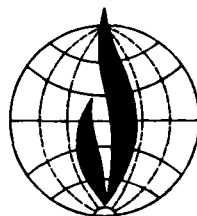


THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Human Rights in the World

Argentina

Controversy surrounding the judiciary

In Argentina, the judiciary is undergoing an extremely trying period. Unfortunately, its independence and impartiality have come under attack and, as a consequence, the democratic balance is in jeopardy and unable to enforce the supremacy of the Constitution.

Shortly after the rise to power of Carlos Meném, the standard-bearer of Peronist *Justicialismo* as President of Argentina on 9 July 1989, the tampering with the Supreme Court and the judicial system as a whole made headlines daily in the national media.

In addition to repeated strikes by judicial officials, particularly over wage issues and working conditions, various rumours about the prospective changes in the Supreme Court began to circulate.

All this led, though not without opposition, to the passage of Law 23.764, which raised the number of judges on the Supreme Court from five to nine, established the order of *certiorari*, a legal procedure which allows the Supreme Court to accept or reject petitions depending on whether they are substantial enough for review by the Court and placed the *Procurador General* (Attorney-General) under the jurisdiction of the Executive.

In its Article 86, the Constitution of

Argentina grants the Executive the power to name "the judges of the Supreme Court and those of other lower courts with the approval of the Senate"; in turn, the Executive is entitled to participate in "the drafting of laws in accordance with the Constitution", being the branch which "enacts and promulgates them"¹.

Furthermore, the system of representative government (which is federal and republican) provides for a division of powers, with the judicial branch "embodied in a Supreme Court of Justice and in other lower courts established by Congress throughout the land"². The number of judges on the Supreme Court is set by law.

What is alarming is not simply the addition of more judges to the Court (which is, nevertheless, a questionable move if it denotes an attempt to pack a Court that will then work hand in glove with the government of the hour), but also the shady manner of proceedings that led to the passage of the law. Bearing in mind that this was a highly significant change in the composition of the judicial branch, it should have been carried out with a broad base of national support, subsequent to an in-depth and thoughtful debate in order to find a satis-

1. The Constitution of Argentina, Art. 86, paragraphs 5 and 4 respectively.

2. *Idem*, Art. 94.

factory solution that preserved the independence of the Court.

The composition of the Supreme Court, when the Peronist government assumed power, had been the work of Dr. Raul Alfonsín, the outgoing President of the Radical Party, who had taken office in December 1983. At that time, the judges on the Court, who had been appointed by the military regime, offered their resignations, as was the custom when *de facto* governments came to an end³. The Court appointed in late 1983 did not necessarily reflect the political weight of the Radicals at that juncture. Indeed, only two out of five judges were considered Radicals: the Chief Justice, Dr. Caballero and the most senior judge, Dr. Belluscio. Dr. Baqué, another judge was what is known in traditional Argentine political jargon as a liberal; a jurist with a particular interest in individual rights and civil liberties. Dr. Fayt, a former professor of constitutional law and close to the old Socialist Party, and Dr. Petracchi, the only Peronist at the time, completed the Bench.

The various rumours about packing the Court began to circulate soon after President Meném assumed power, at a time when there was much discussion about the pardon for military officials who had been tried and found guilty of gross violations of human rights during the last military dictatorship (1976 to 1983). It was acknowledged that there would be a high political price to pay for such a move and that it would be preferable to reserve the matter for the Court. In the end, Meném chose to take it upon himself to grant the pardon outright.

The judiciary began to show the strain of the rumours that were circulating, insinuating that a packed Court would be converted into the handmaid of the current government. Whether well-founded or not, these rumours began to spread as the Court and the government gradually lost credibility in the matter, with the judiciary fearing for its stability and independence, so essential to the Supreme Court and each of the branches of government.

The issue of enlarging the Supreme Court is nothing new, and, moreover, as has been seen, is within the power of the government and the Congress. However, what many observers questioned were the motives for this change in terms of its timeliness and need. About 1960, President Frondizi brought the number of Supreme Court seats to seven. Some years later, President Illia failed in his plan to raise that number to nine; in 1966, during the term of *de facto* President Onganía, the Court shrunk again to five judges.

