by a two- thirds majority of both Houses of Parliament.

Of the remaining articles, the most relevant to our concerns are articles 118 and 119, which define the constitutional position of the Army. The King deploys the Army on the advice of the National Defence Council. The National Defence Council consists of the Prime Minister, Minister of Defence and the commander in chief of the Army. The King is the Supreme Commander of the Army and appoints the Commander in Chief.

Under Article 122 the King has a general power to commute the sentence of any court.

We note that a key demand of the Maoist insurgents is for revision of the Constitution. While revision of the constitution in aspects such as the monarchical system of government are matters beyond the terms of reference of the mission, we are concerned that there should be no changes which might weaken the protection of democracy, the rule of law, and fundamental human rights for which the existing Constitution provides. As already indicated, we consider that the key problem for Nepal is how to ensure that the rights protection set out in the existing Constitution is fully implemented, which is a matter of bringing other laws and administrative practices into conformity with the constitutional provisions which already exist. The principal changes which we regard as desirable to the constitution itself are (1) the removal of the discrimination of women in relation to nationality contained in Article 11 and (2) a clearer statement of the subordination of the Army to the democratically elected government (see chapter 5).

We consider that there is an urgent need for better understanding of the Constitution in the community generally as well as among Government officials including those of high rank. We were shocked to be told by the Home Minister himself that a way around any unforeseen problems with

the Constitution might be for the King to use his power under Article 127. This power provides that "If any difficulty arises in bringing this Constitution into force His Majesty may issue necessary orders to remove these difficulties". This provision is clearly not relevant to a situation 12 years after the constitution came into force and the suggestion shows a worrying lack of commitment to constitutional norms.

B. The Legal System

Nepal's legal system is essentially a common-law system influenced by the common law system of India, but with many traditional Hindu elements still remaining reflecting Nepal's earlier history.

The first Nepali legal code was the Manab Naya Sastra, introduced by King Jayasthiti Malla in the late 14th century. Drafted by Orthodox Brahmins, it was an attempt to unify and codify Nepalese social practices. The code was largely a product of traditional Hindu values, with personal rights and obligations being linked to sex and caste. Women had no independent legal status, but rather were always under the guardianship of a male relative. There were strict penalties for breaches of caste rules, with death prescribed for some inter-caste marriages.

The first attempt at a legal code in the modern sense was the Muluki Ain (General Code of Law of the Land), promulgated by the first Rana ruler, Jung Bahadur, in 1846. The Muluki Ain is said to have been inspired by the Code Napoleon in Europe. At the time it was seen as a progressive measure, as, for example, it abolished the practice of sati, whereby women were required or pressured to immolate themselves on their husband's funeral pyre. However, it continued to reflect a traditional Hindu approach to the law in most respects, with caste playing an important part in determining an individual's rights and penalties, and women having minimal rights.

The first modern code was the New Muluki Ain promulgated in 1963. This legislation replaced Jung Bahadur Rana's code and attempted to introduce a genuine secular legal system. It remains a fundamental part of the Nepali legal system. In its structure, however, it is not intended to be a permanent comprehensive code, but is subject to statutory replacement and/or qualification. Thus, where a statute has been passed by Parliament on the same subject as a part of the New Muluki Ain and makes different legal provisions from that part of the New Muluki Ain those provisions in the New Muluki Ain will be regarded as superseded and no longer good law.

Just before the enactment of the New Muluki Ain, an important statute introduced modern common-law concepts into Nepali Law. The State Cases Act 1961 provides for cases to be investigated and prosecuted by the state as a party, doing away with the previous system under which a person acting as an informer was required to provide the evidence of a defendant's guilt. It introduced the adversarial system of justice in place of the previous inquisitorial system, whereby the judge investigated the case.

A further reform of the legal system was the enactment of the Evidence Act 1974. It lays down rules for the admissibility of confessions, providing that they must have been obtained while the subject was conscious, understanding what s/he had said, and obtained without torture. The Act expressly obliges the prosecution to prove the case beyond reasonable doubt. It also introduced cross-examination of witnesses. Unfortunately, a third major reform planned at this time, the introduction of a criminal code, never went beyond a draft.

The legal system entered a new era with the start of democratic rule and the adoption of a democratic, law-based constitution in 1990. A new State Cases Act 1993 was enacted which further separated the investigation and prosecution functions by delineating the responsibilities of the police and of the prosecution. The provision of the right to challenge laws on grounds of unconstitutionality and the power of the Supreme Court to issue orders of mandamus, certiorari and habeas corpus ensure that its decisions are effectively binding on the lower courts, which in practice was not the case before 1990. The Bar Council Act of 1993 made provision for a modern fully independent legal profession. However, much of the legal system remains unreformed, leaving a patchwork of law in which justice and individual rights are often ignored. This is particularly so in relation to the police and their role in investigating crime, as discussed in Chapter Five.

The court system consists of the Supreme Court, 18 Appellate Courts, and 75 District Courts (one for each district). There is no distinction between criminal and civil courts and no jury trial. Large numbers of relatively minor cases are tried not by the Courts, but by the Chief District Officer, an administrative official who is also empowered to try cases under many individual statutes and may pass sentences of up to six months imprisonment.

The system of trial of minor offences by a District Officer is a wholly anachronistic and unacceptable colonial style system deriving its origins from British India and other parts of the former British Empire. It is a blatant breach of the principal of separation of powers underlying the

Constitution of Nepal. It also contravenes the fair trial provisions of the International Covenant on Civil and Political Rights, Article 14 of which states that in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair an public hearing by a competent, independent and impartial tribunal established by law. Not only is the Chief District Officer not an independent tribunal, being the head of the executive in the district, but the power of adjudication in criminal matters also makes the District Officer an over-powerful figure in his district with scope for abusing his power by harassing opponents with unwarranted prosecutions and convictions. We strongly recommend that this system be abolished and replaced by a system of magistrates' courts for minor criminal offences.

Studies of the operation of the legal system have been carried out by the non-governmental Centre for Legal Research and Resource Development (CeLLRRD) in 1999 and 2001, based on extensive surveys and analysis of the available statistics. These paint a depressing picture of gross inefficiency, brutality, corruption, and ignorance. The criminal investigation system is overwhelmingly based on extraction of confessions, with the majority of persons arrested being tortured in custody to extract confessions. The ability of the police to investigate crime by other methods such as interviewing of witnesses who are not in custody, or collection of forensic evidence, is minimal. Delays with repeated adjournments are the norm in criminal trials as well as civil cases. The ability of judges at first instance to evaluate evidence is often lacking. Only about 60 per cent of prosecutions result in a conviction, a low rate which reflects the absence of any prior screening by prosecutors before cases are brought to court. There is no legal provision for police bail, and bail granted by judges is usually linked to the defendant entering into a bond, which effectively limits bail to the better-off citizens. There is no legal provision for courts to sit in camera when hearing sensitive private matters such as matrimonial cases. Such cases are on the contrary treated as public entertainment. Corruption among police and court clerks is widespread. It is less common among judges, but does occur in significant proportions. There appears to be a gross overloading of the system with civil cases, with no mechanism to prevent minor civil cases being appealed successively up to the Supreme Court.

The system does however have some strengths and potential for further improvement. At the higher level the judiciary has established a reputation for independence, and has struck down several laws and actions of Government Departments as unconstitutional. Our findings as to the operation of the courts are considered in more detail in Chapter 6.

IV. HUMAN RIGHTS CONCERNS

A. Arbitrary Arrest and Detention

The difficulties in respect of the administration of justice in Nepal begin at the point of the first contact of the individual with officialdom. Indeed, in the great majority of cases of detention that came to the notice of the mission, no warrant for arrest had been produced, and no reason had been given to detainees or their families for the arrest. Contrary to the dictates of Nepalese legislation (State Cases Act), arrests are made without warrant before substantial evidence is accrued connecting the suspect with the crime. The purpose of this practice is to facilitate the primary means used by police to gather evidence, custodial interrogation.

In most instances involving arrest by police, detainees had been held for 7 to 14 days or more without any opportunity to see a lawyer, contact family members, or appear before a court. During the initial period of detention, detainees typically had been beaten or otherwise ill-treated, and they had been provided little or no food, other than scraps given by other prisoners. Police officials were reported generally to avoid recording the date of arrest until the day before detainees have been taken before the court, so as to convey the impression that such persons had been produced within the 24 hours prescribed by the Constitution (article 14 (6)).

Under Nepalese law, the military authorities are not authorised to hold persons in detention. If it is necessary to detain a person during the course of military engagement, the Army must transfer the detainee to the custody of civilian authority within 24 hours. Certainly there may arise exceptional instances for which the 24-hour rule is difficult to apply strictly, such as in respect of operations that take place far from civilian police outposts. However, hundreds of cases have been reported of the Army holding persons in barracks for periods of weeks or months. During these periods of detention, the victims usually undergo interrogation under torture. The detainees are held in unacknowledged detention, beyond any judicial supervision and without notification to the families of detainees. Family members or lawyers who may attempt to visit a person detained in military barracks are invariably denied access.

Although initially reluctant to admit to these unlawful cases of detention, both military and civilian Government officials generally conceded to the mission team that the Army was holding a number of persons. Army officials claimed to have been granted authorisation for this practice from the highest levels of Government, while the Prime Minister himself denied

having so authorised the Army to act. Military and other government officials tended to maintain that the practice was a necessary consequence of fighting a difficult conflict against ruthless opponents. However, these officials invariably failed to explain why the already broad allowances provided under the Terrorism and Destructive (Control and Punishment) Act 2002 (TADA) were not sufficient to preclude resort to unlawful means of detention.
Under TADA, a "Security Officer", meaning the Chief District Officer (CDO), but in theory "any Gazetted Officer-employee of H.M.Government designated by ... notification in Nepal Gazette", may arrest on "adequate and reasonable suspicion ... *and furnish information of such arrests along with reasons thereof.*" The mission saw no evidence that Army officers had been designated as "Security Officer" in the Gazette and was in informed by all sources that the appropriate Security Officer was always the CDO. Certainly the Army invariably gave no information about detentions, including the reasons for arrest, to the detainees or their lawyers.

Given that the Army is not authorised to make arrests, it came as no surprise to the mission to discover that there was no budget for food, health or other essential maintenance. Detainees therefore are often forced to subsist on occasional rations shared with them by visitors or sympathetic officers. Overall living conditions are even worse than in police stations or prisons.

The following case that came to the attention of the Mission typifies the pattern of arbitrary detention obtaining in Nepal:

> M.R., a 17 year-old labourer living in Kathmandu, was arrested on 7 July 2002 by seven police officials in civilian dress, who came to his door at 10 p.m. while he was sleeping and asked for his identity card. M.R. told the officer that he did not have the identification document. Although not holding one's identification documents is not an offence in Nepal, the police brought him, along with his brother and his niece, to Hanuman Dhoka. The next day he was moved to the interrogation section and asked about the place where he kept stolen goods. When he proclaimed his innocence, the police subjected him to torture, which included beatings with a plastic pipe and bamboo stick on his back, legs and buttocks. His thighs were rolled with a plastic pipe. That day he was beaten for about one hour. He was continuously beaten on the first three days for about 15-30 minutes each day, and, thereafter, every two to three days over some 15-20 days. Police kicked him with boots, and prodded his stomach with a stick. Detainees were forced to slap each other and when they refused, the police continued to beat them. M.R. finally was able receive a visit by a lawyer on 1 August. He reported he had pain in his wounds for about 20 days, felt giddiness, pain on his right leg and heart, and he could not sleep at night because of the mosquito bites. He was brought to court 20 days after his arrest, and only then was

he provided with money for food. His statement was forcefully taken in the police station, but the manner in which his statement was produced was not addressed in court, and the judge failed to ask him about torture.

Lack of effective remedy

Very few cases of arbitrary detention reach the higher courts on *habeas corpus* writs or otherwise. A large proportion of the *habeas corpus* orders that are issued are ignored by the police or other authorities. In respect of some cases, there is a manifest lack of will on the part the Government to ensure release. Indeed, in such instances as when a prisoner is held by the Army, the civilian authorities seem to consider themselves powerless to act. The courts lack enforcement capacity, and repeated instances of disregard or delay in implementation of court release orders have served largely to erode the authority of the judiciary in Nepal.

In more than a few cases, detainees have been released pursuant to a *habeas corpus* order, only to be immediately re-arrested, again usually without warrant or stated reason. This practice clearly contravenes international standards, which mandate not only the availability of a remedy against unlawful detention, but also that such remedy be effective. Another frequently reported practice is for the Chief District Officer to provide police officers with pre-signed detention orders authorising a preventive detention under TADA. These orders contain blank spaces, which police subsequently fill in with the names of persons whom they detain. Thus, while only the CDO is authorised to order preventive detentions, police officials instead appear effectively to be doing so.

Lack of Access to Counsel

Despite constitutional guarantees (Article 14), there is in practice no right to a lawyer while on remand or under interrogation. In any event, the limited legal aid provisions make enjoyment of this right impracticable for the great majority of defendants, so that there are hundreds of people in custody without access to counsel. One reliable study found that 71 per cent of detainees do not even know of their legal right to a lawyer. Such legal aid provisions as exist involve bureaucratic application procedures, the completion of which is practically impossible for most detainees in police custody. Even when detainees are provided legal representation, there is usually no opportunity for a defendant to consult with the lawyer before trial. From the time of arrest to the commencement of court proceedings the vast majority of detainees will not have spoken to any lawyer. When consultations between detainees and their lawyers eventually occur, these

conversations are usually overheard by the police. Around half of cases are said to proceed through the courts without the detainee being represented by counsel.

B. Torture

The practice of torture by the police, armed police forces and Army is widespread in Nepal. Torture is used to extract information or to obtain a "confession", to dissuade a person from exercising lawful but unwelcome activities (*e.g.*, to prevent lawyers from representing Maoists or acting as a human rights defender), or simply to impress the prisoner with the power of his captors. Torture is usually carried out in such a manner so as not to leave signs. Sexual torture is often used on men and women.

Under the State Cases Act (1992), interrogation must be carried out by the Prosecutors, who are required to witness any statements. In practice, most questioning is done by poorly trained police officers. Under the Evidence Act 1974, no confessions obtained by force should be used, but it is estimated that some 60 per cent of convictions are obtained solely on the basis of a confession. It was found by one reliable study that 50 per cent of statements are made against the free will of the detainee. Further, only around 12 percent of persons making statements were allowed to read the statements prior to signing them. Some 21 percent of detainees were in any event illiterate.

Normally, no food is made available to a detainee appearing in court, even when in police custody. A detainee must be brought before a judicial authority within 24 hours, but in practice the average time between an arrest and a first court appearance is one week. Courts very rarely inquire of persons before them how long they have been detained or whether they have been tortured or otherwise ill-treated. In cases where such inquiries are made, detainees frequently suffer reprisals for having revealed information regarding their treatment.

The ICJ received allegations of torture in numerous cases. The cases described below serve as examples:

> Lal Bahadur Rokaya left his parents' farm in the mountains at Dolpo at the age of 18 after a group of Maoists insurgents had beaten him for refusing to join their movement. He thereafter went to Nepalgunj and enrolled as a student to obtain his secondary school certificate and train as a teacher. As a young man from a Maoist district, he was apparently viewed by the authorities with suspicion and was detained by armed police in Nepalgunj in December 2001, along with three friends. The

police handcuffed and blindfolded him and subjected him to torture every day for eight months. The methods of torture including beatings to his feet with rubber hoses and smearing of his wounds with chilli powder. Eventually his health deteriorated to such an extent that the authorities feared he would die in custody. He was therefore transferred to hospital in a convulsive state, paralysed on his left side. He was diagnosed with cerebral tuberculosis.

J.L., a 20-year old carpet weaver from Dang, was detained by police officials on 8 May 2002. The police did not inform him of the reasons for his arrest. He was taken into custody at Hanuman Dhoka, where he was asked to provide information about a theft case. When he failed to provide the information sought, the police beat him with a plastic pipe and bamboo stick all over his body. The police tied his hands and legs with bamboo and beat him for two hours a day for eight days. They also hung him from the ceiling and beat him with a stick on the soles of his feet and his back for an hour, leaving bruises and contusions all over his body. After 11 days he was taken to court. The judge failed to ask him about his treatment. He was provided with money for food only after being taken to court. (In Nepal detainees are usually required to buy their own food.) There was not enough room to sleep, as he had to share a cell with 15 other detainees.

In June 2001 X, a lawyer, was arrested at his office as he was about to go to court by three civilians who identified themselves as members of the Security Forces. He was taken by private taxi (after changing taxi twice), blindfolded, to an Army barracks. There he was held for 15 days with his hands in handcuffs behind his back and given one meal a day. The meals were the only occasion when his blindfold and handcuffs were removed. He was tortured, including by being punched on his body, kicked with boots, beaten with sticks, and having his fingernails pulled off. On one occasion, he was nearly drowned in a pond. After two days he fell unconscious. He was thereafter hung by his feet, his skin was pinched and pulled and salt rubbed in his wounds. He was questioned as to his professional position, including his defence of persons held in Preventive Detention, his representation of Maoists and his human rights advocacy. After 15 days he was taken to a police station and his handcuffs and blindfold removed. He was denied access to medical care. When his family made legal petitions, the police told the Supreme Court they did not know him. Eventually, after numerous interventions by colleagues and a Bar official, he was released, having spent over three months in detention. He does not dare bring a complaint for fear of further reprisals.

C. Disappearances

Disappeared persons generally fall into two categories. In some instances, civilians, military personnel or Maoist insurgents will have been killed in the course of military or paramilitary operations. Religious customs dictate that bodies should be cremated, and this procedure may take place before the body has been identified.

The vast majority of cases of disappeared persons are those held in unacknowledged detention. Some of these persons are eventually released and others remain in detention. An indeterminate number of the disappeared are believed to have been extra-judicially executed. The process of informing a detainee's family of an arrest may sometimes be justifiably delayed in remote areas, where communication is difficult. Nonetheless, record-keeping regarding detainees appears to be arbitrary. In cases of Army detention, it is unclear whether any record-keeping system exists. This negligence is unsurprising, given that the Army is not legally or formally authorised to detain persons. Yet even the police do not appear to have a central register of all prisoners, so that an officer may in good faith erroneously tell the court or relatives that they do not hold a person. There is very little communication between the Army and the police until the Army hand a prisoner over to police custody, often weeks after the arrest.

The Working Group on Enforced and Involuntary Disappearance of the UN Commission on Human Rights received more cases from Nepal than any other country in 2002. In its report to the Commission of 21 January 2003, the Working Group said that it was "deeply concerned that disappearances have continued in such alarming numbers during 2002."

The following case brought to the mission's attention is representative of the situation of the disappeared in Nepal:

> Bipin Bhandari is the 23-year old son of a lawyer, member of the Executive Committee of the Nepal Bar Association. He is a student and was elected as joint secretary of the Student Union. On 27 April 2002 security forces, including DSP Vikram Singh Thapa, came armed to his father's house to ask about Bipin and his whereabouts. They stayed for a number of hours, searched the house, threatened the family, and finally left. Bipin did not return home. On 17 June his father heard on the radio that he had been arrested with four other students, including two girls. He applied to the National Human Rights Commission (N.H.R.C.) and made representations to the Red Cross and human rights organisations. Upon petition, the Supreme Court asked the NHRC on three occasions to investigate the matter. The ICJ mission has made inquiries to the Army Human Rights Cell, the police and the Home Minister, but no reply has been received to date. The two girls have been released to police custody, but the whereabouts of the three men remain unknown.

There are a large number of unresolved cases of disappearances that are longstanding.

Pravakar Subedi, an engineering student and member of the All Nepal National Free Student Union, disappeared in 1993 after he had gone to buy medicines from a nearby pharmacy. He was not at any of the local hospitals and did not appear on the list of those who died at a student protest in June that year. His brother requested the police for news, but they did not respond. A local newspaper subsequently published his photograph in accompaniment of an article about police cruelty. It was evident that he had been arrested, detained, and injured, but it was not clear whether or not he remained alive. His brother applied for habeas corpus, producing the photograph that he had identified. The photograph was sent together with earlier ones to a laboratory, but they reported that it was slightly overlapped and the two could not be compared. The Police asserted that he had not been arrested or detained and applied to quash the petition. The Supreme Court, citing the problems with the photograph and an alleged discrepancy as to his age, duly quashed it. His family has had no further remedy.

D. Extra-judicial Executions

The mission received information, according to which a large number of persons had been shot by the police or the Army, in some cases deliberately. Some of these cases involve persons caught in crossfire in the conflict between the Army or security forces and the Maoists, but in a large number instances cases the killings have been wilful. Investigations into killings are not generally carried out and prosecutions for unlawful killings are rare.

During its meetings with the human rights cells of the Army and Armed Forces police, the mission attempted to gain information regarding the rules of engagement in force, but none was forthcoming. Indeed, after initially promising to share such rules with the mission, the representative of the Armed Forces Police later conceded that no such rules existed. While it was clear that some rudimentary instruction in humanitarian standards was provided during the courses of training to the officer corps of the Army, there was little evidence of this instruction having been incorporated into Army practice.

The following illustrative case of unlawful execution came to the attention of the mission:

On 21 July 2002, at approximately 10:30 P.M, a group of drunken soldiers kicked down the door of Ram Kishun's house during an Army raid on the village of Jagatiyaa. The soldiers told him to put the light on while they searched the house. They found his daughter Ripa, who was aged about 12 years, dragged her outside to the village well, and shot her in the chest and elsewhere. The soldiers then forced some villagers to carry her body to the police station, where her father was allowed to collect it three days later. He was not allowed to perform funeral rites, but she was buried in a pit he dug in the forest.

E. Women and Children

Nepal is party to the UN Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women, and these conventions are directly enforceable by the courts in Nepal. In practice, however, remedies are ineffective. A victim of rape, sexual assault or trafficking who brings a complaint does so at great risk of further personal violence and social stigma. In the few cases that have been successfully brought, the defendant has generally been sentenced to a fine payable to the state, with no compensation to the victim. In the area of criminal law, certain offences such as homicide, carry higher penalties for women than for male offenders.

There are very few women police officers. Generally, victims and witnesses are not treated with respect by the police and are thus dissuaded from registering complaints. Frequently, court clerks are corrupt and will prolong cases in order to obtain bribes for expediting them. In this system, women and children tend to fall to the back of the queue.

Ms. C.K., aged 28, was arrested on 30 January 2002 with her brother at his house in Kirtipur, where she was working. She was taken to Hanuman Dhoka interrogation section, where female police asked her where a thief was hiding. When she failed to provide information, she was tied up and beaten on the floor every day for three days. Her family members were not informed of her detention. Police officers took 1900 rupees from her and refused to allow her to take a bath or change her clothes, as she could not pay for these privileges. She was asked to sign a paper and gave her fingerprint, although she is illiterate and no one read the contents to her. She believes she might have been arrested for possessing stolen goods.

Tarnum and Tabsum Maniyar, women cousins from Nepalgunj aged 16 and 18, were detained by the Army in April 2002 and taken to the Army camp at Chisapani, where they were raped. The case was thereafter publicised by Amnesty International. The Army immediately sent armed officers to visit them at their home, and pressed them to retract their complaints and deny the incident. Under severe pressure, they retracted their statement and the retraction was broadcast three times on television. The retraction seems to have been accepted by the authorities as final and no further action is likely to be taken.

On 26 September 2002, a law decriminalising abortion (Country Code (Mulki Ain) (11th Amendment)) adopted by the Lower House of the Parliament was given royal assent and entered into force. Previously, abortion had been prohibited under all circumstances without exception. Abortion is now permissible up to the 12th week of pregnancy, the 18th week in case of rape or incest, or at any time if the pregnancy poses a

danger to the life or physical or mental health of the women or would result in the birth of a disabled child.

Before the new law was approved, a study conducted by the Centre for Reproductive Law and Policy (CRLP) and the Forum for Women, Law and Development, established that 27 per cent of all women in prison were serving sentences ranging from two years to life for miscarriage/abortion/infanticide-related crimes. The study also established that when facing criminal charges for abortion, many women were subjected to beatings by police to extract "confessions" and were deprived of their right to a legal counsel despite a potential sanction of life imprisonment. In one notorious case, a woman who had just suffered a miscarriage was denied a medical examination and kept in police custody for 17 days. The same study showed that law enforcement authorities arbitrarily tended to classify spontaneous and induced miscarriages as infanticide and women were therefore subject to criminal penalties. The effects of these practices are continuing, as the newly adopted law failed to address the fate of women currently serving prison sentences for having abortions while the ban was in place. At least 60 women are said to remain in prison for such offences.

Discrimination against persons from the lower castes (Dalits) is illegal, but widely practised. Women who have managed to achieve some measure of equality are usually members of upper castes.

There is also a serious problem of trafficking of women and children, mainly to India, for the sex trade or for domestic or factory work. Traffickers tend to go to the villages and promise to introduce the children into a good household, secure them a good education and pay the parents a small sum, sometimes as little as 300 rupees (less than USD 4.00). The children are treated as chattels and sold on until someone can use them. The case was recounted to the mission of a six-year old boy, who had been forced to work in carpet weaving in India. As it is illegal to employ children, he had to work underground in a dark cellar, and had already gone blind.

F. Freedom of Expression and Freedom of the Press

Nepal has a diverse press with numerous daily papers, including several published in English, which the mission team was able to read and compare on a daily basis, and a variety of radio broadcasts. However, the press is overwhelmingly centred in Kathmandu, and its ability to report on events in remote parts of the country is limited both by distance and the lack of reporters based in those remote areas. Regrettably, many reporters are justifiably fearful for personal safety, particularly if they cover matters which

may give offence to powerful interests, whether they be the security forces, the Maoists, or local elites.

There is strong evidence that the Maoists have systematically targeted those whom they regard as "journalist spies". On 13 August 2002 the mutilated body of Nawaraj "Basant" Sharma was found in western Karnali province. Sharma was the founder and editor of the weekly newspaper *Karnali Sandesh* (Karnali Message), which since 1999 had been the only independent news medium in the far west, Nepal's poorest region. He was also president of the local branch of the Federation of Nepalese Journalists (FJN). He had previously been kidnapped and detained by a Maoist group in February, and on his release had been detained for five days on suspicion of being a Maoist spy. On 1 June 2002 armed men identified as Maoist rebels stormed his home and kidnapped him. Sharma appears to have been subjected to unspeakable cruelty before being killed, with his limbs hacked off and eyes gouged out before he was shot in the chest. The Maoists are also said to have kidnapped Dhana Bahadur Rokka Magar, a news presenter for state owned Radio Nepal's programme Kham, who was abducted from a bus in the Jaluke District in the west of the country, and Demling Lama, correspondent of Radio Nepal and of the Himalaya Times newspaper, who was abducted from his home in the Sindhupalchok district north-east of Kathmandu but escaped four days later from his captors, who had beaten him.

Journalists were particularly affected adversely by the mass arrests which formed part of the state of emergency from November 2001 to August 2002. More than 300 journalists were detained, of whom at least 10 were tortured. (The mission has details of several of these cases, but has decided not to publish their names as it is possible that this might lead to further retaliation against the individuals concerned.) An inquiry in September 2002 identified 26 journalists still held in violation of judicial procedures, in that they had not been taken before a judge and the 90-day limit on their detention had been ignored. Reporters without Borders has described Nepal as "the world's biggest prison for journalists".

As well as actual detentions, the military routinely threaten journalists, as a result of which many practise self-censorship. A representative of the British Broadcasting Corporation in Nepal told Reporters Without Borders: "Our field access is very limited. The threats from the military make us fear for the worst if we go to investigate reports of abuses. We have ended up practising a large degree of self-censorship. The Army and the Government have nothing but contempt for provincial journalists and yet we are the ones who are close to what is going on. What is the good of reporting from

the field if our editors in Kathmandu just reproduce the communiques put out in the capital by the Ministry of Defence?"

This quotation illustrates the extent to which the spirit of freedom of the press has already been blighted as a by-product of the current conflict. In this situation it is likely to become increasingly difficult to expose and prevent human rights abuses unless effective steps are taken to prevent unlawful arrest and detention and torture and to punish abuse of power.

G. Lawyers

Nepal has a Bar consisting of a substantial number of committed and capable lawyers who act responsibly for their clients, and vigorously defend those who are prosecuted. The mission met a number of such lawyers during its visit. However, there remain a sizeable number of lawyers who take excessive fees and participate in the corruption of judges and officials. The Bar Association is divided into political factions, and is usually unable to punish malpractice. A mere five per cent of lawyers are women. Many lawyers were said to be reluctant to go to the Bench because of the poor salaries paid to judges. Lawyers who defend Maoists are subject to severe pressure, such as that described under torture (case of "X") above, which was by no means an isolated case. Very few lawyers are prepared to take on the defence of persons out of favour with the authorities.

Nevertheless, there is among most lawyers a strong commitment to the rule of law. The mission observed a demonstration by some 300 lawyers in Kathmandu on 31 January protesting against the State's failure to release five lawyers in whose favour *habeas corpus* decisions had been given by the Supreme Court.

While Nepal has ratified the major international human rights treaties and these instruments are incorporated directly into Nepalese law, one reliable survey revealed that some 50 per cent of lawyers were unaware of the Conventions or their applicability. The treaties are usually not relied on, either in domestic legal practice or through existent international human rights machinery. For example, bringing complaints before the United Nations Human Rights Committee under the Optional Protocol to the ICCPR is possible but virtually untried.

H. Government Institutions

Corruption is rampant in State institutions. Corruption in the judiciary is typically at the petty level, often 100-200 rupees (USD 1.20-2.50)

to maintain favourable terms with the judge and court staff. This rate is not high compared to corruption in other Government departments. The new Chief Justice is widely respected, and is said to have cut the instances of corruption significantly.

CIAA

The mission met the Chief Commissioner for the Investigation of Abuse of Authority (CIAA), Mr.Surya Nath Upadhyay, who had refused to take office until a new law had been passed giving him wider authority. He appears to have taken advantage of these expanded powers to bring prosecutions against some senior officials accused of corruption. These powers are recent, and it remains to be seen whether the CIAA will be really effective in combating the endemic corruption, as well as cases of torture and other abuses mentioned above. At present, the CIAA Commissioner is bringing about 80 cases a year, a considerable increase on his predecessor's record. He is also securing a conviction rate over 50 per cent.

In respect of cases of torture, the CIAA chief calls on the senior officer to take departmental action in the first instance. If the officer does not act within three months, the CIAA in principle may prosecute, often including the senior officer in the prosecution. However, such prosecutions have rarely occurred in practice. He does not retain jurisdiction over the judges, nor, regrettably, over the military. He maintains that he does send cases involving the military to the Army HQ, but the Army is not at all transparent in respect of their handling of such referrals.

National Human Rights Commission

The mission met with the National Human Rights Commission (NHRC). The members explained that they were inadequately financed. They have made a positive contribution in disseminating general information about human rights, but their representations to the Government seem to be largely ignored. The NHRC did not convey the impression of acting vigorously in cases brought to its attention. Indeed, as we subsequently discovered, the vast majority of complaints received are not acted upon at all. The mission also has serious concerns as to whether the NHRC is fully independent. In its entirely unsatisfactory investigation of the notorious case involving the rape of two girls in Nepalgunj by Army officers (see Women and Children above), the NHRC seemed to accept at face value the Army's version of events in the face of convincing evidence contradicting that account.

The NHRC has no jurisdiction over the Army, which is subject only to the control of the King and the National Security Council (itself composed of the King, the Prime Minister, Minister of Defence and Commander in Chief of the Army). It lacks the power to compel testimony. Its decisions and conclusions are non-binding and may be ignored by governmental authorities. Its work is largely non-transparent, as a result of which public confidence in it is low as an avenue for victims to seek redress. The NHRC has failed to extend its reach nation-wide, although visits by members to many districts and steps towards setting up regional offices constitute moves to redress this shortcoming.

As mentioned in Chapter one, the NHRC recently appointed a rapporteur for trafficking, Dr.Renu Raj Bhandari, who seemed to be highly active and committed. The appointment of rapporteurs in additional thematic areas could substantially assist the work of this fledgling institution.

As noted in Chapter two, the National Human Rights Commission is proposing to serve as a monitoring mechanism for any prospective human rights agreements reached between the Government and the Maoists in the course of the peace negotiations. Given its unreliable past performance and indications by the NHRC to members of the mission that it envisages using untrained volunteers to carry out monitoring operations, we do not consider that the NHRC acting alone is fit for this critical task. We believe that the NHRC could best use its capacities by operating in conjunction with an international monitoring mechanism under the auspices of the UN Office of the High Commissioner on Human Rights.

V. NEPAL'S POLICE AND ARMY

A. Police and Armed Forces Police

The mission met with the "Human Rights Cell" of the Armed Police Forces; with the Police Adviser of the DFID (British Overseas Aid Agency), and with police officers as part of a round table discussion organised by Advocacy Forum at Nepalganj. The mission also met the Home Minister, who is responsible for the police. We have also reviewed reports on the working of the criminal justice system in Nepal, including those prepared by CeLLRD and Advocacy Forum, as well as reports by Amnesty International about police actions during the emergency.

Our overwhelming impression was of a poorly trained and ill-equipped police force, whose methods of operation have little changed since the advent of formal constitutional and human rights reforms. For the most

part, police officials appeared to have minimal investigative competence, relying heavily on torture to extract "confessions" in the absence of any facility for gathering evidence by alternative methods. (See Chapter Three.) The gross inadequacies of the police have no doubt been exacerbated by the Maoist insurgency, which has led to well-documented atrocities by the police and Army as well as by the Maoists. However, the roots of the problems with the Nepal Police go much deeper than incidents of brutality and crime during the insurgency.

Among the serious long-term problems which have been identified are:

(1) ***Widespread and routine use of torture to extract confessions.*** A survey by CeLLRD for its report on the criminal justice system in Nepal found that of 222 arrested persons interviewed 50 per cent stated that they had been tortured;

(2) ***Widespread unlawful detention.*** Article 14(2) of the Constitution provides that suspects may not be detained for more than 24 hours without being brought before a court, excluding the time necessary to travel from the place of arrest. However the same CeLLRD study found that in only 37 per cent of the cases surveyed was this time limit respected;

(3) ***Absence of prosecutorial screening aggravates effects of police abuse.*** Prosecutors systematically neglect to ensure that the cases brought to them by the police involve genuine possible wrongdoing, as opposed to a wrongful arrest or an obviously innocent defendant. Although under Section 17 of the State Cases Act the investigating authority should refer a case to the prosecuting attorney, who may ask the court to acquit for lack of evidence, in practice this important procedural safeguard is not applied;

(4) ***Lack of judicial concern over police abuse of their detention powers.*** The majority of judges appear to be indifferent to breaches of Article 14(2), so that the police were able to ignore it with impunity as a matter of routine. Of the cases surveyed by CeLLRD, applications for remands for further detention were made in 219 cases. These applications were refused in only eight cases, granted after scrutiny of the investigation process and grounds for seeking the remand in 21 cases, and granted without any scrutiny of the investigation process and the grounds in 193 cases, or 87 percent of the total;

(5) ***Refusal of access to lawyers.*** Although Article 14(5) provides that all accused persons have the right to counsel of their choice, it is extremely rare for police to allow arrested persons to access to a lawyer within the first 24 hours of their detention. The rare cases wherein such access is granted concern arrested persons who are wealthy or otherwise influential;

(6) ***Perjury is almost never treated as crime in Nepal.*** There is therefore no disincentive to witnesses, including police officers, to lie in court;

(7) ***Absence of promotion on merit within the police force***;

(8) ***Endemic corruption, including bribery of senior police officers by politicians to enable the police to be misused for electoral purposes***;

(9) ***General lack of investigative competence, with many serious crimes handled by generalist sub-inspectors of police with little or no training in crime investigation***;

(10) ***Insufficient use of forensic or serological testing as part of investigations***;

(11) ***Inadequate keeping of case files and other records***;

(12) ***Severe lack of resources including equipment, accommodation and food.*** Many police posts do not have electric power. In at least one police station, 300 police officers share a building designed for 100 persons. We were told that the entire police budget is usually expended on salaries, with no separate allocation for maintenance, equipment and supplies. In some areas, because there was no separate budgetary allocation for food for an arrested person, the prisoner would receive no food unless the police shared their own food with him or her.

(13) ***Poor donor planning or co-ordination, resulting in waste of aid resources.*** We were given the examples (1) of one aid agency providing 14 women and child centres staffed by police, but without any provision for them to have telephones; (2) another agency providing the police with cameras and recording equipment, but without any budgetary allocation or other provision for films or batteries.

The combined effect of these problems is that the police have every incentive to abandon proper procedures and to beat confessions out of suspects, with very little chance of any sanction against them for doing so.

As their pay and working conditions are poor they remain prone to accepting bribes.

We consider that the police force requires a fundamental overhaul of its working ethos, including both substantial investment in equipment and training, and a rigorous policy of promotion on merit with sanctions against corrupt and incompetent officers. Money alone will not be sufficient to solve the force's deep-rooted problems. What is needed is a change in culture, which can only be brought about by very determined pressure from the highest levels of governmental authority over a prolonged period.

We heard favourable comments on the commitment of the present Inspector General of Police to improvement of his force. However, we consider that the scope for such reform may be limited under the present Ministerial direction of the Police. We found the Home Minister, Mr Dharma Bahadur Thapa, to be ill-informed and unreliable in his analysis of the situation. Out of all the meetings we had in Nepal, it was only at the meeting with him that the statement was made to us that "there is no torture by police". This patent unwillingness by the Minister with supervision of the police to confront an obvious and grave problem indicated that there is little prospect of the culture of torture being eradicated or ameliorated in the near term. Likewise, the Minister's denial that persons were being held by the police in breach of Supreme Court habeas corpus orders meant that meaningful dialogue with him was unlikely, as the previous day had seen the large demonstration by the Nepal Bar Association mentioned above and attended by some 300 lawyers for the release of five named individuals who remained detained in defiance of such orders. We do not see a realistic prospect of reform unless the Minister is a person with a recognition of problems and a genuine commitment to solving them.

We were equally unimpressed by the Human Rights Cell of the Armed Police Forces. After initially offering to show us the Armed Police's Rules of engagement, the Head of this organisation, Deputy Inspector General Gyanenda Raj Rai, rapidly retracted his offer when it was taken up. We were left with the strong impression that no such rules of engagement existed, which corroborated what we had learned from other sources and that the Human Rights Cell had a largely public relations function designed to impress critics such as international organisations and aid donors. Unless it can be transformed into an effective human rights component of the police it should be disbanded.

There is at present no legal provision at all for police bail. This is an obvious gap which should be remedied by legislation as soon as possible.

B. The Royal Nepalese Army

The mission met with Lieutenant Colonel Ramindra Chettry and Deputy Advocate General of the Royal Nepalese Army, BA Kumar Sharma, at Army Headquarters in Kathmandu. They were representing the recently established Army Human Rights Cell. The mission also attempted to visit the Royal Nepal Army camp at Chisapani, near Nepalganj, where large numbers of civilian detainees are believed to be held. The mission was refused admission to these premises, although we were able to see through the entrance gate persons who appeared to be civilian detainees, undertaking labour under the supervision of soldiers. The presence of civilian detainees contradicted information given to the mission that day by the local District Officer that there were no longer any civilian detainees at Chisapani. But the ranking officer present at the base, a lieutenant, confirmed that detainees were being held there.

The Royal Nepal Army has about 53,000 troops and a number of helicopters. It remains, in structure and culture, largely the same army which existed before Nepal became a democracy and is known for its strong personal loyalty to the King. Indeed, it has never been brought under the control of any civilian government. Its troops have extensive experience of United Nations Peacekeeping missions around the world, but until 2001 they had not been engaged in combat in or for Nepal for over 100 years. This relative dormancy changed dramatically with the declaration by King Birendra of a state of emergency in November 2001, following the breakdown of the first peace negotiations with the Maoist rebels.

During the months of the state of emergency and afterwards numerous credible reports emerged according to which the Nepalese Army engaged in gross human rights abuses in the course of its campaign against the Maoists. These accounts were paralleled by equally serious reports of atrocities against civilians by the Maoists. For example, during 2002 Amnesty International submitted to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions details of more than two hundred people killed by the Army. Amnesty International's report on human right abuses in Nepal including those by the Army has been indignantly denounced by some Nepalese commentators, but contains much detail about incidents which critics of the report have not rebutted. Our own meetings with NGOs, lawyers and victims of Army detention satisfied us that the Amnesty International report presents a generally

accurate picture of the situation between the state of emergency and the recent cease-fire.

A particularly shocking massacre by the Army occurred on 14 February 2002. Thirty-five labourers involved in construction of an airport at Suntharali (Kalikot District) were deliberately killed by an Army patrol after first collecting their identity cards. The killing took place in the aftermath of the killing of 56 soldiers by the Maoists at Mangalsen in Achham District on 17 February, and of the firing by Maoists at an Army helicopter at the same airstrip on 20 February. As far as we were able to ascertain, no Army personnel have been charged or disciplined in relation to this massacre.

There have been numerous other cases of extrajudicial killings of civilians, including women, and large number of enforced disappearances. At the end of 2002 at least 199 cases of such disappearances reported in the context of the Maoist insurgency and counter-insurgency had been submitted to the UN Working Group on Enforced or Involuntary Disappearances. The Working Group reported 108 of these cases to the Nepal Government and only 3 had received a response.

There have been documented numerous cases of torture, including rape, by the Army. The notorious case of two Muslim girls abducted by a captain in the Army and held overnight and raped by the captain and an unidentified officer, reported by Amnesty International (see chapter three), occurred at the Chisapani camp, which we attempted to visit. This camp is suspected also to be the place where some of those who have disappeared are or have been held. On 3 April 2002 two young Muslim girls were abducted by a captain in the Army, taken to Chisapani and there held overnight and raped by both the captain and another unidentified officer.

After this case was publicised by Amnesty International the two girls were again taken away by the Army and were later produced by the Army to the press, and in the presence of Army personnel, retracted their earlier claims of rape. We have concluded on the basis of close investigation into this incident that the two girls were raped as they originally stated and that the later retraction of the rape claims was made under duress from the Army. We were informed that following a rising tide of indignation at the treatment of the girls the captain concerned had fled the country at the time of our visit.

Senior Army personnel whom the mission met appeared to be in a state of denial with regard to Army human rights abuses. We were told that the Army did not detain people outside the legal system, but sometimes just

made a brief arrest to get information, such as about stolen weapons. When we informed the Lieutenant Colonel that we had been told the previous day by the ranking officer at the Chisapani camp that detainees were being held there, he then admitted that detainees were indeed being held for intelligence purposes and their identity was not disclosed. There was no time limit on how long detainees were held. The colonel was unable to point to any legal authority for such detention. He was also unable to be precise about numbers of such detainees, and added: "What does it matter if there are 3 detainees or 300?" When asked about the Chisapani barracks rape case, the Colonel simply said that the case had been thoroughly investigated. When asked for a copy of the document authorising the Army to detain people outside the legal system, the meeting degenerated into confusion, and we were eventually told that no documents could be provided to us without Government permission.

Although our direct contacts with Army personnel were limited, they overwhelmingly confirmed information from lawyers, ex- detainees, local and international NGOs and diplomats that the Nepal Army is feudal in its outlook, contemptuous of human rights, and operating as a law unto itself. There is an urgent need for education about the Geneva Conventions and about the role of the Army in a democracy. The Army Human Rights Cell is officially designed to carry out this role, but is a toothless and largely fictitious entity, designed as window-dressing to disarm critics rather than as a serious institution contributing to the process of reform.

We share concerns that have been expressed by legal experts and the representatives of the major political parties with whom we met, that the Constitution does not clearly subordinate the military to the civilian power. By Article 119 of the Constitution, the King is the Supreme Commander of the Army. Article 118 provides that he shall perform the operation and deployment of the Army on the recommendation of the National Defence Committee, which is chaired by the Prime Minister. According to Article 119, the Commander in Chief of the Army is to be appointed by the King on the recommendation of the Prime Minister. In practice there has never been any effective democratic control over the Army. In a situation such as that prevailing presently, where the democratically elected prime minister has been dismissed and replaced by a prime minister chosen by the King, there is clearly no democratic control at all over the operation of the Army. In these circumstances it is not surprising that the Army's loyalty appears to be only to the King and that its commitment to democratic values appears weak.

VI. THE JUDICIARY AND THE ADMINISTRATION OF JUSTICE

A. Institutional framework and impediments to the administration of justice

The judiciary in Nepal is structured as a three-tier hierarchy. The district courts are the courts of first instance and are located in all 75 districts of Nepal. They have jurisdiction over both civil and criminal matters. At the second level, sixteen courts of appeal are established in various regions of the country. The Supreme Court, the highest court in the country, is the guardian of the Constitution. It is composed of fourteen Judges and ad-hoc judges, who are appointed by the King on recommendation of the Judicial Council. All courts, except for the Military Court, fall under the supervisory control of the Supreme Court.

The Constitution also establishes a Judicial Council, a body responsible for providing recommendations to the King regarding the appointment, transfer, disciplinary actions and dismissal of services of the judges. It is composed of the Chief Justice of Nepal as ex-officio Chairman, the Minister of Justice of Nepal, the two most senior justices of the Supreme Court as ex-officio members and a distinguished jurist of reputation nominated by the King as a member.

Over the past ten years, the caseload has increased markedly in all courts, especially in the Supreme Court. This expanded workload has led to an overburdening of the whole system and to longer periods of adjudication. Although the bulk of dockets consist of civil cases, both the civil and criminal justice systems have been hampered as a result of understaffing in courts. Criminal trials often stretch over extended periods of time, sometimes greater than a year and the defendant is usually detained during the trial period. The slow functioning of the system poses an unjustifiable encumbrance to the accused person's liberty and leaves him or her vulnerable to human rights violations.

Several factors contribute to this phenomenon. First, the Government has neglected to deal with the exigencies of the expanded caseload by concomitantly increasing funding and staffing. In addition, the authorities have failed to distribute existing resources in a coherent and rational manner. While urban courts are desperately overburdened and many remotely situated courts have a scant caseload, the proportional distribution of funds among courts fails to reflect realities on the ground.

The Basic Principles on the Independence of the Judiciary provide that it is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions. The Government is clearly in breach of this principle. Typically, Court judgements are not delivered in the form of a written opinion, even if substantial questions of law are at issue. Systematic and timely dissemination of judgements in the official bulletins or by electronic means is glaringly lacking. Throughout the court system there is an absence of computing facilities and even more basic equipment. Although the Supreme Court has a website, it is frequently inoperative and not reliably updated. A number of judges and lawyers expressed their frustration to the mission team that it was not possible to receive judgements of the Supreme Court in a timely fashion.
The judiciary in Nepal benefits from a substantial degree of independence. Indeed, the Chief Justice of Nepal, judges of the Supreme Court and the Registrar and Joint Registrar of the Supreme Court, informed the members of the ICJ mission in a consultation meeting at the Supreme Court that they had not experienced overt pressure or threats to their independence. However, there have been numerous instances wherein the Government has declined to carry out the orders of the court. On 31 January 2003, as mentioned in chapter one, the mission observed a protest demonstration of some 300 lawyers sponsored by the Nepal Bar Association. This action was aimed at the general lack of respect for court orders by the Government and at demanding the release of five colleagues held in defiance of release orders from the Supreme Court. In the consultations between the mission and the judges of the Supreme Court, the judges made clear that they were aware of the problem of government non-compliance, but seemed unable to formulate proposals to alleviate the situation. The courts have been especially reluctant to issue robust contempt orders in such cases.

Judges at the superior levels appear to be highly competent. Many complaints, however, have come to light regarding judicial corruption. Indeed, there is a pervasive public perception of a high level of corruption among the judiciary. A top official of the Nepal Bar Association told the mission that he estimated that some 90 per cent of the judges had been receiving bribes before the appointment of the current Chief Justice, but that this figure had since dropped to about 50 per cent. The Ministry of Justice strongly disputed these estimates during discussions with the mission. The mission raised its concerns regarding corruption with the Chief Justice and other Supreme Court judges. The following day, the Chief Justice announced that teams of judges would be visiting all regions of the country, *inter alia*, to investigate these concerns.

While guidelines governing judicial conduct apparently exist, they are not generally disseminated or implemented. The Judicial Council, in charge of disciplinary matters, far from taking action against corruption, appears instead to be shielding the members of the judiciary. It is therefore not surprising that the Judicial Council also lacks popular confidence.

The Commission for the Investigation of the Abuse of Authority (CIAA), a serious and relatively effective institution, has authority to investigate complaints on matters of corruption and abuse of power by the authorities. While it may look into conduct of court staff, the CIAA lacks competence to supervise the judges themselves. Therefore, corruption and abuse of power by the judiciary goes largely unchecked. Nepal is in critical need of an independent authority, which itself is beyond suspicion of corruption, to investigate and discipline abusive behaviour within the judiciary.

The qualifications of court personnel are in many cases unsatisfactory. There is a tendency to recruit general clerical staff, instead of employing staff with a legal background. To ensure that fundamental fair trial standards are met, it is necessary that all court staff entrusted with important responsibility in handling cases, and not only judges, be properly trained and qualified.
The present annual disposal rate of cases is less than 50 per cent of cases initiated in the year, resulting in half of the cases being backlogged to the following year. While some delays may be the inevitable result of shortfall of resources, it is also in part occasioned by slackness on the part of some judges and judicial personnel, particularly in outlying districts. There exists no audit or other mechanism to assess the effectiveness and efficiency of judicial work and little possibility of penalising poor performance.

Another extremely worrying condition revealed to the mission was the complete absence of functioning courts in a number of districts, particularly in regions affected by the insurgency. According to the Nepal Bar Association, there are no courts or judges in 13 districts. While it may well be that judges have been forced to abandon their posts for security reasons, there can be no justification for leaving detainees stranded indefinitely in detention without access to courts. In such instances, it is incumbent on the supervisory courts to order the transfer of detainees to venues where their cases may be judicially processed.

B. Criminal proceedings

The legal framework is an outdated patchwork of enactments from different periods. Various projects to draft new codes of criminal law and

procedure have been under way for many years, but these efforts have not yet reached fruition. A substantive criminal code draft has been formulated, but there is presently no legislature in place to enact the code. To some extent, the inadequacies in human rights protection in municipal substantive law are mitigated by the fact that Nepal has ratified the major human rights treaties (the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of Discrimination against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD) and the Convention against Torture (CAT)) and that according to article 9 of Nepal's Treaty Act, the provisions of the international treaties become part of Nepalese law upon ratification. However, this safeguard is at present of limited practical use because of the inadequate knowledge among lawyers and judges about the existence of these treaty provisions.

The inadequacies of the present legal framework and practice have adversely affected the entire criminal justice process. Serious abuses by the police begin during the investigation phase, continue during the prosecution phase, and are thereafter sanctioned by the courts during the adjudication phase. While gross violations such as torture happen mainly at the hands of the investigative officers, i.e. the police, they are made possible only through the willingness of the courts to overlook these violations and thereby effectively act in complicity with the perpetrators of the violations.

Investigation Stage

In Nepal, the investigative stage of the criminal proceedings falls entirely under the dominion of the police. The role of the police in the treatment of detainees, previously discussed in this report, bears repeating. It is during the pre trial process that the situation of suspects is most precarious, as they are often held in unlawful detention in overcrowded prisons, without being granted their most basic procedural rights, thereby becoming easy targets of police violence. Detainees are not informed of their right to communicate with counsel, and are systematically denied access to their family, to a lawyer and to a doctor.

The police systematically arrest all criminal suspects. Arrest generally occurs without a warrant, in violation of Nepalese law. Typically, no notice of the grounds for arrest is delivered to the detainee. Regrettably, the Supreme Court has held that no notice has to be served in cases of arrest for the purpose of investigation. The jurisprudence of the Supreme Court in this

respect is in clear conflict with the ICCPR. Article 9 (2) of the ICCPR makes no distinction among the grounds of arrest, but rather provides that all persons must be informed of the charges brought against them.

While Nepalese law mandates that detainees be taken before a judge within 24 hours of the arrest, this right, often ignored, is anyway of little significance in practice in the absence of notification of the rights and access to counsel. As the UN Special Rapporteur on Torture has observed, most people arrested are not brought before a court within the 24-hour period and are held incommunicado in detention for prolonged periods, often in unofficial places of detention. Moreover, as only appellate courts have the power to grant habeas corpus, that remedy is effectively unavailable to those held in areas far from regional appellate courts. In the 13 districts for which there are no courts, persons are held in detention indefinitely. In addition, *habeas corpus*, in practice, is not enforced by an officer of the court, as prescribed by law.

In most instances, remands requested by the police are summarily granted by the court in the absence of a lawyer for the detainee. District courts fail to scrutinise evidence and related documents while ordering remand for detention, thus making pre-trial detention a virtually automatic measure at the investigation stage. Although the period for remand ordered by the court should not, in law, exceed 25 days, in practice repeated remands are requested by the police, making the period of pre-trial detention virtually endless. Suspects who have been released are frequently re-arrested, without further evidence.

Conditions in most places of pre-trial detention do not conform with international standards. While the Prison Act and Regulations provides that persons awaiting trial should be held separately from convicted persons, this injunction is not followed in practice. Also, in breach of the Children Rights Act, juveniles are usually not separated from adults.

Arbitrary and incommunicado detention, which are widespread, are facilitated by two special laws. Under the Public Security Act, the police have wide powers to detain individuals for up to 90 days. This period may be extended for an additional 90 days by the Ministry of the Interior, and, for a further 12 months from the original date, if such extension is approved by an advisory board established under the Act.

The Terrorist and Disruptive Activities Act (TADA) grants authority to the police to arrest any person believed to be involved in activities covered by the Act. It allows for holding persons in preventive police detention for 90

days. Persons detained under TADA are not informed of the reason for the arrest, are not brought promptly before a court and are held for prolonged periods without charge. During the mission, the judges of the Supreme Court expressed reservations about the special courts introduced through TADA and were confident that ordinary courts had the capacity to adjudicate cases arising out of the conflict. In practice, the Special Courts have only been used in a very small number of cases to date.

The Judiciary has largely avoided confronting the alarming practice of military detention. As underscored previously in this report, a substantial number of persons continue to be held in incommunicado military detention, even though there is no legal ground for such military detention in the law. A judge of the Appellate Court of Banke admitted that he knew "personally", but not officially, of this practice.

According to a judge of the Appellate Court in Patan, no detainee has ever protested in court against military detention on the ground that it has no basis in law. The problem, however, is that persons held in military detention are not brought before the judiciary. When a habeas corpus petition is filed on behalf of persons believed to be held in military detention, inquiries are made to the civilian Chief District Officer (CDO), who will usually deny any knowledge of the detainee's whereabouts.

The mission considers that this systematic resort to detention without judicial guarantees and without supervision by a court amounts both to a violation of rights of detainees under Nepalese law and a systematic breach of Nepal's international obligations under the ICCPR. The UN Human Rights Committee has emphasised in its General Comment to ICCPR article 9 that pre-trial detention must be the exception and not the rule and should be as short as possible. Practice in Nepal clearly shows the opposite tendency. Prolonged incommunicado detention also constitutes a violation of the right to be treated with humanity and with respect for the inherent dignity of the human person enshrined in article 10 (1). Critically, incommunicado detention leaves those held vulnerable to torture and other ill-treatment, as borne out by practice in Nepal.

The failure of the authorities to inform the detainee of his right to counsel and to grant access to lawyer also constitutes a breach of Article 14 (3) (b) and (d) of the ICCPR. The Human Rights Committee has consistently held that the refusal of access to a lawyer during police investigation contravenes Article 14 (3) (b) and (d). The Committee has further noted that that Article 14 (3) ICCPR requires that persons should have access to a lawyer "in conditions giving full respect for the confidentiality of their communica-

tions". The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principles 17 and 18) and the Basic Principles for the Role of Lawyers provide that detained persons shall be entitled to have assistance of, and to communicate and consult with legal counsel, and that confidential communication with counsel shall be ensured to detainees (Principles 5 through 8).

Denial of rights to access to a lawyer, relatives and doctors, has contributed to the frequent instances prolonged pre-trial investigation, which in turn places the detainee at high risk of human rights violations. Torture or inhuman or degrading treatment are systematically practised in police custody in order to extract "confession" from the detainee and has been reported in well over half of all cases of detention. According to one reliable Nepalese research report, the investigator is "more concerned with forging or taking evidence, rather than discovering it".

Under the CAT, to which Nepal is a party, the state is obligated to enact legislation banning evidence obtained through torture or any other form of inhuman and degrading treatment from criminal proceedings. Article 4 of the CAT requires Nepal to make torture a specific offence under Nepalese law. Both the Human Rights Committee and the Committee against Torture have stressed that allowing impunity for the crime of torture constitutes as much a breach of international obligations as the acts of torture themselves. Article 14 of the CAT grants victims a right to fair and adequate compensation, including the means for as full rehabilitation as possible.

In dereliction of all of these obligations, Nepal law does not make the practice of torture a specific offence or provide for the suppression of evidence obtained through torture. In practice, officials responsible for acts of torture or cruel, inhuman or degrading treatment are never held accountable for their abuse of power, either by way of criminal sanction or by way of civil accountability. While a right to compensation for torture victims is provided under the Torture Compensation Act, prosecutors are not mandated to prosecute officials for torture, but only to defend police officers in compensation cases. In addition, the compensation granted to the victim is not levied from the perpetrators, but from state funds. There is therefore no individual responsibility specifically for acts of torture under Nepalese law.

Nepal does not adequately comply with any of the preventive measures for the eradication of torture mandated under the Convention against Torture,

such as the training of law enforcement personnel and other public officials, of the systematic review of interrogation rules.

Prosecution stage

After concluding the investigation, the police officer in charge of the case reports the findings to the concerned government lawyer. The government lawyer decides, on the basis of the evidence submitted to him, whether to initiate a prosecution. Although the prosecutor is in principle fully responsible for supervision of the investigation, prosecutors in practice frequently abdicate this function and have simply processed the results of the police investigation without review. The low ratio of convictions compared to prosecutions seems to indicate that the prosecution treats many decisions in a superficial manner. While the rate of convictions for public order offence, is very high, it stands well below 40 per cent in other cases, leading to the conclusion that the prosecution is not adequately filtering or preparing cases.

Adjudication stage

After the appearance of the suspect and submission of the charge sheet to the court, the adjudication stage begins. Here, violations of human rights committed during the investigation stage could and should be redressed. In practice, the judiciary usually turns a blind eye toward official abuses and frequently relies on "evidence" obtained through unlawful methods to convict the accused.

The registration of the charge sheet triggers the bail proceedings, immediately followed by the deposition of the suspect. The deposition should be recorded, but judges do not always follow this procedure. Bail may be granted as a privilege for offences for which the punishment is less than three years. However, bail is often only granted against the deposit of a monetary value bond. As a consequence, bail is generally only available to those who have the means to afford the required sum, making it a privilege of the relatively wealthy. Some District Court judges acknowledged the unfairness of this practice to the mission. This discriminatory policy with regard to bail is also arbitrary and violates the principle of equality before the law. It is problematic that bail is only granted for offences carrying a maximum penalty of less than three years, because it increases the instances of unnecessary incarceration and calls into question the presumption of innocence for those not accorded bail. The mission considers that the purpose of bail is to ensure the appearance of the

defendant in future judicial procedures and its availability should not be connected principally to the length of sentence applicable to the charges.

In respect of a substantial proportion of cases, defendants go unrepresented by counsel at trial, even when faced with the most serious charges. Some defendants are unaware of their right to be represented by counsel, but in many cases the defendant simply lacks the financial means to retain a lawyer. The Legal Aid Act of 1997 provides for the possibility of legal aid to indigent persons. In fact, a lawyer is appointed to each Court of Appeal and in most District Courts to ensure free legal representation for persons unable to afford counsel. These lawyers are paid remuneration on a monthly basis. Yet, these arrangements are inadequate and poorly administered, as more than half of the persons convicted do not have legal representation. These shortcomings infringe the right to representation by counsel under article 14 of the ICCPR. Similarly, the Basic Principles on the Role of Lawyers enjoin governments to ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons.

The Secretary of the Nepal Bar Association told the mission that outside of Kathmandu, Maoists or persons held on suspicion of collaboration with Maoists do not get legal aid. Moreover, as the Bar Association complained to the mission, lawyers themselves have been tortured or arbitrarily detained simply because of association with their clients, particularly in the case of Maoist suspects. These practices contravene the basic Principles on the Role of lawyers, which place a duty upon the state to protect lawyers in the discharge of their functions and explicitly provide that lawyers shall not be identified with their clients or their clients' causes as a result of carrying out their professional functions.
Judges routinely fail to investigate allegations of torture and generally ignore the manner in which "confessions" have been obtained. While legislation prohibits reliance on evidence obtained through use of force, the Supreme Court has placed the burden of proving that torture was inflicted onto the accused. According to a report of the Center for Legal Research and Resource Development, confessions were taken from 85 per cent of detainees in police custody. Some 42 per cent of these detainees complained that the confession was obtained through ill-treatment. Yet, 60 per cent of those complaining about ill-treatment were nonetheless convicted. Taking into account that many persons subjected to ill-treatment do not report their ordeals owing to intimidation or fear of reprisal, even these statistics necessarily understate the true scope of the problem.

The failure to investigate allegations of torture constitutes a violation of international human rights law. As the Human Rights Committee and the Committee against Torture make clear, an independent and impartial investigation must be conducted every time there is an indication that an individual may have been tortured. If the allegations are well founded, the investigation must lead to the prosecution and punishment of the perpetrator.

The resort to violent methods to extract statements is deeply worrying not only because of the violation to the physical integrity of the victim. In addition, the confessions obtained during the investigative phase remain the primary source of proof against defendants in criminal cases and thereby undermine the possibility of a fair trial. Although the Supreme Court has established that the statement of the accused cannot be the sole basis for conviction, judges still mainly rely on the "confession" of the accused for their findings. Moreover, they rely on "confession" before the police officer or prosecutor, rather than on the statement of the accused in court. Indeed, judges tend to pay scant attention to the suspects' or witnesses' depositions in court.

During the mission's visit to the appellate courts, some judges acknowledged the problem of torture and of falsified police records. However, they did not seem to consider it their task to provide remedy for such human rights abuses. Some judges in Banke were unaware of international human rights treaty standards, although Nepal has ratified all major treaties and these standards forming part of Nepalese domestic law. The same attitude was evinced in the district courts in Kathmandu, where judges were aware of the inhumane treatment in police custody, but did not consider it their duty to investigate and punish these abuses.

It is entirely unsatisfactory that courts in Nepal frequently only rely on evidence not directly produced in the courtroom. Although Nepalese legislation prohibits the reliance on evidence obtained through ill-treatment, this legal proscription alone is not a sufficient safeguard. The judge should concentrate on evidence produced in the oral hearing, mainly the deposition of the accused, witness testimony and forensic science. Forensic science may be difficult to obtain given that the police and government attorneys tend to eschew the gathering of forensic evidence in the vast majority of cases. However, judges can play a role in changing the practice of police and investigators by rejecting uncorroborated "confessions" as a basis for convictions.

The Government lacks a serious policy for protection and rehabilitation of victims. When considered as witnesses, victims are seldom provided with protection, so that many persons are reluctant to testify in court against police or other government officials. There are no provisions for giving testimony in closed sessions or through remote television monitor.

There is a dearth of victim rehabilitation programs in Nepal, although we learned that an initiative is under way for one to be established through donor contributions. Fines paid by offenders go to the states coffers, rather than victims, so that crime becomes a source of revenue for the state. Beyond the Torture Compensation Act, there is no law for the compensation and rehabilitation of victims of crime.

VII. CONCLUSIONS AND RECOMMENDATIONS

Most of the recommendations set forth below are intended for implementation by the Government of Nepal. Some, however, are directed to the various governments and agencies which are now, or which may be prepared, to assist the Government of Nepal in improving its legal system and judicial system generally.

As our terms of reference pertained to the administration of justice, it was not generally within the mandate of the mission to examine the conduct of the Maoists during the course of the armed insurgency. Needless to say, many Maoists insurgents are responsible for a large number of well-documented atrocities, including acts which may amount to international crimes. It is to be hoped that the discussions between the Maoists and the Government will proceed to a successful conclusion. In the unfortunate event that further armed conflict, the insurgents no less than the Government must fully respect their obligations under international law.

A. The Rule of Law and General Constitutional Questions

Conclusion A

The most fundamental question arising in the context of the present peace process is whether Nepal should adopt a new constitution; amend the existing Constitution to enshrine new constitutional arrangements; or leave the existing constitutional arrangements in place. It is well beyond the terms of reference of this mission to offer any views on this weighty question. However, as the peace process unfolds, Nepal should continue to operate under a constitutional government. The dissolution of parliament, combined with the failure to hold elections within the six-month

time frame required by the Constitution, and the formation of a government consisting of unelected ministers from outside the major political parties, has placed a profound stress on the democratic and constitutional framework of Nepal. Because the principal ministers seem to be answerable only to the King, Nepal is perilously close to slipping from a constitutional towards an absolute form of monarchy.

In principle, the Government would need to hold instant elections to preserve the integrity of the present Constitution. Recognising that the holding of elections or restoration of the previous parliament may be now both impracticable and generally unwelcome in light of the impending peace negotiations, certain immediate steps might yet be taken to vest the interim Government with some modicum of constitutional and democratic legitimacy. In particular, the inclusion in a broad-based government of members of the dissolved parliament from among the major political parties could be one step in the process.

RECOMMENDATION 1

Until a legitimate parliament is constituted, the Government should not legislate by ordinance and its activities should be strictly limited by the terms of the Constitution.

Conclusion B

At present, there exists no mechanism by which to determine the limit of the monarch's authority under the Constitution. The Constitution provides that actions of the monarch are non-justiciable. Therefore, a monarch carrying out an action arguably outside his constitutional authority or in clear breach of such authority cannot be legally challenged for such transgression. It is certainly not unusual under a constitutional monarchy for difficulties to arise in ascertaining the relationship between the head of state, the parliament and the judiciary. We consider that this following recommendation should be implemented because it is fundamental that the branches of the government are clear as to the limits of their functions in relation to one another.

RECOMMENDATION 2

Whether through a new constitutional arrangement or amendment to existing constitutional provisions, the Constitution should clearly set out those powers of the monarch which are not subject to review and should provide that any question of excess of the monarch's authority shall be subject to review by the courts.

B. International monitoring, assistance and cooperation

Conclusion C

Despite ratifying and incorporating into national law the six principal international human rights treaties, Nepal has failed adequately to cooperate with United Nations human rights mechanisms and has not taken full advantage of the possibility of using the services of the Office of the High Commissioner on Human Rights. Nepal has been derelict in its reporting obligations to several of the human rights treaty supervising bodies and has not always responded to requests for visits or for information by UN special procedure mechanisms.

The capacities of the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) are clearly needed, both to monitor and report on the human rights situation in Nepal and to assist in the implementation of the large number of programmes presently carried out by other agencies and organisations. This presence would also ensure that human rights questions are adequately addressed in the course of the ongoing peace process. The UNOHCHR's recent dispatch of an adviser to work under the auspices of the United Nations Resident Representative, is a welcome, albeit insufficient, step toward that end.

RECOMMENDATION 3

Nepal, as a matter of priority, should submit all outstanding reports to the United Nations human rights treaty supervisory bodies.

RECOMMENDATION 4

The United Nations Office of the High Commissioner Office for Human Rights should establish and the Government should accept a field office with monitoring, co-ordinating and technical assistance functions.

Conclusion D

Nepal at present benefits from the activities and assistance of foreign governmental and inter-governmental agencies and donors, as well as of local and international non-governmental agencies. Yet co-ordination of such activities is not satisfactory. In order to fill existing lacunae in respect of such assistance, as well as to prevent unnecessary duplication and misdirection of energies, donor countries and agencies should establish a mechanism to better co-ordinate their activities. Non-Governmental

Organisations, both external and internal to Nepal, should also seek to enhance their coordination by collecting and providing information as to available assistance and by determining the nature of additional assistance that may be required. Such a procedure should operate independently of the Government and in no way be used to restrict the existence or activities of local or external NGOs.

RECOMMENDATION 5

Two co-ordinating mechanisms should be set up, one for external governmental or international government donors and agencies and one for external NGOs and all internal NGOs and bodies. Those mechanisms should provide a system for the achievement of enhanced co-ordination so as to provide maximum assistance to the Government and people of Nepal and to identify those areas where no assistance is being provided and new assistance can be directed. The NGO mechanism should be entirely independent of Government.

C. The Judiciary

Conclusion E

The judiciary in Nepal maintains a substantial level of independence and many judges at the highest levels appear to be highly competent. However, the judiciary historically has been subject to various complaints and occasional removal and there is a strong perception of judicial corruption held by the Nepalese community. The Judicial Council, which is responsible for discipline of judges, lacks popular confidence. Judges are widely seen as being unable or unwilling to police their own activities. The Commission for the Investigation of the Abuse of Authority (CIAA), which is charged with investigating and prosecuting official corruption and abuse of power, has no jurisdiction over the judiciary. While apparently guidelines exist governing judicial conduct, they are not widely disseminated or implemented.

RECOMMENDATION 6

Either through reform of the existing Judicial Council or new constitutional or statutory provisions, an independent body, consisting of a mix of constituents from within and outside of the bench, including the C.I.A.A., should be established to investigate and discipline instances of corruption and other abuses of judicial authority.

Conclusion F

The courts, at all levels, frequently fail to issue written judgements, even in respect of cases where a significant question of law is at issue. When such judgements are issued, there are often substantial delays in the dissemination of the judgements through bulletins or electronically. The Supreme Court website is frequently inoperative and *judgements* are usually not posted thereto in a timely manner. The appellate and district courts typically lack computer facilities that would allow for the easy retrieval of judgements and the undertaking of research. In addition to the judgements themselves, there is an urgent need for the computerisation of records on case dockets. There is a need for a culture change for judges to adjust and to be assisted to make use of modern technology.

RECOMMENDATION 7

The judiciary, especially at the Supreme and appellate court levels, should issue written *judgements* in a timely manner and these *judgements* should be dispatched expeditiously for use by the judiciary, lawyers and the general public, including through electronic means. The courts are in need of the capacity and training to keep electronic records. The Judicial Academy has played a useful educative role and its activities should be expanded. In particular, greater legal resources should be provided to judicial officers working in more remote locations.

D. Human Rights and the Administration of Justice

Conclusion G

The adoption of the Terrorist and Disruptive Activities Ordinance Act (TADA) has effectively legitimised the widespread practice of arbitrary detention, in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights. Persons detained under TADA are particularly vulnerable to torture. Such persons are often not informed of the reason for arrest, are not promptly taken before a court, and are held for prolonged periods without charge, whether for preventive or investigative purposes. As no state of emergency now exists in the country, TADA on its face contravenes Nepal's international legal obligations.

RECOMMENDATION 8

The Government should at present desist from implementing TADA. At such time as a legitimately constituted parliament convenes, TADA should be repealed or substantially amended to bring it in conformity with Nepal's international obligations under articles 9 and 14 of the International Covenant on Civil and Political Rights.

Conclusion H

There is near total impunity for officials of the Army, armed police forces and police who engage in serious human rights violations including torture, unlawful killings and war crimes.

By failing to make torture a specific crime in its legislation, Nepal is in dereliction of a core obligation under the Convention against Torture. Although torture victims may seek compensation under the Torture Compensation Act, such compensation, when granted, is the responsibility of the state, not the torturer. Thus, under Nepalese law, there is a complete lack of individual responsibility, either criminal or civil, for the international crime of torture; i.e., near total impunity. Indeed the public prosecutor has the responsibility to defend the police in Torture Compensation Act cases, but is not charged with the mandate to prosecute suspect police officials for offences of torture. In practice, neither the police, the prosecutor, nor judges either undertake or order investigations of torture allegations. Most torture victims are fearful of pressing cases for fear of reprisal. Judges do not consider it a component of their responsibility to inquire into a detainee's treatment or to question how "confessions" are obtained. Judges should have a power to refer torture allegations to an investigative authority.

RECOMMENDATION 9

The Government, including the Minister of Law and Justice, the Attorney General, prosecutors and police should investigate and prosecute serious violations of human rights including extrajudicial killings and torture. Nepal should comply with its obligations under the Convention against Torture, including by making the prohibition on torture and inhuman and degrading treatment a specific crime under national law.

RECOMMENDATION 10

Judges should have and exercise the power on a prima facie case of torture or inhuman or degrading treatment to order an independent investigation. Such investigations should be carried out urgently by officials who are independent and administratively separate from the ordinary police. Victims providing accounts of torture should be given appropriate protection against reprisal.

RECOMMENDATION 11

Assistance for complaints and compensation claims for torture or inhuman or degrading treatment should be provided by way of legal aid.

Conclusion I

An unknown but substantial number of persons are presently held in unacknowledged incommunicado military detention without trial. Many such detainees are subject to interrogation under torture. These detentions are unlawful, as the military have no authority to hold persons. The Chief District Officer has responsibility for detainees in cases falling under the Terrorist and Disruptive Activities Act (TADA) and the police have such responsibility in all other cases. When these civilian institutions abdicate their responsibility to see to it that the Army hands over suspects to their control, an independent authority, or the Attorney General, should exercise power to oblige the Chief District Officer or police to answer, subject to powers in the nature of contempt. Because only the appellate courts, not district courts, have the power to grant habeas corpus, persons held in areas far from regional appellate courts have difficulty in filing habeas corpus petitions.

RECOMMENDATION 12

All persons presently detained in military custody should immediately either be released or handed over to the custody of the police or, where appropriate, to the Chief District Officer, who should then decide whether to charge the detainee with a cognisable crime or to release the detainee.

RECOMMENDATION 13

227. The power to hear habeas corpus cases should vest in the District Courts, as well as the appellate courts. An independent authority should be able to call upon the Chief District Officer to provide details of all persons held longer than twenty-four hours and for the release on application to a local district court for persons held longer than twenty-four hours.

Conclusion J

Many persons who encounter the justice system in Nepal lack the most basic access to justice. Persons arrested are typically not informed of their right to a lawyer and many are tried without counsel, even for the most serious offences. Even in respect of defendants who are eventually represented, lawyers are generally not given access to their clients until the trial phase. Almost all interrogations take place without counsel. Existing legal aid provisions are inadequate in scope to cover the overwhelming majority of defendants who cannot afford counsel and in cases where the court

appoints counsel pursuant to a defendant's request, the rates of remuneration are too low to make acceptance of representation attractive.

RECOMMENDATION 14

All persons upon arrest should be informed of their right to a lawyer. Access to counsel should be granted at the first stages of custody, including prior to questioning. Police should notify lawyers of the detention of their clients without delay. Legal aid schemes should be expanded. Under no circumstances should any person be tried without legal representation for an offence which carries a sentence of more than six months.

Conclusion K

A number of lawyers have been arbitrarily detained, some for prolonged periods and subject to torture, simply because of association with their clients.

RECOMMENDATION 15

The Government should scrupulously respect the United Nations Principles on the Role of Lawyers, particularly Article 16 and Article 18, which provides that lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

Conclusion L

It is clear that confession is the primary source of proof of many criminal prosecutions and that in many cases such confessions are improperly obtained. Part of this methodology is a by-product of grossly inadequate police training in criminal matters. International expertise is available in criminal investigations, including police training techniques and relatively efficient forensic science facilities, which would reduce the reliance on torture as the means of obtaining evidence. While certain forensic facilities might be beyond Nepal's resource capacity, some means are relatively inexpensive to implement.

RECOMMENDATION 16

The Government should invite international policing experts to provide training inside and outside Nepal in interrogation and investigative techniques to improve police investigations and so decrease the incidence of torture and improve the administration of justice.

RECOMMENDATION 17

Forensic science facilities should be developed and provided through international assistance to improve police investigation.

Conclusion M

Nepal does not have appropriate forms of non-custodial penalty such as probation, community service orders, parole or release on licence. Enactment of a law to provide for such non-custodial penalties or facilities is a compelling reform which should not be unduly complicated to implement.

RECOMMENDATION 18

That a system of probation and parole supervision be implemented using models now available throughout the world. This is a cheaper and less socially damaging means of supervising transition back to the community and is less expensive than holding people in custody.

E. National Human Rights Institutions

Conclusion N

The National Human Rights Commission (NHRC) is a significant national institution for protecting and promoting human rights in Nepal. Yet while certain NHRC members bring a seriousness of purpose to their work, others appear ready to accept unlawful or otherwise inappropriate Government activities or inactivity with little or no serious investigation. To date the NHRC has been devoid of the capacity to deal with the many complaints it receives. It lacks essential powers to carry out its work effectively, such as the power to compel testimony. Its decisions and conclusions are non-binding and may be ignored by governmental authorities. Its work is largely non-transparent, as a result of which public confidence is low in the institution as an avenue for victims to seek redress. The NHCR has failed to extend its reach nationwide, although visits by members to many districts and steps towards setting up regional offices constitute moves to redress this shortcoming. The NHCR is expected to play a leading role in monitoring the human rights components of any agreement that may be reached between the Government and the Maoists. Any such monitoring should be conducted in conjunction with an international monitoring team from the Office of the UN High Commissioner for Human Rights. Monitoring teams should be composed of paid

and qualified human rights professionals, rather than poorly trained volunteers, as suggested by the NHRC.

RECOMMENDATION 19

The National Human Rights Commission should be reformed, upgraded and expanded to include representatives from a broad cross-section of the community including more representatives of human rights NGOs and other independent bodies. It should be provided with enhanced resources commensurate with the magnitude of its mandate as the primary official organ protecting and promoting human rights. The NHRC should be granted power to enable it to compel testimony and, unless there are compelling counter indications, it should publish its findings pursuant to its investigations. In monitoring the human rights situation pursuant to any agreement reached between the Government and Maoists, it should seek to work in conjunction with international monitors to be provided by the Office of the UN High Commissioner for Human Rights.

RECOMMENDATION 20

The National Human Rights Commission should appoint rapporteurs along the lines of the existing mechanism on trafficking of women and children, so as to rationalise its work and give pronounced and expert focus to critical areas of thematic concern, such as enforced disappearances and torture.

Conclusion O

The human rights bodies established by the police, the armed police forces and Army are little more than public relations units and do not control abuses of human rights. Because they fail dismally to carry out proper investigation and prosecutions of serious human rights abuses occurring within their ranks, near total impunity prevails within each of these institutions. The human rights promotion programs carried out by the Army and Armed Police Forces are also largely without substantial effect, primarily because such programs tend to be targeted at the level of high-ranking officer, with little training imparted transmitted to the non-officer ranks.

RECOMMENDATION 21

The regular Army and the Armed Police Forces should be subject to published rules of engagement, which incorporate fundamental human rights and humanitarian provisions to prevent war crimes and crimes against humanity. Human rights and humanitarian law training should be provided amply to personnel at all levels.

RECOMMENDATION 22

The National Human Rights Commission should be given the resources and the power to investigate abuses by the Army.

F. General Recommendations to Enhance the Administration of Justice

Conclusion P

In addition, we make the following recommendations for improvements to the legal system:

RECOMMENDATION 23

There is a need for enforceable sanctions to be clearly stated within the law for perjury, whether evidence is given by way of oath or affirmation in the courts. Such sanctions should apply to all persons giving evidence, including police and law enforcement officers, so as to improve overall respect for the law.

RECOMMENDATION 24

Detaining authorities, police or otherwise, should keep continuous records of every person coming under custody, recording time and circumstances of arrest, medical conditions and treatment, legal visits and personal visits. A record of hand over of the detainee to the courts or to the legal authorities should also be kept. Such records should be accessible by court order, and copies should be kept centrally.

RECOMMENDATION 25

Provision should be made for the immediate notification, at a maximum within 24 hours, of family members and lawyers when an arrest occurs, regardless of where the detainee is held. A record should be kept indicating by whom and when such notification occurred. Such records should be continuous and accessible by the courts.

RECOMMENDATION 26

Bail or conditional release laws should be expanded to include offences carrying a maximum of three-years' imprisonment, to reduce unnecessary incarceration and to strengthen the presumption of innocence. In serving a sentence, credit should automatically be given for time spent in detention pending trial.

RECOMMENDATION 27

Measures to expedite the procedures from arrest to completion of trial – now often two to three years – should be introduced as a matter of priority

RECOMMENDATION 28

Persons awaiting trial should be held in custody separate from convicted persons, as provided for in the Prison Act and Regulations, but widely breached in practice.

RECOMMENDATION 29

Generally, alternatives to incarceration, such as rehabilitation homes, should be used for juveniles. When juveniles are incarcerated, they should be held in detention facilities separate from adults, both while awaiting trial and in the event of conviction, as provided for in the Children Rights Act, but widely breached in practice.

RECOMMENDATION 30

The Attorney General or an independent body, who is answerable to the parliament but not the executive, should be given authority over prosecution of military and civil police to take action on behalf of the state. The CIAA might also fill this function.

RECOMMENDATION 31

The Attorney General and the CIAA or another independent body should have coextensive authority and power to prosecute serious human rights and war crimes violations.

RECOMMENDATION 32

Habeas corpus must be enforceable by a proper officer of the court, as presently provided in law, but not practice. Officials failing to comply with such orders should be subject to orders in the nature of contempt.

RECOMMENDATION 33

The court before which a habeas corpus writ is returned should be given the power to prohibit re-arrest, unless further cogent evidence is produced to the satisfaction of the court that such re-arrest is appropriate.

RECOMMENDATION 34

Any evidence produced in court that flows from an unlawful Army detention is necessarily tainted and should be inadmissible in court.

RECOMMENDATION 35

There should be an authority for the protection of witnesses and provision for the hiding of witnesses where appropriate, particularly when testifying against Government or military officials. Provision should be made, pursuant to the court's exercise of discretion, for witnesses to give testimony in closed session or by means of remote television monitor.

RECOMMENDATION 36

Legislation should be adopted and implemented to mandate statutory discounts for those pleading guilty to offences.

RECOMMENDATION 37

Women serving prison sentences for abortion-related offences should be released, at least in cases where the conviction was pursuant to conduct that is no longer criminal under the reformed abortion legislation.

RECOMMENDATION 38

Nepal should ratify the Optional Protocol to the Convention against Torture and so move to prevent torture by providing for visits to places of detention by national and international mechanisms.

TUNISIA

EXECUTIVE SUMMARY

This is a report by the Centre for the Independence of Judges and Lawyers ("CIJL") of the International Commission of Jurists ("ICJ") on the situation of judges, lawyers and human rights defenders in Tunisia, a situation that the ICJ/CIJL has been closely monitoring for nearly a decade.

In light of escalating attacks on members of the legal profession, the ICJ/CIJL undertook to organize a fact-finding mission to Tunisia in June 2002 to evaluate and report on the situation of judges and lawyers. However, it was not possible to do so as all efforts to establish a dialogue with the Tunisian Government proved futile and in fact culminated in the refoulement of the mission.

In October 2002, pursuant to an invitation by the Tunisian League for Human Rights, an organization with which the ICJ has been affiliated since 1979, and in view of continuing attacks on lawyers in the exercise of their professional duties, the ICJ/CIJL decided to organize another fact-finding mission. That mission, too, was refouled upon arrival at the airport.