When the Peronist Meném became President, there was still a draft law gathering dust in Congress that had been submitted by Alfonsín's government, but which had not met with any success. However, it differed slightly from the Peronist proposal that eventually passed into law.

The differences between the two were as follows:

The Radicals had put forward a four-part proposal introducing two changes and broadening the Court's scope in two other areas:

3. Despite the constitutional guarantee of judicial immutability, the Supreme Court of Argentina was entirely renewed in 1946, 1957, 1973, 1976 and 1983. See "The Protection of Judicial Independence in Latin America" by Keith S. Rosenn, Bulletin of the Centre for the Independence of Judges and Lawyers, No. 21 and 22, page 88.

- a) at the outset, it aimed to bring the number of judges up from five to seven, but subsequently, in the course of congressional debate, this was raised to nine;
- b) it continued to leave the appointment of Chief Justice to the President, to be confirmed by the Senate, considering that he is the fourth official in line for the presidency;
- c) it introduced the order of *certiorari*, well-known in the United States, which entitles the Court to select the cases that are brought to it on appeal;
- d) it suggested adoption of the *per saltum* method, which allows the Court to review any case as it stands, dispensing with the need for the usual procedural stages.

The Peronist draft bill, presented to the Senate, supported only enlarging the Court to nine and also favoured reforms in Articles 280 and 285 of the Civil and Commercial Procedural Code relating to the *recurso extraordinario* and the *queja por denegación*, a sort of *certiorari*. The justification for the proposal cited the overload of cases awaiting action, the mounting number of officials performing tasks within the exclusive domain of the judiciary and favoured more judges "in order to facilitate their personal and irreplaceable task, ... to strengthen the decisions of the Court in terms of their constitutionality and enhance their academic authority ...".

The Court itself reacted immediately when this proposal was submitted by signing Decree No. 44/89, which quoted the former President Bartolomé Mitre (1862-68) and the International Commission of Jurists, in favour of an impartial controller and opposed to authoritarian governments, thus implying a power struggle. The Court voiced its disap-

proval of a hasty measure which, by increasing "abruptly the number of judges from five to nine would run the risk of triggering a sudden alteration in the application of law and legal scholarship", and added that the independence and stability of the judiciary, combined with the stability of its members and bodies, are the pillars on which the Argentine people are relying for the transition "to constitutional institutions to be genuine and unshakable".

The Bar Association of Buenos Aires sounded a similar opinion to that of Decree 44/89, stating that "owing to its eminent mission and its significance for individual freedoms, the Supreme Court must have a stable organization, protected from changes in the political arena".

Other objections from diverse quarters were directed at the Peronists' claim that the decisions handed down by an enlarged Court would carry greater academic weight. They retorted that the authority of the decisions rested on the stature of the judges, not on their number.

A heated debate ensued also on the "division of the judges into chambers". In its proposal, the Executive declared that one of its purposes was to promote swiftness in the judicial system by enlarging it. However, many rejoined that since partisanship is banned (the Constitution speaks of one Court ... and it has always been thus), this measure would tend to have just the opposite effect, since nine judges instead of five would have to come to an agreement for each case deliberated. They cited as their source Mr. Charles Evans Hughes, Chief Justice of the US Supreme Court who had expressed the view that the Constitution did not authorize division within the Court, and that more judges meant

less efficiency. Given that the Constitution of the United States, the spirit of the law was surely the same in both. The government, for its part, deemed this measure wholly viable, steeped in precedent by a law on the books that had been passed 30 years hence but which had never been brought into force.

A few days before submitting the draft law, the Technical and Legal Secretary to the President claimed, on top of calling the judiciary *Alfonsinista* that "it is impossible to govern if the Supreme Court is against all the Executive's political initiatives and might declare all the laws implemented by it unconstitutional". These statements came under heavy fire since court decisions must be taken as a judgment on whether laws are in accordance with the Constitution and not as personal opinions on the matter.

Without delving into the underlying motives of the draft law, it can be noted that the intense debate did extensive damage to the credibility and prestige of democratic institutions. The poor judgment evidenced in many rumours, including the offer of ambassadorships to entice some judges to quit their posts, undermined confidence in the role of the Court as a model of independence and moderation.

Despite the failure to reach a consensus with the opposition and the numerous judgments against the government's recent economic measures, (such as the laws on Economic Emergency and Government Reform that devised a series of economic reforms, some of which raised a hue and cry, such as those on the pri-

vatization of public companies and services and those imposing the "Bonex" government securities), the government decided to ram the law through, fully suspecting that the Court would declare unconstitutional the Executive decree allowing the forced substitution of the Bonex '89 securities for fixed-term Treasury bonds⁴.

Dr. Germán Bidart Campos⁵ challenged the statements of the Governor of Buenos Aires Province who declared, "The judiciary must share the Executive's basic policy direction", implying that whenever there is a change in the Executive, a new set of judges must be appointed to concur with the new officeholder.

Finally, the Executive enacted Law 23.764 by Decree 670/90 which raised the number of judges to nine. Thanks to the presence of the six senators representing the provincial parties and in the absence of the representatives from the *Unión Cívica Radical*, the Peronists managed to obtain approval of the law in the Senate in seven minutes flat. Following the passage of the law, the Executive-supported candidates for these seats were confirmed.

The Radicals in the opposition criticized vociferously the Senate's "hasty treatment" of the dossiers and backgrounds of the Executive-backed appointees. This had "prevented them from assessing whether they possessed the legal, academic and personal qualifications and required independence to be elevated to a seat on the Court". They also challenged the alleged influence of the Opus Dei movement in the appoint-

4. The Bonex are government securities used to finance its deficit and are quoted on the Stock Exchange. They were substituted forcibly for fixed-term investments, up to a given amount.

5. Titular Professor of Human Rights and Guarantees of the University of Buenos Aires (UBA) and of Constitutional Law of the Catholic University of Argentina (UCA).

ments. The promulgation of this law also led to the alienation of some of the sitting judges, who handed in their resignations.

The claims that the government was seeking a submissive Court now seems borne out since the judges appointed are close to *Justicialismo*, thus giving the Peronists a majority on the Court:

Dr. Levene, subsequently elected Chief Justice of the Court, was an administrative lawyer and Under-Secretary of the Interior, with close links to the Church and Peronism; he was appointed to the Court for the first time in 1974 by María E. Martínez de Perón ("Isabelita"). The second in command, Dr. Cavagna Martínez comes from an old Peronist family from La Plata (capital of the province of Buenos Aires). His father was the last Prime Minister of Juan D. Perón prior to the military takeover in 1955. Dr. Nazareno was the law firm partner of Senator Eduardo Meném (the President's brother). He was the presiding magistrate of the Supreme Court in La Rioja (Meném's home province), and many discredit him politically for his management in La Rioja during the Onganía dictatorship. Dr. Barra was a government official, first serving as Secretary of Public Works where he played a foremost role in the Laws of Economic Emergency and Government Reforms and later as Under-Secretary of the Interior. Finally, there is Dr. Oyhanarte, Meném's former Secretary of Justice and Chairman of the Academic Commission for Constitutional Reform.

Five Radical representatives filed a petition in *amparo*, demanding nullification of the session which had approved the Court's enlargement. The petition was founded on "the violation of our right to act as the people's representatives for which we were elected" and complained of irregularities such as "the

presence of imposters on the benches, a bogus quorum and the abrupt adjournment of the session that prevented the representatives from exercising their prerogatives".

These shady procedures and the failure to take the required time to obtain the needed support for such an important structural change in the judiciary are unfortunate. When it is a matter of altering the scope of the Court's jurisdiction and knowing that a constitutional reform is at hand, it would have been doubtless far wiser to reserve this matter for that time.

A Supreme Court free from shifting political interests and from the periodic renewal of those at the head of state, is necessary to consolidate the stability of the judiciary. The development of the law should reflect a gradual adaptation to scientific and social realities, with stability prevailing over abrupt changes.

Chipping away at the independence of the judiciary and its highest institution, the Supreme Court, decapitates the system of justice whose express mission to ensure constitutional rights and preserve a democratic system is sabotaged. The lingering tradition of constructing a Court to serve as a rubber stamp for the government of the hour does irreparable harm to the separation of powers, one of the basic principles of the rule of law.