Nevertheless, the ICJ/CIJL was able to interview several Tunisian lawyers and human rights defenders outside of Tunisia. Human rights lawyers cannot carry out their professional duties as their every move is tracked by Government agents, files are created on them, their offices are raided and their telephone and fax lines are intercepted. Furthermore, they are often denied access to their clients or their clients' files which makes it impossible for them to prepare a proper *defence*. The harassment of human rights lawyers reached new heights in December 2002, when eight lawyers and an unfairly dismissed judge, Mokhtar Yahyaoui, were violently assaulted for having formed an organization to protect political prisoners.

Furthermore, the Council of the Bar Association as well as the President of the Bar Association are currently being prosecuted for having exercised the legitimate right to call their members to strike in protest against grossly unfair trail proceedings wherein detainees were physically attacked by police agents in court.

Other human rights defenders continue to be targeted and NGOs such as the Center for the Independence of the Judiciary in Tunis are not

allowed to officially register. The elections held by the Tunisian League for Human Rights in October 2000, by which Mokhtar Trifi, a lawyer, was elected President, have long been a sore point for the authorities who continue to attack Mr. Trifi and create obstacles for the organization.

The case of the dismissed Judge Mokhtar Yahyaoui merits special attention as he was one of the rare members of the Tunisian bench to speak out against the lack of independence of the judiciary. The Tunisian Constitution guarantees judicial independence, yet the Superior Council of the Judiciary, the body charged with nominating, transferring, disciplining, and promoting judges includes as its President and Vice President the President of Tunisia and his Minister of Justice as well as other members appointed by the Executive. Such control over the Superior Council of the Judiciary, in effect, nullifies the meaning and intent of the Constitution as well as recognized international standards on the independence of the judiciary.

The ICJ/CIJL is grateful to all those who assisted and gave of their time in trying circumstances, in particular, M. Abderaouf, Alya Sherif Chammari, Khemaïs Chammari, Bechir Essid, Frej Fenniche, Najib Hosni, Mohamed Jmour, Khemaïs Ksila, Omar Mestiri, Radhia Nasraoui, Sihem Ben Sedrin, and Mokhtar Trifi.

The ICJ/CIJL regrets that despite many written requests it was unable to establish a dialogue with Tunisian authorities.

I. INTRODUCTION

This is a report of ICJ/CIJL activities to promote and protect the independence of judges and lawyers in Tunisia. The report does not purport to be an exhaustive description of all accounts of harassment that judges, lawyers and human rights defenders have suffered throughout the past several years. It serves, rather, to highlight certain situations and give an overall appreciation of ICJ/CIJL endeavors to address some of the problems suffered by members of the legal profession and human rights defenders in Tunisia.

For nearly a decade, the ICJ/CIJL has been addressing interventions to the Tunisian government and issuing press releases on the harassment of lawyers and other human rights defenders whose situation has been deteriorating since the early 1990's when the ICJ/CIJL organized a seminar for judges in that country. In June and October 2002 respectively, the ICJ/CIJL planned to undertake two fact-finding missions to Tunisia with the aim of engaging in discussions on the role of the judiciary and lawyers

with the Government, lawyers, judges, academics, NGOs and other members of civil society. The missions would have culminated in a report with concrete recommendations for all concerned parties. However, despite prolonged efforts to establish a dialogue with the Tunisian authorities, the ICJ/CIJL fact-finding delegations were both immediately turned back from Tunis-Carthage airport. The present report, therefore, relies upon information gathered from interviews with Tunisian lawyers and human rights defenders whom the ICJ/CIJL was able to meet outside of Tunisia over the past year. These include: M. Abderaouf; Alya Sherif Chammari; Khemeis Chammari; Bechir Essid; Frej Fenniche; Najib Hosni; Mohamed Jmour; Khemaïs Ksila; Omar Mestiri; Radhia Nasraoui; Sihem Ben Sedrin; and Mokhtar Trifi. The report also draws upon a variety of other sources such as the CIJL/ICJ's past accounts of the persecution of judges, lawyers and human rights defenders in Tunisia; ICJ/CIJL trial observations; the report of the UN Special Rapporteur on the independence of judges and lawyers; the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and other well-documented accounts by international and Tunisian NGOs.

II. ATTACKS ON LAWYERS

In 1994 the Human Rights Committee stated in its Concluding Observations at its fifty-second session that:

> "The Committee cannot conceal its disappointment with the deterioration in the protection of human rights in Tunisia in the period under review. It is concerned, in particular, with the growing gap between law and actual practice with regard to guarantees and safeguards for the protection of human rights...[the Committee] is concerned by the reports on harassment of lawyers who have represented clients accused of having committed political offenses and of the wives and families of suspects.[1]"

Describing the situation of lawyers in Tunisia, *Attacks on Justice*, a ICJ/CIJL publication which documents the global state of the judiciary and legal profession, states that:

> "The Tunisian Bar has existed for over 100 years and is generally seen as having played a historically significant role in the struggle for independence. The first President of Tunisia, the late Habib Bourgiba, was himself a lawyer who had used the Bar to intervene in the political process to defend human rights and pursue issues of public importance. The principle of intervention from the Bar remained in Tunisia after independence, when politicians, trade unionists or other groups

[1] CCPR/C/79/Add.43.

> under pressure or attack would turn to the Bar for protection. However in 1991 Tunisian authorities began targeting lawyers who defended Islamists and used the press as a means of attacking them. In recent years, the target has become human rights lawyers. Thus, Tunisian lawyers are frequently obstructed from carrying out their professional duties.[2]"

Over the years, the ICJ/CIJL has issued numerous press releases and written more than a dozen interventions to the Tunisian Government on behalf of human rights lawyers such as Alya Sherif Chammari; Bechir Essid[3]; Najib Hosni; Anouar Kousri; Radhia Nasraoui; and Mokthar Trifi,[4] all of whom have been attacked in the discharge of their professional duties.[5]

Furthermore, as explained by Mr. Abid Hussain, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression:

> "Many political trials have reportedly taken place with no regard for the rights of defence and due legal process. The Special Rapporteur heard allegations that the judiciary is not entirely untouched by influence exerted by the executive branch. In addition, the task of lawyers specializing in the defence of human rights has been made increasingly difficult by the restrictions imposed on their activities in the defence of their clients, for example, the difficulty in obtaining copies of judicial documents and the practice of granting visiting permits to lawyers but refusing to recognize them on the day they visit prisons.... The Special Rapporteur considers that the harassment of lawyers and impeding their freedom to pursue their profession constitute violations of the principle of equity of the judicial system and of the right of the accused to a fair trial.[6]"

Mr. Essid, the President of the *Ordre national des avocats tunisiens* (National Bar Association of Tunisian Lawyers) and Mr. Jmour, its Secretary-General, who were interviewed by the ICJ/CIJL,[7] confirmed that the violation of the right to *defence* by persons detained for political reasons is particularly egregious in Tunisia. For example, the ability of lawyers to consult with clients is severely restricted as the Ministry of Justice limits or even refuses

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2 ICJ, *Attacks on Justice*, 11th ed. (Geneva: ICJ, 2002) 517.

3 Bechir Essid is the *Bâtonnier de l'Ordre national des avocats tunisiens* (President of the Tunisian Bar Association). The Council of the *Ordre des avocats* is currently being prosecuted for having called a national strike of lawyers on 7 February 2002 to protest the lack of fair trial guarantees during the trial of Hamma Hammami, a political activist.

4 Mokhtar Trifi is the President of the *Ligue tunisienne des droits de l'homme*, "LTDH", (Tunisian League for Human Rights) which was founded in 1977. It is one of the first human rights organizations of its kind to be established in the Arab world.

5 *Attacks on Justice, supra* note 2, 517-518.

6 E/CN.4/2000/63/Add.4.

7 ICJ interview with Mr. Bechir Essid and Mr. Mohamed Jmour, Paris, 5 November 2002.

permits to visit detainees; lawyers are routinely denied access or only given limited access to their clients' files; and detainees are pressured to change lawyers and hire those recommended by the authorities. In addition, human rights lawyers rarely benefit from a corporate clientele, as those clients are also intimidated. To further discourage all clients and deprive human rights lawyers of their source of livelihood, policemen and other state agents are routinely posted at the entry of lawyers' offices. Furthermore, human rights lawyers are under constant surveillance, files are created on them, their passports are not renewed or are withheld, and their telephones and faxes are wire tapped or cut off. It is unfortunately not infrequent that lawyers' offices are ransacked and that they are physically assaulted when trying to exercise their professional activities.

Indeed, in mid-December 2002, the authorities stepped up their attacks on human rights lawyers who recently formed an organization to represent persons detained for political reasons. The ICJ/CIJL strongly condemned the wave of violent assaults on lawyers Saïda Akremi Bhiri, Nourredine Bhiri, Samir Ben Amor, Samir Dilou, Anwar Oled Ali, Youssef Rezjai, M. Ayadi and Mohamed Jmour.[8] It is most alarming that the minor son of lawyers Saïda Akremi Bhiri and Nourredine Bhiri was also assaulted during the attacks on his parents.[9]

As indicated in a joint report written by the ICJ, Lawyers without Frontiers (Belgium) and the Observatory for the Protection of Human Rights Defenders on the situation of human rights lawyers in Tunisia:

> "Attacks on the free exercise and independence of the legal profession are targeted to lawyers who are, or who are seen to be, engaged politically. This is manifested notably in the case of lawyers who defend members of the political opposition, those who are engaged in politically 'sensitive' causes, those who are active within independent organizations, or those who themselves are related to political opponents.[10]"

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8 See, ICJ Press Release: *Tunisia: Wave of Violent Assaults on Lawyers Continues* (Geneva: ICJ, 18 December 2002), wherein the ICJ strongly condemned the recent violent spate of attacks against lawyers in clear violation of fundamental international human rights principles. As stated in the press release, "Some of the lawyers who were attacked are members of the newly created International Association for the Support of Political Prisoners which the Tunisian authorities consider to be illegal as it represents persons detained for political reasons."

9 Lawyers Committee for Human Rights Press Release: *Lawyers Committee for Human Rights Extends Solidarity to the Tunisian Legal and Human Rights Community* (New York: LCHR, 16 January 2003).

10 *Joint Report by Lawyers without Borders (Belgium), ICJ and the Observatory for the Protection of Human Rights Defenders*, Tenth Congress of the Union of Arab Lawyers, March 2001, Beirut.

The report goes to describe the numerous methods Tunisian authorities utilize to exert pressure on human rights lawyers such as economic strangulation, harassment by police, criminalization of the lawyers' professional activities and legal repression.[11]

A. Prosecution of the Council of the Bar Association (Conseil de l'ordre national des avocats)

As in the past, the Tunisian Bar Association continues to play an essential role in defending human rights. This is demonstrated by the strong stand it took in protesting the unfair trial proceedings of Hamma Hammami, Abdeljabar Maddouri and Samir Tammallah at their 2 February 2002 trial. Prior to the commencement of that hearing, while the defendants, who are members of the banned *Parti communiste des ouvriers tunisiens* (Communist Party of Tunisian, hereinafter "PCOT"), were sitting in the courtroom, they were suddenly attacked and dragged away by plainclothes policemen in full view of lawyers and international observers, including a ICJ/CIJL trial observer.[12] As stated by Human Rights Watch, "(t)his measure prompted a protest walkout by the entire *defence* team. The defendants were later escorted in a disheveled state to a different courtroom, where they stated that the police had beaten them."[13] Shocked at these assaults on the detainees, the Council of the National Bar Association and the aforementioned President of the Bar Association, Bechir Essid, who was one of the *defence* lawyers, decided on 2 February 2002 in an extraordinary meeting to call a national lawyers' strike which would take place on 7 February.

According to Mr. Essid and Mr. Jmour, the strike was called to protest the lack of fundamental fair trial guarantees during the Hammami trial, attacks on the defendants by police in the courtroom, and the lack of respect for the rights of the defence. The strike was also intended to express outrage

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11 *Ibid.*

12 Mr. Alain Werner, a Swiss lawyer, observed the 30 March hearing on behalf of the ICJ/CIJL wherein the three defendants received sentences of imprisonment from 18 months to three years and three months. In his report, the ICJ/CIJL observer expressed strong misgivings about the fairness of the trial, *Rapport d'Alain Werner, mandaté par la Ligue Suisse des Droits de l'Homme, la Commission des droits de la défense de l'ordre des avocats de Genève et la Commission internationale de juristes pour une mission d'observation judiciaire* (Geneva: ICJ, 30 March 2002).

13 Human Rights Watch Press Release: *Tunisia: Release Activists Sentenced on Political Charges* (New York: HRW, April 2 2002). See also, Rapport de Christian Grobet, observateur judiciaire de la Ligue Suisse des Droits de l'Homme (Geneva: LSDH, 9 March 2002). Mr. Hammami, who is the spokesperson for the PCOT and the husband of well-known human rights lawyer Radhia Nasraoui, came out of hiding on 2 February 2002 with the other two defendants to seek dismissal of a default *judgement* delivered against them at their *in abstentia* trial in 1999. Appeals hearings took place on 9 March 2002 and 30 March 2002.

at the treatment of lawyers who themselves had been assaulted in the courtroom during the aforementioned trial. Female lawyers, in particular, had been targeted and rudely insulted.[14]

The Council's call for a strike, which consisted of not attending court hearings for one day, was respected by 3,595 lawyers and was not observed by 80.[15]

The evening before the strike, the Minister of Justice indicated that the strike was "political in nature" and that the Council's decision could be subject to an appeal in court. Indeed, that same evening several lawyers from the party in power, *Rassemblement constitutionnel démocratique* ("RCD"), filed a lawsuit against the Council in the Court of Appeal requesting the court to determine that the Council was not competent to order the members of the Bar to strike. According to Mr. Essid, the purpose of the lawsuit is to weaken the Council's role in protecting lawyers and prohibit lawyers from engaging in their constitutional right to strike.

The Tunisian authorities also intend to create a chilling precedent in that a court ruling which divests the Council of the power to declare strikes will deprive lawyers of one of their most important weapons in their struggle for justice. This is particularly troubling as, at the present time, the most active protectors of human rights in Tunisia are lawyers.

Given the significance of the trial against the Council, the ICJ, the Observatory for the Protection of Human Rights Defenders, and Lawyers Without Borders (Belgium) mandated Mr. Lyon-Caen, a prominent French magistrate of the *Cour de cassation*, the highest court in France, to observe the first trial of the Council which took place on 19 November 2002.[16] That hearing was adjourned to 24 December 2002, which was again observed by the aforementioned trial observer. It is not an unusual tactic for Tunisian authorities to schedule trials which generate international interest during the holidays in the hope that this will dissuade foreign observers from traveling to Tunis. The 24 December hearing was adjourned as was the 25 February hearing which has now been rescheduled for 22 April.

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14 An eyewitness informed ICJ/CIJL that the agents who attacked the prisoners addressed female lawyers as "whores".

15 *Supra* note 7.

16 Mr. Lyon-Caen had been present at the 2 February 2002 Hammami trial where he witnessed the assaults on the defendants and their lawyers. See, Fédération Internationale des ligues des Droits de L'Homme report, *Mission d'observation judiciaire, Tunisie: le procès Hammami, une caricature de justice* (Paris: FIDH, January 2003).

III. HARASSMENT OF HUMAN RIGHTS DEFENDERS

The CIJL/ICJ has intervened in favor of other human rights defenders such as Khemaïs Chammari[17] whose trial it observed; Khemaïs Ksila, a former vice president of *La Ligue tunisienne des droits de l'homme* (Tunisian League for Human Rights, hereinafter "LTDH"); Mohammed Mouada, President of the opposition *Mouvement des démocrates socialistes*; and Dr Moncef Marzouki, former President of LTDH, founder of the *Conseil national pour les libertés en Tunisie* (National Council for Freedom in Tunisia), and founder of the Democratic Congress party. As described in *Attacks on Justice*:

> "[In 2000-2001] the Government continued to subject human rights defenders and activists to harassment and intimidation. Many defenders have been prosecuted or threatened with prosecution, subjected to ill treatment or had their telephone or fax lines cut.[18]"

The UN Special Representative on human rights defenders and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression have urged the Tunisian Government to end the harassment and intimidation of human rights defenders, political opponents, trade unionist, lawyers and journalists.

A. The Tunisian League for Human Rights (Ligue tunisienne des droits de l'homme)

Pursuant to the Associations Act of 7 November 1959, which regulates the activities of NGOs, the Ministry of Interior can approve or refuse the registration of organizations.[19] In practice, it is almost impossible to set up

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17 Khemaïs Chammari, a former opposition Member of Parliament (*Mouvement des démocrates socialistes*) was a vice president of LTDH and Fédération Internationale des ligues des Droits de l'Homme ("FIDH") as well as a founding member of the Arab Institute for Human Rights. In July 1996, the ICJ sent Katerina Nägeli, a Swiss lawyer to observe his trial before the Criminal Chamber of the Court of Appeal of Tunis. Mr. Chammari was charged with "disclosure of national defence secrets to a foreign country or its agents, " a crime punishable by death pursuant to the Tunisian Penal Code. As stated in an ICJ press release, *Tunisia: Jurists Dismayed by Politically Motivated Chammari Sentence*, 20 July 1996, "(t)he alleged 'secrets' pertain to the trial case of the *Mouvement des democrates socialistes* ("MDS") President, Mr. Mohammed Mouada, who was sentenced on 29 February 1996 to 11 years in prison on charges believed to have been fabricated." The ICJ trial observer concluded that the proceedings were based on "dubious and even faked evidence". See, ICJ Report by Dr. Caterina Nägeli, *Observation of proceedings against Mr. M. Khémis Chammari in Tunisia* (Geneva: ICJ, 16-19 July 1996).

18 *Attacks on Justice, supra* note 2, 513.

19 *Report of Tunisian League for Human Rights* (Tunis: LTDH, 2001), p. 9 states, "(r)égie par la Loi du 7 novembre 1959 modifiée le 2 août 1988 et le 2 avril 1992, la loi sur les associations relève du droit d'association garantie par l'article 8 de la constitution et l'article 22 du pacte

new independent associations as such requests are often rejected. More ominously, the Associations Act is used to criminalize the activities of independent organizations.

The United Nations Human Rights Committee has declared that:

> "The Committee is concerned that the Associations Act may seriously undermine the enjoyment of the freedom of association under article 22, particularly with respect to the independence of human rights non-governmental organizations. In this connection, the Committee notes that the act has already had an adverse impact on the Tunisian League for Human Rights.[20]"

Thus, there is little respect for freedom of association for human rights organizations in Tunisia. Indeed, the case of the LTDH demonstrates the nature and level of attacks and interference in the work of NGOs. This reputable human rights organization, which has 41 local sections, has been affiliated with the ICJ since 1979.

Much to the consternation of a few members of the ruling RDC party, the LTDH elected to its board a majority of human rights activists, with Mokhtar Trifi, a human rights lawyer, being elected President at its fifth general assembly in October 2000. Four RDC members filed a lawsuit and won an interim injunction to annul the results of the elections and expel the newly elected steering committee of the LTDH. On 21 June 2001, the Appeal Court in Tunis affirmed the decision of the lower court which had ordered the results of the elections to be annulled and the elected board dissolved. Ironically, the authorities ordered that that same board organize elections for a new assembly.[21] The LTDH continues to issue communications and attempts to conduct its daily business despite daily difficulties such as having its telephone and fax lines cut or monitored as experienced by ICJ/CIJL during numerous attempts to contact this organization. As stated by Mr. Trifi, the LTDH considers the Appeal Court's ruling

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international. Celle ci ne concerne pas les partis, mais le ministère public utilise souvent la loi sur les associations pour inculper les membres des partis ou des formations politiques non autorisés.... La formation d'associations indépendantes se heurte à différents blocages et tracasseries. En fait, l'administration se comporte comme si la création des associations est soumise au régime de l'autorisation préalable. Toute activité associative, sans cette autorisation imposée par le ministre de l'intérieur est criminalisée. Malgré le suivi à la lettre de toutes les procédures de déclaration de constitution, les pouvoirs publics refusent de délivrer le récépissé aux intéressés."

20 CCPR/C/79/Add.43.

21 For a full report on the LTDH elections, see, Human Rights Watch and The Observatory for the Protection of Human Rights Defenders, *A Lawsuit Against the Human Rights League, an Assault on all Rights Activists* (New York: HRW and OPHRD, April 2001).

invalidating that organization's democratic elections to be "a political decision in legal packaging".[22]

The Government, in turn, continues to harass Mr. Trifi. The latest incident against this human rights lawyer took place on 6 February 2002, the evening before the lawyers' strike.[23] Mr. Trifi's law office was raided and the contents of his desk, along with 200 dinars, were emptied. When Mr. Trifi attempted to register a complaint with the police, he was asked to name the persons he suspected of the crime, whereupon Mr. Trifi indicated that it was the chief of the political police in Tunis, Mr. Belazrag, who had previously threatened him. At the mention of this name, the policeman allegedly refused to register a complaint whereby Mr Trifi, in turn, refused to sign the police report. Thereafter, three policemen charged by the public prosecutor with investigating the crime also reportedly refused to note Mr. Belazrag's name on the complaint. Thus, the incident was not investigated and the harassment of the LTDH and its president continues.

IV. THE JUDICIARY

Article 65 of the 1959 Constitution of Tunisia establishes the principle of the independence of the judiciary and provides that judges, in the exercise of their functions, are not subject to any authority other than the law.[24] Article 66 of the Constitution states that judges are named by Presidential decree upon the recommendation of the *Conseil supérieur de la magistrature* (Superior Council of the Judiciary), and Article 67 establishes that the aforementioned Superior Council is responsible for the nomination, promotion, transfer and discipline of judges.

A. Structure of the Courts

The judicial system in Tunisia is composed of ordinary civil and criminal courts, an administrative court, and military courts.

(i) Ordinary Courts

Law no. 67-29 of 14 July 1967 establishes the structure of the ordinary courts, the statutes pertaining to the judiciary and the composition of the Superior Council of the Judiciary. Further to Article 1 of this Law, the civil and criminal court systems consist of lower district courts

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22 Interview with Mr. Mokhtar Trifi, Paris, 6 November 2002.

23 *Ibid.*

24 Article 65, "L'autorité judiciaire est indépendante; les magistrats ne sont soumis dans l'exercice de leurs fonctions qu'à l'autorité de la loi."

(*Justices cantonales*); courts of first instance (*Tribunaux de première instance*); the housing court (*Tribunal immobilier*); courts of appeal (*Cours d'appel*); and the Court of Cassation (*Cour de cassation*), which being the nation's highest appeals court, considers arguments on points of law as opposed to fact.[25]

(ii) Administrative Courts

Pursuant to Article 69 of the Constitution, the administrative court system is headed by the Council of State (*Conseil d'Etat*) which examines legislation.[26] The Council of State is composed of the Administrative Tribunal (*Tribunal administratif*) and the Court of Accounts (*Cour des comptes*), which has jurisdiction over the finances of government ministries and agencies.

(iii) Military Tribunals

Parallel to the civil system are the military tribunals within the Ministry of *Defence*. The Code of Military Justice provides that military tribunals within the Ministry of Defence are competent to try military personnel and civilians accused of national security crimes as provided by law.[27] At times of peace, a military tribunal consists of a civilian judge and four military *conseillers* who are active officers in the military.[28] The verdicts of these courts may be appealed before the Military Court of Cassation.[29]

B. The Superior Council of the Judiciary

As indicated above, Law no. 67-29 defines the composition of the Superior Council of the Judiciary. However, as this body is charged with nominating, transferring, disciplining, and promoting judges under the direct authority of the Executive, it is not independent.

Pursuant to Article 6 of Law no. 67-29 on judicial structure, the President of Tunisia heads the Superior Council of the Judiciary while the Minister of Justice serves as its Vice President.[30] The following members of the Superior Council of the Judiciary are selected by Presidential decree: the

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25 Article 1, amended by organic law no. 85-79 of 11 August 1985.

26 Article 69 (amended by constitutional law no. 97-65 of 27 October 1997).

27 The Code of Military Justice established by Decree of 10 January 1957, Chapter I, Articles 5 and 8 modified by law no. 2000-56 of 13 June 2000.

28 Chapter II, Article 10 of the Code of Military Justice.

29 Chapter V, Article 29 of the Code of Military Justice.

30 Title II, Article 6, amended by organic law no. 87.14 on 10 June 1987 and organic law no. 87-80 on 29 December 1987.

first president of the Court of Cassation; the public prosecutor of the Court of Cassation; the public prosecutor who is director of judicial services; the Inspector General of the Ministry of Justice; the first president of the Housing Court; the first president of the Court of Appeal of Tunis; and the public prosecutor of the Court of Appeal of Tunis.[31] It is the President, or if he so designates, the Vice President who convene meetings of the Superior Council.[32]

It is clear then that the Superior Council of the Judiciary, which decides on the judicial career of judges, is not independent but rather serves as an instrument of the Executive. As stated in *Attacks on Justice*:

> "This situation places undue pressure on the work and independence of judges who render decisions in politically sensitive cases... Judges fear the possibility of transfer or discipline if they issue judgements conflicting with the interests of the executive.[33]"

Such undue influence on judges violates one of the most fundamental precepts of the *UN Basic Principles on the Independence of the Judiciary*, namely, that:

> "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.[34]"

Accordingly, the Government's prevalent and persistent interference with the functioning of the judiciary constitutes a serious threat to the constitutionally and internationally guaranteed principle of judicial independence.

C. Dismissal of Judge Mokhtar Yahyaoui

On 14 July 2001, by order of the Minister of Justice, Judge Mokhtar Yahyaoui, the president of the 10th Civil Chamber of the Court of First

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31 Title II, Article 7bis added by organic law no. 85-79 of 11 August 1985.

32 Title II, Article 7 added by organic law no. 85-79 of 11 August 1985.

33 *Attacks on Justice, supra* note 2, 516.

34 Principle 2 of the *UN Basic Principles on the Independence of the Judiciary*. The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted the *UN Basic Principles on the Independence of the Judiciary* by consensus. These were endorsed by the UN General Assembly (A/RES/40/32, 29 Nov. 1985) which later specifically "welcomed" the Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice." (A/RES/40/146, 13 Dec. 1985).

Instance in Tunis, was suspended from his duties.[35] The cause of this suspension was an open letter that the Judge addressed on 6 July to the President of the Republic in the latter's capacity as President of the Superior Council of the Judiciary. In this letter, Judge Yahyaoui decried the lack of independence of the judiciary and Government disregard for the constitutional prerogatives of the judiciary. Judge Yahyaoui wrote that judges often had to "deliver verdicts which were dictated to them by political authorities... [leading] to judgements which do not reflect the law, but only the Executive's interpretation of the law."[36]

The ICJ/CIJL addressed an intervention on 20 July 2001 on behalf of Judge Yahyaoui to the Tunisian Government, pointing out its concerns that Article 8 of the Tunisian Constitution on the freedom of opinion and expression and Article 65 on the independence of the judiciary, as well as the *International Covenant on Civil and Political Rights*, to which Tunisia is a State party, had been violated. The Government's attention was also drawn to the violation of the *UN Basic Principles on the Independence of the Judiciary*.

Possibly due to mounting national and international outcry, on 1 August 2001 Judge Yahyaoui was allowed to resume his functions and his withheld salary was reinstated. However, the situation did not improve and at the beginning of November 2001, Judge Yahyaoui was removed from cases on which he was working. Shortly thereafter, he was asked to appear before the Disciplinary Council on 29 December on the grounds that he did not "fulfill his professional obligations" and that he had "denigrated the reputation of the judiciary." Given the short time that he was afforded to prepare his case, compounded by the fact that December 29 fell within the holiday period, Judge Yahyaoui's *defence* team asked the Disciplinary Council for an adjournment. This request was denied and the Judge's lawyers, to protest the lack of basic rights for the *defence*, withdrew from the case. On 29 December the Disciplinary Council announced the dismissal of Judge Yahyaoui. This decision was published by decree in the official gazette on 25 January 2002.

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35 Chapter VII of Law no. 67-29 of 14 July 1967 on judicial structure addresses the discipline of judges. Arts. 54 and 55 of this chapter provide that the Disciplinary Council is competent to discipline judges yet in urgent cases, it is the Secretary of State for Justice who does so.

36 See joint report by Avocats Sans Frontières Belgique and l'Observatoire pour la protection des défenseurs des droits de l'homme de la FIDH, *Tunisie, l'affaire Yahyaoui, Le combat d'un homme pour l'indépendance de la justice* (Avocats Sans Frontières Belgique and l'Observatoire pour la protection des défenseurs des droits de l'homme de la FIDH, June 2002).

The ICJ/CIJL sent another intervention on 13 March 2002 to express its deep concern at the dismissal of Judge Yahyaoui and remind the authorities of Tunisia's national and international legal obligations. The ICJ/CIJL requested the authorities to reinstate Judge Yahyaoui and ensure that disciplinary proceedings against him conform with the *UN Basic Principles on the Independence of the Judiciary*.[37] To date, no response to either intervention has been forthcoming. Furthermore, dismissed Judge Yahyaoui informed the ICJ/CIJL on 24 December 2002 that after nearly one year, he has yet to receive a written decision from the Superior Council of the Judiciary explaining the reasons for his dismissal. Without such written notification setting forth the rationale for his dismissal, former Judge Yahayoui cannot appeal the decision.

The UN Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, also sent urgent appeals to the Tunisian authorities on behalf of Judge Yahyaoui.[38] In its response to the Special Rapporteur the Government stated that the dismissed judge's open letter to the President was in retaliation for a judgement against him in a civil case. The Special Rapporteur remained unconvinced and noted "with concern the decision of the disciplinary council to dismiss Judge Yahyaoui and the reasons for that decision."[39] Despite several requests to conduct a mission in Tunisia pursuant to his mandate, the Special Rapporteur has yet to receive an invitation from the Tunisian Government.

Mr. Yahyaoui and members of his family face persistent harassment and intimidation at the hands of the authorities. Mr. Yahyaoui's 17-year old daughter, Amira, was assaulted outside of her school on 14 June 2002 by an unknown person who beat her with a truncheon.[40] In addition, his nephew, Zouheir Yahyaoui, has been imprisoned for having operated a web site expressing critical views on the political situation in Tunisia.[41] Mr. Yahyaoui himself has been prevented from leaving the country and travelling outside of Tunis.

On 11 December 2002, Mr. Yahyaoui was physically assaulted by plain-clothes policemen as he was attempting to enter a colleague's office. These recent attacks on Mr. Yahyaoui and on several Tunisian human rights

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37 Principles 17-20.

38 E/CN.4/2002/72, *Report of the Special Rapporteur on the independence of judges and lawyers*, 11 February 2002.

39 *Ibid.*

40 Amnesty International Press Release: *Tunisia: The trial of Zouheir Yahyaoui, the right to freedom of expression on trial again* (London: Amnesty International, 19 June 2002).

41 *Ibid.*

lawyers were allegedly intended to punish them for establishing the *Association internationale pour le soutien aux prisonniers politiques* (International Association for the Support of Political Prisoners), which is considered by Tunisian authorities to be an illegal organization.[42]

V. CENTER FOR THE INDEPENDENCE OF JUSTICE IN TUNIS

The Center for the Independence of Justice in Tunis was created in November 2001 by more than forty judges, lawyers, university professors, human rights defenders and other members of civil society to promote and protect the independence of the judiciary and lawyers as guaranteed by the Constitution and Tunisian laws. The Center is presided over by dismissed Judge Mokhtar Yahyaoui and has an executive committee whose members include Bechir Essid, the President of the Bar Association; Mokhtar Trifi, the President of the LTDH; Mohamed Charfi, the previous Minister of Education, lawyers Alya Chammari and Nejib Hosni; as well as Radhia Nasraoui and other renowned human rights defenders.

Despite numerous efforts by the founders of the Center to legally register their organization (through personal delivery of required documents and by registered mail), the authorities have refused, to date, to allow them to do so.

Regarding the difficulties Tunisian NGOs face when trying to register as organizations, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reported that:

> "... freedom of association, and also any other form of expression of divergent opinions, were subject to constraints designed to curtail if not suppress these freedoms. These constraints take various forms of pressure on organizations and, what is much more serious, on individuals themselves.
>
> Firstly, the Special Rapporteur was informed that it is virtually impossible to set up new independent associations. The number of 7,000 NGOs mentioned by the authorities very largely represents associations close to the Government or set up by it...
>
> In addition, the Special Rapporteur was informed that the everyday activity of the existing independent organizations is by no means facilitated by the Tunisian authorities...."[43]

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42 ICJ Press Release: Tunisia: ICJ condemns violent attacks on former Judge Mokhtar Yahyaoui (Geneva: ICJ, 12 December 2002). Also see, Tunisia: Wave of Violent Assaults, *supra* note 8.

43 E/CN.4/200/63/Add.4, *Report of the Special Rapporteur on freedom of opinion and expression: Civil and Political Rights Including the Question of Freedom of Expression*, 23 February 2000.

According to Mr. Najib Hosni, a well-known human right lawyer on whose behalf the ICJ/CIJL has intervened several times[44], the Center for the Independence of Justice in Tunis is particularly threatening to the authorities as it promotes an independent judiciary – a radical change from the present *de jure* and *de facto* system whereby judges are controlled by the Executive as demonstrated above.

VI. ICJ/CIJL FACT-FINDING MISSIONS

A. *First fact-finding mission (16-22 June 2002)*

In light of the attacks on the independence of the judiciary and mounting harassment of lawyers and human rights defenders in Tunisia, the ICJ/CIJL determined that it would be appropriate to conduct a fact-finding mission to that country. Furthermore, the ICJ/CIJL was strongly encouraged by Tunisian lawyers and other human rights defenders to undertake such a mission. The objective, as in all ICJ/CIJL fact-finding missions, was to undertake a full and fair evaluation of the state of the judiciary and lawyers based upon information gathered from interviews with Government authorities, judges, lawyers, academics, NGOs, human rights defenders and other members of civil society in order to ascertain whether national and international standards relating to the independence of the judiciary and lawyers are being respected. A report on the situation in Tunisia as it relates to the independence of the judiciary and the functioning of lawyers would have been issued after the conclusion of the mission. The report would have included concrete recommendations pursuant to the findings of the ICJ/CIJL mission and would have annexed any comments the Tunisian Government wished to add.

The experts who were selected for the first ICJ/CIJL fact-finding mission were: Louise Doswald-Beck, Secretary-General of the ICJ; Judge Alice Desjardins, Federal Appeals Court of Canada; and Mr. Michael Ellman, British Soliticitor. Alain Werner, a Swiss lawyer, was chosen as Rapporteur. On 24 May, the ICJ/CIJL sent a letter to Mr. Hatem Ben Salem, the Tunisian Ambassador in Geneva, informing him of its intention to conduct a fact-finding mission and requesting interviews with relevant government officials. A similar letter was addressed to the Minister of Justice and the Minister in charge of human rights on 4 June. No written responses to any of these letters were given. In a meeting with Mr. Hatem Ben Salem on 7 June, however, the ICJ/CIJL was informed that that the fact-finding

[44] *Attacks on Justice, supra* note 2, 518.

mission would not be welcome and that it would not be granted appointments with Government authorities. Various reasons for this denial were given including the following: the ICJ/CIJL had organized a seminar in Tunis in 1994 which had displeased the authorities; the ICJ/CIJL should not interfere in the internal affairs of countries; this organization had not followed proper procedures; it did not have an invitation; and one of the experts, Michael Ellman, was Jewish. However, as the Ambassador did not at any point inform the ICJ/CIJL that the mission would be denied entry into the country, preparations for the mission continued.

Nevertheless, on 15 June 2002, Judge Desjardins who was the first member of the delegation to arrive in Tunis, was immediately turned back from Tunis-Carthage airport. It became evident that the other members of the delegation would also receive the same treatment. Therefore, the ICJ decided to cancel the mission and attempted to secure appointments from Government authorities for a second mission.

On 16 June, the ICJ/CIJL issued a press release on the refoulement of Judge Desjardins, expressing its disappointment, and at the same time, its desire for future cooperation with Tunisian authorities. The ICJ/CIJL also sent a letter on 19 June to the Ministry of Justice to protest the refoulement of one of the delegation's most senior members and request future dialogue.

B. Second fact-finding mission (26-31 October 2002)

On 27 September and 14 October, the ICJ/CIJL addressed letters to the Minister of Foreign Affairs and the Minister of Justice informing them that it intended to organize another fact-finding mission to examine the situation of the judiciary and the functioning of lawyers. In this letter, the ICJ/CIJL requested appointments with relevant officials.[45] Furthermore, the ICJ/CIJL had received an official invitation from its affiliate, the LTDH, to conduct a mission to evaluate the situation of judges and lawyers. The ICJ/CIJL received numerous other invitations from Tunisian human rights lawyers to conduct such a mission.

The expert members of the second mission were Christian Grobet, a Swiss lawyer and Parliamentarian; Margaret Owen, a British barrister, Fellow at Cambridge University and retired magistrate; and Joachim Nergelius, Professor of Constitutional Law at Lund University and President of ICJ

[45] By this time, Mr. Hatem Ben Salem was no longer the Tunisian Ambassador in Geneva as he had been appointed Coordinator for Human Rights at the Ministry of Justice in Tunis.

Swedish Section. Other members of the mission were Linda Besharaty-Movaed, ICJ Legal Advisor and Hassiba Hadj-Sahraoui, ICJ Jurist.

A few days prior to the delegation's departure, the ICJ received several telephone calls from the chargé of the Tunisian mission in Geneva who attempted to dissuade the mission from taking place. The ambiguous reasons given by the chargé were that the LTDH was not in a position to invite the ICJ/CIJL (presumably as it had not held elections pursuant to will of the Executive) and that the terms of the ICJ/CIJL mission were "in contradiction with the situation of the judiciary".

Despite several requests by the ICJ for an official written communication and explanation of the aforesaid reasons, none was forthcoming. Thus, it was decided that the mission should proceed.

Upon arrival at Tunis-Carthage airport on 26 October, all members of the delegation other than Ms. Owen who had missed her connecting flight, were immediately taken aside and requested to hand over their passports and tickets. The delegation was informed by security agents that it was not allowed entry into Tunisia and that it had to return on the same flight that had brought it there. The delegation made several requests for a written explanation yet was told that there would be no such thing. Ms. Owen, who arrived in Tunis later that same day, was also immediately turned back.

The CIJL/ICJ issued a press release strongly condemning the refoulement of its second mission.[46] Louise Doswald-Beck, the Secretary-General stated that:

> "By closing its doors to international scrutiny, we can only conclude that the Tunisian Government has something to hide. The Government is foolish in thinking that by shunning the international legal community, it will not be held accountable to international human standards.[47]"

Thus, by not allowing the ICJ/CIJL missions to take place, the Tunisian Government demonstrated its bad faith and unwillingness to address serious concerns pertaining to the independence of judges and lawyers.

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46 ICJ Press Release: *Tunisia Slams Door on Civil Society* (Geneva: ICJ, 28 October 2002).

47 *Ibid.*

VII. PAST ICJ/CIJL INVOLVEMENT IN TUNISIA: 1994 SEMINAR

The ICJ/CIJL's involvement in Tunisia began in 1994 when, in collaboration with the Ministry of Justice and the Arab Institute for Human Rights[48], it organized a two-week seminar on *Judicial Independence and Functions in Tunisia.* On the last day of the seminar, the judges, who were junior in rank and who had been selected by the Minister of Justice to participate in said seminar, signed and unanimously adopted a report entitled *Summary of Activities of the Course* based upon their discussions during the seminar. Among the most important conclusions of the report were those calling for "a greater number of directly elected members of the [High Council] and for greater financial and legal independence of the High Council."[49] As indicated previously, the High Council is the constitutional body charged with nominating, dismissing, and promoting judges. The report also called for "the adoption of the principle that judges cannot be transferred without their consent"[50] and that "any transfer should take place according to objective standards that are applied equally."[51] Recommendations regarding prosecutorial oversight of police records at the time of arrest, and the right of detainees to representation during custody were also drawn up.

Several days after the termination of the seminar, the ICJ/CIJL was notified by the Ministry of Interior that the participating judges had withdrawn their support for the declaration as it did not properly reflect their views. In fact, the judges were placed under duress to sign a counter-declaration substantially altering the views they had expressed in the earlier declaration. Mr. Frej Fenniche who was at that time the Executive Director of the Arab Institute for Human Rights and co-organizer of the seminar, stated that, "(o)n 10 Dec. 1994, at 3:00 a.m., representatives of the Ministry of Justice went to the homes of each of the participating judges and ordered them

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48 The Arab Institute for Human Rights was created in 1989 through a joint initiative of the Union des Avocats Arabes, l'Organisation Arabe des Droits de l'Homme and the Ligue Tunisienne pour la Défense des Droits de l'Homme. It has consultative status with ECOSOC and the African Commission on Human and Peoples' Rights. It also has Observer Member status at the Permanent Committee of Human Rights at the League of Arab States. The mission of the Arab Institute is to "(p)romote the principles and culture of human rights, tolerance, peace and respect for human dignity, justice, equality and understanding between peoples in the Arab world based on the fundamental values of the Universal Declaration of Human Rights and through an approach based upon the indivisibility and complementarity of all human rights." The Institute achieves its objectives mainly through training and educational activities. <http://www.aihr.org.tn/objectifs.htm> visited on 24 December 2002.

49 ICJ Press Release: *Judges Intimidated in Tunisia* (Geneva: ICJ, December 1994).

50 *Ibid.*

51 *Ibid.*

to sign a counter-declaration."[52] This counter-declaration which contained only two short paragraphs was significantly at odds with the original declaration and included "two sentences praising the President of the Republic."[53] All but a few of the participating judges caved in to pressure to sign the counter-declaration. Mr. Fenniche informed us that the Ministry of Justice and the President of the Administrative Tribunal attempted to pressure him, too, to denounce the seminar and the declaration in question but Mr. Fenniche refused to comply with their request.[54]

VIII. INTERNATIONAL OBLIGATIONS

Tunisia has ratified the following United Nations treaties: *Convention against Torture, Convention on the Rights of the Child, Convention on the Elimination of all Forms of Discrimination against Women, International Convention on the Elimination of all forms of Racial Discrimination, International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.* However, Tunisia is not party to the two optional protocols to *the Covenant on Civil and Political Rights,* the first relating to the right of individuals to bring complaints to the Human Rights Committee and the second aimed at the abolition of the death penalty. In addition, Tunisia has ratified the *African Charter on Human and Peoples' Rights.*

Pursuant to Article 32 of the Constitution of Tunisia, ratified international treaties have legal precedence over domestic laws. By extension, treaties may be applied directly in domestic legislation by judges and those responsible for their application.

Relevant non-binding international obligations include: *UN Basic Principles on the Independence of the Judiciary*; *UN Basic Principles on the Role of Lawyers*; and *UN Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.*

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52 Interview with Mr. Fenniche, Geneva, 22 October 2002.

53 *Judges Intimidated in Tunisia, supra* note 49.

54 Pursuant to an Amnesty International report, "Mr. Frej Fenniche, then executive director of the Tunis-based Institut arabe des droits de l'homme (IADH), Arab Institute of Human Rights, was arrested in May 1996 at Tunis airport as he was about to board a plane to France where he was to represent the IADH at a human rights conference. He was held for four days in the Ministry of the Interior, where he was reportedly ill-treated, and the literature he was carrying for the meeting in France was confiscated." Amnesty International, *Tunisia Human Rights Defenders in the Line of Fire* (London: Amnesty International, 1 November 1998).

IX. RECOMMANDATIONS

The ICJ/CIJL urges the Government of Tunisia to respect the following recommendations pertaining to the judiciary, lawyers, and human rights defenders:

Judiciary

- Respect Article 65 of the Constitution calling for an independent judiciary.
- Conduct an impartial investigation into the dismissal of former Judge Yahyaoui and provide him with an opportunity to prepare a proper *defence* before a competent and independent body.
- Amend the law on the composition of the Superior Council of the Judiciary such that the majority of its membership is not designated by the Executive, but by qualified judges who are elected independently.

Lawyers and Human Rights Defenders

- Immediately cease assaulting lawyers and conduct impartial investigations into recent incidents where lawyers, and in some cases their children, have been physically attacked.
- Dismiss the lawsuit brought against the Council of the Bar Association and the President of the Bar Association for having exercised the legitimate right to call a strike. Cease future interference in the affairs of the Bar Association.
- End police surveillance and interception of telephones and faxes of lawyers and human rights defenders. Cease pillaging the offices of lawyers and human rights defenders. These actions clearly constitute harassment and intimidation.

National NGOs

- Allow the Center for the Independence of Judges in Tunis to register as an NGO. Such organizations promoting and protecting the independence of judges and lawyers exist legitimately throughout the world.
- Recognize as valid the democratic elections of the Tunisian Human Rights League and allow this and other human rights organizations to carry on their work without any interference or harassment.

International NGOs and UN special mechanisms

- Allow international NGOs and UN Special mechanisms into Tunisia to conduct missions pursuant to their respective mandates.

International Obligations

- Act in accordance with the following instruments: *International Covenant on Civil and Political Rights*, in particular, articles 9 and 14; *African Charter on Human and Peoples' Rights*, principally articles 7 and 26; amend the Code of Military Justice so that civilians are not tried by military courts; respect the *UN Basic Principles on the Independence of the Judiciary* and the *UN Basic Principles on the Role of Lawyers;* and respect the *UN Declaration on the Right and Responsibility of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.*

CRIMINAL JUSTICE REFORM IN INDIA: ICJ POSITION PAPER. REVIEW OF THE RECOMMENDATIONS MADE BY THE JUSTICE MALIMATH COMMITTEE FROM AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE[1]

EXECUTIVE SUMMARY

The following review has been prepared by the International Secretariat of the International Commission of Jurists (ICJ) on the occasion of a two-day national conference jointly organized by the ICJ and the Human Rights Law Network on 9-10 August 2003 in New Delhi. It seeks to create a public and political debate on the recommendations made by the Justice Malimath Committee on Criminal Reforms in light of international human rights standards and the international legal obligations of India.

The Committee on Reform of the Criminal Justice System headed by Justice V. S. Malimath has proposed important changes to various aspects of administration of justice with a particular focus on the principles of evidence and conduct of criminal trials. The Malimath Committee was constituted on 24 November 2000 by the Union Government. The Report was submitted to the Union home ministry in April 2003 for further consideration and action. It is the first time in 150 years of Indian legal history that such wide-ranging reforms are being proposed.

The Committee sought to expedite the criminal process as it considers that "the criminal justice system is virtually collapsing under its own weight as it is slow, inefficient and ineffective" and that "people are losing confidence in the system." The recommendations, however, have far reaching consequences for the rule of law in India.

The changes proposed by the Committee represent a turn from a system that had been rooted in jurisprudence prevalent in India for more than a century. If the suggested changes are implemented by the Government, there will be serious consequences for the protection of human rights of

[1] This report was mainly researched and written by Cordula Droege, Legal Officer, International Commission of Jurists.

individuals, and particularly members of the weaker sections of society. The recommendations may also interfere with international human rights norms and with safeguards established by the Supreme Court of India and various State High Courts.

The Committee proposes a lesser proof criterion for the finding of guilt than has been followed until now, namely a standard of "court's conviction that it is true" rather than proof beyond reasonable doubt. Another important recommendation concerns the right to silence of the accused during trial. This right is a corollary of the right against self-incrimination, a basic postulate of well-settled international jurisprudence.

Last but not the least, the Committee proposes that courts be permitted to accept as evidence the statements or confession made by the accused to a police officer, overturning a provision in the Indian Evidence Act to the contrary.

Human rights groups and legal organizations have already expressed their concern with regard to the major recommendations, and there is a discussion within the legal community. However, by and large, the recommendations have not given rise to the public debate they warrant.

The ICJ would like to intervene in the legal debate to draw attention to the international standards concerning the right to a fair trial. The ICJ, in partnership with the legal community and human rights NGO's, wishes to address the debate from the perspective of international human rights, and raise public and political debate about the implications of such proposals on the rule of law. Therefore, this joint National Conference at the initiative of the Human Rights Law Network (HRLN) will be the first national event focussing on the Justice Malimath Committee Report from a human rights angle. The Conference will create a forum for judges, human rights and criminal lawyers, representative of human rights organizations and other legal professionals.

The OBJECTIVES of the review are the following:

- Give a preliminary response to the Justice Malimath Committee Report on criminal justice reforms in India from the international human rights perspective;
- highlight the problems and lacunas with regard to the major recommendations of the Justice Malimath Committee and make proposals in light of India's obligations under international law, in particular the ICCPR and customary international law;

- raise the debate within the legal community on a constructive dialogue with public authorities with a view to achieving a criminal justice reform based on dignity and human rights.

Terms of Reference

Proposals on the reform of the criminal justice system. In March 2003, the Committee on Reforms of the Criminal Justice System (Justice Malimath Committee) submitted a comprehensive report with recommendations to improve the Indian criminal justice system. The Justice Malimath Committee was constituted by the Government of India, Ministry of Home Affairs by its order dated 24 November 2000 and was to examine the fundamental principles of criminal law, particularly with a view to shortening the excessively long delays of criminal trials and to restoring confidence in the Indian criminal justice system. This included the possibility to review the main statutes governing the criminal justice system in India, namely the Constitution of India of 26 November 1949, the Indian Penal Code,[2] the Code of Criminal Procedure,[3] and the Indian Evidence Act.[4] The Committee proceeded to examine several national systems of criminal procedure, and especially comparing the adversarial and inquisitorial systems. It considered in particular the criminal justice systems of continental Europe. It also consulted with many actors involved, seeking the opinions of members of the civil society through an in-depth questionnaire, and with all actors involved in the criminal justice system, such as courts, bar councils, police departments, state governments, forensic scientists, and legal academics.

The 158 recommendations resulting from the study of the Justice Malimath Committee are aimed at addressing all aspects of the system. They are divided into the following areas: fundamental principles; investigation; prosecution; judiciary; crime & punishment. The essence of the Justice Malimath Committee proposal is a shift from an adversarial criminal justice system to an inquisitorial criminal justice system, based on the continental European systems. It seeks a shift towards a system in which the main objective of the criminal justice system is the "quest for truth". The second key proposal by the Committee is a substantive strengthening of the police force, as it emphasizes that police investigations are at the beginning of every criminal justice system. A third important area of propositions concerns the introduction of legislation on federal crimes, organized crime

2 Act No 45 of Year 1860.
3 Act No 2 of 1074.
4 Act 1 of 1872.

and terrorism. Lastly, the Justice Malimath Committee makes recommendations for an improvement of the status of victims of crime and witnesses.

Many of the recommendations seek to provide adequate resources for the authorities involved in the criminal process and an improved training for their members. These recommendations are welcome and, if implemented, will help to improve the Indian criminal justice system. Some of the recommendations, however, raise concern as to their compatibility with international human rights standards. The International Commission of Jurists wishes to submit some remarks and recommendations from the perspective of the international rule of law.

Principal issues of concern. The purpose of the following review is confined to analysing some specific recommendations which, in the view of the ICJ, constitute issues of concern. Many of them are recommendations the consequences of which cannot yet be fully assessed, either because they are kept in rather general terms, or because their effect cannot yet be seen. In those cases, caution is nevertheless expressed where there seems to be reason for prudence. The main areas of concern are related to the proposed shift from an adversarial to an inquisitorial system. The ICJ is concerned that the proposal does not fully adopt the inquisitorial system, but wants to introduce some elements of it into the Indian system, without regard to the overall compatibility with the system. There is, in particular, a grave concern with regard to the proposals concerning the presumption of innocence and the right to silence. Secondly, a strong emphasis on strengthening the police force can be made out throughout the Justice Malimath Committee's proposals. Emphasis is laid on so called "efficiency" of the system, which the Justice Malimath Committee seems to assess through the criterion of a high conviction rate. The rationale of a criminal justice system to respect and protect human rights is not discussed. Not much importance seems to be given to the concept of efficiency through professional and proper investigation in full respect of human rights. The ICJ wishes to recall some fundamental principles of human rights that have to guide the investigations. Lastly, the issue of victim and witness protection, in particular the protection of women, appears to be one of the fundamental aspects of criminal justice. The ICJ would like, in this regard, to address the propositions made by the Justice Malimath Committee in the light of the international legal obligations of the state in this area of law.

The analysis is limited to the compliance of the proposed recommendations to international legal standards on human rights. It does not address in detail the many social factors that adversely affect the current criminal justice system. However, when analysing the proposals, it must be kept in

mind that many of the shortcomings that the Justice Malimath Committee seeks to remedy result from structural factors, such as the high level of discrimination, the problem of corruption, the shortage of resources, and the prevailing violence to which many state officials resort to.

The ICJ also would like to stress that the following analysis is not intended as a comprehensive review and does not address all issues raised by the 158 recommendations. Only the most pressing concerns will be highlighted and discussed.

International Human Rights Conventions and customary law. India is a party to many international human rights conventions. It has ratified the International Covenant on Civil and Political Rights (in the following ICCPR);[5] the International Covenant on Economic, Social and Cultural Rights,[6] the Convention on the Elimination of All Forms of Racial Discrimination,[7] the Convention on the Elimination of All Forms of Discrimination Against Women,[8] and the Convention on the Rights of the Child.[9] Furthermore, customary international law, formulated to a large extent in the Universal Declaration on Human Rights,[10] is legally binding upon India. For this study, the customary rules on the right to a fair trial and the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which is also a peremptory norm of international law,[11] are of particular relevance.

Declaratory human rights instruments. There are also international standards of a non-binding nature which illustrate human rights in the administration of justice, and in particular criminal justice. These are declaratory in nature and influence international standards on the right to fair trial as interpreted by national and international human rights bodies and tribunals. On a universal level, there are, in particular: the Basic

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5 999 U.N.T.S. 171. India has made reservations to articles 1, 9, 13 and declarations on arts. 12, 19(3), 21, 22.

6 993 U.N.T.S. 3.

7 660 U.N.T.S. 195.

8 249 U.N.T.S. 13.

9 G.A. res. 44/25, annex, 44 UN. GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989).

10 G.A. res. 217A (III), UN. Doc A/810 at 71 (1948).

11 The prohibition of torture has been identified not only as a norm of customary international law, but also as an inderogable norm of peremptory international law [Human Rights Committee, *General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), paras. 8, 10]. India has signed, but not ratified the UN Convention against Torture (78 U.N.T.S. 277).

Principles on the Role of Lawyers,[12] the Guidelines on the Role of Prosecutors,[13] the Basic Principles on the Independence of the Judiciary,[14] the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[15] the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[16] the Resolution of the Human Rights Commission on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms,[17] and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.[18]

Fair trial standards in comparative perspective. Finally, insofar as the Justice Malimath Committee refers to the inquisitorial system of continental Europe – particularly France and Germany – the rights of the accused in those systems and the rights guaranteed by the European Convention on Human Rights[19] as interpreted by the European Court of Human Rights must, to the extent possible and relevant, be taken into account. Indeed, all countries of Europe are bound by the European Convention on Human Rights, which has a consolidated jurisprudence on the right to fair trial in particular. Also, where possible, the national codes of criminal procedure should be taken into account, so as to illustrate how the rights of the accused, and also the rights of victims, are protected in those systems.

Outline. The analysis first addresses some assumptions on which the Justice Malimath Committee bases its proposals, and which concern the functioning of the two main currents of criminal justice, namely the adversarial/common law and the inquisitorial/continental criminal justice system (I.). It then proceeds to a critical study of the propositions concerning first

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12 Adopted in Havana, 27 August to 7 September 1990, UN. Doc. A/CONF.144/28/Rev.1 at 118 (1990).

13 Adopted in Havana, 27 August to 7 September 1990, UN. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

14 Adopted in Milan, 26 August to 6 September 1985, UN. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

15 Adopted by General Assembly resolution 40/34 of 29 November 1985, UN. Doc. A/40/53 (1985).

16 Adopted by General Assembly resolution 55/89 Annex, 4 December 2000.

17 Commission on Human Rights Resolution 2003/34.

18 *Final report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, 18 January 2000, E/CN.4/2000/62.

19 Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 213 U.N.T.S. 222.

the investigation stage (II.) and then the trial stage (III.) of the criminal justice system. Lastly, it addresses the question of victim and witness protection, and in particular the propositions of the Justice Malimath Committee with regard to women in criminal justice (IV).

I. PRELIMINARY REMARKS: ADVERSARIAL AND INQUISITORIAL CRIMINAL JUSTICE SYSTEMS AND UNDERLYING ASSUMPTIONS OF THE JUSTICE MALIMATH COMMITTEE

The Justice Malimath Committee, to counter the lack of efficiency, proposes a shift from the adversarial to the inquisitorial criminal justice system (Recommendation 1-7). The "quest for truth" should be at the centre of the criminal justice system, as an instrument to assign wide investigation powers to the magistrate. The rationale underlying the recommendations seems to be that a system which gives investigation powers to courts leads to "more effectiveness", in other words a higher rate of conviction. Thus Recommendation No 1 proposes a new preamble for the Code of Criminal Procedure, which reads "(...) it is expedient to constitute a criminal justice system for punishing the guilty and protecting the innocent" without mentioning the protection of the accused. The Justice Malimath Committee's assumption that a shift from the adversarial to the inquisitorial systems will lead to an improvement of the situation of the criminal justice system in India must, however, be critically assessed in the light of public international law.

A. The role of magistrates in the inquisitorial system

Safeguards for the accused in the inquisitorial criminal justice system. The first assumption is that the adversarial system is at the root of the malfunctioning and distrust. However, not only is it very doubtful whether the conviction rate is in any way linked to the inquisitorial system, but above all, it is not the rationale of the inquisitorial system to convict the greatest possible number of accused. Rather, the role of the magistrate in this system is not to be above all "effective", but mainly to conduct a fair trial, to examine all evidence for and against the accused,[20] and to protect the accused from arbitrariness. Therefore, the statement by the Justice Malimath Committee, according to which "[t]he inquisitorial system is certainly efficient in the sense that the investigation is supervised by the

[20] See, in particular article 81 of the French Code of Criminal Procedure: "Le juge d'instruction procède, conformément à la loi, à tous les actes d'informations qu'il juge utiles à la manifestation de la vérité. Il instruit à charge et à décharge".

judicial magistrate which results in a high rate of conviction"[21] is mistaken in that it overlooks the safeguards against abuses in the investigation process. Whereas it is self-evident that the main objective of a criminal law process is the search for truth, it is certainly not the only duty of the magistrate.

Also, the shift to an inquisitorial system carries with it an increase in the competences and powers of the court, which has the duty to order further investigations on its own motion if it is not satisfied with the result of the investigations. The Indian law-maker must be aware of the implications of such a shift towards a court-controlled system, and build into a new system the safeguards necessary to such a system. For example, the duty of the magistrate to search for truth means a high commitment of the magistrate to find the truth *proprio motu.* In this respect, the fourth paragraph of recommendation No 1 contains an unclear proposal, stating that it shall be the duty of "(...) everyone associated with it in the administration of justice, to actively pursue the quest for truth". Does this also comprise the defence counsel?[22] Whereas the defence lawyer must be seen as part of the legal profession and thereby as having a duty to respect the rule of law, his main role is the defence of his client within the limits of the law, and he cannot be compelled to present evidence to the detriment of the accused. It is incumbent on the magistrate to shed light on all facts pertinent for the conviction.

A human rights-based criminal justice system. All systems, be they adversarial or inquisitorial, must comply with international human rights law. International human rights law is, in principle, indifferent to the internal criminal law system, as long as its features are compatible with international human rights. A country seeking a change in its criminal procedure system has to be aware that most systems have had to adapt gradually to international human rights standards. Indeed – and this is of particular relevance as the Justice Malimath Committee repeatedly refers to the European systems – the European Convention on Human Rights is a good example for this, as the European Court of Human Rights made clear that each country, while free to adopt its own system of criminal justice, evidence, proceedings, etc., is nevertheless bound by the fair trial standard laid out in the Convention.[23] Thus, although there are a lot of differences between

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21 Explanation before Recommendation No 1.

22 This seems to be the implicit meaning by the Committee in its Report at p. 57, para. 3.54 and p. 250, para. 21.5.

23 See, in this sense ECtHR, *Salabiaku v. France,* Judgment of 7 October 1988, Series A No 141-A, para. 27

the adversarial and the inquisitorial system, "in the final analysis, they come very close together. The issue is more one of different instruments and safeguards rather than of basic goals and principles. Both systems strive for the same end: to convict the guilty and to discharge the non-guilty by seeking the truth by fair means."[24]

It is of utmost importance that any criminal justice system, be it adversarial or inquisitorial, be it based on a system of free proof or legal proof, or a combination of these systems, comply with international human rights standards. In particular, the rights of the accused must be at the centre of all proceedings, and the rights of the victim must be protected at all stages. Human rights must be the benchmark for any criminal justice system.

B. Systemic shortcomings of the criminal justice system in India

The assumption that the shift from an adversarial to an inquisitorial system will render criminal justice more efficient also fails to address the deeper-rooted causes of the shortcomings of the criminal justice system in India. As has been reported by numerous human rights organizations, the Indian criminal justice systems suffers from discrimination of certain sections of society, old-fashioned and inefficient institutions, lack of human and technical resources, lack of investigation expertise, a confession-oriented approach to interrogation, lack of punitive action against abusers of human rights, and a level of corruption.[25]

Lack of resources: the Indian criminal justice system suffers from serious under-funding and understaffing, and continues to be extremely slow. The population-judge ratio is extremely low. There is a need for training of all judicial personnel and court administrators.[26]

Torture: Torture is endemic in India and this is a fact acknowledged by the authorities and widely documented.[27] Police forces are poorly trained on investigation methods and on the absolute prohibition of torture and cruel, inhuman or degrading treatment. Most cases of torture by state officials

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24 *A. Eser*, Collection and Evaluation of Evidence in Comparative Perspective, in: 31 Israel Law Review (1997), 429.

25 *Amnesty International*, India: Words into action. Recommendations for the prevention of torture, AI INDEX ASA 20/003/2001, p. 3.

26 *National Human Rights Commission of India*, Annual Report 2000-2001, paras 3.62 *et seq.* (available at http://nhrc.nic.in/); *Concluding observations of the Human Rights Committee: India*, 4 August 1997, CCPR/C/79/Add.81, para. 27; *Amnesty International*, Annual Report 2002 (India) and Annual Report 2003 (India).

27 See the accounts in the Annual Reports of the National Human Rights Commission of India.

occur in police custody, and it is widely acknowledged by governmental and non-governmental studies that the police operate in a system facilitating the use of torture and ill-treatment. Torture is systematically used in the criminal justice system as a method of investigation: the increasingly dysfunctional criminal justice system and torture in custody constitute a vicious circle of deficient interrogation, falsified investigation results and distrust of the criminal justice system. It appears that there exists a certain perception in India that torture is acceptable under extreme circumstances, and for "hardened criminals" and "terrorists".[28] The overload within the criminal justice system also contributes to public tolerance towards violence as a means of justice. The consequence of this is a lack of investigation into allegations of torture, let alone of "mere beatings", and impunity for the perpetrators. Corruption within the police equally provides a ground for the practice of extortion and threats. It is reported that members of the medical profession refuse to examine torture victims or document injuries, often because of fear and threats.[29] As a result, the number of custodial deaths is alarmingly high. The Supreme Court and High Courts of India as well as the National Human Rights Commission have handed down many recommendations to achieve a better prevention against torture and to provide for redress measures for victims, but it has not lead to an eradication of torture.

Discrimination: The other background to be taken into account is the persisting discrimination on state and society level in India.[30] Discrimination constitutes one of the very seeds for the systematisation of torture and an impediment to the fairness and functioning of the criminal justice system. Discrimination on the basis of gender, religion, caste, ethnicity, social, political and economic background is widespread throughout India

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28 *Amnesty International (op. cit.* note 25) p. 5.

29 See the reports by *Amnesty International*, India: Break the Cycle of Impunity in Punjab, AI INDEX: ASA 20/002/2003, 20 January 2003, p. 35, India: Time to Stop Torture and Impunity in West Bengal, AI INDEX: ASA 20/033/2001, 10 August 2001, p. 20, and India: The Battle against Fear and Discrimination: The Impact of Violence against Women in Uttar Pradesh and Rajasthan, AI INDEX: ASA 20/016/2001, 8 May 2001, p. 28; see, on the role of the medical profession the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly resolution 37/194 of 18 December 1982.

30 National Human Rights Commission of India, Annual Report 2000-2001, p. 135 (reports of violence against dalits, minorities, disabled and others); *P.J. Alexander*, Some recommendations from the Law Commission of India on arrest and detention, p. 1 (available at http://www.article2.org/mainfile.php/0102/27); *Amnesty International (op. cit.* note 25) p. 3; *Amnesty International*, Annual Report 2002 (India) and Annual Report 2003 (India); *Human Rights Watch*, World Report 2003 (India).

and lays the foundations for endemic torture.[31] All torture involves the dehumanisation of the victim, the severing of the bonds of human sympathy between the torturer and the tortured. This process of dehumanisation is made easier if the victim is from what is considered a despised social, political, ethnic or religious group."[32] Although discrimination is outlawed in the Indian Constitution and progressive legislation and jurisprudence exists to prevent and sanction discrimination, and although India is a party to the major Conventions against discrimination of particular groups, the reality in India does not reflect these legal commitments, partly because they have not been accompanied by an adequate increase in resources.[33] The criminal justice system reproduces the discrimination existing in society against women, dalits and adivavis, and members of the scheduled castes and scheduled tribes.

Corruption. Lastly, there exist many accounts of corruption throughout the criminal justice system, and this contributes to a spreading of torture practices, to more discrimination, and to miscarriages of justice.[34]

Recommendations

- **Any reform of the Indian criminal justice system must be based on respect for human rights, in particular the rights of the accused and the rights of victims.**
- **Whichever criminal justice system is adopted, it has to be in conformity with the international human rights obligations of India.**
- **Any reform of the criminal justice system must take into account and seek to eradicate the root causes of its malfunctioning, i.e. discrimination, lack of resources, corruption and the practice of torture.**

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31 See *Law Commission of India*, 152nd Report on Custodial Crime (1994), para. 1.5; *Concluding observations of the Committee on the Elimination of Discrimination against Women: India*, 1 February 2000, A/55/38, para. 68, 71.

32 See *Human Rights Watch*, Broken People – Caste Violence Against India's "Untouchables", March 1999; *Amnesty International (op. cit.* note 25) p. 5; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: India*, 17 September 1996, CERD/C/304/Add.13; *Concluding Observations of the Human Rights Committee: India*, 4 August 1997, CCPR/C/79/Add.81, paras. 5, 15.

33 *Amnesty International (op. cit.* note 25) p. 7.

34 *Ibid.*, p. 3; Responses by *Basil Fernando* to the questionnaire formulated by the Committee on Reforms of the Criminal Justice System (on Part B: Institutions); see also *Justice K.N. Singh*, The Obstacles to the Independence of the Judiciary, in: *International Commission of Jurists*, The Independence of the Judiciary in India (1990), p. 23 *et seq.*

II. REFORMS CONCERNING THE POLICE AND POLICE INVESTIGATION METHODS

Throughout its proposals, the Justice Malimath Committee seeks to strengthen the police force. Indeed, the police in India is overburdened, often operates in high risk situations, lack adequate remuneration and appropriate training. Proposals and reports on police reform have not borne fruit until now.[35] The proposals to strengthen the material and human resources in the police, to have a more sustained training policy must therefore be welcome as a real improvement for the police system in India. Equally, the creation of an investigation and a law and order wing could lead to more efficiency within the criminal justice system, through the higher specialisation and qualification of investigation officers.

However, there is a lack of balance between the strong attacks by the Justice Malimath Committee on judges, prosecutors and witnesses and the very strong support for increased police power. The report raises a concern that a somewhat disproportionate weight is given to the strengthening and supporting the interests of the police. It should be the concern for the welfare and human rights of all persons under Indian jurisdiction that constitute the main concern for a reform of the police. Among the powers that the Justice Malimath proposes to confer to the police, the most far reaching are the extension of police power to detain persons in police custody, the admissibility of confessions made to the police as evidence in criminal trial, the extensive powers of surveillance granted to the police, and the appointment of a police officer to the prosecution office. It must be noted that most of these police powers have already been conferred to the police in the Prevention of Terrorism Act, 2002. It is disturbing that powers meant for the exceptional situation of fight against terrorism is now to be mainstreamed into the everyday criminal justice system; the most problematic aspect of this trend is the curtailing of judicial supervision of law enforcement officials.

Recommendation:

- **The protection of human rights should be the driving motor of any reforms of the police.**

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[35] For a background on the many attempts to reform the police see *National Human Rights Commission of India*, Annual Report 2000-2001, paras. 3.50; *Amnesty International* (*op. cit.* note 25), pp. 11 *et seq.*

A. Police custody

Length of police custody. Recommendations 28 to 30 seek to extend the length of police custody from 15 to 30 days. The suggestion is problematic as a prolongation of police custody in reality amounts to a substantial increase in the risk of violence against the suspect, particularly as the police is and will remain the authority carrying out criminal investigations. This is contrary to what has been recommended by the Special Rapporteur on torture and the Committee against Torture, who, as a protection from torture in police custody, have asked that detention and interrogation facilities should be separate, so that those who have an interest in the outcome of the investigation are not the same as those who decide on and are in charge of detention.[36]

Recommendations on detention:

- **The authority conducting the investigation should be separate and independent from the detention authority.**
- **The length of police custody should not be extended.**

B. Admissibility of evidence – in particular confessions – collected by the police in criminal trial

Recommendations No 21 *et seq.* contain a number of suggestions for better technological equipment, in particular for tape recording, videography, photography. The use of modern technology may indeed lead to an improvement of criminal justice, as it may sometimes provide objective evidence for certain facts. It also helps to broaden the investigation tools.

Recording of confessions. As far as the recording of confessions is recommended, it is true that many organizations approve and encourage the use of recording devices in police stations as a safeguard against torture and ill-treatment.[37] However, it must be borne in mind that audio or video recording can never of itself be a sufficient disincentive from torture or

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[36] *Concluding observations of the Committee against Torture: Colombia*, 9 July 1996, A/51/44 para. 78; *Concluding observations of the Committee against Torture: Jordan*, A/52/44, para. 176; *Consolidated recommendations of the Special Rapporteur on torture*, UN DOC A/56/156, 3 July 2001, para. 39 (f).

[37] *Consolidated recommendations of the Special Rapporteur on torture* (*op. cit.* note 36), para. 39 (d): "Serious consideration should be given to introducing video- and audio-taping of proceedings in interrogation rooms" and para. 39 (f): "All interrogation sessions should be recorded and preferably video-recorded"; *Amnesty International*, Combating Torture – A Manual for Action (2003), p. 105.

ill-treatment. Also, regard must be had to the particular circumstances of each case, and it must be taken into account that recordings may merely serve to formally legitimise illegal interrogation methods.[38] Altogether, this method will only serve as an efficient safeguard against illicit interrogation methods, if it is supervised by an independent authority, and not left to the hands of the interrogating officers. Recording under the supervision of a higher-ranking police officer, as proposed by the Justice Malimath Committee, is an insufficient safeguard, as it guarantees no independent supervision.

Proposition to use confession to the police as evidence. Recommendation 37 highlights the possible implication of the provisions on audio and video recording and exposes the risk of misuse in criminal proceedings. Indeed, this Recommendation suggests that "Section 25 of the Evidence Act may be suitably amended on the lines of Section 32 of POTA 2002 that a confession recorded by the Superintendant of Police or Officer above him and simultaneously audio or video recorded is admissible in evidence subject to the condition that the accused was informed of his right to consult a lawyer."[39] Against the background of the systematic resort to torture by the police in India, such a suggestion carries with it the risk that confessions extracted under duress will be used as evidence against the accused, in clear violation of international law.[40]

Confession to the police as evidence should be rejected. The possibility to allow confessions made to the police as direct evidence must be rejected as a matter of principle, at least where it is not made in the presence of a lawyer. Most international bodies have guarded against confessions as

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38 For instance, according to *Basil Fernando,* Director of the Asian Human Rights Commission, it is to be feared that given the level of corruption and closeness of the police system, the presence of a higher ranking officer serves as a legitimisation rather than a deterrent of abuse [Responses to the questionnaire formulated by the Committee on Reforms of the Criminal Justice System, question 7.17].

39 Section 32 POTA is a derogation from Section 25 of the Indian Evidence Act, 1872, which reads: "No confession made to a police officer shall be proved as against a person accused of any offence".

40 According to the Human Rights Committee, "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment" [*General Comment 20, Article 7,* UN Doc. HRI/GEN/1/Rev.6 (1992), para. 12]; It has also made clear that the use of evidence extracted through torture violates the right not to confess guilt and stated that national laws "should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable" [*General Comment 13, Article 14,* UN Doc. HRI\GEN\1\Rev.6 at 14 (1994), para. 14]. The UN Convention against Torture expressly prohibits the use of evidence extracted through torture in article 15. A similar prohibition can be found in Principle 16 of the UN Guidelines on the role of prosecutors.

evidence, since it can easily lead to evidence obtained through torture or cruel, inhuman and degrading treatment being admitted as evidence. The Special Rapporteur on torture has stated that "[n]o statement of confession made by a person deprived of liberty, other than one made in [the] presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained confession by unlawful means."[41] An investigation and criminal justice system based on confessions and coupled with public pressure on police to fight crime results in a systematic resort to torture in order to coerce confession.[42] There is a good reason why the Indian Evidence Act does not allow confessions as evidence,[43] and as long as torture is not completely eradicated in India, it should remain this way.[44] Also, the admissibility of confessions does not fit into the framework of the Indian Evidence Act as it now stands, as there are no safeguards enshrined in the system of proof in order to prevent miscarriages of justice. Even in systems of free proof where all evidence is in principle admitted in trial, safeguards exist. In France, for instance, any record of proceedings only has probative value if it fulfils all formal conditions, and any record of interrogation must contain all questions that have been answered.[45] Even then, any confession, like any other piece of evidence, is subject to the free appreciation of the judges.[46] In Germany, no confession made to the police is admissible as evidence;[47] only declarations made to the magistrate may be read in the hearing in order to take evidence of a confession.[48]

Right to the presence of a lawyer during police interrogation as a minimum guarantee. The suggestion by the Justice Malimath Committee is all the more worrying since the right to a lawyer during police interrogation is not, as yet, enshrined in the statutes of India, although it has been affirmed by the Supreme Court.[49] In reality, lawyers and relatives are reportedly denied access to detainees.[50] Indeed, the Justice Malimath Committee, in Recommendation No 37 only makes the use of confessions to the police as

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41 *Consolidated recommendations of the Special Rapporteur on torture* (*op. cit.* note 36), para. 39 (d).

42 *Amnesty International (op. cit.* note 25), p. 22; Opinion of the Commission on the Prevention of Terrorism Bill, 2000, Annex 2 to the Annual Report of the Human Rights Commission of India 2000-2001.

43 This recommendation is based on the provision of section 32 POTA.

44 Historically, there is a clear link between the change in the law of evidence and the official abolition of torture.

45 Article 429 of the French Criminal Procedure Code.

46 Article 428 of the French Criminal Procedure Code.

47 See §§ 250 et *seq.* of the German Criminal Procedure Code.

48 § 254 of the German Criminal Procedure Code.

49 Satpathy v P.L. Dani, AIR 1978 SC 1025.

50 *Amnesty International (op. cit.* note 25), p. 23.

evidence subject to the *information* about the right to be interrogated in the presence of a lawyer, not subject to the actual presence of a lawyer. Most people are interrogated without the presence of a lawyer, so that these confessions should not be considered as evidence. The Indian law-maker should make the presence of a lawyer compulsory for interrogations by the police. This has been recommended by international human rights bodies,[51] and is stated as a right in the Rome Statute for the International Criminal Court.[52] Equally, the Basic Principles of the Role of Lawyers establish a right to legal assistance at all stages of criminal proceedings, including during interrogation and the right to be informed of this right.[53]

Duty to investigate allegations of torture. Lastly magistrates, like any other state authority, have a duty to investigate allegations of torture and ill-treatment.[54] This duty of investigation is an obligation for the magistrate to conduct the investigation *proprio motu* and *ex officio*. This is important, as many detainees or accused brought before a court will not complain about having been tortured, as they will often be subject to intimidation by the police. Magistrates should always automatically verify if evidence has not been obtained through torture or cruel, inhuman or degrading treatment. This international standard has also been adopted by the Indian Supreme Court, which has held that section 54 of the CrPC required that the magistrate before whom the arrested person is brought shall enquire if the person has a complaint of torture or ill-treatment and inform the person of his or her right to a medical examination.[55]

Recommendations on police investigations

- **All evidence in criminal cases must be obtained through professional methods of investigation and in full respect of human rights.**
- **Confessions extracted through torture or other cruel, inhuman and degrading treatment are unlawful and cannot be admitted as evidence under any circumstances.**

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51 *Concluding Comment of the Committee against Torture: Democratic Republic of Korea*, 11 November 1996, A/52/44, para. 68; *Concluding Comments of the Committee against Torture: United Kingdom*, 9 July 1996, A/51/44, para. 65 (e).

52 Article 55 (2) (d) of the Rome Statute of the International Criminal Court, UN. Doc. A/CONF.183/9, entered into force 1 July 2002; The Supreme Court of India, in the case of *D.K. Basu v. West Bengal*, 18 December 1996, [1997] 2 LRC 1, para. 36 (10) has recommended the right to presence of a lawyer during, but not throughout the interrogation: though it is a progressive approach, it still falls short of the international standard.

53 Principles 1 and 17 of the Basic Principles on the Role of Lawyers.

54 On the details of this international legal obligation see below under point IV 1.

55 *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378.

- **Confessions made to the police should not be admissible in criminal trials. Only confessions made to a magistrate should be used as evidence.**
- **All interrogations should be carried out in the presence of a lawyer throughout the interrogation; interrogated persons should be informed of their right to legal assistance; they should be given the opportunity to have recourse to a lawyer through legal aid.**
- **Any magistrate must conduct an investigation *propriu motu* into allegations of torture.**

C. Intelligence, surveillance, data collection

Another example of the extension of powers for the police is Recommendation No 26, which reads: "An apex Criminal Intelligence Bureau should be set up at the National level for collection, collation and dissemination of criminal intelligence. A similar mechanism may be devised at the State, District and police station level." The Justice Malimath Committee proposals for these intelligence bureaus is that they should all have their own computerised databases and that all these databases should be linked to one another.[56] The exact charter for the national intelligence bureau is to be determined by Central Government.[57] Recommendation No 26 is complemented by Recommendation No. 39, in which the Justice Malimath Committee suggests that "a suitable provision be made on the lines of section 36 to 48 of POTA 2002 for interception of wire, electric or oral communication for prevention or detection of crime." The breadth of this provision is highly disturbing, as it does not provide for the usual guarantees such as the protection of privacy, the exclusion of certain data, etc.

International standards on the protection of the right to privacy. Interception of telecommunications has a strong impact on the right of citizens to the protection of their privacy. The right to privacy is protected in article 17 ICCPR: any interference with this right must be clearly provided for in law and must be proportionate to the aim sought by the interference.[58] The

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56 Committee on Reforms of the Criminal Justice System, p. 116, para. 7.27.

57 *Ibid.*, p. 117, para. 7.27.3.

58 *Toonen v. Australia*, 4 April 1994, CCPR/C/50/D/488/1992, para. 8.3.
In a comparative legal perspective: In France, interception of telephone conversation is only permitted for crimes for which punishment is two years or more, for the specific purposes of obtaining information concerning national security, for the protection of essential elements of scientific and economic capacities of France, for the prevention of terrorism or organized crime and for the prevention of some unlawful paramilitary groups, and for a maximum duration of four months [Articles 100-100-7 of the French Code of Criminal Procedure and Loi n° 91-646 du 10 juillet 1991 relative aux correspondances émises par la voie des télécommunications]. In Germany, interception of communications is only

Human Rights Committee has stated that in principle, "telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited";[59] it has required clear legislation setting out the conditions for interference with privacy and providing for safeguards against unlawful interferences.[60] Communications between the accused and his lawyer should be exempt from interception, in accordance with Principle 22 of the Basic Principles on the Role of Lawyers, which states that "governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.[61] In the same vein, the Supreme Court of India, in the *judgement* of *People's Union for Civil Liberties v the Union of India and another* has specifically ordered procedural safeguards to be observed for telephone tapping.[62] The Indian legislator, if it were to adopt the Justice Malimath Committee's recommendations with regard to the interception of telecommunication, should take the international standards and the principles of the Indian Supreme Court into account. It may also have recourse to the extensive European legislation and human rights case law on the matter. Indeed, the European Court of Human Rights has held very early that any interference by state authorities with the private life of the individual must be justified by legislation which clearly sets out the conditions for such interference in a precise manner foreseeable to the individual,[63] and respects the principle of proportionality.[64] The same

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admissible for some specifically designated crimes and only if specific facts justify the suspicion that this crime has been committed [§§ 100a et seq. German Code of Criminal Procedure].

59 *General Comment 16, Article 17*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 8.

60 *Concluding observations of the Human Rights Committee: Russian Federation*, 26 July 1995, CCPR/C/79/Add.83, para. 19.

61 See also § 148 of the German Code of Criminal Procedure, which guarantees the confidentiality of communications between the accused and his or her lawyer, with some very limited exception in cases of terrorism suspects; see, on these proposed safeguards *Amnesty International*, Briefing in the Prevention of Terrorism Ordinance, 15 November 2001, ASA 20/049/2001, p. 10.

62 *People's Union for Civil Liberties v the Union of India and another*, Case of Coram Kuldip Singh and S Saghir Amhmad, JJ, Judgment of 18 December 1996 in W.P. (C) No. 246 of 1991, para. 35.

63 ECtHR, *Malone v. the United Kingdom*, Judgment of 2 August 1984, Series A No 82, para. 67; *Kopp v. Switzerland*, Judgment of 25 March 1998, Reports 1998-II, para. 55; *Amman v. Switzerland*, Judgment of 16 February 2000, Reports 2000-II, para. 50; *Rotaru v Romania*, Judgment of 4 May 2000, Reports 2000-V, para. 52.

64 The European Court of Human Rights has considered incompatible with the right to privacy a law which does not lay down the limits of the surveillance and storing of data, does not define the kind of information that may be recorded, the categories of people against whom surveillance measures may be taken, the circumstances in which such measures may be taken or the procedure to be followed, the limits on the age of information held and the length of time for which it may be kept, the persons authorized to consult the files and the

safeguards must be guaranteed for data collection and storing, as they also constitute an interference with private life.[65] The collection of data revealing racial or ethnic origin, political opinions, religious or other beliefs, trade union membership, and data concerning health or sexual life is equally prohibited.[66]

Use as evidence in trial. Clear condition should also bet set out on when and how the information collected through surveillance may be used as evidence. If it is used as evidence, some safeguards must be observed. For instance, the evidence should only be admissible if the accused is furnished with a copy of the order of the competent authority; the accused and his or her lawyer should be given the opportunity to review the content of the evidence and challenge it during trial.