The series of events which intervened after these measures goes to justify a certain lack of confidence: The Minister of Public Works and Services announced on 13 July 1990 that he had approved Iberia's proposal to acquire a percentage of Aerolineas Argentinas. Two hours later, the Peronist Deputy, Moises Fontela, presented a petition of *amparo* to prevent this sale, which was endorsed by the judge, thus blocking this privatization. At 3 p.m., the Minister appealed

the decision to the Supreme Court, which, two hours later annulled the decision of the judge, clearing the way for this sale by the government. The Court drew harsh criticism for its meekness in this affair.

Another change worked by Law 23.764 was the placement of the *Procurador General* (the Attorney-General) under the jurisdiction of the Executive. It should be explained that the *Procurador*, who acts as the prosecutor before the Supreme Court, is a member of the Court and attends their regular meetings, had been appointed by the same procedure applied to judges: he was proposed by the Executive and then confirmed by the Senate. However, in the case of Dr. Roger, proposed by President Meném, the custom had already been flouted since he was appointed by Decree and was not sworn in before the Court. Therefore, he had, *de facto*, already begun to depend directly on the Executive. With his function thus politicized, and invested as a political appointee in the heart of factionalism, with Senate confirmation, he loses the security of tenure associated with the judiciary and is unprotected from partisan issues. Furthermore, it distorts the meaning of *Procurador General* as the representative of civil society⁶.

The international principles on the independence of the judiciary are clear on this matter, and governments should take them seriously. It is imperative to recall that "The judiciary has a significant role to play in the construction of a

democratic society...". Such was the conclusion of the participants in the Seminar on the Independence of Judges and Lawyers in Argentina, Brazil, Paraguay and Uruguay held in Buenos Aires in 1988 and organised jointly by the Centre for the Independence of Judges and Lawyers, the International Commission of Jurists, the Centre for Legal and Social Studies and the Association of Lawyers of Buenos Aires (Item 21 of the conclusions and recommendations of this Seminar).

Likewise, the seventh UN Congress on the Prevention of Crime and the Treatment of Offenders approved by consensus the Basic Principles on the Independence of the Judiciary in 1985. The United Nations General Assembly endorsed these unanimously and invited governments to respect them and take them into consideration when drafting legislation and national procedures (A/RES/40/146); the first principle declared "The independence of the judiciary will be guaranteed by the government through the Constitution or in the legislation of the country which will provide for and regulate the manner in which the community will carry this out. All government and similar institutions will respect and observe the independence of the judiciary".

It must be hoped that governments will consider the independence of the judiciary as a priority in any democracy in order to guarantee the due protection of human rights and ensure the balance of powers.

6. The seminar in Buenos Aires in 1988 on the Independence of the Judiciary in Argentina, Brazil, Paraguay and Uruguay in its conclusions and recommendations, at item 43, stated clearly that "The Office of the Public Prosecutor should be independent. This independence is strengthened if it comes as the product of agreement between the Executive, Judiciary and Legislative Branches and the representatives of civilian bodies bearing a direct interest therein. The law should establish its powers in connection with its independent role ... It is deemed fundamental that the Office represent civilian society, defend democracy and human rights".

South Africa*

Investigation into the Violence in Natal

The International Commission of Jurists sent a mission to South Africa in August and September 1990, to investigate the violence which has been tearing the province of Natal apart for upwards of four years. The members of the mission were John Macdonald O.C.(United Kingdom), Christian Ahlund (Sweden) and Jeremy Sarkin (South Africa).

We spent as much time as possible in the townships talking to ordinary people. We were shown round by both sides to the conflict. We went to Ulundi for a four hour meeting with Chief Buthelezi, the Chief Minister of the homeland of Kwa-Zulu. We met the African National Congress (ANC) leadership in Natal and talked with the police, the judiciary, the Attorney General, lawyers, church leaders, businessmen and independent observers. We put our conclusions to the Foreign Minister Pik Botha and to Adrian Vlok, the Law and Order Minister.

The breakdown of law and order

Law and order has broken down in Natal. Over the last four years more than 4'000 people have been killed in the province and some 50'000 have been driven from their homes. It is difficult to convey the shattering sense of loss that characterises great numbers of those displaced persons who have lost loved

ones, houses, belongings, in fact everything except the clothing in which they escaped from the disaster areas - and who now face the prospect of having to rebuild lives again from nothing.

In considering the breakdown of law and order it is helpful to start with two remarkable judgments which were delivered in August 1990 by Mr. Justice Didcott in the case of Mr. Ngcobo and by Mr. Justice Wilson in the case of Mr. Mweli.

The cases underline the scale of the violence; the strain on police resources compounded by the serious misconduct of some policemen; the total lack of confidence of people in the police force; the fear which is ever present in the townships; the danger of giving evidence and the violent political rivalry. On the credit side there are some good community policemen who have a professional approach, and if a case is brought to Court it will be properly tried.

Mr. Justice Wilson reserved his harshest criticism of the police for the fact that at a time when Mr. Mweli had been arrested and charged with five counts of murder and was in custody he was detained again under the Emergency Regulations. The effect of this detention was to prevent the investigating officers from having access to the accused and thereby interfering with and delaying the investigation of the very serious charges against him.

The cases show that law and order

* This is a summary of the report of a mission undertaken by the International Commission of Jurists to Natal Province in August and September 1990.

has broken down and that in Mr. Justice Didcott's words there is terrible interne-cine warfare which is tearing the province apart.

Political and economic pressures on the government to act

Both the government and the ANC are committed to the negotiation process. Most white South Africans we spoke to do not expect there to be another all white election. The government, therefore, needs to make progress quickly. The violence in Natal could derail the whole process. It has to be stopped if the negotiations are to succeed.

We were told by leading businessmen in Durban that violence poses an even greater threat to investment and the economy than sanctions and that it was only in July 1990 that they had got through to the government the seriousness of the situation. The Foreign Minister Pik Botha agreed that the violence was having a very adverse effect on the economy. There are therefore pressing political and economic incentives for the government to act.

We are satisfied that the State President and a majority of the Cabinet are committed to stopping the violence in Natal. We appreciate that some of the decisions they will have to take will be difficult and that it will not be easy to implement all the decisions. There is a real danger that powerful forces within and beyond the security establishment will try to destabilize the position.

Political rivalry

90% of the black people in Natal are Zulus. The violence has not been tribal,

Zulus have been killing Zulus. While apartheid and the ideology of separate development are the root causes of the trouble, violent political rivalry has now come to be the dominant factor in people's lives.

Inkatha, founded in 1928 as a cultural movement to preserve and promote the Zulu heritage, was revived in 1975 by Chief Buthelezi, and became a much more politically motivated organisation. With his fiery anti-apartheid rhetoric and refusal to accept the bogus independence offered by Pretoria, Buthelezi was seen by many including the banned ANC, as an ally in the struggle, fighting apartheid from inside. Internationally the Chief Minister was lauded by Western leaders because of his anti-sanctions views and his rejection of violence against apartheid.

Chief Buthelezi, as the dominant force in the KwaZulu Legislative Assembly, ran the homeland as a one party state. Increasingly, the contradiction between Chief Buthelezi's anti-apartheid rhetoric and his close day to day relationship with Pretoria brought criticism from the ANC. Inkatha membership became necessary to get work and criticism of the Inkatha regime was and is not tolerated.

In 1983 the United Democratic Front (UDF) was formed to be an alliance of hundreds of anti-apartheid organisations. The UDF, with the slogan "Apartheid Divides, UDF Unites" and its espousal of non-racial, non-tribal politics, set about campaigning and organising all over the country, including Natal, with enormous success. Inkatha perceiving a threat to its political dominance, began to intimidate and attack organisations aligned to the UDF.

In 1985, Inkatha formed its own trade union wing UWUSA to challenge the Congress of South African Trade Unions

(COSATU) which supports the UDF and the ANC. Conflict was inevitable. The clash came with the strike at the British Tyre and Rubber factory in Howick, a few miles from Pietermaritzburg. The entire black workforce was sacked. A stay-away in support of the strikers took place and a consumer boycott was organised in Pietermaritzburg. All this was strongly opposed by Inkatha who accused the UDF youth of coercing support for the boycott. On a December evening in 1986, a large Inkatha group was bussed into a township and in the early hours of 5 December 1986 three COSATU supporters were murdered. The scene was set for an escalation of the violence.