Recommendations on interceptions of telecommunications:

- **The conditions for the interception of telecommunications should be clearly regulated in law.**
- **The legal provisions on interception of telecommunications should comply with the minimum safeguards set out in international law and jurisprudence; in particular, there should be a judicial supervision of interceptions.**
- **Personal data as well as communication with LEGAL counsel should be exempt from interception.**
- **The rights of the accused must be protected if intercepted data is used as evidence in trial, in particular the right to challenge the evidence in the hearing.**

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procedure to be followed; there must be effective procedural safeguards surveillance should, in principle, subject to judicial control [*Rotaru v. Romania*, Judgment of 4 May 2000, Reports 2000-V, para. 57, 59; *Craxi v. Italy (No 2)*, Judgment of 17 July 2003, paras 78 *et seq.*] It is not sufficient to simply hold national security as a ground for interfering with private life, if such ground is not defined with more precision [*Ibid.*, para. 58].
Similar safeguards are demanded by the *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* [ETS 181; see, in particular, articles 5 to 8] and the *EC Directive on data protection* [Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995, p. 0031-0050].

65 ECtHR, *Leander v. Sweden*, Judgment of 26 March 1987, Series A No 116, para. 48 *et seq.*; *Rotaru v. Romania*, Judgment of 4 May 2000, Reports 2000-V, para. 43.

66 Articles 8 and 6 respectively; see also *Z v. Finland*, Judgment of 25 February 1997, Reports 1997-I.

D. Police officer as Director of Prosecution

Recommendation No 52, according to which the post of Director of Prosecution should be filled from among suitable high ranking police officers, carries the risk of a criminal justice system which will ultimately lie in the hands and control of the police. It may put into question the very basis of separation and balance of powers by giving the institution who has the *initiative* and the charge of *conducting* the investigation the power to decide on whether the results of the investigation are sufficient to file a charge. An institution with more distance to the investigation process should be in charge of assessing the result of the investigation.

This recommendation may also lead to lack of an institution conducting an independent investigation and bringing charges against the police itself, particularly in cases of allegations of human rights violations. In such cases, as has been mentioned, an independent investigation must be conducted into the alleged facts. If the Director of Prosecution leading the investigation is a police officer, the rights of the individual will be violated. Police and prosecution should therefore be distinct, including personal independence.

Recommendation:

- **No police officer should be nominated as director of prosecution.**

III. REFORMS CONCERNING THE CRIMINAL TRIAL PROCEDURE

A. Presumption of innocence and burden of proof

The Justice Malimath Committee has reconsidered the standard of proof beyond reasonable doubt prevailing in Indian criminal procedure. It suggests a new standard of proof lying below "proof beyond reasonable doubt" and above "preponderance of probabilities". It therefore proposes a standard of "courts [*sic*] conviction that it is true". This recommendation carries the risk of unhinging the whole criminal justice system of India, but also one of the fundamental universal values of criminal justice, in a national, international and comparative perspective.

The presumption of innocence in international law. The lowering of the standard of proof in criminal justice below "proof beyond reasonable doubt" would constitute a violation of the presumption of innocence, one of the cornerstones of national and international human rights law and

criminal justice (see article 14 (2) ICCPR). The presumption of innocence prohibits the sentencing of a person, unless the state authority has proven his or her guilt. If a doubt remains, the accused cannot be convicted (*in dubio pro reo*). The Human Rights Committee has clearly stated that "[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been *proved beyond reasonable doubt*".[67] Therefore, article 14 (2) does not leave the determination of the standard of proof to the states[68] and any conviction on evidence which does not fulfil the standard of proof beyond reasonable doubt constitutes a violation of India's obligations under the ICCPR.

The presumption of innocence from a comparative legal perspective. The same holds true from a comparative perspective. The Justice Malimath Committee, referring to continental European systems such as the French, the German and the Italian, states that "[t]he standard of proof required is that of the inner satisfaction or conviction of the Judge and not proof beyond reasonable doubt as in the Adversarial System".[69] In this respect, it must be recalled that all countries of Europe are parties to the ICCPR and thereby bound by Article 14 (2) ICCPR. Moreover, they are all parties to the European Convention on Human Rights and bound by the presumption of innocence laid out in Article 6 (2) ECHR. As far as the Justice Malimath Committee refers to systems in which a "clear and convincing conviction", no confusion must be made between the difference in systems of proof – free proof (intime conviction, freie Beweiswürdigung) or legal proof (*probatio legalis*) – and the standard of proof for the finding of guilt.

For instance, the Justice Malimath Committee asserts that in France, the standard of proof "is 'intime conviction' or inner conviction, the same as 'proof on preponderance of probabilities'".[70] The French Code of Criminal Procedure indeed establishes that the judge decides according to its inner conviction.[71] This reflects the system of proof in France, which admits all

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67 *General Comment 13, Article 14* (*op. cit.* note 40), para. 14, para. 7, emphasis added; similarly, the Inter-American Court of Human Rights has stated that the principle of presumption of innocence "demands that a person cannot be convicted unless there is clear evidence of his criminal liability. If the evidence presented is incomplete or insufficient, he must be acquitted, not convicted" [I/A Court HR, *Cantoral Benavides Case*, Judgment of August 18, 2000, Series C No. 69, para. 120].

68 This is affirmed by the Committee on Reforms of the Criminal Justice System, p. 70, 71, para. 5.22.

69 *Ibid.*, p. 25.

70 *Ibid.*, p. 70, para. 5.22.

71 Article 427 of the French Criminal Procedure Code ("[...] et le juge decide d'après son intime conviction".

proofs, but requires an assessment of all proofs by the judge. It is contrary to the system of evidence used in many common law countries, where the admission of evidence is ruled by exclusionary rules, but once evidence is presented legally imposes itself to the judge as a matter of law. In the French system of free proof, on the contrary, the judge is not bound by any evidence, but has to assess the legality, admissibility, and persuasive force of each of piece of evidence, including confessions,[72] according to the principles of human dignity and reason.[73] However, the finding of guilt presupposes that – based on the inner conviction – the judge is convinced beyond reasonable doubt that the accused is guilty. Similarly, the German Criminal Procedure Code – although limiting the admissible pieces of evidence – enshrines the free assessment of proof by the court.[74] For conviction, it demands a persuasion of the court – based on its free conviction – which leaves no reasonable doubt.[75] Where the slightest doubt remains, the accused must be acquitted: the principle *in dubio pro reo* applies, which demands that any doubt must go to the benefit of the accused. Thus, both the adversarial and the inquisitorial systems require the same standard of proof, namely proof beyond a reasonable doubt".[76]

Recommendation:

- **If a system of administration of proof is adopted which is based on the inner conviction of the judge, the whole system of evidence based on the Evidence Act would have to be revised; however, it may not lead to a lowering of the standard of proof for conviction: international law requires proof beyond a reasonable doubt.**

B. Right to silence and drawing of adverse inferences

The proposed change in the *standard* of proof is accompanied by suggestions to also change the *burden* of proof. Indeed, in Recommendation 8, the Justice Malimath Committee proposes to amend Section 313 of the Code of Criminal Procedure, 1973, by adding a clause according to which "if the accused remains silent [faced with a question by the court], or refuses to answer any question put to him by the court which he is not compelled by law to answer, the court may draw such appropriate infer-

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72 Article 428 of the French Criminal Procedure Code.

73 *T. Garé and C. Ginestet*, Droit pénal, procédure pénale, Paris, Dalloz 2002, p. 214.

74 § 261 of the Criminal Procedure Code: "Über das Ergebnis der Beweisaufnahme entscheidet das Gericht nach seiner freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung".

75 *Kleinknecht/Meyer-Gossner*, StPO, 42nd ed., Beck 1995, § 261, para. 26.

76 *A. Eser (op. cit.* note 24), at 430.

ences including adverse inference as it considers proper in the circumstances". The proposal of the Justice Malimath Committee also suggests that once the prosecution and the defence statement are submitted to the court, "[a]llegations which are admitted or are not denied need not be proven and the court shall make a record of the same". These propositions amount to laying the burden of proof with the defence.

Right to silence as a fundamental rule of criminal justice. The Justice Malimath Committee writes about the origin of the right to silence that "[i]t was essentially the right to refuse to answer and incriminate oneself in the absence of a proper charge. Not initially, the right to refuse to reply to a proper charge."[77] The Justice Malimath Committee's assumption is that the right to silence is only needed in tyrannical societies, where anyone can be arbitrarily charged. It assumes that whenever a charge is "proper", there is no need for protection of the accused. It fails to see that if the presumption of innocence is taken seriously, the concepts of a proper and an improper charge looses its meaning with regard to the presumption of innocence: all charges must be corroborated by evidence produced in the courtroom. To accept the concept of improper charges is to get rid of the presumption of innocence by assuming that some charges are in themselves proof of the guilt of the accused. The Law Commission of India has similarly warned against a curtailing of the right to silence as contrary to Article 20 (3) of the Constitution of India.[78] The right to silence also comprises the right not to comment on allegations of the prosecution, and not thereby concede to them. The standard proposed by the Justice Malimath Committee is essentially the one of civil litigation, where facts not denied are considered proven by the court.

The underlying rationale of the Justice Malimath Committee seems to be that the protection of the accused can be lowered as long as this is accompanied by a guarantee that the accused should have counsel to assist him or her[79] and that state officials act in respect of due process of law.[80] Laudable as the urge that state officials uphold the rule of law is, it would not be sufficient to guarantee the rights of the accused; those rights are also a safeguard against the whole state apparatus: there is an inherent imbalance of power between the prosecution and the accused; the accused is an individual, whereas the prosecution acts with the weight of the state.

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77 Committee on Reforms of the Criminal Justice System, p. 48, para. 3.3.1

78 *Law Commission of India*, 180th Report on Article 20 (3) of the Constitution of India and the Right to Silence, May 2002.

79 Committee on Reforms of the Criminal Justice System, p. 57, Rn. 3.54.

80 *Ibid.*, pp. 58-62.

In any state, this inequality must be counter-balanced by safeguards for the accused, as it is from the outset impossible for him to match the power of state, even if the state authorities respect the rule of law.

Adverse inferences as violation of article 14 ICCPR. If adverse inferences were drawn as suggested by the Justice Malimath Committee, they would be in violation of article 14 ICCPR. Indeed, the Human Rights Committee considers the drawing of adverse inferences to be in violation of Article 14 (3) (g). It has urged countries where such presumptions exist to "reconsider, with a view to repealing it, this aspect of criminal procedure, in order to ensure compliance with the rights guaranteed under article 14 of the Covenant".[81] As India is legally bound by article 14 ICCPR, it should take this jurisprudence into account.

Adverse inferences and article 6 ECHR. As far as the Justice Malimath Committee states that such inferences are used in continental European systems, the jurisprudence of the European Court of Human Rights should be recalled. Indeed, the European Court of Human Rights has set strict conditions for the compliance of inferences of guilt with the right to remain silent and the privilege against self-incrimination protected under Article 6 ECHR. It has stated that "it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself." In the opinion of the Court, inference to the detriment of the accused may only be drawn "in situations which clearly call for an explanation from him" and only to assess the "persuasiveness of evidence adduced by the prosecution".[82] According to the Court, "[t]he question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent".[83] Also, the Court considers that the drawing of such inferences can only be compatible with the principle of fair trial if the accused is granted access to a lawyer already at the stage of the police interrogation.[84] Where the accused is tried by jury, the judge must give the jury proper direction on these conditions.[85] In sum, the European Court of Human Rights, while having to accept that each member state is free

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81 *Concluding Observations of the Human Rights Committee: United Kingdom*, 6 December 2001, CCPR/CO/73/UKOT, para. 17.

82 ECtHR, *John Murray v. the United Kingdom*, Judgment of 8 February 1996, Reports 1996-I, para. 47.

83 *Ibid.*, para. 51.

84 *Ibid.*, para. 66.

85 ECtHR, *Condron v. the United Kingdom*, Judgment of 2 May 2000, Reports 2000-V, para. 66.

to adopt the system of criminal justice that it chose to, has set strict limits to the possibility of drawing adverse inference; it may never be the only evidence.[86]

Recommendations:

- **Where the accused does not explicitly deny an allegation made by the prosecution, this should not be understood as a concession that the allegation is true.**
- **The drawing of adverse inferences should be explicitly prohibited in the Evidence Act.**

C. New procedure following the "Prosecution statement"

In Recommendations No 9 and 10, the Justice Malimath Committee suggests a new process to be followed for the charge, which may jeopardize the right to silence and the presumption of innocence. It proposes that once the "Prosecution Statement" is served upon the accused, the accused must file a "defence statement" within two weeks, in which he "shall give specific reply to every material allegation." Where the accused fails to reply, or replies too vaguely in the opinion of the court, the allegations of the Prosecution Statement shall be considered as proven[87] and allegations which are not denied need not be proven[88].

Discriminatory proposal. The presumption of innocence, however, implies that the burden of proof must remain with the prosecution, and it is the accused's right not to comment on it. Also, the two week time-frame for the defence statement is inherently discriminatory, as it is evident that only persons with good advice from counsel will realize the risk they are running if they do not respond, and be able to respond to the satisfaction of the court. It makes it impossible from the outset for anyone of the disadvantaged and vulnerable sections of society to seek justice.

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86 In a similar vein, the Public Union for Civil Liberties (PUCL) has stated that for rebuttable presumptions not to become a general prescription for arbitrariness, they "should be confined to cases where (i) no independent evidence is possible; (ii) any other explanation is prima facie unrealistic; and (iii) the complainant/witness/prosecution has no reason for cooking up false evidence against the accused. (If not all three, then at least two of the three), PUCL response to questionnaire by the Committee on Reforms of the Criminal Justice System, PUCL Bulletin, November 2002, para. 2.2.

87 Recommendation No 9 (f).

88 Recommendation No 10 c).

Contradictory approach. The evidence and proof system proposed by the Justice Malimath Committee is in fact the one used in contradictorial civil litigation, where the party relying on an alleged fact has to prove it. Not only does this contravene the presumption of innocence in criminal cases, but the proposals of the Justice Malimath Committee also appear self-contradicting: it seeks to introduce an inquisitorial system, where the court is charged with finding truth, while at the same time introducing a burden of proof which belongs to the contradictorial civil process. It becomes clear, here again, that the introduction of an entirely new criminal justice system must be very well thought out, lest the outcome should be a patchwork of contradictory propositions to the detriment and in violation of the human rights of the accused. A similar contradiction lies in the upholding of the principle that the accused must plead any exceptions and shall be precluded from pleading exceptions if he has not done so in the defence statement: this is not the case in inquisitorial systems, where the burden lies on the prosecution and court to prove that no exception is fulfilled and where the court must seek on its own motion whether any exception is fulfilled to the benefit of the accused.

No proper criminal investigation by the prosecution. The process proposed by the Justice Malimath Committee also suggests that "in the light of the plea taken by the accused, it becomes necessary for the prosecution to investigate the case further, such investigation may be made with the leave of the court" (Recommendation No 9 (i)). This implicitly means that were the accused pleads guilty, the investigation must not be taken further. This, again, contradicts the inquisitorial principle: it amounts to putting the burden on the accused to contest every allegation against him, failing which no investigation will be carried out; the "quest for truth" becomes remarkably easy in such conditions. The Recommendations also overlook the fact that the right to silence also ensures proper and thorough investigation. While the Justice Malimath Committee asks for conviction based on "clear conviction", such conviction is not actually possible in the framework of the procedure proposed by it. Indeed, where the system operates with mandatory presumptions of fact (as it states that all facts not denied, or not denied to the satisfaction of the court *shall* be deemed proven) and mandatory preclusions (where the accused does not contradict the facts or where the accused does not claim the benefit of exceptions) the court cannot come to a conviction or any conclusion arising out of the evidence, as it is already bound by the statutory conclusions.

Recommendations:

- **There should be no obligation to file a defence statement to the prosecution statement.**

- **There should be no presumption that allegations of the prosecution not explicitly denied by the defence are proven.**
- **There should be no preclusion rule to exception-pleas.**

D. Summary procedures

Summary procedures with sentence up to three years. In Recommendations 72 *et seq.* the Justice Malimath Committee suggests that offences for which a punishment is three years and below should be tried in summary procedures under Sections 262 to 264 of the Criminal Procedure Code, so as to quicken the pace of justice. Parallel to this, the Justice Malimath Committee proposes an extension of the procedures for petty offences. In current legislation summary procedures exist for offences for which punishment is imprisonment for a term not exceeding two years and no sentence of imprisonment for a term exceeding three month can be passed. Through the Justice Malimath Committee's proposal, summary procedures will allow for sentence of imprisonment for a term of up to three years. Also, the Committee suggests that instead of giving magistrates the discretion to try the case summarily, the summary procedure shall be automatic in the mentioned cases.[89] While it is indisputable that trials in India exceed the admissible length of time, and that measures must be taken to counter procedural shortcomings, the propositions of the Malimath Committee may be an issue of concern.

Summary procedure must respect international fair trial standards. If summary procedures are extended, they have to comply with fair trial standards as provided in Article 14 (3) ICCPR. Although the principle of fair trial does not apply without any restrictions, any limitation must be confined to the necessary, and must be proportionate to the aim pursued. In principle, international law, and particularly article 14 ICCPR allows for fast procedures, and the Human Rights Committee has even suggested special courts to deal with petty offences where a state system suffers from a great backlog of cases.[90]. Nevertheless, the summary procedure in India, as it has been used in practice until now, may be too quick to ensure full compliance with fair trial standards. Indeed, with very few exceptions, summary procedures in India have been conducted up to now in cases where the offence is very minor (such as trafficking offences) and the accused has pleaded guilty. Although the summary procedure can be followed where the accused does not plead guilty, leading to a summary

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89 Recommendation 72.

90 *Concluding Observations of the Human Rights Committee: Brazil,* 24 July 1996, CCPR/C/79/Add.66, para. 24.

record of only the "substance of the evidence", and only "a brief statement of the reasons for the finding",[91] it is not followed in practice. In cases which can lead to a conviction of up to three years, it is almost certain that the accused will not plead guilty in many of those cases, and the case will warrant a contradictory procedure guaranteeing equality of arms. In those case, the rights of the accused to adequate time and facilities for the preparation of his defence and to communicate with counsel (guaranteed in article 14 (3) (b) ICCPR), and to examine, or have examined the witnesses against him and obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (guaranteed in article 14 (3) (e) ICCPR) must be respected.

Recommendation:

- **All procedures, including summary procedures, must respect the rights of the accused guaranteed in article 14 ICCPR.**

E. Terrorism and organized crime

Proposed expansion of the jurisdiction of Special Courts. Recommendation No 137 suggests that "[c]rime units comprising dedicated investigators and prosecutors and Special Courts by way of Federal Courts be set up to expeditiously deal with the challenges of "terrorist and organized" crimes. The main concern with this Recommendation is the expansion of powers of the so called Special Courts,[92] which already exist under the Prevention of Terrorism Act, 2002 (POTA).[93]

No independent courts. Special Courts do not comply with the right to be tried by a tribunal previously established by law (the "juge naturel"). The judges of these Courts are appointed by Central or State Government, with the concurrence of the Chief Justice of the High Court. Such appointment bears the risk of political and partial appointments. Moreover, where a question on the jurisdiction of the Special Court arises, it is not decided by the court itself, but referred to Central Government which takes a binding decision.[94] This is contrary to Principle 14 of the UN Basic Principles on the Independence of the Judiciary, according to which the

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91 Section 264 Criminal Procedure Code.

92 The Human Rights Committee has held that Special Courts may only exceptionally try civilians and in full respect of the rights of fair trial, *General Comment 13, Article 14* (*op. cit.* note 40), para. 4.

93 Act No. 15 of 2002.

94 Section 23 (3) POTA.

assignment of cases to judges within the court is an internal matter of judicial administration.

Anonymous witnesses. The Special Court may also keep the identity of witnesses secret where it is satisfied that the life of a witness is in danger. Although it is, in principle, possible that witness protection may require the secrecy of the identity of the witness as a restriction of the right of the accused to have the evidence against him disclosed and to examine witnesses against him, such restrictions of the rights of the accused may seriously obstruct the defence,[95] and must be balanced against the rights of the accused.[96] They must be counter-balanced by safeguards to preserve equality of arms at the trial,[97] and be reasoned by the court. The provision of the POTA goes very far in that measures to protect witnesses may include "the holding of proceedings at a place to be decided by the Special Court",[98] or a decision that "all or any of the proceedings pending before such a Court shall not be published in any manner".[99] The latter measure constitutes a violation of article 14 (1) ICCPR, which stipulates that any *judgement* shall be made public save for the narrow exceptions mentioned in the paragraph, and which are not fulfilled in the case of terrorism trials.[100]

Confessions made to the police. According to POTA, the Special Courts may also admit confessions made to the police as evidence, which, as mentioned above,[101] is conducive to admitting confessions extracted under duress as evidence, and should be rejected. Equally, POTA already provides for the possibility of adverse inferences as they are now being suggested by the Justice Malimath Committee,[102] which is contrary to the right to silence and the presumption of innocence.[103]

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95 Cf. Human Rights Committee, *Peart and Peart v. Jamaica*, 19 July 1994, CCPR/C/57/1, para. 11.5; *Concluding Observations of the Committee against Torture: Colombia*, 9 July 1996, A/51/44 para. 78.

96 See the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*: "the views and concerns of victims should be presented and considered at appropriate stages of the proceedings (...) without prejudice to the accused."

97 See, *inter alia*, ECtHR, *Doorson v. the Netherlands*, Judgment of 26 March 1996, Reports 1996-II, para. 54.

98 Section 30 (3) (a).

99 Section 30 (3) (d) POTA.

100 "(...) except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children", the Human Rights Committee has recalled the obligation to publish the judgements save in those "strictly defined exceptions", *General Comment 13, Article 14* (*op. cit.* note 40), para. 6.

101 See above under chapter III, B.

102 Section 53 POTA.

103 See above under chapter II, B.

Proposed mainstreaming of the definition of terrorism from POTA. Recommendation No 138 suggests a comprehensive and inclusive definition of terrorists' acts, disruptive activities and organized crimes in the Indian Penal Code. The recommendation bears the risk that very different categories of crimes, in particular terrorist and organized crimes, may be amalgamated. Terrorist crimes and organized crime are too distinct categories. It is true that organized crime may serve to finance terrorist groups and activities, and that there may be, as the Justice Malimath Committee states, a "close nexus between drug trafficking, organized crime and terrorism".[104] On the other hand, it may also lack any relationship whatsoever to terrorism. The Justice Malimath Committee's proposition blurs categories of crimes. Such an approach is dangerous regarding criminal law, which should be as clearly defined as possible. The consequence of such amalgamation would be an extension of the jurisdiction of the Special Courts, which by themselves lack fair trials standards, to common criminality.[105]

Definition of terrorism in POTA in violation of international law. Most disturbingly, the Recommendation could lead to the drafting of a criminal provision with a definition of terrorism based on the definition of Section 3 POTA.[106] The terrorism definition of Article 3 POTA contravenes the principle of *nullum crimen, nulla poena sine lege,*[107] which is a fundamental and inderogable[108] right under international law. It not only prohibits retroactivity of laws, but also prescribes that criminal offences must be clearly defined, free from ambiguities, and not extensively construed to an accused's detriment. The individual must be able to know from the

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104 Committee on Reforms of the Criminal Justice System, p. 229.

105 Such concern was already expressed with regard to the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) by Human Rights Committee Member Klein, who urged India to "review all the laws that left room for abuse of authority and not to try to replace the TADA by a penal-law amendment bill. It was essential to limit the powers of the police and the armed forces by means of clear texts (...)", Summary record (partial) of the 1606th meeting: India, 21 November 1997, CCPR/C/SR.1606, para. 47. In the ambit of the European Union, the Working Party established under Directive 95/46/EC has underlined the importance of "refusing the amalgam between fight against real terrorism and the fight against criminality in general" (Article 29 – Data Protection Working Party, Opinion 10/2001 on the need for a balanced approach in the fight against terrorism adopted on 14 December 2001, 0901/02/EN/Final WP 53).

106 Misuse of POTA during the last year has been documented by *Human Rights Watch* in: In the Name of Counter-Terrorism: Human Rights Abuses Worldwide – A Human Rights Watch Briefing Paper on the 59th Session of the United Nationals Commission on Human Rights, March 25, 2003 (India).

107 Article 15 (1) ICCPR; Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 7; see also Article 22 (2) of the Rome Statute for the International Criminal Court, which reads "The definition of a crime shall be strictly construed and shall not be extended by analogy".

108 See Article 4 (2) ICCPR.

wording of the relevant provision, what acts and omission will make him or her criminally liable.[109] In particular in respect of the crime of terrorism and the special legal regime it is submitted to, the definition must avoid imprecision and ambiguity.[110] This requirement is not fulfilled by section 3 (1) POTA.[111] The provision is complemented by section 4, according to which anyone in possession of certain weapons within a notified area shall be held guilty of terrorist act, without any other further act such as a killing. Such a wide and imprecise definition of terrorism is incompatible with the principle of *nullum crimen, nulla poena sine lege.* If the Justice Malimath Committee's suggestion to draft a comprehensive definition on organized crime, terrorism and disruptive activities were followed, it would only serve to blur the boundaries of criminal definitions.

Recommendations:

- **The jurisdiction of Special Courts should not be expanded, as they do not comply with the requirement of independent and impartial tribunals respecting the rule of law and the right to a fair trial.**
- **Terrorism, disruptive activities and organized crime should not be amalgamated in a common definition in the Indian Criminal Code.**
- **Any definition adopted in the Criminal Code should not use the definition of Section 3 POTA, as it is in contravention of international law.**

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109 See, *inter alia, Concluding Observations of the Human Rights Committee: Algeria,* UN Doc CCPR/C/79/Add.95, 18 August 1998, para. 11; *Concluding Observations of the Human Rights Committee: Portugal (Macao),* CCPR/C/79/Add.115, 4 November 1999, para. 12; ECtHR, *Veeber v. Estonia (NO2),* Judgment of 21 January 2003, para. 30.

110 The Human Rights Committee has criticized the definition of terrorism in Egyptian law as "so broad that it encompasses a wide range of acts of different gravity", *Observations and recommendations of the Human Rights Committee: Egypt,* UN Doc CCPR/C/79/Add.23, 9 August 1993, para. 129; see also the *Recommendation of the Inter-American Commission on Human Rights* according to which States must "ensure that crimes relating to terrorism are classified and described in precise and unambiguous language that narrowly defines the punishable offense, by providing a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offenses or are punishable by other penalties" (*Report on Terrorism and Human Rights,* OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, Recommendation No 10 (a).)

111 This provision contains a number of terms that are so vague that they fail to meet the exigency of clarity required for a criminal offence, and that, moreover, they criminalize activities which are the exercise of human rights. Under the terms of "any means whatsoever" and "likely to cause disruption of services essential to the life of the community" the exercise of the right to demonstrate or to strike could be considered a terrorist crime. The definition also incriminates in section 3 (5) membership in a terrorist organization, without the person having been involved in any illegal act such as a killing, which might entail a violation of freedom of association under article 22 ICCPR and the principle of individual responsibility in criminal law.

IV. REFORMS CONCERNING VICTIMS OF CRIME AND WITNESS PROTECTION

A. The rights of victims of crime and human rights violations

The Justice Malimath Committee has made some progressive and welcome recommendations on the protection for victims of crime. The rights to participation of the victim in the criminal trials will ensure their access to justice, particularly the right to produce evidence, to ask questions to the witnesses, to know the status of investigations and to move the court for further investigation, to advance arguments, to participate in negotiations, and the right to appeal under certain circumstances.[112] Equally, the proposal for a Victim Compensation Law enshrining the State's obligation to compensate victims even when the offender is not apprehended is a step towards a real protection of victims of crime and of human rights violations. Indeed, any criminal legislation should be based on respect of the rights of the accused and the victim.

Impediments to the protection of victims of crime in India. Nevertheless, the legislative background adverse to victims of crime must be recalled. Most notably, shortcomings still exist with regard to crimes committed by public officials, in particular police forces and armed forces – crimes by state authorities towards citizens amount to human rights violations. In practice, investigations and prosecutions are not conducted in a consistent and systematic manner. This is often due to immunities granted to many state officials, particularly members of the armed forces.[113] The investigations carried out have often lacked the thoroughness and effectiveness warranted by the gravity of the alleged violation. The vast majority of

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[112] Recommendation 14.

[113] The law protects public officials from prosecution with far reaching immunity clauses. Section 197 of the Criminal Procedure Code provides that no magistrate, public servant or member of the Armed Force not removable from his office may be prosecuted for any act done in the discharge of his duties, except with the previous sanction of the government. Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 and Section 7 of the Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 and Section 57 of the Prevention of Terrorism Act, 2002 contain similar clauses.
The National Human Rights Commission, while having been active in the fight against torture, is limited in its mandate by the Protection of Human Rights, 1993, which prevents it from investigating allegations of human rights violations committed by members of the army or paramilitary forces and incidents which took place more than a year before the complaint was made [Sections 19 and 36 (2) Protection of Human Rights Act, 1993].
The UN Human Rights Committee has demanded that the requirement of consent by government to prosecute officials from security forces should be removed from all legislation, as it creates a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2 (3) ICCPR [*Concluding Observations of the Human Rights Committee: India, 4 August 1997*, CCPR/C/79/Add.81, para. 21].

complaints about torture or ill-treatment do not result in conviction or in very minor sanctions.[114] In many cases, victims do not even complain, because they are unaware of their rights, because of the stigma attached to the complaint, especially in rape cases, or because they have been threatened by the perpetrators.[115] Medical doctors have sometimes failed to emit truthful reports, often because of pressure from the perpetrators.[116] In areas of armed conflict, officials even appear to have been rewarded in some cases for their misconduct and violence.[117] Despite progressive jurisprudence of the Supreme Court of India on the matter,[118] there is, as yet, no government reparation scheme or law.

International standards protecting victims of crime. It is important that the legislator should adopt a rights based approach for victims of crime. There

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114 On statistics see *National Human Rights Commission of India*, Annual Report 2000-2001, Annexures, Charts and Graphs; REDRESS, Responses to Human Rights Violations – Reparation for Torture in India, Nepal and Sri Lanka, February 2003, p. 20.

115 REDRESS (*op. cit.* note 114), p. 21.

116 See the reports by *Amnesty International*, India: Break the Cycle of Impunity in Punjab (*op. cit.* note 29) p. 35, India: Time to Stop Torture and Impunity in West Bengal (*op. cit.* note 29), p. 20 and India: The Battle against Fear and Discrimination: The Impact of Violence against Women in Uttar Pradesh and Rajasthan (*op. cit.* note 29), p. 28; see, on the role of the medical profession the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly resolution 37/194 of 18 December 1982.

117 *Amnesty International*, India: Time to Stop Torture and Impunity in West Bengal (*op. cit.* note 29), p. 20.

118 *D.K. Basu v. West Bengal*, 18 December 1996, [1997] 2 LRC 1, para. 56: "Thus, to sum up, it is now a well accepted proposition in most of the jurisdictions, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometime perhaps the only suitable remedy for redressal of the *established* infringement of the fundamental right to life of a citizen by the public servants and the State is victoriously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on punitive element The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be fell to the criminal courts in which the offender is prosecuted, which the State, in. law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damage which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait, jacket formula can be evolved in that behalf. The relief to redress the wrong for the *established* invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit"[*sic*].

is an important body of rights and principles to protect victims of crime and particularly victims of crimes committed by state authorities. Of these, the main universal instruments are the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[119] the Resolution of the United Nations Human Rights Commission on the rights to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms[120] as well as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.[121]

The main needs of victims of crime that must be taken into account are the right to access to mechanisms of justice, including the right to be informed at every stage about those rights, participation of the victim throughout the proceedings, respect for their dignity and privacy, and the right to obtain redress. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that the views and concerns of victims of crime should be presented and considered at appropriate stages in the proceedings, that victims should be provided proper assistance throughout the process, that they should suffer only minimal inconvenience, in particular with regard to their privacy, and that unnecessary delays should be avoided in the proceedings.[122] It also states that victims of crime should obtain prompt redress through expeditious, fair, inexpensive and accessible procedures.[123] Offenders should make fair restitution to victims, their families or dependants and governments should consider restitution as an available sentencing option.[124] When compensation is not fully available from the offender or other sources, the state should provide financial compensation.[125]

The duty to investigate, to punish and to provide reparation for grave human rights violations. Of the victims of crime, specific attention should be paid to victims of grave human rights violations. Also, very specific international human rights standards and jurisprudence govern the rights of victims and their next-of-kin in all cases of grave human rights violations, such as death, torture, ill-treatment or disappearances. Such standards

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119 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/40/53 (1985).

120 Commission on Human Rights Resolution 2003/04.

121 *Final Report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (*op. cit.* note 18).

122 Principle 6; see also Principle 10 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*.

123 Principle 5.

124 Principles 8 et seq.

125 Principles 12, 13.

follow, amongst others, from the ICCPR and the jurisprudence of the Committee on Human Rights, which are binding on India. Any state authority, upon a credible allegation of torture or cruel, inhuman or degrading treatment, of a killing, or of the disappearance of a person, has an obligation *ex officio* to lead a prompt, effective, independent and impartial investigation into the incident.[126] Also, victims of human rights violations have a right to an efficient remedy (see article 2 (3) ICCPR) which implies that the victim of the violation should have access to a remedy which can lead to the punishment of those responsible.[127] Also, victims of human rights violations have a right to adequate compensation, proportionate to the gravity of the violation and the harm suffered.[128]

Recommendations:

- **Any criminal justice system must be based on the rights of the accused and the rights of the victim.**
- **The criminal justice system of India should ensure that the rights of victims – such as the right to have access to and participate in the proceedings at all stages, the right to be informed of one's rights, the right to respect of one's dignity and privacy and the right to obtain redress – are duly guaranteed in law and practice.**
- **The criminal justice system should give particular attention to improving the investigation, prosecution and punishment of state officials who commit crimes and human rights violations.**

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126 Human Rights Committee, *General Comment 6, Article 6*, UN Doc. HRI\GEN\1\Rev.6 (1994), para. 4; *General Comment 20 on Article 7* (*op. cit.* note 40), para. 14; ECtHR, the requirements for investigations of the jurisprudence of the European Court of Human Rights have been recently summarized in the case of *Finucane v. the United Kingdom*, Judgment of 1 July 2003, paras. 67-71. See also the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by General Assembly resolution 55/89 of 4 December 2000 (so called Istanbul Principles).

127 Human Rights Committee, *General Comment 6, Article 6*, UN Doc HRI/GEN/1/Rev.6 (1982), para. 3; *General Comment No 20, Article 7*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), paras. 13, 15; *Nydia Erika Bautista v. Colombia*, CCPR/C/55/D/563/1993, 13 November 1995, para. 8.6; *José Vicente y Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Ángel María Torres Arrozo y Antonio Hugues Chaparro Torres v. Colombia*, CCPR/C/60/D/612/1995, 20 July 1997, para. 8.8. *Concluding Observations of the Human Rights Committee – Brazil*, 24 July 1996, CCPR/C/79/Add.66, para. 8.]. Although personal immunity may be legitimate for some cases, and although immunity for magistrates should even be the norm as it is a safeguard to preserve their independence and impartiality [Principle 16 of the *Basic Principles on the Independence of the Judiciary*, UN Doc A/CONF.121/22/Rev.1 (1985)], it is not, in general compatible with the right of the victim to an effective remedy for grave human rights violations.

128 *Concluding Observations of the Human Rights Committee: Brazil*, 24 July 1996, CCPR/C/79/Add.66, para. 20; ECtHR, *Papamichalopoulos v. Greece (article 50)*, Series A No 330-B, para. 34.

- **There must be prompt, effective, impartial and independent investigations into all allegations of ill-treatment, death or disappearance or other serious human right violations; the investigating authority must, above all, be independent from the authority whose actions are being scrutinized.**
- **In particular, victims and their next-of-kin must have access to legal aid where this is necessary to ensure their adequate participation in the proceedings.**
- **The criminal justice system should guarantee the right of victims of crime and human rights violations to prompt and adequate redress. Compensation, however, does not absolve the state from its duty to prosecute and punish.**
- **The immunity clauses for state officials should be revoked in all statutes.**

B. Offences against women

Women are particularly vulnerable when they become victims of crime, committed both by private and public actors, because of their already weak situation and protection in society, and because of the stigma that it attached to many gender specific crimes, particularly to the crime of rape. The recommendations to protect women by strengthening the criminal provisions and procedures in cases of violence against women are welcome, particularly the recommendation on increasing gender sensitivity among the magistrates.

Marital rape. Recommendation 119 to redefine the offence of rape is welcome, as it will lead to a more accurate protection of women from violence. However, it is to be noted that the Justice Malimath Committee does not recommend the criminalization of marital rape, which has been identified as an issue of concern by the Human Rights Committee[129] and is included by the Special Rapporteur on Violence into the definition of acts of domestic violence.[130]

Female judges. The proposition of Recommendation No. 67 to assign criminal cases relating to women to female judges is rather unclear, in particular as it only recommends the nomination of women judges in urban areas, thereby leaving rural areas without a policy of gender-sensitivity. It

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[129] *Concluding Observations of the Human Rights Committee: India*, 4 August 1997, CCPR/C/79/Add.81, para. 16.

[130] *Special Rapporteur on violence against women*, Framework for model legislation on domestic violence, E/CN.4/1996/53/Add.2, 2 February 1996, para. 11.

is, in principle, a progressive approach and should be encouraged, and would only need clarification. The Human Rights Committee has stressed that it is important to have a pluralistic judiciary, including members of minorities and women.[131] It is desirable that on account of the increased number of women becoming involved in the criminal justice system, the presence of women must be mainstreamed in the judiciary. It is also desirable that judges who are adequately trained and gender sensitive be appointed.

Rights of the accused. Recommendation 116 may lead to a curtailing of the rights of the accused. It stipulates that in order to prove bigamy, if a man and a woman have lived together "for a reasonably long period", it shall be deemed proven that they have married according to the customary rites. This assumption goes very far for a criminal offence, which should normally be clearly described in law.

Offence against women made bailable and compoundable. Recommendation 114, which proposes that Section 498A of the Indian Penal Code regarding cruelty by the husband or his relatives should be made bailable and compoundable, is equally an issue of concern. Indeed, if the offence is made bailable, women are at risk of being subjected to more violence and to threats with regard to the criminal process. If the offence becomes compoundable this will lead to procedures of mediation between the victim and the perpetrator. An in-depth study should be conducted with a view to determining the effect that such legislation may have on women.

Time limits for First Information Reports. As far as the Justice Malimath Committee suggests a certain time limit to file First Information Reports, i.e. a complaint to the police,[132] it seems to come into contradiction with its own findings that women are often under trauma immediately after the event.[133] The demand that there should be a restrictive delay specifically for this offence, which does not generally exist for complaints, appears to be discriminatory towards women.

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131 *Concluding observations of the Human Rights Committee: Sudan*, 11 November 1997, CCPR/C/79/Add.85, para. 21.

132 Recommendation 123.

133 Committee on Reforms of the Criminal Justice System, p 194, para. 16.7; the Committee fails to address the issue of concern mentioned by the UN Special Rapporteur on Violence against Women, according to whom women survivors of sexual violence in Gujarat were reportedly denied the rights to file FIRs [Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2003/75/Add.1, 27 February 2003, para. 988].

Recommendations:

- **Marital rape should be made a crime in the Indian Criminal Code.**
- **The presumption of a "reasonable long period" of common life to prove bigamy should be reviewed.**
- **The proposition to make cruelty towards women bailable and compoundable should be subject to further study.**
- **There should be no time limits for first information reports concerning violence against women.**

C. Witness protection

The Justice Malimath Committee's recommendation towards an effort in treating witnesses with respect is an important step towards rebuilding a dignified court system for all participants. It will also serve the interests of justice as witnesses will be willing and able to follow court proceedings accurately and give correct testimony. Also, stricter laws on perjury may reduce the risk of innocent persons being sentenced on the basis of false testimony – although Recommendation 87 seems to express a distrust of witnesses somewhat disproportionate to the trust accorded to police officers. It must also be stressed that intimidation or compelling of witnesses leads to unreliability of their testimony, which affects the accused's right to fair trial.[134] From an international law perspective, the protection of witnesses raises two concerns, which may seem contradictory, but are a common feature to all criminal trials: on the one hand, the state has an obligation to protect witnesses, and the Justice Malimath Committee's proposals may fall short of an efficient protection; on the other hand, the right of the witness to protection must be balanced against the right of the accused to a fair trial.

Duty of the state to protect witnesses. The Justice Malimath Committee's recommendations on the status of witnesses give only vague indication on witness protection. Recommendation 81 merely states that "[a] law should be enacted for giving protection to the witnesses and their family members on the lines of the laws in USA and other countries". The recommendations are specific with regard to protecting witnesses in the courtroom. However, many threats to witnesses occur outside the courtroom.[135] It has been criticised in the press, that in the current Indian situation, witness protection is not a realistic proposition.[136] It should nevertheless be recalled

134 *John Campbell v. Jamaica*, 24 March 1993, CCPR/C/47/D/307/1988, para. 6.4.
135 This has been acknowledged by the Committee in its Report at p. 152, para. 11.3.
136 The Indian Express, 10 July 2003.

that states have an obligation to protect persons against threats to their life or personal integrity and must take positive measures to ensure this protection.[137] It is clear that efficient witness protection will, in certain cases, require a mobilisation of state resources, such as police protection. When the life and limb of the witness are at stake, the obligation of the state will require the mobilisation of such resources.

Recommendation:

- **The state should adopt the adequate legislation and make available adequate resources to protect witnesses not only at the trial but also outside the courtroom.**

D. Rights of the accused

From a different perspective, it must be recalled that witness protection, where it affects the defence, must be balanced against the rights of the accused to a fair trial and equality of arms.

Right to cross-examine witnesses. This is of particular importance with regard to anonymous witnesses, for, in principle, the accused has a right to cross-examine witnesses against him. Therefore, anonymous witnesses are, in principle, incompatible with article 14 (3) (e).[138]

No adjournments. Recommendation No 82 may be prejudicial to the defence; it states that in order to avoid witnesses being required to appear several times in court, trials should proceed on a day to day basis and granting of adjournments should be avoided. The judge should be held accountable for any lapse on this behalf. This could lead to shortcomings with regard to the accused's right to have adequate time and facilities to prepare his defence (article 14 (3) (b) ICCPR). Also, it is not clear whom the judge will be accountable to. It is, in principle, for the judge to deal with the entire proceedings of the case without interference from a higher instance or interference from another branch of state; this is not only a matter of the independence of judges, but also a right of the accused to be tried by a tribunal previously established by law (juge naturel).

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137 Cf. *General Comment 6, Article 6* (*op. cit.* note 228), paras. 3, 4; *General Comment No 20, Article 7*, UN Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 13; ECtHR, *A v. the United Kingdom*, Judgment of 23 September 1998, Reports 1998-VI, para. 22.

138 *Concluding observations of the Human Rights Committee: Colombia*, CCPR/C/79/Add.75, para. 21.

Rights of victims in bail proceedings. Recommendation No 14 provides that the victim should be heard in respect of the grant or cancellation of bail. While this is to be welcome in certain cases in order to protect the victim from threat or violence – such as, for instance, cases of domestic violence – a certain caution must be expressed as to the general rule. The international law on pre-trial detention seeks to make such detention the exception rather than the rule (article 9 (3)). The accused, and this also flows from the presumption of innocence, should not be held in detention where there is no risk of his absconding, of his influencing witnesses or the like. The protection of victims, in such cases, may have to be guaranteed by other – albeit more costly – means, such as protection orders, so as to preserve the fundamental right to liberty and the presumption of innocence of the suspect.

Recommendation:

- **The criminal justice system should find a fair balance between the rights of the accused and witness protection at all stages of the trial. Measures of witness protection must be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.**

SUMMARY OF THE RECOMMENDATIONS

In summary, the ICJ welcomes the steps of the Indian Government to initiate a process of reform of the criminal justice system. It wishes to recall India's obligations under international law concerning the criminal justice process, especially the rights of the accused and the rights of victims. It therefore submits the following recommendations:

As to the approach towards a reform of the criminal justice system

- **Any reform of the Indian criminal justice system must be based on respect for human rights, in particular the rights of the accused and the rights of victims.**
- **Although every country is free, as a matter of international law, to choose the criminal justice system that it deems appropriate, the question whether a shift from the adversarial to the inquisitorial system would be beneficial to India's criminal justice system should be subject to further study and analysis.**
- **Any reform of the criminal justice system must take into account and seek to eradicate the root causes of its malfunctioning, i.e. discrimina-**

tion, lack of resources, corruption and the widespread practice of torture.
- **The eradication of torture must be the priority for the Indian authorities. India should ratify the UN Convention against Torture, which it has signed.**

As to reforms concerning the police

- **The length of police custody should not be extended.**
- **The authority conducting the investigation should be separate and independent from the detention authority.**
- **All evidence in criminal cases must be obtained through professional methods of investigation and in full respect of human rights.**
- **Confessions extracted through torture or other cruel, inhuman and degrading treatment are unlawful and cannot be admitted as evidence under any circumstances.**
- **Confessions made to the police should not be admissible in criminal trials. Only confessions made to a magistrate should be used as evidence.**
- **All interrogations should be carried out in the presence of a lawyer throughout the interrogation; interrogated persons should be informed of their right to legal assistance; they should be given the opportunity to have recourse to a lawyer through legal aid.**
- **Any magistrate must conduct an investigation *propriu motu* into allegations of torture.**
- **The conditions for the interception of telecommunications should be clearly regulated in law.**
- **The legal provisions on interception of telecommunications should comply with the minimum safeguards set out in international law and jurisprudence; in particular, there should be a judicial supervision of interceptions.**
- **Personal data as well as communication with counsel should be exempt from interception.**
- **The rights of the accused must be protected if intercepted data is used as evidence in trial, in particular the right to challenge the evidence in the hearing.**
- **No police officer should be nominated as director of prosecution.**

As to reforms concerning the criminal trial procedure

- **If a system of administration of proof is adopted which is based on the inner conviction of the judge, the whole system of evidence based on the Evidence Act would have to be revised; however, it may not lead to**

a lowering of the standard of proof for conviction: international law requires proof beyond a reasonable doubt.
- Where the accused does not explicitly deny an allegation made be the prosecution, this should not be understood as a concession that the allegation is true.
- The drawing of adverse inferences should be explicitly prohibited in the Evidence Act, on the basis of the wording of article 67 (1) (g) of the Rome Statute of the International Criminal Court.
- There should be no obligation to file a defence statement to the prosecution statement.
- There should be no presumption that allegations of the prosecution not explicitly denied by the defence are proven.
- There should be no preclusion rule to exception-pleas.
- All procedures, including summary procedures, must respect the rights of the accused guaranteed in article 14 ICCPR.
- The jurisdiction of Special Courts should not be expanded, as they do not comply with the requirement of independent and impartial tribunals respecting the rule of law and the right to a fair trial.
- There should be no common definition of terrorism, disruptive activities and organized crime in the Indian Criminal Code.
- Any definition adopted in the Criminal Code should not use the definition of Section 3 POTA, as it is in contravention of international law.

As to reforms regarding victims of crime and witness protection

- Any criminal justice system must be based on the rights of the accused and the rights of the victim.
- The criminal justice system of India should ensure that the rights of victims – such as the right to have access to and participate in the proceedings at all stages, the right to be informed of one's rights, the right to respect of one's dignity and privacy and the right to obtain redress – are duly guaranteed in law and practice.
- The criminal justice system should give particular attention to improving the investigation, prosecution and punishment of state officials who commit crimes and human rights violations.
- There must be prompt, effective, impartial and independent investigations into all allegations of ill-treatment, death or disappearance or other serious human rights violations; the investigating authority must, above all, be independent from the authority whose actions are being scrutinized.

- **In particular, victims and their next-of-kin must have access to legal aid where this is necessary to ensure their adequate participation in the proceedings.**
- **The criminal justice system should guarantee the right of victims of crime and human rights violations to prompt and adequate redress. Compensation, however, does not absolve the state from its duty to prosecute and punish.**
- **The immunity clauses for state officials should be revoked in all statutes.**
- **Marital rape should be made a crime in the Indian Criminal Code.**
- **The presumption of a "reasonable long period" of common life to prove bigamy should be reviewed.**
- **The proposition to make cruelty towards women bailable and compoundable should be subject to further study.**
- **There should be no time limits for first information reports concerning violence against women.**
- **The state should adopt the adequate legislation and make available adequate resources to protect witnesses not only at the trial but also outside the courtroom.**
- **The criminal justice system should find a fair balance between the rights of the accused and witness protection at all stages of the trial. Measures of witness protection must be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.**

TRIAL OBSERVATIONS

TURKEY: LEYLA ZANA AND THREE OTHER KURDISH FORMER PARLIAMENTARIANS

EXECUTIVE SUMMARY

The re-trial of Leyla Zana, Selim Sadak, Hatip Dicle and Orhan Dogan, all Kurdish former parliamentary deputies, continued before No.1 Ankara State Security Court on 23 May, 20 June, 18 July, 15 August, 15 September 2003, 17 October 2003. The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) appointed observers, Mr. Paul Richmond, a barrister of England and Wales for the hearing on 23 May, Ms. Linda Besharaty-Movaed, Legal Advisor, CIJL/ICJ for the hearing on 20 June, Mr. Stuart Kerr, a barrister of England and Wales, for the hearings on 20 June, 15 August, 15 September and 17 October, and Dr. Patrick Vella, a former judge in the Courts of Malta, for the hearing on 18 July, to monitor and report on the re-trial.

Leyla Zana and her co-defendants had been convicted on 8 December 1994 by the Ankara State Security Court of "*membership of an armed gang*" contrary to Article 168 of the Turkish Penal Code and were sentenced each to a term of 15 years imprisonment. However, on 17 July 2001, the European Court of Human Rights (ECtHR) ruled that the said four former parliamentarians had not received a fair trial at the Ankara State Security Court which at the time of the trial included a military judge.[1] The ECtHR held that the Ankara State Security Court, as composed then, was not "*an independent and impartial tribunal within the meaning of Article 6 of the Convention.*"[2] Following this ruling, Leyla Zana and her three co-defendants are now being re-tried and eight hearings have been held to date at No.1 Ankara State Security Court. The hearings took place on 21 February 2003, 28 March 2003, 25 April 2003, 23 May 2003, 20 June 2003, 18 July 2003, 15 August 2003, 15 September 2003 and 17 October 2003.

On the basis of the observation of the hearings by the above-mentioned trial observers, the ICJ/CIJL welcomes practices which indicate that certain

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1 *Sadak and Others v. Turkey* (no.1) (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96), para.40.

2 *Ibid.*

aspects of the right to a fair trial were being respected. The ICJ/CIJL is satisfied that during each of the hearings, the defendants were at no stage excluded from intervening in the proceedings and were able to hear legal arguments and the testimony of witnesses in full. No limitations were placed on public attendance at the hearings nor on any of the lawyers making up the defence team of the defendants in the exercise of their professional duties, led by main defence lawyer, Mr. Yusuf Alatas of the Ankara Bar.

Nevertheless, the ICJ/CIJL believes that in so far as the principles of *equality of arms* between the prosecution, the defence and the *independence and impartiality of the tribunal* and the *presumption of innocence* are concerned, there continue to be significant defects[3]. In summary, the ICJ/CIJL is concerned that the layout of the Court, the Court's disparity of approach to defence and prosecution witnesses, lawyers and evidence, the failure to require the prosecution to disclose relevant evidence, the lack of continuity of the composition of the judges' panel and serious indications that the fundamental principle of the presumption of innocence was not respected are all factors which have lead to a conclusion that the defendants have not been afforded a fair trial.

Consequently, the ICJ/CIJL reiterates its exhortation to the Turkish Government to recognise that *equality of arms* between the parties before a Court is essential and of fundamental importance to the notion of a *fair trial* under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It therefore, once again, urges the Turkish Government to ensure that at future hearings in this re-trial, all the provisions of Article 6 of the ECHR to which the Republic of Turkey is a party, will be fully respected and implemented.

Furthermore, the ICJ/CIJL expresses its concern that the defendants continue to be detained in circumstances wherein: (1) the Court maintains its belief that the 1994 conviction was still valid despite the decision of the ECtHR, (2) the Presiding Judge allegedly commented that the defendants are guilty of the offences for which they are being tried, and (3) the trial is proceeding at a rate of only one day per month, violating the Court's obligation to proceed with expedition where bail is refused. The ICJ/ CIJL is therefore concerned that the defendants' right to *liberty and security* have also been violated.

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[3] For a full discussion of each issue, please see Section IV of this report.

Moreover, the ICJ/CIJL notes that during the hearing of 15 August, in protest at the continued violations of the right to a fair trial, the defence chose to withdraw from active participation in the proceedings, Unlike previous hearings, no procedural applications were made to the Court, no evidence or witnesses for the defence were called, nor were any applications made for the defendants to be released on bail. In contrast to the previous hearings, the defendants themselves elected not to participate in the proceedings and did not make any statements to the Court.

The ICJ/CIJL is, furthermore, extremely concerned about an allegation made by two of the defendants, Orhan Dogan and Hatip Dicle, at the hearing on 15 September that they had been inhumanly and degradingly treated by security forces when they were being transferred to Court. While the ICJ/CIJL is satisfied that the Presiding Judge noted the complaint for the Court record, concerns still remain, as it was apparent to the observer that there was no effort by the prosecution to investigate the allegations, nor did the judges call for any such inquiry into the incident. The observer was informed that the failure to undertake any investigation so that the alleged perpetrators could at least be warned about their conduct is not normal procedure. If these allegations are true, the ICJ/CIJL believes that this demonstrates a significant and undesirable effort on the part of the security forces to intimidate the defendants thereby limiting their ability to participate effectively in the proceedings. The ICJ/CIJL calls on the judges or the prosecutor to immediately instigate an investigation into the incident and, if the allegations are found to be true, to employ appropriate sanctions against the perpetrators accordingly.

INTRODUCTION

The charge of "*membership of an armed gang*" against Leyla Zana and her co-defendants is pursuant to Article 168 of the Turkish Penal Code. Article 168 provides as follows:

> "Any person who, with the intention of committing the offences defined in Article 125[4] ... forms an armed gang or organisation or takes leadership ... or command of such a gang or organisation or assumes some special responsibility within it shall be sentenced to not less than fifteen years' imprisonment.

[4] Article 125 of the Turkish Penal Code provides: "It shall be an offence punishable by death to commit any act aimed at subjecting the State or part of the State to domination by a foreign State, diminishing the State's independence, breaking its unity or removing part of the national territory from the State's control."

The other members of the gang or organisation shall be sentenced to not less than five and not more than fifteen years' imprisonment."

The prosecution case is based firstly, on the activities that Leyla Zana and her co-defendants are alleged to have engaged in on behalf of the Workers Party of Kurdistan (PKK) (harbouring militants, negotiating with local leaders and threatening them as a way of forcing them to help the PKK establish itself in their regions). Secondly, the prosecution bases its case on the content of oral and written statements made by the defendants in defence of Kurdish rights in which they allegedly express support for PKK activities.

The defence case is that Leyla Zana and her co-defendants have never advocated the formation of a separate Kurdish state through armed action. Rather, through their speeches and writings they have sought to forge a peaceful, democratic resolution to the conflict between the Turkish government and its minority Kurdish population, a resolution in which the basic rights and distinct cultural identity of Turkey's Kurds are recognised by the Turkish state authorities. The defence maintains that the political leaders associated with the Kurdish issue are being prosecuted solely in order to silence persons who have sought to criticise the Turkish government.

In previous hearings which took place on 21 February 2003, 28 March 2003 and 25 April 2003, the Court heard a total of 21 witnesses on behalf of the prosecution. However, various human rights groups have expressed concern that the trial may not be conducted in accordance with international fair trial guarantees. According to the London-based Kurdish Human Rights Project, at the hearing on 28 March 2003, "The Court denied requests from defence lawyers that the jailed parliamentarians be released pending the conclusion of the retrial; and that a member of the judiciary be removed due to his previous involvement in the case, raising concerns about impartiality."[5] The International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT), after observing the hearing on 25 April 2003 commented that they were, "alarmed to witness repeated delays in this trial, as well as obvious violations of the rights of defence, which give evidence of continuing malfunctioning of the judicial system in Turkey despite recent legal reforms adopted by Turkey in the framework of EU accession. The observer indeed noticed

5 *European Court Orders Turkey to Grant Retrial for Leyla Zana and Others*, Newsline Issue 21 Spring 2002, p.10.

restrictions placed upon the lawyers' ability to question the witnesses during the hearing."[6]

Based on its observation of all subsequent hearings in the re-trial, namely from May to September, the ICJ/CIJL finds that concerns relating to the right to a fair trial by an independent and impartial tribunal remain outstanding.

I. LEGAL FRAMEWORK

The ECHR is the primary binding regional instrument to have been ratified by Turkey. In addition, relevant persuasive non-treaty standards include the Universal Declaration of Human Rights of 1948 (UDHR), the UN Basic Principles on the Independence of the Judiciary of 1985[7] and the UN Basic Principles on the Role of Lawyers of 1990.[8]

Under the terms of Article 90 of the Turkish Constitution, the above instruments form an integral part of Turkish domestic law.

Article 6 of the ECHR guarantees the *right to a fair trial* in criminal proceedings. The object and purpose of the provision is "to enshrine the fundamental principle of the rule of law"[9] The principle that there should be *equality of arms* between the parties before the Court is of fundamental importance to the notion of a fair trial under this Article. Each party in a case is to have a reasonable opportunity of presenting its case to the Court under conditions which do not place that party at substantial disadvantage vis-à-vis its opponent.[10]

The equality of arms principle necessitates that there be parity of conditions for the examination of witnesses. Article 6 further provides that

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6 Joint FIDH and OMCT Press Release: *Turkey: Release jailed Kurdish deputies* 29 April 2003.

7 Basic Principles on the Independence of the Judiciary, adopted by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985, endorsed by General Assembly Resolution 40/32 of 29 November 1985 and Resolution 40/146 of 13 December 1985. See G.A. Res. 40/32, UN GAOR, 40th Sess., Supp. No. 53, at 204, UN Doc. A/40/53 (1985); Res. 40/146, UN GAOR, 40th Sess., Supp. No. 53, at 254, UN Doc. A/40/53 (1985).

8 Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, and welcomed by the General Assembly in Resolution 45/121 of Dec. 14, 1990. G.A. Res. 45/121, 45th Sess.

9 *Salabiaku v. France* (1991) 13 EHRR 379.

10 *Kaufman v. Belgium* (1986) 50 DR 98, EcmHR 15.

everyone is entitled to a fair and public hearing by "*an independent and impartial tribunal established by law*".

Article 5 of the ECHR guarantees the *right to liberty and security of the person.* Where a person is detained for the purposes of bringing him or her before a Court for trial on a criminal charge, that person should be brought promptly before a judge or a competent officer authorised to exercise judicial power in deciding to release that person on bail or to continue detention[11].

II. VIOLATION OF THE RIGHT TO A FAIR TRIAL

Several irregularities noted during the course of the hearing evidence the fact that the parties were not treated in a manner that ensured their procedurally equal position during the course of the trial:

A. Presumption of Innocence

The ICJ/CIJL is deeply troubled at allegations that the Presiding Judge in the case of Leyla Zana and her co-defendants may not be impartial. According to Mr. Yusuf Alatas, a highly respected defence lawyer, in accordance with domestic law, the defence had to make a formal request to the Court for a re-trial[12]. On this occasion, the two wing members of the bench agreed to grant a re-trial, however, the president of the Court refused. According to Mr. Alatas, in refusing the application for a re-trial the president of the Court commented in open Court to the effect that, "the deficiencies and mistakes identified by the European Court of Human Rights will not change the guilt of the accused." In the opinion of the observer, this alleged public pre-trial comment must cast serious doubt upon the impartiality of the Presiding Judge. If true, it demonstrates that prior to the commencement of the trial, the Presiding Judge held a pre-formed opinion as to the guilt of the accused and that that opinion is likely to weigh on his ultimate decision regardless of the evidence that is placed before him. The observer understands that in light of the prejudicial

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11 *Abdoella v. The Netherlands(1992)20 EHRR 585.*

12 Amnesty International, *Concerns in Europe and Central Asia, Turkey, January – June 2003* states, "A second 'adjustment package' that came into effect on 4 February [2003] granted the right to automatic retrial for those who the European Court of Human Rights (ECHR) had ruled had suffered a violation of the European Convention of Human Rights as a result of a Court *judgement* in Turkey. This opened the way for a retrial of the four imprisoned Democracy Party (DEP) deputies – Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak – who, according to an ECHR ruling, had been found not to have received a fair trial in 1994.", p.2.

comment, the defence did apply for the Presiding Judge to be replaced, however, that application has been refused.

In addition, the observer was informed by the interpreter and by defence counsel that in the re-trial, the prosecution and the judges have frequently referred to the defendants as the "convicted" ("*hukumlu*"). The ICJ/CIJL considers that the use of such terminology provides further evidence that the judges have actually formed or at least gives the impression that they have formed a prejudicial view of the defendants' guilt.

Moreover, at the conclusion of the hearing on 20 June 2003, counsel for the defence made an application for each of the defendants to be released. The prosecution objected to the release and the application was refused. The reason given for refusing the application was that the Court maintained its belief that the conviction reached in 1994 was still valid despite the fact that the ECtHR had ruled to the contrary.

This reasoning, read in conjunction with the use of the word "convicted" to refer to the defendants and the allegation that the Presiding Judge, Judge Orhan Karadeniz, had commented on the guilt of the defendants in a pre-trial application[13], leads the ICJ/CIJL to conclude that there has been a violation of the presumption of innocence enshrined by Art. 6(2) ECHR.[14] Where a judge expresses an opinion suggesting that he has formed an untimely impression of guilt, this has been held to violate the presumption of innocence doctrine.[15]

Furthermore, as this re-trial should be considered to be a new proceeding with the aim of remedying defects contained in the 1994 trial wherein defendants were sentenced to a term of imprisonment of 15 years each, then extreme caution must be used in future hearings to ensure that the trial will be fair and in conformity with Turkey's international obligations.

B. The Layout of the Court

In each of the hearings in the re-trial of Leyla Zana and her co-defendants, at the start of the hearing, and after every adjournment, the prosecutor and the judges simultaneously entered the Court room from the same door

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13 See, *ICJ/CIJL Report of the Re-Trial of Leyla Zana and Three Other Kurdish Former Parliamentarians before No. 1 Ankara State Security Court on 23 May 2003.*

14 Article 6(2) of the ECHR states, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

15 *Ferantelli and Santangelo v. Italy* (1996) 23 EHRR 288, paras. 59-60.

whilst the defence team entered the Court room from a side door along with the public. When the judges rose to consider in chambers the request made by the defence for the release of the four defendants, the prosecutor also retired with the judges and left the Court-room along with them through the same exit door.

Furthermore, during the hearing, the prosecutor sat on an elevated platform, on the same level with the judges and adjacent to them, and quite close to the judge sitting on the prosecutor's left. On the other hand, the defence lawyers sat at a table at ground floor level, the same level as the public and the defendants. The defence lawyers were also placed at quite a distance from the defendants in a way that no communication between them was possible during the hearing. The ICJ/CIJL observer was informed by defence counsel Mr. Alatas that no communication can take place between the defence lawyers and the defendants either during the trial or during the breaks when the session is adjourned. He said that the only time he can communicate with his clients is at the prison where they are held.

Regarding the seating arrangement of the defendants, they sat in a place expressly reserved for them as in all criminal trials, facing the Court and between the public and the Court. During the whole hearing, defendants were surrounded by some six machine-gun armed military personnel. Also, armed policemen were placed in various positions around the Courtroom.

The layout of the Court and the proximity of the judges and the prosecutor who are all physically removed from the defence team, gives rise to legitimate grounds for fearing that the tribunal is submitted to external influence and pressure and, consequently, is not independent or impartial. Moreover, the fact that the prosecutor sits so close to the judges and on the same level with them undoubtedly indicates that in Turkey the prosecutor is given more importance and is held in higher esteem than the defence lawyer. To prove this further, the prosecutor, like the judges, was provided with a computer and a terminal which enabled him to see the records of the proceedings as they were being entered by the Court stenographer or registrar. The fact that the defence was not provided likewise with such technological facilities and was placed on ground floor level beneath the judges and the prosecutor, on the same level as the public and at a distance from the defendants and the judges leads the ICJ/CIJL to conclude that there was, once again, a clear violation of the principle of the equality of arms between the prosecution and the defence as the latter was placed at a substantial disadvantage.

One can, therefore, reasonably suspect that the layout at No. 1 Ankara State Security Court, and the fact that the judges and prosecutor entered and exited the Court room simultaneously and through the same door, facilitating communication between them about the proceedings, both in chambers as well as in the Court room to the absolute exclusion of the defence, gives a picture of an absence of fairness and a feeling that the Court is certainly not independent or impartial with the prosecutor being so close to it. On 20 June, when the judges rose to consider a defence application that had been opposed by the prosecutor, it was possible from the public gallery to see the prosecutor conversing with one of the panel of judges, during deliberations. On another occasion, two judges entered the Courtroom while the prosecutor and the Presiding Judge stayed behind and entered a few minutes later. On 15 August the Presiding Judge began proceedings by informing the Court that one of the witnesses for the prosecution who was due to attend to give evidence was not in attendance to give evidence. This information came directly from the Presiding Judge, and not, as the observer would have expected, from the prosecutor. The inference drawn was that the judge had been provided with this information directly from the prosecutor outside Court. The judge informed the parties that the evidence of the absent witness would be heard at the next hearing in September.

Read in conjunction with earlier observations it was apparent that (1) the layout of the Court and (2) the practice of the prosecutor and the judges of retiring to the same anti-chamber to consider any applications, made it clear that the prosecutor had access to and the opportunity to communicate with the panel of judges outside the Court to the absolute exclusion of the defence lawyers.

In the Courtroom itself, the observer noted on 20 June that the prosecutor sat sufficiently close enough to the wing member of the judge's panel such that a file could be passed between them – again without reference to the defence.

Furthermore, the ICJ/CIJL is concerned that the large Court room was not equipped with a public address system so that everything that was being said in this open and public trial could be easily heard and followed by all attending, the general public included. The interpreter confirmed that it was quite difficult sometimes to hear and understand what witnesses were stating, and in particular, what the Presiding Judge was saying or dictating as very often he spoke in a very low and subdued voice making it extremely difficult to follow and hear all that he was saying. It is quite inconceivable how such a system is lacking in this day and age, especially when the same

Court room is equipped with other modern technological facilities, such as computers, a direct recording system, air conditioning, etc. It is hoped that the absence of a public address system was only of a temporary nature and that it will be installed eventually and quite soon for the benefit of all concerned. Not having a public address system is of a matter of great concern when one recalls that the trial, in accordance with the standards enunciated in the ECHR, has to be an open and public hearing, and consequently, has to be a transparent trial which cannot give rise to doubts and suspicions. The trial must be one where anyone attending can clearly see, hear and follow all that is happening without any hindrance whatsoever. The ICJ/CIJL observer and interpreter sat on the very first bench directly behind the defendants and nevertheless, had to pay extreme attention to hear what the Presiding Judge was saying.

For all these reasons, the ICJ/CIJL concludes that the lay-out of the Court, the disparity in the treatment of the defence and the prosecution, and the actual and perceived ability of the prosecutor to have contact with the judges give rise to a significant fear that the principle of equality of arms is not being respected and that the tribunal is neither impartial nor independent.

C. Examination of Defence Witnesses

At the conclusion of the prosecution case on 23 May, the defence lawyers applied to the Court to call witnesses on behalf of the defence.[16] The prosecutor resisted the application on the grounds that a long period of time had elapsed since the facts which gave rise to the alleged offence took place and that the witnesses would therefore not be able to assist the Court in disclosing any relevant evidence. The judges thereafter refused the defence application to call and examine defence witnesses, citing in support of their decision the reasons advanced by the prosecutor.

Whilst it is recognised that equality of treatment between the prosecution and the defence does not necessarily require the attendance and examination of every witness the defence wishes to call,[17] in the opinion of the ICJ/CIJL, it must be questionable whether the decision of the State Security Court was compatible with Article 6 of the ECHR given that 1) the decision applied to *all* potential defence witnesses without exception, 2) the

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16 Defence counsel, informed the observer that defence witnesses would include new witnesses whose testimony had not been heard at the first trial.

17 *Engel and Others v. Netherlands* (1979-80) 1 EHRR 647 at para 91; *Bricmont v. Belgium* (1990) 12 EHRR 217 at para 89.

defendants face a sentence of 15 years imprisonment for a serious offence and 3) the testimony of the witnesses will provide the defence with their only means of proving various disputed points. Moreover, in the opinion of the ICJ/CIJL, the reasons relied on by the Court for denying the defence the opportunity of calling and examining witnesses in support of the defence case may potentially violate Article 6. It would appear that the reasons advanced for not permitting the attendance and examination of the defence witnesses (i.e. that a long period of time has elapsed since the facts which gave rise to the alleged offence took place and the witnesses would not therefore be able to assist the Court in disclosing any relevant evidence) apply equally to the prosecution witnesses as to the proposed defence witnesses. Yet, the Court was prepared to hear oral testimony from no less than 26 prosecution witnesses. The decision of the State Security Court not to permit the defence to call and examine witnesses in support of its case subjects the defence to a procedurally inferior position vis-à-vis the prosecution in contravention of the principle of the equality of arms.

However, the ICJ/CIJL welcomes the fact that at the hearing on 20 June, contrary to the previous ruling where the defence was not allowed to call any witness, 4 witnesses for the defence were allowed to be called to give live evidence. The ICJ/CIJL is furthermore satisfied that during the 18 July hearing, the defence was allowed to call 6 additional witnesses to support its case.

Nevertheless, despite the fact that defence witnesses were allowed to testify, it is a matter of great concern that normal procedure in criminal trials in Turkey precludes the defence from *examining* the witnesses. Rather, as in the instant case, it is the Presiding Judge who examines the witnesses. In the present case, after putting forth his questions to the witnesses, the Presiding Judge simply summarized what he felt each of the witnesses said and thereafter dictated his summary to the Court stenographer, after the defence and prosecution clarified some points as summarized by the judge or indicated that they had nothing to add to what the judge had asked.

The fact that defence witnesses were examined solely by the Presiding Judge, and not directly by the defence who called them, is worrying and the ICJ/CIJL believes that this procedure could easily be improved upon and brought in line with the requirements of the ECHR regarding the examination of witnesses. Nothing can be more fundamental to ensure a fair trial than to have everything a witness states recorded *verbatim* into the Court record. This is the only way of examining witnesses which would not give rise to doubts and suspicions as to what a witness had actually stated. Hardly any notes were taken during the evidence given by each of

the defence witnesses and the Presiding Judge seemed largely to rely upon his memory of what each witness had said in reply to his questions. This system of examining witnesses in Turkey inevitably leaves room for doubt as to the veracity or accuracy of the Court record as it is based solely upon recollections and summaries by the Presiding Judge of statements of defence witnesses.

The examination of prosecution witnesses was, however, radically different in that all testimony given by these witnesses was taken down directly by the Court stenographer and kept in the records of the case.

At the hearing on 17 October, the defence applied to the judges to call a further defence witness, Ahmet Turk, to give evidence. The Judges refused the application, adopting the prosecution's objection as their reasons. It was said that it would be wrong for Mr. Turk to give evidence since he had originally been a defendant in the initial trial in 1994.

It is the view of the ICJ/CIJL that the ruling to refuse the defence's application to call Mr. Turk to give evidence violates article 6(3) (d) ECHR, in that the defence was prevented from securing the attendance and examination of a witness on behalf of the defendants under the same conditions as witnesses against them. The observer was informed that there is no provision in domestic legislation which supports the Judges' ruling. Moreover, the reason given for disallowing the testimony of Mr. Turk appears to be deficient, given that several witnesses on whom the prosecution rely are convicted felons, who are serving terms of imprisonment at the time of these proceedings. The ICJ/CIJL are therefore concerned that the right to a fair trial has potentially been violated.

The ICJ/CIJL therefore believes that the defence have been placed in a procedurally inferior position vis-à-vis the prosecution as the procedure for examining witnesses varied substantially between witnesses for the prosecution and witnesses for the defence.

D. Cross-examination of Prosecution Witnesses

It was most apparent during each hearing that there lacked parity of conditions for the examination of witnesses by the prosecution and defence. Whereas the prosecutor was able to ask questions *directly* of the witnesses called in support of the prosecution case, when the defence sought to cross-examine a prosecution witness, it was first required to put it questions to the judge. This procedure took place within the hearing of the prosecution witnesses. Furthermore defence questions were repeatedly

met with objections from the prosecution but whether this was the case or not, the judge would proceed to decide whether or not he would put the question to the witness. If the judge decided to ask a question, he would rephrase it and put it in terms which he deemed appropriate.

This procedure for cross-examination of prosecution witnesses by the defence, which is common to all criminal trials in Turkey, prevents the defence from effectively challenging the witnesses brought by the prosecution. The requirement of having to ask questions through a judge puts a potentially unreliable witness on notice of the challenges to his/her evidence and provides him/her with the opportunity to manufacture a suitable but incorrect answer. Furthermore, defence counsel is prevented from examining witnesses in terms which accord with defence counsel's trial strategy. For example, in the hearing on 23 May the defence sought to question a Kurdish-speaking prosecution witness as to the identity of the interpreter who had translated his oral testimony into Turkish for the purposes of his witness statement. The prosecution objected to this question and the Presiding Judge ruled that the witness need not answer the question because it was not relevant. In the opinion of the observer, the defence line of questioning was highly relevant in so far as the defence sought to adduce evidence to the effect that the interpreter was in fact a gendarme officer and therefore not impartial.

The defence also sought to question another prosecution witness as to his political allegiance. The prosecution objected to this question and the Presiding Judge again ruled that the witness need not answer the question because it was not relevant. In the opinion of the observer, the question was relevant in so far as the defence sought to adduce evidence to the effect that the witness is actively involved with the Nationalist Action Party (MHP), an ultra-nationalist party whose primary concern is to fight Kurdish separatism and Kurdish political aspirations in Turkey, and therefore not impartial. The defence question was therefore highly relevant to the issue of the credibility of the prosecution witness.

Furthermore, a witness for the prosecution, whose first language was Kurdish, was not provided with an interpreter in the Courtroom. This witness had, with the assistance of an interpreter, prepared a statement written in Turkish. At the hearing on 23 May, he adopted this statement as his evidence-in-chief at the re-trial. The witness was then tendered for examination by counsel for the defence, however, no interpreter was provided. Due to the witness's extremely limited understanding of the Turkish language (the language in which all Court proceedings are conducted in Turkey), he was unable to fully understand many of the

questions put to him by the defence, remarking on several occasions, "I speak very little Turkish", "My Turkish is not very good", "I don't understand".

The observer is deeply concerned at an apparent inequality of arms in so far as the prosecution was able to benefit from the witness giving his evidence-in-chief (the written statement) in his first language, Kurdish, but the defence was required to cross-examine the witness in Turkish, a language of which he had only an extremely limited understanding. In the opinion of the observer, in order for the prosecution and defence to be afforded a procedurally equal position, a Kurdish-Turkish interpreter ought properly to have been provided for the cross-examination of the witness. In the absence of an interpreter, the Court ought properly to have adjourned the testimony of the witness until a later date with a direction that an interpreter attend on that occasion.

Most alarmingly, at the hearing of 17 October, in furtherance of the prosecution case, written testimony of a prosecution witness, Ejder Pagal, was adduced. The testimony was read by the Judges, as Mr. Pagal was not in attendance at court. He is a serving prisoner. The testimony of this witness was particularly crucial because he alleged that he saw Leyla Zana conversing with Abdullah Ocalan, the former leader of the PKK, at a PKK camp. His testimony also indicated that it was not possible for him to be recognised as he had undergone facial surgery to alter his appearance. It was said that a lawyer from the defence team was present when the witness statement was taken but that she was not allowed to ask any questions of the witness.

The ICJ/CIJL have serious concerns about the manner in which the testimony of Mr. Pagal has been introduced as evidence. No reasons were provided by the Judges for reading the statement in his absence, or why it was not possible or desirable to have the witness produced at court, especially given that live testimony of serving prisoners has been adduced in the course of the trial and susceptible to cross-examination.

Moreover, serious concerns surround the reliability of the evidence, given that the identity of the witness is open to question. While it is recognised that the anonymity of witnesses may be justifiable in order to ensure their safety, the ICJ/CIJL is not satisfied that the court or Judges took any steps to ensure the reliability of the evidence, either in content or its source, in order to counterbalance the significant disadvantage under which the defence were accordingly placed in not being allowed to test the evidence

of Mr. Pagal[18]. The defence were provided no opportunity of examining the witness, or shown that any safeguards that the identity of the witness had been verified. Further, no reasons were provided as to why this witness was entitled to the protection of anonymity, when no others witnesses, including other serving prisoners and former associates of the defendants, have. Therefore, grave concerns about the handling of this evidence remain, and significantly detract from the actual and perceived fairness of the proceedings.

It is therefore the opinion of the ICJ/CIJL that such disparity is inconsistent with the principle of equality of arms.

E. The Defence was prevented from adducing relevant evidence

Both in the hearing observed on 23 May and at previous hearings, several prosecution witnesses gave evidence as to the distance between a coffee shop where the defendants were alleged to have held a meeting in support of the PKK and a gendarme station. The evidence of the prosecution witnesses ranged from 60 metres to 700 metres. In that hearing, counsel for the defence applied to the Court to have an independent examiner appointed in order to undertake an official measurement of the distance between the coffee house and the gendarme station. The prosecution objected to the application and the Court refused to grant the defence request.

The decision of the Court to refuse to grant the defence application provides a further instance of the defence having been substantially disadvantaged vis-à-vis the prosecution. The measurement evidence, which according to Turkish law could only have been obtained by an independent Court appointed examiner, would have been highly probative of the credibility or otherwise of the prosecution witnesses. The failure of the Court to request that such evidence be obtained denies the defence an effective opportunity to challenge the prosecution case and effectively advance its own case and casts doubt upon the willingness of the Court to subject the evidence of the prosecution witnesses to any detailed scrutiny. The ICJ/CIJL recalls that the equality of arms principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself.

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[18] *Doorson v. Netherlands* 22 EHRR 330.

F. The prosecution failed to disclose material evidence against the accused

During the course of the hearing observed on 23 May, a prosecution witness produced an audio-cassette which he alleged contained a recording of a conversation he had had with the defendants in which they expressed support for the PKK. This cassette was not disclosed to the defence prior to the trial and therefore the defence was denied the opportunity of having knowledge of and commenting on material evidence filed by the prosecution.

It transpired that the original audio-cassette contained a recording of a conversation held in Kurdish, but that this had subsequently been translated into Turkish and the cassette produced by the prosecution witness in fact contained the Turkish translation. Upon a request from the defence, the prosecution agreed to disclose the Turkish version of the recording but not the original Kurdish version. A defence application for the original Kurdish recording to be disclosed was refused by the Presiding Judge.

The failure of the prosecution to disclose either the Turkish or Kurdish version of the audio-cassette prior to trial must have inevitably affected the conditions under which the defence cross-examination took place. The defence was denied the opportunity of familiarising itself with the evidence before the Court and commenting on its existence, contents and authenticity. Perhaps even more concerning, however, is the decision of the judge not to order disclosure of the cassette alleged to contain a recording of the original conversation in Kurdish. Without a copy of the original Kurdish conversation, the defence is fundamentally prejudiced in two key respects. First, it has no means of testing the prosecution witness's claim that the voices on the cassette are in fact those of the defendants; and second, no means exist for testing whether the translation of the Kurdish conversation into Turkish that has been admitted into evidence is in fact an accurate translation.

G. The recording of legal submissions of the defence and statements of the defendants

The ICJ/CIJL is concerned that the principle of equality of arms was not fully respected in so far as the prosecutor's submissions to the Court were entered directly into the Court record in his own words, whilst the defence lawyers and defendant were barred from dictating defence submissions and speeches directly into the record. Instead, the defence had to rely upon

the judge to summarise (rather than repeat verbatim) the defence submissions before they were entered into the Court record. The ICJ/CIJL considers that this procedure, which is common to all criminal trials in Turkey, fails to comply with the principle of equality of arms in so far as it places the defence at a substantial disadvantage vis-à-vis the prosecution.

The ICJ/CIJL is concerned that the procedure for recording defence submissions in Turkey potentially fails defendants in three key respects. First, during the course of the trial it risks creating the impression that defence submissions are not as important as those made by the prosecutor. Second, it may prevent defendants from arguing on appeal matters advanced on their behalf during the course of their trial. Third, the procedure as presently followed could be said to deprive appellate Courts, whose role is to scrutinise the fairness of trial proceedings, of any accurate record of the proceedings in the lower Court. These matters thus serve to place the defence at a substantial disadvantage vis-à-vis the prosecution during the course of criminal proceedings in Turkey.

The ICJ/CIJL understands that although during the hearing the defence can object to the judge's summary, acceptance of this objection is within the judge's discretion. After the hearing is over, the defence lawyer has no right to object to how his/her argument is summarised in the record. In the hearing observed, the defence counsel did seek to challenge the judge's summary on at least two occasions. On both occasions the judge amended his summary.

Further, at each hearing, each of the defendants was afforded the opportunity of making a statement in support of his or her defence. However, the observers noted that, as with the defence lawyers' submissions, statements by the defendants to the Court, were neither recorded *verbatim* in the Court record by the Court stenographer, nor were summarized by the judge for inclusion in the Court record.

On some occasions the defendants provided copies of their statements to the Court but on 20 June Orhan Dogan made his statement from notes and subsequently did not provide a copy of his statement to the Court. No record of his statement was included in the Court record by the stenographer either in full or in summary form, through the judge. The ICJ/CIJL is of the opinion that this procedure gives the impression that submissions by defence counsel as well as those by the defendants themselves are not afforded the appropriate weight.

Thus, the unequal manner in which evidence and submissions are taken leads to a violation of the right to a fair trial and is another clear example of inequality of arms between the prosecution and the defence, the former being afforded a more advantageous position than the latter.

H. Continuity of the judges' panel

The observer present at the 15 August hearing noted that at that hearing the panel of judges was differently composed from the proceedings that the same observer monitored on 20 June. One wing member of the panel in June presided on 15 August and the wing members were, as far as the observer was able to ascertain, entirely new to the proceedings.

Further, on 15 September, the observer noted that the panel of judges was yet further re-composed. The Presiding Judge from 15 August returned to his role as a wing member, while another wing member from 20 June presided in September.

Read in conjunction with the earlier observations that, (1) the submissions of the defence lawyers are summarised for the Court record, (2) the testimony of defence witnesses is summarised by the judge for the Court record, and (3) the witnesses for the prosecution are not directly cross-examined but are questioned via the judge who then summarises a line of questioning, the ICJ/CIJL is deeply concerned that the lack of continuity of the panel of judges exacerbates the problems already referred to in earlier reports. In particular, the potential margin of inconsistency further gives rise to the impression that defence arguments and evidence are not important.

Further, the ICJ/CIJL is concerned that the change in judicial personnel impacts severely upon the ability of the Court to give a fair verdict based on the totality of the evidence. The ICJ/CIJL believes that it is an impossible task to reach a verdict when the Judges making the decision will not have heard all of the evidence, and will therefore have to rely on the record of proceedings, which, it has already been noted, is a source of concern itself, given the manner in which proceedings are recorded. The ICJ/CIJL is of the opinion, therefore, that the lack of continuity in the panel of judges significantly impacts on the fairness of the trial.

I. Alleged mistreatment of defendants

At the hearing on 15 September, an allegation was made by two of the defendants, Orhan Dogan and Hatip Dicle, that security forces had treated

them in an inhumane and degrading manner while they were being transferred to Court. Mr. Dogan and Mr. Dicle informed the Court of the alleged treatment when they made their statements to the Court. Details of the alleged mistreatment were, however, not given. When the judge came to summarise the speeches for the Court record, he had to be reminded by the defence lawyers to include in his summary, reference to the allegation. However, the Court did not request an investigation into the allegation, nor did the prosecutor indicate that he would undertake any effort to investigate the said allegation, nor did he request that the security forces deter from such behaviour. The observer was informed by defence counsel that failure to undertake any investigation into the said mistreatment so that the alleged perpetrators could at least be warned about their conduct is not normal procedure.

While the ICJ/CIJL welcomes the fact that the Presiding Judge noted the complaint for the Court record, concerns still remain as to whether any further action will be taken by either the judge or the prosecutor. If defendants' allegations are true, the ICJ/CIJL believes that this demonstrates a significant and undesirable effort on the part of the security forces to intimidate the defendants prior to the trial, thereby limiting their ability to participate effectively in the proceedings. The failure to investigate the incident at the very least leads to a perception of complicity between the Court and the security forces which further taints the proceedings.

J. Trial by an independent and impartial tribunal

The ICJ/CIJL also has misgivings relating to the extent of the independence of the judiciary. Although the Turkish Constitution prohibits state authorities from issuing orders or recommendations concerning the exercise of judicial power, it is widely reported that in practice, the Government and the National Security Council (NSC), a powerful advisory body to the Government composed of civilian government leaders and senior military officers, periodically issues announcements or directives about threats to the State, which can be interpreted as instructions to the judiciary. Furthermore, the ruling body of the judiciary, the High Council of Judges and Prosecutors has the potential to exert undue pressure on members of the judiciary. Established by Article 159 of the Constitution, the High Council is responsible for appointing, transferring, promoting, disciplining and dismissing judges. The High Council is chaired by the Minister of Justice, a Minster of Justice Under-Secretary and five judges selected by the President. The Minister of Justice and the Under-Secretary of the Minister of Justice each retain voting rights in the High Council and therefore there is direct Executive influence in the process of judicial

appointment, promotion, transfer and discipline. Furthermore, decisions of the Council are not open to judicial review.[19] The ICJ/CIJL is concerned that the NSC, an omnipotent group within the Government, can be likely to influence the High Council which, in turn, can exert pressure on the judges of the State Security Court in the instant highly politicised case[20].

The ICJ/CIJL are also concerned by allegations that the independence of the Judges may have been compromised by external executive pressure. In between the hearings of the trial in October and November, it was widely reported in the Turkish press[21] that a government official had said that if the European Union were to proscribe KADEK as a terrorist organisation then the "DEP trial (ie. this trial) may take a different course". Although the source of this remark remains unidentified, the ICJ/CIJL are naturally concerned that the course of this trial may be susceptible to executive influence motivated in turn by political considerations unconnected with the issues of this trial.

The ICJ/CIJL therefore call for a complete independence of the judiciary in Turkey.

III. VIOLATION OF THE RIGHT TO LIBERTY

A. The continued detention of the defendants

The defendants have been in detention since their arrest in 1994 and subsequent trial by the State Security Court that year. The State Security Court granted the defendants a re-trial in February 2003 pursuant to legislative changes (the second "Harmonization package") that granted the right to automatic re-trial for those whom the EctHR had ruled had not received a fair trial.[22] Despite this re-trial, the defendants continue to remain in detention and repeated applications by defence counsel for their release are denied. The ICJ/CIJL is concerned that the continued detention of the defendants constitutes an infringement on their right to *liberty and security* pursuant to Article 5 of the ECHR.

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19 For a detailed discussion see Chapter VII of *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission, 1999*, published by the Centre for the Independence of Judges and Lawyers, Geneva, Switzerland.

20 At the hearing on 15 September, Orhan Dogan alleged that the NSC had in fact named the four defendants (and others) as people "harmful to the state", in a document which had been distributed to the main institutions, including the Ministry of Justice.

21 Hurriyet (23rd Ocober 2003), Radikal.

22 See footnote 13.

As had already transpired in earlier sittings, at the conclusion of the hearing on 18 July, all members of the defence team made verbal submissions for each of the four defendants to be released. Whilst the defence lawyers brought various submissions and legal arguments to substantiate their request for the defendants' release, these submissions, however, were not taken down *verbatim* by the Court stenographer, but merely and very briefly summarized by the Presiding Judge. The prosecution simply objected to the release of the defendants without giving any reasons to substantiate its objection. Unlike the defence submissions, the objection of the prosecution was recorded *verbatim* by the Court stenographer.

Following a short ten minute break intended for the panel of three judges, along with the prosecutor, to discuss in chambers the request for the release of the defendants submitted by the defence team, the Court then reconvened and the Presiding Judge read out the Court's decision refusing the defence request for the defendants' release. The observer was informed by the interpreter that the reason given by the Court for refusing this request was that there were still other witnesses to be heard in future sittings of this case. It is recognised that this may constitute a valid reason for refusing an application for bail, in order to prevent the defendants from interfering with the course of justice (i.e., committing an offense or fleeing after having done so). However, it was not argued by the prosecution that there was a fear or suspicion that the defendants would in fact interfere with the course of justice, nor did the Presiding Judge rule that a fear or suspicion of interference with the course of justice was the reason that detention should continue. It is therefore the opinion of the ICJ/CIJL that the reasons given for the continued detention of the defendants – namely that they are to remain in detention as more witnesses remain to be heard – are deficient.

On 15 September, the defence made a further application for the release of the defendants, following the same procedure as in the July hearing. The Presiding Judge informed the Court that the application had been refused but gave no reasons for his decision.

The trial has, thus far, been heard on eight days, at the rate of one day per month. It is expected that there will be at least two further hearings in October and November. ICJ/CIJL is worried that the protracted proceedings in the trial may give rise to a violation of Article 5 of the ECHR.

Where a person is held in detention pending the determination of a criminal charge, that person can expect special diligence on the part of

the competent authorities to reach such determination of guilt or innocence with expedition. The ICJ/CIJL considers that the periods of inactivity in the trial are unacceptable and therefore, that the obligation to proceed expeditiously has been violated[23].

Therefore, the delay in reaching a conclusion to the trial, read in conjunction with the fact that: (1) the defendants have already been in prison for almost nine years, (2) no rationale is given for the continued detention of the defendants, (2) there is a presumption by the Court that the 1994 conviction was valid in spite of the decision of the ECtHR to the contrary, and (3) the Presiding Judge had allegedly earlier commented on the guilt of the defendants in a pre-trial application[24] are factors which do not constitute sufficiently valid legal grounds to continue the detention of the defendants.

It is the opinion of the ICJ/CIJL that as a natural and legal consequence of the ruling of the ECtHR on 17 July 2001, the present re-trial is to be considered as, and in actual fact is, a completely new process with the aim of remedying the defects that existed in the first trial. Therefore, extreme care and caution must be taken to ensure that the rights of the defendants to a fair trial and to liberty of person are respected in conformity with the ECHR and with Turkey's international obligations arising from the said ECHR. As such, the defendants' right to liberty and security of the person are not being respected.

IV. CONCLUSION

It is regrettable that the State Security Court has not remedied the defects identified by the ECtHR in 2001. Despite some positive rulings by the State Security Court, the ICJ/CIJL finds that, in the main, the fundamental principle and the right to a fair trial were not fully respected and implemented as required by the ECHR. In particular, the *violation of the principle of equality of arms* between the prosecution and the defence, the *violation of the right to liberty* because of the continued detention of the four defendants, the violation of the *presumption of innocence* due to the insufficiently valid legal reasons given for such a state of affairs, and the reasonable suspicion that the *Court is not an independent or impartial tribunal* for the reasons stated above, still prevail today. These deficiencies, coupled with the fact that the National Security Council, through the High Council, is in a position to exert pressure on the judges indicate that No. 1 Ankara

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[23] *Abdoella v. The Netherlands(1992)20 EHRR 585*, para. 24.

[24] See, *ICJ/CIJL Report of the Re-Trial of Leyla Zana and Three other Kurdish Former Parliamentarians before the No.1 Ankara State Security Court on the 23 May 2003.*

State Security Court was neither independent nor impartial when hearing the case of Leyla Zana and three other Kurdish former parliamentary deputies.

The ICJ/CIJL urges the Government to ensure that at the next hearing, which has been scheduled for 17 October 2003, the abovementioned defects are remedied in line with Turkey's international obligations.

V. BACKGROUND INFORMATION

Leyla Zana, Hatip Dicle, Orhan Dogan and Selim Sadak were former members of the Turkish National Assembly and the Democracy Party (DEP).[25] On the basis of repeated applications over the course of nearly three years by the public prosecutor to the Ankara State Security Court, on 2 March 1994, the National Assembly lifted the applicants' parliamentary immunity. Shortly thereafter, the defendants were taken into police custody. On 16 June 1994, the Constitutional Court dissolved the DEP and ordered the party's MPs to vacate their parliamentary seats.

The defendants were initially charged with "*treason against the integrity of the state*" a capital offence under Article 125 of the Penal Code. That charge was later changed to "*membership in an armed gang*" within the meaning of Article 168 of the Penal Code.

In its judgement of 8 December 1994, the Ankara State Security Court sentenced the defendants to 15 years imprisonment within the meaning of Article 168. The Court rejected the charge under Art. 125. It found, in sum, that defendants had engaged in intensive "separatist" activity under instructions from the PKK – a separatist armed group seeking to fund a Turkish state in south-eastern and eastern Turkey.

On 17 January 1996, the former parliamentarians lodged an application with the then European Commission on Human Rights alleging, by reference to Articles 6 and 10 of the ECHR that they had not been afforded a fair hearing by an independent and impartial tribunal and that their freedom of expression had been infringed.

On 17 July 2001, the European Court of Human Rights ruled that the former members of the Turkish Parliament had not received a fair trial. The Court ruled that there had been a violation of Article 6 because the Ankara State Security Court, which at the time of the trial included a

[25] For all factual information cited, refer to *Sadak and Others v. Turkey* (no. 1) (App. Nos. 29900/96, 29901/96, 29902/96 and 29903/96).

military judge, was not "an independent and impartial tribunal". The Court further unanimously held that the applicant's rights under Article 6(3) (a) and (b) had been violated in so far as there had been a change in the characterisation of the offence during the last hearing of the trial and the applicant's had not been allowed additional time to prepare their defence against the new charge and furthermore, the applicant's had been denied an opportunity to examine or have examined key witnesses for the prosecution.[26]

On 3 February 2003, Turkey's President, Ahmet Necdet Sezer, ratified the most recent "Harmonisation Law" aimed at bringing the country closer to meeting European Union membership requirements pertaining to human rights. According to the new law, when the European Court has ruled that a person has been denied a fair hearing in accordance with Article 6, that person shall have the right to a re-trial. On 4 February 2003, the ex-parliamentarians officially lodged an application for a re-trial pursuant to the new law adopted by the Turkish Parliament.

VI. METHODOLOGY

The observers monitored the proceedings hearing at No. 1 Ankara State Security Court on 23 May 2003, 20 June 2003, 18 July 2003, and 15 September 2003. They were very ably assisted throughout by an interpreter who translated the proceedings expertly. They noted that several other observers from different organisations and bodies were also present in the Courtroom during the hearings, as well as representatives from some foreign embassies and the European Parliament.

After the hearing on 20 June, the observers requested to meet briefly with the prosecutor in order to clarify questions of procedure. However, after being introduced, the prosecutor refused to answer any questions. Similarly, the observers attempted to meet with the Presiding Judge, Judge Orhan Karadeniz, but were prevented from doing so by the police.

After each hearing, the observers, along with the interpreter and other observers, met for over an hour with lead defence lawyer Mr. Yusuf Alatas at his law office. Here the defence lawyer answered all the questions which the observers and others put to him to clarify matters of procedure and certain aspects of Turkish law relevant to the present case, aspects of which have been incorporated in this report.

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[26] *Ibid.*

TURKEY: FILZ KALAYCI, LAWYER

EXECUTIVE SUMMARY

This is the final report of the trial of Filiz Kalayci, a Turkish lawyer, who was charged with "insulting the Ministry of Justice" and "professional misconduct" on account of an article that she wrote in a national newspaper regarding F-Type prisons in Turkey. Her comments were published in the Cumhuriyet newspaper on 15 January 2002.[1]

The Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) appointed an observer, Mr. Paul Richmond, Barrister of England and Wales, to monitor and report on Ms. Kalayci's trial before No. 4 Ankara Heavy Penal Court, which took place on 20 May 2003.

The ICJ/CIJL is satisfied that the charges against Ms. Kalayci were dismissed on 20 May 2003. Nevertheless, it is concerned that the charges were ever brought at all and were pending for almost 15 months. The ICJ/CIJL is of the opinion that the charges were a manifestation of state-sponsored harassment and intimidation of a member of the Turkish legal profession who had sought to exercise her internationally guaranteed right to non-violent freedom of expression. The ICJ/CIJL is of the view that the criminal proceedings against Ms. Kalayci were in fact brought for a political purpose. As such, they were brought in order to punish an individual lawyer who had sought to defend the human rights of Turkish citizens detained in F-Type prisons and also as a means of intimidating both her and her fellow members of the legal profession into refraining from expressing similar opinions in the future.

The ICJ/CIJL finds that although several aspects of the right to a fair trial were respected during the course of the criminal proceedings against Ms. Kalayci, serious concerns persist in relation to others such as **the right to be tried by an independent tribunal** and **the right to be tried without undue delay**.

The ICJ reminds the Turkish Government of its international obligations to guarantee freedom of expression[2] and allow lawyers to perform their

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1 The full text of the article, together with translation, is reproduced in Annex C.

2 Article 10, European Convention on Human Rights.

professional functions without intimidation, hindrance, harassment or prosecution.[3]

I. THE TRIAL

A. The Charges Against Filiz Kalayci

Filiz Kalayci was charged with "insulting the Ministry of Justice", a criminal offence pursuant to Article 159 of the Turkish Penal Code, and "professional misconduct", a criminal offence pursuant to Article 240 of the Turkish Penal Code. The charges stemmed from an interview that she gave to Cumhuriyet newspaper regarding the situation of F-Type prisons in Turkey. Her comments were published in the 15 January 2002 edition of the newspaper.

Article 159 of the Turkish Penal Code creates a criminal offence of insulting, "Turkishness, the Republic, the Grand National Assembly, the spiritual personality of the government, ministries, the military, security forces or judiciary of the state."

According to the indictment dated 12 April 2002, the particulars of the alleged offence under Article 159 were that in the 15 January 2002 edition of the Cumhurriyet newspaper, Filiz Kalayci made statements such as "The Minister of Justice is causing prisoners to go on death strikes ... He is in a way issuing an invitation for new deaths ... He does not give prisoners any other alternatives and therefore provokes the action".

Article 159 of the Turkish Penal Code is just one of a number of laws that have been widely criticised as criminalising freedom of expression in Turkey.[4] Prosecutors bring dozens of such cases to court each year, which constitute a form of harassment against writers, journalists and political figures who express ideas contrary to the ideals of the Turkish state, although judges have reportedly dismissed many charges brought under these laws.

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3 Principles 16 and 18, Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, and welcomed by the General Assembly in Resolution 45/121 of Dec. 14, 19990. G.A. Res. 45/121. 45th Session.

4 Other laws criticised for limiting freedom of expression in Turkey include Article 8 of the 1991 Anti-Terror Law (disseminating separatist propaganda; Penal Code Articles 312 (incitement to racial, ethnic, or religious enmity); 160 (insulting the Turkish Republic); 169 (aiding an illegal organization): the Law to Protect Ataturk; and over 150 articles of the Press Law (including a provision against commenting on ongoing trials).

Legislative amendments introduced in February 2002 as part of Turkey's programme towards E.U. accession initiated two important changes to Article 159. First, whereas the Penal Code previously imposed a maximum six-year term of imprisonment for any person found guilty of an offence under Article 159, the maximum punishment was reduced to three-years imprisonment. Second, speech or writing that was intended to merely criticise, but not insult, state institutions was made no longer illegal.[5] While the limitation upon the scope of Article 159 and the reduced penalty for violators is to be welcomed, humanitarian NGO's maintain that the law still restricts non-violent expression in a manner and to a degree that is incompatible with the standards of a modern liberal democracy.

Article 240 of the Turkish Penal Code provides as follows:

> "Apart from situations written in the Act, whatever the reason may be, if a public servant abuses or misuses their duty/responsibility, depending on the degree of the offence, they shall be imprisoned for three years. In the event of any mitigating circumstances the penalty shall be between six months to one year imprisonment, and in both circumstances there shall be a heavy financial penalty as punishment. Furthermore, there shall also be suspension or dismissal from being a public employee."

Article 240 of the Turkish Penal Code, as set out above, creates a criminal offence of professional misconduct. The failure of any public employee to act in accordance with his/her duty is a serious offence punishable by a term of imprisonment, a heavy fine and dismissal from public service.

The observer was informed that Article 240 of the Turkish Penal Code was originally enacted in order to provide a complaint mechanism for Turkish citizens dissatisfied with the conduct of any *public employee* instructed to act on their behalf. The observer was also informed that the courts do have experience of criminal prosecutions of lawyers on charges of professional misconduct. However, the criminal proceedings have usually been commenced following a complaint made by an ordinary citizen against a lawyer instructed to act on their behalf rather than at the instigation of the Office of the Public Prosecutor of its own motion.

In addition to the foregoing, the observer was informed that according to the Rules of the Bar Association, whenever a criminal investigation is

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5 Other revisions to Turkish laws in recent months have included amending Article 8 of the Anti-Terror Law so that political activity is not illegal if it is not intended to disrupt the unity of the state, and amending Article 312 of the Turkish Penal Code so that incitement can only be punished if it presents "a possible threat to public order".

commenced against a lawyer under Article 240 of the Turkish Penal Code, the lawyer is also subjected to a disciplinary investigation by his/her Bar Association. The Observer was informed that a criminal conviction will usually, but not automatically, result in the lawyer concerned being disbarred for life.

B. Other applicable law, decrees or regulations

Articles 58 and 59 of the Law on Lawyers are relevant in so far as they outline the conditions of inquiry for lawyers accused of offences committed during the course of their professional duties. Article 58 provides as follows:

> "All investigations concerning offences committed by lawyers during the course of their duty shall be carried out by the Public Prosecutor, responsible for the area, following the grant of permission by the Minister of Justice. The offices and homes of lawyers may only be searched with a court order, and under the supervision of a Public Prosecutor and a representative of the Bar Association. Such a search may only be undertaken in respect of the matter in relation to which the court order was obtained. Lawyers should not be subjected to body searches, unless they are suspected of offences requiring heavy sentencing."

Article 59 of the Law on Lawyers provides as follows:

> "The file in respect of an investigation carried out in pursuance of Article 58 shall be sent to the Under-Secretary of the Minister of Justice responsible for Heavy Penal matters. Following their investigation, if it is decided that legal action is necessary then the file will be sent to the Public Prosecutor of the Heavy Penal Court nearest to where the offence was committed. Within five days, the Public Prosecutor shall prepare an indictment and pass it to the Heavy Penal Court to decide whether there are grounds for a final investigation or not.
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> A copy of the indictment shall, in accordance with the Procedure Rules of the Penal Court, be given to the lawyer against whom there is an investigation. Following receipt of the indictment, the lawyer may, within the time period set by law, request that further evidence be obtained. If the request is acceptable it is taken into consideration and, if necessary, the judge will order further, more detailed investigation.
>
> The trial of a lawyer against whom it is decided to open an investigation will be held at the Heavy Penal Court nearest to where the offence was committed. The Bar Association of which the lawyer is a registered member will be notified of the prosecution."

C. The nature of the prosecution case

The trial of Filiz Kalayci before No. 4 Ankara Heavy Penal Court was based upon the contents of an interview that she gave to Cumhuriyet newspaper published on 15 January 2002. The sections of the interview that were selected as the basis for the prosecution were as follows:

> "The Minister of Justice is causing prisoners to go on death strikes ... He is in a way issuing an invitation for new deaths ... He does not give prisoners any other alternatives and therefore provokes the action.
>
> The prisoners should be able to communicate to each other during breaks for which the prison administration must be responsible [to create the] necessary possibilities. Something above this and a regime tighter than this cannot be accepted. It is not correct that the F-Type prison system is suitable to the international standards. This is a completely self-made Turkish-type prison system.
>
> This new proposal, 3 doors 3 locks, has been prepared by many NGO's, including the major Bar Association. The Minister of Justice cannot simply ignore it. If he does refuse it only means issuing invitation to new deaths. It is not correct that it would cost the State a fortune to introduce this system. That is a government made speculation. It would be well enough to turn the keys and open some of the doors, letting people of the strict isolation.
>
> This proposal is refused because the State wants to continue with the isolation cell system. The isolation cannot be accepted in terms of the life conditions and health of the prisoner. It is very damaging."

On 18 January 2002, the Istanbul Public Prosecutor's Office initiated an investigation into Ms. Kalayci's comments on the basis of a potential contravention of Article 159 of the Turkish Penal Code. However, on the same day, it decided that the investigation ought more properly be conducted by the Ankara Public Prosecutor's Office and so it referred the case to the Ankara Public Prosecutor's Office. On 5 February 2002, the Ankara Public Prosecutor's Office commenced its investigation. Ms. Kalayci received a telephone call inviting her to the Public Prosecutor's Office. Once at the office she was shown the complaint by the Istanbul Public Prosecutor, together with the newspaper article. This was the first occasion upon which she became aware that she was being investigated in respect of a possible criminal offence. Ms. Kalayci was informed that the accusation against her was that she had contravened Article 159 by insulting the Ministry of Justice. She was invited to make a statement in her defence. She was neither accused of violating Article 240 nor invited to make representations in relation to any accusation of professional misconduct.

On 23 March 2002, the Ankara Public Prosecutor's Office, having completed its investigation, prepared an Indictment. The indictment charged Ms. Kalayci with "insulting the Ministry of Justice" pursuant to Article 159 of the Turkish Penal Code. The indictment further intimated that Ms. Kalayci was guilty of "professional misconduct" but did not expressly include a count alleging a contravention of Article 240 of the Turkish Penal Code.

On 3 April 2002, in accordance with Articles 58 and 59 of the Law on Lawyers, approval of the Ministry of Justice for the continuance of the prosecution was sought. The Ministry of Justice approved the prosecution of Filiz Kalayci.

On 12 April 2002, in accordance with procedures governing the prosecution of lawyers laid down in Articles 58 and 59 of the Law on Lawyers, the case file was sent to the nearest Heavy Penal Court to where the offence was allegedly committed, the Kirikkale Heavy Penal Court. Because the indictment in existence at this time did not contain a count alleging a contravention of Article 240, Ms. Kalayci's legal representatives argued that the court had no jurisdiction to determine any allegation of "professional misconduct". The Kirikkale Heavy Penal Court did not decide this issue. Instead it decided to transfer the case to the Ankara Heavy Penal Court.

On 7 June 2002, a hearing took place at the Ankara Heavy Penal Court. Ms. Kalayci submitted a defence statement. Ms. Kalayci's legal representatives repeated their submission regarding the absence of any count charging a contravention of Article 240. The Ankara Heavy Penal Court considered that since the indictment contained only a single count alleging a contravention of Article 159, a matter normally tried before a First Instance Penal Court, it had no jurisdiction to hear the case. The matter was adjourned in order for the court to consider whether or not it had jurisdiction.

On 27 June 2002, a hearing took place at the Ankara Heavy Penal Court. The Court decided that since the indictment raised an allegation under Article 159 but not Article 240, it had no jurisdiction to hear the case against Ms. Kalayci and so referred the case to the First Instance Penal Court.

On 30 October 2002, a hearing took place at the First Instance Penal Court No. 2. Ms. Kalayci submitted her written defence statement to the court. The Court considered that the indictment properly raised alleged contraventions of both Article 159 and Article 240 of the Turkish Penal

Code and since Article 240 could only be tried before a Heavy Penal Court, it had no jurisdiction to hear the case. The matter was adjourned in order for the court to consider whether or not it had jurisdiction.

On 7 November 2002, a hearing took place at the First Instance Penal Court No. 2. The court decided that it did not have jurisdiction to hear the case because the indictment did contain a properly drafted count alleging a contravention of Article 240. Given the conflict between the Heavy Penal Court and the First Instance Penal Court, it was decided that the jurisdiction of the case should be determined by the Court of Cassation.

On 22 January 2003, a hearing took place before the 5th Chamber of the Court of Cassation in order to determine jurisdiction. The Court of Cassation decided that the indictment contained two alleged offences, an offence of "insulting the Ministry of Justice" pursuant to Article 159, which was expressly pleaded, and an offence of "professional misconduct" pursuant to Article 240, which, although the particular statutory provision was not pleaded in the indictment, was pleaded with sufficient clarity for their to be a charge to be determined. The Court of Cassation proceeded to find that in light of the contents of the indictment, the case against Ms. Kalayci should be tried before the Heavy Penal Court.

On 7 March 2003, the Ankara Heavy Penal Court No. 4 determined, without an oral hearing, that in light of the decision of the Court of Cassation, it had jurisdiction to try the case.

On 8 April 2003, a hearing took place before the Ankara Heavy Penal Court No. 4. The Public Prosecutor applied for an adjournment in order to give him more time to give his opinion on the merits of the case. The matter was adjourned to 20 May 2003.

On 20 May 2003, the final hearing took place before Ankara Heavy Penal Court No. 4. The Public Prosecutor gave his opinion that no crime had been committed. He submitted that, in his opinion, Ms. Kalayci had, by her comments, intended to criticise, but not insult, the Ministry of Justice and accordingly, in line with recent legislative amendments, no crime had been committed under Article 159 of the Penal Code. If no offence had been committed under Article 159 then there was no professional misconduct pursuant to Article 240. The Public Prosecutor invited the court to acquit Ms. Kalayci.

D. The nature of the defence case

In her defence statement, Filiz Kalayci maintained that she was not guilty of insulting the Ministry of Justice and not guilty of professional misconduct, rather she had simply sought to exercise her internationally guaranteed right to non-violent freedom of expression.

The observer noted that Ms. Kalayci was promptly provided with information relating to both the nature and cause of the charge of insulting the Ministry of Justice. Due to a lack of precision in the drafting of the indictment, information relating to the charge of professional misconduct was less readily forthcoming, however, Ms. Kaycili was aware of both the legal description of the offence and the facts upon which the allegation was based well in advance of the start of the trial. At no stage of the proceedings was Ms. Kalayci excluded from observing the proceedings against her. She was able to hear the prosecution case in full. No restrictions were placed upon her choice of legal representatives or her ability to defend herself in person had she so wished. Having decided to instruct legal representatives, no restrictions were placed upon her ability to communicate with them in confidence. In court, Ms. Kalayci benefited from the right to be presumed innocent until proven otherwise and the standard of proof imposed upon the prosecution was "beyond reasonable doubt". Ms. Kalayci was able to put forward her defence by way of written submission and she was able to refute the prosecution's evidence. Equally, she was afforded the right to remain silent if she so wished. The court authorities complied with their duty to notify Ms. Kalayci of the date and location of each of the hearings in her case and no restrictions were placed upon the possibility of public attendance at the hearings.

The Observer received no complaint to the effect that Ms. Kalayci had been denied full access to all appropriate information, files and documents necessary for the preparation of her case, however, as to the timeliness of that access, the observer was informed that Ms. Kalayci was only afforded access to the prosecution file on the day of the first hearing on 7 June 2002. The observer also received an allegation that Ms. Kalayci had been prevented from putting forward her defence by way of oral submissions, instead being required to rely solely upon the contents of her written defence statement. The observer received a further complaint that at the outset of the first hearing, Ms. Kaycili was asked to state in open court whether she had any previous convictions and that the attitude of the presiding judge at the first hearing had been less than impartial. The observer also received a complaint to the effect that proceedings against Ms. Kalayci had not been concluded within a reasonable time given the

restrictions that the pending prosecution imposed upon her professional activities.

E. The role of the prosecution and defence counsels

The prosecution was represented by Public Prosecutor Ali Celik. The Observer understands that Mr. Celik was not specifically selected to prosecute Ms. Kalacay, rather, the case was randomly allocated to No. 4 Ankara Heavy Penal Court. The case was then assigned to Mr. Celik because he is responsible for prosecuting all cases in Court No. 4.

The Observer attempted to organise a meeting with Mr. Celik but unfortunately he was away from his office when the observer called upon him.

Ms. Kalayci was represented by 9 members of the Contemporary Lawyers Association ("CLA"). She was able to appoint lawyers of her own choosing. Since Ms. Kalayci remained on bail, her lawyers were not restricted in their ability to communicate with her in confidence. They were not subjected to any form of harassment or intimidation on account of the representation that they provided. The Observer received no complaint to the effect that Ms. Kalayci's lawyers had been denied full access to all appropriate information, files and documents necessary for the preparation of the case, however, as to the timeliness of that access, the observer was informed that the lawyers were only afforded access to the prosecution file on the day of the first hearing on 7 June 2002. Notwithstanding this fact, Ms. Kalayci's lawyers were confident that they had been afforded adequate time to prepare the defence case since the allegation was not complex and the only item of prosecution evidence was the newspaper article. In court, the nominated spokesperson for the lawyers was able to address the court by way of full oral submissions and during the said submissions was afforded an effective opportunity to challenge the prosecution case and advance his client's own case. The Observer is not able to report directly upon the ability of counsel for Ms. Kalayci to call and effectively examine witnesses since none were called by either party during the course of the proceedings.

F. Violation of the Principle of "Equality of Arms"

The Observer is concerned that the principle of "equality of arms" was not fully respected in so far as the prosecutor's submissions were entered directly into the court record in his own words, whilst the defence lawyers and defendant were barred from dictating their own defence submission directly into the record. Instead, the defence had to rely upon the judge

to summarise the statements of the defendant and argument of counsel before it was enter into the court record. The Observer considers that this procedure, which is common to all criminal trials in Turkey, fails to comply with the principle of "equality of arms" in so far as it places the defence at a substantial disadvantage vis-à-vis the prosecution.

The Observer is concerned that the procedure for recording defence submissions in Turkey potentially fails defendants in three key respects. First, during the course of the trial it risks creating the impression that defence submissions are not as important as those made by the prosecutor. Second, it may prevent defendants from arguing on appeal matters advanced on their behalf during the course of their trial. Third, the procedure as presently followed could be said to deprive appellate courts, whose role is to scrutinise the fairness of trial proceedings, of any accurate record of the proceedings in the lower court. In the opinion of the Observer, these matters serve to place the defence at a substantial disadvantage vis-à-vis the prosecution during the course of criminal proceedings in Turkey.

As a result of information obtained from interviewees, the Observer understands that although during the hearing the defence can object to the judge's summary, acceptance of this objection is within the judge's discretion. After the hearing is over, the defence lawyer has no right to object to how his/her argument is summarised in the record. In the hearing observed, the defence counsel did not seek to challenge the judge's summary at any stage of the proceedings.

G. The conduct of the presiding judge

The presiding trial judge requested that the Observer withhold his name from the final report on the trial observation. The Observer was informed that this request was made because Turkish law prevents a judge from commenting on a case until the case has been finally determined and the case against Filiz Kalayci will not be finally determined until the Public Prosecutor has exhausted his appeal rights. In light of the presiding judge's request, the Observer has decided, out of an abundance of caution, to also withhold the names of the other two judges responsible for hearing the case against Filiz Kalayci.

The observer did receive an allegation that the presiding judge had refused to hear oral evidence from Ms. Kalayci on the basis that she had already prepared a written defence statement. The observer was informed that this occurred at the first hearing. The observer himself witnessed that the judge

refuse to hear any oral submissions from Ms. Kalayci at the hearing on 20 May 2003, although this was after the public prosecutor had requested an acquittal.

The observer also received a single complaint regarding the attitude of the presiding judge towards Ms. Kalayci at the first hearing when she was allegedly ordered to remove her hands from the bench that she was sitting on. It was alleged that this demonstrated that the presiding judge had been less than impartial.

H. Judgement

At the hearing on 20 May 2003, the Public Prosecutor invited the court to acquit Ms. Kalayci. The Public Prosecutor gave his opinion that Ms. Kalayci had, by her comments, intended to criticise, but not insult, the Ministry of Justice and accordingly, in line with recent legislative amendments, no crime had been committed under Article 159 of the Penal Code. The judges unanimously ruled that since there was no evidence that Ms. Kalayci had actually intended to insult the Ministry of Justice, rather than merely criticise it, no offence had been committed under Article 159.

II. EVALUATION OF THE FAIRNESS OF THE PROCEEDINGS

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is the primary binding regional instrument to have actually been ratified by Turkey.[6] In addition, relevant persuasive non-treaty standards include the Universal Declaration of Human Rights of 1948 (UDHR), UN Basic Principles on the Independence of the Judiciary of 1985[7] and the UN Basic Principles on the Role of Lawyers of 1990.[8]

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6 Turkey has been a State Party since 1954.

7 Basic Principles on the Independence of the Judiciary, adopted by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan 1985, endorsed by General Assembly Resolution 40/32 of 29 November 1985 and Resolution 40/146 of 13 December 1985. See G.A. Res. 40/32, UN GAOR, 40th Sess., Supp. No. 53, at 204, UN Doc. A/40/53 (1985); Res. 40/146, UN GAOR, 40th Sess., Supp. No. 53, at 254, UN Doc. A/40/53 (1985).

8 Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, and welcomed by the General Assembly in Resolution 45/121 of Dec. 14, 1990. G.A. Res. 45/121, 45th Sess.

A. Compliance with international fair trial standards

Based on his observation of the hearing on 20 May 2003 and subsequent interviews, the Observer is pleased to report that, in his opinion, the prosecution of Filiz Kalayci was conducted largely in accordance with international fair trial guarantees. The observer makes the following observations:

(a) The right to be tried by a competent tribunal established by law

Ms. Kalayci was tried before a court that was established in advance of and independently of the case before it. The judicial panel was not specifically chosen to hear the case, rather, the case was randomly assigned to Court No.4 which had legal jurisdiction to hear the case. It was most apparent that the court was presided over by competent personnel who were experienced with the subject-matter of the proceedings. The judges hearing the trial of Ms. Kalayci were experienced with the subject-matter of the proceedings and in command of the issues before them. On the basis of the foregoing, the observer concludes that Ms. Kalayci was tried by a competent tribunal established by law in accordance with Article 6(1) of the ECHR and Principle 5 of the Basic Principles on the Independence of the Judiciary.

(b) The right to a public hearing

Ms. Kalayci was afforded a public oral hearing. No restrictions were imposed in relation to the possibility of attendance by the public and press. Adequate facilities were provided for public attendance in the form of a large public gallery within the courtroom. At the conclusion of each hearing, the time and venue of the next hearing was publicly announced. The *judgement* in the case was also made public. In light of the foregoing, the observer is of the opinion that Ms. Kalayci's right to a public hearing as guaranteed by Article 6(1) of the ECHR was respected throughout the course of the proceedings against her.

(c) The right not to be compelled to testify or confess guilt

No restrictions were placed upon Ms. Kalayci's right to remain silent. No complaints were received of her having been coerced to testify or to confess. In the opinion of the observer therefore, Ms. Kalayci was afforded her right not to be compelled to testify or confess guilt in accordance with the European Court's interpretation of Article 6 of the ECHR.

(d) The right to adequate time and facilities to prepare the defence

The Observer was informed that Ms. Kalayci and her legal representatives were only able to access the prosecution file containing the evidence against her on the day of the first hearing on 7 June 2002. In the opinion of the observer such a restriction could potentially constitute a violation of the right to adequate facilities for the preparation of the defence, however, whether that is in fact so will depend upon the circumstances of the individual case. In the circumstances of the present case, the Observer was informed by both Ms. Kalayci and her legal representatives that there was no prejudice occasioned because prior to the first hearing they knew that the prosecution case was based solely upon the newspaper article (a copy of which they had) and, from their experience, they concluded that access to the prosecution file would not have revealed any further relevant information. This conclusion transpired to be accurate.

The Observer understands that in cases falling under the jurisdiction of the Heavy Penal Court, there is no restriction in Turkish law upon defence access to the prosecution file prior to commencement of trial, however, in practice it is often difficult to access such documentation because the public prosecutor is not readily available. In the opinion of the observer, there are likely to be cases where late discovery of the evidence to be relied upon by the prosecution will prejudice the defence in the preparation of their case. However, in the circumstances of the present case, the observer is satisfied that the defence was not so prejudiced.

The Observer notes that a little over 12 months elapsed between the indictment being preferred and the start of the trial. A further 6 weeks then elapsed between the start of the trial and its conclusion, a period of time during which only two short hearings were held. The case against Ms. Kalayci was not especially complex. She faced only two charges and the prosecution evidence comprised solely the article published in the Cumhuriyet newspaper. She was represented by 9 lawyers whom she appointed at the earliest stage of the proceedings. She was on bail throughout the proceedings and therefore no restrictions were placed upon her ability to communicate in confidence with her legal representatives. Defence counsel were satisfied that they had had adequate preparation time. In view of the foregoing, the observer concludes that Ms. Kalayci and her legal representatives were afforded adequate time and facilities for the preparation of the defence in accordance with Article 6(3)(b) of the ECHR and Principle 21 of the Basic Principles on the Role of Lawyers.

(e) The right to be presumed innocent until proven guilty

The Observer was informed that formally the burden of proof lay with the prosecution throughout the entire trial and the standard of proof was "beyond reasonable doubt". However, any analysis of the degree to which the right to be presumed innocent until proven guilty was applied in practice requires an assessment of the degree to which the public authorities refrained from prejudging the outcome of the trial, invoking the guilt of the accused and/or treating the accused as if she was already guilty.

The Observer did receive a complaint from the lawyers representing Ms. Kalayci to the effect that, in practice, courts in Turkey often look to the defendant to prove his or her innocence. In the instant case, the observer was informed that having made the written allegation against Ms. Kalayci, the public prosecutor did not speak once during the course of the proceedings. Instead, the court looked to the defence to prove that no offence had been committed. The observer does not consider that this procedure constitutes a violation of Ms. Kalayci's right to be presumed innocent until proven guilty. It appears to the observer that in conducting its fact-finding process, the court simply accepted the prosecution's case as being the contents of the indictment and the newspaper article before then inviting the defence to make its representations in relation to the allegations raised. Such representations would include submissions on whether the prosecution had discharged the burden of proof upon them in light of the evidence they had submitted. The observer does not consider that this procedure can properly be said to be inconsistent with the right to be presumed innocent.

The Observer did receive a single complaint regarding the attitude of the presiding judge towards Ms. Kalayci at the first hearing when she was allegedly ordered to remove her hands from the bench that she was sitting on. The presiding judge was not prepared to comment upon any aspect of the case against Ms. Kalayci, however, even in the absence of any comment from the judge, the observer is of the opinion that the actions of the judge cannot in any sense properly be said to indicate that he had prejudged the outcome of the trial, invoked the guilt of the accused or treated the accused as if she was already guilty. On the basis of the hearing observed and the absence of any other complaints, the Observer is satisfied at the judge's attitude and approach towards the prosecution and defence.

Notwithstanding the foregoing, the Observer is concerned about the fact that at the outset of the first hearing on 12 April 2002, the Court asked Ms. Kalayci to declare whether she had any previous convictions. The Observer

was informed that this is a standard practice in Turkish courts and that the comments of the defendant in relation to their previous convictions are checked against records held by the Ministry of Justice. The Observer was further informed that, in some cases, the prosecution file also contains a list of previous investigations that have been conducted in relation to an accused, irrespective of the ultimate outcome of those investigations.

Whilst the Observer recognises that the European Commission has expressed its view in several cases that informing decision-makers of a person's prior convictions before a verdict is reached does not necessarily violate fair trial guarantees, including the presumption of innocence enshrined by Article 6(2) of the ECHR,[9] the Observer nevertheless considers that the practice of requiring a defendant to declare his/her criminal record at the outset of a criminal trial, prior to the determination of guilt or innocence, is not a practice that should be encouraged. Similarly, the observer can see no valid reason for retaining a record of previous investigations against a defendant on a file which is made available for the judges to read prior to their determination on the issue of guilt or innocence. The Observer considers that if justice is to be not only done, but also seen to be done, such practices ought properly to be abolished.

In the instant case, however, Ms. Kalayci was able to declare that she had no previous convictions and the prosecution file did not contain any record of previous investigations. Accordingly, the observer concludes that Ms. Kalayci's right to be presumed innocent until proven guilty under Article 6(2) ECHR was respected.

(f) The right to be informed of the charge

The observer notes that prior to the commencement of the trial in the Ankara Heavy Penal Court on 8 April 2003, there were protracted legal arguments surrounding the issue of jurisdiction and these arguments appear to have centred upon whether or not the authorities had complied with their duty to provide Ms. Kalayci with sufficient information as to a charge of professional misconduct in order for it to be included in the indictment.

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[9] *X v. Austria*, 3 April 1967, 23 Coll. Dec. 31 (presiding judge disclosed details of the accused's previous convictions to lay judges before a verdict was reached on a burglary charge); *X v. Austria*, 1 April 1966, 19 Coll. Dec. 95 (accused's previous convictions for theft were referred to during the course of trial); *X v. Denmark*, 14 December 1965, 18 Coll. Dec 44 (the public prosecutor informed the court of the accused's numerous previous convictions before the jury reached a verdict on a rape charge).

Although on 5 February 2002, during her meeting with the Public Prosecutor, Ms. Kalayci was promptly informed of the exact legal description of the alleged offence contrary to Article 159 of the Turkish Penal Code and the facts upon which the allegation was based, on this occasion she was neither accused of violating Article 240 nor invited to make representations in relation to any accusation of professional misconduct. Subsequently, the indictment preferred against her clearly charged her with "insulting the Ministry of Justice" pursuant to Article 159 of the Turkish Penal Code, however, it did not, however, expressly include a count alleging a contravention of Article 240 of the Turkish Penal Code. In short, while Ms. Kalayci was informed of the facts upon which the allegation of professional misconduct was based, she was not provided with information on the specific law and its provisions as required for the purposes of compliance with her right to be informed of the charge against her.

Whilst it is regrettable that the original indictment was not drafted with greater precision, in the opinion of the observer, this is not sufficient to conclude that the authorities have thereby failed to comply with their duty to provide Ms. Kalayci with information relating to the basis of the charges against her. Ultimately, at the commencement of her trial on 8 April 2003, Ms. Kalayci was in full knowledge as to the fact that she faced two counts on the indictment. She had been provided with information as to the specific laws and their provisions and she was informed of the date, time and place when the alleged offences were committed. Indeed, she was aware of the possibility of there being a charge of professional misconduct on the indictment as early as March/April 2002 and was therefore not prevented from preparing a defence in this regard. In the opinion of the observer, therefore, Ms. Kalayci was afforded her right to be informed of the charges she faced in accordance with Article 6(3)(a) ECHR.

(g) The right to defence

The observer received a complaint that Ms. Kalayci had been prevented from putting forward her defence by way of oral submissions, instead being required to rely solely upon the contents of her written defence statement. Again, the presiding judge was not prepared to comment on any aspect of the proceedings against Ms. Kalayci. In the opinion of the observer, although regrettable, the fact that Ms. Kalayci was prevented from making oral submissions would not be sufficient to constitute a violation of the right to defence. The observer notes that at no stage was Ms. Kalayci excluded from observing the proceedings against her. She was present throughout the trial, able to hear the prosecution case in full and put forward her defence by way of written submissions. The Observer notes that Ms. Kalayci

was represented by no less than 9 lawyers and no restrictions were placed upon her choice of legal representatives. She was able to communicate in confidence with them and advise them in the presentation of her case. Ms. Kalayci's lawyers were not subjected to any form of harassment or intimidation on account of the representation that they provided. In view of the foregoing, the Observer concludes that overall Ms. Kalayci was provided with a satisfactory opportunity to present her defence and accordingly her right to make a defence in accordance with Article 6(3)(c) of the ECHR was respected.

B. Concerns relating to compliance with international fair trial standards

(a) The right to be tried by an independent and impartial tribunal

The observer is pleased to report that in several respects, the judges charged with determining the charges levelled against Ms. Kalayci demonstrated that they were impartial. The judges had not taken part in the proceedings in any prior capacity. No information was received to suggest that they had any personal interest in the outcome of the case. They had not commented on the case in public prior to or during the trial. The judges did not appear to have any pre-formed opinion that could have weighed on their decision.

Nevertheless, the Observer does have continuing concerns relating to the extent of the independence of the judiciary. These concerns centre on the make up of the ruling body of the judiciary, the High Council of Judges and Prosecutors and its potential to exert undue pressure on members of the judiciary. Established by Article 159 of the Constitution, the High Council is responsible for appointing, transferring, promoting, disciplining and dismissing judges. The Council is chaired by the Minister of Justice, a Minister of Justice Under-Secretary and five judges selected by the President. The Minister of Justice and the Under-Secretary of the Minister of Justice each retain voting rights in the High Council and therefore there is executive influence in the process of judicial appointment, promotion, transfer and discipline. Decisions of the Council are not open to judicial review. Discussion within the Turkish government about possible changes to the High Council suggests that the government is aware that it is not satisfactory.[10]

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[10] For a detailed discussion see Chapter VII of *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission, 1999*, published by the Centre for the Independence of Judges and Lawyers, Geneva, Switzerland.

The observer is fortified in his conclusion that the tribunal hearing the case against Filiz Kaycili was not truly independent of the executive as a result of the meeting that he conducted with the presiding judge. The presiding judge was not prepared to enter into any discussion regarding the case against Filiz Kaycili, he was not prepared to discuss the extent of the independence of the judiciary generally in Turkey and he requested that his name be removed from the present report. In the opinion of the observer, these are not the actions of an independent judicial officer who is able to freely express his opinions regarding the legal system in Turkey. Rather, they are the actions of a cautious judicial officer who, because of the likely repercussions for himself, was not prepared to risk being accused of criticising the Ministry of Justice in front of the international community.

This influence of the Ministry of Justice is particularly worrying in the present case since, in accordance with Articles 58 and 59 of the Law on Lawyers, both the preliminary investigation and the prosecution of Filiz Kalayci was approved, not only by the Public Prosecutor's Office, but more significantly, by the Minister of Justice and the Under-Secretary of the Minister of Justice, respectively. The judges seized of the trial of Ms. Kalayci were thus left in the invidious position of knowing that individuals capable of exercising a profound influence over their entire judicial career had already found there to be a prima facie case to answer. In such circumstances, the observer is of the opinion that judicial independence was compromised.

Given his concerns relating to the degree to which the judges charged with hearing the case against Ms. Kalayci could be said to be truly independent, the observer is satisfied at the decision of the judges to acquit Ms. Kalayci on the basis that no offence had been made out despite the fact that this was done on the recommendation of the public prosecutor.

(b) The right to be tried without undue delay

Ms. Kalayci was informed that the Office of the Public Prosecutor was taking steps to investigate her with regards to a potential prosecution on 5 February 2002. She was acquitted on all counts on 20 March 2003. The Observer understands that the Public Prosecutor has a further 14 days in which to seek leave to appeal the decision of the Heavy Penal Court but that since the public prosecutor in fact sought the acquittal of Ms. Kalayci, an appeal is unlikely to be forthcoming. Assuming that no appeal is pursued, upon expiry of the period in which leave to appeal may be sought, the decision of the Heavy Penal Court will become final.

The Observer is deeply concerned at the fact that Ms. Kalayci was the subject of criminal proceedings for a period of almost 15 months before the public prosecutor sought her acquittal on the basis that no offence had in fact been committed. In terms of the charges faced and the nature of the evidence involved, the case against Ms. Kalayci was not a complex one. She faced only two charges, she was the only defendant and the only evidence against her constituted a single article in one newspaper. Legal argument relating to jurisdiction undoubtedly rendered the case more complex than it would otherwise have been, however, in the opinion of the observer, the Turkish court system failed Ms. Kalayci by taking a total of 11 months (April 2002 – March 2003) to determine this one issue. The alleged offences were serious and, if convicted, Ms. Kalayci faced the possibility of a prolonged period of imprisonment and disbarment for life. The criminal proceedings were undoubtedly a source of considerable personal concern for her and she may well have been subjected to a degree of stigmatisation among certain sections of society. In such circumstances, there was a compelling need to determine guilt or innocence as expeditiously as possible. In the opinion of the Observer, therefore, the competent authorities ought properly to have acted with a greater degree of efficiency in order to bring the trial of Filiz Kalayci to a conclusion within a reasonable time in accordance with Article 6(1) of the ECHR, Principle 27 of the Basic Principles of Lawyers and Principle 17 of the Basic Principles on the Independence of the Judiciary.

III. CONCLUSION

Any comment on the trial of Filiz Kalayci must necessarily extend beyond an analysis of the fairness of the proceedings in the courtroom to include the overall context within which the criminal charges against her arose. It is through this optic that the Observer reports his profound concern that the criminal charge against Filiz Kalayci was in reality a form of harassment of a lawyer who had sought to exercise her legitimate right to non-violent freedom of expression.

In the opinion of the observer, three key facts support this position: the content of the newspaper article, Turkey's record of criminalising freedom of expression and the fact that Ms. Kalayci was the subject of criminal proceedings for a period of almost 15 months before the public prosecutor sought her acquittal on the basis that no offence had in fact been committed.

Regarding the content of the newspaper article, the Observer notes that Ms. Kalayci's comments addressed the issue of reform of the strict regime

in F-Type prisons in Turkey. The Observer is aware that prison conditions have been a subject of intense debate in Turkey in recent years as prisoners, their families and many human rights defenders and other civil organizations have expressed concern that F-Type prisons increase the risk of torture or ill-treatment in detention. The Turkish authorities meanwhile have been anxious to deflect criticism of the F-Type prison system as they pursue their ambition of E.U. accession. The subject matter of Ms. Kalayci's article was therefore politically sensitive.

Regarding Turkey's record of criminalising freedom of expression, the Observer recalls that the Turkish Human Rights Association has calculated that Turkish law and regulations contain more than 300 provisions constraining freedom of expression, religion, and association. These laws and regulations are frequently used to prosecute politicians, journalists and writers for their non-violent expression of their beliefs and opinions. Article 159 of the Turkish Penal Code has been particularly widely used against citizens who have criticised state institutions and this has led to many unjust prosecutions.

However, the Observer is most strongly fortified in his opinion by reason of the fact that Ms. Kalayci was the subject of criminal proceedings for a period of almost 15 months before the public prosecutor sought her acquittal on the basis that no offence had in fact been committed. Article 159 of the Turkish Penal Code was amended in February 2002 so as to render speech or writing that was intended to merely criticise, but not insult, state institutions no longer illegal. Interestingly, February 2002 was also the month when Ms. Kalayci was summoned to the Ankara Public Prosecutor's Office in order to answer the allegation that she had "insulted the Ministry of Justice". By the time the first indictment was preferred by the Ankara Public Prosecutor a month later on 23 March 2002, the new law was in full effect. It is therefore possible to conclude that throughout the entire duration of the criminal proceedings against Ms. Kalayci, from March 2002 – May 2003, the public prosecutor would have been aware that speech or writing that was intended to merely criticise, but not insult, state institutions was no longer illegal. In such circumstances, one is left questioning why a public prosecutor who in May 2003 was prepared to declare that Ms. Kalayci's comments were merely criticism rather than insult, ever initiated criminal proceedings against her in the first place. And, when one recalls that the proceedings were not only initiated but maintained for a total of 15 months, questions must be asked to as to the motive of the public prosecutor in so doing. There can be no mileage in an argument that the proceedings needed to be continued in order to resolve a jurisdictional issue because the legal argument relating to

jurisdiction concerned Article 240, not Article 156. In the opinion of the observer, the proceedings against Ms. Kalayci were initiated and maintained solely in order to harass and intimidate a lawyer who had sought to express her opinion on a politically sensitive issue.

ANNEX A

1. Background information concerning the accused

Filiz Kalayci, 29 years old, qualified as an advocate in 1998 and since then has practised as a member of the Ankara Bar Association. She specialises in criminal defence work with an emphasis on political and serious criminal cases heard before the State Security Court. She has no previous convictions.

2. Socio-political background to the trial

Article 2 of the Turkish Constitution describes the characteristics of the Republic as a "democratic, secular, and social State governed by the rule of law, in accordance with the concepts of social peace, national solidarity, and justice; respectful of human rights, committed to Ataturk nationalism, and based on the fundamental principles set forth in the preamble". Thus, the principle of the rule of law is given a prominent place in the Constitution together with other fundamental characteristics of the Turkish State.

According to Turkish law, the power of the judiciary is exercised by judicial (criminal), military and administrative courts. These courts render their verdicts in the first instance, while superior courts examine the verdict for subsequent rulings.

Criminal courts of original jurisdiction are Justice of the Peace Courts (Sulh Ceza Mahkemeleri), Courts of General Criminal Jurisdiction (or Courts of First Instance) (Asliye Ceza Mahkemeleri), and Heavy Penal Courts (Aoir Ceza Mahkemeleri). Justice of the Peace Courts and Courts of General Criminal Jurisdiction have one judge, and are generally located in the capitals of sub-provinces. Heavy Penal Courts are composed of three judges, one of whom is the head, and are located in provincial capitals. In addition, State Security Courts deal with political and serious criminal cases deemed threatening to the security of the state. Turkish courts have no jury system; judges render decisions after establishing the facts in each case based on evidence presented by lawyers and public prosecutors. The Supreme Court of Appeal (also known as the Court of Cassation) is the only competent authority for reviewing decisions and verdicts of lower-level judicial courts, both civil and criminal.

Article 9 of the Turkish Constitution provides for an independent judiciary. Under Article 138, judges are protected from instructions, recommenda-

tions or suggestions that may influence them in the exercise of their judicial power. Furthermore, no legislative debate may be held concerning the exercise of judicial power in a pending trial and both legislative and executive organs are required to comply with court decisions without alteration or delay. Article 139 of the Constitution provides judges with security of tenure, although certain legitimate exceptions are authorised.

Notwithstanding these provisions, there is continuing concern within the international community regarding the extent of the independence of Turkish judges in practice. These concerns centre on the make up of the ruling body of the judiciary, the High Council of Judges and Prosecutors and its potential to exert undue pressure on members of the judiciary. Established by Article 159 of the Constitution, the High Council is responsible for appointing, transferring, promoting, disciplining and dismissing judges. The Council is chaired by the Minister of Justice, a Minister of Justice Under-Secretary and five judges selected by the President, thereby failing to separate the judiciary from the executive. Decisions of the Council are not open to judicial review. Discussion within the Turkish government about possible changes to the High Council suggests that the government is aware that it is not satisfactory.[11]

Turkey has also been the target of much criticism over a long period of time by human rights organisations[12], United Nations Mechanisms[13] and the European Court of Human Rights[14] on the issue of the extent to which Turkish lawyers are able to exercise their role in the judicial process without

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11 For a detailed discussion see Chapter VII of *The Independence of Judges and Lawyers in the Republic of Turkey: Report of a Mission, 1999*, published by the Centre for the Independence of Judges and Lawyers, Geneva, Switzerland.

12 Turkey has been highlighted in many reports of the International Commission of Jurists, see for example *Attacks on Justice*, years 1999. 2000 and 2009 and *The Independence of Judges and Lawyers in the Republic of Turkey, Report of a Mission, 1999.* See also, Amnesty International documents, as for example, *Lawyers severely ill-treated outside Buca Prison in Izmir*, EUR 44/31/96, March 1996; *17 years in the balance: Lawyer Esber Yagmurdereli returns to prison in freedom of expression case*, EUR 44/074/1998, November 1997; *Ocalan Lawyers at Risk*, EUR 44/020/1999, February 1999 and Amnesty International Annual Reports of 2000 and 2001.

13 See, for example, report of cases of harassment of lawyers in the reports of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy (E/CN.4/1998/39, 12 February 1998; E/CN.4/1999/60, 13 January 1999; E/CN.4/2000/61, 21 February 2000 at 287-302; E/CN.4/2002/72, 11 February 2002 at 184-189); Report submitted by Ms. Hina Jilani, Special Representative of Secretary-General on Human Rights Defenders (E/CN.4/2002/106, 27 February 2002) and Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain (E/CN.4/199840, 28 January 1998; E/CN.4/1997/31/Add1, 11 February 1997.

14 See for example ECtHR, *Kurt v. Turkey*, 25 May 1998 and ECtHR, *Okcuoglu v. Turkey*, 8 July 1999.

undue restriction and pressure. Observers have commented that on occasion lawyers are subjected to state-sanctioned or state-tolerated harassment, intimidation and violence merely for providing professional legal services to their clients. Lawyers who repeatedly conduct defences before the State Security Courts are, at least in some cases, considered to share the political views of their clients and, as such, termed "terrorist lawyers" by the police, the public prosecutors and the courts. Lawyers who appear in trials before the State Security Courts in cases of torture and extra-judicial killing are, in some quarters, qualified as "public enemies". Lawyers who publicly comment on the human rights practices of Turkey or the Kurdish situation tend to be regarded, in some official circles, as enemies of the state and branded separatists.

ANNEX B

1. Appointment of the Observer

The Trial Observer, Mr. Paul Richmond, Barrister of England and Wales, was appointed by the ICJ and was charged with reporting directly to the ICJ. Mr. Richmond observed the hearing on 20 May 2003.

The Observer was briefed by the ICJ in the way made apparent in this report. This report has been prepared in general reliance upon the Trial Observation Manual prepared by the ICJ which formed part of that briefing.

2. Methodology

The Observer attended the hearing at No. 4 Ankara Heavy Penal Court on 20 May 2003. He was accompanied by a local interpreter capable of simultaneous translation.

During the Mission to Turkey the Observer also held meetings with Filiz Kalayci (the defendant), Mr. X (Ms. Kalayci's main legal representative), representatives of the Contemporary Lawyers Association, the presiding Judge and representatives of the Human Rights Association. The Observer has unfettered access to the complete prosecution file and obtained copies of the official court minutes of the hearing that he observed.

The report also includes information from a number of written sources. Among these are documents, reports, books etc. from U.N. agencies, news sources, humanitarian NGOs and researchers on Turkey. These sources where used are appropriately attributed.

The Observer and the ICJ would like to express their gratitude towards all those agencies, organisations and individuals that have contributed to the information presented in this report.

ANNEX C

Cumhuriyet Daily, 15.01.2002

Lawyer Kalayci blamed the Ministry of Justice "to provoke death fasts".

Reaction to the circular on "Chatting"

Spokesperson of prisoners[15] Lawyer Filiz Kalayci criticised that prisoners to be convened would be identified by the selection committee and said that this proposal was not consented by prisoners. Prisoners want the proposal of the Bar Association."

It was reported that the "conditional chatting" circular announced by the Ministry of Justice to be applied when the death fasts are stopped was already distributed to prisoners in Sincan F type prison. It was also reported that the circular was not consented by prisoners. Lawyer Filiz Kalaycý claimed that death fasts were not developed by only prisoners but the Ministry provoked the action by not providing any other option.

By criticising the identification of prisoners to come together by the selection committee, Lawyer Filiz Kalayci said that this conditional proposal cannot be accepted. "The proposal was not consented by prisoners. They want the proposal of the Bar Association", she said. (...)

Kalayci by drawing attention to the on-going deaths, claimed that death fasts were not developed by only prisoners but the Ministry **provoked** the action by not leaving any other option. "The Ministry is cause of re-entering of people into death fasts", Kalayci said.

Saying that the Ministry cannot turn its back to the proposal "three doors, three locks" prposed by the democratic organisations including bar associations, Lawyer Filiz Kalayci siad that "if the Ministry turns its back to the proposal, it will issue an invitation for new deaths. There is no other meaning."

(...)
(...)
(...)

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[15] The Cumhuriyet daily published a corrigendum which reads that "Lawyer Filiz Kalayci was mistakenly identified as spokesperson of prisoners. We apologize from Lawyer Kalayci evaluated the issue in regard to her clients and our readers".

ANNEX D

INDICTEMENT
TO KIRIKKALE HEAVY PENAL COURT

Plaintiff:
Defendant: Lawyer Filiz Kalayci, born in 1974, registered at Goksun Alislibucak village, resident at.....member of Ankara Bar Association

Complaint Issue: To insult and despise the moral personality of the Ministry of Justice and to misconduct the duty of lawyership

Date of Crime: 15 January 2002

Permission of Legal Investigation: Correspondence of the Ministry of Justice dated 9 April 2002 including the statement of the Directorate General for Penal affairs

The legal investigation dossier launched upon complaint against defendant lawyer who is registered at Ankara bar Association was examined;

It has been understood from report of Ankara Chief Office of Republic Prosecution, comments of Directorate General for Penal Affairs and from the examination of all documents that Lawyer Filiz Kalayci

made statements like "The Ministry is cause of re-entering of people into death fasts", "the Ministry issues an invitation for new deaths", "the Ministry **provoked** the action by not leaving any other option" as published on the Cumhuriyet daily of 15 January 2002 with a view that her prisoned clients were victimised .

It is demanded, on behalf of the public, to make a decision to launch a final investigation against defendant lawyer Filiz Kalayci on the grounds of Article 59/1 and 2 of the Law No.1136 and try her for prosecution based on Article 159/1 of the Turkish Penal Code.

12 April 2002
Kenan Saglam
Chief Prosecutor of the Republic

TUNISIA: TUNISIAN BAR COUNCIL CASE

PRELIMINARY NOTE

It was agreed that this report would be presented to the reader in the chronological order of its narrative, in order to remain as close as possible to the observations made by Mr. Pierre Lyon-Caen concerning the hearings and the context within which they took place.

INTRODUCTION

On February 2, 2002, Hamma Hammami, Spokesman of the Tunisian Communist Workers Party (*Parti communiste des ouvriers de Tunisie*, hereinafter "PCOT "), was tried, together with two of his fellow party members, before the Court of First Instance in Tunis for acts amounting to crimes of opinion. During the trial, which became a symbol of the repression suffered by those who oppose the power of President Ben Ali in Tunisia, the Council of the Bar Association protested against various infringements on the rights of the *defence*. In the days following the hearing, the Council recommended that all lawyers in Tunisia suspend their professional activities on February 7, 2002. This call for a strike was widely followed in a country that has some 3, 800 lawyers, except by lawyers close to the Democratic Constitutional Rally (*Rassemblement constitutionnel démocratique*, hereinafter "RCD"), the party in power.

A lawsuit was then filed by six lawyers, three of them deputies from the RCD. Their lawsuit seeks a retroactive annulment of the decision to strike and calls for the Council of the Bar Association to be prohibited from mounting strikes in the future. They claim that this decision is contrary to human rights and fundamental liberties, including the right to work and professional freedom. Yet no lawyer had been prevented from working on the day of the strike and none had been the subject of penalties on the part of the Council. This is not the first time that Tunisian lawyers have ceased to discharge their professional duties in order to denounce the malfunctioning of the administration of justice in Tunisia. However, this is the first time that a lawsuit has been brought in response to such acts.

This case, tried before the Court of Appeal of Tunis, was the subject of numerous adjournments: April 2, 2002, September 24, 2002, November 19, 2002, December 24, 2002, and February 25, 2003. The sixth hearing was held on April 22, 2003. M. Pierre Lyon-Caen, Counsel for the Prosecu-

tion at the *Cour de Cassation* in Paris attended the sessions of November 19 and December 24, 2002 and that of February 25, 2003.

The report of the observation of the hearings reveals once again the malfunctioning of the administration of justice in Tunisia as well as the increasingly significant gap between official discourse, which proclaims its attachment to respect of human rights, and the reality of the daily repression of free expression in the country. The law and the judicial system are often used by the authorities to repress opponents of all kinds, with the government exercising constant pressure on judges in order to influence their rulings.

This instrumentalization of the justice system affects anyone who expresses criticism of the authorities, including human rights defenders and, among these, members of the legal profession. The independent human rights associations, including the National Council for Liberties in Tunisia (*Conseil national pour les libertés en Tunisie*, (CNLT)) and the Tunisian League of Human Rights (*Ligue tunisienne des droits de l'homme* (LTDH)) are particularly targeted. Legal proceedings have been started against the LTDH, notably Mr. Mokhtar Trifi, president of the League, who is being prosecuted for "circulating false news likely to disturb public order", an accusation that a considerable number of rights defenders also face. Harassment of human rights defenders is also characterized by obstacles put in place to prevent them from holding meetings, defamation campaigns, constant police surveillance, cutting of telephone lines and numerous instances of physical aggression.

Magistrates and lawyers are also subject to this repression, as illustrated by the case of Judge Mokhtar Yahyaoui. This judge had denounced the lack of independence of the judiciary in Tunisia in a letter published in July 2001. As a result, he was relieved of his functions and he and his family were subjected to a campaign of harassment. His nephew, Zouhayr Yahyaoui, organizer of the Internet site TUNeZINE concerning fundamental freedoms in Tunisia, was condemned to two years and four months in prison for "disseminating false information".

Tunisian lawyers are often the target of such harassment. The Bar of Tunisia appears to be one of the few pockets of liberty remaining in Tunisia: the President of the Bar and members of the Council of the Bar Association are chosen following free elections over which the authorities struggle to exercise control. The Bar Association defends individual liberties, denounces police violence and inhuman conditions of detention, and regularly protests against signs of dependence on the part of the

judicial authorities toward the executive. However it does not escape pressures and violence directed against it. Many lawyers are subjected to professional pressure characterized by the loss of contracts with state enterprises and other important companies; pressure is even exerted on their regular clientele. Searches are carried out in lawyers' offices and they are the target of constant police surveillance. Cases of physical aggression against lawyers have risen continually since the beginning of legal proceedings against the Council of the Bar Association. On May 8, 2003, the President of the Bar himself was assaulted in the middle of the night by plain-clothes police agents. This incident is of urgent concern to all of the country's human rights *defence* organizations.

The proceedings against the Council of the Tunisian Bar Association are an illustration of the climate reigning in Tunisia. Moreover they are highly symbolic, as they affect the institution representing lawyers in the country, a professional body that has always expressed its commitment to fundamental rights and liberties peacefully.

I. HEARING OF NOVEMBER 19, 2002

At the request of the International Commission of Jurists (ICJ), the Observatory for the Protection of Human Rights Defenders (a joint program of the International Federation of Human Rights (FIDH) and the World Organization Against Torture (OMCT)) and Lawyers Without Borders, I traveled to Tunis to attend, as an observer, a hearing of the Tunis Court of Appeals held on **November 19, 2002**. The aim of the hearing was to examine the appeal initiated by several lawyers within the Tunisian Bar to annul the decision by the Council of the Bar Association recommending the suspension of its members' professional activities on February 7, 2002.

The decision to strike had been taken following assaults on H. HAMMAMI and two of his fellow party members during a hearing at the Court of First Instance in Tunis on February 2, 2002, in which the aforementioned persons were to be judged, having appealed against their conviction *in abstentia.*[1]

Prior to the opening of the Court session and accompanied by a member of the Council of the Tunisian Bar Association, I paid a courtesy visit to the

[1] I had attended as an observer on behalf of the FIDH what had seemed to me a parody of legal proceedings (cf. FIDH report "*Tunisie, Le procès Hammami: une caricature de justice*", January 2003).

presiding judge of the hearing I was to attend. He received me briefly, standing up, and agreed to accept my visiting card.

THE HEARING

Upon my arrival in the courtroom, one of the plaintiff lawyers, Mr. Habib ACHOUR, handed me an "explanatory note" written in French and obviously prepared for the benefit of the foreign observers. This note attempts to demonstrate that the real defenders of fundamental liberties were actually the plaintiffs who were seeking to annul the decision to strike and not the President of the Bar, the members of the Council of the Association and the majority of lawyers who followed them.

The authors of the text try to give the impression that the decision of the Council of the Bar Association had infringed upon the right to work and professional freedom.

I questioned several lawyers on this subject, all of whom pointed out to me that the appeal for a work stoppage on the day of February 7, 2002 had not been accompanied by any constraints or sanctions; there were neither picket lines nor proceedings against lawyers who did not participate in the strike. A special resolution, which was shown to me in the original Arabic text, had been adopted specifically to respond to rumors asserting the opposite.

In the above-mentioned "explanatory note", moreover, it is stated that on the day of the strike "*hundreds of lawyers in professional garb went to the courts to attend hearings and to exercise their functions normally*". Evidence is therefore produced by the authors of the note themselves that, contrary to their assertion, there had been no infringement of the free exercise of the legal profession by those persons – the number of whom is contested – who did not wish to follow the recommendation of the Council of the Bar Association.

I noted the presence in the courtroom of a representative of the President of the Brussels Bar Association – this Bar was preparing to sign an agreement with its Tunisian counterpart – as well as members of the embassies of the United States, Great Britain, the Netherlands and Switzerland, with whom I spoke briefly at the conclusion of the hearing concerning the reasons for the adjournment which had just been decided.

Indeed, the hearing only lasted a very short while, the case being postponed for the fourth time until December 24, 2003 at the request of the plaintiffs, to allow them time to present new findings.

OBSERVATIONS

Beyond the technical justifications, this new adjournment can be explained by a desire to wear down the foreign observers. The choice of the date of the next hearing, December 24, is not insignificant in this regard.

Another hypothesis can be ventured – which does not exclude the previous one – continue to hang a sword of Damocles over the Tunisian Bar: indeed the Bar has legitimate reason to fear that the Court of Appeals will pronounce in favor of the annulment of the decision in question,[2] while the plaintiffs hold out for the prospect of a withdrawal of their lawsuit, which would put an end to the procedure without the Court of Appeals having to give a ruling. As long as a withdrawal remains a possibility, the authorities can hope that the Tunisian Bar will not take any measures likely to disturb them.

Finally, it is conceivable that the authorities are hesitating – and thus gaining a bit of time – to make a gesture toward the Bar in the hope of mollifying it. Like any authoritarian regime, it wants to give itself an image of respectability, which is contested in certain quarters: hence a few gestures of leniency following a great deal of authoritarianism. Thus, H. Hammami was released last September, well before serving his entire sentence, after a long hunger strike by his wife which was given a lot of media coverage, especially in France; and more recently the two men convicted with him were also released. On November 7, 2002, on the occasion of the 15th anniversary of his coming to power, President Ben Ali made reference in his speech to the difficulties being encountered by the Tunisian Bar, something that had never happened before, according to the lawyers with whom I spoke. Is it the sign of a desire to calm relations between the Bar and the authorities, which when the time comes, will result in a withdrawal?

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[2] Nevertheless, this annulment is by no means a foregone conclusion: the Tunisian Bar had decided to issue strike appeals in the past without provoking a reaction from the authorities. Thus a one-hour strike in solidarity with the Palestinians was widely followed by lawyers; likewise, when several lawyers were assaulted by the police while meeting with their clients, the strike decided by the Council of the Bar Association did not cause any difficulties. The President of the Paris Bar had the opportunity to remind his Tunisian colleagues that the Bar associations in France, and particularly that in Paris, had issued appeals for strikes on several occasions.

What exactly is at stake in this case? It is public knowledge that the plaintiff lawyers are members of the governing party and are thus seen to be acting in close collaboration with the authorities.

Now, the Tunisian Bar is one of the few pockets of liberty remaining in the country.

The President of the Bar and the Members of the Council of the Bar Association are chosen following free elections, over which the authorities in power do not seem to be able to exercise any influence.

The Bar Association courageously defends individual liberties, denounces police violence and inhumane prison conditions, and protests against signs of dependence on the part of the judicial authorities toward the executive. As a result, a collective movement of lawyers which is given significant media coverage outside the country is very poorly tolerated by the authorities.

To sanction the call to strike as illegal would subsequently make it possible to threaten the participants with disciplinary proceedings, which could go as far as suspension or disbarment and thus reduce the scale of the movement, making it easier to punish the more limited number of participants. It is thus preservation of the collective role of Tunisian lawyers in the sphere of *defence* of liberties that is at stake.

The seriousness of these problems is all the more pronounced given that individually lawyers continue to be threatened in the exercise of their functions. A given lawyer, because he participates in the activities of an association for the independence of the judiciary in Tunisia, is regularly summoned by the Prosecutor's office and by the police for the purpose of intimidation. Another sees his most important clients abandon him under pressure from the authorities, without the slightest criticism being hereto voiced by any of his clients.

Still another notices that his clients are threatened at the entrance of the building where his law offices are located. Another is the victim of a burglary which has all the markings of organized vandalism, etc.

At the same time, "pro-government" lawyers see an increase in their clientele, notably national companies, public legal entities and important clients whose interests lead the lawyers to support the authorities in power and handle them with care.

II. HEARING OF DECEMBER 24, 2002

During a previous hearing on November 19 2002, the case was postponed until December 24 to allow the plaintiffs time to present new conclusions.

THE HEARING

On December 24 2002, at the hearing which I attended at the Court of Appeals in Tunis, it was decided that a new adjournment would take place on February 25, 2003 to hear the pleadings, without any prior proceedings having taken place. There is no way of knowing whether the case will indeed be heard on this date or once again adjourned.

It was pointed out to me by several lawyers that the case could have been heard that day or postponed for a week, according to the customary practice. The two-month adjournment can only be explained by the reasons given above (to maintain pressure on the Bar Association and leave the door open for a possible compromise) and demonstrates an awareness of the high stakes that are involved in this case.

In the courtroom I again met the representatives of the embassies of the United States, the Netherlands and Belgium – who congratulated me once again on my presence.

Also present at the hearing was Ms. Doris Leuenberger, member of the Council of the Bar Association of Geneva and the Swiss League of Human Rights.

I did not see representatives of the international press agencies.

As at the previous hearing, one of the petitioning lawyers approached me to deliver a "recapitulative fact sheet" dated December 24 and obviously intended for the foreign observers.

This note[3] essentially restates the premise of the previous note: that the petition for annulment of the decision by the Council of the Bar Association is based on the infringement that this decision represents on the fundamental principle of the free exercise of the practice of law, and as a result, on the fact that "*no one can decide to oblige a lawyer to stop exercising his profession...*"

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[3] See annex.

But this same document indicates "the Council of the Bar Association decided to list the names of those lawyers who did not accept to submit to the strike decision", (...) "hundreds of lawyers in professional garb went to the courts to attend hearings and to exercise their functions normally." Thus, there was no obligation for Tunisian lawyers to stop exercising their professional activities, but only an incitement to do so.

According to information collected among Tunisian lawyers, there are approximately 250 lawyers (out of a total of 4,000) who are members of the party in power and 63 lawyers who did not want to participate in the strike.

OBSERVATIONS

Since the previous hearing, the relations between the Tunisian Bar and the Government have become noticeably strained. Indeed, some 15 lawyers, including Mr. Jmour, Secretary General of the Tunisian Bar Association, have been the subject of physical attacks which could not have been coincidental.

There appears to be a link between these attacks and the recent creation of the International Association for the Support of Political Prisoners, in Tunis, notably by Judge Mokhtar Yahyaoui, who was himself violently assaulted in the street.

I was anxious to visit my colleague Yahyaoui, whose acquaintance I had made during my previous missions to Tunis. I communicated to him my heartfelt solidarity, as well as that of the international community, in the physical and moral hardships he is suffering. Indeed, not only was his physical safety endangered, but he continues to be deprived of any means of communication with the outside world and is not authorized to travel abroad. Moreover, his status as a founding member and President of the Tunisian Centre for the Independence of the Judiciary and founding member of the International Association for the Support of Political Prisoners subjects him to constant police surveillance.

During our meeting, M. Yahyaoui told me that the Conference of the Association of Tunisian Magistrates had just been held.

He related to me an incident that is very revealing about the relations between the government and the Tunisian judiciary: the administrative office of the Ministry of Justice had proposed to assist in reproducing the report of the outgoing Board of this Association [Association of Tunisian

Magistrates]. It performed this task, but only after having "censored" the report, in particular by removing a paragraph concerning the freedom of expression of magistrates, which was considered an intolerable reference to the incident at the origin of Judge Yahyaoui's removal from office.

The judge also informed me that 3 lists of candidates for the Board of this Association had been in competition with one another, including an "official" list which had been eliminated in favor of that of the outgoing members, who were reelected. The authorities reproach the latter for not being sufficiently docile. Their key demand concerns the adoption by Tunisia of international standards on the independence of the judiciary (in particular, the *UN Basic Principles on the Independence of the Judiciary*, approved by resolutions 40/32 and 40/146 of the UN General Assembly, November 29 and December 13, 1985 respectively).

This satisfying reaction on the part of the Tunisian judiciary is not new: already in 1985, as Mr. Yahyaoui informed me, young magistrates had formed an association and gone on strike to secure modification of the status of the judiciary with a view toward achieving greater independence. The authorities had reacted by deciding to dissolve the association in question and starting disciplinary proceedings against its leaders.

III. HEARING OF FEBRUARY 25, 2003

On February 25, 2003, attending the proceedings for the third time, I was present at the 5th postponement by the Court of Appeals in Tunis (until next April 22) of the trial opposing a number of Tunisian lawyers, members of the RCD party, and the Council of the Tunisian Bar Association, and aimed at securing the annulment of a decision by this Council calling for a strike by Tunisian lawyers[4].

THE HEARING

As at the previous hearings I had attended, the 1st Secretary of the Embassy of the Netherlands, the 2nd Secretary of the Embassy of the United States and representatives of the embassies of Great Britain and Switzerland were present in the courtroom.

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[4] In addition to being mandated by the ICJ and the Observatory, I also received a commission from the Syndicat français de la Magistrature (French Union of the Magistracy) to observe the hearing of February 25, 2003.

A desire to wear down the foreign observers is perhaps the motivation behind the number of postponements and the choice of dates liable to inconvenience the European monitors: December 24 and Easter Tuesday, April 22. They nevertheless continue to come to Tunis. On February 25, a lawyer from Brussels, Mr. Braun, representing the President of the Bar Association and whom I had already met at the hearing of November 19 was present, as was Mr. Asselineau, an attorney at the Paris Bar, also representing the President of his Bar Association and who had attended the sessions involving the initial postponements in the case last spring. Also present was Mr. Alain Werner, an attorney at the Geneva Bar, currently training in the United States, representing Human Rights Watch. Three Dutch lawyers were also to have attended the hearing, but were prevented from doing so, having been turned back at the airport. There may be a link between this refusal of entry onto Tunisian territory and the fact that in November 2002, a charter flight carrying 50 Dutch attorneys had been the subject of a refusal of landing rights at the airport in Tunis[5]. Indeed, these lawyers had intended to travel to Tunis to lend their support to the President of the Bar Association, Mr. Bechir Essid, prior to the December 24 hearing.

COMMENTS

The maintenance of pressure on the Tunisian Bar Association was simultaneously confirmed and contradicted by what I learned on the spot. I was told that the Secretary General of the Union of Arab Lawyers (a lawyer from Cairo) had paid a visit several weeks before to the Tunisian Minister of Justice, to ask him to see to it that the lawyers of the governing party – the RDC – withdraw their action for annulment of the decision by the Council of the Bar Association. The Minister is said to have opposed the request in anticipation of the decision of an extraordinary General Assembly of Tunisian lawyers, which was held February 16, 2003, following the physical attacks suffered by certain lawyers in Tunis during the previous month of December, breaches of the immunity of certain lawyers' chambers, as well as the ransacking of the offices of the President of the Tunisian Bar Association, Mr. Essid, during the night of January 24/25, 2003[6].

Contrary to the hopes of the authorities, even though the first meeting of the General Assembly could not be validly convened since it failed to achieve the required quorum (506 lawyers were present, while a quorum

5 See the AFP dispatch of November 20, 2002.
6 See AFP dispatch of February 1, 2003.

required approximately 1,100 – a large number of the notifications to attend having been intercepted and therefore having not reached the person to whom they were addressed). The second meeting was validly convened with more than 1,000 lawyers present, and a motion in support of the President of the Bar and the majority of the Council of the Bar Association was adopted virtually unanimously, with only a few dozen pro-government lawyers opposing it, according to information provided to me by the Secretary General of the Bar Association, Mr. Jmour

The pretext given by the plaintiffs for requesting the adjournment was the fact that they had returned late the night before from the Congress of Arab Lawyers, which had been held in Cairo. The President of the Bar – who was also attending the Congress – did not oppose the adjournment, given that the Bar Association is not in any hurry for the case to be judged – having every reason to fear that the decision would not be in its favor – and, moreover, a former President of the Bar had apparently encouraged the Council of the Association to appear conciliatory, letting dangle the possibility of a withdrawal of the suit.

In any case, the Tunisian Government did not exert any pressure, either on the petitioning lawyers, or on the Court of Appeals, to urge that this case be examined in depth at this hearing, the decision to postpone having been taken in a matter of minutes, without any discussion. Indeed it seems that the increasingly likely possibility of a war in Iraq is of deep concern here, with the Tunisian authorities in particular fearing that it could lead to a destabilization of the country. They almost certainly do not wish to open an internal conflict with the Tunisian lawyers.

Whatever the case, the extraordinary congress of the Union of Arab Lawyers meeting in Cairo in light of the international situation, had specifically expressed its anxiety concerning the dangers of the effects of the war on the Iraqi civilian population and instructed the Tunisian Bar to communicate its humanitarian concerns to the European NGOs and Bars.

IV. HEARING OF APRIL 22, 2003[7]

The 6th hearing in the trial against the Council of the Bar Association took place on April 22, 2003 and the case was heard that day. The verdict will be announced on May 20, 2003.

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7 The partner organizations decided not to send Mr Lyon-Caen to Tunis on this date, for fear that the hearing would again be the subject of a postponement.

Ms. Doris Leuenberger, Member of the Council of the Geneva Bar Association and Vice President of the Swiss League of Human Rights had been mandated by the Council of the Geneva Bar to monitor the proceedings on April 22. In her report on the trial, Ms. Leuenberger noted the following:

I noted that the procedures were respected insofar as the lawyers for the Council of the Bar Association, including a former President of the Bar and a professor at the University of Tunis, were able to express themselves without being interrupted by the Court. In substance, they emphasized that the lawyers petitioning for annulment of the decision by the Council of the Bar Association had neither current nor personal interest in bringing the action, insofar as they themselves had not participated in the strike, which moreover had already taken place.