Inkatha continued to lose support. We were driven by the political director of the Inkatha institute round three large townships to the North of Durban which he told us used to be strong Inkatha areas but are now ANC. Inkatha's recruitment drives backed up by coercion and violence have further alienated the population from Inkatha. Unhappily ordinary people have come to see attack as the best means of defence so Inkatha's action has led to a whole cycle of attack and counter-attack. Retaliation dished out by the ANC supporters is often brutal.

While it is clear that Inkatha is losing ground the extent of the support for Inkatha and the ANC in Natal will not be known until free and fair elections are held. Hopefully the first elections will be for a Constituent Assembly so that, as in Namibia, any new constitutional settlement will derive its validity from the people and will not be imposed by politicians. What is certain is that in the long term Inkatha will continue to lose support unless Chief Minister Buthelezi asserts his authority and controls the excesses of his supporters and in particular

the war lords.

The people in the townships are crying out for help and that help must come first from the government. The State President must give a clear signal to people in the communities that Ministers want a police force which has the confidence, trust and respect of all South Africans.

Six areas for government action

There are six areas where the government must act:

1. The police must be ordered to prevent clashes and must not remain on the side lines.
2. There must be a massive increase in the police resources. There is a need for some 5'000 officers in Natal to investigate crime in place of the 150 who are currently available. Mr. Vlok the Minister of Law and Order told us that more money had been set aside for the police. The police must take retraining and refresher courses much more seriously. To help this we suggest that a second police staff college should be established and that the teachers at both colleges should regularly exchange duties with officers from countries overseas. Whenever possible the government should use Zulu speaking police and Zulu speaking members of the Defence Force. It was a mistake to withdraw the Zulu speaking 121 battalion from Natal.
3. The carrying of weapons (including cultural weapons such as clubs, sticks shod with iron and staffs) must be banned at all political meetings and rallies.
4. The problems posed by the KwaZulu police must be addressed. In areas

like KwaZulu, where there is the clearest possible evidence of misconduct, the KwaZulu must be suspended from duty and be replaced by the South African Police (SAP). Throughout KwaZulu, citizens must be able to contact the SAP if they need help.

5. Known and notorious killers who are still at large must be prosecuted.
6. The State of Emergency in Natal should be lifted.¹ It is not needed. The authorities have ample powers to control the situation without the emergency regulations. The existence of the regulations encourages policemen to cut corners and break the rules because they enjoy wide immunities while the emergency lasts. The regulations also inhibit the press from exposing police misconduct and from reporting fully on the tragedy.

Above all the government must provide fresh leadership for the security forces in Natal. If the government takes these practical steps to assert the rule of law we believe there will be a response from the people.

The Peace initiatives - A Mandela Buthelezi Meeting

The media have devoted much space this summer to the calls for a meeting between Nelson Mandela and Chief Buthelezi. Much less attention has been paid to the successive peace initiatives and meetings which have taken place over the last three years. We do not think it is widely known outside South Africa that in July 1989 an agreement was

signed by five representatives of Inkatha and five representatives of the UDF and COSATU. The report detailed a practical plan to bring peace to the region. It was endorsed at the COSATU congress where the UDF representatives were also present. It was endorsed by the Inkatha National Conference. The Inkatha Central Committee, however, raised difficulties and on 23 September 1989, they resolved that a moratorium be imposed on all peace talks. We talked to Chief Buthelezi about the moratorium. He accepted that the moratorium was a "hiccup". From this we took him to mean that there were no problems on the Inkatha side which could not be resolved. It is a tragedy that the imaginative agreement has not been implemented.

We believe there is an urgent need for a meeting between the ANC leadership and the Inkatha leadership, but a meeting if it is to achieve anything must be as carefully prepared as any other summit meeting, and there must be some assurance that if an agreement is reached it will be carried out.

We therefore suggest that the meeting should be a four-sided meeting. The four sides being the ANC, Inkatha, the government and the churches, the role of the government and the churches being to ensure that this time any agreement which is reached is carried out.