They also underlined that the right to strike was enshrined in the Tunisian Constitution and that the Council of the Bar Association had the absolute authority to call a one-day strike, especially since the question had been submitted to an extraordinary general assembly which had approved it by majority vote. In fact, this strike was not of a constraining character for those who did not wish to participate in it, and they had not been the subject of any disciplinary sanctions.

The *judgement* will be rendered on May 20. Nevertheless, the Council of the Tunisian Bar Association is almost certain that the case will not be declared in its favor, as rulings in this kind of case are always rendered in conformity with the instructions received from the authorities. Can an opinion be hazarded already on the verdict in this case?

According to our Tunisian colleagues, this trial is of particular importance, because if the authorities, by resorting to legal proceedings, succeed in censuring decisions of the Council of the Bar Association which are not to their liking, it will be the very independence of lawyers – untouchable so far – that will be affected.[8]

CONCLUSION

As indicated above, the hearing of April 22 was the 6th hearing in this trial. Given that this was not the first time that the Council of the Bar Association

[8] See "Rapport sur deux missions d'observation d'un procès dirigé contre le Conseil de l'Ordre des avocats, sur mandat du Conseil de l'ordre des avocats de Genève" (" Report on two trial observation missions in connection with proceedings against the Council of the Tunisian Bar Association, as commissioned by the Council of the Geneva Bar Association") by Doris Leuenberger, May 1, 2003.

had called for a strike, the question remains, why it had never been the subject of proceedings before.

It is therefore essential to analyze this trial in the context of the strong position taken by the Council of the Bar Association in protest against the developments in the proceedings against Messieurs H. Hammami, A. Maddouri and S. Tammallah on February 2, 2002. The strike was intended to protest against the lack of fundamental fair trial guarantees during the aforementioned proceedings, the attacks against the accused by the police in the courtroom and the failure to respect the rights of the *defence*. The strike was also aimed at denouncing the outrageous treatment to which the *defence* lawyers were subjected, the latter having themselves been physically assaulted during the hearing.

In conclusion, it is clear that the proceedings instituted against the Bar Association had no other purpose than to punish the lawyers for having protested against the lack of independence of the judiciary and against grossly inequitable procedures that remove all credibility from the functioning of the Tunisian justice system. Indeed the Hammami trial has become a symbol of the malfunctioning of the administration of justice in the country.

The Tunisian authorities also intend to create a terrible precedent: a judicial decision stripping the Council of the Bar Association of the power to call a strike would deprive the lawyers of their most effective weapons in the struggle for justice. This is all the more disquieting because lawyers are among the most active human rights defenders in Tunisia.

The verdict is expected on May 20, 2003. We would like to believe that the Tunisian authorities will not take the risk of once again presenting a *judgement* that would sanction a justice system in which the law no longer has a place.

Addendum

As expected, on 8 July 2003, the Court of Appeal of Tunis retroactively annuled the lawyers' strike that had been called by the Council of the Bar Association.[9]

[9] Please see joint ICJ/CIJL, FIDH, OMCT, and ASF press release, "*Les avocats bâillonnés par la décision d'une justice aux ordres*", 19 July 2003, on the ICJ website www.icj.org.

ANNEX

Recapitulative fact sheet

Honourable colleagues, ladies, gentlemen,

In the name of all of the plaintiff lawyers and the colleagues who are defending them, we present to you this recapitulative fact sheet concerning the action which we have brought against the strike decision issued by the Council of the Tunisian Bar Association on 02/02/2002, in the hope of shedding light on the facts of the case and the noble issue at stake in our action.

- On the aforementioned date the Council of the Bar Asociation took the decision to strike, enjoining the lawyers of Tunisia to stop all professional activity on 07/02/2002.

- On 05/02/2002, in *defence* of fundamental liberties, including the right to work, a group of lawyers lodged an appeal against said decision before the Court of Appeals in Tunis, in accordance with the provisions of Articles 71 and 72 of the Legal Profession Act, on the grounds that this decision was contrary to the aforementioned law and in particular its Artcle 62.

- On 06/02/2002, the President of the Bar Association and the Public Prosecutor at the Court of Appeals were notified of the appeal.

- On 07/02/2002, hundreds of lawyers in professional garb went to the courts to attend hearings and to exercise their functions normally.

- On 01/03/2002, the Council of the Bar Association decided to display a list of lawyers who had not accepted to submit to the strike decision. At the order of the President of the Bar, this list was posted on the notice boards of the Council of the Bar Association.

- On 02/04/2002, the plaintiff lawyers presented their conclusions to the Court of Appeals in Tunis, in which they qualified the decision of the Council as illegal for having infringed on – among others – Article 62 of the Legal Profession Act, which does not attribute to the Council the power to decide a strike, and they requested the Court to pronounce the annulment of said decision.

- On 24/09/2002, the plaintiff lawyers filed a new reply in Court, in which they noted that the decision of the Council is contrary to:
  - human rights and fundamental liberties, including the right to work, protected by the law and the Constitution;
  - professional freedom;
  - article 62 of the Legal Profession Act

- Furthermore, they reproach the Council for the procedural irregularity of its decision in that no minutes were produced certifying the decision and due to the manifest absence of a legal quorum of members for holding its meeting.

- For all these reasons, the plaintiffs have maintained their petition for annulation of the contested decision.

- At the request of the President of the Bar Association, the Court postponed the case on 19/11/2002 to allow the defenders of the contested decision to file a new reply.

- At the hearing of 19/11/2002, the plaintiffs again requested a postponement of the case in order to present additional observations. The President of the Bar Association submitted to the decision of the Court, which decided to postpone the case until 24/12/2002 to allow the plaintiffs to produce their observations.

- In our reply today, we furthermore request the Court to consider the free exercise of the legal profession as a fundamental principle and to rule as a consequence that no one can decide to oblige a lawyer to stop exercising his profession even momentarily, except in cases expressly and restrictively foreseen by the law.

Honourable colleagues, ladies, gentlemen,

- Our action aims to have an illegal decision annulled that is contrary to fundamental liberties and human rights.

- Our combat is a combat in favour of respect for the law and free exercise of the legal profession.

And we are deeply convinced that you share this ideal with us.

With our thanks and respect,
On behalf of the plaintiffs and the Counsels for the *Defence*

MALAYSIA: P. UTHAYAKUMAR, LAWYER

EXECUTIVE SUMMARY

This is the final report on the criminal proceedings against Mr. P. Uthayakumar, a human rights lawyer and solicitor of the High Court of Malaya at Kuala Lumpur who was charged with two offenses of insulting and interrupting a public servant during judicial proceedings and one offense of criminal intimidation contrary to Articles 228 and 506 of the Penal Code. The International Commission of Jurists' (ICJ) Centre for the Independence of Judges and Lawyers (CIJL) appointed an observer, Mr. Charles Briefel, Barrister of England and Wales, to observe and report on the proceedings which took place on 8 April 2003 at the High Court at Shah Alam. This is the first such intervention by the High Court in Malaysia in proceedings of this nature against a lawyer.

The charges stem from Mr. Uthayakumar's alleged conduct during and immediately after a coroner's inquest hearing at Sepang Magistrates Court on 3 September 2002 into the death of a nineteen-year old youth whilst in police custody. Mr. Uthayakumar was acting on a pro-bono basis on behalf of the family of the deceased and was arrested at the steps of the court on 16 January 2003, detained overnight in police custody and then charged. After his arrest and first appearance at the Magistrates Court on 21 January 2003 on the criminal charges, Mr. Uthayakumar applied to the High Court for "Revision" of the case against him, pursuant to Section 323 of the Criminal Procedure Code, requesting that he be discharged. The basis of the Application for Revision to the High court was that the prosecution was groundless, frivolous, vexatious, brought male fides and constituted an abuse of process.

At the High Court hearing, the prosecution confirmed its intention to withdraw the first two charges of insulting and interrupting a public servant during judicial proceedings. This decision followed representations made in March to the Attorney-General by the United Nations Special Rapporteur on the independence of judges and lawyers, Dato Param Cumaraswamy. Legal argument therefore concentrated on the remaining charge of criminal intimidation. The High Court ruled in favor of Mr. Uthayakumar on 5 May, ordering that he be discharged. On 29 May Mr. Uthayakumar appeared at the Sepang Magistrates Court and was formally discharged. The Attorney General has filed a notice of appeal to the Court of Appeal against the decision of the High Court. The Attorney General

has also submitted a formal complaint against Mr. Uthayakumar to the Disciplinary Board of the Bar Council.

The Malaysian legal system has been under international scrutiny for its prosecution of lawyers. The arrest and prosecution of Mr. Uthayakumar should thus be considered within the context of previous prosecutions against lawyers and previous reports that lawyers in Malaysia have been facing difficulties in carrying out their work freely and independently. Within this context, it was inevitable that Mr. Uthayakumar's case would attract considerable attention and elicit criticism about the authorities who displayed a lack of *judgement* and the prosecution which sought to hinder, intimidate and harass Mr. Uthayakumar in his work as a human rights lawyer.

The ICJ/CIJL is concerned about the original decision of the Attorney-General[1] to proceed against Mr. Uthayakumar and is troubled about the circumstances of Mr. Uthayakumar's arrest, his detention and treatment in custody. Although the ICJ/CIJL welcomes the eventual decision of the Attorney General to withdraw the first two charges, it is disappointed that the Attorney-General nevertheless chose to proceed on the remaining criminal intimidation charge: Mr. Uthayakumar, therefore, still faced the prospect of being sentenced to a term of imprisonment of up to seven years.

The ICJ/CIJL commends the decision of the High Court to order the discharge of the criminal intimidation charge and welcomes the forthright comments of the judge in support of the independence of lawyers. In the circumstances of this case, the ICJ/CIJL believes that any charge of alleged unprofessional conduct could have been dealt with by the Disciplinary Board of the Bar Council after the conclusion of the inquest proceedings in which Mr. Uthayakumar was appearing without resorting to his arrest, detention and criminal prosecution. The ICJ/CIJL reminds the authorities in Malaysia of their international obligations not to identify lawyers with their clients' causes and allow lawyers to perform their professional functions without intimidation, hindrance, harassment or prosecution.

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[1] Under Article 145(3) of the Federal Constitution the Attorney-General shall have power exercisable at his discretion to institute, conduct or discontinue any proceedings of an offense. Section 376 of the Criminal Procedure Code empowers the Attorney-General who is the Public Prosecutor to control and give direction over and in respect of all criminal prosecutions and proceedings.

I. PROCEEDINGS

A. Information about the Defendant

Mr. Uthayakumar is an advocate and solicitor of the High Court of Malaya at Kuala Lumpur. He was called to the Malaysian Bar on 23 January 1993. He is legal advisor to the Police Watch and Human Rights Committee and Secretary General of a new political party, the Malaysian Peoples Reform Party, (Party Reformasi Insan Malaysia, PRIM). Over the last ten years Mr. Uthayakumar has acted in a number of cases relating to abuse of police powers, deaths in police custody, police shootings, and police inaction.[2] He frequently appears on a pro-bono basis in high profile cases alleging human rights abuses against the Royal Malaysian Police Force, acting on behalf of victims or the families of victims. In 2002, Mr. Uthayakumar had conduct of three cases of death in police custody from 21 June 2002 to 4 August 2002 and another three cases of fatal shootings by the police between 24 August to 7 September 2002. He has lodged over a hundred complaints against the police. He has drawn attention to the fact that 2002 saw a significant increase in deaths in police custody and that from January to September 2002 a total of 18 persons died in police custody "representing one death in police custody every 2 weeks". This issue was raised in Parliament with the Deputy Home Affairs Minister Datuk Chor Chee Heung on 14 October 2002.

B. The Prosecution Case

The Coroner's Inquest at Sepang Magistrates Court which is the subject of the charges against Mr. Uthayakumar relates to the death in custody of a 19 year old youth identified as Tharmarajen. Tharmarajen was arrested by the Ibu Pejabet Kontijen police on 3 April 2002 and detained at a number of police stations for consecutive periods of 14 days. At Putrajaya Police Station, after a total period of police detention of approximately 2 months, he became seriously ill and, after being conveyed to Putrajava hospital, died on 21 June 2002. The family of the deceased alleges that he was subjected to cruel, inhumane and degrading treatment. Mr. Uthayakumar has been representing the family on a pro-bono basis (at the date of writing this report, the inquest has yet to have been concluded).

At the first day of the inquest on 3 September 2002, Mr. Uthayakumar was cross-examining police witness P. From the outset, the family of the

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[2] Memorandum prepared by Police Watch and Human Rights Committee and Parti Reformasi Insan Malaysia.

deceased has blamed P, who was the arresting and investigating officer, for the death of Tharmarajen. By all accounts, the exchange in court became increasingly heated and a number of people in the public gallery became highly agitated, venting their anger at P. During cross-examination Mr. Uthayakumar accused P of criminal negligence, and threatened to submit a complaint against the officer to the Bukit Aman Police Headquarters. The magistrate ordered Mr. Uthayakumar to stop the line of questioning and that if he did not, he would be ordered to leave the court. Mr. Uthayakumar responded that he would not leave the court and continued with his questioning, at which point the magistrate adjourned the hearing.

Immediately after the case was adjourned, P and lawyers from the Deputy Public Prosecutor's office alleged that Mr. Uthayakumar threatened P. Prosecution statements give varying versions of what Mr. Uthayakumar is alleged to have stated to P – *"You watch out, I will fix you, we (will) fix you"* or just *"I will fix you"* or just *"We will fix you"*. Mr Uthayakumar denies using such language but admits using words to the effect that he was serious about submitting a complaint against P to Bukit Aman Police Station.

C. The Arrest

Mr. Uthayakumar was arrested some four and a half months after the alleged incident. The arrest took place on 16 January 2003 at 4:30 p.m. on the steps of Sepang Magistrates' Court after a further hearing of the inquest into the death of Tharmarajen in which Mr. Uthayakumar was continuing to act on behalf of the deceased's family. Mr. Uthayakumar alleges that between 20 to 30 officers took part in his arrest in the full view of his clients, the press and the public. He alleges that he was not informed of the grounds of arrest, contrary to Article 5(3) of the Federal Constitution. He was conveyed to Sepang Police Station where he was allegedly kept in police custody until 5:30 p.m. the next day i.e. for 25 hours and thereby in contravention of Article 5 of the Federal Constitution which stipulates a maximum of 24 hours. The police claim that he was released at 1:30 p.m. By either account, Mr. Uthayakumar was kept in custody overnight. During his detention he alleges that he was verbally abused, stripped to his underwear and denied basic living conditions (toiletries brought to the police station by his family) in breach of the Lock Up Rules 1953. He also states that he was denied access to his family. On 20 January 2003, Mr. Uthayakumar lodged two complaints concerning his arrest and treatment in police custody, the first being against the officers who allegedly mistreated him, and the second against P for lodging the false report which resulted in his arrest. Mr. Uthayakumar points out that unlike the complaint made against him by P, his complaint has never been investigated.

This indicates, in his view, a lack of an even-handed approach by the authorities and breaches Article 8 of the Federal Constitution that states that "all persons are equal before the law".

D. Charges

Mr. Uthayakumar was charged on 21 January 2003 (the day after he submitted the two complaints concerning his arrest and detention in police custody) at Sepang Magistrates Court. He was charged with two offenses of violating Section 228 of the Penal Code (one alleging that he intentionally insulted the magistrate and the alternative charge that he intentionally interrupted the magistrate).[3]

Section 228 of the Penal Code provides as follows:

> "Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to six months or with a fine which may extend to two thousand ringgit, or with both."

Although Section 228 has been commonly referred to as an "offense of contempt" it should be distinguished from the contempt power applicable in Malaysia by virtue of Section 3 of the Civil Law Act 1956. In contrast to Section 228, the law of Contempt of Court in Malaysia is a law of strict liability. The test is whether the matter complained of had the tendency or was calculated to interfere with the due administration of justice or to scandalize the court, not whether the accused intended the result.

Mr. Uthayakumar was also charged with criminal intimidation contrary to Section 506 of the Penal Code which states as follows:

> "Whoever commits the offense of criminal intimidation shall be punished with imprisonment for a term which may extend to two years, or a fine, or with both; and if the threat be to cause death or grievous hurt, or to cause the destruction of any

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[3] Translation – "That you on September 3, 2002 in and about 4:15 p.m. at the Sepang Magistrate Court, in the district of Sepang, Selangor,Darul Ehsan, criminally intimidated P, by the threatening words "You watch out, I will fix you, we fix you", and thus committed an offense punishable under Section 506 of the Penal Code."
"That you on September 3, 2002 in and about 4:15 p.m. at the Sepang Magistrate Court, in the district of Sepang, Selangor Darul Ehsan, had intentionally insulted the magistrate Norazmi bin Mohd Narawi during the inquest of Than-narajen A/L Subramaniam, when the said magistrate had ordered you to be quiet, in defiance of which you would be ordered to leave the court, had refused and informed the magistrate of your desire to carry on talking, and thus had committed an offense under Section 228 of the Penal Code."

> property by fire, or to cause an offense punishable with death or imprisonment, or with imprisonment for a term which may extend to seven years, or impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both."

The offense of criminal intimidation is defined under Section 503 as follows:

> "Whoever threatens another with any injury to his person, reputation or property of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

On 31 January 2003, M Manoharan & Co, lawyers on behalf of Mr. Uthayakumar filed an application to the High Court of Malaya at Shah Alam under Section 323 of the Criminal Procedure Code for "Revision", to discharge the case on the basis that it was groundless, brought in bad faith, vexatious, and an abuse of process. According to the revisionary powers under Section 323, "the judge may call for and examine the record of any proceedings before any inferior criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, as to the regularity of any proceedings of such inferior court".

It was also submitted on behalf of Mr. Uthayakumar that the charges were defective in that the charge of criminal intimidation failed to identify the "grievous harm" and that the particulars were incomplete (the charge was, rather, based on the complaint of P, the police witness accused by Mr. Uthayakumar of being responsible for the death of the youth Tharmarajen). It was submitted in the Section 323 application that the Sepang Magistrates Court should therefore have discharged the case against Mr. Uthayakumar pursuant to Section 173(g) of the Criminal Procedure Code.

E. Conduct of the Presiding Judge

The High Court application was presided over by Judge Datuk Haji Suriyadi Bin Halim Omar. In the meetings conducted by the Observer during his mission it was clear that this judge is held in very high esteem for his independence, integrity and ability. This view was shared by Mr. Uthayakumar and his lawyers. The Observer was satisfied with the Judge's conduct during the hearing. It was clear that the Judge had a strong command of the issues and the legal complexities of the case. He presided

over the hearing with a competent, fair, but firm, hand. He was critical of the handling of the case by both the police and the Office of the DPP. Mr. Uthayakumar's counsel were provided with satisfactory opportunity to present their arguments (no witnesses were called). The Judge's ruling delivered on 5 May 2003 (see below) was detailed, comprehensive and well reasoned. ICJ/CIJL welcomes the forthright comments contained in the ruling in support of the independence of lawyers.

F. Judgement

The ruling of Judge Datuk Haji Suriyadi Bin Halim Omar was delivered on 5 May 2003.

The Judge reiterated the power of the High Court to, "examine records of proceedings in the subordinate court wherever it considers that in doing so the purpose of justice will be served, especially when the record discloses no offense or when the accused is subjected to a vexatious and groundless prosecution". He stated that discharge may be warranted when the absence of grounds is clearly established by the evidence on record, making the attainment of a conviction impossible.

The Judge was highly critical of the fact that the preliminary hearing took place before the same magistrate that presided over the coroner's inquest, describing it as 2an aberration in the administration of justice". He also held that Mr. Uthayakumar had been prejudiced by the defective wording of the charge reiterating the principle that "it is fundamental in the system of justice as we know it that a person accused must be informed clearly of the charge against him and further it is a fundamental rule that an allegation must be stated with sufficient precision to enable the accused to meet the allegation and properly prepare his *defence*". He concluded that apart from the charge being badly framed much to the prejudice of the applicant, it was rebutted at the outset of the case by the notes of proceedings prepared by the Court. Conviction was therefore impossible. The Judge held that the Section 506 charge was groundless and fell squarely within the ambit of Section 173(g) of the Criminal Procedure Code. Ordering that Mr Uthayakumar be discharged pursuant to the court's revisionary powers under Section 323, the Judge then stated the following:

This discharge must not be construed as an indication of any desire to disallow this prosecution, whether as a matter of policy or otherwise, of which I have no power, but primarily a decision based on the available records. The court's regrets are secondary to the awesome power of the Public Prosecutor, in relation to preferring a charge against the applicant,

engaged at the very outset to perform his time-honored duty, but side-tracked perhaps by ineffectual and empty bravado. As an observation, if there was truth as per the allegation of the charge, here was a mere man, armed without any resources except enthusiasm, who had the temerity in an unguarded moment, having picked on no less than a personnel of another powerful State institution, backed by equally powerful resources. It is gratifying that the counsel has apologized to the learned magistrate, and the Right Honorable Attorney General, through his officer, has indicated that the contempt proceedings against the applicant would be withdrawn. Further, due to the chequered history of this case, and wide reporting of the matter, the police department, the legal fraternity and the court, are uncomfortably under intense scrutiny of the public. Perhaps this whole sad episode could be put to rest permanently, if all parties were to put their heads together, and goodwill prevailing.

II. EVALUATION OF THE FAIRNESS OF THE PROCEEDINGS

There are serious concerns about the original decision to proceed against Mr. Uthayakumar, the circumstances of his arrest as outlined above, his claim that he was not informed of the grounds of arrest, the decision to detain him, his treatment in custody and the lack of specificity of the charges. Mr. Uthayakumar's complaint that the inquest hearing at Sepang Magistrates' Court on 21 January 2003 was conducted by the same magistrate who presided over the inquest hearing on 3 September 2002 was reiterated by the High Court. The magistrate was a material witness in relation to the charges faced by Mr. Uthayakumar. It is very difficult to reconcile this situation with the guarantees of fairness and impartiality pursuant to the Universal Declaration of Human Rights,[4] although in Mr. Uthayakumar's case this magistrate only presided over the preliminary hearing and not the trial itself.

As far as the Section 323 application for Revision at the High Court is concerned, Mr. Uthayakumar was ably represented by his lawyers M. Manoharan & Co (three advocates on a pro-bono basis). No restrictions were placed upon Mr. Uthayakumar's ability to present his case. Defence counsel were able to put forward their case by way of oral and detailed written submissions. As stated above the Judge presided over the hearing with a competent, fair, but firm, hand. The Observer received no complaints from Mr. Uthayakumar or his lawyers about the Section 323

[4] Malaysia has not yet ratified the International Covenant on Civil and Political Rights.

application process or any aspects of the hearing.[5] There is no suggestion that they were denied adequate preparation time.

III. OTHER APPLICABLE LAW AND PRINCIPLES

The Legal Profession Act 1976 (LPA 1976) establishes the Bar, of which all advocates and solicitors of the High Court are members, and the Bar Council. The Malaysian Bar Council is an autonomous body created by statute, whose primary purpose under Section 42 (1) (a) is to "uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour." At all times members of the legal profession should act with due regard for the requirements of professional practice and conduct in court as set out in Part VI of the LPA 1976 and the relevant rules.

West Malaysian lawyers are professionally organised by the LPA 1976. In addition, practice standards are governed by the Legal Profession (Practice and Etiquette) Rules 1978, the Bar Council Rulings 1997, and the Conveyancing Practice Rulings. Lawyers in Sabah and Sarawak are professionally organised by the Advocate Ordinance of Sabah and the Advocate Ordinance of Sarawak.

The prosecution of a lawyer in respect of statements made in court breaches Principle 20 of the United Nations 1990 Basic Principles on the Role of Lawyers. This principle guarantees lawyers civil and penal immunity for statements made in good faith in oral or written proceedings before a court. It is a basic duty of a lawyer to properly represent the interests of a client and provide a full and adequate *defence.* The charging of a lawyer for statements made in court improperly associates a lawyer with his client's cause and represents an unjustified interference in the performance of a lawyer's professional duties.

IV. BACKGROUND AND CONTEXT

The prosecution of Mr. Uthayakumar should be considered in the context of previous prosecutions of lawyers.[6] Reports such as Justice in Jeopardy

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5 The Bar Council was represented by an advocate on a "watching brief" (this accords with the recommendation of the *Justice in Jeopardy* report). A separate advocate represented the Police Watch and Human Rights Committee also on a watching brief.

6 Tommy Thomas (lawyer), Karpal Singh (lead *defence* counsel for Anwar Ibrahim charged with sedition), and Zainur Encik Zakaria (member of Anwar Ibrahim's *defence* team and former President of the Bar Council of Malaysia). Mr Zakaria was sentenced to three months imprisonment for contempt on 30 November 1998. He had made an application for the

(co-authored by ICJ/CIJL)[7] conclude that lawyers in Malaysia have been facing difficulties in carrying out their work freely and independently. The prosecution of lawyers has led to tension between the Government, Judiciary and the Bar Council and given rise for concern as to the ability of lawyers to render their services free from threats or harassment.

The above-mentioned Justice in Jeopardy report, recommended, *inter alia*, that:

The courts should act with great forbearance and restraint in the use and threatened use of the contempt power [for alleged professional misconduct] in respect of lawyers who are acting in their professional capacity. The power should only be used as a last resort when all other means of achieving the proper result have failed. When considering whether contempt proceedings against lawyers practising their profession are appropriate, due regard should be paid by the court to the sometimes delicate and difficult situations lawyers in practice, have to face. Unprofessional conduct by lawyers should be dealt with by the Disciplinary Board after the conclusion of the hearing, except in cases where the continuation of the process fairly is impossible.

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exclusion of two prosecutors on the basis that they had attempted to fabricate evidence. The court ruled that this application was an abuse of process and interfered with the due administration of justice. *(see, Attacks on Justice,* 1998, ICJ/CIJL). After the Court of Appeal dismissed Zainur Zakaria's appeal on 5 September 2000, he appealed to the Federal Court. On 27 June 2001 the Federal Court ruled in favor of Mr. Zakaria and quashed the contempt of court conviction and the prison sentence.

7 *See,* report *Justice in Jeopardy,* Malaysia, 2000, by the ICJ/CIJL, the International Bar Association, the Commonwealth Lawyers Association and the *Union Internationale des Avocats* which conducted a joint mission to Malaysia from 17-27 April 1999. The report of this mission, entitled *Justice in Jeopardy,* was published in April 2000. It concluded that the powerful Executive in Malaysia had not acted with due regard for the essential elements of a free and democratic society based on the rule of law. The report examined the relationship between the Executive, the Bar Council and the Judiciary and found that in politically and economically sensitive cases the Judiciary was not independent. It found that the autonomy of the Bar had been threatened by the government and that the relationship between the Bar and Judiciary was strained. It noted that in politically sensitive defamation cases, awards of damages were so great that they stifled free speech and expression. It also noted that the use of contempt proceedings against practising lawyers constituted a serious threat to their ability to render services freely. The four organisations urged Malaysia, *inter alia,* to recognise the independence of the Judiciary, not to threaten or diminish the autonomy of the Bar Council, ensure that the choice of judges in sensitive cases would be carefully considered and establish a Judicial Services Commission that would recommend appointments to the Judiciary. *See,* also *Justice on Trial,* Lawyers Committee for Human Rights, April 1999 and *Attacks on Justice,* 2000, ICJ/CIJL.

The Malaysian Bar Council has also had occasion in the past to speak out when the police have exerted undue pressure on lawyers.[8] It noted that there has been a significant improvement in the relationship between the Bench and the Bar with the appointment of the new Chief Justice, Judge Tan Sri Mohamad Dzaiddin Abdullah, who was sworn into office in December 2000.[9] The Council stressed that he has taken positive steps to improve the administration of justice and to strengthen ties with the Malaysian Bar. Judge Tan Sri Mohamad Dzaiddin Abdullah stated that his first and main agenda would be to restore the public's confidence in the judiciary by making changes in respect of "seeing justice done", reducing the numerous citations for contempt and fostering a better relationship with the Bar. His appointment was welcomed inside and outside of Malaysia. The Malaysian Bar, in a press statement on 20 December 2000, called his appointment "most welcome" and found him "eminently suited to this task." The UN Special Rapporteur on the independence of judges and lawyers, Dato Param Cumaraswamy, in his 2001 report to the 57th UN Commission on Human Rights, called the appointment of Judge Tan Sri Mohamad Dzaiddin Abdullah "a positive development, which was enthusiastically welcomed by all." The arrest and prosecution of Mr. Uthayakumar therefore occurred at a time of a perceived improvement in the relationship between the Bar and the Judiciary in Malaysia.[10]

V. CONCLUSIONS

The Observer's comments concerning the prosecution of Mr. Uthayakumar extend beyond the fairness of the hearing on the 8 April 2003 at the High Court to the overall context in which the criminal proceedings were initiated.

As indicated previously, the way this case has been handled gives serious rise for concern. The Malaysian legal system has been under international scrutiny for its prosecution of lawyers, particularly through the use of the contempt power. Against this background stands Mr. Uthayakumar, who over the last ten years has acted in a number of cases relating to abuse of police powers, deaths in police custody, police shootings, and police inaction, frequently appearing on a pro-bono basis in high profile cases alleging human rights abuses against the Royal Malaysian Police Force. It is therefore not without coincidence that this lawyer was arrested on the

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8 Case of Irene Fernandez (*Justice in Jeopardy*, p. 21).

9 Chief Justice Tan Sri Mohamad Dzaiddin Abdullah was the former Vice-President of the Malaysian Bar and judge of the Federal Court.

10 A new Chief Justice Tan Sri Ahmad Fairuz was appointed on 15 March 2003.

steps of a court where he was representing the family of a youth who died in police custody. This high profile arrest has attracted unfavorable attention onto the authorities as well as on the prosecution who sought to hinder, intimidate or harass Mr. Uthayakumar in his work as a human rights lawyer.

A judge or magistrate must be able to conduct the case before him/her in an orderly manner. This cannot be done if advocates do not observe the judge's rulings. However, since, prosecution under Section 228 or the use of the contempt power has a direct impact on the ability of lawyers to provide effective representation – a guarantee of the right to a fair trial – considerable care must be taken before charging and arresting lawyers for this offense. As pointed out by Andrew Nichol QC in the Justice in Jeopardy Report,[11]

"Where professional lawyers are considered to have overstepped the mark, it will often be sufficient to allow the disciplinary body of the profession to investigate and, if necessary, to impose a penalty".

Alternatively, where a lawyer in exercising his or her professional functions acts overzealously, a judicial caution can be invoked without resorting to the penal code. The real purpose of sanctions such as the law on insulting a public servant during judicial proceedings, or the contempt of court, is to prevent conduct which prejudices the right to a fair trial, and not actions which individual judges perceive offensive to their dignity.

In the circumstances of this case, any alleged unprofessional conduct could have been dealt with by the Disciplinary Board of the Bar Council after the conclusion of the inquest proceedings in which Mr. Uthayakumar was appearing without resorting to arrest, detention and criminal prosecution. Although the ICJ/CIJL welcomes the decision of the Attorney General to withdraw the Section 228 charges, criminal proceedings for criminal intimidation were still pursued and Mr. Uthayakumar still faced a sentence of imprisonment of up to 7 years. It is unfortunate that the Attorney General has decided to appeal the decision of the High Court to order Mr Uthayakumar's discharge.

ICJ/CIJL finds the circumstances and timing of Mr. Uthayakumar's arrest and detention deeply disturbing.

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[11] Appendix 6 of *Justice in Jeopardy* report.

ICJ/CIJL commends the decision of the High Court to order Mr. Uthayakumar's discharge and welcomes the forthright comments of the Judge in support of the independence of lawyers. This is the first such intervention by the High Court in Malaysia in proceedings of this nature against a lawyer.

ICJ/CIJL reminds the authorities in Malaysia of their international obligations not to identify lawyers with their clients' causes and allow lawyers to perform their professional functions without intimidation, hindrance, harassment or prosecution.

VI. RECOMMENDATIONS

In exercising his or her discretion under Article 145(3) of the Federal Constitution to institute, conduct or discontinue any proceedings for an offense under Section 376 of the Criminal Procedure Code, to control and give direction over and in respect of all criminal prosecutions and proceedings, the Attorney-General should act with great forbearance and restraint in relation to lawyers practicing their profession.

The offense of Insulting or Interrupting a Public Servant during Judicial Proceeding under Section 228 of the Penal Code should not be invoked against lawyers.

Unprofessional conduct by lawyers should be dealt with by the Disciplinary Board of the Bar Council after the conclusion of the proceedings in which the lawyer is acting except in the most egregious cases and/or where the continuation of the process fairly is impossible.[12]

The police should be fully instructed and trained regarding the role of lawyers and must refrain from any interference with, or undue pressure on, lawyers when the latter are acting in their professional capacity. Guidelines should be established on police behavior in relation to lawyers and introduced as part of police training.

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[12] As recommended in *Justice in Jeopardy*, p. 86.

ANNEX I

Appointment of the Observer: The Trial Observer, Charles Briefel is a Barrister, called to the Bar of England and Wales in 1984. He is currently working in Bosnia and Herzegovina in the field of human rights, rule of law, legal and judicial reform in. He was appointed by the ICJ/CIJL and was charged with reporting directly to the ICJ/CIJL. Mr. Briefel observed the hearing on the 8th April 2003 at the High Court of Malaya at Shah Alam.

Methodology: During the mission he met with advocate and solicitor for Mr. Uthayakumar – M Manoharan; High Court Judge – Datuk Haji Suriyadi Bin Halim Omar; Deputy Public Prosecutor – Kamarul Hisham Kamaruddin; President of the National Human Rights Society Ramdas Tikamdas Hakam; Advocate for the Bar Council – Edmund Bon; Executive Director of the Bar Council Catherine Eu; Legal Advisor for the Bar Council- Lim Ka Ea; Member of the Human Rights Commission of Malaysia (ex Court of Appeal judge) – Dato Vohrah; advocate and solicitor – Vinod Sharma; the defendant – Mr. P Uthayakumar. The Observer sought to arrange a meeting with the Attorney-General but was unable to do so due to time constraints.

PART II. ARTICLES

CLOSING THE IMPLEMENTATION GAP – HOW TO MAKE INTERNATIONAL HUMAN RIGHTS TREATIES WORK IN DOMESTIC LAW

GERALD STABEROCK[1]

INTRODUCTION

International human rights law has developed in a remarkable way following World War II until today. After an intense period of international standard setting followed by the development and improvement of judicial and non-judicial international implementing procedures in various forms, attention has since shifted to the question of the domestic implementation of international standards. This new debate emerged with the end of the cold war and the transitions from authoritarian rule to democracy in Central and Eastern Europe as well as through an emerging constitutionalism in other parts of the world.

As a commentator analysing the impact of international human rights treaties recently stated, "the conceptual battle is over" and "the focus has shifted to the implementation of human rights", adding that "the challenge is now to ensure that the promises of international treaties are brought to the true customers of the system."[2] Of course, challenges to the legitimacy of international human rights standards have not disappeared completely – the same way as the end of the cold war has probably not meant an "end of history."[3] The emerging fundamentalism and intolerance in parts of the world, but also the post September 11 climate, may serve as an illustration for such new challenges. Still, the pertinent question is how to bring international standards and the international human rights debate "home" to the countries and societies concerned and to overcome the existing gap of implementation.

The change of perspective towards implementation has gone hand in hand with an increased relevance of international standards through binding case law and the reach of international monitoring procedures, such as the

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1 The author is Co-ordinator of ICJ's National Implementation Programme.

2 CHRISTOF HEYNS, FRANS VILJOVEN, "The Impact of United Nations Human Rights Treaties on the Domestic Level", 23 Human Rights Quarterly 2001, 483 – 484.

3 An allusion to the debate surrounding FRANCIS FUKUYAMA'S, The End of History and the Last Man, Avon Books, 1993.

European Committee for the Prevention of Torture (CPT) visiting places of custody all around Europe.[4] Most recently, the adoption of the Optional Protocol to the UN Convention Against Torture marked another step of evolution in directly linking a domestic "preventive mechanism" to an "international supervisory process."[5] If one considers also the various non-binding standards and institutional and policy recommendations from international bodies, it becomes clear that the broader international human rights framework is emerging as a possible blueprint for domestic implementation machinery.[6]

As the Acting High Commissioner for Human Rights and former ICJ Commissioner, B. Ramcharan, has stressed, there is a need to focus on the creation of a national protection framework.[7] A national protection system ought to be rooted firmly in international norms and provide the procedural and institutional framework for their domestic enforcement. This article will seek to highlight some of the recent legal developments concerning the reception and role of international treaties in domestic law. It will also seek to address a number of additional legal and practical challenges to an effective national protection framework and identify practical ways to overcome them, including the better use of treaty reporting procedures.

HUMAN RIGHTS TREATIES IN DOMESTIC LAW

1. Domestic applicability

An effective national protection framework requires, as a starting point, a legal system that includes and reflects international human rights

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4 European Convention for the Protection of Torture and Inhuman or Degrading Treatment or Punishment, ETS 126; for an updated list of recommendations see at www.cpt.coe.int/en/.

5 The Optional Protocol to the UN Convention Against Torture establishes a Sub-Committee under the Committee Against Torture to conduct preventive visits and the nomination/establishment of one or more "national preventive mechanisms." For more information, see http://www.apt.ch/un/opcat/dop_appeal.htm.

6 Such recommendations stem from UN treaty or charter-based mechanism and refer to legislative change or the introduction of special mechanisms or institutions for the protection of human rights. A range of recommendations exists at the regional level either mandating specific institutional structures of a State (as in the OSCE Copenhagen commitments on democratic institutions and the rule of law) or addressing a preventive framework of legal and institutional changes (for example to transfer authority over the penitentiary system from the Ministry of Interior to the Ministry of Justice).

7 BERTRAND RAMCHARAN, Acting High Commissioner for Human Rights, Opening Address, The Paris Principles: A Reflection, A Round-Table on the Occasion of the 10th Anniversary of the Paris Principles, Geneva, 10.12.2003 – on file with the author.

standards, so that individuals can use domestic remedies for their enforcement. The question as to the absorption of international human rights standards into domestic law is largely developed along the concepts of monism and dualism.[8] Direct introduction into the domestic legal order is not necessarily required under general international law. As reflected in the ICCPR, a state party is obliged "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant" and "to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant."[9] It thus recognises a need among other States to ensure legislative compliance in order to give effect to the Covenant. It does not, on the other hand, require any state formally to introduce the treaty into its domestic law. However, a positive trend is discernible towards the internalisation of human rights treaties. This is reflected in recent deliberations on the revised General Comment on Article 2 ICCPR, which in its present version reads, in pertinent part:

> "(...) Article 2 (...) does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that the Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not [alternatively: already] form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights required by article 2.[10]"

If adopted, this revised General Comment would constitute an important step forward in comparison to its predecessor[11] in recognising that incorporation is the clearly preferred way of ensuring domestic compliance with the Covenant rights. Similar indications about the integration into

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8 In monist countries international treaties generally become a direct part of domestic law with the ratification, whereas dualist countries require an additional transformation act to introduce the international obligation into domestic law. An additional issue is the question whether a norm is considered under domestic law as self-executing and directly enforceable without further implementing legislation. On these questions, see THOMAS BUERGENTHAL, Self-Executing and Non-Self-Executing Treaties in National and International Law, 235 (1992) Recueil des Cours 317 et seq.

9 See Art.2 par. 1 and 2 ICCPR.

10 Draft General Comment on Article 2 „The nature of the general obligation imposed on States Parties to the Covenant", CCPR/C/74/CRP.4/Rev.4, para.11. The paragraph has, however, not yet been adopted by the Committee in its second reading.

11 General Comment No.3, UN GAOR, Hum. Rts. Comm., 13th Sess, at 4, U.N. Doc. HRI/Gen/Rev. 1 (1994).

domestic law can be found at the regional level.[12] Domestic applicability is advisable in light of an increasingly developed and refined case law and best ensures compliance with Article 27 of the Convention on the Law of Treaties (VCLT).[13] It also reflects the special nature of international human rights treaties, granting rights to individuals against their own state rather than solely formulating reciprocal rights and obligations among nation states. If treaties provide for an individual right opposable to one's state, it seems plausible to allow one to invoke this very right at the national level. It is interesting to note in this context, that a recent study on the domestic impact of UN human rights treaties confirmed that the impact was most visible if international treaties had been made more or less comprehensively part of domestic law through legislation or constitutional amendment.[14]

2. Latest developments of incorporation

The approach taken in the draft General Comment reflects the developments over the last 10-15 years, which have brought a new trend towards the internalisation of human rights treaties. A recent comparative survey on the status of the ICCPR in domestic law is indicative of this trend, concluding that a majority of States Parties have opted for the incorporation of the Covenant.[15] Interestingly, this tendency is not confined to a particular region or legal tradition. However, a comment on typical situations involving introduction of international standards is warranted.

2.1. Transition countries

The process of introducing international human rights treaties into domestic law is particularly evident in so-called processes of transition, such as those of Central and Eastern Europe. Human rights norms incorporated into domestic law have sometimes been accorded constitutional or quasi-

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12 Council of Europe, Draft Recommendation of the Committee of Ministers to Member States on improving domestic remedies, CDDH (2003)026 Addendum I Final, App. 1, par. 5: "welcoming that the Convention has now become an integral part of the domestic legal order of all States Parties".

13 Art.27 of the Vienna Convention on the Law of Treaties reads: "A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty. (...)".

14 CHRISTOF HEYNS, FRANS VILJOEN, supra note 2, at 487. The study analysed the impact of UN treaty bodies in 20 countries.

15 CHRISTOPHER HARLAND, The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of States Parties: An Initial Global Survey Through UN Human Rights Committee Documents, 22 (1999) Human Rights Quarterly, 187, at 189-190.

constitutional status.[16] Especially in the former Soviet Union this process constitutes a remarkable departure from previous doctrine and practise. Similar processes of transition occurred previously in Central and Latin America.[17] In other countries, such as South Africa, international human rights treaties have been instrumental in the drafting of the Constitutional Bill of Rights. The requirement to interpret provisions in light of international standards ensures that there is no fundamental departure from its international obligations.[18] A number of other African countries that have been engaged in a process of constitutionalism have at least based their Bill of Rights to a large extent on international human rights treaties, making it possible to interpret them in light of the current understanding of international standards.[19] All these examples indicate the importance accorded to international human rights treaties in a transition process. The developments in Eastern Europe confirm the importance of international standards, as human rights treaties have not only been introduced into domestic law, but have often been perceived more broadly as benchmarks against which to measure the legitimacy of reforms. Relevant pre-trial and fair trial provisions, for example, have been emblematic of a justice system based not only on effectiveness but also on legitimacy.[20] Interestingly, the applicability of international standards in the administration of justice frequently leads to changes in domestic legal practise and attitude, despite the fact that most countries already have some notions of fair trial in their legal system.[21] This further illustrates the "added value" of direct applicability and incorporation.

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16 See ERIC STEIN, International Law and Internal Law in the New Constitutions of Central-Eastern Europe, in: Recht zwischen Umbruch und Bewahrung, Festschrift für Rudolf Bernhardt, Ulrich Beyerlin (ed.), Heidelberg 1995, 865 et seq.; BILL BOWRING, Russia's Accession to the Council of Europe and Human Rights, (2000) European Human Rights Law Review, 362 –379.

17 For references, see, for example, Arts. 137, 141 of the Constitution of Paraguay, reprinted in: ROBERT GOLDMAN, CLAUDIO GROSSMAN, CLAUDIA MARIN, DIEGO RODRIGUEZ-PINZON, The International Dimension of Human Rights – A guide for the application in domestic law, Washington D.C. 2001; See also, references on Argentina, Brazil and Venezuela in: CHRISTOPHER HARLAND, supra note 15, at 201-207.

18 Section 39 (1) b of the Constitution of South Africa.

19 For examples in this context, INTERNATIONAL COMMISSION OF JURISTS, The Review- No. 60 – Special Issue/1998, "The evolving African Constitutionalism", Geneva 1998.

20 A feature in many transition systems was that the judicial system lacked independence and that checks and balances within the investigative process were largely missing. Fair trial rights were often limited to the period of the trial itself.

21 See for example, ANDREW BRUCE, Ten Years of the Bill of Rights and the ICCPR in Criminal Proceedings, Presentation at the Symposium: A Decade of the Bill of Rights and the ICCPR in Hong Kong, 2002, available at www.hku.hk/ccpl/pub/conference/Conference-AndrewBruceFinal.pdf (website consulted 15.12.2003); BILL BOWRING, supra note 16, at 362 et seq. with references to criminal justice cases in Russia.

An interesting new example of incorporation is the intended introduction of both UN Covenants into the domestic law of Taiwan. The ICJ actively supported this process together with its affiliated organisation, the Taipei Bar Association.[22] Taiwan has undergone a far-reaching democratic transition process with considerable legal and judicial reforms in the last 10 years. While formal accession to international human rights treaties is contemplated, such action faces a number of obstacles due to Taiwan's uncertain international status. Notwithstanding these international difficulties to formally assume any international obligation under the Covenants, Taiwan is working on their domestic realisation through a human rights act, the creation of a national human rights commission and the elaboration of a human rights training policy.[23]

2.2. Post-conflict situations

Post-conflict States also typically engage in a process of internalisation of international human rights treaties. This tendency is largely a result of the engagement of the international community in supporting the incorporation of international standards as the measurement for the re-establishment of the rule of law.[24] One may see this as a confirmation of the development of major human rights norms as a form of universal *ordre public.* A telling example is the case of Bosnia and Herzegovina where the European Convention and other international treaties were introduced as applicable law even prior to the ratification of these treaties.[25] If linked to the creation of implementing institutions such as the Bosnian Human Rights Chamber

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22 The ICJ conducted two missions within its National Implementation Programme to Taiwan in the course of 2003. Advice included the scope of a human rights act and its reflection of both Covenants, the need for a broader implementation strategy, including individual remedies, a national human rights institution, legislative screening and a training strategy.

23 See for more information: RESEARCH, DEVELOPMENT AND EVALUATION COMMISSION, EXECUTIVE YUAN, 2002 Human Rights Policy White Paper, Human Rights Infrastructure-building for a Human Rights State, 1st edition, Taiwan, 2002. Arguably, Taiwan possesses all ingredients for being a State under international law apart from its recognition by other States. The idea of universality of human rights treaties and the fact that its rights and obligations are not based on reciprocity support the claim to explore avenues for an accession of the 22 Million inhabitants of Taiwan to the UN Human Rights machinery.

24 Another critical issue in practise is the need to ensure accountability and compliance with international standards by the international community itself if it is the *de facto* governing authority. See also: OMBUDSPERSON INSTITUTION IN KOSOVO, Special Report 1, On the compatibility with recognised international standards of UNMIK Regulation No.2000/47 on the Status and Privileges and Immunities of KFOR and UNMIK, available at www.ombudspersonkosovo.org.

25 Annex 6 of the Dayton Peace Agreement introduces international human rights conventions, in particular the ECHR, and establishes the Human Rights Chamber and the Human Rights Ombudsman as implementing institutions.

and the Ombudsman Office, international provisions are likely to become a fundamental part of a new legal order. However, if the international commitment to human rights as part of the peace process is marginal, as for example the case in Tajikistan, ratification and incorporation is likely to remain an unfulfilled promise.[26]

2.3. Established democracies

It is important to note that internalisation is not limited to transition processes, but occurs equally in countries with a long rule of law tradition. In particular, in common law countries where human rights treaties are usually not directly applicable, a proliferation of human rights acts can be observed. These laws are either largely influenced in language by the main human rights treaties or directly incorporate international standards into the domestic legal order. Powerful examples have been the incorporation of the European Convention in the United Kingdom and most recently in Ireland, where the Human Rights Act entered into force on January 1, 2004.[27] These examples show that incorporation becomes necessary if strong and effective international remedies exist. In the United Kingdom especially it was the continuous exposure to the judgments of the European Court of Human Rights that induced the incorporation of the European Convention. Individual communications to universal bodies have been used less systematically to trigger similar changes, but offer nonetheless an important component of any strategy to advocate legal changes.

Even in the absence of full incorporation, common law courts in particular have increasingly applied international standards to domestic law. This process is largely influenced by the Bangalore Principles on the Domestic Application of International Standards.[28] The Principles, which had been elaborated by high-level jurists from various common law countries, provide for a theoretic framework for the introduction of international standards. They allow the introduction of international treaty law in particular in cases where common law or statutory provisions are either lacking completely

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26 Tajikistan ratified the six UN human rights treaties in 1999 under international pressure before the departure of the UN Peace Operation. Despite the horrifying atrocities committed during the civil war, human rights have played only a minor role in the peace and reconciliation process – in striking difference to the various other UN supported peace processes at the time.

27 Irish European Convention of Human Rights Act of 30 June 2003 that entered into force on 1 January 2004.

28 Bangalore Principles on the Domestic Application of International Human Rights Law, reprinted in: Developing Human Rights Jurisprudence – Conclusions of the judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law, Commonwealth Secretariat, Issue No.2, 1992, 1-3.

or are ambiguous. While non-binding in nature, these principles carry persuasive legal authority and are said to have in fact stimulated the use of human rights treaties in a number of countries.[29] However, it should be noted that these principles have clear limits in not being able to overcome contradictions to existing laws. They also require a highly qualified and open-minded judicial profession.

3. *Adequate status in domestic law*

The effectiveness of international standards in domestic law is closely related to their rank in the legal hierarchy. It is important to prevent the erosion of international standards by subsequent or more specific legislation. While there is no rule of international law according to which international human rights norms should have constitutional or quasi-constitutional status, accordance of such status would probably best reflect the rule of article 27 VCLT.[30] Superiority to ordinary law is of considerable practical relevance. In fact, international standards are particularly needed in those cases where domestic law falls behind international standards. Importantly, in many countries the rank also determines the extent to which they are relied on in providing constitutional remedies or are subject to judicial review by courts. A range of jurisdictions have in different forms limited the *lex posterior* rule to international human rights treaties on various grounds, often on the presumption that the state after ratifying an international human rights treaty does not intend to violate its international law obligations unless otherwise indicated.[31] A number of human rights acts with ordinary law status have tried to prevent the erosion by specifically mandating a system of preventive auditing or by obliging the legislator to indicate any intended departure from human rights legislation.[32] It should

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29 JUSTICE MICHAEL KIRBY, The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms, Address before the Conference on the Tenth Anniversary of the Bangalore Principles, available on www.hcourt.gov.au/speeches/kirbyj/kirbyj_bang11.htm (consulted on 15.12.2003).

30 It cannot be excluded that the Constitution may itself conflict with international norms. While those occasions will be limited, they can often be resolved with interpretation. Conflicts between introduced international human rights standards and pre-existing constitutional rights may be resolved by a rule according to which neither set of rules limits the other.

31 For an interesting overview of some of these approaches, see BENEDOTTI CONFORTI, National Court and the International Law of Human Rights, at 3, 10-14, in B.Conforti and F. Drancioni, Enforcing Human rights in Domestic Courts, Kluwer, 1997.

32 Section 19 of the UK HRA provides that Ministers are to attach a statement of compatibility on each law and Section 3 (1) requires courts to read legislation in a way to give effect to Convention rights, while Section 4 (1) provides that "if the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility." A similar solution exists within the Irish Human Rights Act where such power is conferred to the High and Supreme Court.

also be noted that beyond any direct legal implications, the legal rank entails an indication of the value accorded to international standards. The higher the status the more likely international norms are to become the catalyst for a broader process of creating a human rights culture.

4. Conclusion

While this article cannot give a full account of the domestic applicability in various jurisdictions, it indicates an emerging trend towards internalisation of international human rights treaties. Importantly, while scope and effect differ according to the country context, this trend occurs in variable situations (transition as well as established democracies) and diverse legal systems (common and civil law) around the globe. Such trends constitute an important step towards a more effective national protection framework. The introduction of international human rights treaties has been successful if embodied in a broader political transformation context supported by the international community or resulting out of an effective linkage to an international remedy, such as to the European Court of Human Rights. Overall, the increasing domestic applicability is also an encouraging indicator of the diminishing divide between international and national human rights law. The very nature of international human rights treaties giving rights to individuals against the state supports this approach. Moreover, it is important to note that the introduction of international standards into the formal legal system opens additional advocacy strategies to domestic and international NGOs in order to foster their actual realisation. Experience in countries enacting human rights legislation, however, also suggests that additional legal and institutional reforms are required for an effective protection framework.[33]

LEGAL AND INSTITUTIONAL REFORMS

The internalisation of major human rights treaties into domestic law provides without any doubt a potentially powerful instrument for their domestic realisation. Unfortunately, however, it is a common experience in working on legal reforms in various countries that direct applicability remains "virtual reality" if not placed in a broader reform context. The challenges may be legal, such as the rank of the treaty or the extent to which judicial review can be exercised, or rather practical, such as the lack

[33] Some of the human rights legislation mentioned above include implementation components as an integral part of the legislation, such as legislative auditing or impact assessment, or in parallel to relevant legislation, such as training strategies or national human rights institutions.

of knowledge and capacity to use international standards. Another fundamental component of a national protection system that needs to be considered in more detail is that the overall legal system must reflect international standards and provide for the necessary legal, administrative and institutional mechanism for their realisation.

1. Compatibility studies and systematic auditing

With the ratification of human rights treaties, States are under an obligation to make such changes to domestic law as are necessary to ensure compliance.[34] It seems fair to draw a logical conclusion from this that a State party acceding in good faith cannot but conduct some form of audit or survey in order to identify necessary changes. Such studies indeed provide for an appropriate mechanism to identify needed legal and institutional reforms. Unfortunately, it seems that some States do not conduct compatibility studies at all or do so only on a selective basis.[35] They are also often undertaken in a formalistic fashion.[36] While such surveys lead to occasional legal reforms, the perspective is often less one of modernising domestic law than to assess whether ratification is "safe" without reservations. The fact that ratification of treaties often dates back a considerable time without such an audit having ever been done is another concern. On the universal level, treaty reporting is a process that could in part compensate for this loss if undertaken appropriately (see below).

There are, however, positive examples, especially in cases where compatibility studies have been conducted transparently and were open to criticism and dialogue with civil society and the legal community. There are some positive models of compatibility studies in the context of ratification of a treaty or within the drafting of specific incorporating legislation. These were either supported strongly by the international community or resulted from the loss of a number of cases at regional human rights courts. Such an auditing has appeared to be most successful when supported by international actors, as in the case of accession to the Council of Europe. To give a rough indication of this process: A group of domestic experts screens domestic law – with the assistance of international experts – for its

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34 Art.2, par.2, ICCPR and the Draft General Comment on Article 2, supra note 10, para.11.

35 See on this issue also CHRISTOF HEYNS, FRANS VILJOVEN, supra note 2, at 497-98.

36 It might be asserted, however, that many human rights treaties would have attracted diminished adherence if countries had been fully aware of the legal and institutional changes they might be required to undertake.

compatibility with the European Convention and its additional protocols.[37] The compatibility study leads to a range of identified required legislative and administrative reforms. Importantly, this screening process is not the only legal assistance provided. The Venice Commission for Democracy through Law and other organisations with field presences provide additional expertise and support.[38] In the case of Armenia, for example, the Venice Commission reviewed and discussed the constitutional reform proposal and analysed its provisions with the requirements under the case law of the European Convention, especially with regard to the scope of various limitation clauses.[39] Follow-up assistance on needed legislative changes was also provided by some organisations. Finally, membership to the Council of Europe was conditioned not only on the ratification of the full scope of Conventions, but also on a range of legislative and institutional changes beyond the direct requirements under human rights law.[40] While some criticism may be voiced to the accession process,[41] it still provides an impressive example of how international accession can be used to ensure that the formal legal framework is brought into compliance with international human rights treaties.

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37 For an example of such a study, CONSEIL DE L'EUROPE, Direction Générale des Droits de l'Homme, Etude de la compatibilité du droit de la République d'Arménie avec les exigences de la Convention européenne des Droits de l'Homme, H (2000) 12.

38 To mention are in particular the Organisation for Security and Cooperation in Europe through its field missions and the OSCE Office for Democratic Institutions and Human Rights, the American Bar Association Central and Eastern Europe Initiative (ABA Ceeli) or the Open Society Initiative (SOROS) with its legal component (COLPI – Constitutional and Legal Policy Institute).

39 The Venice Commission of the Council of Europe is an independent expert body that was set up to provide assistance and high-level authoritative advise in the context of democratic transition. Relevant documents are available at the Venice Commission website at: http://www.venice.coe.int/site/interface/english.htm.

40 See for a typical example, the requirements set forth on Armenia's application for membership of the Council of Europe, PACE Opinion No. 221 (2000). It is important to note that many requirements made towards new Member States seek to foster a strong rule of law and go beyond of what is strictly speaking, legally required under the European Convention and its Protocols. It may for example include the requirement to ensure an individual complaint mechanism to a Constitutional Court or the establishment of a Human Rights Ombudsman Institution or the reform of the prison system.

41 Criticism results from the fact that the political transition has been only partially successful in CIS countries. Some countries were prematurely admitted to the Council of Europe – an argument supported by recent democratic setbacks in Armenia and Azerbaijan (see also the election monitoring reports of the OSCE ODIHR at www.osce.org/odihr/). A practical concern was the Council of Europe distance to the political and legal reform processes on the ground and the static nature of much of its assistance. The international community could also have ensured a stronger debate within some of the accession countries. Overall, however, the integration process has been very positive in overcoming many features of the old soviet legal system.

In the absence of a serious governmental screening process, national human rights institutions or non-governmental organisations, such as the ICJ or its domestic partner organisations, could organise such assessments. This would be likely to result in a broader and more honest and open legal reform debate. Outside the immediate ratification process, assessments could well be linked to the cycle of reporting under various human rights treaties. An example of a possible model for such assessments has been developed by the ABA CEELI programme, that drafted a CEDAW and ICCPR Assessment Tool.[42] They provide guidance for an assessment of legal and actual compliance with the specific provisions in these treaties. A strength of such assessment is the increase of awareness of the treaties among the domestic legal community and its potential to stimulate a broad debate on legal reform.

2. Law making and human rights impact assessments

Legal compliance is a continuous process, not least in countries where the primacy of human rights treaties over ordinary law is not ensured. There is a lack of domestic capacity and political will in many countries to give due regard to international human rights standards in the law making process. Parliaments, law commissions[43] and governmental ministries often lack the knowledge and awareness of treaty obligations.

There are, however, a number of positive examples of statutory obligations requiring the review of draft legislation for compliance not only with constitutional but also international human rights standards. Some of the human rights legislation, such as the UK Human Rights Act, has established auditing duties in varying forms, whereas some other countries foresee such duty in a separate law or the constitution.[44] The value of systematic auditing is to ensure compliance with international standards as well as to sensitise legislators. The authority in charge and modus of such screening and auditing varies in different countries. Without favouring a specific model, a benchmark should be that the review is conducted in a transparent way and submitted to the public domain. Civil society and others are thus

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42 American Bar Association Central Eastern European Law Initiative, CEDAW Assessment Tool, The Rights Consortium, 2002, Washington D.C., and American Bar Association Central Eastern European Law Initiative, International Covenant on Civil and Political Rights, Legal Implementation Index, 2003, Washington D.C.

43 Law commissions exist in most common law countries responsible for the development of legal reform.

44 For a comparative analysis, JUSTICE, Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance, at 13 and 103 et seq., 2001, with references to statutory obligations in Canada, Sweden, Netherlands, New Zealand, Australia.

afforded an opportunity to challenge its findings and the soundness of its reasoning.

Another positive option is to increase the role played by independent National Human Rights Institutions in relation to legislative processes. The UN Paris Principles, as the principle points of reference for national human rights institutions, specifically recognise such function.[45] This role, however, in practise rarely is exercised in any systemised fashion. A recent best practise study of the Commonwealth Human Rights Initiative also recommended regular impact assessments of legislation by National Institutions.[46] The value of such impact assessments is to look beyond the formal reflection of international standards, and to consider the practical repercussions of legislation – an element of great importance with regard to marginalized people.

Perhaps the most important safeguard against eroding legislation is an open and transparent law making process that allows for a broad discussion of legal reforms and sufficient input from civil society. It should be noted that such a process is in itself a requirement of the notion of the rule of law.[47] Increasingly, domestic human rights NGOs have contributed to this process by providing independent expertise, by broadening the debate and by raising the awareness of the scope of international obligations among lawmakers.[48] However, especially in transition countries or countries with a lack of democratic processes, there is a discernible divide between civil society and government that prevents a reasonable input and dialogue on key legislation. International NGOs, such as the ICJ, could play a more active role by providing authoritative legal opinions. Such briefs could be used as a lobbying tool for domestic partners, who with international support are often more likely to be heard with their concerns. This would also address an existing gap in legislative reform assistance, which is usually placed in a development context with a multi-stage approach. In practise, however, this assistance is rarely capable of reacting quickly to critical draft laws outside of an agreed project framework.

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45 UN Principles Concerning the Status of National Institutions, par. 3 a (i), GA Resolution 48/134, 20 December 1993, annex.

46 COMMONWEALTH HUMAN RIGHTS INITIATIVE, National Human Rights Institutions, Best Practice, at 24, 2001.

47 "Legislation will be formulated and adopted as a result of an open process reflecting the will of the people, either directly or through elected representatives (...)", Document of the Moscow Meeting of the Conference on Security and Cooperation in Europe, 1991, par. 18.1, in: OSCE ODIHR, OSCE Human Dimension Commitments – A Reference Guide, at 63, Warsaw 2001.

48 See for example JUSTICE, supra note 44, at 98, with a checklist for legislative scrutiny, at 98, 2001.

3. Comprehensive legal reforms

Increasingly, there is an emergent understanding that implementation requires more than the stipulation of a right in the constitution or a statute. Compliance is more complex and requires a set of additional legal and administrative measures to enable the judicial system effectively to address human rights concerns.

The constitutional prohibition of torture, for example, is an important starting point, but must be complemented by other legislation and a strong system of preventive safeguards and control mechanism. The prohibition against the use of confessions obtained through torture must be accompanied by procedural rules to allow for the effective challenge of evidence; the provision of independent medical expertise in police or pre-trial custody; and a review to limit the reliance of legal systems on confessions and statements obtained in the investigation. The same applies with regard to violations in the private sphere, such as violence against women or trafficking in human beings, where the due diligence obligation mandates States to establish an effective system to protect victims.[49] States regularly assert that their legal systems outlaw torture or violence, and in essence that it "takes care" of any such abuses. In reality, however, the legal system frequently proves incapable of responding properly. The practical functioning of anti-trafficking laws, for example, requires a difficult interplay among, for example, the police or border guards (to identify victims as victims and to refer victims to support services), prosecutors (who must consider the possible provision for witness and victim protection) and immigration authorities (that have to issue temporary or permanent residence permits).[50]

In a positive vein, international bodies have increasingly provided guidance as to such approaches, for example, through the recommendations of the European Committee for the Prevention of Torture (CPT),[51] the Robben

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[49] The concept was derived from the disappearances cases of the Inter-American Court (Velasquez Rodriguez v. Honduras, Judgment of 29.07.1988, Ser. C, 4, 1988) and is increasingly used as the applicable standard with regard to violations within the private sphere such as violence against women, see REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, E/CN.4/2003/75/Add.1 par. 4 et seq.

[50] For a guide on comprehensive anti-trafficking legislation and international standards, ANGELIKA KARTUSCH, Reference Guide for Anti-trafficking Legislative Review, OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2001.

[51] For a list of general recommendations of the European Committee for the Prevention of Torture, see supra note 4.

Island Guidelines on the Prohibition and Prevention of Torture in Africa,[52] or through a model law issued by the Special Rapporteur on Violence Against Women.[53]

The above-cited examples show how legal implementation transcends formal legal applicability and requires additional laws and regulations or the drafting of action plans or some form of coordinating structures. It also indicates that legal compliance is directly linked to judicial and non-judicial implementing mechanisms. Effective lawmaking needs to become more holistic in its approach. A good recent example is the EU Race Directive that requires EU Member States not only to establish far-reaching non-discrimination provisions and judicial and administrative remedies (including the possibility of some form of public interest litigation), but also to create a national implementing mechanism.[54]

National and international human rights NGOs especially must address and document how legal systems fail to perform in practise to create the momentum for more comprehensive legal reforms. National Institutions are another crucial player to initiate comprehensive legal reforms. Finally, the treaty reporting process ideally should become a domestic stimulus for such legal reforms.

4. Treaty reporting as a reference for domestic reform

An underused potential tool for implementation is the reporting process under various human rights treaties. Reporting includes – in an ideal world – a stocktaking exercise of domestic legislation and practises. Even if, as in most countries, a comprehensive auditing has not taken place by the time of ratification, reporting can be used to screen legislation and practises for the state's compliance with international standards. Moreover, concluding observations of the treaty supervisory committees provide guidance on some of the steps to be taken in order "to ensure compliance". These recommendations may cover areas of institutional and legal reform. This is evident if, for example, recommendations are made with regard to national institutions, the ombudsman or other mechanisms for the

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52 Robben Island Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment of Punishment in Africa, endorsed by the African Commission during its 32nd Session, 17-23 October 2002, Banjul, The Gambia. For more information see: http://www.apt.ch/africa/.

53 REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, A framework for model legislation on domestic violence, E/CN.4/1996/53/Add.2.

54 EU Council Directive 2000/43 EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

protection of specific groups or when specific pieces of legislation are recommended, such as laws on violence against women.

Despite the important role that treaty reporting is meant to play to induce domestic reforms, recent studies show that its impact has been limited.[55] While some successes have been noted, the process rarely leads to stocktaking of legislation and practise. Reporting is too often perceived as an administrative exercise to satisfy an international demand, rather than as a tool for discussing domestic implementation. The perceived lack of relevance and administrative burden by some governments is in fact partly self-inflicted, in that they do not understand reporting as a domestic process. Dialogue and visibility of report drafting or follow-up are in many places non-existent. It is not completely uncommon that working groups established to draft reports to treaty bodies are dissolved upon their submission. The obligation to disseminate the report and observations is implemented at best half-heartedly.

4.1. Effective domestic stocktaking

In order to achieve a better auditing of laws and practise, the report drafting needs at the outset to be more open, visible and inclusive. Reporting carries a capacity building dimension for governmental officials, but in many countries it is the provenance of a small group of people within a number of ministries to draft the report – often at an administrative level, with little input from decision makers. Not surprisingly, the reports rarely reflect a critical self-appraisal and their impact in initiating an internal reform debate is limited. A good way to reach a better audit is to open the process already in the stage of preparation. A number of States have started to hold public hearings or to allow for some form of input of civil society into the report. National human rights institutions, the functions of which include, according to the Paris Principles, "the contribution to reporting", can also play some role in this context.[56] Admittedly, the role of national institutions is not clearly defined and various institutions have chosen different paths, such as the submission of independent reports, contributions to state reports, and the facilitation of governmental and/or shadow

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55 Christof Heyns, Frans Viljoven, supra note 2, at 488.

56 UN Paris Principles, supra note 45, par. 3 (d), which reads: "(...) contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence".

reports.[57] Some form of open process within the country, whereby the government, the police, military and other official institutions must explain to civil society, the legal community and the media how they ensure compliance with a treaty is likely to lead to a substantially more honest and specific assessment and report.

Perhaps the most powerful tool of stocktaking is the submission of alternative reports by NGOs. The participation in public hearings and consultations with the State in the preparation of the report as suggested should not come at the expense of the submission of information to the treaty body directly. Meanwhile, it is important to see the submission of information to an international treaty body not as the only or primary goal of NGO reporting. Ideally, shadow reporting is more than an *ad hoc* report, as it is the case in some "donor driven" transition countries. A proper model is based on a cooperation or platform of various organisations and reflects longer term monitoring.[58] The submission of information should not be the sole reason and output, but an expression of a sustained and clearly defined monitoring. Reporting understood in this domestic sense should not replace the role of the international treaty body, but rather should increase the relevance of the process domestically.

4.2. Follow-up to recommendations

An essential question is how recommendations may be better translated into concrete reforms. A concern frequently raised in this regard is the lack of quality and accuracy of treaty body recommendations, which in turn negatively affects their domestic use. While some of this shortcoming is linked to a problematic reporting process, it seems fair to say that recommendations resulting from most treaty bodies could be improved.[59] For example, conclusions should be linked closer to processes supported by regional organisations, especially if they are closer to the field. It is to be welcomed that some Committees have created their own internal follow-

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57 Morten Kjaerum, National Human Rights Institutions, Implementing Human Rights, 1, 16 et seq., in: Motren Bergsmo (ed.) Human Rights and Criminal Justice for the Downtrodden, Essays in Honour of Asbjorn Eide, Martinus Nijhoff, Leiden 2003.

58 A good example is the model worked out by a coalition of Russian NGOs (on ICESCR) supported by the ICJ Section, JUSTICE, where a clear monitoring framework with benchmarks and necessary data was developed to be followed by a longer term monitoring (including regional). The same NGOs presented the report in Geneva and will lobby for follow-up reforms.

59 For example the CAT has failed to indicate clearly a system of preventive safeguards under the Convention comparable to the CPT. Recommendations do also often seem schematic and not targeted to the country concerned and may occasionally even fall behind what actors in the field promote as standard.

up procedures.[60] The idea of setting benchmarks for follow-up reports as suggested in the context of ICESCR is another interesting option to increase the measurable follow-up.[61]

The question of follow-up is, however, primarily a domestic one. There is an urgent need to establish some form of structured follow-up procedure that includes an element of accountability. Instances exist of state reporting where hardly anybody even within the state's administration is able to trace the report six months after the presentation, which may well be considered to be a violation of the obligation to apply the treaty in good faith. What is needed is a process that is open, visible and accountable. Government representatives should be obliged to discuss the observations and be answerable as to whether any concrete steps to implement or to analyse possible reforms have been undertaken. Such process could be formal, such as through a hearing in Parliament, or more informal, such as through public hearings or *ad hoc* working groups. Domestic and international civil society, too, should improve their domestic follow-up efforts. However, in many countries the biggest challenge is the lack of reach and capacity for dialogue with the authorities. As a result, state and alternative reporting operate largely in isolation. Good examples such as a joint Ministerial/ NGO Committee on follow-up as established in the United Kingdom can rarely be found anywhere else.[62]

It is therefore important that intermediary institutions, such as national human rights or human rights ombudsman institutions, assume this pivotal role. The mandates of national institutions provide for a range of tools for the implementation of recommendations, such as monitoring, legal studies or legislative initiatives. Probably an even more important function, at least in transition countries, would be for the institution to bridge the gap between government and civil society and to facilitate a domestic debate and dialogue on reporting and follow-up.

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60 See: Points of Agreement, 2nd Inter-Committee Meeting, June 20, 2003, par.17, stating that in light of the initiatives taken by the HRC and CAT, the inter-Committee meeting recommended that all treaty bodies examine the possibility of introducing procedures to follow-up their recommendations", on file with the author.

61 See on this idea: Eibe Riedel, New Bearings to the State Reporting Procedure: Practical Ways to Operationalize Economic, Social and Cultural Rights – the Example of the Right to Health, in: Von Schorlemer, Sabine (ed.), Praxishandbuch UNO, die Vereinten Nationen im Lichte Globaler Herausforderungen, Berlin, 2003, 345 – 358.

62 Information available on: http://www.dca.gov.uk/hract/ngo/lcdpaper3.htm. (website consulted on 15.12.03)

4.3. International support to follow-up and the Office of the High Commissioner for Human Rights

Those who provide international assistance to the justice or human rights sectors should also play an important follow-up role. Organisations providing such assistance in the field are typically not cognisant of recommendations produced by UN treaty bodies, which is often indicative of the lack of domestic visibility of these processes. It would be important, if they too, take the recommendations on board within their reform assistance program. The potentially most important role, however, must be played by the Office of the UN High Commissioner for Human Rights. A number of positive steps have taken place in recent years, such as the creation of a unit on treaty recommendations and the conduct of regional workshops on reporting and follow-up. These measures are steps in the right direction. As a rule, however, follow-up dialogue should be conducted directly within the country and should bring together government, national institutions and civil society. The closer the discussion can be taken to the societies affected, the more likely it is to result in more than a formal discussion on the status of recommendations. Regional institutions, such as the OSCE ODIHR, have gained positive experiences in the conduct of NGO-Government round-table seminars following treaty reporting.[63] If conducted in this way, reporting is a much less distant, invisible process, and recommendations may feed into any broader domestic reform debate that may be underway.

ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS STANDARDS

While the applicability of international standards and its proper reflection in the legal system are key considerations for an effective national protection framework, it is an independent and impartial judicial system that enforces international standards. It is therefore of greatest importance that the judicial system provides for appropriate legal remedies and that it is sufficiently independent to apply human rights norms. Judges, lawyers and prosecutors should be sufficiently aware of international human rights norms.

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[63] The OSCE Office for Democratic Institutions for Human Rights conducted follow-up workshops on CAT in Armenia (2001), Kyrgyzstan (2000) and Kazakhstan (2001). Follow-up to reporting provided a framework for a broader debate on necessary reforms and resulted in further recommendations such as the drafting of regulations for civil society prison monitoring (Armenia) or for the change of authority over the penitentiary service (Kyrgyzstan). Final reports are on file with the author.

1. The role of courts and judges in the enforcement of international standards

Reference to international treaty norms made by domestic judges is still relatively rare – even if treaties are made a component of domestic law. Too frequently, such reference remains the sole provenance of a few exceptional jurists. The extent to which the judiciary applies international standards largely depends on their domestic incorporation and on the extent to which courts are competent to exercise judicial review and set aside legislation. However, whatever the legal system, there will be ways to use international law through judicial wisdom and creative lawyering. An illustration of this creativity is a case of the Indian Supreme Court on sexual harassment. In the absence of any domestic regulation on sexual harassment, the Court, by reference to CEDAW, which has not directly been incorporated through an act of Parliament, stipulated a range of applicable legal rules valid until such time as proper legislation is passed.[64]

1.1. Judicial independence and the rule of law

Lack of independence in the legal profession is the most critical impediment to the application of human rights standards. In an environment where tenure and independence is not secured, a culture of critical decision-making and of references to international human rights law will remain an illusion. The ICJ through its Centre for the Independence of Judges and Lawyers (CIJL) has long focused on this question and played an important protective role through its fact-finding missions, trial observations and the documentation of attacks on justice. The possibility for judges to enforce human rights standards of course also depends on the overall culture of the rule of law, the balance of power within the legal system and on the capacity within the judicial system.

1.2. Legal culture based on international standards

While independence and impartiality are important conditions for a legal culture based on international human rights standards, they should not be mistaken as their full equation. An independent judge might well violate international human rights law, as can be seen by the number of cases at the European Court of Human Rights that have gone through an inde-

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[64] Sexual Harassment – Vishaka v. State of Rajasthan, 1997 SOL 121 quoted from: Coelho, Use of International Law in Domestic Indian Cases, International Civil Liberties Report 2001, at 131, at: www.archive.aclu.org/library/iclr/2001/iclr2001_18.pdf (consulted on 15.12.03). This case is an interesting example of the implementation of positive obligations under CEDAW through domestic courts.

pendent judicial process. The broad challenge is to create a legal culture that is based on international human rights standards. This is particularly important in transition countries, where the rule of law has often been understood as the rule by law rather than the rule of rights.[65] In this context, it is important to recognise that the incorporation and also the application of international human rights standards contribute to such a change of legal culture.

1.3. Highest courts need to take the lead

Constitutional and Supreme Courts should take the lead in changing this legal culture. Experiences in Eastern Europe confirm that such courts are instrumental in making the European Convention on Human Rights an accepted part of domestic law. In fact, it would be an illusion to expect a consistent reference to international human rights law, even if directly applicable, as long as the highest legal authorities have not visibly endorsed such standards. If they do, however, it will encourage a more frequent reference to them by lawyers and lower court judges. In this context, it is important to note that creating networks among constitutional courts or the conduct of high-level judicial seminars such as those organised by the Commonwealth Human Rights Initiative have proven fruitful. The twinning of leading Courts of Eastern Europe with Western counterparts is also a successful model that helped for example the Albanian or Ukrainian Courts to declare the death penalty un-constitutional.[66] However, attention must be paid that the extensive and often prestigious network of these courts does not come at the expense of needed attention to lower courts.

1.4. Training strategies

Training is at the core of any implementation strategy. International human rights standards and case law need to be integrated from early on into the law school curriculum and into the legal education of jurists. In Eastern Europe especially, a number of institutions have provided regular training seminars for judges on the ECHR. The challenge now is to introduce such

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65 See the important description in the OSCE Copenhagen document of 1990, par. 2, stating: "(...) rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of a democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing for its fullest expression", in: OSCE ODIHR, Human Dimension Commitments – A Reference Guide, at 61, Warsaw 2001.

66 See on this issue also, the Venice Commission opinion that concluded that the death penalty was incompatible with the new Albanian Constitution. Information available at: http://www.venice.coe.int/.

training into the standard curriculum of judicial training institutes. To be successful, training must go alongside the provision of necessary texts and case law in local languages.

It is important to conduct practical and in depth training that shows the precise scope of international standards and their value for domestic litigation. A wide perception, for example in the former Soviet Union, is that international standards are too abstract to be applied and that they constitute only a statement of principles. The extent of such a perception is largely influenced by a lack of a constitutional rights culture and by a traditionally positivist understanding of the law. Hence, judges are not sufficiently familiar with applying fundamental rights in the interpretation of ordinary law and have difficulties in determining limitation clauses in international treaties.

This example illustrates an important point. Legal training goes beyond a pure explanation of what the law is, but is a tool for a reflection on human rights standards and domestic legal practise. This dialogue is particularly pertinent if the legal community is unfamiliar with certain concepts and rights, such as the case with regard to the rights under CEDAW. Here again, training on CEDAW as well as its introduction into domestic law is part of a process of changing the legal culture. In the absence of such training, the lack of familiarity may either lead to a failure to apply the standards or to a judicial determination of norms as non self-executing. A similar case could probably be made with regard to economic, social and cultural rights and their rejection in many Western countries. Examples of domestic application, reflecting an emerging trend of their justiciability,[67] include courts that are influenced by international standards, such as the South African Constitutional Court, or the Bosnian Human Rights Chamber.[68] For most judges in Western Europe, however, this is a new perception that probably will require detailed training on the Covenant rights.

2. The role of lawyers in the enforcement of international standards

International and especially academic writing often focuses on the role of courts in enforcing international human rights standards. This focus may

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67 See also Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, Committee on Economic Social and Cultural Rights, 19th Session, Geneva, 1998, E/C.12/1998/24 par.9.

68 The mandate of the Bosnian Human Rights Chambers includes both civil and political as well as ESCR rights.

neglect the important and creative role lawyers play in the integration of international standards into domestic legal doctrine, contributing to a perception that the role of international treaties in domestic law is a dry and academic topic.

Lawyers help to bring international human rights standards to the attention of judges and often prompt the judiciary to enforce them. In doing so, lawyers are crucial for the development of a culture of human rights litigation within their jurisdiction. This can take various forms, be it as individual lawyer, within law firms or within the structure of a legal aid clinic or legally oriented human rights NGO, such as the many network members of the ICJ. A particularly important tool for the implementation of international standards is what is referred to as "public interest litigation schemes". While their scope differs greatly from one legal system to another, the schemes generally are based on the common idea that litigation is a tool for a broader reform of the legal system. Such litigation helps to ensure that the legal system follows a rights based approach, especially in dealing with those having difficulties in accessing legal remedies effectively.[69] A rights based approach is especially important in transition countries in order to overcome the long felt distrust against the legal system. This approach, as seen in Eastern Europe, helps ensure that the new principles of the rights, such as those in the European Convention of Human Rights, take root within the domestic legal tradition.[70]

A relatively recent development meriting greater attention is the integration of international human rights norms into public interest litigation. There is a partly unexplored potential for strategic litigation, especially in countries that have internalised international standards. The same holds true for countries, such as India, with a long tradition of approaching the courts on public interest litigation. International foundations play an important role in the support of such litigation, often organised within legal NGOs or within legal aid centres. International support not only helps secure funding, but may also offer a certain amount of protection to public interest litigation, especially if litigation strategies combine domestic and international remedies. The latter is a relatively recent approach,[71] followed, among others, by organisations such as INTERIGHTS. A good example for such a double strategy can be seen with regard to the Roma

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69 HELEN HERSHKOFF, AUBREY MC CUTCHEON, Public Interest Litigation: An International Perspective, 283, 285, in: Mary Mc Clymont, Stephen Golub (ed.), Many Roads to Justice, The Ford Foundation, 2000.

70 On the experience with public interest litigation, see: AUBREY MC CUTCHEON, Eastern Europe: Funding Strategies for Public Interest Litigation, in Mary Mc Clymont, Stephen Golub (ed.), supra note 70, at 233 et seq.

71 HELEN HERSHKOFF, AUBREY MC CUTCHEON, supra note 70, at 292-95.

Rights Centre in Budapest litigating cases on behalf of Roma, both nationally and internationally with outside support.[72] International and national remedies are not seen separately, but as part of a joint litigation strategy. The ICJ has embarked in 2003, together with its Moscow affiliate, on a similar project providing in depth training to a selected group of jurists in Kyrgyzstan on the ICCPR in order to challenge a largely post-Soviet legal structure through domestic and international litigation.

Public interest litigation carries an important secondary effect in building its own network of lawyers firmly based on national and international human rights standards. The same applies with regard to legal clinical institutions that provide free legal aid to those who would otherwise not be able to access the justice system. Among the many purposes it serves is that it builds capacity for future human rights lawyers.

Another important mode of intervention is the submission of *amicus curiae* briefs, which can be a powerful tool, especially in high profile cases. They can ensure the effective application of international human rights law and the acceptance of their legal reasoning. Legal NGOs have an important role to play here and are encouraged to do so. The ICJ has supported *amicus curiae* briefs at the domestic and international level, for example to challenge amnesty laws in Latin America.

A rather unique example, indicating the possible impact of litigation, was the publication of a report by the UK auditing office, concluding that there was a need for local government training on the Human Rights Act to prevent potentially extensive litigation costs.[73]

3. Role of human rights NGOs

Beyond litigation, human rights NGOs with a legal focus have a range of additional tools at their disposal. In a number of countries, especially in transition contexts, human rights NGOs have started to provide human rights education to judges, lawyers, prosecutors or the police as part of a process of "critical engagement". At the same time, they have retained their monitoring capacity also with regard to the legal system. In this field, new techniques, such as trial monitoring projects, are on the increase. In

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[72] For more information: http://www.errc.org.

[73] Press release of the Audit Commission, "Three Years On: Public Services urged to take Human Rights Act into Account" at http://www.audit-commission.gov.uk/reports/PRESS-RELEASE.asp?CategoryID=&ProdID=0C48A4AD-0929-4b97-B290-96F2BB700F50 (website consulted at 15.12.2003).

contrast to international trial monitoring, this monitoring is directed less towards political or sensitive human rights cases, but rather towards the ordinary cases to identify systemic shortcomings within the judicial system. Monitoring of the judicial system is part of the democratisation of societies, where judges themselves should realise that they are not outside the scope of public scrutiny. Local and international non-governmental organisations have an important function in assessing the performance of the justice system to identify its capacity to implement international human rights standards. A number of organisations have established clear criteria for the assessment of actual compliance with international standards in the judiciary, which strengthens the credibility of such assessments.[74]

4. *Role of National Human Rights Institutions/Human Rights Ombudsman*

National human rights institutions, including human rights ombudsman institutions, have become increasingly important players in the enforcement of international standards. While their mandates differ considerably, as does their set-up, structure and available resources, they are increasingly powerful tools for the implementation of human rights treaties, provided they are sufficiently independent from the Government that creates them. They have an important preventive role, for example through prison or police station monitoring, both in investigating individual cases and general preventive visits. The mandate under the Paris Principles usually comprises preventive, promotional and protective elements. Almost all founding laws contain a direct reference to international human rights law, at times even when those treaties are not incorporated as such into domestic law.[75] The recent adoption of the Optional Protocol to the UN Convention Against Torture potentially re-enforces their role as institutions that bridge the gap between international standards and domestic law.[76]

While the Paris Principles treat the quasi-judicial function as optional, many strong institutions have the possibility to receive individual complaints. Especially in transition countries, where the legal system is not performing smoothly and is easily mistrusted, such remedies can lead to an effective tool for the implementation of human rights treaties. The complaint

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74 See: OPEN SOCIETY INSTITUTE, Monitoring the EU Accession Process: Judicial Independence, 2001, Budapest; The American Bar Association undertakes country assessments based on a Judicial Reform Index, see www.abanet.org.

75 This is for example the case in India: The Protection of Human Rights Act, 1993, No. 10 of 1994, Section 2 (b).

76 The Optional Protocol foresees the establishment of preventive mechanism in line with the Paris Principles that will be linked to a Sub-Committee to CAT on the international level.

function does usually not replace the role of the courts, in particular since the decisions of national institutions are usually not legally binding. The lack of legal force is often perceived as a major shortcoming. Many members of national institutions tend to disagree and point to the implementation of most of their findings and to the important role of an alternative institution, built less on formal authority, but on the power of persuasion.

Institutions differ greatly and some institutions, such as the Ugandan Human Rights Commission, even have a tribunal, where a number of torture cases have recently been solved successfully. An important component of many institutions is the possibility of using the legal system to enforce international human rights standards. National institutions can do so in varying forms depending on their mandate. Some have the possibility to apply to constitutional courts, as in many Eastern European countries, or undertake litigation in courts as in many common law countries or to submit *amicus curiae* briefs in important human rights cases.[77] In using this arsenal of possible interventions, national institutions can play a crucial role in human rights litigation in their countries and are clearly needed in fostering a legal culture based on international standards.

5. *Law enforcement, police and prosecutors*

The enforcement of international human rights standards is hardly conceivable if education on international standards excludes the police, law enforcement and the prosecution. Unfortunately, experience shows that these institutions are most likely to regard international norms as "foreign" and not tailored to their professional duties, partly because they consider themselves as losing powers within transition processes. The international community also finds it easier to work with other institutions and neglects the prosecution. In this context, it is important to note that the mandate of the prosecutor's office in some countries extends beyond a criminal law function. The importance of prosecutors understanding international standards is especially important with regard to the question of impunity and with the development of positive obligations, as for example with violence against women. It is thus essential that prosecutors be sufficiently trained as to such obligations in order to ensure their implementation.

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77 See for example: National Human Rights Institutions and the Administration of Justice, Conference recommendations, Copenhagen, November 13-14, 2003, available at: www.nhri.net/pdf/Conclusion_NHRI_AoJ.pdf.

FINAL REMARKS

Closing the implementation gap will remain a focus of attention for the human rights community in the years to come. Human rights treaties have been instrumental in bringing about many of the positive changes in domestic legal systems. Contentious jurisdiction has forced countries to internalise international treaties and has ensured that domestic courts apply them in line with its international interpretation. Monitoring bodies of various sorts provide important guidance on a prevention framework. However, whatever improvements may be achieved within the international machinery, implementation can only succeed if standards and values find firm roots in domestic legal orders. This is increasingly necessary to protect the integrity of the international system, as illustrated by the threats to the functioning of the European Court of Human Rights caused by the dramatic increase in caseload.

National implementation requires a broad and holistic incorporation approach. A strategy must be built around the incorporation of human rights treaty law into domestic law with sufficient legal hierarchy, a system of remedies and an overall legal framework that is tested and screened for its compliance with international standards. And it requires a training and re-training strategy, especially within the administration of justice. Closing the implementation gap can only be achieved if the legal community understands international human rights standards in its interpretation and endorses them as "their own" standards. This remains a difficult task that calls on all legal professions, in particular judges and lawyers, their professional associations, and also national human rights institutions and non-governmental organisations. Without all of these efforts, universality will not be truly achieved.

International human rights law has helped to expand the legitimate space for civil society groups around the world. It has also opened new opportunities for international advocacy on the national level. This includes the injection of the international human rights debate into specific domestic reform considerations. The ICJ and its network of national sections and affiliated organisations seem to be well placed to take a strong role in this process. It also helps to support the positive development that international human rights law is no longer the sole provenance of an elite few, but is instead finding its way into the mainstream of local human rights and legal communities. This is essential to overcome the divide between international and national human rights law.

A fundamental lesson learned in national implementation is that international support is critical. Two major fields of possible improvement should be noted. First, there is a compelling need that all international actors, be they multi-lateral or bilateral, non-governmental or governmental, place their assistance to the justice sector and to rule of law reforms clearly on international human rights standards. Too often, their work is based on vaguely defined "best practices" – usually imported directly from their own specific legal system. The result is not only frequent confusion and resulting legal contradictions, but it also prevents international human rights standards from becoming the main objective benchmarks for legal reform. Secondly, there is a need for an enhanced and improved involvement of the UN Office of the High Commissioner for Human Rights. The substantial political and technical support rendered to the accession in Eastern Europe finds no equivalent at the universal level. There have been some positive developments with an attempt to increase the necessary field reach of the High Commissioner's Office and an increased follow-up to treaty reporting. A recently agreed new cooperation with United Nations Development Program (UNDP) to mainstream human rights into its activities in the field might also be a good development. However, entrusting UNDP with assisting to internalise international human rights standards must be viewed with some suspicion in light of the track record and frequently negative attitude towards human rights issues by many Resident Representatives. The added value of the High Commissioner's Office is its special status and political leverage, that should also be translated into the way "technical assistance projects" are perceived and conducted. Such activities can be powerful instruments if not regarded as purely technical exercises. The OHCHR has all moral authority to focus on the domestic realisation of its treaties and to address also difficult and tough reform needs through legal review projects and consistent follow-up projects, including round-tables with government and non-governmental actors directly in the countries concerned. For this to succeed its activities must move closer to ground and have to become more confident to directly address domestic reform processes.

Overall, the shift of attention towards implementation will be a continuous process that will help to diminish the dichotomy between international and national human rights law. At the end of this process, international human rights standards may then have truly become part of a universal *ordre public*.

JUDICIAL INDEPENDENCE AND JUDICIAL CORRUPTION: FURTHER DEVELOPMENTS[1]

JUSTICE ROBERT D NICHOLSON AO[2]

It is now widely recognised and accepted that judicial corruption is the most corrosive and destructive force with respect to judicial independence. Independence of the judiciary, so essential to ensure that the judicial power is exercised to apply the law, is deprived of its legitimacy when the exercise of the power is corrupted by influences directing the foundation of a judicial decision away from the law. Judicial independence requires the absence of corruption from exercises of the judicial power; judicial corruption cannot be tolerated where the delivery of justice is to be respected. Yet judicial corruption permeates the exercises of judicial power in most countries of the world.[3] Its presence negates the longing of millions of people for justice according to law. It is therefore now beyond question that the presence of judicial corruption in the judicial systems of the world must be openly considered, analysed and addressed, internationally, nationally and locally.

At the 9th Conference of Chief Justices of Asia and the Pacific held in Christchurch, New Zealand in October 2001 I presented to the Chief Justices a paper under the title of "Judicial Ethics: Issues for Discussion."[4] As part of that paper consideration was given to whether statements of ethics for judges should address issues relating to judicial corruption. Reference was there made to the work of the ICJ Centre for the Independence of Judges and Lawyers culminating in its March 2000 statement on a "Policy framework for Preventing and Eliminating Corruption and ensuring the Impartiality of the Judicial System." An account was given of the subsequent work of the UN Group on Strengthening Judicial Integrity, which produced the Bangalore Draft Principles on Judicial Conduct and listed issues requiring to be addressed in dealing with judicial corruption. Now that the Chief Justices are again meeting in Conference, I have been requested to update that account by making an assessment of further

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1 A paper presented at the 10th Conference of Chief Justices of Asia and the Pacific Tokyo, Japan, 1 September 2003.

2 Judge of the Federal Court of Australia; Secretary, Lawasia Judicial Section; President ICJ (Western Australia).

3 ICJ Centre for the Independence of Judges and Lawyers, "Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System", 15 March 2000, at p.2.

4 (2001) 11 *Journal of Judicial Administration* 69 at pp.76-78.

developments in relation to the prevention and control of judicial corruption in the intervening two years.

It cannot be thought that in that intervening period there is any less reason to consider that judicial corruption is not a continuing factor of enormous significance to the existence of judicial independence – and hence the proper application of the law – in the countries of the world. In June 2003, on the eve of his retirement as UN Special Rapporteur on the Independence of Judges and Lawyers and the occasion of the award to him of the Sixth Justice in the World Prize, Dato' Param Cumaraswamy stated that, based on his experience in that office, allegations of judicial corruption "are quite common" and there is a need for greater judicial accountability in the light of the increased number of complaints, particularly concerning judicial corruption.[5]

It is convenient to assemble the new developments with reference to the institutions which have been driving them.

THE UN GROUP ON STRENGTHENING JUDICIAL INTEGRITY

In November 2002 a Round Table Meeting of Chief Justices of Civil Law countries was held at the Peace Palace in The Hague for the purpose of reviewing the Bangalore Draft Code of Judicial Conduct, as it was then described. The Judicial Group had until that point in time comprised exclusively judges from English speaking countries, principally of the common law tradition. Those who had taken part were Chief Justices or senior judges from Australia, Bangladesh, India, Nepal, Nigeria, Sri Lanka, Tanzania and Uganda. The purpose of the meeting at The Hague was to expand the dialogue to civil law countries.[6]

There were two general outcomes of the meeting at The Hague. Firstly it was decided to describe the Bangalore Draft as "Principles" rather than as a "Code", the latter being considered as something more final and exhaustive than was intended.[7] Secondly it was also decided to omit the detailed provisions on implementation, leaving the manner of implementa-

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5 Dato' Param Cumaraswamy, Acceptance Speech, The Sixth Justice in the World Prize 2002, Justice in the World Foundation, International Association of Judges, Madrid, June 5, 2003, at p.6.

6 The Hon Justice Michael Kirby, "Judicial Integrity – A Global social Contract", address to the Opening Ceremony of the Third Meeting of the UN Judicial Group on Strengthening Judicial Integrity, Colombo, Sri Lanka, 10 January 2003 at pp.12-13.

7 *Ibid.* at p.13.

tion of the principles to the lawmaking traditions of each participating country.[8]

Justice Kirby, the rapporteur to the Judicial Group, has stated that several differences of view emerged in the meeting, which he identified as follows:

> "Civil law countries often afford a special status to prosecutors, different from that adopted in common law countries. Participation in politics is more common in the judiciaries of the civil law tradition. The right of free speech for judges tends to be less restricted. Methods of appointment, training and promotion are different. The right to withdraw a judges' labour in certain extreme circumstances is asserted by the judiciary of some countries. In others, there are specific problems connected with the risks of corruption, such as the involvement of judges in gambling. Finding common ground between these different views imposes upon international meetings the obligation to delete the inessential and to stick to the fundamental prerequisites."[9]

Nevertheless a consensus emerged from the meeting.

In January 2003 the UN Judicial Group held a further meeting, this time in Sri Lanka. Its purpose was to examine the report of the meeting in The Hague along with reports of case studies from Nigeria, Sri Lanka and Uganda. The result was that the meeting adopted the revised version of the Bangalore Draft as settled by the judges of the civil law tradition at The Hague and decided to postpone any further amendments to the text pending further consultations.[10] Such consultations will be pursued by the Chair of the Group, HE Judge Christopher Weeramantry, who will write to Chief Justices around the world informing them of the draft and inviting comments.

It follows that if the Chief Justices of Asia and the Pacific meeting in Tokyo wish to convey comments to the UN Judicial Group, it is open for them to do so either collectively or individually.

The provisions in the Bangalore Draft Principles most relevant to the issue of judicial corruption are those relating to judicial independence[11] and to impartiality.[12] In recognizing that judicial independence is a pre-requisite to the rule of law, the Bangalore Principles accept as an application of that

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8 *Ibid.*
9 *Ibid.*
10 Letter to the writer from the Rapporteur, 14 March 2003.
11 The Bangalore Principles of Judicial Conduct 2002, Value 1.
12 *Ibid.* at Value 2.

principle that "a judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures threats or interference, direct or indirect, from any quarter or for any reason."[13] A further relevant application is that "a judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate."[14] Additionally it is recognised that the inappropriate connections from which a judge must be free include the executive and legislative branches of government and that it is not only the existence of such freedom but that appearance to a reasonable observer of such freedom which is material.[15]

In asserting the principle of impartiality, the Bangalore Principles state that impartiality is essential to the proper discharge of judicial office both with respect to the decision and to the process by which it is reached.[16] The applications of the principle recognise that a judge must perform his or her judicial duties without fear, bias or prejudice.[17] A further application requires that a judge ensure that his or her conduct, both in and out of courts, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.[18]

Further values in the Bangalore Principles reinforce the application of the values of judicial independence and impartiality against the occurrence of judicial corruption. Those are the values of integrity[19] and propriety.[20] A particular application of the latter is that "a judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality."[21] Among such situations to which attention is directed by the principles are those arising from the judge's family situation, including their financial interests.[22] Importantly in relation to the possibility of corruption, the Principles state that "a judge and members of the judge's

13 *Ibid.* at 1.1.
14 *Ibid.* at 1.2.
15 *Ibid.* at 1.3.
16 *Ibid.* at Value 2.
17 *Ibid.* at 2.1.
18 *Ibid.* at 2.2.
19 *Ibid.* at Value 3.
20 *Ibid.* at Value 4.
21 *Ibid.* at 4.3.
22 *Ibid.* at 4.4, 4.7, 4.8 and 4.9.

family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties".[23] This principle is qualified to the extent that subject to the law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.[24]

COMMONWEALTH OF NATIONS

In 1998 the Latimer House Guidelines were adopted by representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association. These Guidelines set out good practice for relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights. They were designed to ensure effective implementation of the Harare Principles. Those principles were adopted at the 1997 Commonwealth Heads of Government Meeting at Edinburgh. They involved a pledge to work for the protection and promotion of the fundamental political values of the Commonwealth in relation to democracy and democratic processes reflecting the rule of law and the independence of the judiciary.[25] In considering the issue of judicial ethics, the Guidelines espoused the position that "a Code of Ethics and conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges."[26] The Guidelines also recommended that the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct.[27]

It was against that background that the Commonwealth Secretariat in collaboration with the Commonwealth Magistrates and Judges Association organised a Commonwealth Judicial Colloquium on Combating Corruption within the Judiciary in Limassol, Cyprus in June 2002. Twenty-three Commonwealth countries and jurisdictions were represented.[28] They were

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23 *Ibid.* at 4.14.

24 *Ibid.* at 4.16.

25 Commonwealth Judicial Colloquium on Combating Corruption within the Judiciary, Conference Report, Limassol, Cyprus, 25-27 June 2002 at p.135.

26 *Ibid.* at 135 (Latimer House Guidelines, Art v.1(a)).

27 *Ibid.* at 136 (Latimer House Guidelines, Art v.1(b)).

28 *Ibid.* at 6.

supplemented by judicial educators and experts in the area of combating corruption and by government officers whose responsibilities include the investigation of acts of judicial corruption.

The judicial officers attending the Colloquium accepted as a common philosophical and practical starting point, the Commonwealth Harare Declaration.[29] Importantly for present purposes they acknowledged:

> "... a judicial system free from corruption was an essential component of a truly democratic country and is critical to national development and the eradication of poverty. A court system that is free from corruption [is] one of the essential features of a country able to attract investment and thus develop in a way that would enhance the welfare of its people."[30]

Importantly also the judicial officers attending the Colloquium re-affirmed the 1999 commitment of the Commonwealth Heads of Government that:

> "...judicial independence does not imply a lack of accountability. Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land. There should be procedures to discipline or dismiss them if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial."[31]

The Colloquium was not in any sense confined to articulating principles only in generality. On the contrary, it focussed on the identification of strategies, best practices and actions that would achieve the objective of securing independence, integrity and accountability of judicial officers and a judicial system free from corruption.[32] The result was that the Colloquium, relevantly and in addition to the adoption of guidelines on judicial ethics[33], resolved that it:

> "...
> ii. urges all national and international legal professional organisations within the Commonwealth to promote anti-corruption programmes for the legal profession;
> encourages the formulation of national strategies aimed at eliminating conflicts of interest and corrupt practices within the judiciary;

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29 *Ibid.* at 6, conclusion 2.
30 *Ibid.* at 6, conclusion 3.
31 *Ibid.* at 6, conclusion 5.
32 *Ibid.* at 6, conclusion 6.
33 *Ibid.* at 7, conclusion 8.i.

> recognizing that transparency assists in combating corruption, encourages judicial officers and their court staff to foster greater public awareness of the court's operations, role and function."[34]

In support of these recommendations the Colloquium also resolved that judicial training programmes should be available and include training on ethical and corruption issues.[35] In further support it was recommended that "all judicial officers should be given training on anti corruption issues and on the promotion of professionalism and integrity both on appointment and at regular intervals during their tenure."[36] Specifically, it was recommended that such training should include "the handling of relations between the judicial officer, members of the general public, and local organisations, including members of the legal profession"; " awareness of the disguised nature of corrupt approaches and the broader effect of corrupt activity both on the judiciary as a body and upon society generally"; and "where they exist, an awareness of agreed procedures for reporting corrupt approaches and information relating to corrupt activities, together (with) the disciplinary consequences of a failure to follow those procedures."[37]

In a paper to the Colloquium, his Honour Judge Hollis, the Director of Studies in the CMJA, drew a distinction between individual corruption and systemic corruption. In relation to the former he considered that judicial isolation had the danger that it could encourage growth of judicial corruption. He raised the issue that the freedom of the press could be important in exposing the latter.[38]

In a keynote address, Judge Weeramantry suggested we have passed far beyond the stage where the principal threat to the judiciary is through bribes and threats. Rather, he said, today's attacks are far more complex and insidious and come from a wide variety of sources reflecting the growth in power, influence and complexity of political organisations, commercial entities and other power centres in society. The consequence is that approaches to the judiciary can be concealed under multiple layers of secrecy, rendering them very often quite difficult to detect so that judges are thrown back upon their own moral integrity and the forum of their conscience in preserving their rectitude.[39] Judges from their own experien-

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34 *Ibid.* at 7, conclusion 8.
35 *Ibid.* at 7, conclusion 9.
36 *Ibid.*, p.9, Annex A, item 1.
37 *Ibid.*, p.9, Annex A, item 2 vii, xii and xiii.
38 *Ibid.*, pp.36-39.
39 *Ibid.*, p.41.

ce will undoubtedly accept this as an accurate observation of the present condition in which the issue of judicial corruption is likely to arise. His later suggestion that the media may be another source of influence is also likely to strike a cord with present experience in many jurisdictions.[40] There could not be any quarrel with his concluding observation that combating corruption needs to occur on as many fronts as possible: internally and externally, domestically and internationally, conceptually and procedurally.[41]

Dr Nihal Jayawickrama, formerly Executive Director of Transparency International, referred in his paper to the issue of what evidence establishes corruption. He accepted that public perceptions may be unreliable, even exaggerated, but such perceptions required addressing.[42] He cited the findings of the Presidential Commission of Inquiry Against Corruption in Tanzania as having identified evidence more disturbing than public perceptions. The evidence was:

"i) court clerks demand bribes in order to open files;
ii) court clerks accept bribes from offenders in order to destroy case files;
iii) magistrates accept bribes in order to grant undeserving 'court injunctions';
iv) accused persons either voluntarily or under compulsion offer bribes to magistrates so that they are given light sentences;
v) magistrates and prosecutors accept bribes in order to reduce sentences or dismiss cases;
vi) bribes are solicited and given to magistrates and prosecutors so that accused persons may be granted bail;
vii) personal secretaries and typists accept bribes in order to produce copies of judgments;
viii) magistrates accept bribes from advocates so that they may give preferential judgments;
ix) primary and district court judges refuse to give copies of judgments to people who have lost their cases in order to prevent them from appealing to higher courts, thereby protecting those who have fraudulently obtained their judgments;
x) magistrates collude with auctioneers in selling property belonging to litigants who have lost their civil cases and share the receipts."[43]

Rightly he drew the connection between the loss of public confidence in the judicial system and the presence of corruption.[44]

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40 *Ibid.*, p.42.
41 *Ibid.*, p.43.
42 *Ibid.*, pp.47-48.
43 *Ibid.*, p. 48.
44 *Cf* Hon Chief Justice Gleeson, "Public Confidence in the Judiciary," (2002) 76 *Australian Law Journal* 558.

Other papers to the Colloquium considered issues relating to Commonwealth countries in the African region.

The conclusions of the Limassol Colloquium were further considered at the Commonwealth Magistrates' and Judges' Conference in Malawi in late August 2003. Issues considered in that context included the promotion of anti-corruption programmes, the position of the junior judge and the local court, maintenance and control of financial provision for the Courts, codes of ethics and conduct, education programmes, the role of the independent bar and the position of the lay magistrate.[45] The Chief Justices and Heads of Judiciary of Cyprus, Eastern Caribbean, England and Wales, Ghana, Guyana, Jersey, Kiribati, Lesotho, Malawi, Malta, Mauritius, Namibia, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe issued a statement following the meeting. It commended Codes of Conduct to guide members of the judiciary; endorsed the Limassol conclusions and urged their implementation; requested governments to improve conditions of judicial service and, to that end, urged them to establish independent commissions; and resolved to support the work of the CMJA.

BANK INITIATIVES

In furtherance of its aims to encourage development and investment by improvement of legal and judicial systems, in February 2003 the World Bank published volume 1 of The World Bank Legal Review. It is described as offering a combination of legal scholarship, lessons from experience, legal developments and recent research on the many ways in which the application of law and the improvement of justice systems promote poverty reduction, economic development and the rule of law.

It will be recalled that The World Bank was responsible for producing in August 1999 an analysis of the causes of corruption in the judiciary.'[46] The authors of that work have been responsible for further informative research in the area.[47]

In early August 2003 the Asian Development Bank conducted a seminar in Manila on issues related to judicial independence.

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45 Commonwealth Magistrates' and Judges' Conference, Registration Brochure, 13th Triennial Conference, Malawi, 24-29 August, 2003.

46 Edgardo Buscaglia and Maria Dakolias, "An Analysis of the Causes of Corruption in the Judiciary", The World Bank, August 1999.

47 Maria Dakolias and Kim Thachuk, "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform" (2000) 18(2) *Wisconsin International law Journal* 353; Edgardo Buscaglia, "An analysis of judicial corruption and its causes: An objective governing-based approach" (2001) 21 *International Review of Law and Economics* 233.

COUNTRY INITIATIVES

Many countries have recently taken initiatives either of their own making or in furtherance of regional or international obligations or objectives relating to judicial corruption. Chief Justices of the Asia Pacific region have been invited to contribute information on any such developments within their own jurisdiction. The following is information which is presently available from that source or otherwise. Information was sought on the following three questions:

(1) Are there any statutes or regulations in your jurisdiction which seek to prevent, control, or eliminate judicial corruption?
(2) Are there any codes, standards or guidelines in your jurisdiction which specifically address the issue of judicial corruption?
(3) Are there any significant or recent decisions of the highest court in your jurisdiction addressing issues relating to judicial corruption?

The following statements are compiled from such responses.

Australia

In June 2002 the Council of Chief Justices of Australia published through the Australian Institute of Judicial Administration a "Guide to Judicial Conduct". The purpose of the publication was to give practical guidance to members of the Australian judiciary at all levels. The Guide stated that there are three basic principles against which appropriate judicial conduct should be tested, namely impartiality, judicial independence and integrity and personal behaviour. In considering conflict of interest and its relevance to the maintenance of impartiality the Guide develops some specific statements in relation to "personal relationships". The full text of that aspect appears as an appendix to this paper.

China

The Chinese Communist Party and the Chinese Government have always attached great importance to judicial corruption. The sixteenth National Congress of CCP held in November 2002 reiterated the necessity to strengthen the supervision of judicial work and punishment of judicial corruption. In recent years, a series of statutes and regulations has been made to prevent, control and punish the abuse of judicial power by judges. Meanwhile, combining with the actual situations of Chinese courts and judges, China has also enacted a series of related conduct and disciplinary regulations concerning trial and enforcement work. Therefore, it is considered it can be said that a comparatively perfect legal and regulatory

system has been established to prevent, control and eliminate judicial corruption.

The *Judges Law of the People's Republic of China*, made in February of 1995 and amended in June of 2001, not only clarified the functions, rights and responsibilities of judges as well as the criteria for appointment and removal of judges, but also regulated the evaluation, awards and punishment of judges. It also especially identified the thirteen kinds of acts which cannot be conducted by judges when they perform their functions. Additionally, the Supreme People's Court, according to the characteristics of judicial organs, has a series of conduct and disciplinary regulations of judges, such as the *Fundamental Principles of Judicial Ethics of the People's Republic of China, Methods on the Investigation of the Responsibilities Arising from the Illegal Trial by Judges of People's Courts (Tryout), Methods on Trial Disciplinary Punishments in People's Court (Tryout)* and *Methods on Disciplinary Punishments concerning the Enforcement work in People's Courts (Tryout)*.

Regulations on thirteen kinds of acts which cannot be conducted by judges when they perform their functions in *Judges Law of the People's Republic of China*, and all prohibitive rules in Disciplinary Norms made by the Supreme People's Court are both special interpretations of judicial corruption. In China, judicial corruption refers to acts when the judiciary abuses judicial power, bends the law for the benefit of relatives or friends or seeks benefits for themselves depending on the authority they have. The disposition of judicial corruption can be classified into those attracting a criminal penalty, those meriting disciplinary punishment and those leading to removal from positions according to the nature of the circumstances and harmful consequences.

In order to ascertain disciplines of trial work in courts further, standardize and restrict professional conduct of judges for the purpose of preventing and punishing judicial corruption and ensuring the judicial impartiality and honesty, the Supreme People's Court issued *Several Regulations on Strict Implementation of Related Punishing Rules in Judges Law of the People's Republic of China* on June 18, 2003. The "Several Regulations" are the elaboration and interpretation of related rules in Article 32 of *Judges Law of the People's Republic of China*, which makes provision for more clear and concrete measures that can be applied in dealing with the thirteen kinds of acts which cannot be conducted by judges when they perform their function. The "Several Regulations" will be effective and applied in the whole country.

China: Hong Kong Special Administrative Region

The Prevention of Bribery Ordinance, Cap 201 of the Laws of Hong Kong deals with corruption including judicial corruption. This is accessible at http://www.justice.gov.hk/Home.htm.

China: Macao Special Administrative Region

(1) The statutes or regulations that seek to prevent, control and eliminate judicial corruption are as follows:
   (a) In accordance with the provisions of the law of the Macao Special Administrative Region on declaration of incomes, property and interests, every five years, and at the time of taking office, renewal and promotion, all magistrates have to declare to the President of the Court of Final Appeal on all the properties and earnings that belong to them, and also to their spouses. Misleading or delayed declarations will result in penalties.
   (b) There are special provisions made in Chapter 4 "Illegal acts committed while executing public duties" of the penal code of the Macao Special Administrative Region to address acts on corruption, bribery and abusive exercise of public functions committed by the magistrates and other civil servants.
   (c) The Statute of Magistrates of the Macao Special Administrative Region prescribes the rights and obligations of the magistrates, the procedures for disciplinary investigation, and specific authorities of the Council of Judicial Magistrates on investigation and disciplinary actions against the magistrates.

(2) In the three types of law as mentioned above, there are disciplinary systems provided by law that address the illegal acts committed by the magistrates, such as corruption, bribery and abusive exercise of public functions.

(3) No corruption and bribery have ever been committed by magistrates in the Macao Special Administrative Region, and the Court of Final Appeal, the Court of Appeal as well as the Court of First Instance have never heard cases on those issues.

Japan

Though there are neither statutes nor regulations in the Japanese jurisdiction the primary objective of which is to prevent, control or eliminate judicial corruption, there are some articles that aim to avoid judicial corruption in the Court Organisation Law, the Law of Impeachment of Judges, the Rule of Service Disciplines and the Penal Code.

(1) Court Organisation Law, article 49
"When a judge has swerved from his duty, neglected his duty or degraded himself, he shall be subjected to disciplinary punishment by judicial decisions."

(2) Law of Impeachment of Judges, article 2
"A judge is liable to be removed from his post on being impeached and convicted" when there is "conduct in grave contraventions of official duties or grave neglect of official duties" or "misconducts seriously affecting the integrity of a judge."

(3) Rule of Service Disciplines
A judge "must respect a sense of honor and keep away from a disgusting deed (Article 3)" and "cannot be given any donation from others regarding his official duties whether in the name of a reward, gratitude or not, and whether direct or indirect (Article 8)."

(4) Penal Code
Besides the Articles 197 – 198 concerning briberies and corruptions, Article 194 (Abuse of Authority by Special Public Officer) stipulates in regards to "abuses of the authority and arresting or detainment of another" by public officers including those who are in charge of justice.

Despite the existence of the National Public Service Ethics Law, enacted in 2000, which stipulates for national public service officials in general aiming "to deter activities that create suspect or distrust against the fairness of performance of duties", judges are excluded from the application of the law, for the reason that the judiciary has achieved a high level of vocational ethics through continuous efforts for many years. Still, the moral ethics standard provided by this law and others is respected in practice in relation to the parties in dispute and other persons.

The Japanese jurisdiction does not have any codes, standards or guidelines which specifically address the issue of judicial corruption.
There are not any significant or recent decisions of the Supreme Court of Japan addressing issues relating to judicial corruption.

It is thought that the reason why there is no specific laws and decisions on the matter of judicial corruption is that some good traditions and practices have been established inside the judiciary, and that each judge holds extremely strict self-discipline by trying not to damage the good traditions or by trying to improve by learning from others.

Kiribati

Kiribati has Guidelines for Judicial Conduct drawn up two years ago after a symposium on judicial corruption organised by the Commonwealth Secretariat in Cyprus.

Republic of Korea

(1) Concerning prevention, controlling or eliminating judicial corruption, in Korea, Article 65 of the Constitution provides impeachment grounds and procedures for the Judges. It is stated that if a judge and other public officials designated by the law have violated the Constitution or other laws in the performance of official duties, the National Assembly may pass motions for their impeachment. The motion may be proposed by one third or more of the total members of the National Assembly and shall require a concurrent vote of a majority of the total members of the National Assembly for passage.

Once the motion for impeachment has passed the National Assembly, the Constitutional Court makes judicial decisions regarding impeachment. In order for a decision to pass, six or more Justices of the Constitutional Court must approve it.

Other than the Constitution, there is the Judges Disciplinary Act, which stipulates the disciplinary measures and procedures for Judges. Article 2 of the Act provides that if a Judge committed a serious breach or has been negligent of one's duties, then he/she is subject to disciplinary measures. Furthermore, disciplinary measures may also be taken against a judge who has degraded oneself or maligned the dignity of the court.

(2) The Supreme Court pronounced the Judicial Code of Conduct, presenting the ideal ethical guideline that the judges should abide by both during on and off duty. The purpose of implementing the Code is to provide the judges with the principles and the rules of self-conscience and behaviour as a judicial member while strengthening the people's trust toward court decisions. The Judicial Code of Conduct was pronounced on 1 July 1995. Please refer to Attachment 1 for the full text of the Code.

(3) Decisions on issues related to judicial corruption cases were not made recently.

Malaysia

Malaysia has no specific statute or regulation concerning judicial corruption. The *Anti Corruption Act 1997* covers judicial corruption.

The Judges' Code of Ethics 1994 covers the issue of judicial corruption.

There is no significant or recent decision of the highest court in Malaysia on the issue of judicial corruption. The latest decision on judicial corruption involving a magistrate was decided by the Federal Court in 1997.

Northern Mariana Islands

(1) The judiciary of the Commonwealth of the Northern Marianas is guided by the Code of Judicial Conduct implemented on December 3, 1989 and the disclosure requirements to the Office of the Public Auditor mandated by Public Law 8-11.
(2) There are no specific does or statements or guidelines in this jurisdiction but we will look into cases from other U.S. jurisdictions or the Ninth Circuit where our cases are appealed to.
(3) There are no cases so far within the jurisdiction with respect to judicial corruption.

Pakistan

In regards to corruption in the superior judiciary, there is a prescribed Code of Conduct. The grounds as well as procedure for removal of a Judge of the Supreme Court and High Courts are laid down in Article 209 of the Constitution. The subordinate judiciaries also have a Code of Conduct which is the same as prescribed for the Provincial Civil Servants. Further, detailed procedures for removal from service are laid down in the Civil Servants (Efficiency and Discipline) Rules. Right of appeal against the order of the Chief Justice is available through the Provincial Subordinate Judiciary Service Tribunal.

Philippines

The following materials in the Philippines address the issue of judicial corruption:
(1) Provisions of the Constitution of the Philippines, particularly Art. VIII (Judicial Department) and Art. XI (Accountability of Public Officers).

(2) Provisions of the Revised Penal Code, particularly Articles 204, 205, 206, 207, 240 and 245.
(3) Anti-Graft and Corrupt Practices Act (R.A. No. 3019).
(4) Presidential Decree No. 46.
(5) Provisions of the Civil Code of the Philippines, particularly Articles 27, 32, 739 and 1491.
(6) Code of Judicial Conduct which became effective on October 20, 1989.
(7) Canons of Judicial Ethics (Adm. Order No. 162).
(8) Rule 140 of the Rules of Court as amended by AM No. 01-8-10-SC which took effect on October 1, 2001.
(9) A.M. No. 02-9-02-SC.
(10) Administrative Circular No. 62-2002.
(11) Decisions of the Supreme Court in:
- *People v. Valenzuela*, GR Nos. L-63950-60, April 19, 1985, wherein for the first time, the *res ipsa loquitur* principle was applied in an administrative case against a judge
- *Cuenco v. Fernan*, Adm. Case No. 3135, Feb. 17, 1988, holding that incumbent members of the Supreme Court may not be subjected to disbarment proceedings
- *Maceda v. Vasquez*, GR No. 102781, April 22, 1993, holding that where a criminal complaint against a Judge or other court member arises from their administrative duties, the Ombudsman must defer action on said complaint and refer the same to the Court for determination whether said Judge or court employee had acted within the scope of their administrative duties
- *In re 1999 Bar Examinations*, Bar Matter No. 979, March 22, 2000 (Minute Resolution), wherein the Court censured an incumbent Justice of the Court
- *Avancena v. Liwanag*, AM. No. MTJ-01-1383, March 5, 2003, dismissing a judge and requiring him to show cause why he should not be disbarred for violating the Anti-Graft and Corrupt Practices Act
- *Avancena v. Liwanag*, AM. No MTJ-01-1383, July 17, 2003, disbarring said judge.

Samoa

Samoa does not have any statutes or regulations which seek to prevent, control or eliminate judicial corruption.

It is presently working on the second draft of a Bench Book for Land and Titles Court Judges to be finished in October/November 2003 which will

address the issue of judicial corruption amongst other matters. What is said in that Bench Book in relation to Land and Titles Court Judges will be relevant to all Judges of the Samoan Courts.

Samoa does not have any significant or recent decisions of its highest Courts (Court of Appeal) addressing issues relating to judicial corruption.

Singapore

There are no statutes or regulations in Singapore which seek to prevent, control or eliminate judicial corruption. The *Prevention of Corruption Act* became law in 1960, but it applies to everybody and is not specifically about judicial corruption.

There are no codes, standards or guidelines in Singapore which specifically address the issue of judicial corruption.

There has not been any case in the Supreme Court of Singapore concerning judicial corruption.

Solomon Islands

Presently there is no legislation specifically dealing with judicial corruption nor any guidelines or judicial decisions in Solomon Islands that address the issue of judicial corruption.

Tonga

(1) The only provision is clause 75 of the Constitution which provides for impeachment by the Legislative Assembly for:

> "Breach of the laws or the resolutions of the Legislative Assembly maladministration, incompetency, destruction or embezzlement of Government property, or the performance of acts which may lead to difficulties between this and another country."

(2) There are no code or guidelines on judicial conduct except that the Magistrates are working on guidelines at present. Once these have been drafted the aim is hold a meeting of magistrates and judges to finalise guidelines.

(3) There are no cases on corruption.

Vietnam

In Vietnam, independence of the court in adjudication is a constitutional principle. This principle also could be found in a number of laws such as procedural laws, Law on Organisation of the People's Court, Ordinance on Judges and Assessors of the People's Court. The first Constitution of Democratic Republic of Vietnam, which was promulgated in 1946, has stated "During adjudication, judges shall obey only law, other state agencies shall not be allowed to intervene". The following 1959, 1980 and 1992 Constitutions of Vietnam again and again assured this principle. Article 130 of the 1992 Constitution of Vietnam provides "During adjudication, judges and people's assessors are independent and shall obey the law".
In Vietnam, corruption is currently considered as a "national evil", a major cause that makes the country poor and slow-developed, a challenge/barrier to successful economic and judicial reforms. Therefore, the Government of Vietnam keeps a standpoint that all corruption acts should be timely discovered and strictly dealt with. Persons performing corruption acts should be strictly punished in accordance to the law notwithstanding whoever he is, whatever position he holds. In 1998, Vietnam has promulgated Ordinance on Fighting against Corruption. This Ordinance defines the corruption acts, specifies subject of the corruption acts, lists measures to prevent corruption, to discover corruption acts and to deal with violators and identifies obligations of state agencies, organisations and individuals in the fight against corruption. Besides, criminal law of Vietnam also contains provisions on crimes of corruption nature such as embezzling property, receiving bribes, abusing position and/or power to appropriate property, abusing position and/or power while performing official duties, abusing position and/or power to influence other persons for personal profits, etc. According to the provisions of the Criminal Code a person who commits crime of a corruption nature could be sentenced up to 20 years imprisonment, life imprisonment or the death penalty. Judges or other legal professionals who commit the crime of corruption shall be treated in the same way as other officials and receive similar punishment. This is the policy of Vietnam towards corruption.

Based on the foregoing approach, at present, Vietnam is implementing a number of different groups of solutions to fight against corruption, including corruption in the judicial sector. Those groups include a group of institutional and legal solutions, a group of state administration solutions and a group of social and economic solutions.

With respect to the group of institutional and legal solutions, Vietnam is determined to carry out reform of organisation and operation of the court and

improvement of its legal system, including the improvement of substantive and procedural laws. The improvement of legal system aims at filling up the gaps in legal regulations that could be abused for personal benefits. The reform of court should produce the rationally organised and well-functioned court to ensure its independence. Court procedure will be modified toward the broader application of adversarial element; at the time, it should be simpler, more public and transparent. Rights and obligations of the citizen will be more fully, clearly and accurately regulated, etc. If these reforms were to be done, they would clear out or limit the circumstances leading to the corruption acts in the judicial sector.

With respect to the group of state administration solutions, Vietnam is improving the mechanism for training and appointment of judges. Educational and ethical standards, self-confidence and professional liability of judges should be enhanced. Only when judges are fully aware of their social liability, fully equipped with the necessary legal, cultural and scientific knowledge, they could be self confident in their job and prevent themselves from all kinds of seductions. Besides, legal regulations should clearly describe what judges can and/or cannot do during the exercise of their functions and in the normal life. For example, Ordinance of Judges and Assessors of the People's Court States that judges can not do things that law prohibits public servants to do; they also cannot provide consultant services to the accused or parties to the case under their possession. Judges cannot illegally interfere into the dealing of cases not assigned to them or abuse their influence to persons who are responsible for the case. Judges are prohibited to receive the accused or parties of the case under their possession outside the assigned place.

Vietnam is also carrying out a *group of social solutions* with the view to building up a mechanism of internal and external supervision over the court. This is done in order to timely discover corruption acts committed by judges and/or other officials of the court and deal with them. However, this democratic supervision mechanism should not be abused to illegally interfere into the adjudication work of judges. Role of mass media in conveying public opinions and comments on certain corruption or wrongful acts of judges should be enhanced. Legal dissemination and education should be improved to equip the people with necessary legal knowledge that helps them to correctly understand basic legal issues and enables them to protect themselves. People should be taught that the function and task of the court is to protect legitimate rights and interests of citizens and that to give bribes to judges for favours is illegal and immoral conduct. Concurrently, enhancement of the role of lawyers and

non-government legal consultant organisations is also one of the focuses of this group of solutions.

The last group of solutions is *group of economic solutions.* It is done in order to ensure that working conditions and salary levels of judges should be equal to the nature of their labour and to the role that they play in the State and society.

ISSUES TO BE ADDRESSED

The above developments and the literature in relation to them make apparent that there are a number of issues of continuing significance which require to be addressed in the development of any local, regional or international consideration of preventing or eliminating judicial corruption. The following are listed as the most important:

1. What conduct should be included within the description "judicial corruption"?
2. What form of external regulation is appropriate to address judicial corruption? How would complaints be made and by whom?
3. What form of internal judicial self-regulation is appropriate to address judicial corruption? Should there be codes or guidelines?
4. To what extent should there be public involvement to counter the advent of judicial corruption? Does the media have a role? Should there be lay panellists?
5. What role should judicial education play in the prevention and elimination of judicial corruption?
6. What institutional reforms are desirable for the same purpose? What methods of selection and advancement of judges should be applicable and how can salaries be kept at an adequate level?
7. What role do prosecutors play in preventing judicial corruption?

CONCLUSION

There is world-wide interest in considering and conquering the presence of corruption in the judiciary. Many judiciaries have a proud record of corruption free performance. In the interests of justice through application of the law, it is of tremendous importance that dialogue and action directed to the prevention and elimination of judicial corruption continue with thoroughness and vigour.

APPENDIX

EXTRACT FROM AUSTRALIAN GUIDE TO JUDICIAL CONDUCT ON PERSONAL RELATIONSHIPS OF JUDGES

"There are many personal relationships to be considered. The most important relationships may be categorised for present purposes as:

***First Degree** – parent, child, sibling, spouse or domestic partner;*
***Second Degree** – grandparent, grandchild, "in-laws" of the first degree, aunts, uncles, nephews, nieces;*
***Third Degree** – cousins and beyond;*
And such relevant relationships may exist with:
(i) Parties;
(ii) Legal advisers or representatives of parties;
(iii) Witnesses.
In addition to such relationships, friendship or past professional or other association with such persons needs to be considered in some situations. There are no hard and fast rules, but the following guidance is offered.

(a) A judge should not sit on a case in which the judge is in a relationship of the first, second or third degree to a party or the spouse or domestic partner of a party.

(b) Where the judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Ordinarily there is no need to do so if the matter is uncontested or is a relatively minor or procedural matter. Nor is there a need to do so merely because the person in question is a partner in, or employee of, a firm of solicitors or public authority acting for a party. In such cases, it is a matter of considering all the circumstances, including the nature and extent of the involvement in the matter of the person in question. Some judges may be aware of cases involving such a relationship when the judge has sat without objection, but current community expectations make such conduct undesirable.

In most of these situations, Bar Rules in each jurisdiction require a barrister to return a brief to appear in a contested hearing, so the occasion for a judge disqualify himself or herself should arise infrequently.

There may be a justifiable exception by reference to the principle of necessity (see par 2.1), or where the solicitor-relative is a partner or employee of the solicitor on the record, but has not been involved in the preparation or presentation of the case. There may also be a justifiable exception where, notwithstanding the relationship, the parties to the case consent to the judge sitting but that may

depend upon the nature of the relationship, which should be disclosed to the parties before the judge decides whether to sit or not to sit.

(c) *Personal friendship with a party is a compelling reason for disqualification, but friendships should be distinguished from acquaintanceship which may or may not be a sufficient reason for self-disqualification, depending upon the nature and extent of such acquaintanceship. The judge should consider whether to inform the parties of an acquaintanceship before the hearing begins.*

(d) *A current or recent business association with a party will usually mean that a judge should not sit on a case. For this purpose a business association usually does not include associations such as insurer and insured, banker and customer, rate payer and local government body, but might do so, depending on the circumstances.*

(e) *Past professional association with a party as a client is not of itself a reason for disqualification unless the judge has been involved in the subject matter of the litigation prior to appointment or unless the past association gives rise to some other good reason for disqualification.*
If the judge has been involved in the subject matter of litigation, the judge should not sit, but otherwise the decision to sit or not to sit may depend upon the extent of previous representation and when it occurred. It may be desirable to disclose the circumstances of such representation to the parties before deciding what to do. The nature and content of anything learned, or any views formed, bearing upon the credibility of the party may need to be considered.

(f) *Friendship or past professional association with counsel or solicitor is not generally to be regarded as a sufficient reason for disqualification.*

(g) *Where a person who is in a first degree relationship to the judge is known to be a witness, the judge generally should decline to take the case, unless the witness is to give only undisputed narrative testimony. In such a case, and if no objection is taken by the parties, the judge may decide to sit, but may well choose not to do so.*

(h) *Where the relationship of a witness to the judge is of the second or remoter degree, disqualification by the judge is less compelling, but again the decision to sit or not to sit may depend upon the nature of the testimony and the issue, if any, of credibility.*

(i) *The mere fact that a witness is personally well known to the judge, may not of itself be a sufficient reason for disqualification of the judge. If however the credibility of the witness, as distinct from the opinion, is known or likely to be in dispute, the judge should not sit.*

(j) *A recent business association between a judge and a witness will not necessarily be a basis for disqualification of the judge, if the association involved only an isolated transaction, but all of the circumstances should carefully be considered. In the latter two cases, the fact of the relationship or friendship, and ordinarily its nature, should be disclosed to the parties.'*

PROGRESS TOWARDS A UNITED NATIONS TREATY AGAINST ENFORCED DISAPPEARANCES

FEDERICO ANDREU-GUZMÁN[1]

PRELIMINARY CONSIDERATIONS

The enforced disappearance of persons is one of the most serious forms of human rights violation. Its practice has been described as an "offence to human dignity"[2] and as a "grave and abominable offence against the inherent dignity of the human being".[3] The United Nations General Assembly has repeatedly stated that enforced disappearance "is an offence to human dignity and a grave and flagrant violation of human rights and fundamental freedoms [...] as well as a violation of the rules of international law".[4]

Enforced disappearance is not a simple human rights violation. This practice violates numerous human rights, many of them permanently non-derogable, as specifically recognised by the Declaration on the Protection of all Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons. The nature of enforced disappearance as a multiple human rights violation has been repeatedly recognised by the Inter-American Court of Human Rights.[5] International case law and doctrine have frequently indicated that enforced disappearance *per se* constitutes a violation of a person's right to security; to protection from the law; to freedom from arbitrary detention; to recognition as a person before the law; and to freedom from torture or cruel, inhuman or degrading treatment. Professor Dalmo Abreu Dallari points out that enforced disappearance is "one of the gravest crimes that can be committed against a human being".[6]

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1 Senior Legal Adviser, International Commission of Jurists.

2 Article 1 of the Declaration on the Protection of all Persons from Enforced Disappearance.

3 Inter-American Convention on Forced Disappearance of Persons, Preamble, paragraph 3.

4 Resolution 49/193 of the General Assembly, adopted on 23 December 1994. In this same regard, see resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998.

5 See, for example, the Inter-American Court of Human Rights, *Velásquez Rodríguez* case, Ruling of 29 July 1988, para. 155; *Godínez Cruz* case, Ruling of 20 January 1989, para. 163; *Fairén Garbi y Solís Corrales* case, Ruling of 15 March 1989, para. 147; and *Blake* case, Ruling of 24 January 1998, para. 65.

6 *Le refus de l'oubli – La politique de disparition forcée de personnes – Colloque de Paris, janvier – février 1981*, Published by Berger-Levrault, Paris 1981, p. 90 (original in French, free translation).

One characteristic element of enforced disappearance is that it removes the individual from the protection of the law.[7] As reality shows, this specificity of enforced disappearance has the consequence of suspending a disappeared person's enjoyment of all rights, placing the victim in a situation of total defencelessness. As Alejandro Artucio clearly described, "a disappeared person who the authorities deny having arrested logically cannot exercise his/her rights, nor invoke any remedy".[8] This element is all the more serious, considering that enforced disappearance is a human rights violation and crime of a continual or permanent nature.

But the disappeared person is not the only victim of enforced disappearances. The UN Working Group on Enforced or Involuntary Disappearances has concluded, in the light of its experience, that the families of the disappeared are also victims as they, along with other relatives and dependants, are subjected to an "anguished uncertainty" and thus there is a "wide circle of victims of a disappearance".[9] The Inter-American Commission on Human Rights also concluded that enforced disappearance "affects the entire circle of family and friends, who wait for months and sometimes years for some news of the victim's fate".[10] Needless to say, enforced disappearance is frequently associated not only with illegal procedures on the part of the authorities but, often, clandestine actions more generally associated with terror. The air of insecurity created by this practice extends not only to the friends and relatives of the disappeared but also to the communities or groups to which the disappeared person belongs, and to society itself. The Working Group on Enforced or Involuntary Disappearances rightly concluded that enforced disappearances also have devastating effects on the societies within which they occur.[11] This same observation was made by the 24th International Conference of the Red Cross and Red Crescent, which recalled that enforced disappearances caused not only great suffering to the relatives

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7 See, for example, paragraph 3 of the Preamble to the Declaration on the Protection of all Persons from Enforced Disappearance. In the same regard, see article II of the Inter-American Convention on Forced Disappearance of Persons and article 7 (2) (i) of the Rome Statute of the International Criminal Court.

8 Alejandro Artucio, "La disparition instrument ou moyen pour d'autres violations des droits de l'homme", in *Le Refus de l'oubli ..., op. cit.*, p. 106 (original in French, free translation).

9 United Nations Document E/CN.4/1990/13, para. 339.

10 *Annual Report of the Inter-American Commission on Human Rights – 1978*, OEA/Ser.L/II.47, doc. 13 rev. 1, of 29 June 1979, p. 23. In this same regard, see the *Annual Report of the Inter-American Commission on Human Rights, 1980 – 1981*, OEA/Ser.G, CP/doc.1201/1981, of 20 October 1981, p. 113.

11 United Nations document E/CN.4/1985/15, para. 291.

of the disappeared "but also to society".[12] Enforced disappearance cannot therefore be epitomized as a number of human rights violations, as its practice – systematic or not, widespread or not – creates a climate of terror, both within the family nucleus of the disappeared person and within the groups and communities to which he or she belongs.

Nowadays, it is clearly acknowledged that enforced disappearance constitutes a form of torture for the relatives of the disappeared. In 1978, the UN General Assembly stated its shock at "the anguish and sorrow which such [enforced disappearances] cause to the relatives of disappeared persons, especially to spouses, children and parents".[13] Recognition of the distress, sorrow and suffering to which the relatives of the disappeared are subjected through the very act of enforced disappearance has now been translated into normative doctrine. The Declaration on the Protection of all Persons from Enforced Disappearance thus expressly establishes that, "Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families".[14] This reality has been noted by the UN Human Rights Committee[15], the European Court of Human Rights[16], the Inter-American Commission on Human Rights[17] and the Inter-American Court of Human Rights[18].

Enforced disappearance is not only a serious and multiple violation of fundamental rights but also an international crime. In 1983, the General Assembly of the Organisation of American States, in a far-reaching

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12 24th International Conference of the Red Cross and Red Crescent, Manila, 1981, Resolution II "Enforced or Involuntary Disappearances".

13 Resolution 33/173 "Disappeared persons", adopted by the United Nations General Assembly, 20 December 1978. In this same regard, see, for example, Resolutions 43/159 of 1988, 44/160 of 1990, 46/125 of 1991 and 47/132 of 1992 of the United Nations General Assembly.

14 Article 1 (2) of the Declaration on the Protection of all Persons from Enforced Disappearance.

15 Human Rights Committee: decision of 21 July 1983, Communication 107/1981, *María del Carmen Almeida de Quinteros* case (Uruguay), para. 14; decision of 25 March 1996, Communication 542/1993, *Katombe L. Tshishimbi* case (Zaire), CCPR/C/56/542/1993, para. 5.5; decision of 25 March 1996, Communication 540/1996, *Ana Rosario Celis Laureano* case (Peru), CCPR/C/56/540/1993, para. 8.5. In this same regard, see *Final Observations – Algeria* (CCPR/C/79/Add.95, of 18 August 1998 para. 10) and *Final Observations – Uruguay* (CCPR/C/79/Add.90).

16 See, European Court of Human Rights, Ruling of 25 May, Case N° 15/1997/799/1002, *Kurt v. Turkey.*

17 See, *inter alia, Annual Report of the Inter-American Commission on Human Rights, 1977-1978,* OEA/Ser.L/V/II.43, doc.21, corr.1, p. 24; and the *Report on the Human Rights Situation in Argentina,* 1980, OAS document OEA/Ser.L/V/II/49, doc. 19, p. 59.

18 See, *inter alia,* Inter-American Court of Human Rights, Ruling of 24 January 1998, *Blake v. Guatemala* case, para. 116.

resolution, stated that the practice of enforced disappearance constituted a crime against humanity.[19] The General Assembly was to repeat this description in subsequent resolutions.[20] Nowadays, international law only classifies enforced disappearance as a crime against humanity when it is committed within the context of a systematic or wide-scale practice.[21] Nonetheless, enforced disappearance is undeniably a crime under international law.[22] The United Nations General Assembly has described enforced disappearance as a violation of international law and a crime punishable under criminal law.[23]

LONG PROCESS OF INTERNATIONAL CODIFICATION

Despite the fact that enforced disappearance is recognised as one of the most serious violations of basic rights and a crime under international law and its practice persists in various regions of the world, there is no international treaty of universal vocation enabling this serious phenomenon to be countered. Within the universal human rights system, there is no treaty that defines the crime of enforced disappearance or establishes obligations with regard to the prevention, investigation and eradication of this practice.

The international community's first reactions to enforced disappearances date back to the 1970s. The situations in Chile and Argentina highlighted the seriousness of enforced disappearances and the need to establish international protection mechanisms in the face of this scourge. As Wilder Tayler notes, "the Inter-American Commission on Human Rights (IACHR) began denouncing the 'phenomenon' of disappearances in 1974 in its regular reports to the General Assembly of the Organisation of American

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19 Resolution AG/RES. 666 (XIII-0/83), adopted on 18 November 1983, para. 4.

20 See Resolutions AG/RES. 742 (XIV-0/84), adopted on 17 November 1984, para. 4; AG/RES. 950 (XVIII-0/88), of 19 November 1988, para. 4; AG/RES. 1022 (XIX-0/89), of 10 November 1989, para. 7; and AG/RES. 1044 (XX-0/90), of 8 June 1990, para. 6.

21 In this regard, see *Report of the International Law Commission on the work of its 48th session – 6 May to 26 July 1996*, United Nations document Supplement No. 10 (A/51/10), pp. 100 to 111; the Declaration on the Protection of All Persons from Enforced Disappeareance (preamble); the Inter-American Convention on Forced Disappearance of Persons (Preamble); and the Rome Statute of the International Criminal Court, article 7.

22 See in this regard, O. de Frouville, "Les disparitions forcées", in H. Ascensio, E. Decaux and A. Pellet, *Droit international pénal*, CEDIN – Paris X, pub. A Pedone, Paris 2000, pp. 377 and following; Nigel Rodley, *The treatment of prisoners under international law*, Clarendon Press – Oxford, Second Edition, 1999, pp. 266-269; Kai Ambos, *Impunidad y derecho penal internacional*, pub. Ad Hoc, 2nd edition, Buenos Aires, 1999, pp. 113 and following; and *La desaparición, crimen contra la humanidad*, pub. APDH, Buenos Aires 1988.

23 Resolution 49/193 of the General Assembly, adopted on 23 December 1994. In the same regard, see Resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998.

States."[24] Within the sphere of the United Nations, the General Assembly adopted its first resolution on enforced disappearances in 1978, urging governments to devote resources to the search for the "disappeared".[25] Subsequently, in 1980, the Commission on Human Rights established the Working Group on Enforced or Involuntary Disappearances.[26] In addition, from the start of the 1980s, the Human Rights Committee of the International Covenant on Civil and Political Rights adopted important recommendations on cases of enforced disappearances.

From 1980 onwards, the first efforts to establish an international legal framework to combat enforced disappearances and, in particular, to draft an international convention emerged. These initiatives arose largely from civil society. The International Commission of Jurists was involved in these efforts from the start. The first international effort to promote an international convention against enforced disappearances was the international symposium organised in 1981 by the Institute of Human Rights of the Bar of Paris. In 1982, the *Federación Latinoamericana de Familiares de Detenidos Desaparecidos* (Latin American Federation of the Families of the Disappeared – FEDEFAM) adopted a draft Convention at its annual Congress in Peru. In 1986, a draft declaration was adopted by the First Symposium on Enforced Disappearances in Colombia, organised by the *Colectivo de Abogados José Alvear Restrepo* (José Alvear Restrepo Lawyers' Group) in Bogotá. In 1988, FEDEFAM and the *Grupo de Iniciativa* (a group of Argentinian NGOs) organised an international meeting in Buenos Aires, from which emerged a new draft convention. Nonetheless, as Wilder Tayler notes, "Following the Paris colloquium and until 1987, the impetus for the elaboration of norms specifically dealing with forced disappearances shifted to Latin America, generating intense activity at the regional NGO level and in the inter-American system. Nevertheless, the principle objective of these initiatives continued to be that of elaborating instruments of universal protection."[27] The majority of these drafts were sent to the United Nations, either to the Commission on Human Rights and the Working Group on Enforced or Involuntary Disappearances or the then-Sub-Commission on the Prevention of Discrimination and Protection of Minorities.[28]

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24 Wilder Tayler, "Background to the Elaboration of the Draft International Convention for the Protection of all Persons from Forced Disappearance" in *International Commission of Jurists – The Review*, July 2001, N° 62-63, p. 63.

25 Resolution 33/173 of 1978 of 20 December 1978.

26 Resolution 20 (XXXVI) of 29 February 1980.

27 Wilder Tayler, *op. cit.*, p. 65.

28 This body is now the Sub-Commission on the Promotion and Protection of Human Rights.

At the end of the 1980s, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, through its "detention" Group, commenced an examination of a draft Declaration on Enforced Disappearances, presented by the expert Louis Joinet. Previously, the Working Group on Enforced or Involuntary Disappearances had recommended that the Sub-Commission should consider the need to prepare an international United Nations instrument against enforced disappearances. In 1989, the Sub-Commission finalised its work and adopted a draft Declaration on the Protection of all Persons from Enforced Disappearance. In 1990, the Commission on Human Rights established an intersessional working group charged with examining the draft Declaration. This draft was rapidly considered and adopted and, in 1992, the General Assembly of the United Nations adopted the Declaration on the Protection of all Persons from Enforced Disappearance.[29]

Meanwhile, within the inter-American sphere, a process was underway to elaborate a convention against forced disappearances. In 1987, the General Assembly of the Organisation of American States (OAS) requested that the Inter-American Commission on Human Rights (IACHR) draw up a draft convention. In 1988, the IACHR submitted a draft. In 1994, the OAS General Assembly adopted the Inter-American Convention on Forced Disappearance of Persons.[30]

TOWARDS AN INTERNATIONAL TREATY AGAINST ENFORCED DISAPPEARANCES

With the adoption of the Declaration on the Protection of all Persons from Enforced Disappearance, the UN General Assembly recalled the importance of elaborating "an instrument which characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission".[31] The adoption of this Declaration certainly constituted an important step forwards in establishing a normative framework to combat enforced disappearances. Nonetheless, the Declaration on the Protection of all Persons from Enforced Disappearance is not a legally binding instrument.

In the mid-1990s, various international non-governmental organisations relaunched the initiative for a United Nations convention against enforced disappearances. In 1994, Amnesty International (AI) began a comparative

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29 Resolution 47/133, of 18 December 1992, of the United Nations General Assembly.
30 The Convention came into force on 28 March 1996.
31 Resolution 47/133 of 18 December 1992.

analysis of all the draft conventions and declarations as well as the Declaration on the Protection of all Persons from Enforced Disappearance, with a view to facilitating the drafting of a United Nations convention. The study was submitted for the consideration of Louis Joinet, expert of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, subsequently renamed the Sub-Commission for the Promotion and Protection of Human Rights. On this basis, in 1995 Mr. Joinet produced a preliminary draft *International Convention for the Protection of all Persons from Enforced Disappearance*. In June 1996, Amnesty International (AI) and the International Commission of Jurists (ICJ) organised an initial seminar of experts to work on the preliminary draft presented by Mr. Joinet to the Sub-Commission. Another seminar was organised by AI and the ICJ in November 1997, after the Working Group on the Administration of Justice of the Sub-Commission had begun to examine the draft international convention.[32] In 1998, the Sub-Commission adopted the draft *International Convention for the Protection of all Persons from Enforced Disappearance*[33] and remitted it to the Commission on Human Rights for examination and adoption.

The draft Convention produced by the Sub-Commission is based primarily on the Declaration on the Protection of all People from Enforced Disappearance. But the Working Group on the Administration of Justice also considered the Inter-American Convention on Forced Disappearance of Persons, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment and other international instruments, such as the doctrine of the Working Group on Enforced or Involuntary Disappearances.[34] The draft Convention consists of a preamble plus three parts. The First Part (articles 1 to 24) contains substantive provisions relating to a definition of the crime of enforced disappearance and obligations in terms of prevention, investigation, eradication, international cooperation and reparation, along with various safeguard clauses. The Second Part (articles 25 to 33) contains provisions relating to the monitoring mechanism and international supervision and protection procedures. Finally, the Third Part (articles 34 to 39) refers to the final clauses.

THE COMMISSION ON HUMAN RIGHTS AND THE SUB-COMMISSION'S DRAFT

In 1999, the Sub-Commission's draft Convention was placed on the work agenda of the Commission on Human Rights. Non-governmental organisa-

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32 See in this regard United Nations document E/CN.4/Sub.2/1998/19, paras. 10 to 15.
33 United Nations document E/CN.4/Sub.2/1998/19, Annex.
34 United Nations document E/CN.4/Sub.2/1996/16, paras. 38 and following.

tions actively involved in the process[35] asked the Commission on Human Rights to establish an intersessional open-ended working group with a mandate to consider and adopt the draft Convention. Despite the fact that this initiative received the strong support of diplomatic delegations from Latin America, France and Sri Lanka, it gained insufficient support for the proposal to be accepted. Some European States wrongly felt that enforced disappearance was essentially an issue of the past and a practice that had proliferated largely in Latin America, for which reason the adoption of such a convention was not considered necessary. The reports of the Working Group on Enforced or Involuntary Disappearances have demonstrated that this perception of the phenomenon of enforced disappearances is severely mistaken: unfortunately, the reports reveal that the practice is neither one of the past nor exclusive to just one region of the world. Other European diplomatic delegations felt that the issue would be resolved with the adoption of the Rome Treaty of the International Criminal Court. While it is clear that the Rome Statute will enable the future suppression of enforced disappearance by an international court, the International Criminal Court will only be able to suppress this conduct when it is committed "as part of a widespread or systematic attack directed against any civilian population"[36], or when it is a crime against humanity. From any angle, the Rome Statute is insufficient to face up to the problem of enforced disappearance. First, the Rome Statute does not address the problem of enforced disappearance when it is not a crime against humanity, in other words when it occurs outside of a "widespread or systematic attack directed against any civilian population". In actuality, a very large number of enforced disappearances take place outside the realms of a systematic or widespread practice. These enforced disappearances will remain outside the sphere of competence of the future International Criminal Court. Secondly, the Rome Statute does not establish specific obligations for the prevention, investigation and eradication of enforced disappearance at domestic level. Thus, in 1999, the Commission on Human Rights limited itself to asking the UN Secretary-General to request the opinions of the States, the international organisations and non-governmental organisations on the draft Convention.[37]

In 2000, the ICJ and other non-governmental organisations, together with the Sub-Commission, requested that the Commission on Human Rights establish an intersessional working group to consider the draft Convention. The Sub-Commission also urged the Commission on Human Rights to

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35 In particular, the ICJ, FEDEFAM, AI, Human Rights Watch and the International Federation for Human Rights (FIDH).

36 Article 7 of the Rome Statute of the International Criminal Court.

37 Resolution 1999/38, para. 9.

examine the draft Convention "as a priority".[38] In addition to France, the Latin American countries and Sri Lanka, this request was supported by various States. A number of diplomatic delegations continued to show hostility towards this initiative and the Commission on Human Rights limited itself to repeating its requests for comments on the draft Convention.[39] Nevertheless, the Commission on Human Rights did take an initial step towards establishing a procedure for considering the draft Convention, by requesting that the Secretary-General collect "views and comments, as a matter of high priority, on the draft International Convention, on the follow-up thereto, and, in particular, on whether an intersessional working group should be set up to consider it".[40] That same year, the ICJ organised a seminar on the draft Convention, directed at the diplomatic missions in Geneva. The ICJ's aim was to counter the arguments being made by some delegations against creating the Working Group, in particular those stemming from a misreading of the Rome Treaty or an erroneous perception of the phenomenon of enforced disappearances. The seminar also considered the most appropriate way in which the Commission on Human Rights should examine the draft Convention.

At the 57th session of the Commission on Human Rights in 2001, the ICJ and other non-governmental organisations again asked the Commission on Human Rights to establish an intersessional working group to consider the draft Convention. The Working Group on Enforced or Involuntary Disappearances submitted its comments and observations on the Sub-Commission's draft Convention on to the Commission on Human Rights.[41] The Working Group on Enforced or Involuntary Disappearances supported the creation of an intersessional working group to study the draft Convention and "expresse[d] its hope that the Commission on Human Rights w[ould] speedily finalize the drafting process".[42] In addition, the Working Group noted, *inter alia*, the fact that the draft Convention picked up "many of the recommendations which the Working Group has for many years submitted to the Commission on Human Rights and Governments".[43]

With the support of all member countries of the Latin American and the Caribbean Group (GRULAC) and various European and African countries, France proposed the establishment of an intersessional working group to

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38 Resolution 2000/18 of 17 August 2000, para. 2.
39 Resolution 2000/37, para. 3 (j).
40 Resolution 2000/37, para. 9.
41 United Nations document E/CN.4/2001/68, Annex III, 18 December 2000.
42 *Ibid.*
43 *Ibid.*

consider the draft Convention. However, certain States, such as the United States of America, India and Australia, fiercely opposed this initiative. Others, such as the United Kingdom and Canada, considered that it was premature and that there was a need to determine whether such a treaty was necessary, given the international instruments already in existence. Other States, such as Switzerland, while conscious of the need to adopt a treaty against enforced disappearances, considered that, due to financial considerations and the proliferation of new treaty monitoring bodies, it was advisable to consider the possibility of elaborating a third protocol to the International Covenant on Civil and Political Rights. Following difficult negotiations, a broad group of States agreed to propose a completely new formula: firstly to establish an intersessional working group to draft a new treaty on enforced disappearances – without specifying whether it related to a Convention or a Protocol – and, secondly, to request a study to determine whether existing international standards enabled the effective and full protection of individuals from enforced disappearances to be guaranteed. The proposal was presented by France, with the joint backing of 49 States. The United States of America proposed removing the paragraph establishing the intersessional working group from the draft Resolution presented by France. Mexico requested that this proposal be voted on separately before voting on the Resolution as a whole. Thirty-four States voted against the US proposal and 15 abstained. The United States of America, India, Japan and Malaysia voted in favour, in other words against the proposal to create the intersessional working group. Finally, the Resolution was adopted by consensus.

The Commission on Human Rights thus established two concrete mechanisms by which to initiate the process of examining the draft Convention.[44] First, the Commission on Human Rights decided to appoint an independent expert with the mandate to undertake a study into the existing international criminal and human rights framework for enforced disappearances, and to identify existing gaps in order to ensure full protection from enforced disappearances.[45] Mr. Manfred Nowak, outgoing member of the Working Group on Enforced and Involuntary Disappearances, was, in 2001, charged with undertaking this study. Secondly, the Commission on Human Rights decided to establish a working group with the mandate of elaborating "a legally binding normative instrument for the protection of all persons from enforced disappearance [...] for its consideration and adoption by the General Assembly".[46] The formula chosen by the Commis-

[44] Resolution 2001/46, "Question of enforced or involuntary disappearances", 23 April 2001.
[45] *Ibid.*, para. 11.
[46] *Ibid.*, para. 12.

sion on Human Rights in its Resolution – "a legally binding normative instrument" – was appropriate to the current state of the discussion. Some States that express their support in principle for the need for a conventional instrument on enforced disappearances voiced doubts as to the need or viability of a new treaty body, and would have preferred monitoring of the future instrument to be exercised by a body already in existence. This option could, although not necessarily, mean a change of instrument "format". In this order of ideas, the term "legally binding normative instrument", which covers both the possibility of a convention and that of a protocol, could facilitate a frank and open debate on this issue.

In 2002, expert Manfred Nowak presented his excellent study to the Commission on Human Rights.[47] After reviewing all current international standards that could be used to combat enforced disappearances, Mr. Nowak noted, "In view of the extreme seriousness of this human rights violation [enforced disappearance], various measures have been taken in response by the international community at the universal and regional levels, and certain standards have been developed in the framework of international human rights, humanitarian and criminal law. At the same time, it must be recognised that protection against enforced disappearance is a slowly developing concept, with many gaps, disputed questions and uncertainties."[48] He then highlighted numerous gaps in terms of prevention and eradication, the rights of the victims and their relatives, the appropriation of children born in captivity to disappeared mothers, etc. The expert concluded that, "The gaps in the present international legal framework outlined in the present report clearly indicate the need for a 'legally binding normative instrument for the protection of all persons from enforced disappearance'."[49]

THE INTERSESSIONAL WORKING GROUP

The mandate of the intersessional Working Group was established by resolutions 2001/46 and 2002/41 of the Commission on Human Rights. The Working Group is mandated to prepare a draft legally binding normative instrument for the protection of all persons from enforced disappearance for "consideration and adoption by the General Assembly".[50] In addition, the Commission specified the sources of the Working Group's work by stating that this draft instrument was to be formulated "on the basis

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47 United Nations document E/CN.4/2002/71, 8 January 2002.
48 *Ibid.*, para. 96.
49 *Ibid.*, para. 97.
50 Resolution 2002/41, para 13.

of the Declaration on the Protection of All Persons from Enforced Disappearance, in the light of the work of the independent expert and taking into account, *inter alia*, the draft international convention on the protection of all persons from enforced disappearance"[51] of the Sub-Commission.

The Working Group held its first formal two-week work session in January 2003. The French Ambassador H.E. Bernard Kessedjian was elected chairperson/rapporteur of the Working Group. In September of the same year, the Working Group held an informal two-week work session and, in January 2004, its second formal work session. It is important to note that, under the impetus of its chairperson, the Working Group has established a *sui generis* organisation of work, which has shown itself to be highly useful. First, the experts Manfred Nowak and Louis Joinet have been actively involved in the work. In addition, other experts, such as a representative from the United Nations High Commissioner for Refugees (UNHCR) in the first session, and two members of the Working Group on Enforced or Involuntary Disappearances in the second session, have been invited to participate in the Working Group's debates, more particularly to resolve the technical difficulties that have arisen during the Working Group's deliberations. Secondly, a work plan was established that would gradually enable a discussion of the content and elements the new treaty on enforced disappearances should contain in order to progress towards the elaboration of a draft treaty. The plan is in two phases: an initial phase of identifying the elements the new treaty should contain, and a second one of elaborating and negotiating the new treaty.

Thus, during its first phase, corresponding to the sessions held in 2003, the Working Group discussed the elements the new treaty should necessarily contain with regard to its substantive provisions, leaving until a later phase the debate on the nature of the instrument (Convention or Protocol) and the monitoring mechanism. Without adhering to a draft of the normative text, the Working Group discussed various issues of great importance, such as the definition of the crime of enforced disappearance, its eradication and prevention, the rights of victims and their relatives, the issue of impunity and the appropriation of children. These debates resulted in strong consensus around essential elements of the new treaty, with some topics requiring greater consideration and some not being the object of agreement. These elements are provided in Ambassador Kessedjian's report to the Commission on Human Rights[52] and have been of great utility in the

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[51] *Ibid.*

[52] United Nations document E/CN.4/2003/71.

necessary and prior choices to be made before elaborating a draft treaty. Ambassador Kessedjian's report thus reflects the broad lines of direction agreed by the Working Group in the elaboration of the new treaty. In a second phase, initiated with the second formal session in January 2004, the Working Group began to examine a draft treaty produced by the French chairmanship. This draft did not consider the question of the format of the new treaty (convention or protocol), nor that of its monitoring mechanism. Nonetheless, during the January 2004 session, the Working Group did discuss this aspect, deciding to postpone a decision on these aspects until a future session. The Working Group did not adopt a normative text at its January session, but the debates provided numerous contributions to enable the chairperson to present a revised draft text, to be discussed by January 2005 at the latest.

FUTURE DEVELOPMENTS

During 2004, the French chairmanship of the Working Group must present a revised text of the draft treaty. In addition, the Working Group must resolve the debate on the nature of, and monitoring mechanism for, the new treaty. There is still insufficient consensus surrounding a number of issues, such as classification of the crime of enforced disappearance in national legislation, methods of prevention, the right of the families of the disappeared to know the truth, and the functions of a monitoring body (system of individual communications and investigations into situations of widespread or systematic occurrences of enforced disappearances).

Certainly, all attempts to elaborate new standards are arduous and, in some cases, have proved to be prolonged and drawn out. But the direction in which Ambassador Kessedjian has taken the Working Group, the organisation of work adopted, the participation of UN experts have thus far ensured the good progress of the working group's efforts. Its work has been characterised by a high technical standard and a progressive understanding of the seriousness of enforced disappearance in all its dimensions. The active presence of non-governmental organisations has contributed to this result. It should, moreover, be noted that an increasing number of government delegations are actively and constructively participating in the process, including some that had previously expressed reservations as to the need for a treaty on enforced disappearances. In this context, it is of great importance that, at its 2004 session, the Commission on Human Rights should authorise the working group to hold two formal sessions. This would contribute to speeding up the elaboration process and the adoption of a universal and legally binding instrument on enforced disappearances.

"MODERNISING" THE ARAB CHARTER ON HUMAN RIGHTS

HASSIBA HADJ SAHRAOUI[1]

Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

Paragraph 37 of the Vienna Declaration and Program of Action adopted by the World Conference on Human Rights on 25 June 1993, A/Conf.157/23, 12 July 1993

INTRODUCTION

Advanced as early as 1970, the idea of a protective human rights instrument for the Arab region only took concrete form in 1994, with the adoption by the members of the League of Arab States (the League) of the Arab Charter on Human Rights.[2] Signed by only one State[3] and never ratified, the Arab Charter was subjected to a process of "modernisation" decided in 2003 by the Council of the League of Arab States.[4] The revision and

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1 Legal Officer, International Commission of Jurists.

2 See resolution 5437 of the Council of the League of Arab States adopted during its 102nd regular session on 15 September 1994. The text of the Arab Charter on Human Rights is available in French on the website of the Bibliothèque Jeanne Hersch http://www.droitshumains.org/Biblio/Txt_Arabe/inst_l-chart94.htm. Only the Arab text is deemed authentic. A French translation of the Charter prepared by Mohammed Amin Al-Midani has been published in the *Revue universelle des droits de l'homme*, vol. 7, 1995, pp. 212-214. A non-official translation in English prepared by the UN Human Rights Center is also available at http://www1.umn.edu/humanrts/instree/arabcharter.html. It has also been published in ICJ Review, June 1996, N° 56, pp. 57-64. The International Commission of Jurists has worked from the Arab, English and, to a lesser extent, the French texts.

3 The signature was that of Iraq.

4 See resolution 6302/119 of 24 March 2003 of the Council of the League of Arab States. See also resolution 2003/76 of the United Nations Commission on Human Rights entitled "National institutions for the promotion and protection of human rights", paragraph 10 of

updating of the text of the Charter in light of international human rights standards[5] was judged necessary to enhance the poor level of success the Charter had enjoyed and to respond to the different criticisms formulated both by certain Arab States and by various non-governmental organisations, both Arab and international.[6]

Within the framework of this effort to "modernise" the Arab Charter on Human Rights, the Arab Standing Committee on Human Rights met during the months of June and October 2003 to discuss proposals put forward by the Member States of the League. The text adopted in 1994 was significantly modified. Likewise, the present analysis of the provisions of the Charter will refer both to the text of the Arab Charter on Human Rights as adopted in 1994 and to the modifications accepted by the Arab Standing Committee on Human Rights at the conclusion of its two sessions in June and October 2003.[7]

As part of a technical assistance agreement,[8] the Office of the High Commissioner for Human Rights of the United Nations and the League of Arab States set up a group of Arab experts from United Nations treaty monitoring bodies and special procedures of the Commission on Human Rights charged with examining the text of the Arab Charter on Human

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the preamble, in which the Commission takes note of "the initiative of the Council of the League of Arab States, as referred to in its resolutions 6089 of 12 March 2001, 6243 of 5 September 2002 and 6032 of 24 March 2003, to review and update the Arab Charter for Human Rights of 1994 and encourage the efforts of Arab non-governmental organizations to support this initiative". (*sic*)

5 See the response of the League of Arab States of 30 July 2003 to a press release by the International Commission of Jurists of 20 June 2003 "Arab Charter on Human Rights Must Meet International Standards" on the occasion of the June 2003 session of the Arab Standing Committee on Human Rights: "The objective of the Meeting [of the Arab Standing Committee on Human Rights] was to review the Arab Charter and amend and modify it as necessary, **in order to ensure its consistency with the evolving standards and practices pertaining to the protection of human rights**". (Emphasis added).

6 See the Declarations of Sanaa', of December 2002, and Beirut, of June 2003, initiated respectively by the Arab Center for International Humanitarian Law and Human Rights Education and the Cairo Institute for Human Rights Studies. See our discussion of these issues *infra*.

7 Regarding the general organisation of the Charter: besides a preamble, the Charter consists of 43 articles in the 1994 version and 37 in the 2003 version and is subdivided into 4 parts: a first part is devoted to the right of peoples to self-determination; the second part establishes certain civil and political rights but also various economic, social and cultural rights; the third part deals with mechanisms for the protection of the rights guaranteed and the fourth part is devoted to procedures for ratification and entry into force of the Charter.

8 A "Memorandum of intent" was signed in April 2002 between the League of Arab States and the Office of the High Commissioner for Human Rights of the United Nations within the framework of technical assistance and consultative services.

Rights in its 1994 and 2003 versions and evaluating its conformity with international human rights standards.[9]

It will be up to the selected experts to identify the omissions and deficiencies and to bring to light the inconsistencies, discrepancies and elements in contradiction with international human rights standards that are present in the 1994 text and in the revisions proposed by the Arab Standing Committee on Human Rights during its exceptional sessions of June and October 2003. The observations and commentaries of the experts will be examined during the meeting of the Arab Standing Committee on Human Rights taking place in Cairo from 4 to 8 January 2004. The Arab Commission will then be charged with finalising the new version of the Arab Charter on Human Rights. The final text should be submitted to the Member States of the League for adoption during the summit of Arab heads of State, to be held in Tunis in March 2004.

This article aims to highlight the concerns raised by the text of the Arab Charter as adopted in 1994 and some of the revisions considered during the 2003 sessions of the Arab Standing Committee on Human Rights with a view to contributing to the improvement of the Arab Charter. The concerns in this regard are all the more acute, as the 1994 text, which already fell well short of international human rights standards, has been revised by representatives of the Member States within the Arab Standing Committee on Human Rights during its extraordinary sessions of June and October 2003 devoted to "modernisation" of the Arab Charter on Human Rights. Although an initiative aimed at bringing the text of the Arab Charter on Human Rights into conformity with international human rights standards is no doubt welcome, the process of "modernisation" remains highly problematic in view of the revisions currently envisaged.

It should be emphasized that of the 22 Member States of the League of Arab States, 13 States are party to the International Covenant on Civil and Political Rights;[10] 13 States are party to the International Covenant on Economic, Social and Cultural Rights;[11] 18 States are party to the International Convention on the Elimination of All Forms of Racial

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9 See the terms of reference of the mission of the Committee of experts, which will meet in Cairo from 21 to 26 December 2003.

10 Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Somalia, Sudan, Syria, Tunisia and Yemen. Algeria, Libya and Somalia are also party to the First Additional Protocol to the Covenant.

11 Algeria, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Somalia, Sudan, Syria, Tunisia and Yemen.

Discrimination;[12] 13 States are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[13] 13 States are party to the Convention on the Elimination of All Forms of Discrimination against Women;[14] and 20 States are party to the Convention on the Rights of the Child.[15] Moreover, of the 22 Member States of the League of Arab States, 10 are also African States, 9 of which are party to the African Charter on Human and Peoples' Rights.[16]

Any process of "modernisation" of the Arab Charter on Human Rights should reinforce universal standards in this area at the regional level, as set forth in the relevant international instruments, as well as protection of these rights, as required by the Vienna Declaration and Program of Action.[17] This criterion of conformity with universal human rights standards is indispensable for evaluating the process of reform of the Arab Charter on Human Rights.

Examination of the provisions contained in the text of the Arab Charter on Human Rights reveals patent normative as well as institutional inadequacies in both the Charter itself and the proposed revisions.

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12 Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Mauritania, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Yemen and United Arab Emirates.

13 Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Libya, Morocco, Qatar, Saudi Arabia, Somalia, Tunisia and Yemen. The Comoro Islands and Sudan are also signatories to the Convention. In addition, Algeria and Tunisia have recognised the competence of the Committee against Torture to receive and process individual communications under article 22 of CAT.

14 Algeria, the Comoro Islands, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Saudi Arabia, Tunisia and Yemen.

15 Algeria, Bahrain, the Comoro Islands, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Mauritania, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Yemen and United Arab Emirates.