An International Monitoring Agency

Finally, we suggest that the South African Government should invite a team of international monitors, perhaps drawn

1. As of 18 October 1990, the State of Emergency has been lifted in Natal Province.

from the EEC countries to monitor, on a continuing basis, the law enforcement agencies and to report direct to the State President. The monitors would need to have power to summon witnesses and require the production of documents.

This proposal is based on the United Nations experience in El Salvador. It will take time to implement. Until then, the International Commission of Jurists will keep the situation in Natal under constant review.

Sri Lanka

Magisterial inquiry into the homicide of Richard de Zoysa*

Background

On 18 February 1990 Richard de Zoysa, a 31 year old journalist, was abducted from his home near Colombo in Sri Lanka in the early hours of the morning by a group of men. His body was found in the sea the following day. He had been shot. A magisterial inquiry into the killing was instituted shortly afterwards. About three-and-a-half months later Mr. de Zoysa's mother, Dr. Manorani Saravanamuttu, who had been present at the abduction, claimed to have identified one of the abductors as Senior Superintendent of Police Ronnie Gunasinghe when watching a television news broadcast on which he had appeared. The police authorities declined to arrest Mr. Gunasinghe. Public concern about the killing had, meanwhile been growing nationally and internationally.

Both Dr. Saravanamuttu and the lawyer she had instructed to represent her

interests at the inquiry received death threats over the telephone and in writing.

Mr. Anthony Heaton-Armstrong was appointed by the International Commission of Jurists to witness the later stages of the magisterial inquiry and attend the court hearings on 5 and 16 July 1990.

Personae

Richard de Zoysa was a well-known and respected journalist who enjoyed a good reputation among the local population. The Government and the President himself were frequent targets of his criticism. In the context of Sri Lanka's recent troubled history he was likely to have caused a large number of disparate groups, both official and unofficial, to have felt that this scrutiny was unwelcome. At the time of his death he was working for the Inter Press Service News

* This is a summary of the report by Mr. Anthony Heaton-Armstrong who attended the Commission of Inquiry into the killing of Richard de Zoysa on behalf of the International Commission of Jurists.

Agency (IPS), concentrating on reports of human rights violations. He was very shortly due to leave Sri Lanka to take up a post for the IPS in Lisbon, Portugal.

Dr. Saravanamuttu, Richard de Zoysa's mother, is a medical practitioner of considerable experience. She is regarded as being a highly composed and considerate individual.

Ronnie Gunasinghe is a senior policeman and had recently been tipped for promotion to the rank of Deputy/Assistant Inspector General of Police. He has been closely involved in the operations to stem the tide of JVP¹ violence. He has a reputation as a hard and tough man, and is said to be personally favoured by the President.

Observations

Since the upsurge of JVP violence there have been between 8'000 (the official figure estimated by the International Committee of the Red Cross), and 30'000 (the unofficial figure) 'disappearances' in Sri Lanka. It is officially conceded that the security forces have been directly or indirectly responsible for some of these, although it is not possible to quantify them precisely.

Almost invariably, the disappearances are absolute - i.e. the disappeared person is lost forever. Bodies are rarely identifiable as the killers take steps either to secrete them or to make identification impossible e.g. by burning them or by removing them to a location where identification is unlikely due to the remoteness from those who might be able to perform the identification.

Until very recently, before Richard de

Zoysa's abduction and killing, the security forces were entitled to dispose of bodies in their custody without recourse to a post-mortem or inquest.

Richard de Zoysa's abduction and killing was unusual in that his body was recovered in an identifiable state and was actually identified. This has therefore been described as a 'bungled job'.

During his meetings with the Attorney-General and the Inspector-General of Police, Mr. Heaton-Armstrong also observed that no credence had been officially attached to Dr. Saravanamuttu's identification of Ronnie Gunasinghe as one of those present at her son's abduction - hence the failure to suspend him from duty pending further investigation or, at least, to transfer him to an area where he was less likely to be able to influence potential witnesses and to jeopardise a successful and effective investigation.