16 Algeria, the Comoro Islands, Djibouti, Egypt, Libya, Mauritania, Somalia, Sudan and Tunisia.

17 Paragraph 37 of the Vienna Declaration and Program of Action adopted by the World Conference on Human Rights on 25 June 2003 (A/conf.157/23, 12 July 1993) states that: "**[r]egional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection.** The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities... [It] reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist." (Emphasis added)

HISTORICAL BACKGROUND

As early as 1970, a committee of experts within the League of Arab States was appointed to prepare a draft declaration which would be completed in 1971 and submitted to States for their comments. In view of the lack of enthusiasm on the part of the States, the text was reworked and a draft treaty was again submitted to the States in 1983. The League then decided to temporize and await the adoption of the Declaration on Human Rights in Islam by the Organisation of the Islamic Conference.[18] It was only on 15 September 1994 that the League finally adopted the Arab Charter on Human Rights, with the objections of seven governments.[19]

It should be noted that parallel to the initiatives of the League toward the adoption of an Arab Charter on Human Rights, various initiatives undertaken by Arab non-governmental organisations have resulted in draft texts or critically examined the projects of the League. Thus, as from 1986, a draft Charter on Human and Peoples' Rights in the Arab World had been drawn up by Arab experts participating in the conference organised under the auspices of the International Institute of Higher Studies in Criminal Sciences, from 5 to 12 December 1986, in Syracuse (Italy). This project was subsequently presented and adopted by the 16th Congress of the Arab Lawyers Union, which was held from 8 to 12 April 1987 in Kuwait.[20] Moreover, at the initiative of the Arab Center for International Humanitarian Law and Human Rights Education, a round table on the subject of "modernising" the Arab Charter on Human Rights was held in Sanna'a in Yemen in December 2002 and led to the adoption of the Sanna'a Declaration for the Modernisation of the Arab Charter on Human Rights. Finally, from 10 to 12 June 2003, the Beirut conference was convened at the initiative of the Cairo Institute for Human Rights Studies (CIHRS) and the *Association de Défense des Droits et Libertés au Liban* (ADL), with the support of the Euro-Mediterranean Human Rights Network and the International Federation of Human Rights Leagues. This conference resulted in the adoption of the Beirut Declaration on the Regional Protection of Human

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18 See resolution 4458 of the Council of the League of Arab States of 28 March 1985. The Cairo Declaration on Human Rights in Islam would later be adopted in August 1990 within the framework of the Organisation of the Islamic Conference.

19 Concerning the manoeuvres resulting in the adoption of the text of the Arab Charter on Human Rights, see Mona Rishmawi, "The Arab Charter on Human Rights: a Comment", *Interights Bulletin*, vol. 10, note 1.

20 The text is available on the website of the Bibliothèque Jeanne Hersch at the following address: http://www.droitshumains.org/Biblio/Txt_Arabe/inst_proj86.htm. The text was referred to by the Acting United Nations High Commissioner for Human Rights in his speech of 9 October 2003 before the Arab Standing Committee on Human Rights.

Rights in the Arab World. This Declaration very clearly states: "the Arab Charter on Human Rights lacks a number of the international human rights standards and guarantees adopted by other regions in the world, it is also missing the necessary mechanisms to ensure and monitor its implementation." The participants at the Conference consequently expressed "reservations on the endeavors that aim at the adoption of the Arab Charter in its present state or introducing superficial or partial modifications." The Declaration subsequently enumerates the principles and standards that should govern such a process of modernisation.[21]

STRUCTURAL PROBLEMS IN THE ARAB SYSTEM OF HUMAN RIGHTS PROTECTION

1. The existence of an Arab system of human rights protection

In addition to normative provisions, the successful functioning of a human rights protection system requires the existence of bodies, mechanisms and procedures of supervision and review of complaints aimed at ensuring the implementation of these normative provisions. Such bodies, mechanisms and procedures are lacking in the system established within the framework of the League of Arab States, and neither the Arab Standing Committee on Human Rights nor the committee of experts envisaged under the Arab Charter on Human Rights satisfy the requirements of an effective human rights monitoring system.

a) The Charter of the League of Arab States

The Pact of the League of Arab States was adopted on 22 March 1945, i.e. even before the adoption of the Charter of the United Nations, by seven founding States: Egypt, Iraq, Jordan (at that time Transjordan), Lebanon, Saudi Arabia, Syria and Yemen. This Pact had been preceded by a preliminary draft Pact of the League, the Alexandria Protocol, adopted on 25 September 1944. Today the League includes 22 Member States.[22] The Pact of the League of Arab States is supplemented by the Joint Defence and Economic Cooperation Treaty (1950) and the National Economic Action Charter (1980).

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[21] For the text of the Beirut Declaration, see the website of the Cairo Institute for Human Rights Studies http://www.cihrs.org/focus/almethaq/beirut-declaration.htm.

[22] Algeria, Bahrain, the Comoro Islands, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Mauritania, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Yemen and United Arab Emirates.

The framework in which the Arab system of human rights protection is envisaged is the League of Arab States. It is therefore important to note that among the stated aims and purposes of the organisation, the promotion and protection of human rights are omitted from reference. Indeed, article 2 of the Pact of the League of Arab States provides that:

> "The league has as its purpose the strengthening of the relations between the member-states, the coordination of their policies in order to achieve co-operation between them and to safeguard their independence and sovereignty; and a general concern with the affairs and interests of the Arab countries. It has also as its purpose the close co-operation of the member states, with due regard to the organization and circumstances of each state, on the following matters:
> a) Economic and financial matters, including trade, customs, currency, agriculture and industry;
> b) Communications, including railways, roads, aviation, navigation, and posts and telegraphs;
> c) Cultural matters;
> d) Matters connected with nationality, passports, visas, execution of judgments and extradition;
> e) Social welfare matters;
> f) Health matters."

As for the principles governing the activities of the League, article 5 of the Charter is devoted to the prohibition against the resort to the use of force or, more precisely, to the inadmissibility of the resort to force to resolve disputes that might arise between Member States. Article 6 concerns measures that the Council can take in case of aggression or the threat of aggression against a Member State.

The League comprises a Council made up of representatives of Member States, the supreme authority of the organisation, a permanent Secretariat headed by a Secretary General and permanent special committees composed of representatives of Member States. The latter are charged with studying technical aspects relating to areas of cooperation between Member States of the League. In addition, a number of Arab specialised organisations have been established, including the Arab League Educational Cultural and Scientific Organization, the Arab Organization for Agricultural Development, the Arab Industrial Development & Mining Organization, the Arab Administrative Organization, the Arab Labor Organization, the Arab Atomic Energy Board, the Arab Satellite Communications Organization.

Consequently, at no time was the League of Arab States ever viewed as an instrument for the promotion and protection of human rights. This deficiency would mark the weak development of activities in favour of

human rights by this regional organisation. The publication of a brochure by the League of Arab States on the occasion of its jubilee is symptomatic of the marginal character of the attention paid to human rights by the League of Arab States. At no point does the brochure mention the activities or organs of the League devoted to the promotion and protection of human rights.[23]

In order to avoid this lacuna regarding a reference to human rights promotion and protection in the aims and purposes of the organisation, which could serve to hinder the development of its activities in the area of human rights, the League of Arab States should consider an amendment to the Charter which would add the promotion and protection of human rights to the enumeration of the purposes of the organisation. The League is a regional organisation within the meaning of Chapter VIII of the United Nations Charter and it is now well established that massive human rights violations may be considered by the Security Council to constitute a threat to peace or a breach of the peace. Therefore, the prevention of these violations at the regional level constitutes both a necessity and a guarantee for the preservation of regional autonomy in terms of security sought by the League.

b) The Arab Standing Committee on Human Rights (ASCHR)

At the invitation of the United Nations Secretary-General, an additional constituent focusing on human rights was grafted onto the activities of the League by the adoption of resolution R 2443/48 (XLVIII) of the Council of the League of Arab States of 3 September 1968, creating an Arab Standing Committee on Human Rights in the framework of article 4 of the Pact.[24] It seems clear in light of resolution R 2443/48 (XLVIII) and of the

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23 See League of Arab States, Basic information, Jubilee 1945-1995.

24 Article 4 of the Pact of the League of Arab States states that "[a] special Committee shall be formed for each of the categories enumerated in article 2, on which the member States shall be represented. These Committees shall be entrusted with establishing the basis and scope of co-operation in the form of draft agreements which shall be submitted to the Council for its consideration preparatory to their being submitted to the States referred to". It should be noted that prior to this the Council of the League had symbolically addressed the question of human rights in adopting resolution 2259 (XLVI) of 12 September 1966, creating a special committee within the General Secretariat to formulate a program celebrating the International Year of Human Rights. A second committee of "orientation" was created by the Council of the League in its resolution 2304 (XLVII) of 18 March 1967. The committee was given the responsibility of cooperating with the first committee for deciding the modalities of the League's participation in this celebration. On the Arab Standing Committee on Human Rights, see: Stephen Marks, "La Commission permanente arabe des droits de l'homme", *Revue des droits de l'homme*, 1970, vol. III-1, pp. 101-108; Riad Daoudi, "Human Rights Commission of the Arab States", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. two, 1995, Amsterdam, North-Holland, pp. 913-915.

Rules of Procedure of the ASCHR that, both by its composition as well as by its mandate or rules of operation, the ASCHR is an authority lacking any real competency to monitor respect of human rights by the Member States of the Arab League.

The ASCHR in fact is made up of delegates from Member States. The Secretary General of the League is represented within the ASCHR and the latter is subordinate to the Council of the League, which reviews the work of the ASCHR and approves the draft agreements prepared by the ASCHR at the request of the Council, the Secretary General or an individual Member State. The Chairman of this ASCHR is appointed for two years by the Council of the League from among the candidates presented by the Member States.[25] The Secretary General appoints a human rights specialist as an officer at the General Secretariat.[26] According to article 8 of its Rules of procedure, the Secretary General of the League convokes the ASCHR, the meetings of which are held *in camera*. According to article 9 of the same Rules, the ASCHR's decisions are taken by simple majority of the delegations present. The decisions of the ASCHR are only considered as draft agreements submitted to the Council of the League.[27]

Following its second session in April 1969, the ASCHR halted a program of action under which it considered itself competent to address all questions relating to human rights in the Member States by means of communications sent by the Member States and communications undertaken with the national human rights commissions, and in addressing recommendations to the States concerned. Nevertheless, the ASCHR has been principally concerned with the question of human rights violations in the Arab territories occupied by Israel and the non-respect of humanitarian conventions by the latter. The ASCHR deliberately chose to limit its activities to human rights violations in the territories occupied by Israel. Indeed, the work of this ASCHR, ever since the first regional conference for human rights, the Conference of Beirut of 1968, has been marked by the omnipresence of the Palestinian question and the defence of the human rights of Palestinians in the territories occupied by Israel. While it is true that the Palestinian question has merited – and continues to merit – special attention, the ASCHR nevertheless should not have failed to address the question of respect of human rights in the other members of the League.

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25 Article 5 of the Rules of procedure.
26 Article 6 of the Rules of procedure.
27 Article 12 of the Rules of procedure.

The ASCHR has, on the other hand, affirmed the necessity of elaborating regional legal instruments proclaiming and protecting human rights in the Member States, including the elaboration of an Arab Declaration/Charter on human rights, a task for which it remains responsible.

In light of the mentioned deficiencies, a revision of the composition, mandate and powers of the Arab Standing Committee on Human Rights is needed in order to make it a real monitoring body for respect of human rights by the States Parties.

A fundamental reform for reducing the relation of subordination of the ASCHR to the Council of the League would be the election of independent members and the granting of genuine decision-making power to the ASCHR in place of its current power simply to make recommendations to the Council of the League, which exercises decision-making authority. To that end, the experiences of the African Commission of Human and Peoples' Rights and the Inter-American Commission on Human Rights are instructive. A redefining of the functions of the Arab Standing Committee on Human Rights should be envisaged. The text of the Arab Charter on Human Rights will have to take into account the existence of this Committee and to determine the question of the relations to be maintained between the Arab Standing Committee on Human Rights and the Committee of Experts charged with monitoring the application of the Charter.

2. Role of NGOs in the Arab League system

Under the current rules of operation of the League of Arab States, non-governmental organisations can participate in the activities of the League only to a very limited extent. An NGO can only obtain consultative status with the League and thus participate in the work of the Arab Standing Committee on Human Rights if it is established or registered in a Member State of the League and if this State gives its consent. As a result, less than twenty non-governmental organisations have secured consultative status with the League of Arab States.[28] NGOs not obtaining the agreement of Member States of the League and international NGOs are thus excluded. Moreover, the control exercised by the States over the procedure for obtaining consultative status by NGOs allows for the exclusion of those Arab

[28] Information on the procedure for obtaining consultative status is somewhat "confidential". A greater availability and dissemination of information concerning the procedure for obtaining consultative status for non-governmental organisations, as well as about the organisations already enjoying such status, should be sought.

organisations that may be very active in the area of human rights, but which are not recognised by the authorities of a country due to legal obstacles the latter have imposed. Finally, it is the Member States themselves that propose which organisations will be able to enjoy consultative status. With very few exceptions, only organisations close to the ruling authorities enjoy consultative status with the League of Arab States.

In this context, it is important to recall paragraph 38 of the Vienna Declaration of 1993 according to which:
"The World Conference on Human Rights recognizes **the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels**. The World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training and research in this field, and to the promotion and protection of all human rights and fundamental freedoms. **While recognizing that the primary responsibility for standard setting lies with States, the conference also appreciates the contribution of non-governmental organizations to this process.** In this respect, the World Conference on Human Rights emphasizes the importance of continued dialogue and cooperation between Governments and non-governmental organizations. Non-governmental organizations and their members genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights, and the protection of the national law. These rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations. Non-governmental organizations should be free to carry out their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights."[29]

It is surprising to note that while the non-governmental organisations of the region have actively participated in reflections concerning an Arab Charter on Human Rights,[30] they have only been invited to participate in the work of the Arab Standing Committee on Human Rights in a marginal way and without any real possibility to influence the content of the final text.

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[29] Paragraph 38 of the Vienna Declaration and Program of Action adopted at the close of the World Conference on Human Rights held in Vienna, 14-25 June 1993, A/Conf.157/23, 12 July 1993. (Emphasis added.)

[30] See discussion *supra*.

Recalling resolution 2003/76 of the United Nations Commission on Human Rights encouraging the participation of non-governmental organisations in the process of "modernising" the Arab Charter on Human Rights, the League of Arab States should revise and expand the conditions under which NGOs can enjoy consultative status with the League so as to ensure a broad participation by national and international NGOs in its activities. A rapid modification would permit the participation of national and international NGOs in the elaboration of the "modernised" version of the Arab Charter on Human Rights. In the interim, given the importance of the process of "modernisation" of the Arab Charter on Human Rights, the Arab Standing Committee on Human Rights and the League of Arab States should allow on an *ad hoc* basis the participation of all NGOs interested in this process during its January 2004 session.

THE ARAB CHARTER ON HUMAN RIGHTS

What follows is a brief presentation of the Arab Charter on Human Rights and the amendments proposed during the course of the two sessions of the Arab Standing Committee on Human Rights held in June and October 2003, in light of various international and regional conventions on protection of human rights.[31]

1. General problems in the text

As underlined previously, the text of the Arab Charter on Human Rights was submitted to the Arab Standing Committee on Human Rights for "modernisation" during its sessions of June and October 2003. Almost all of the established rights have been reformulated.

First, a remark regarding terminology is in order. In the revised version of the text of the Charter, reference is made in a significant number of articles to the law (*kanoun*). Thus, a certain number of rights are only recognised within the limits of the law or indeed their exercise can be limited or restricted by the law (see articles 5, 6, 9, 10 paragraphs 1 and 2, 12, 15, 17, 18, 24 paragraphs 1 and 2, 25, 26 paragraphs 2 and 3, 30 and 31 of the text of the Arab Charter on Human Rights as revised in 2003).

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[31] International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, African Charter on Human and Peoples' Rights, American Convention on Human Rights and the European Convention for Protection of Human Rights and Fundamental Freedoms.

The terminology used in the Arab text is "*kanoun* and *tashri*". According to "Faruqi's Law Dictionary",[32] the two terms have an identical meaning. If the two terms are synonymous, the reference to "*kanoun* and *tashri*" is redundant and this repetition, which adds nothing to the sense of the text, should be eliminated. If, on the other hand "*kanoun* and *tashri*" have different meanings, it is then imperative to clarify the meaning and exact content of the term "*tashri*". Finally, the insertion of the notion of "*tashri*" is problematic insofar as the recourse to a vaguely defined juridical concept liable to varying or even contradictory interpretations by the States Parties endangers the juridical security of persons and must therefore be rejected.

As regards the field of application of the Arab Charter, in the course of the reformulation of the text, the inappropriate references to only citizens as entitled holders of the guaranteed rights were replaced by a reference to persons as holders of almost all the guaranteed rights. There nevertheless remain several anomalies, such as in the articles dealing with the right to work, including the right to social security,[33] the right to education, including the right to free compulsory education,[34] the right to a sufficient standard of living[35] and the right to health,[36] which continue to be reserved solely for citizens of a Member State.

Article 2 of the Arab Charter on Human Rights thus guarantees the rights set forth in the Charter for any person subject to the jurisdiction of a State party and present in its territory. According to international jurisprudence, the criterion of subjection to the jurisdiction of a State is sufficient and it is not necessary to be present on the territory of that State.[37]

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32 See under the term "law", Harith Suleiman Faruqi, *Faruqi's Law Dictionary – English-Arabic*, 3rd revised edition, Beirut, Librairie du Liban, 1991, p. 408.

33 Article 27 of the Arab Charter on Human Rights in its 2003 version.

34 Article 29 of the Arab Charter on Human Rights in its 2003 version.

35 Article 33 of the Arab Charter on Human Rights in its 2003 version.

36 Article 33 of the Arab Charter on Human Rights in its 2003 version.

37 See the draft General Comment of the United Nations Human Rights Committee on article 2 of the International Covenant on Civil and Political Rights relating to the nature of the general legal obligations imposed on States, the first nine articles of which were adopted in their second reading by the Committee during its 79th session in October-November 2003. The Committee underlined there that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness. It adds that "this principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances under which this power or effective control was established". Press release of the High Commissioner for Human Rights, "Le Comité des droits de l'homme poursuit l'examen d'un projet d'observation sur les recours en cas de violation du pacte", available at the address http://www.unhchr.ch/huricane/huricane.nsf/newsroomfrench (in

The Arab Charter on Human Rights moreover sets out the principle of the primacy of the internal laws of States in cases of conflict between the

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French). The text of the draft General Comment is available in English, Human Rights Committee, Draft General Comment on Article 2: "The nature of the General Legal Obligation Imposed on States Parties to the Covenant", CCPR/C/74/CRP.4/rev.4, 79th session at the following address: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f12e2228d384b536c1256d1d003b854f?Opendocument.
See also *Concluding observations of the Human Rights Committee: Israel CCPR/CO/78/ISR* of 21 August 2003, para. 11: "The Committee has noted the State party's position that the Covenant does not apply beyond its own territory, notably in the West Bank and in Gaza, especially as long as there is a situation of armed conflict in these areas. The Committee reiterates the view, previously spelled out in paragraph 10 of its concluding observations on Israel's initial report (CCPR/C/79/Add.93 of 18 August 1998), that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law." Likewise, see *Concluding observations of the Human Rights Committee: Israel* CCPR/C/79/ Add.93, 18 August 1998, para. 10: "The Committee is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories. In this regard, the Committee points to the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein. In response to the arguments presented by the delegation, the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control. The Committee requests the State party to include in its second periodic report all information relevant to the application of the Covenant in territories which it occupies." The Committee on Economic, Social and Cultural Rights has adopted an identical interpretation: see *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel,* E/C.12/1/Add.90, 26 June 2003, para. 15 according to which "The Committee also reiterates its concern about the State party's position that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction, and that the Covenant is not applicable to populations other than the Israelis in the occupied territories. The Committee further reiterates its regret at the State party's refusal to report on the occupied territories (E/C.12/1/Add.27, para. 11). In addition, the Committee is deeply concerned at the insistence of the State party that, given the circumstances in the occupied territories, the law of armed conflict and humanitarian law are considered as the only mode whereby protection may be ensured for all involved, and that this matter is considered to fall outside the sphere of the Committee's responsibility." Finally, both the Inter-American Commission on Human Rights and the European Court of Human Rights have a similar jurisprudence. See Inter-American Commission on Human Rights, Request for precautionary measures in favor of detainees being held by the United States at Guantanamo Bay, 12 March 2002, ILM, 2002, p. 532. See also along the same lines, European Court of Human Rights, *Loizidou v. Turkey, Preliminary objections,* judgement of 23 March 1995, Series A No. 310, paras. 59-64. – European Court of Human Rights, *Cyprus v. Turkey,* Judgment of 10 May 2001, Reports 2001-IV, para. 77.

normative provisions of the Charter and those of the internal legal system of a Member State. In this respect, article 34 of the Charter provides that "it is not permitted to interpret or draw conclusions from the Charter in such a way as to contradict or oppose the principles and rights protected by the national laws of a Member State or those recognised by international or regional human rights instruments ...". It should be noted that most other international human rights protection instruments, by contrast, impose on States the obligation to take all necessary measures (including legislative modifications) to give full effect to the recognised rights.[38] Article 2 of the International Covenant on Civil and Political Rights states this obligation very clearly and the draft General Comment of the Human Rights Committee on article 2 of the Covenant explicitly underlines this aspect.[39] The other universal or regional instruments contain similar obligations: article 2 of the International Covenant on Economic, Social and Cultural Rights; article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 2 of the Convention on the Elimination of All Forms of Discrimination against Women; article 2 of the Convention on the Rights of the Child; articles 1 and 2 of the American Convention on Human Rights.

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[38] Thus, article 2 of the International Covenant on Civil and Political Rights states:

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

[39] Human Rights Committee, Draft General comment on Article 2: "The nature of the General Legal Obligation Imposed on States Parties to the Covenant", CCPR/C/74/CRP.4/rev.4, 79th session, *op. cit.*

Finally, a provision of the Charter stipulating that the internal laws of States Parties have prevalence over the international obligations binding upon these States is in flagrant contradiction with the general legal principle *Pacta sunt servanda* and article 27 of the Vienna Convention on the Law of Treaties setting forth the principle of the primacy of international law.[40] Even if this provision of the Charter were to be understood as imposing not the primacy of the internal law of States over that of international instruments, but rather the interpretation of the latter in conformity with the internal laws of States Parties, the unity and integrity of the Charter would be no less damaged. A provision should therefore be inserted affirming the primacy of obligations ensuing from the Charter over the obligations of internal law and affirming the obligation for the States Parties to take all measures necessary for the exercise and enjoyment of the rights established in the Charter.

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[40] International jurisprudence on this question is unanimous. See Permanent Court of International Justice, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4; *Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*; International Court of Justice, *Nottebohm, Second Phase, Judgment, Reports 1955*, p. 4; International Court of Justice, *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment,, I.C.J. Reports 1958*, p. 55; International Court of Justice, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion,, I.C.J. Reports 1988*, p. 12 . On the impossibility for a State to invoke internal law to escape its international obligations, see Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7*; Permanent Court of International Justice, *Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J. Series A, No. 17*. On the primacy of obligations with respect to human rights, see Human Rights Committee, *Concluding observations on Peru*, CCPR/C/79/Add. 67, 25 July 1996, para. 10: "In addition, the Committee expresses serious concern in relation to the adoption of Decree Law 26,492 and Decree Law 26,6181, which purport to divest individuals of the right to have the legality of the amnesty law reviewed in courts. With regard to article 1 of this law, declaring that the Amnesty Law does not undermine the international human rights obligations of the State, the Committee stresses that **domestic legislation cannot modify a State party's international obligations under the Covenant.**" (Emphasis added). Lastly, see the abundant jurisprudence of the inter-American human rights system: Inter-American Court of Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws which violate the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of 9 December 1994, *Series A*, No. 14, paragraph 35; Inter-American Court of Human Rights, Advisory Opinion OC-13/93, 16 July 1993, *Certain attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights*, Series A, Judgments and Opinions, No. 13, paragraph 26; *Loyaza Tamayo Case, Reparations Judgment, 27 November 1998*, paragraph 168, Annual Report of the Inter-American Court of Human Rights 1998, OAS/SER.L/V/III.43, Doc. 11, p. 487; Inter-American Commission on Human Rights, Report N° 34/96, Cases 11,228, 11,229, 11,231 and 11,282 (Chile), 15 October 1996, paragraph 84.

2. Foundations and preamble of the Charter

A reading of the preamble of the Arab Charter on Human Rights quickly reveals the difficulties that certain of the references pose.

Thus, the preamble states:

> "Given the Arab nation's belief in human dignity since God honoured it by making the Arab World the cradle of religions and the birthplace of civilizations which confirmed its right to a life of dignity based on freedom, justice and peace,
>
> Pursuant to the eternal principles of brotherhood and equality among all human beings which were firmly established by the Islamic Shari'a and the other divinely-revealed religions,
>
> Being proud of the humanitarian values and principles which it firmly established in the course of its long history and which played a major role in disseminating centres of learning between the East and the West, thereby making it an international focal point for seekers of knowledge, culture and wisdom,
>
> Conscious of the fact that the entire Arab World has always worked together to preserve its faith, believing in its unity, struggling to protect its freedom, defending the right of nations to self-determination and to safeguard their resources, believing in the rule of law and that every individual's enjoyment of freedom, justice and equality of opportunity is the yardstick by which the merits of any society are gauged,
>
> Rejecting racism and Zionism, which constitute a violation of human rights and pose a threat to world peace,
>
> Acknowledging the close interrelationship between human rights and world peace,
>
> Reaffirming the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam
>
> In confirmation of all the above, [The Governments of the Member States of the League of Arab States] have agreed as follows:"

The reference in the preamble of the Arab Charter to the highly contested "Cairo Declaration on Human Rights in Islam", adopted on 5 August 1990 by the Council of Foreign Ministers of the Organisation of the Islamic Conference (OIC), poses a permanent risk of contradiction and conflict of norms between the provisions of the Arab Charter and those of the Universal Declaration of Human Rights, the International Covenant on

Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, to which the Arab Charter refers as well. There exists a real incompatibility between the spirit and the letter of the Cairo Declaration and the provisions of the International Bill of Human Rights.

The ICJ and others have longed recognised the danger posed by elements of the Declaration for the intercultural consensus on which international human rights instruments are built, notably its sanctioning of discrimination against non-Muslims or women, to whom the Declaration accords equal dignity but not equal legal status with men.[41] This permanent contradiction is perfectly expressed by Professor Ramdan Babadji: "[...] Arab nationalism is caving in to Islamic fundamentalism and [...] the Arab League is abdicating responsibility to the Organisation of the Islamic Conference with the reference to the Cairo Declaration on Human Rights in Islam, which it has endorsed. Increasingly lacking legitimacy, the League is trying to regain it by harnessing that of which the Organisation of the Islamic Conference is supposedly the holder, namely religion, even though the latter is totally absent from its charter [the Pact of the League of Arab States]. But with these two references, the League is engaged in stretching itself to the breaking point."[42]

In the case of normative conflicts between the Declaration on Human Rights in Islam and the provisions of the International Bill of Human Rights, the latter should prevail, in as much as the issues involved are ones of positive law (conventional or customary) binding the Member States of the League of Arab States and many of these provisions enjoy the status of peremptory norms of international law, such as for example the prohibition of slavery and servitude. Consequently there could not be any question of their being derogated from by means of a regional instrument.

The preamble of the Charter also contains a rejection of racism and Zionism as constituting two forms of human rights violations and posing a threat to world peace. This condemnation of racism and Zionism is reiterated in article 1, paragraph (b) of the Arab Charter, which also states that "racism, Zionism, occupation and foreign domination pose a challenge

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41 See the press release issued by the ICJ on 5 December 1991: "Jurists concerned by the Declaration on Human Rights in Islam".

42 Ramdan Babadji, "Charte arabe des droits de l'homme: pour quoi faire?", in Centre arabe pour l'éducation au droit international humanitaire et aux droits humains – Institut des droits de l'homme, *Vers un système arabe de protection des droits de l'homme: la Charte arabe des droits de l'homme*, Lyon, Institut des droits de l'homme, 2002, p. 32.

to human dignity and constitute a fundamental obstacle to the realization of the basic rights of peoples. There is a need to condemn and endeavour to eliminate all such practices."

This reference to Zionism in the preamble and in article 1[43] is problematic for three reasons:

- The Charter must be based on universal values. Mention of Zionism as an obstacle to the enjoyment of human rights is essentially a political statement and has no place figuring in a human rights protection instrument;
- The insertion of the reference to Zionism between the condemnation of racism and that of colonial domination implies that it constitutes a reprehensible practice *per se*. This supposition is not supported by United Nations General Assembly resolution 46/86 of 16 December 1991, which revokes UN General Assembly resolution 3379 (XXX) on the elimination of all forms of racial discrimination, which had stated that Zionism constituted a form of racism and racial discrimination;
- Finally, the condemnation of Zionism seems to amount to a condemnation of the very existence of the State of Israel.[44] The conclusion of peace agreements between the State of Israel and certain of its Arab neighbours has occurred since the adoption of the Charter. Suspended from the League for a period following the Camp David agreement, Egypt was reintegrated with full membership rights at the Casablanca summit meeting in 1989. This reality should be ratified in the "modernised" version of the Arab Charter on Human Rights.
  Hence, the authors of the Arab Charter should remove the condemnation of Zionism in the preamble and in its article 1 in order to devote the Charter exclusively to protection of human rights in the Arab region, without digressions of a political nature liable to obscure the Charter's basic purpose.

The reference to Arab nationalism in article 35 of the Charter in its 1994 version could also be considered inappropriate in a text which means to be based on the universality of human rights ("citizens have a right to live in an intellectual and cultural environment in which Arab nationalism is

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43 Article 1, paragraph 2 of the Charter in its 1994 version and article 1, paragraph 3 of the revised text of 2003.

44 As the aim of Zionism is the establishment and consolidation of the State of Israel, this condemnation of Zionism by States who have signed peace agreements with Israel could be perceived as contrary to these accords. For this possible analysis, see the aforementioned article by Mona Rishmawi, note 5.

a source of pride..."). It is fortunate that this glorification of Arab nationalism has been removed in the 2003 version of the Charter.

It should be noted that in the "Beirut Declaration on the Regional Protection of Human Rights in the Arab World" of June 2003, the Arab NGOs participating in the conference severely criticised the attempts of governments to evade their international commitments under the pretext of "respect for the cultural, national and religious specificities of the Arab world".

Finally, it should be recalled that "[a]ll human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[45]

Any reference to cultural, religious or civilization-based specificities should be interpreted and understood as a specific effort by a region to reinforce the principle of the universality, indivisibility and complementarity of human rights and should in no case be considered as a means of eclipsing or even denying the universality of such standards or as a justification for their violation. As regards the recourse to notions such as the *sharia'* or the reference to Islamic law to which the Arab Charter refers, notably in the preamble, such recourse to notions of uncertain legal import and which are susceptible to varied or even contradictory interpretations should be limited as much as possible. Finally, if these references are necessary, dynamic and progressive methods of interpretation should be privileged.

3. Analysis of the articles of the Arab Charter on Human Rights

a) The right of peoples to self-determination

Article 1 of the Arab Charter on Human Rights enshrines the right of peoples to self-determination. This right is recognised by the Charter of

[45] Paragraph 5 of the Vienna Declaration and Programme of Action, adopted in June 1993 in the framework of the World Conference on Human Rights, A/Conf.157/23, 12 July 1993.

the United Nations, resolutions 1514,[46] 1541[47] and 2625[48] of the United Nations General Assembly and Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It implies the free determination by a people of its own political, economic and social system.[49] The right of peoples to self-determination also has as a corollary the permanent sovereignty over natural resources, as affirmed by resolution 1803 of the United Nations General Assembly.[50] In the new draft version of article 1 of the Arab Charter on Human Rights, a reference has been added to the principle of territorial integrity. The ICJ welcomes the reiteration of the right of peoples to self-determination, but draws attention to the fact that respect of territorial integrity cannot constitute an obstacle to the exercise of the right of peoples to self-determination. Indeed, the Human Rights Committee has considered that "the right to self-determination does not only apply to colonial situations but also to other situations and that the people of a given territory should be able to determine their political and economic destiny".[51] Moreover, the opinion of 20 August 1998 of the Supreme Court of Canada in the Reference concerning certain questions relating to the secession of Quebec from Canada formulates limits to the principle of territorial integrity: only "a state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law."[52]

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46 Resolution 1514 (XV) of the United Nations General Assembly: "Declaration on the granting of independence to colonial countries and peoples" of 14 December 1960.

47 Resolution 1541 (XV) of the United Nations General Assembly: "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 of the Charter" of 15 December 1960.

48 Resolution 2625 (XXV) of the United Nations General Assembly: "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" of 24 October 1970.

49 See also International Court of Justice, *Military and Paramilitary Activities in Nicaragua and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 108.

50 Resolution 1803 (XVII) of the United Nations General Assembly: "Permanent sovereignty over natural resources" of 14 December 1962.

51 *Concluding observations of the Human Rights Committee: Iraq*, A/47/40, pars.182-218, 31 October 1991, para. 195.

52 Par. 154. See also par. 138: "In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are

b) The prohibition of slavery and servitude

The right not to be held in slavery or servitude is simply ignored by the Arab Charter on Human Rights. The Arab Charter merely establishes a prohibition of forced labour.[53] This constitutes a grave omission because the prohibition of slavery is considered a norm of *ius cogens*. The prohibition of slavery was set forth as from 1926 in the Slavery Convention and in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, of 1956. This prohibition was supplemented by the adoption of the Forced Labour Convention of 1930 and the Abolition of Forced Labour Convention of 1957. This prohibition of slavery has been continually reiterated: thus article 4 of the Universal Declaration of Human Rights, article 8 of International Covenant on Civil and Political Rights, article 6 of the American Convention on Human Rights, article 4 of the European Convention on Human Rights and article 5 of the African Charter on Human and Peoples' Rights all contain a prohibition of slavery. Lastly, it should be recalled that article 7 of the Statute of the International Criminal Court qualifies enslavement as forming a basis for a crime against humanity.[54]

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manifestly inapplicable to Quebec under existing conditions. [...] ". Available at the Internet address: http://www.lexum.umontreal.ca/csc-scc/en/pub/1998/vol2/html/1998scr2_0217.html.

[53] This ban on forced labour was established in article 31 of the Arab Charter in its 1994 version and is affirmed in a watered-down manner in the new article 27.

[54] Article 7 of the Statute of the International Criminal Court, devoted to crimes against humanity states:

"1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[...]

(c) Enslavement; [...]

2. For the purpose of paragraph 1: [...]

c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; [...]."

This prohibition had already been formulated in the Statute of the Nuremberg Tribunal. See also "Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" of 1950 whose principle 6c) specifies that "murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime" are crimes against humanity. Report of the International Law Commission on the work of its second session, from 5 June to 29 July 1950, Official documents, fifth session, *Yearbook of the International Law Commission, 1950*, vol. II, United Nations, New York. The text is available at the Internet website: http://www.un.org/law/ilc/texts/nurnfra.htm.

Finally, the prohibition of slavery and servitude is a non-derogable right under the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights.

c) The principle of non-discrimination

The principle of non-discrimination is directly related to the principle of equality. It is established in numerous international instruments and has various fields of application.[55] The principle of non-discrimination is also affirmed in article 1 of the American Convention on Human Rights, article 14 of the European Convention and article 2 of the African Charter on Human and Peoples' Rights. While it is true that the principle of non-discrimination is incorporated in article 2 of the Charter,[56] including discrimination on the basis of sex, the Charter does not contain any explicit reference to equality between men and women in the enjoyment of the rights set forth in the text nor equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.[57] The Declaration on the Elimination of Discrimination against Women and the United Nations Convention on the Elimination of All Forms of Discrimination against Women reiterate this fundamental principle of equality. It is regrettable that the Arab Charter on Human Rights does not include a provision similar to that of article 3 of the Covenant setting out the principle of equality between men and women and does not encompass, as does the Covenant in its article 23, the principle of equality with regard to marriage, in the marriage and at its dissolution.

The insertion of a supplementary paragraph in article 2 of the Charter, directly inspired by the Declaration on Human Rights in Islam, stipulating that men and women are equal in human dignity, rights and duties within the framework of the objective differences set forth by Islamic law (*sharia'*) and by other revealed laws, is highly problematic. Such a provision strips the principle of non-discrimination on the basis of sex of its substance so

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55 Thus, while the principle of non-discrimination is enshrined in article 1, paragraph 3 of the United Nations Charter, articles 2, 7 and 10 of the Universal Declaration of Human Rights and articles 2, 3, 14, 25 and 26 of the International Covenant on Civil and Political Rights give substance to the principle of non-discrimination and reiterate the principle of equality before the courts and tribunals, the equality of persons before the law and the right without discrimination to the equal protection of the law.

56 Article 2 of the Arab Charter in its 1994 version sets out the principle of non-discrimination on the basis of race, sex, religion, political opinions, national or social origin, property, birth or other status, and without any discrimination between men and women.

57 This question principally relates to the patrimonial stakes involved.

that it is virtually negated and is therefore in flagrant contradiction with international standards. In addition, the recourse to non-juridical concepts or to concepts only vaguely defined should be avoided.

It is also disturbing that many of the rights granted by the Charter are solely to the benefice of citizens of States Parties. Such an exclusion of non-citizens is a discrimination as prohibited under international human rights standards and persons subject to the jurisdiction of a State party should enjoy the rights set forth in the Charter, with the exception of the right to vote and to be elected, which may be reserved only to citizens.

d) The right not to be arbitrarily deprived of life

The Arab Charter in its 1994 version reserved the death penalty for serious common law crimes (article 10). It was excluded for political offences (article 11), for persons under 18 years of age, for pregnant women prior to their delivery and for nursing mothers within two years from the date on which they gave birth (article 12).

The revised version of the Arab Charter establishes the right to life in its article 4 and specifies in article 9 that the death penalty shall be reserved for the most serious crimes in conformity with the law, and by a final judgement of a specialised jurisdiction, and that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Article 10 of the Charter in its 2003 version reiterates that the death penalty in principle is prohibited for minors, pregnant women prior to their delivery and nursing mothers within two years from the date on which they gave birth. On the other hand, the exclusion of the death penalty for political crimes as affirmed by the Arab Charter in its 1994 version, has been eliminated in the 2003 version of the Charter.

The right not to be arbitrarily deprived of life is insufficiently protected by the Arab Charter on Human Rights, for the following reasons:
- The death penalty should only be possible in compliance with a final judgement pronounced by an independent, impartial and competent court established by law;
- The right to appeal against the imposition of a death sentence should be guaranteed;
- Minors are not sufficiently protected, as article 10 of the Charter in its 2003 version restricts itself to a superficial prohibition of the death penalty for minors in that it retains the possibility for the internal law of States Parties to determine differently;

- The death penalty is not excluded for persons suffering from any form of mental illness, even though the imperative of such exclusion was reaffirmed by the United Nations Commission on Human Rights in resolution 2003/67;[58]
- The death penalty for political crimes is not any more expressly excluded in the 2003 version of the Arab Charter on Human Rights;
- Finally, the necessity of abolishing the death penalty altogether is of fundamental importance. Article 6, paragraph 2 of the International Covenant on Civil and Political Rights and the Second Optional Protocol to the Covenant set forth the principle of abolition of the death penalty. This mandate toward progressive abolition is regularly emphasised by the United Nations Commission on Human Rights.[59] But at no point does the Arab Charter on Human Rights envisage the obligation for States to abolish the death penalty eventually.

e) The right to security of person

The Arab Charter in its 1994 version had adopted an approach similar to that of the Universal Declaration of Human Rights: congruent with article 3 of the Declaration, it guaranteed the right to life, liberty and security of person. The text amended in 2003, on the other hand, seems to follow the structure of the International Covenant on Civil and Political Rights in that it guarantees in separate articles the right to life (article 4) and the right to liberty and security of person (article 5). The problem is that both the Covenant and the Arab Charter limit the concept of the right to security to the aspect of deprivation of liberty. But as the Human Rights Committee has established, in reality this right relates to several human rights, if not to all of them, and is not limited solely to the problem of deprivation of liberty.[60] Thus, for instance, the right to security is directly linked to the

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58 United Nations Commission on Human Rights resolution 2003/67 of 24 April 2003, *The question of the death penalty*, paragraph 4, which urges all States that still maintain the death penalty not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.

59 See the resolutions adopted by the Commission on Human Rights on the death penalty.

60 See Human Rights Committee, decision of 12 July 1990, *William Eduardo Delgado Páez v. Colombia* Communication No. 195/1985, UN Doc. CCPR/C/39/D/195/1985, 23 August 1990, par. 5.5: "The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The *travaux préparatoires* indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. The Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These elements have been dealt with in separate clauses in the Covenant. Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty.

right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.

The Charter should guarantee the right to security and affirm the obligation for States to take all reasonable and appropriate protection measures to assure the right to security of person.

f) The right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment

The prohibition of torture and cruel, inhuman or degrading treatment or punishment is established in article 5 of the Universal Declaration of Human Rights and in article 7 of the International Covenant on Civil and Political Rights. The Covenant moreover recognises the non-derogable nature of this prohibition. This prohibition is also affirmed in article 3 common to the Geneva Conventions of 1949 and in the regional human rights protection instruments.[61] Previously established in article 13 of the Charter in its 1994 version, the prohibition of torture and cruel, inhuman or degrading treatment or punishment is now developed in article 11 of the Charter in its 2003 version. Article 12 deals with the prohibition of medical or scientific experimentation. The Arab Charter on Human Rights stresses the significance of expressly prohibiting physical or mental torture. It is nevertheless revealing to note that neither in its 1994 nor 2003 versions does the Charter include a prohibition of cruel, inhuman or degrading punishment. Such an omission may well be linked to the persistent recourse to corporal punishment in certain States of the region.

It should be noted that article 4 of the Charter in its 1994 version, which contains a list of rights for which no derogation is possible, only mentions torture or degrading treatment. Does this mean that recourse to cruel or

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At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant." See also Human Rights Committee, decision of 20 March 2000, *Carlos Dias v. Angola*, Communication N° 711/1996, UN Doc. CCPR/C/68/D/711/1996, 18 April 2000, para. 8.3, and Human Rights Committee, decision of 25 October 2000, *Rodger Chongwe v. Zambie*, Communication No. 821/1998, UN Doc. CCPR/C/70/D/821/1998, 9 November 2000. para. 5.3.

[61] Article 5 of the American Convention on Human Rights, article 3 of the European Convention on Human Rights, article 5 of the African Charter on Human and People's Rights.

inhuman treatment would be admissible? See the discussion *infra* concerning derogations of the rights guaranteed.

Article 11 of the current version protects from torture individuals present within the territory of a State. This formulation poses a problem insofar as it calls into question the scope of the Charter as defined in article 2. Considering its importance, the principle of *non-refoulement*, or the prohibition against expelling, returning or extraditing any person exposed to the risk of torture, should be incorporated explicitly in the prohibition of torture.

g) The right to a fair trial

The right to a fair trial by a competent, independent and impartial court established by law and to all of the judicial guarantees to which every person is entitled is a fundamental principle of law.

The Charter in its 1994 version devoted 11 articles to deprivations of liberty and judicial guarantees.[62] These provisions were reorganised during the sessions of the Arab Standing Committee on Human Rights in 2003, without, however, guaranteeing an enhanced protection. Thus, each of the rights set forth in the text is expressed succinctly and tersely. For example, the Charter does not guarantee the right to a fair and equitable trial by a competent, independent and impartial court established by law, but only enumerates the legal guarantees that the accused should enjoy.

From the perspective of the proper administration of justice, the mere evocation of legal guarantees that the accused should enjoy is hardly satisfactory. The right to a fair and equitable trial by an independent and

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[62] See article 4 in the 2003 version of the Charter (article 5 in the 1994 version) concerning the right to life; article 5 in the 2003 version of the Charter on the right to liberty and security of person and the prohibition of arbitrary detention. Article 6 in both the 1994 and 2003 versions of the Charter concerns the legality of crimes and punishments and application of the least severe penal law. Article 7 in the 1994 and 2003 versions of the Charter sets forth the principle of the presumption of innocence and the legal guarantees which an accused person should enjoy. Article 9 in the 1994 version concerns equality before the law and the right to an appeal; the new article 8 in the 2003 version of the Charter for its part establishes only equality before the law but on the other hand lays down the obligation of States Parties to guarantee the independence of the justice system. Article 9 (article 10 in the 1994 version of the Charter) reserves recourse to the death penalty for serious offences and article 10 prohibits the death penalty for minors, and article 11 in the 2003 version (article 13 in the 1994 version) concerns prohibition of torture or cruel, inhuman or degrading treatment, and article 6 in the 2003 version (article 16 in the 1994 version) concerns the *non bis in idem* principle.

impartial tribunal established by law is enshrined in both the universal and regional texts[63] and has been considered by the Human Rights Committee as an absolute right which admits of no exception.[64] The substance of the right to a fair trial is not specified in the Arab Charter: the right to a defence, notification of the right to legal counsel, notification in a language the accused understands, the right to benefit from the assistance of a lawyer, the right to appointed counsel whose services are provided *gratis*, the right to inform the family of the accused of his detention as well as the place of incarceration, the right to have adequate time and facilities to prepare his defence, the right to a public trial, and the exclusion of evidence obtained by torture and other coercive measures. Thus, many elements that have been affirmed explicitly by international jurisprudence nevertheless are not guaranteed by the Arab Charter. It is therefore indispensable that the Arab Charter guarantees the right to a fair trial by an independent and impartial court established by law and exhaustively sets forth the judicial guarantees that every accused person should enjoy.

h) The rights of minorities

Respect of the rights of minorities is mandated under article 27 of the International Covenant on Civil and Political Rights. The content of this requirement is specified by the Human Rights Committee in its General Comment No.23[65] and by the Committee on the Elimination of Racial

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63 See article 11 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights, article 6 of the European Convention on Human Rights, article 8 of the American Convention on Human Rights and articles 7 and 26 of the African Charter on Human and Peoples' Rights. See also the "Basic Principles on the Independence of the Judiciary" adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985 and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, and the "Basic Principles on the Role of Lawyers" adopted by the Eighth United Nations Congress for the Prevention of Crime and the Treatment of Offenders held in Havana (Cuba) from 27 August to 7 September 1990.

64 See Human Rights Committee, *Miguel González del Río v Peru*, Communication No. 263/1987, UN Doc. CCPR/C/46/D/263/1987, 28 October 1992, para. 5.2: "The Committee recalls that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception". See also Human Rights Committee, General Comment No 29: "States of Emergency", CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 11: "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or **peremptory norms of international law**, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by **deviating from fundamental principles of fair trial, including the presumption of innocence**." (Emphasis added.)

65 Human Rights Committee, General Comment No. 23: "The Rights of Minorities (Art. 27)", 8 April 1994.

Discrimination in its General Recommendations Nos. 23 and 24.[66] The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[67] also enumerates certain obligations incumbent on States regarding protection of minorities. Thus, the rights set forth are conferred "on individuals belonging to minority groups and which [are] distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the [International Covenant on Civil and Political Rights]".[68] Jurisprudence has also helped flesh out the content of the rights guaranteed by article 27 of the Covenant.[69] Thus, "although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant".[70]

In the 1994 text, article 37 dealt specifically with the rights of minorities. This clause was also the subject of a "restructuring", once again failing to move in the direction of increased protection. This reference to the rights of minorities is now included in an article 30, which very generally advocates the right of every person to live in an intellectual and cultural environment in which human rights and fundamental liberties are respected and where any form of racial discrimination is rejected. *In fine,* the right of minorities to enjoy their culture, language and religious practices is affirmed.

A more adequate and unequivocal formulation of these rights, encompassing both the obligation to refrain from violations and the positive obliga-

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66 Committee for the Elimination of Racial Discrimination, General Recommendation No. 23, "The Rights of Indigenous Peoples", of 18 August 1997 and General Recommendation No. 24, "Article 1 of the Convention", of 27 August 1999.

67 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly of the United Nations in its resolution 47/135 of 18 December 1992.

68 Human Rights Committee, General Comment No. 23, para. 1.

69 See Human Rights Committee, Concluding Observations: Dominican Republic, CCPR/C/79/Add.18, 5 May 1993, para. 7; Human Rights Committee, Concluding Observations: Estonia, CCPR/C/79/Add.59, 9 November 1995, para. 36; Conclusions of the Committee for the Elimination of Racial Discrimination, Zimbabwe, CERD/C/304/Add.3 of 28 March 1996, para. 18.

70 Human Rights Committee, General Comment No. 23, para. 6.2.

tions incumbent on States to protect the rights of minorities should be incorporated in a separate article of the Charter.

i) Political Rights

Political rights under the Charter are reduced to their most rudimentary expression. The International Covenant on Civil and Political Rights in its article 25 guarantees "the right and the opportunity" for every citizen "to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; to have access, on general terms of equality, to public service in his country." The rights contained in article 25 of the Covenant are explicitly affirmed in General Comment No. 25 of the Human Rights Committee.[71] Similar provisions are set forth in article 13 of the African Charter on Human and People's Rights and in article 23 of the American Convention. For its part, article 19 of the Arab Charter in its 1994 version restricts itself to mentioning the exercise of political rights without specifying their content, while the text of the 2003 version of the Charter in article 17 only mentions political capacity exercised within the limits of the law. Article 33 in the 1994 version and article 28 in the 2003 version ensure the right of access to public office.

j) Other rights

Another disquieting development in the process of "modernising" the text of the Arab Charter on Human Rights is the removal of the prohibition against imprisonment for civil debts, whereas this proscription was recognised by article 14 of the Charter in its 1994 version. A similar provision is included in the American Convention on Human Rights (article 7, paragraph 7). This regression is all the more inexplicable given that article 11 of the International Covenant on Civil and Political Rights this prohibition admits of no derogation.

The right to freedom of expression is also omitted, or is only envisaged in the limited framework of the exercise of freedom of religion, even though the Human Rights Committee has specified in its General Comment no. 23 that "[t]he rights of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from

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[71] Human Rights Committee, General Comment No. 25, "The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25)", 12 July 1996.

other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19."[72]

Finally, while article 26 of the Charter guarantees the right to freedom of belief, thought and opinion, the right to adopt the religion or belief of one's choice (or the freedom to change one's religion or belief as set forth in article 18 of the Universal Declaration of Human Rights) is not guaranteed.

Conclusion:

A serious project of "modernisation" of the Arab Charter on Human Rights would ensure the establishment in the final version of the Arab Charter of the following rights hitherto omitted:
- the right not to be held in slavery or servitude;
- the principle of equality between men and women (in wording devoid of ambiguity and without juridical subterfuges allowing the established right to be denied);
- the absolute prohibition of the death penalty for minors;
- the absolute prohibition of the death penalty for persons suffering from any kind of mental illness;
- prohibition of the death penalty for political crimes;
- eventual abolition of the death penalty altogether;
- prohibition of torture and other cruel, inhuman, degrading treatment must also include the prohibition of punishments;
- freedom of religion in all its components, including the right to adopt the religion or conviction of one's choice;
- prohibition of imprisonment for civil debt;
- freedom of expression;
- political rights in all their components, including the right to vote and to be elected; and
- freedom of association without limiting its exercise to specific areas of social life.

4. Expanded possibilities for restrictions and derogations

Articles 3 and 4 in the 1994 version of the Arab Charter on Human Rights have been merged in its 2003 version into a single article 3 relating to restrictions and derogations to the rights guaranteed in the Charter. Thus, the structure of the Charter differs from that of other international

[72] Human Rights Committee, General Comment No. 23, para. 5.3.

instruments in as much as there is now a general clause of restrictions to the rights guaranteed.

a) Restrictions on rights guaranteed

By restriction or limitation is understood the possibility for States to limit the exercise of the human rights and fundamental freedoms recognised in favour of the individual. One such possibility has been affirmed in article 29, paragraph 2 of the Universal Declaration of Human Rights.[73] The universal and regional human rights protection instruments allow the imposition of restrictions on certain of the rights which they guarantee.[74] The possibility for States to limit the exercise of rights guaranteed is set forth either in the form of a general clause authorising such restrictions or in the form of paragraphs in the specific articles establishing the rights. Thus, the International Covenant on Civil and Political Rights accepts

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[73] Article 29, § 2 of the Universal Declaration of Human Rights: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

[74] The American Convention on Human Rights makes provision for the possibility of limiting exercise of the rights to freedom of conscience and religion (article 12), freedom of thought and expression (article 13), freedom of assembly (article 15), freedom of association (article 16) freedom of movement and residence (article 22). These possibilities of restriction are limited by article 30 of the Convention which provides that "the restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established." Only the restrictions provided for by law and necessary in a democratic society in the interest of national security or public order, or to protect public health or morality, or the rights and freedoms of others are acceptable.
The Convention for Protection of Human Rights and Fundamental Freedoms provides for restrictions to article 8 (right to respect for one's private and family life), article 9 (right to freedom of thought, conscience and religion), article 10 (freedom of expression) and article 11 (freedom of assembly and association). The Convention specifies in article 18 concerning limitation of the use of restrictions on rights that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." The paragraphs 2 of the articles devoted to rights liable to be restricted set forth that interference by a public authority with the exercise of such rights is prohibited, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
For its part, the African Charter on Human and Peoples' Rights provides restrictions on the exercise of freedom of conscience and the profession and free practice of religion (article 8), the right to assemble freely (article 11) and the right to freedom of movement (article 12) provided that such restrictions are decreed by laws and regulations in the interest of national security, and the safety, health, ethics and rights and freedoms of others.

restrictions to freedom of movement (article 12), freedom of thought, conscience and religion (article 18), freedom of expression (article 19), freedom of assembly (article 21), freedom of association (article 22) and to political rights (article 25). Nevertheless, such restrictions are only possible if they are provided by law, are necessary in a democratic society to protect national security, public order, public health or morality, or the rights and freedoms of others, and if they are consistent with other rights recognised by the Covenant. Moreover the Human Rights Committee in its General Comments Nos. 10, 22, 27 and 29[75]has specified the conditions under which restrictions to rights are possible.

In light of these elements, the possibility of restricting the exercise of rights is not left to the free judgement of the States. It is subjected to strict conditions:

- The restrictions have to be provided for by law;
- The restrictions have to be necessary in a democratic society to protect national security, public order, public health or morality, or the rights and freedoms of others;
- The restrictions have to be necessary to protect these objectives;
- The restrictions have to be proportionate to the interest to be protected;[76]
- The restrictions have to be consistent with all of the other rights recognised in the relevant international instrument.

Article 3 a) of the Arab Charter on Human Rights in its 2003 version[77] provides that only restrictions provided by law and considered necessary to protect the national security and economy, public order, health or morals or the rights and freedoms of others are possible. It must immediately be noted that the grounds for restriction are broader than those of the International Covenant on Civil and Political Rights. Thus, protection of the economy is considered as legitimate grounds for restriction of the rights guaranteed in the Arab Charter.

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75 Human Rights Committee, General Comment No. 10, "Freedom of expression (art. 19)", of 29 June 1983, par. 4; Human Rights Committee, General Comment No. 22, "The right to freedom of thought, conscience and religion (art. 18)", 30 July 1993, para. 8; Human Rights Committee, General Comment No. 27, "Freedom of movement (art.12)", CCPR/C/21/Rev.1/Add.9 of 02 November 1999, in particular pars. 11 to 18; and Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11, 31 August 2001, paras. 4, 7 and 9.

76 The restrictions must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed. See para. 13 of General Comment No. 27, "Freedom of movement (art. 12)", CCPR/C/21/Rev.1/Add.9, 2 November 1999, of the Human Rights Committee.

77 Previously article 4 a) in the 1994 version of the Charter.

The Charter furthermore refers in several articles to restrictions to the rights guaranteed by law (see the references "by virtue of the law", "respecting the legislation in force", "only the restrictions provided by law are covered") while omitting the criteria of the necessity and proportionality of the restriction.

Finally, the Charter contains a large number of veiled restrictions to the rights guaranteed.[78] Thus, the scope of such rights "can become quite reduced, even non-existent, if the modalities of its exercise are abandoned to the internal legislation of the States who have recognised the right".[79] Yet the rights established in articles 5, 6, 9, 10 paragraphs 1 and 2, 12, 15, 17, 18, 24 paragraphs 1 and 2, 25, 26 paragraphs 2 and 3, 30 and 31 are so established within the limits of modalities fixed by the internal law of States Parties. It should be noted that this reference to the law poses a problem insofar as the law does not necessarily emanate from a democratically elected body,[80] nor is it necessarily subject to parliamentary control, nor to the control of constitutionality. Potentially then, the exercise of all the rights established under the Charter could be restricted by law.

Restrictions on rights guaranteed should be limited to measures strictly necessary and proportional to the interest to be protected, and the reasons for the restriction of protected rights must not be vague or excessively general. The modalities of the exercise of rights guaranteed, when defined by the internal law of States, can constitute veiled restrictions which should be eliminated from the final text of the Charter.

b) Derogations from rights guaranteed

By derogation is meant the possibility for a State to curtail provisionally the exercise and enjoyment of human rights and fundamental liberties.[81] This possibility is strictly limited. General Comment No. 29 of the Human Rights Committee is decisive in clarifying the criteria and conditions for recourse

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78 See the discussion *supra* on the notions of "kanoun" and "tashri'" which permit restrictions to the rights guaranteed.

79 Frédéric Sudre, *Droit européen et international des droits de l'homme*, 6th revised edition, Presses universitaires de France, Paris, 2003, p. 203.

80 This can be linked with the denial of the political rights in the Charter, notably the right to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

81 "The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant." Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11, 31 August 2001, par. 1.

to measures of derogation.[82] Thus it appears clearly that derogations to rights are only possible if the following requirements are met.

- The situation must constitute a public emergency that threatens the life of the nation;
- The State Party must have officially declared a state of emergency. This condition is essential for maintaining the principles of legality and the rule of law;
- The derogation measures must be of an exceptional and provisional nature;
- The derogations are only permitted to the extent strictly required by the exigencies of the situation. This condition applies to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency;
- The principle of proportionality must be respected;
- The measures of derogation must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin;
- The measures of derogation must not be inconsistent with the State Party's other obligations under international law, particularly the rules of international humanitarian law;
- There can be no derogation of certain rights qualified as being non-derogable.

Article 3 b) of the Arab Charter on Human Rights as amended in 2003 provides for the possibility, in case of an emergency situation threatening the life of the nation, of adopting measures of derogation on obligations foreseen in the Charter, to the extent that the situation strictly so requires.

With regard to the formal conditions that States resorting to measures of derogation must respect, in the Arab Charter on Human Rights as adopted in 1994 no formal condition was foreseen concerning declaration of the state of emergency, notification of the Secretary General of the League of Arab States or the lifting of the state of emergency. This procedural deficiency would stand to generate a situation of legal insecurity for the beneficiaries of the rights. The new draft text of this article takes into account and incorporates formal conditions such as the official declaration of the state of emergency and the notification of the Secretary General of the League of Arab States. The condition of necessity also seems to have been incorporated and brought into conformity with international standards: thus, the 2003 version of the text sets forth that derogations are

[82] Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11, 31 August 2001.

possible "strictly to the extent that the situation requires it" and under the condition that these measures are not inconsistent with other obligations under international law and that they do not involve discrimination. A clear limitation of the time allowed for recourse to a state of emergency should also be envisaged. Thus, article 27 of the American Convention on Human Rights contains a limitation on the duration of the suspension, in accordance with the strict requirements of the situation. This aspect is particularly important in light of the regular practice of certain Member States of the League of Arab States and their frequent and/or prolonged recourse to states of emergency, and it shows very clearly the need to better control the recourse to derogations. It should be noted that Algeria has had a state of emergency in force since 1992; Egypt since 1981; Syria since 1963, and Sudan has repeatedly extended its state of emergency.[83]

The formulation of article 3 of the Charter in the revised version of 2003 poses a problem insofar as the States seem authorized to "back out of" their obligations under the Charter and "are no longer bound" by the provisions of the Charter. Derogation should be understood to mean the suspension of applicability, and then only to the extent required, and not release from obligations. In practice, this will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party and the obligation again take full effect again as soon as the reason for the suspension has disappeared.[84] The insertion in the Arab Charter of a general clause of derogation should therefore be excluded.

The 1994 version established as non-derogable rights the prohibition of torture and degrading treatment, right of return to one's country, political asylum, the right to a trial, the right not to be retried for the same act and the principle of the legality of crime and punishment. This list posed difficulties, inasmuch as freedom from cruel or inhuman treatment and punishment did not seem to be considered as a non-derogable right. In the revised version of the Arab Charter on Human Rights, the Arab Standing Committee on Human Rights has left the establishment of a list of non-derogable rights absent from the current state of the text.

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[83] Report of the Office of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights decision 1998/108, "Question of human rights and states of emergency", List of States which have proclaimed or continued a state of emergency, E/CN.4/Sub.2/2003/39 of 16 June 2003.

[84] Human Rights Committee, General Comment No. 29, "States of Emergency (art. 4)", CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 4.

While the African Charter on Human and Peoples' Rights rests on the absence of a clause of derogation, the European Convention for Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights each enumerates non-derogable rights.[85] In light of the various human rights protection instruments and General Comment No. 29 of the Human Rights Committee, the list of non-derogable rights in the Arab Charter on Human Rights should include at least the following elements:[86]

- Right to life;
- Prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and medical or scientific experiments conducted without the free consent of the person concerned;
- Prohibition of slavery, the slave trade and servitude;
- Recognition of everyone as a person before the law;
- Prohibition against imprisoning a person on the ground of inability to fulfil a contractual obligation;
- Principle of legality in penal matters, by virtue of which criminal responsibility and punishments must be defined in clear and precise provisions of a law that was in force and applicable at the moment that the action or omission took place, except in cases where a subsequent law provides for a less severe punishment;
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person;

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85 Article 15 of the European Convention considers as non-derogable rights the right to life, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and servitude, the principle of the legality of crimes and punishments. Article 27 of the American Convention on Human Rights establishes the right to recognition of the juridical person, the right to life, the right to the integrity of the person, the prohibition of slavery and servitude, the principle of legality and non-retroactivity, freedom of conscience and religion, the protection of the family, the right to a name, the rights of the child, the right to a nationality and political rights. It also does not authorize suspension of guarantees indispensable to the protection of the aforementioned rights. For its part, the International Covenant on Civil and Political Rights retains as non-derogable rights article 6 (right to life), article 7 (prohibition of torture and other cruel, inhuman and degrading treatment and punishment, and medical or scientific experiments conducted without the free consent of the person concerned), article 8, paragraphs 1 and 2 (prohibition of slavery, the slave trade and servitude), article 11 (prohibition against imprisoning a person on the ground of inability to fulfil a contractual obligation), article 15 (principle of legality in penal matters, by virtue of which criminal responsibility and punishments must be defined in clear and precise provisions of a law that was in force and applicable at the moment that the action or omission took place, except in cases where a subsequent law provides for a less severe punishment), article 16 (recognition of everyone as a person before the law) and article 18 (liberty of thought, conscience and religion).

86 The Human Rights Committee in General Comment No. 29 has included supplementary elements regarding protection of persons belonging to minorities for example, notably in para. 13.

- Prohibition against taking of hostages, abductions or unacknowledged detention;
- Right to a fair trial by a competent, independent and impartial tribunal established by law;
- Prohibition against arbitrary deprivations of liberty or non-observance of fundamental principles of fair trial such as the presumption of innocence;
- Right to take proceedings before a court, in order that court may decide without delay on the lawfulness of a detention;
- Obligation to ensure effective internal remedies against any violation of the provisions of the Covenant and respect of fundamental judicial guarantees;
- Principle according to which only a court of law can try and convict an individual for a criminal offence;
- Respect for the presumption of innocence.

5. Monitoring and follow-up mechanisms

Only two relatively short articles of the Arab Charter on Human Rights are devoted to mechanisms for monitoring the application of the Charter.[87] The system envisaged is summary, to say the least: article 35 in the 2003 version of the Charter[88] deals with the composition, election of members, etc. of the Committee of Experts/Arab Committee on Human Rights which is to be established. Article 36 in the 2003 version of the Charter[89] covers the obligations of Member States with regard to the Committee of experts on human rights. These provisions were slightly modified during the revision of the text of the Charter in 2003.

Concerning monitoring and follow-up mechanisms, the Arab Charter proposes the creation of a committee of seven independent experts, chosen by the Council of the League. The experts do not enjoy any specific immunity and nothing is indicated regarding the material and financial assistance which is to be accorded to them. The experts are charged with receiving the reports of governments and transmitting their observations to the Arab Standing Committee on Human Rights, which transmits them in turn to the Council of Arab Foreign Ministers without any indication as to the follow-up that will be given them. This subordination of the

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87 By comparison, the International Covenant on Civil and Political Rights devotes 18 articles to the Human Rights Committee, and the African Charter on Human and Peoples' Rights devotes 30 articles to the African Commission on Human Rights.

88 Article 40 of the Charter in its 1994 version.

89 Article 41 of the Charter in its 1994 version.

mechanism for monitoring application of the Charter to the political organs of the League of Arab States should not be accepted.

Moreover, the terseness of article 41 of the Charter in its 1994 version, which provided for the obligation of the States to issue reports, but without specifying the content of such reports, is striking. The ICCPR, for example, requires States to present reports concerning the measures they adopt putting the recognised rights into effect. Fortunately, in the revised 2003 version of the Charter, article 36 stipulates that the reports of the States must include the legislative and other provisions adopted to implement the rights and freedoms contained in the Charter.

The members meet at the invitation of the Secretary General of the League of Arab States, and nothing is indicated regarding the right of the experts to receive information from other sources or their right to investigate or to interpret, if necessary, the clauses contained in the Charter. No mechanism is foreseen for individual communications.

Concerning the role of NGOs in the procedures and mechanisms foreseen for monitoring the application of the Charter, operation of both the UN and regional systems of human rights protection has demonstrated the utility and necessity of participation by NGOs, notably in gathering information and implementing procedures through the possibility accorded to NGOs to refer matters to the monitoring mechanisms.[90] Such mechanisms must be accessible to NGOs in the Arab system. It is therefore important that amendments be introduced to the text of the Arab Charter so that the rights guaranteed are accompanied by monitoring mechanisms to ensure that they are effectively respected. The League of Arab States should review the modalities for participation by NGOs in its work and accept the possibility for NGOs to refer matters to the mechanisms monitoring application of the Charter, including in the framework of individual communications.

CONCLUSIONS AND RECOMMENDATIONS

It remains to be determined whether the system to be established when the Arab Charter enters into force will be equipped with the normative and institutional machinery allowing for a genuine protection of human rights in the Arab region, or rather whether the process will simply result in taking

[90] See chapter IV "Defining the Role of Non-governmental Organisations" in the work edited by Anne F. Bayefsky, *The UN Human Rights Treaty System in the 21st Century*, La Haye, Kluwer Law International, 2000, pp. 181-230.

of cosmetic measures aimed at creating the illusion of an attachment by the States of the region to rights which may have in any event subscribed to under other systems.

The extent of deficiencies marking the system of human rights protection envisaged within the framework of the League of Arab States is worrying. The elaboration and adoption of an Arab Convention on the Suppression of Terrorism won massive adherence by the States of the region and the text of the accord was adopted in 1998 and entered into force in 1999. This agreement stipulated very specific obligations for the States Parties with regard to police and judicial cooperation and coordination between intelligence agencies, as well as cooperation regarding border controls, migration and customs. This result is proof, if any were needed, that when the political will exists among Member States, the League of Arab States is capable of remarkable efficiency.

The need to establish an effective system of human rights protection in the Arab region is particularly striking at a moment when the United Nations Development Program (UNDP) and the Arab Fund for Economic and Social Development have published in October 2003 their second report on human development in the Arab World. This report paints a disastrous picture concerning respect of human rights in the region and criticises "a certain number of countries [that] have adopted extremely severe regulations and policies in the framework of what is called the 'war against terrorism'". According to the report, "the most disastrous consequences of the adoption of regulations [...] are in Arab countries where the authorities have used the pretext of the situation to decree new laws restraining civil and political liberties".[91]

In its current state, the Arab Charter on Human Rights is marred by fundamental deficiencies: it contains important omissions, guarantees rights only superficially, offers expanded possibilities for restrictions and derogations to the rights guaranteed, and above all contains no real mechanism to monitor respect of these rights. The process of "modernisation" envisaged must at least aim at bringing the Arab Charter on Human Rights to the level of international human rights standards. An exercise in the opposite direction would be meaningless.

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[91] United Nations Program for Development (PNUD) and the Arab Fund for Economic and Social Development, Arab Human Development Report, 2003.

Postscript

Since the time of this writing, a revised text has been adopted by the Arab Standing Committee on Human Rights at a complementary meeting to its second extraordinary session, held from 4 to 15 January 2004. Within the framework of a technical assistance agreement, the United Nations Office of the High Commissioner for Human Rights and the League of Arab States had constituted a group of Arab experts who are members of UN treaty bodies or special procedures of the UN Commission on Human Rights. This group was charged with the task of analysing the text of the versions of the 1994 and 2003 versions of the Arab Charter to assess its conformity with international human rights standards. At the end of a meeting held in Cairo from 21 to 26 December 2003, the group of experts formulated recommendations and proposed a new text of Arab Charter on Human Rights. While the majority of its recommendations were included in the final text of the Arab Charter, certain positive proposals, including one for an expanded role of NGOs in the procedure before the Arab Committee on Human Rights were not retained. Nonetheless, the January 2004 text contains significant improvements to the texts of 1994 and the text as of October 2003. These improvements go a substantial way towards to harmonising the Charter with international standards:

- *In article 1 of the Charter, there is now a reference to universality, interdependence and the indivisible character of human rights.*

- *The revised version recognises the principle of non-discrimination and equality of opportunity and effective equality between men and woman in the exercise of all the rights enshrined in the Charter. The revised version also remedies an obvious omission by prohibiting slavery, servitude and human trafficking (article 10). Some rights, however, are granted only in a partial way, such as non-discrimination against women and regarding citizens and some precision and complements as to the contents are still needed. Regarding the status of women, article 3 c) of the revised Charter refers to Islamic Sharia and stipulates that men and woman are equal in human dignity, rights and duties within the framework of the positive discrimination instituted by the Islamic Sharia and other divine laws and by the international legislation and instruments.*

- *The Charter contains a fundamental flaw insofar as many of its provisions grant rights for the sole benefit of nationals/citizens. Thus, article 24 f) limits the benefit of freedom of assembly and association to the sole citizens. In a similar fashion, article 34 states that the right to work is a natural right of citizens and adds in its paragraph e) that "each State party ensures the workers who immigrate on his territory the necessary protection in accordance with the legislation in force". By contrast, the International Covenant on Economic, Social and Cultural Rights recognises the right to work to any person. Article 36 of the*

Charter also reserves the right to social security to citizens, whereas article 9 of the International Covenant on Economic, Social and Cultural Rights guarantees the same right to any person subject to the jurisdiction of a State Party. Lastly, article 41 which guarantees the right to education, limits the exemption of payment for primary education high school solely to citizens, contrary to article 13, 2 a) and b) of the International Covenant on Economic, Social and Cultural Rights.

- *Regarding administration of justice there has been a significant improvement, whereby the Charter now enshrines equality before the law and equal protection of the law (article 11), equality before courts and tribunals and independence of justice (article 12), the right to a fair trial by a competent, independent and impartial tribunal established by law and free legal assistance (article 13), the right to liberty and security of persons as well as habeas corpus guarantees (article 14), the principle of legality of offences and punishment (article 15), the presumption of innocence, the right to be informed immediately and in details of the nature and cause of the charges retained, the right to have sufficient time and to prepare one's defence, the right to contact one's relatives, the right for any defendant to the assistance of a lawyer of his/her choice, and if necessary, the right to the free assistance of an interpret and right of everyone convicted of a crime to have his conviction and sentence reviewed by a higher tribunal (article 16), a special legal regime for minors (article 17), the principle non bis in idem (article 19), the prohibition of imprisonment for civil debt (article 18) and finally the treatment with humanity of any person deprived of his/her liberty (article 20). Article 23 also constitutes a remarkable improvement, as an effective remedy is now guaranteed to any person whose rights or freedoms recognised in the Charter are violated.*

- *The revised version of the Charter also addresses some of the previous deficiency regarding non-derogable rights. Article 4 not only incorporates the necessary formal requirements, but also integrates in the list of non-derogable rights the interpretation and jurisprudence of UN treaty bodies. The terminology used is also satisfactory, insofar as it refers solely to suspension of rights. Thus, article 4 of the Charter dedicated to derogation requires the presence of a situation of an exceptional emergency threatening the existence of the nation which must be officially proclaimed. The other formal requirements, such as the notification to the other States Parties through the Secretary-General of the League of Arab States of the provisions from which it is derogating, the reasons for the derogating measures, as well as the duration of the derogation. A State Party may take only non-discriminatory measures, compatible with the other obligations under international law and to the extent strictly required by the exigencies of the situation. However, there exist differences between the grounds of discrimination as stated in article 3 a) and the grounds of discriminations as stated in article*

4 a). Thus, article 3 refers to religious belief, whereas article 4 refers to religion. Article 4 fails to refer to opinion, thought, national origin, fortune, birth or physical or mental handicap.

The list of non-derogable rights is highly expansive, which constitutes a most welcome improvement, and, indeed, is advance on other human rights instruments. The non-derogable rights include: The right to life; the prohibition of torture or other cruel, inhuman, humiliating or degrading treatments; the prohibition of medical or scientific experimentation undertaken without the free consent of the person concerned; prohibition of slavery, servitude and human trafficking; the right to a fair trial by a competent, independent and impartial tribunal established by law as well as the right to free legal assistance; the right to liberty and security of persons as well as habeas corpus guarantees; the principle of legality; the prohibition of imprisonment for civil debt; the principle non bis in idem; the freedom of thought, belief and religion; the treatment with humanity of any person deprived of his/her liberty; the recognition of the legal personality of everyone; the right to leave a country, including one's own country; the right to seek asylum and the right to a nationality.

ANNEX

THE ARAB STANDING COMMITTEE ON HUMAN RIGHTS[92]

Update of the Arab Charter on Human Rights

The Arab Standing Committee on Human Rights,

Having perused the note of the secretariat and the decisions of the Council of the League of Arab States Nos. 6243 (118) dated 5 September 2002, 6302 (119) dated 24 March 2003 and 6355 dated 9 September 2003, concerning the updating of the Arab Charter on Human Rights, and

Having studied, discussed and debated the matter,
Hereby recommends as follows:

1. The Arab Charter on Human Rights as contained in the enclosed text should be approved and referred to the Arab Standing Committee on Legal Affairs to review the legal text in preparation for its submission to the Council of the League at its forthcoming session.

Draft Arab Charter on Human Rights

Proceeding from the faith of the Arab nation in the dignity of the human person whom God has exalted since the Creation and that the Arab nation is the cradle of religions and the homeland of civilizations with lofty human values that affirm the human right to a life of dignity based on freedom, justice and equality,

In implementation of the eternal principles of fraternity, equality and tolerance among human beings imparted by the noble Islamic religion and by the other divine religions,

Being proud of the humanitarian values and principles that it has firmly established throughout its long history and that have played a key role in spreading centres of knowledge in the East and the West, making them destinations for the people of the earth and for those searching for knowledge and wisdom,

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[92] This is an unofficial translation from the Arabic text made by the Office of the High Commissioner for Human Rights.

Believing in the unity of the Arab nation as it struggles for its freedom, defends the right of nations to self-determination and to the protection of their wealth and development, and believing in the sovereignty of the law and its role in the protection of human rights in the most comprehensive sense of the term, and believing also that the individual's enjoyment of freedom, justice and equality of opportunity is a fundamental measure of any society,

Rejecting all forms of racism and Zionism, which constitute a violation of human rights and a threat to international peace and security, recognizing the close link between human rights and international peace and security, reaffirming the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the two International Covenants on civil and political rights and on economic, social and cultural rights, and having regard to the Cairo Declaration on Human Rights in Islam,

Now therefore, the States parties to the Charter have agreed as follows:

Article 1

The present Charter seeks in the context of the national identity of the Arab States and their sense of belonging to a common civilization, to achieve the following objectives:

(a) To place human rights at the centre of the key national concerns of the Arab States so as to make them lofty and fundamental ideals that shape the will of individuals in the Arab States and enable them to improve their lives in accordance with noble human values;
(b) To inculcate in human beings in the Arab States a sense of pride in their identity and attachment to the land, history and common interests of their homeland and to imbue them with the culture of human brotherhood, tolerance and openness towards others, in accordance with universal principles and values and with those proclaimed in international human rights instruments;
(c) To prepare the new generations in the Arab States for a free and responsible life in a civil society that is characterized by solidarity and founded on the interdependence between awareness of rights and commitment to duties and governed by the values of equality, tolerance and moderation;
(d) To entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.

Article 2

(a) All peoples have the right of self-determination and to control over their natural wealth and resources, and the right to freely choose their political system and to freely pursue their economic, social and cultural development.
(b) All peoples have the right to national sovereignty and territorial integrity.
(c) All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.
(d) All peoples have the right to resist foreign occupation.

Article 3

(a) Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.
(b) The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enunciated in the present Charter so as to ensure protection against all forms of discrimination on any of the grounds mentioned in the preceding paragraph.
(c) Men and women have equal human dignity and equal rights and obligations in the framework of the positive discrimination established in favour of women by the Islamic Shariah and other divine laws and by applicable laws and international instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.

Article 4

(a) In exceptional situations of emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
(b) In exceptional situations of emergency, no derogation shall be made from the following articles: article 5, article 8, article 9, article 10, article 13, article 14 (h), article 15, article 18, article 19, article 31, article 20,

article 22, article 27, article 28 and article 29. Likewise, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.

(c) Any State party to the present Charter availing itself of the right of derogation shall immediately inform the other States parties, through the intermediary of the Secretary-General of the League of Arab States, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

(a) Every human being has the inherent right to life.

(b) This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 6

Sentence of death may be imposed only for the most serious crimes in accordance with the laws in force at the time of commission of the crime and pursuant to a final judgement rendered by a competent court. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.

Article 7

(a) Sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.

(b) The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.

Article 8

(a) No one shall be subjected to physical or psychological torture or to cruel, inhuman, degrading or humiliating treatment.

(b) Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of or participation in such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.

Article 9

No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances.

Article 10

(a) All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances.
(b) Forced labour, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others and all other forms of exploitation or the exploitation of children in armed conflict are prohibited.

Article 11

All persons are equal before the law and have the right to enjoy its protection without discrimination.

Article 12

All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to bring proceedings before all courts of law.

Article 13

(a) Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite resources legal aid to enable them to defend their rights.
(b) Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.

Article 14

(a) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.

(b) No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.
(c) Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
(d) Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.
(e) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. It shall not be the general rule that persons awaiting trial shall be detained in custody.
(f) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is not lawful.
(g) Anyone who has been the victim of arbitrary or unlawful arrest or detention shall have an enforceable right to compensation.

Article 15

No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied.

Article 16

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty by a final judgement rendered according to law. In the course of prosecution and trial, he shall enjoy the following minimum guarantees:

(a) To be informed promptly, in detail and in a language which he understands, of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with his family;
(c) To be tried in his presence before an ordinary court and to defend himself in person or through legal assistance of his own choosing and to communicate with his legal counsel freely and in confidence;
(d) To have the free legal assistance of a defence lawyer, if he cannot defend himself or if the interests of justice so require, and to have the right

to the free assistance of an interpreter if he cannot understand or speak the language used in court;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) Not to be compelled to testify against himself or to confess guilt;
(g) To have the right, if convicted of a crime, to file an appeal according to law before a higher tribunal;
(h) To have the right to respect for his person and his privacy in all circumstances.

Article 17

Each State party shall ensure in particular to any child at risk or any delinquent charged with an offence the right to a special legal system for minors in all stages of investigation, trial and implementation of sentence, as well as to special treatment that takes account of his age, protects his dignity, facilitates his rehabilitation and reintegration and enables him to play a constructive role in society.

Article 18

No one who is shown to be unable to pay a debt arising from a contractual obligation shall be imprisoned.

Article 19

(a) No one may be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release.
(b) Anyone whose innocence is established by a final judgement shall be entitled to compensation for the damage suffered.

Article 20

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
(b) Accused persons shall be segregated from convicted persons and shall be subject to a treatment appropriate to their status as unconvicted persons.
(c) The penitentiary system shall comprise treatment of prisoners the aim of which shall be their reformation and social rehabilitation.

Article 21

(a) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.

(b) Everyone has the right to the protection of the law against such interference or attacks.

Article 22

Everyone shall have the right to recognition as a person before the law.

Article 23

Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 24

(a) Every citizen has the right to freely pursue a political activity.
(b) Every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives.
(c) Every citizen shall have the right to stand for election or to choose his representatives in free and impartial elections, on the basis of equality among all citizens and guaranteeing the free expression of his will.
(d) Every citizen has the right of equal access to public service in his country on the basis of equality of opportunity.
(e) Every citizen has the right to freely form and join associations with others.
(f) Every citizen has the right to freedom of association and peaceful assembly.
(g) No restrictions may be placed on the exercise of these rights other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others.

Article 25

Persons belonging to minorities shall not be denied the right to enjoy their own culture, to use their own language and to practise their own religion. The exercise of these rights shall be governed by law.

Article 26

(a) Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force.
(b) No State party may expel an alien lawfully in its territory, other than in pursuance of a decision reached in accordance with law and after that person has been allowed to seek a review by the competent authority, unless

compelling reasons of national security preclude it. Collective expulsion of aliens is prohibited under all circumstances.

Article 27

(a) No one may be arbitrarily or unlawfully prevented from leaving any country, including his own, nor prohibited from residing, or compelled to reside, in any part of that country.
(b) No one may be exiled from his country or prevented from returning thereto.

Article 28

Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence against public order under ordinary law. Political refugees may not be extradited.

Article 29

(a) Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.
(b) States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.
(c) No one shall be denied the right to acquire another nationality in accordance with the domestic legislation in his country.

Article 30

(a) Everyone has the right to freedom of thought, conscience and religion. No restrictions may be imposed on the exercise of such freedoms except as provided for by law.
(b) The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms to protect public safety, public order, public health or morals or the fundamental rights and freedoms of others.
(c) Parents or guardians have the freedom to ensure the religious and moral education of their children.

Article 31

Everyone has a guaranteed right to own private property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property.

Article 32

(a) The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any media, regardless of frontiers.
(b) Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

Article 33

(a) The family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman. Men and women of full age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.
(b) The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons the most ample opportunities for physical and mental development.
(c) The States parties shall take all necessary legislative, administrative and judicial measures to guarantee the protection, survival, development and well-being of the child in an atmosphere of freedom and dignity and shall ensure, in all cases, that the child's best interests are the basic criterion for all measures taken in his regard, whether the child is at risk of delinquency or is a juvenile offender.
(d) The States parties shall take all the necessary measures to guarantee, particularly to young persons, the right to pursue a sporting activity.

Article 34

(a) The right to work is a natural right of every citizen. The State shall endeavour to provide, to the extent possible, a job for the largest number of those willing to work, while ensuring production, on the freedom to choose one's work and equal opportunities, without discrimination of any kind as to race, colour, sex, religion, language, political opinion, union affiliation, national or social origin, disability or other status.
(b) Every worker has the right to the enjoyment of just and favourable conditions of work which ensure appropriate remuneration to meet his

essential needs and those of his family, and regulate working hours, rest and holidays with pay, as well as the rules for the preservation of occupational health and safety and the protection of women, children and disabled persons in the place of work.
(c) The States parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. To this end, and having regard to the relevant provisions of other international instruments, States parties shall in particular:

1. Provide for a minimum age for admission to employment;
2. Provide for appropriate regulation of the hours and conditions of employment;
3. Provide for appropriate penalties or other sanctions to ensure the effective enforcement of these provisions.

(d) There shall be no discrimination between men and women in their enjoyment of the right to effectively benefit from training, employment and job protection and the right to receive equal remuneration for equal work.
(e) Each State party shall ensure to workers who migrate to its territory the requisite protection in accordance with the laws in force.

Article 35

(a) Every individual has the right to freely form trade unions or to join trade unions and to freely pursue trade union activity for the protection of his interests.
(b) No restrictions shall be placed on the exercise of these rights and freedoms except such as are prescribed by the laws in force and that are necessary for the maintenance of national security, public safety or order or for the protection of public health or morals or the rights and freedoms of others.
(c) States parties to the present Charter guarantee the right to strike within the limits laid down by law in accordance with the international labour criteria.

Article 36

The States parties shall ensure the right of every citizen to social security, including social insurance.

Article 37

The right to development is a fundamental human right and all States are required to establish the development policies and the measures necessary to guarantee this right. They have a duty to implement the values of solidarity and cooperation among them and at the international level with a view to eradicating poverty and achieving economic, social, cultural and political development. Pursuant to this right, every citizen has the right to participate in the realization of development and to enjoy the benefits and fruits thereof.

Article 38

Every person has the right to an adequate standard of living for himself and his family, that ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

Article 39

(a) The States parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the right of the citizen to free basic health-care services and to have access to medical facilities without discrimination of any kind.

(b) The measures taken by States parties shall include the following:

1. Development of basic health-care services and the guaranteeing of free and easy access to the centres that provide these services, regardless of geographical location or economic status;
2. Efforts to control disease by means of prevention and cure in order to reduce the mortality rate;
3. Promotion of health awareness and health education;
4. Suppression of traditional practices which are harmful to the health of the individual;
5. Provision of basic nutrition and safe drinking water for all;
6. Combating environmental pollution and providing proper sanitation systems;
7. Combating smoking and abuse of drugs and psychotropic substances.

Article 40

(a) The States parties undertake to ensure to persons with mental or physical disabilities a decent life that guarantees their dignity, and to enhance their self-reliance and facilitate their active participation in society.

(b) The States parties shall provide social services free of charge for all persons with disabilities, shall provide the material support needed by those persons, their families or the families caring for them, and shall also do

whatever is needed to avoid placing those persons in institutions. They shall in all cases take account of the best interests of the disabled person.
(c) The States parties shall take all necessary measures to curtail the incidence of disabilities by all possible means, including preventive health programmes, awareness raising and education.
(d) The States parties shall provide full educational services suited to persons with disabilities, taking into account the importance of integrating these persons in the educational system and the importance of vocational training and apprenticeship and the creation of suitable job opportunities in the public or private sectors.
(e) The States parties shall provide all health services appropriate for persons with disabilities, including the rehabilitation of these persons with a view to integrating them into society.
(f) The States parties shall endeavour to enable persons with disabilities to make use of all public and private services.

Article 41

(a) The eradication of illiteracy is a binding obligation upon the State and every person has the right to education.
(b) The States parties shall guarantee every citizen free education at least throughout the primary and fundamental levels. All types and levels of primary education shall be compulsory and accessible to all without discrimination of any kind.
(c) The States parties shall take appropriate measures in all domains to ensure partnership between men and women with a view to achieving national development goals.
(d) The States parties shall guarantee to provide education directed to the full development of the human person and strengthening respect for human rights and fundamental freedoms.
(e) The States parties shall endeavour to incorporate the principles of human rights and fundamental freedoms into formal and informal education curricula and educational and training programmes.
(f) The States parties shall guarantee the establishment of the requisite mechanisms to provide ongoing education for every citizen and the creation of national plans for adult education.

Article 42

(a) Every person has the right to take part in cultural life and to enjoy the benefits of scientific progress and its application.
(b) The States parties undertake to respect the freedom of scientific research and creative activity, and to ensure the protection of moral and material interests resulting from scientific, literary and artistic production.

(c) The State parties shall work together and enhance cooperation among them at all levels, with the full participation of intellectuals and creative artists and their organizations, with a view to developing and implementing recreational, cultural, artistic and scientific programmes.

Article 43

Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.

Article 44

When their existing legislative or non-legislative measures do not effectively ensure the implementation of the rights enunciated in this Charter, the States parties undertake to take, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary for the implementation of these rights.

Article 45

(a) Pursuant to this Charter, an "Arab Human Rights Committee", hereinafter referred to as "The Committee", shall be established. This Committee shall consist of seven members who shall be elected by secret ballot by the States parties to this Charter.
(b) The Committee shall consist of nationals of the States parties to the present Charter, who must be highly experienced and competent in the Committee's field of work. The members of the Committee shall serve in their personal capacity and with full independence and impartiality.
(c) The Committee shall not include more than one member from a State party; such a member may only be re-elected once. Due regard shall be given to the rotation principle.
(d) The members of the Committee shall be elected for a four-year term, although the mandate of three of the members elected during the first election and selected by lot, shall be for two years.
(e) Six months prior to the date of the election, the Secretary-General of the League of Arab States shall invite the States parties to submit their nominations within the following three months. He shall transmit the list of candidates to the States parties two months prior to the date of the election. The candidates who obtain the largest number of votes cast shall be elected to membership of the Committee. If, because various candidates have an equal number of votes, the number of candidates with the largest

number of votes exceeds the number required, a second ballot will be held between the persons with equal numbers of votes. If the votes are again equal, the member or members shall be selected by lottery. The first election for membership of the Committee shall be held at least six months after the Charter enters into force.

(f) The Secretary-General shall invite the States parties to a meeting at the headquarters of the League of Arab States in order to elect the members of the Committee. The presence of the majority of the States parties shall constitute a quorum. If there is no quorum, the Secretary-General shall call another meeting at which at least two-thirds of the States parties must be present. If there is still no quorum, the Secretary-General shall call a third meeting, which will be held regardless of the number of States parties present.

(g) The Secretary-General shall convene the first meeting of the Committee, during the course of which the Committee shall elect its Chairman, from among its members, for a two-year term renewable only once and for a similar period. The Committee shall establish its own rules of procedure and methods of work and shall determine how often it shall meet. The Committee shall hold its meetings at the headquarters of the League of Arab States. It may also meet in any other State party to the present Charter at that party's invitation.

Article 46

(a) If, in the unanimous view of other members, a member of the Committee has ceased to perform his functions for any reason other than temporary absence, the Chairman of the Committee shall so inform the Secretary-General of the League of Arab States who, in turn, shall declare vacant the seat occupied by the member concerned.

(b) In the event of the death or resignation of a Committee member, the Chairman shall immediately inform the Secretary-General, who shall then declare vacant the seat occupied by the member concerned as of the date of his death or that on which the resignation took effect.

(c) Whenever a member's seat is declared vacant pursuant to the provisions of paragraphs (a) and (b) above and the term of office of the member to be replaced does not expire within six months from the date on which the vacancy was declared, the Secretary-General of the League of Arab States shall refer the matter to the States parties to the present Charter which may, within two months, submit nominations, pursuant to article 45, in order to fill the vacant seat.

(d) The Secretary-General of the League of Arab States shall draw up an alphabetical list of all the duly nominated candidates, which he shall transmit to the States parties to the present Charter. The elections to fill the vacant seat shall be held in accordance with the relevant provisions.

(e) Any member of the Committee elected to fill a seat declared vacant in accordance with the provisions of (a) and (b) above shall remain a member of the Committee until the expiry of the remainder of the term of the member whose seat was declared vacant pursuant to the provisions of the two aforementioned paragraphs.
(f) The Secretary-General of the League of Arab States shall make provision within the budget of the League of Arab States for all the necessary financial and human resources and facilities that the Committee needs to discharge its functions effectively. The members of the Committee shall be afforded the same treatment as experts recruited by the secretariat of the League of Arab States with respect to remuneration and reimbursement of expenses.

Article 47

The States parties undertake to ensure that members of the Committee shall enjoy the requisite immunities for their protection against any form of harassment, moral or material pressure or prosecution on account of the positions or statements they express in the performance of their duties as members of the Committee.

Article 48

(a) The States parties undertake to submit reports to the Secretary-General of the League of Arab States on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof. The Secretary-General shall transmit these reports to the Committee for its consideration.
(b) Each State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter. The Committee may request the States parties to supply it with additional information relating to the implementation of the Charter.
(c) The Committee shall consider the reports submitted by the States parties pursuant to paragraph (b) of this article in the presence and with the participation in the deliberations of the representative of the State party concerned.
(d) In discussing the report, formulating its comments and submitting its recommendations for the necessary action, the Committee shall act in accordance with the objectives of the Charter.
(e) The Committee shall submit an annual report containing its comments and recommendations to the Council of the League, through the intermediary of the Secretary-General.
(f) The reports, final comments and recommendations of the Committee shall be public documents which the Committee shall disseminate widely.

Article 49

(a) The Secretary-General of the League of Arab States shall submit the present Charter, once it has been approved by the Council of the League, to the States parties for signature, ratification or accession.
(b) The present Charter shall enter into effect two months after the date on which the seventh instrument of ratification is deposited with the secretariat of the League of Arab States.
(c) After its entry into force, the present Charter shall become effective, for each State party, two months after it has deposited its instrument of ratification or accession with the secretariat.
(g) The Secretary-General shall notify the States parties of the deposit of each instrument of ratification or accession.

Article 50

Any State party may submit written proposals, though the Secretary-General, to amend the present Charter. After the States members have been notified of these proposals, the Secretary-General shall invite them to consider the proposed amendments before submitting them to the Council of the League for adoption.

Article 51

The amendments shall take effect, with regard to the States parties that have approved them, once they have been approved by two-thirds of the States parties.

Article 52

Any State party may propose additional optional protocols to the present Charter and they shall be adopted according to the same procedures followed for the adoption of amendments to the Charter.

Article 53

(a) Any State party when signing this Charter, depositing the instruments of ratification or acceding hereto, may make a reservation to any article of the Charter, provided that such reservation does not conflict with the aims and purposes of the Charter.
(b) Any State party that has made a reservation pursuant to paragraph (a) of this article may withdraw this reservation at any time by means of a notification addressed to the Secretary-General of the League of Arab States.
(c) The Secretary-General shall notify the States parties of reservations made and of requests for their withdrawal.

THE IMPACT OF COUNTER-TERRORISM ON HUMAN RIGHTS: TOWARDS AN INTERNATIONAL MONITORING MECHANISM

IAN D. SEIDERMAN[1]

The challenges to human rights protection at the global level that have emerged since 11 September 2001 are by now well rehearsed. A preoccupation with security, in the narrowest sense, seems to have achieved near ubiquity in contemporary public life, allowing in a variety of contexts for the planning and implementation of new measures – legislative, administrative and *ultra vires* – some designed so as to trump human rights obligations, including core fundamental human rights. Some of these measures are no doubt impelled by a good faith attempt by national authorities to address quite legitimate and pressing security concerns and to fulfil their obligations to protect the well being of their populations. There is good reason to suspect that many others have been employed opportunistically, on pretextual grounds, to achieve goals not altogether consistent with human rights.

The threats to human rights engendered by the implementation of many counter-terrorism measures and actions may now frequently be invoked, but clearly not in substantially heightened proportion to the magnitude of the present threat. It is notoriously difficult to quantify instances of human rights abuses and therefore not possible to draw conclusively hard evidence in support of the common perception, held by many human rights proponents, that serious violations are globally on the rise since 11 September. But there can be little doubt as to the quantum shift that has occurred as to the nature of many practices and violations, the range of actions that have recently become acceptable, the identity of the States responsible, and the justifications advanced for conduct falling afoul of international standards. Behaviour which had previously been unthinkable, or at least, while practised, was never acknowledged, is now proudly announced as both legitimate and necessary to meet a compelling security concern.[2]

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[2] Perhaps the most notorious example was the proposal developed by the well-known United States defence lawyer Alan Dershowitz that torture is justifiable to prevent certain terrorist activities and that the judiciary be empowered to issue warrants authorising torture in specific cases. Alan M. Dershowitz, *Why Terrorism Works* (2002).

Given these developments, there would appear to be a pressing need for the United Nations human rights system to monitor the situation of human rights and counter-terrorism as a matter of priority and urgency. Yet remarkably, more than two years after the 11 September events, the United Nations has yet to perform any serious monitoring of the impact that counter-terrorism measures are having on human rights in its Member States. Regional human rights bodies have performed only marginally better in this respect. This comment will outline existing inter-governmental efforts to monitor the compliance of counter-terrorism measures with human rights obligations and then discuss the efforts by the International Commission of Jurists and other non-governmental organisations, as well as a few governments, aimed to plug the gaps in the international monitoring.

EXISTING INTERNATIONAL EFFORTS

While the fight against terrorism, or terrorist acts, has been an international priority since long before 11 September 2001, the generalised change in political climate, accompanied by robust political pressure applied by, among others, the world's superpower State, has prompted the emergence of a new regime of international legal obligations. One of the first international responses to the 11 September attacks was the adoption by the UN Security Council of Resolution 1373 (2001), which calls upon States to fulfil existing obligations and to undertake new measures to prevent and suppress the perpetration and financing of terrorist acts.[3] Pursuant to Security Council Resolution 1373, a substantial number of States have since adopted or announced plans for measures that could undermine international human rights obligations, including fundamental and non-derogable rights.[4] A number of measures to combat terrorism have also been adopted

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[3] For a description of SC Resolution 1373 and national measures taken pursuant thereto, see F. Andreu Guzmán, *Terrorism and Human Rights No.2*, International Commission of Jurists, Occasional papers No.3 (March 2003), pp. 18-32.

[4] The Human Rights Committee (HRC) has begun examining national measures undertaken, including in the context of resolution 1373 (2001), in respect of their compatibility with the ICCPR. The Committee's observations on the United Kingdom and Northern Ireland (CCPR/CO/73/UK, CCPR/CO/73/UKOT, 6 December 2001, § 6, 14 and 19), Sweden (CCPR/CO/74/SWE, 24 April 2002, § 12), Yemen (CCPR/CO/75/YEM, 26 July 2002, § 18), Moldova (CCPR/CO/75/MDA, 26 July 2002, § 8), New Zealand (CCPR/CO/75/NZL, 7 August 2002, § 11), Egypt (CCPR/CO/76/EGY, 28 November 2002, § 16), Estonia (CCPR/CO/77/EST, 3 April 2003, paragraph 8), Portugal (CCPR/CO/78/PRT, 5 July 2003, § 15), Israel (CCPR/CO/78/ISR, 5 August 2003, § 14), the Russian Federation (CCPR/CO/79/RUS, 6 November 2003, § 13), Sri Lanka (CCPR/CO/79/LKA), 1 December 2003, § 13) and the Philippines (CCPR/CO/79/PIL, 1 December 2003, § 9) express concern at States measures regarding such questions as non-derogable rights, *non refoulement* and

and/or implemented at the regional level, in accordance with SC Resolution 1373, some of which clearly fail to comport with international legal obligations. Of particular concern are the European arrest warrant[5] and the "politico-military" dimension of the Organization for Security and Cooperation in Europe Charter on Preventing and Combating Terrorism. The Convention on the Prevention and Combating of Terrorism of the African Union, the Convention on Combating International Terrorism of the Organisation of the Islamic Conference (OIC) and the Arab Convention for the Suppression of Terrorism of the League of Arab States constitute a source of grave concern, as each in some measure disregards fundamental principles of human rights and international criminal law.[6]

There has been no shortage of lip service paid by the various protagonists in the United Nations system to the dangers entailed by at least certain counter-terrorism efforts. The UN General Assembly, in its Resolution of 18 December 2002, flatly asserted that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law."[7] The UN Security Council, in Resolution 1456 of 2003, reaffirmed

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extradition, detention, judicial guarantees and right of asylum. In addition, 17 independent experts of the Commission on Human Rights made a public statement on 10 December 2001 in which they deplored "human rights violations and measures that have particularly targeted groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media." More recently, at their tenth annual meeting on 27 June 2003, the special rapporteurs/representatives, experts and chairpersons of the working groups of the special procedures of the Commission on Human Rights and the chairpersons of human rights treaty bodies issued a joint statement "deploring the fact that under the pretext of combating terrorism, human rights defenders are threatened, vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their land rights or against the negative effects of economic globalization policies." Available at http://www.unhchr.ch/huricane/huricane.nsf/newsroom.

5 The Council Framework Decision on the European arrest warrant and the surrender procedures between Member States was adopted on 13 June 2002. As Allegre and Leaf note, "while the foundations had been laid for the [European Arrest Warrant] over a number of years, the momentum generated by September 11th and the need for the EU to demonstrate its ability to combat cross-border crime in the aftermath undoubtedly accounted for the speed with which the final measure was adopted." S. Allegre and M. Leaf, *European Arrest Warrant*, Justice (2003).

6 See Andreu-Guzmán, *supra* n. 1 at 37-69.

7 Entitled "Protection of human rights and fundamental freedoms while countering terrorism", GA Resolution 57/219 of 18 December 2002 "[a]ffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law" (A/RES/57/219, op 1). In its 1999 resolution on "Human Rights and Terrorism", the UNGA had declared: "All measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards" (Resolution 54/164

this principle in substantially similar terms.[8] United Nations Secretary-General Kofi Annan has appeared to take the problem seriously, making several public references affirming that human rights principles are paramount in the fight against terrorism. Only four months after the 11 September attacks, the Secretary-General insisted that "there is no trade-off between effective action against terrorism and the protection of human rights."[9]

The United Nations Commission on Human Rights has, through the prompting of just a few of its Member States and NGOs, declared on more than one occasion that "all measures to counter terrorism must be in strict conformity with international law, including international human rights standards."[10] Many of the special procedures of the Commission, consisting of independent experts, that carry out most of the substantive and analytic work of the Commission, have also drawn attention to the negative impact of numerous measures taken in the context of counter-terrorism efforts.[11]

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of 17 December 1999, final preambular paragraph). This prescription was reaffirmed two years later in UNGA resolution 56/160 of 19 December 2001.

8 "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law." Security Council Resolution 1456 (2003) of 20 January 2003.

9 Statement to the Security Council, 18 January 2002, available at http://www.un.org/News/Press/docs/2002/sgsm8105.doc.htm.

10 Resolution 2003/68, adopted by the Commission on Human Rights on 25 April 2003, also declares: "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law." See also Resolution 2003/37, adopted by the Commission on Human Rights on 23 April 2003, entitled "Human rights and terrorism", reaffirming in its preamble that "all measures to counter terrorism must be in strict conformity with international law, including international human rights standards and obligations." The Commission also "urges States to enhance cooperation at the regional and international levels in the fight against terrorism in all its forms and manifestations, in accordance with relevant international obligations under human rights instruments and international humanitarian law, with the aim of eliminating terrorism in all its forms and manifestation [...]" (op.7). See also resolution 2002/35 of 22 April 2002, pp 22; Resolution 2001/37 of 23 April 2001, pp 20; and Resolutions 2000/30, 1999/27 and 1998/47 of the Commission on Human Rights.

11 See, *e.g.* Working Group on Arbitrary Detention, E/CN.4/2003/8 of 16 December 2002; Special Representative of the Secretary General on Human Rights Defenders, E/CN.4/2002/106 of 27 February 2002 and E/CN.4/2003/104 of 3 January 2003; Special Rapporteur on the question of contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E/CN.4/2002/24 of 13 February 2002 and report on the "Situation of Muslim and Arab peoples in various parts of the world in the aftermath of the events of 11 September 2001" E/CN.4/2003/23 of 3 January 2003; Special Rapporteur on the Independence of judges and lawyers, E/CN.4/2003/65 of 10 January 2003; Special Rapporteur on Extrajudicial, summary or arbitrary executions, E/CN.4/2003/3 and Corr.1 of 13 January 2003 and E/CN.4/2003/3/Add.1 of 12 February 2003; Special Rapporteur on the human rights of migrants, E/CN.4/2002/94 of 15 February 2002 and

The Special Rapporteur on Torture, Theo van Boven, devoted his entire report to the General Assembly in 2002 to the issue of the prohibition of torture and cruel, inhuman or degrading treatment and punishment in the context of counter-terrorist measures.[12]

Certain regional human rights bodies have also exposed the potentially negative impact of anti-terrorism measures on human rights, including the Secretary General of the Council of Europe,[13] the Chairperson of the European Committee for the Prevention of Torture[14] and the Inter-American Commission on Human Rights.[15] More robustly, the Council of Europe has adopted Guidelines on Human Rights and the Fight against Terrorism[16] and the Inter-American Commission on Human Rights has adopted recommendations on terrorism and human rights.[17]

GAPS IN UNIVERSAL MONITORING

Although inter-governmental institutions have widely acknowledged the challenges posed to human rights by counter-terrorism measures and have begun to evaluate the question on a conceptual level, they have generally shown great reticence to examine the actions of individual States and their impact on human rights on a case specific basis. The resistance by many

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E/CN.4/2003/85 of 30 December 2002; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, E/CN.4/2002/75 of 30 January 2002 and E/CN.4/2003/67 of 30 December 2002; Special Rapporteur on the question of torture of torture and other cruel, inhuman or degrading treatment or punishment, A/57/173 of 2 July 2002; Special Representative of the Secretary-General on human rights defenders, E/CN.4/2002/106 of 27 February 2002 and E/CN.4/2003/104 of 3 January 2003.

12 UN Doc A/57/173 of 2 July 2002.

13 Opening Speech by the Secretary General of the Council of Europe, Mr Walter Schwimmer, at the 10th International Judicial Conference in Strasbourg from 23 to 24 May 2002, available at http://www.coe.int/T/E/Communication_and_Research/Press/Events/5.-Ministerial_conferences/2002/2002-05_International_Judicial_Conference_-_Strasbourg/Disc_SG.asp#TopOfPage.

14 Statement by the President of the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT) to the Ministers' Deputies on 4 October 2001, Ref.: CPT/Inf (2001) 24 [EN] – Date: 4 October 2001, available at http://www.cpt.coe.int/en/annual/rep-11-speech.htm.

15 Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr. of 22 October 2002. Report available at the website of the ICHR http://www.cidh.oas.org/Terrorism/Eng/toc.htm.

16 Guidelines on Human Rights and the Fight against Terrorism, adopted by the Deputies of the Ministers for Foreign Affairs of the Council of Europe on 15 July 2002, available at http://www.coe.int/T/E/Communication_and_Research/Press/Theme_Files/Terrorism/CM_Guidelines_2002068.asp#TopOfPage.

17 Report on Terrorism and Human Rights, *ibid.* and Inter-American Commission on Human Rights, Resolution on Terrorism and Human Rights of 12 December 2001, available at http://www.cidh.oas.org/Terrorism/Eng/part.t.htm.

States to international scrutiny of human rights that had been dissolving over time, especially with the collapse of the cold war order, has reactively stiffened again in the post 11 September security climate. Most individual and international human rights institutions have patently failed to rise to meet arguably the greatest global challenges to the rule of law and human rights since the inception of the contemporary human rights regime.

Security Council CTC

The Security Council's Counter-Terrorism Committee (CTC), although unusually focused and productive for a UN body, has thus far opted to avoid any direct engagement in human rights monitoring.[18] Former Chairman of the CTC, Ambassador Jeremy Greenstock, did consider it necessary to stress that counter-terrorism measures implementing Security Council Resolution 1373 must be taken in conformity with international law and may not target certain groups or be used for internal political motives. During the first phases of the CTC's work in 2002, former High Commissioner for Human Rights, Mary Robinson, in her report entitled "Human Rights: a Uniting Framework", argued that "serious human rights concerns ... could arise from the misapplication of resolution 1373 (2001)" and therefore "it would be desirable that a human rights expert assist the Committee."[19] In June 2002, the CTC Chairman expressed his support for a "parallel monitoring of observance of human rights obligations," implying that the work should not intrude directly on the CTC's domain.[20] The CTC has at least made passing reference to the Guidance on Compliance with International Human Rights Standards formulated by the Former High Commissioner Robinson, but has desisted from using the Guidance as a reference for its own work.[21]

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18 Shortly after the establishment of the CTC, the Chairman addressed the Security Council on 18 January 2002 and made it clear that "monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate." UN Doc. S/PV. 4453.

19 Report of the High Commissioner for Human Rights submitted pursuant to General Assembly resolution 48/141, entitled "Human Rights: a Uniting Framework", UN Doc. E/CN.4/2002/18 of 27 February 2002, para. 31.

20 The Chairman, Ambassador Greenstock, also declared that "The CTC's processes will put pressure on governments to ensure, in the decisions they take both political and administrative, that they do not condone acts of indiscriminate violence against civilians, in any political context, nor use counter-terrorism as a pretext for political oppression." Presentation by Ambassador Greenstock, Chairman of the CTC at the Symposium: "Combating International Terrorism; The Contribution of the United Nations", held in Vienna on 3-4 June 2002, available at www.un.org/Docs/sc/committees/1373/ViennaNotes.htm.

21 "Further Guidance" for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) (intended to supplement the Guidance of 26 October 2001) entitled Compliance with International Human Rights Standards, available at http://www.un.org/Docs/sc/committees/1373/. See Report of the United Nations High

In January 2003, the Chairperson of the CTC, explaining the nature and aims of the CTC, again noted that "monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organisations to study States' reports and take up their content in other forums."[22] On 19 June 2003, Sir Nigel Rodley addressed the CTC on behalf of the United Nations Human Rights Committee, which is the supervisory body for the International Covenant on Civil and Political Rights (ICCPR). Sir Nigel proposed that the Committee "pose questions to the Member States on the human rights dimension of their report to the CTC" and that it "include human rights expertise among the complement of expertise it has at its disposal."[23] These proposals have thus far been met with a resounding silence by the CTC.

The rationale for the refusal of the CTC to incorporate a human rights analysis into its work, namely that such matters belong in other fora, is surely disingenuous. The CTC has retained experts to advise it in many other legal areas that impact upon counter-terrorism, including financial law, customs law, immigration law, extradition law and practise, police and law enforcement and illegal arms trafficking.[24] Yet somehow the CTC deems it unnecessary to factor in human rights law as it reviews the measures individual States should and should not be taking in pursuing their activities to combat terrorism.

Human Rights Treaty Bodies and Special Procedures

The United Nations human rights machinery has certainly been active in examining the counter-terrorism/human rights question, but in a fractured, non-cohesive, and far from comprehensive manner. Most substantive human rights monitoring activity is carried out by the treaty supervisory committees, which monitor the major human rights instruments, and the special procedures experts mandated by the UN Human

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Commissioner for Human Rights, General Assembly Official Records, Fifty-seventh Session, Supplement No. 36 (A/57/36), paragraph 3. For the text of the "Further Guidance", see also Report of the United Nations High Commissioner pursuant to General Assembly Resolution 48/141: "Human Rights: a Uniting Framework", E/CN.4/2002/18 of 27 February 2002, Annex I.

22 See S/PV.4453, 4453rd meeting of the Security Council, 18 January 2002.

23 Briefing by Sir Nigel Rodley, Vice-Chairperson of the Human Rights Committee to the Security Council Counter Terrorism Committee of 19 June 2003. See http://www.icj.org/IMG/pdf/Nigel_Rodley.pdf.

24 See http://www.un.org/Docs/sc/committees/1373/work.html.

Rights Commission. Both the treaty bodies and the special procedures receive support by the Office of the High Commissioner for Human Rights. But while human rights treaty bodies and special procedures can and do play a useful and important role, their contribution, both actual and potential, is clearly inadequate.

With respect to human rights treaty bodies, it is instructive to look to the activity of the Human Rights Committee (HRC), which, as the supervisory body for the ICCPR, is mandated to examine a wide range of human rights concerns that might arise out of the implementation of counter-terrorism measures by States Parties. Thus, since the adoption of resolution 1373 (2001) through November 2003, the HRC examined the reports of some 24 States Parties to the ICCPR.[25] In no fewer than 12 of these reviews, the Committee expressed its concerns regarding counter-terrorism measures taken by the concerned States, sometimes reaffirming that all States Parties must ensure that the measures undertaken in order to implement Security Council Resolution 1373 conform fully with the ICCPR.[26]

As useful as the analysis of the HRC may be, the limitations are obvious. First, the HRC and the other human rights treaty bodies carry competency only to monitor the activity of States Parties, and no treaty has attracted universal adherence. In addition, treaty bodies function on a reporting cycle that precludes comprehensive monitoring and therefore dictates that they must play a mainly reactive and not a preventive function. The HRC has the capacity to examine no more than 15 reports of Member States in a given year.[27] Indeed, quite a few of the States Parties fail to fulfil their reporting obligations in a timely manner, or do not do so at all. The monitoring of individual complaints by the HRC is even more highly circumscribed by the number of States Parties that have accepted the individual complaint mechanism.

Monitoring by the thematic special procedures mandated by the Commission on Human Rights is similarly limited by the particularised nature of each mandate. Thus, in considering a complex piece of legislation that may impact multiple human rights areas, the Special Rapporteur on torture,

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25 Azerbaijan, Egypt, El Salvador, Estonia, Georgia, Hungary, Israel, Latvia, Luxembourg, Mali, New Zealand, Philippines, Portugal, Republic of Moldova, Russian Federation, Slovakia, Sri Lanka, Sweden, Switzerland, Togo, Ukraine, United Kingdom, Viet Nam and Yemen. During that period of time, the Committee was also to have examined reports from Afghanistan, Colombia, Equatorial Guinea Gambia, and Suriname.

26 See footnote 4, for an enumeration of the States concerned.

27 Briefing by Sir Nigel Rodley, Vice-Chairperson, Human Rights Committee, to the Security Council Counter-Terrorism Committee, 19 June 2003.

for example, will only look to a narrow dimension of the law. The Rapporteur will have to focus most of a report limited to some 30 or so pages on all aspects of torture, not just those touching upon counter-terrorism, and in regard to all States in the world. While the present Rapporteur and other special procedures are both aware or and alarmed by the threat certain counter-terrorism posed, they are typically the first to admit that their efforts cannot but be inadequate. Country-specific special procedure mandates can of course do a more thorough job, but they can only pursue monitoring in respect of the very few (and increasingly fewer) States for which such mandates exist.

Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights has begun to consider the question of counter-terrorism and human rights, but its work consists neither in monitoring nor analysing the laws and practices of individual States. UN General Assembly Resolutions 57/219 and 58/187, entitled "Protecting human rights and fundamental freedoms while countering terrorism", adopted respectively in 2002 and 2003, request the High Commissioner to make general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking action to counter terrorism.[28] Although this prescription constitutes a positive step forward, the resolutions have failed to establish a mechanism or procedure with the capacity to review the measures undertaken by Member States. As mentioned above, the previous High Commissioner has contributed a Guidance and Further Guidance for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373. More recently, the Office of the High Commissioner has produced a useful Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism. This Digest, however, is simply a compilation of existing comment, with the identities of individual States to which the jurisprudence is addressed conspicuously obscured.

Human Rights Sub-Commission

The Sub-Commission on the Promotion and Protection of Human Rights, which carries out much of the conceptual work for the Commission, has studied the question of terrorism and human rights through its expert Kalliopa Koufa. Her mandate, however, has not extensively focused on the

[28] Commission Resolution 2003/68, adopted 24 April 2003.

effect of counter-terrorism activities on human rights in States.[29] In August 2003, the Sub-Commission decided to appoint Ms. Koufa as a coordinator for a project to begin in 2004, which would study the compatibility of counter-terrorism measures at the national, regional and international levels with international human rights standards, with a view to elaborating guidelines.[30] Given the serious restrictions the Human Rights Commission has imposed upon the mandate and capacities of the Sub-Commission to carry out country-specific work, the latter is unlikely to be able or willing to examine individual state practises and actions with any depth.

TOWARDS A UNIVERSAL MONITORING MECHANISM

There is a compelling need for the responsible agents in the international community to monitor and evaluate the impact of counter-terrorism measures and human rights on a case-specific basis, and not merely in abstract or general terms. The purpose of monitoring is not primarily to produce statements of condemnation against transgressing States. Rather, proper monitoring serves to document the nature and extent of the problem, to isolate trends and tendencies and their causes, and to issue specific recommendations to States so they may rectify lapses in respect for human rights obligations. The ICJ and a number of other non-governmental human rights organisations have therefore made the establishment of monitoring mechanisms among their highest priorities.

The NGO Joint Declaration

On 23-24 October, the ICJ held a Conference entitled "Human Rights and Counter-Terrorism: International Monitoring Systems", which brought together a number of experts from UN human rights treaty bodies and special procedures, Sub-Commission and Office of the High Commissioner, as well as regional and NGO experts. Most participants endorsed the view that there is indeed a great deficit in the monitoring efforts and capacities of inter-governmental human rights machinery.[31] The ICJ and a number

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[29] Her Working Paper and Progress Reports are contained in UN Docs. E/CN.4/Sub.2/1997/28, E/CN.4/Sub.2/1999/27, E/CN.4/Sub.2/2001/31, E/CN.4/Sub.2/2002/35, and E/CN.4/Sub.2/2003/W.P. 1 and Adds. 1 and 2. Her final study is to be submitted to the Sub-Commission's 56th session in 2004.

[30] Resolution 2003/15, adopted 13 August 2003, entitled "Effects of Measures to combat terrorism on the enjoyment of human rights," contained in UN Doc. E/CN.4/Sub.2/2003/L.16.

[31] A compilation of presentations is available at http://www.icj.org/news.php3?id_article=3210&lang=en.

of other non-governmental organisations[32] launched a joint NGO Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-terrorism. The Declaration is annexed to this commentary.

The Declaration largely follows the format and style of a UN Resolution, in part because the signatories have considered that this or similar language would be appropriate to a resolution of the Human Rights Commission or General Assembly. The first four preambular paragraphs recall a number of basic principles, as affirmed by the Security Council, the General Assembly and the Commission on Human Rights, including that human rights, humanitarian law and refugee law must be respected while fighting terrorism. Paragraph 5 sets forth the core problem, namely, that some counter-terrorism measures adopted or contemplated by States are incompatible with human rights and other important legal obligations. Certain human rights that are especially impacted and problematic practices are canvassed in preambular paragraphs 6 and 7, and include, among others, administrative detention without judicial review, the removal of safeguards to prevent torture, curtailment of the right to a fair trial, and breaches of the principle of non-discrimination. While acknowledging in preambular paragraph 8 that certain special procedures and treaty bodies have played a positive monitoring role, the Declaration in paragraphs 9 and 10 underscores the limitations inherent in these efforts. The Declaration makes similar observations in paragraph 11 with respect to the work of the Sub-Commission and in paragraph 12 to that of the Office of the High Commissioner for Human Rights. In paragraph 13, the Declaration notes both the achievements and the shortcomings of existing regional monitoring mechanisms and calls attention in paragraph 14 to the Security Council's Counter-Terrorism Committee failure to take up review and monitoring work. Paragraph 15 expresses the overall and unavoidable conclusion that there exist substantial monitoring gaps, a problem which the operative paragraphs then go on to address.

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[32] The founding signatories to the text are Human Rights Watch, FIDH, the International Service for Human Rights, the Friends World Committee for Consultation (Quakers) and the seven organisations constituting the Coalition of International NGOs against Torture (CINAT): Amnesty International, the Association for the Prevention of Torture (APT), the International Commission of Jurists (ICJ), the International Federation of Action by Christians for the Abolition of Torture (FIACAT), the International Rehabilitation Council for Torture Victims (IRCT), the World Organisation against Torture (OMCT), and Redress: Seeking Reparation for Torture Survivors. The Declaration has remained open for signature at least through to the 60th session of the Commission on Human Rights, to be held from 15 March to 23 April 2004.

In operative paragraph 2, the signatories call on the Commission at its 60th session to establish an independent monitoring mechanism as a matter of utmost priority. Operative paragraph 4 spells out the *de minimus* components of such a mechanism. Its mandate should essentially include the capacity of the appointed expert to undertake country visits. The mechanism should maintain dialogue and coordination with and take into account the activities of other relevant organs, including the Counter-Terrorism Committee of the Security Council, the Committees supervising compliance with the human rights treaties, other special procedures experts, the Office of the High Commissioner, and regional mechanisms. Finally, in operative paragraph 5, the Declaration calls upon regional inter-governmental bodies to undertake parallel efforts in respect of their own Member States.

Form of the mechanism

The present UN human rights system, owing to lack of political will to provide the requisite resources, does not allow for adequate monitoring of States conduct with respect to the remit of any of the existing thematic or country-specific mandates. Usually a single expert or at most a five-member working group of experts working part time and perhaps assisted by single professional from the Office of the High Commissioner is charged with examining the situation in respect of all 192 UN Member States. A mandate on counter-terrorism and human rights, as politically sensitive as it is, can expect to receive no better support.

Three classic models presently obtain among the existing current special procedures mandates. The most common type of special procedure is the Special Rapporteur of the Commission on Human Rights, a mandate created by resolution of the Commission and the most common type of special procedure mechanism. A Special Rapporteur is an independent expert appointed by the Chairperson of the Human Rights Commission, often for an initial and renewable three-year term. The methods of work adopted by individual Special Rapporteurs may vary, but typically involve seeking and receiving information from governmental, inter-governmental and non-governmental sources and engaging in an exchange with Governments regarding concerns relevant to their respective mandates. The most substantial work carried out by the Special Rapporteur involves the carrying out of *in situ* missions, at the invitation of the country to be visited, although owing to constraints on resources most rapporteurs are confined to no more than three missions per year. The Special Rapporteur usually delivers comments, observations, conclusions and recommendations both regarding general conceptual issues and country-specific concerns. The Special Rapporteur reports to the Commission on Human Rights and,

in some cases, may also be mandated to report to the UN General Assembly. Many rapporteurs also provide an urgent appeal procedures, by use of which they may request a government to respond rapidly to case demanding immediate attention, such in the case of a person detained incommunicado and at risk of torture.

The second model is the Representative or Special Representative of the United Nations Secretary-General. This type of mandate presently exists for the themes of Internally Displaced Persons and Human Rights Defenders. A Special Representative may also be established by the Commission and report both to the Commission and the General Assembly. Although the nature of their respective mandates and methods of work are largely similar, a key distinction between the Special Rapporteur and the Special Representative is that the latter is appointed by the UN Secretary-General, rather than by the Commission Chairperson. The position of Special Representative is arguably enhanced by the title and manner of appointment of the mandate holder, which may suggest that he or she carries the political backing of the Secretary-General, in addition to that of the Commission. In principle, this model appears to be highly appropriate to a counter-terrorism and human rights mandate for another reason: As the UN system as a whole is intimately concerned with anti-terrorism measures, it would seem sensible and coherent for the Secretary-General to have at least nominal supervision of the mandate, so as better to facilitate coordination and consultation with other branches of the UN, especially the Counter-Terrorism Committee of the Security Council and the United Nations Office for Drug Control and Crime Prevention in Vienna (UNDCCP).[33]

The third model is the Working Group of the Human Rights Commission, one presently operative in respect of the thematic areas of enforced disappearances; arbitrary detention; and problems of racial discrimination faced by people of African descent. Rather than a single expert, the Working Group comprises five members, one from each regional group of States. The advantages of this model are that the mechanism accesses a richer and broader composite of expertise, as its members are intended, in principle, to be selected based partly on their knowledge and understanding of regional legal and political systems. This model might be best suited to the complexity of the task of monitoring human rights and counter-terrorism, since the question also ranges across several thematic

[33] The UNDCCP, which maintains a Terrorism Prevention Branch, has established a Global Programme against Terrorism, which provides technical assistance to States in adopting counter-terrorism measures. See http://www.unodc.org/unodc/en/terrorism.html.

areas for which a diversity of expertise would be welcome. Many States would no doubt consider the drawback to this mechanism to be its cost, and certainly it is more expensive to retain five working group members rather than a single expert. But this disparity in cost should not be overly exaggerated. Based on the practice of existing working groups the number of country missions undertaken by these mandates and their support level from the Secretariat is typically not much greater than for special rapporteur mandates, and these are the most costly elements in the exercise of a mandate.

Mandate of the mechanism

While the NGO declaration does not take a position as to the form of mandate, it does contain some minimum elements necessary to be effective, whatever its eventual design. These and several additional conditions would seem indispensable to an effective monitoring mechanism:

- The mechanism must have a mandate to examine not only general conceptual problems regarding human rights and counter-terrorism, but also to evaluate the law, policy, and practice of all States. It should be competent to receive credible information from governmental, inter-governmental and non-governmental sources and to engage in dialogue with governments. It should be given the mandate and resources to take, at minimum, three missions per year.
- The mechanism should report to the Commission on Human Rights, both on missions it undertakes and on its ordinary day-to-day work. Because of the broad scope of the issues and its necessary connection to the work of the UN on terrorism, it should report additionally to the General Assembly.
- The mechanism should be requested by the Commission to engage in consultations and an exchange of information with the Counter-Terrorism Committee of the Security Council. This type of exchange may not only facilitate the objective of human rights protection, but may also assist States in carrying out counter-terrorism efforts in a lawful and more effective manner.
- The mechanism would also be expected to exchange information and engage in cooperative activities with all other relevant thematic mandate holders and treaty bodies. Some obviously concerned special procedures mandate holders are the Special Rapporteur on torture, the Special Rapporteur on Summary Executions, the Working Group on arbitrary detention, the Special Representative of the Secretary-General on human rights defenders, and the Special Rapporteur on the Independence of Judges and Lawyers. All seven of the treaty bodies should coordinate with the mandate holder.

- The mechanism should make use of the international guidelines and jurisprudence developed on human rights and counter-terrorism, including that of the treaty bodies, the Sub-Commission on the Protection and Promotion of Human Rights, the Office of the High Commissioner, and regional human rights bodies and courts. Commentary relating to human rights and States of emergency, such as the Human Rights Committee's General Comment 29, should constitute a main frame of reference.
- A mandate holder for this as for any independent mechanism should be accorded reasonably wide latitude to interpret his or her own methods of work. In that respect, any resolution establishing a mechanism should be avoiding being excessively prescriptive.
- The mandate holder should, where appropriate, act upon individual complaints. At a minimum, he or she should receive complaints and pass credible information relevant to the mandate to the concerned government. Most special procedures mandate holders cannot and do not adjudicate or draw as to the merits of complaint. But they are able to serve as a conduit through which a victim may reach a government, and through the report of the mandate holder, draw public attention to his or her case. In practical terms, a violation that would come to the attention of a counter-terrorism mandate holder may in many instances more directly concern other mandates, as well, for example, arbitrary detention or torture. A counter-terrorism expert might as matter of discretion deem it appropriate in certain circumstances to pass the information on to another appropriate mechanism. If the violation alleged is also intimately connected with a problem relating to an unlawful counter-terrorism measure, a joint action might be appropriate. The precise parameters of the mandate should, however, be defined by the expert him or herself.
- The appointment of the mandate holder should be undertaken with due regard to criteria of expertise and independence. With respect to expertise, a candidate for the mandate should have high competency in human rights law, especially that regarding the administration of justice, as well as knowledge of international and domestic law relating to counter-terrorism, and a solid familiarity of criminal, human rights and humanitarian law. As for independence, it is essential that the expert does not hold an active post in government while serving the mandate. The procedures and methods of appointment should be publicised in advance, with the opportunity for interested parties to submit names for nomination and to submit comments with respect to individual nominees.

Arguments raised by some States against a mechanism

A number of States have so far fiercely resisted calls for the creation of a new special procedure mechanism. At the official or public level, delegations of course rarely express the nervousness felt by their Governments at the prospect of attracting international scrutiny of their counter-terrorism programs. Nonetheless, such sensitivity no doubt underlies this reticence. Many governments are well aware that certain counter-terrorism measures and practices would not pass muster under independent scrutiny. However, paradoxically the States that have already come in for the greatest public criticism, such as the United States or Turkey, could potentially see criticism diffused, as the spotlight refocuses on a larger number of States that have largely remained off the international radar screen. An independent expert of the Commission may serve to remind all of these States that countering terrorism and protecting human rights are, of course, in no way incompatible goals; the existing corpus of international legal standards allows for both objectives to be achieved concomitantly. As trite as it may be to recall, a world in which human rights are better protected stands to be a world that experiences fewer instances of terrorism.

Many States do not discount the propriety of establishing a monitoring mechanism, but instead simply contend that there is no need for the mechanism, because existing efforts are sufficient. As discussed above, this conclusion is unfounded; there is decidedly an enormous gap in international monitoring. A somewhat more honest response is related to the high cost and the problem of "mechanism proliferation" at the Human Rights Commission. This argument, which resounds each time a new mechanism is proposed, holds that there exists an unsustainable surfeit of special procedures mechanisms and that it is not possible to continue to add new special procedures, at least unless some existing mandates are terminated. And because it is too politically difficult to eliminate existing mandates, the system is essentially condemned stagnation with the present lot.

While it is always difficult to deny that scarce resources limit capacity, for the imperative question of counter-terrorism and human rights, the "proliferation of mechanisms" argument is simply not sustainable. Even the most casual observer will note the general consensus that, at least since the 11 September events, the condition of human rights in the world has eroded substantially, in part due to the activity taken by States in purported pursuit of fighting terrorism. It is not too far a stretch to characterise this state of affairs as constituting a true human rights crisis, as long established bedrock principles are increasingly challenged. It therefore seems inconceivable that with the existence of 39 existing special procedure mandates, covering a wide range of thematic topics, there is no room for a mechanism to confront one of the truly great human rights challenges

of the era. The cost of establishing such a mechanism would constitute a minute portion of the human rights budget, which itself is already a shamefully minimal portion – less than two percent – of the overall UN budget.

Even the establishment of a monitoring mechanism would constitute a meagre and inadequate commitment of resources for a problem of such magnitude. Yet while certainly no panacea, a new monitoring mechanism would make an essential, if modest contribution to addressing the assault on human rights and rule of law. More generally, the failure by the UN to tackle adequately one of the great human rights challenges of the era will likely marginalise the institution as a guardian of human rights and may be seen by future generations as a failure of historic proportions.

ANNEX

DECLARATION ON THE NEED FOR AN INTERNATIONAL MECHANISM TO MONITOR HUMAN RIGHTS AND COUNTER-TERRORISM

The undersigned Non-Governmental Organisations,

Considering that all States have an obligation to ensure the respect, protection and promotion of human rights and fundamental freedoms;

Recalling UN General Assembly Resolution 57/219 of 18 December 2002, UN Security Council Resolution 1456 of 2003 and UN Commission on Human Rights Resolution 2003/68 of 25 April 2003, each of which affirm that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights law, refugee law and humanitarian law;

Mindful that every State has both the right and duty under international law to take measures to combat terrorism and *reaffirming* that in so doing States unequivocally retain all other obligations under international law, including those deriving from human rights law, international humanitarian law, refugee law and the principles of the Rule of Law and criminal law;

Emphasising that the odious nature and extreme gravity of acts of terrorism cannot serve as a justification for any State to breach its international law obligations and that the standards giving rise to these obligations, no less than counter-terrorism measures, are aimed towards protecting the security of the person;

Profoundly alarmed that in the name of fighting terrorism a number of States have adopted or announced measures that are clearly incompatible with international obligations in respect of human rights law, international humanitarian law and refugee law and the principles of the Rule of Law and criminal law;

Gravely concerned that human rights and fundamental freedoms have been or may be undermined by certain counter-terrorism measures adopted or contemplated, including, *inter alia*, the practices of administrative detention without judicial review; prolonged incommunicado detention; transfer, return, extradition, denial of entry, or expulsion of persons at risk of being

subjected to torture in contravention of the principle of *non-refoulement* or asylum; the adoption of loose definitions of "terrorism" or "terrorist organisations", capable of resulting in breaches of the principle of legality and allowing for the criminalisation of legitimate acts in exercise of fundamental freedoms; the removal of basic safeguards to prevent torture or cruel, inhuman or degrading treatment or punishment and violations of the right to life; the adoption of measures which curtail the right to fair trial, freedom of association, basic labour rights, the right to asylum and the principle of non-discrimination.

Concerned also at the adverse consequences of certain counter terrorism measures for the enjoyment of rights of human rights defenders, migrants, asylum seekers, refugees, members of national or ethnic, religious and linguistic minorities, political activists and journalists, as highlighted by a number of special procedures mechanisms;

Encouraged that several UN human rights treaty bodies and Special Procedure mechanisms of the Commission on Human Rights have played a significant role in monitoring the impact of counter-terrorism measures on human rights and *underlining* in particular the importance of General Comment number 29 of the Human Rights Committee on article 4 of the International Covenant on Civil and Political Rights; the statement adopted on 22 November 2001 by the Committee against Torture reminding States that the Convention obligations are non-derogable and must be observed in all circumstances; the statement on racial discrimination and measures to combat terrorism adopted by the Committee on the Elimination of Racial Discrimination; and the Joint Statement of Special Rapporteurs of 27 June 2003 expressing profound concern at the multiplication of policies, legislation and practices adopted by many countries in the name of the fight against terrorism which negatively affect the enjoyment of virtually all human rights;

Taking into account that the human rights treaty supervision system does not have universal scope, as not all States are party to the respective human rights treaties and the work of treaty bodies is restricted by a reporting cycle that precludes timely monitoring, so that the Human Rights Committee, for example, is able only to examine at most 15 reports in a year;

Taking into account also that monitoring by the thematic special procedures mandated by the Commission on Human Rights (CHR) is highly limited due to the circumscribed and particularised nature of each mandate;

Encouraged by the analytical contribution contained in the reports of the Special Rapporteur on terrorism and human rights of the Sub-Commission on the Promotion and Protection of Human Rights and the decision by the Sub-Commission in Resolution 2003/15 to further study the compatibility of counter-terrorism measures with international human rights standards with a view to elaborating detailed guidelines, but also *noting* that the Sub-Commission within the terms of its present mandate and capacities is not able to undertake country-specific monitoring;

Recognising that under both General Assembly Resolution 57/219 and Commission on Human Rights Resolution 2003/68 the Office of the High Commissioner on Human Rights is requested to make general recommendations concerning the obligation of States to promote and protect human rights and fundamental freedoms while taking action to counter terrorism and *welcoming* initiatives the Office has already taken in this regard, including the Guidance and Further Guidance for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 and the Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism;

Noting with satisfaction various regional efforts in respect of human rights and counter-terrorism measures, particularly the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism and the Report on Terrorism and Human Rights of the Inter-American Commission on Human Rights; *greatly concerned,* however, that in respect of the great majority of States, no regional monitoring mechanisms are available and that existing intergovernmental regional human rights systems are not endowed with the mechanisms or procedures to supervise the compliance of national counter-terrorism measures with international human rights obligations and norms at the regional level;

Acknowledging with disappointment that the Counter-Terrorism Committee of the UN Security Council (CTC) has so far declined to accept the application of a human rights analysis to its work and has failed to appoint a human rights specialist among its various expert advisers and that neither the General Assembly, the Commission on Human Rights nor any other United Nations organ has established any human rights monitoring mechanism with the specific mandate to review the measures undertaken by Member States in this field;

Deeply concerned that no universal and comprehensive UN mechanism or system exists to monitor the compatibility of domestic counter-terrorism

measures with international norms and human rights, especially such measures related to the implementation of Security Council resolution 1373 of 2001, and that there exists a substantial gap in monitoring exercised by the human rights treaty bodies and Special Procedures mechanisms of the Human Rights Commission;

1. Express profound conviction as to the urgency and indispensability of the establishment of a UN mechanism to monitor and to help to ensure the compliance of domestic counter-terrorism measures adopted or contemplated by all UN Member States with international norms and human rights obligations.

2. Call upon the United Nations Commission on Human Rights, at its sixtieth session in 2004, to establish as a matter of utmost priority an independent mechanism on the question of human rights and counter-terrorism measures;

3. Request that the Commission mandate such a mechanism to monitor and help ensure the compliance of States with their international human rights obligations in their efforts toward countering terrorism;

4. Request that so as to ensure a comprehensive human rights approach, the mechanism should:
   (a) have the capacity to undertake *in situ* visits;
   (b) establish a dialogue and enhanced cooperation with the CTC with a view to assisting States to better meet their human rights obligations in implementing UN Security Council resolution 1373;
   (c) engage with and take into account the observations and recommendations of all relevant treaty bodies, including the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination Against Women, and the Committee on Economic, Social and Cultural Rights;
   (d) engage with and take into account the analyses, observations and recommendations of all Relevant Charter-based organs, including the Commission on Human Rights and its Special Procedures mechanisms and the Sub-Commission for the Promotion and Protection of Human Rights;
   (e) engage with and take into account also the analyses, observations and recommendations of regional institutions and mechanisms, including the African Commission on Human and Peoples Rights, the Council of Europe, the European Committee for the Preven-

tion of Torture, the European Court of Human Rights, the European Union Network of Independent Experts in Fundamental Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe;

(f) Co-ordinate activities with the Office of the UN High Commissioner for Human Rights;

5. Call upon regional inter-governmental organisations, particularly those presently engaged in counter-terrorism efforts and including the African Union, the Association of South East Asian Nations, the Council of Europe, the European Union, the League of Arab States, the Organisation for Security and Cooperation in Europe, the Organisation of American States, and the Organisation of the Islamic Conference, to develop or strengthen effective systems to ensure that counter-terrorism measures adopted or contemplated in Member States are compatible with international human rights and humanitarian law.

PART III. DOCUMENTS

INTERVENTION BY THE INTERNATIONAL COMMISSION OF JURISTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF *SENATOR LINES V. 15 MEMBER STATES*

1. INTRODUCTION

The International Commission of Jurists (ICJ), established in 1952, is an independent organisation dedicated to the protection and promotion of human rights through the rule of law. The ICJ provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the regional and national levels. It is composed of 60 distinguished jurists from around the world. The ICJ enjoys consultative status with the Council of Europe and observer status in the Steering Committee on Human Rights (CDDH).

The purpose of this intervention is to address the key question of the *Senator Lines* case, which is now pending before the European Court of Human Rights: To what extent can States parties to the European Convention on Human Rights (hereinafter "ECHR" or "the Convention") be held responsible for the conduct of organs of international organisations of which they are members?

This intervention will be limited to what the ICJ believes to be the crucial issue of Member State responsibility. No opinion will be expressed on the merits of the present application, i.e. the question as to whether Article 6 ECHR was complied with in the instant case. Similarly, this brief will not address a related yet distinct problem: the extent to which individual Member States may be held responsible for alleged violations of the ECHR whilst implementing decisions of international organisations. The Court has previously addressed this problem[1] and it is under the Court's review in a number of pending applications.[2] Instead, the case of *Senator Lines* involves the question of (joint) Member State responsibility for conduct of the international organisation itself.

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1 See, *inter alia*, ECtHR, 15 November 1996, *Cantoni v. France* (Reports 1996, p. 1614).

2 See, *inter alia*, ECtHR, *Bosphorus Airways v. Ireland* (Appl. No. 45036/98), pending, and *Emesa v. the Netherlands* (Appl. No. 62023/00), pending.

The applicant in the case of *Senator Lines*, a German company, complains of a breach of the right to a fair trial (Article 6 ECHR) by the Court of First Instance of the European Communities (CFI) and the European Court of Justice (ECJ). It is clear that the European Union as such is at present not bound by the Convention. Senator Lines' application is directed against the 15 Member States of the European Union, the argument being that the Member States may be held collectively or individually responsible for violations of the Convention by Community institutions. In their observations, the respondent States deny responsibility.

It is the ICJ's clear conviction that the Court should accept the possibility of Member State responsibility for the conduct of organs of international organisations of which they are members. This position is inspired by two main considerations, which are set out in paragraph 2. It is submitted that the concept of "Member State Responsibility" is in conformity with general international law (paragraph 3) and in line with existing jurisprudence, even if the Court has not expressed its views on this matter to date (paragraph 4). It is argued that the doctrine of "equivalent protection", which was applied by the Commission in the past, should be abandoned (paragraph 5).

2. THE COURT SHOULD ACCEPT THE POSSIBILITY OF MEMBER STATE RESPONSIBILITY

The position that the Court should accept the possibility of Member State responsibility is inspired by two main considerations. First, respect for human rights should be secured in a practical and effective fashion. From the perspective of the rights holder, it would clearly be unacceptable for violations of basic rights to go unaddressed, merely because the perpetrator is an international body established by the State, rather than the State itself. Secondly, States should not be allowed to escape their obligations under the Convention by transferring powers to international organisations. The Convention is certainly not opposed to international co-operation; the important role played by international organisations in present-day society is undisputed. But it would be highly undesirable for the conduct of these organisations, no matter how excessive, to be excluded from review by the Strasbourg Court.

Our starting point for analysis is that the State is the guarantor of the rights and freedoms protected by the Convention. As the Court observed in the case of *Refah Partisi*, the States are obliged under Article 1 of the Convention "to secure the rights and freedoms of persons within their jurisdiction". Those positive obligations relate "not only to any interference that may result from acts or omissions imputable to agents of the State or occurring

in public establishments but also to interference imputable to private individuals within non-State entities".[3]

When addressing the issue of interferences by *international* "non-State entities", it is important to bear in mind the special character of the Convention as a constitutional instrument of European *ordre public* for the protection of individual human beings.[4] The need to interpret the Convention in such a way as to make its safeguards practical and effective is well established in the Court's case-law. As was emphasised recently:

> The Court (...) would stress that although the Convention right to individual application was intended as an optional part of the system of protection, it has over the years become of the highest importance and is now a key component of the machinery for protecting the rights and freedoms set out in the Convention. (...) individuals now enjoy at the supranational level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention.[5]

The ICJ submits that this "real right of action" should not be undermined by the possibility that States parties to the Convention transfer powers to international organisations that would be exempt from review by the Strasbourg Court. As the Court observed in the case of *Waite & Kennedy:*

> where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.[6]

These general considerations also apply to the European Union.[7] It is clear that the Union represents a special case in many respects:

- Unlike many other international organisations, the legal order of the European Union provides for protection of human rights as general

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3 ECtHR, 13 February 2003, *Refah Partisi a.o. v. Turkey* (GC) (Appl. 41340/98 e.a.), para. 103.

4 See, *inter alia*, ECtHR, 23 March 1995, *Loizidou v. Turkey (prel. obj.)* (Series A, vol. 310), para. 75.

5 ECtHR, 6 February 2003, *Mamatkulov & Abdurasulovic – Turkey* (Appl. No. 46827/99, 46951/99), para. 106.

6 ECtHR, 19 February 1999, *Waite & Kennedy – Germany* (Reports 1999-I, p. 393), para. 67.

7 For the sake of brevity, no distinction will be made between the European Communities, international organisations the legal personality of which is undisputed, and the European Union. The draft Constitution of the EU, as adopted in June 2003 by the European Convention, provides that the Union shall have legal personality (Article I-6).

principles of Community law. The recently adopted Charter of Fundamental Rights of the EU codifies many of the rights recognised in the case law of the ECJ. Although different interpretations of fundamental rights can and do occur (see section 5 below), the overall picture is that the ECJ's case-law shows a clear willingness to apply the jurisprudence of the European Court of Human Rights.[8]

- Where conflicts do occur, Article 307 EC Treaty gives express precedence to the ECHR: "The rights and obligations arising from agreements concluded before 1 January 1958 (...) between one or more Member States on the one hand, and one or more third countries on the other hand, shall not be affected by the provisions of this Treaty". This implies that in cases where Community law is found incompatible with the ECHR, Community law itself allows for sufficient room for the Convention rights to remain unaffected. Case law of the ECJ confirms that individuals may benefit from Article 307 EC by relying on individual rights that they may derive from, for instance, ILO Conventions.[9]
- The position of the EU under the Convention has a special dimension in that the Union may well accede to the Convention in the near future. The draft Constitution of the EU, as adopted in June 2003 by the European Convention, provides that the Union "shall seek accession" to the ECHR (Article I-7), a prospect that has been welcomed by, *inter alia*, the President of the European Court of Human Rights and the Secretary-General of the Council of Europe. At this stage, however, EU accession is by no means certain.

The Union may be a special case, but there are many other international organisations to take into account, most of which are highly unlikely to accede to the ECHR. Some of these organisations may be less visible than the EU in daily life, but it is not difficult to contemplate that human rights complaints may well arise about the conduct of these organisations. Indeed, complaints concerning, for instance, the European Patent Office have been lodged in the past.[10] The ICJ therefore urges the Court to take a principled decision on the question of Member State Responsibility in general.

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8 See recently for instance ECJ, 20 May 2003, *Österreichischer Rundfunk a.o.* (case C-465/00 a.o.; n.y.r.), para. 73 and 77; ECJ, 12 June 2003, *Schmidberger a.o.* (case C-112/00; n.y.r.), para. 79.

9 See ECJ, 2 August 1993, *Levy* (case C-158/91, ECR 1993, p. I-4307, para. 21; ECJ, 3 February 1994, *Minne* (case C-13/93; ECR 1994, p. I-384), para. 18; ECJ, 28 March 1995, *Evans & McFarlan Smith* (case C-324/93, ECR 1995, p. I-606), para. 30.

10 See, *inter alia*, ECommHR, 10 January 1994, *Heinz v. 17 States Patries to the ECHR* (Appl. 21090/92; DR 76-A, 127; *Yearbook ECHR* 1994, p. 39).

3. MEMBER STATE RESPONSIBILITY: RELEVANT PRINCIPLES OF GENERAL INTERNATIONAL LAW

3.1. International law is relevant to the interpretation of the Convention

Is the Court has noted on many occasions, the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court has indicated its willingness to interpret the Convention in harmony with other principles of international law of which it forms part.[11] In *Bankovic* the Court observed:

> The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty.[12]

What are the relevant principles of international law involved in this case?

3.2. Member State Responsibility in general international law

The issue of Member State Responsibility is controversial. In its written observations, the France argued there is no general rule of international law whereby States members are, due solely to their membership, responsible for the conduct an international organisation of which they are members.[13] This is certainly true.
But it should not be overlooked that the Resolution of the *Institut de Droit International (IDI), to which the France refers*, is mainly concerned with liability *for the obligations of an international organisation itself.*[14] Of particular relevance here is the famous case of the International Tin Council, which was unable to meet its financial obligations. In that case the question arose as to whether and to what extent its Member States were liable to pay for the ITC's debts. The English courts replied essentially that no such liability attached.

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11 See, *inter alia*, ECtHR, 21 November 2001, *Al-Adsani v. UK* (35763/97), para. 55.

12 See, *inter alia*, ECtHR, 12 December 2001, *Bankovic a.o. v. Belgium and 16 other Contracting Parties* (Appl. 52207/99), para. 57. See also ECtHR, 10 July 2001, *Avsar v. Turkey* (Appl. 25657/94), para. 284.

13 See *Observations du Gouvernment de la République Française*, pp. 8-9.

14 "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of *their Obligations* toward Third Parties" [emphasis added], in 1996 *Annuaire de ID I*, pp. 445-453.

However, the "ITC scenario" is readily distinguishable from situations where an international organisation interferes with the *obligations of its Member States.* One may think of an organisation that seeks to develop nuclear weapons whereas its Member States are parties to the Non-Proliferation Treaty, or – more pertinent in the instant case – an organisation that allegedly violates the human rights which its Member States have undertaken to secure. The question then is not so much whether Member States may be held liable for the obligations of "their" organisation, but rather whether they can hide behind the corporate veil of the organisation if it is said to contravene their own obligations.
Against this background, it is interesting to take a closer look at the 1995 discussions in the *Institut de Droit International.* Mr. M. Waelbroek, for instance, stated:

> The starting point is to consider that an international organization (whether set up to exercise tasks *jure imperii* or *jure gestionis*) is an instrument by which certain States seek to accomplish together certain tasks more effectively than they could if they were acting individually. Membership in the international organizations confers certain advantages on them. Otherwise they would presumably not become a member. Therefore, it would be wrong, both from a policy and from an equity point of view, to allow Member States to evade all responsibility towards third parties for the activities of the international organizations to which they belong. [...] if the constituent instrument does not clearly exclude the secondary liability of the Member States or if the liability arises as a result of tortious conduct rather than under contract, there are compelling policy reasons to allow injured parties to recover against the Member States if the organization defaults.[15]

Mr. I Shihata added:

> A member State may be held separately liable for its behaviour related to an international organization to the extent that such a behaviour is in violation of an established international law obligation.[16]

Again, these statements were made in the context of a discussion concerning the liability of Member States for the obligations of their organisation. But the point is that even within that specific context there is support for the idea that Member States may be held liable, at least under some circumstances, for the debts of their organisation.
The same would apply *a fortiori* where an organisation allegedly violates the obligations by which its Member States are bound. State practice is scarce, but it points in the same direction. When during Operation Allied Force

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15 *Ibidem*, p. 322.
16 *Ibidem*, p. 291.

a NATO air strike hit the Chinese embassy in Belgrade, the United States did not hesitate to assume responsibility: it apologised and paid damages to China.[17] This is the perfect illustration of what Mr K. Zemanek observed during the discussions in the *Institut de Droit International*:

> States cannot do through an international organization what they are not allowed to do by themselves under international law.[18]

This position is again fully in line with the view taken by the International Law Commission when drafting the articles on State responsibility: States should not be allowed to escape their international responsibility.[19]

4. MEMBER STATE RESPONSIBILITY: RELEVANT PRECEDENTS IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

To date, the Court has not had the opportunity to address the question whether States can be held responsible under the Convention for the conduct of organs of international organisations to which those States belong. Yet the Strasbourg case law gives some pointers for an answer. For instance in the case of *Costello-Roberts* the Court observed:

> the State cannot absolve itself from responsibility [to secure the rights and freedoms of the Convention, ICJ] by delegating its obligations to private bodies or individuals.[20]

The same principle was previously applied in *Van der Mussele*. This case concerned the obligation for lawyers to grant free legal aid to clients who could not afford to pay regular legal services. When Mr Van der Mussele

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17 See the series of Memoranda of Understanding of 30 July and 16 December 1999, at http://www.state.gov/documents/ organization/6523.doc and /6526.doc.

18 1995 *Annuaire IDI*, p. 326.

19 See e.g. *YBILC* 1973-II, p. 176, § 1 ("Article 2 ... is intended to ensure that a State shall not escape its international responsibility"); *YBILC* 1974-II (part 1), p. 278, § 3 ("... the deletion of Article 7 ... would leave a dangerous loophole ... through which a State might evade international responsibility"); *YBILC* 1975-II, p. 69 ("... in which case we run the unpardonable risk of presenting the State with an easy loophole in particularly serious cases where its international responsibility ought to be affirmed"); *ibidem*, p. 82, § 37 ("Paragraph 2 of the article ... is intended ... to prevent attempts by the State also to evade the international responsibility"); *YBILC* 1978-II (part 2), p. 100, § 6 ("... there can be no question of its avoiding or even reducing its responsibility"); *YBILC* 1979, dl. II (part 2), p. 95, § 5 ("... the real concern of the arbitrator was simply to ensure that (...) international responsibility for internationally wrongful acts committed by the protected State should not ultimately be erased").

20 ECtHR, 25 March 1993, *Costello-Roberts v. UK* (Series A vol. 247-C), para. 27.

claimed that this amounted to compulsory labour, in breach of Article 4 of the Convention, the Belgian Government submitted that it was not answerable: the implementation of professional rules was a responsibility of the *Ordre des avocats*. The Court rejected that argument:

> Under the Convention, the obligation to grant free legal assistance arises, in criminal matters, from Article 6 § 3 (c); in civil matters, it sometimes constitutes one of the means of ensuring a fair trial as required by Article 6 § 1 (see the *Airey* judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26). This obligation is incumbent on each of the Contracting Parties. The Belgian State (...) lays the obligation by law on the *Ordre des avocats* (...). Such a solution cannot relieve the Belgian State of the responsibilities it would have incurred under the Convention had it chosen to operate the system itself.[21]

The principle seems clear: if a State chooses to delegate powers to other bodies, it continues to be responsible for any violations of the Convention that may occur subsequently. The question arises as to whether any different approach should be taken when it comes to the voluntary transfer of powers to international organisations. There seems to be no reason why this should be the case. Indeed, in the case of *Matthews*, the Court noted:

> The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.[22]

It can also be argued from a different perspective that the transfer of competences to international organisations cannot relieve the States concerned from their obligations under the Convention. In its well-known decision in the case of *M & Co.*, the Commission observed

> Under Article 1 of the Convention the member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations.[23]

The Commission confirmed this view in 1995.[24] In 1996 the Grand Chamber of the Court observed, along similar lines, in the case of *Cantoni*:

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21 ECtHR, 23 November 1983, *Van der Mussele v. Belgium* (Series A, vol. 70), para. 29.
22 ECtHR, 18 February 1999, *Matthews v. UK* (Reports 1999, p. 251), para. 32.
23 ECommHR, 9 February 1990, *M. & Co.* v. Germany (Appl. 13258/87), *DR* 64, p. 144; *Yearbook ECHR* jrg. 33 (1990), p. 51.
24 ECommHR, 16 January 1995, *Gestra v. Italy* (Appl. No. 21072/92), *DR* 80-A, p. 93.

> The fact, pointed out by the Government, that Article L. 511 of the Public Health Code is based almost word for word on Community Directive 65/65 does not remove it from the ambit of Article 7 of the Convention.[25]

There is no room for distinguishing between "ordinary" legislation and legislation meant to implement Community law. Accordingly, Advocate-General Jacobs was absolutely right when observing in the case of *Bosphorus*:

> Community law cannot release Member States from their obligations under the Convention.[26]

The only question that remains: can Community law deprive individuals from their right of access to the European Court of Human Rights?

5. THE "EQUIVALENT PROTECTION" DOCTRINE

In the case of *M. & Co.*, the European Commission of Human Rights introduced the principle of "equivalent protection":

> [T]he transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.[27]

On its face, this statement seems inaccurate. Certainly the Convention would not be opposed to a transfer of powers to an organisation *in abstracto*, as long as there are no problems in practice. In reality, many international organisations do not provide for "equivalent protection" of human rights, simply because they are not concerned with or confronted by human rights issues at all. In such circumstances, would a transfer of powers to such an organisation remain incompatible with the Convention? The Convention does not require the Contracting States to incorporate its provisions in domestic law. It would thus be strange to require more from international organisations by insisting that they must provide for protection mechanisms where many or most human rights under the Convention to not come into play.

In one sense, the statement in *M. & Co.* goes too far. It is difficult to see what consequences would flow from a finding by the European Court that the transfer of powers to an organisation is incompatible with the Convention? Would such a determination imply that the powers had never been

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25 ECtHR, 15 November 1996, *Cantoni v. France* (Reports 1996, p. 1617), § 30.

26 Jacobs AG in case C-84/95, ECR 1996, p. I-3972.

27 ECommHR, 9 February 1990, *M. & Co.* v. Germany (Appl. 13258/87), *DR*64, p. 144; *Yearbook ECHR* jrg. 33 (1990), p. 51, para. 4.

validly transferred? Would it imply that the organisation's powers were null and void *ab initio*? This would lead to unforeseeable consequences. The Courts' approach in *Matthews* is clearly preferable: The Convention is "neutral" vis-à-vis any transfer of powers, but Member States' responsibility simply continues after such a transfer.

It must also be noted that *M. & Co.* concerned the question as to whether Article 6 ECHR obliges a domestic court to refuse to grant *exequatur* to a judgment of the ECJ, because the procedure before the ECJ allegedly had been conducted in a manner contrary to the rights guaranteed by Article 6 ECHR. The holding of *M. & Co.* was therefore fairly narrow, since it related primarily to the scope of obligations under Article 6 ECHR. Thus *M. & Co.* is distinguishable from cases in which acts of Community organs were said to infringe upon the rights of the Convention. Nevertheless, although the Court itself never adopted the "equivalent protection"-test, the Commission seems to have expanded the doctrine so as to exclude review of any Community act.

A clear disadvantage of the "equivalent protection"-test is that it focuses on the general level of human rights protection within an international organisation. Apparently the possibility of incidental violations is accepted as long as the general level of human rights protection is satisfactory. This trade-off is hard to reconcile with "the object and purpose of the Convention as an instrument for the protection of individual human beings",[28] the very essence of which is "respect for human dignity and human freedom".[29] Clearly it would be inconceivable to hold, *mutatis mutandis*, that the general level of human rights protection in a State Party to the Convention is so high that individual complaints against that State shall no longer be reviewed.

There is a remarkable contrast between the Commission's "equivalent protection"-test and the Court's normal approach to concentrate on the specific circumstances of the individual case – for instance when it comes to prison conditions[30] or expulsions to "third" countries.[31]

On these grounds alone it is unjustified to label the protection of human rights in any organisation as "equivalent", and thereby provide overly broad delegation of responsibility to the relevant organisation to ensure human rights protections. In the case of the European Union it should be added that notwithstanding the ECJ's overall willingness to apply the Strasbourg

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28 ECtHR, 7 July 1989, Soering v. UK (Series A vol. 161), para. 87.

29 ECtHR, 11 July 2002, Christine Goodwin v. UK (GC) (Appl. 28957/95), para. 90.

30 See for example ECtHR, 15 July 2002, Kalashnikov v. Russia (Appl. 47095/99), para. 95; ECtHR, 4 February 2003, Lorsé v. the Netherlands (52750/99), para. 62 and 65.

31 See for example ECtHR, 29 April 1997, *H.L.R. v. France* (Reports 1997, p. 745), para. 41, and ECtHR 6 March 2001, *Hilal v. UK* (Appl. No. 45276/99), para. 66.

case law, as noted in paragraph 2 above, there are divergences in the case law. On occasion these divergences lead to a lower level of protection by the ECJ. Three examples demonstrate that this concern is not theoretical.

- According to well-established case law of the Strasbourg Court, the right to adversarial proceedings entails the right to reply to the opinion of the Advocate-General.[32] However, in the case of *Emesa* the ECJ ruled that the impossibility for applicants to reply to the opinion of the Advocate-General did not constitute a breach of the right to a fair hearing, as laid down in article 6 ECHR.[33] The grounds advanced by the ECJ for distinguishing its own position from that of the domestic courts appear to be less than convincing.

- Another example can be found when comparing in the decision of the Strasbourg Court in the *Colas Est* case and the decision of the ECJ in the *Hoechst* case.[34] Colas Est, a legal person, was confronted with a search inside its offices by employees of the national competition authority. In reaching its conclusion that Article 8 ECHR had been breached, the Court attached great importance to the fact that no prior permission had been given by a judicial authority. At the same time, the Commission of the European Communities, which is responsible to ensure fair competition in the EU Member States, is competent to act similarly without prior permission of a judicial authority. In the *Hoechst* case, the ECJ was of the opinion that the European system offered sufficient guarantees for legal persons that are subjected to an investigation. Admittedly, *Hoechst* was decided before *Colas Est.* Indeed, in the more recent case of *Roquette Frères*, the ECJ took notice of the *Colas Est* decision.[35] But it can be derived from *Roquette Frères* that the ECJ remains of the opinion that the existing EU regime offers a sufficient degree of protection.

- The third example is the decision of the CFI in the *Mannesmannröhren-Werke* case.[36] This case is about the principle of *nemo tenetur.* The CFI followed the approach developed by the ECJ ten years earlier in the *Orkem* case.[37] In the interim period, the Strasbourg Court had developed

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32 See *inter alia* ECtHR, 20 February 1996, *Vermeulen v. Belgium* (Reports 1996, p. 224), and ECtHR, 7 June 2001, *Kress v. France* (GC) (Appl. 39594/98).

33 ECJ, 4 February 2000, *Emesa Sugar (Free Zone) NV* (case C-17/98).

34 ECtHR 16 April 2002, *Colas Est a.o. v. France* (Appl. No. 37971/97); and ECJ 21 September 1989, *Hoechst v. Commission* (cases 46/87 and 227/88).

35 ECJ, 22 October 2002, *Roquette Frères SA* (case C-94/00).

36 CFI, 20 February 2001, *Mannesmannröhren-Werke AG v. the Commission* (case T-112/98).

37 ECJ, 18 October 1989, *Orkem* (case 374/87).

its jurisprudence on the subject of *nemo tenetur*,[38] but the CFI ignored these developments. There are reasonable grounds to believe that the CFI would have reached a different conclusion if it had taken the developments in Strasbourg into account.

Of course it would be a delicate move for the Strasbourg Court to decide, on the basis of these three examples, that the level of human rights protection by the ECJ no longer qualifies as "equivalent". But this very observation demonstrates another major disadvantage of the "equivalent protection doctrine": it may involve a significant pressure to "approve" the adequacy of international organisations in protecting human rights.
A telling example may be the case of *Heinz*[39], in which the Commission accepted that the European Patent Office (EPO) offered an "equivalent protection" of human rights too. The Commission based its conclusion on a rather summary review of "various procedural safeguards", which were contained in the EPO Convention. The decision does not show to what extent these "various procedural safeguards" were in conformity with the requirements of article 6 ECHR.
For all these reasons it is submitted that, to the extent that it is still operative, the "equivalent protection doctrine" should be abandoned. Indeed, the Court's recent judgment in the case of *Pellegrini* suggests that the "equivalent protection doctrine" has already been abandoned. It is recalled that the doctrine was developed in *M. & Co.* in the context of *exequatur* proceedings. In *Pellegrini* the Court found a breach of Article 6 ECHR because the Italian courts had failed to verify whether a "foreign" decision – in this case by the Vatican courts – was the result of proceedings that were in conformity with Article 6 ECHR:

> The Court notes at the outset that the applicant's marriage was annulled by a decision of the Vatican courts, which was declared enforceable by the Italian courts. The Vatican has not ratified the Convention and, furthermore, the application was lodged against Italy. The Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties.[40]

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38 ECtHR, 25 February 1993, *Funke v. France* (Series A vol. 256-A) and ECtHR 17 December 1996, *Saunders v. the UK* (Reports 1996, p. 2044).

39 ECommHR, 10 January 1994, *Heinz v. 17 States* (Appl. No. 21090/92).

40 ECtHR, 20 July 2001, *Pellegrini v. Italy* (Appl. No. 30882/96).

It seems inevitable that this judgment will have an impact on cases where national courts in the EU Member States are asked to grant *exequatur* to judgments of the ECJ. Like the Vatican courts, the ECJ is not *bound* by the Convention, even if it tends to follow the Strasbourg jurisprudence. If the Italian courts are required to review the proceedings before the ecclesiastical courts prior to authorising enforcement of their decisions, the courts necessarily should be required to review decisions of the ECJ, at least until such time as the EU accedes to the Convention in its own right.

6. CONCLUSION

The ICJ submits that the Court should accept the possibility of Member State responsibility for the conduct of organs of international organisations of which they are members. From the individual's perspective it would clearly be unacceptable if violations of basic rights remained unaddressed, merely because the perpetrator was an international body established by his own State, rather than the State itself. Conversely, States should not be allowed to escape their obligations under the Convention by transferring powers to international organisations. It is submitted that the concept of "Member State Responsibility" is in conformity with general international law and in line with existing jurisprudence. The doctrine of "equivalent protection", which was applied by the Commission in the past, should be abandoned.
As Rolv Ryssdal, then President of the European Court of Human Rights, observed in 1991:

> It is difficult to accept that the Contracting States of the Convention should be in a position to shed their Convention obligations simply as a consequence of transferring certain of their competences to an international organisation.[41]

Judge Ryssdal was right. Any other position would result in cases of impunity, would leave marked gaps in the European human rights protection system, and could portend an erosion in the European Court's function as a guardian of human rights. This result would also be likely to undermine public support for international cooperation at a time when an increasing number of international organisations have been established and the impact of their decisions is growing.

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[41] R. Ryssdal, "On the Road to a European Constitutional Court", *Collected Courses of the Academy of European Law* 1991, vol. II-2, pp. 12-13.

THE UN SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARDS TO HUMAN RIGHTS

PREAMBLE

Bearing in mind the principles and obligations under the Charter of the United Nations, in particular the preamble and Articles 1, 2, 55 and 56, inter alia to promote universal respect for, and observance of, human rights and fundamental freedoms,

Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society and individuals shall strive, by teaching and education to promote respect for human rights and freedoms, and, by progressive measures, to secure universal and effective recognition and observance, including of equal rights of women and men and the promotion of social progress and better standards of life in larger freedom,

Recognizing that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights,

Realizing that transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Interna-

tional Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court; the United Nations Convention against Transnational Organized Crime; the Convention on Biological Diversity; the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Declaration on the Right to Development; the Rio Declaration on the Environment and Development; the Plan of Implementation of the World Summit on Sustainable Development; the United Nations Millennium Declaration; the Universal Declaration on the Human Genome and Human Rights; the International Code of Marketing of Breast-milk Substitutes adopted by the World Health Assembly; the Ethical Criteria for Medical Drug Promotion and the "Health for All in the Twenty-First Century" policy of the World Health Organization; the Convention against Discrimination in Education of the United Nations Educational, Scientific, and Cultural Organization; conventions and recommendations of the International Labour Organization; the Convention and Protocol relating to the Status of Refugees; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development; and other instruments,

Taking into account the standards set forth in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization,

Aware of the Guidelines for Multinational Enterprises and the Committee on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development,

Aware also of the United Nations Global Compact initiative which challenges business leaders to "embrace and enact" nine basic principles with respect to human rights, including labour rights and the environment,

Conscious of the fact that the Governing Body Subcommittee on Multinational Enterprises and Social Policy, the Governing Body, the Committee of Experts on the Application of Standards, as well as the Committee on Freedom of Association of the International Labour Organization have named business enterprises implicated in States' failure to comply with Conventions No. 87 concerning the Freedom of Association and Protection of the Right to Organize and No. 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively, and seeking to supplement and assist their efforts to encourage transnational corporations and other business enterprises to protect human rights,

Conscious also of the Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, and finding it a useful interpretation and elaboration of the standards contained in the Norms,

Taking note of global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system,

Noting that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities,

Noting also that new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future,

Acknowledging the universality, indivisibility, interdependence and interrelatedness of human rights, including the right to development, which entitles every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized,

Reaffirming that transnational corporations and other business enterprises, their officers – including managers, members of corporate boards or directors and other executives – and persons working for them have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations,

Solemnly proclaims these Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and urges that every effort be made so that they become generally known and respected.

A. General obligations

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

B. Right to equal opportunity and non-discriminatory treatment

2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age – except for children, who may be given greater protection – or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

C. Right to security of persons

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humani-

tarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

D. Rights of workers

5. Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

6. Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

7. Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.

8. Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.

9. Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labour Organization.

E. Respect for national sovereignty and human rights

10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.

11. Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

F. Obligations with regard to consumer protection

13. Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.

G. Obligations with regard to environmental protection

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment

of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

H. General provisions of implementation

15. As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

16. Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

17. States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.

18. Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken.

In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

19. Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.

I. Definitions

20. The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

21. The phrase "other business enterprise" includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.

22. The term "stakeholder" includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term "stakeholder" shall be interpreted functionally in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others.

23. The phrases "human rights" and "international human rights" include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.

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