Commentary and conclusions

The Police Investigations

The ICJ observer is of the view that an identification parade should have been held immediately after it became known to the police that Dr. Saravanamuttu had claimed to have identified Gunasinghe. A properly conducted parade, with a 'line-up' comprising a number of individuals with similar appearances to that of Gunasinghe might have proved to be extremely helpful. The observer suggests that it is still not too late to hold a parade.

The observer states that under Section 393(5) of the Code of Criminal Proce-

1. Janatha Vimukthi Peramuna (People's Liberation Front)

ture it is the duty of the Superintendent or Assistant-Superintendent of Police to report to the Attorney-General on any offences such as abduction and murder which occur within his division. This was not done in this case.

Mr. Heaton-Armstrong also expressed concern about the alleged collusion between the police investigating the case and the lawyers representing Gunasinghe and Ranchagoda, another police officer.

The ICJ observer concluded that viewed as a whole, the police investigations into Richard de Zoysa's killing seem to have proceeded on the unshakeable assumption that Senior Superintendent of Police Gunasinghe cannot have been involved. The involvement in the case of Batty Weerakoon², Mr. Saravanamuttu's lawyer, could be said to have been regarded by the police as unhelpful and unnecessary. His contributions seem to have been dismissed almost out of hand. The observer noted that it seems to him that this has been an influential factor in the police investigation.

The role of the Attorney-General

The ICJ observer was also of the opinion that the Attorney-General, like the police, reacted unnecessarily defensively and proceeded on the unshakeable assumption that Gunasinghe is innocent.

The Advocate-General could, and arguably should, have taken a stronger stance over the question of an identification parade. His decision regarding the leading of evidence before the magistrate has the appearance of a determina-

tion to prevent the court taking the initiative over the decision whether or not to arrest and charge Gunasinghe. In the opinion of the ICJ observer this unusual case called for a public examination of Dr. Saravanamuttu's evidence in court followed by a judicial, not an executive decision. In the event the role of the magistrate has been undermined.

Mr. Heaton-Armstrong concluded that this is not a 'fleeting glance' case. Dr. Saravanamuttu has made what appears on the face of it to have been a valid identification. There are, without doubt, a number of factors which could be argued to weaken the strength of her identification but, short of disbelieving her, it seems that her evidence - all of it - must be taken at face value. This has not been a case which cried out for an immediate arrest but there is, at this stage, no alternative but for Superintendent of Police Gunasinghe to be arrested and brought before a court for committal proceedings on a charge of unlawful abduction and murder.

The role of the court

The ICJ observer had no reason to believe that the court proceedings were not conducted fairly, judiciously and in an atmosphere of ostensible independence. The magistrate was clearly very concerned about the case and had a detailed knowledge of the material placed before her.

Counsel for Gunasinghe and Ranchagoda, both of whom could properly be described as suspects, seem to have been given 'free rein' during both hearings the observer attended. They were,

2. Both Dr. Saravanamuttu and Mr. Weerakoon have received death threats. Two Police Officers on regular assignment to Mr. Weerakoon have also received death threats.

therefore, at risk of being able to pick up information of interest to their clients which might prejudice a fair and just trial. Little care appears to have been taken to ensure that they did not become privy to information which should not have been revealed to them at this stage.

The observer considered it most unfortunate that Dr. Saravanamuttu's claims had not been given a judicial and public airing, and that the magistrate had been deprived of the opportunity to make a decision about the strength of the evidence which would have enabled her to decide whether or not to order Gunasinghe's arrest and charging.

The future

The State has conceded that the security forces have been responsible for unlawful abductions and, possibly, killings. Where these occur there are almost insuperable difficulties in identifying the culprits and prosecuting them to conviction and sentence. There is a widespread belief that the security forces have an extensive involvement in this area and that insufficient action is taken to identify those responsible by those whose duty it is to do so. If the State is not seen to take a firm stance against this type of activity private citizens will inevitably take the law in their own hands and attack the servants of the State. There appears to be a strong case for the setting up, by the President, of an independent judicial inquiry into the circumstances of the killing of Richard de Zoysa and the police investigation which followed under the Presidential Commissions Act. Such an inquiry would at least establish some useful lessons for the avoidance of simi-

lar killings in future and might point the way towards more effective police investigations into them. If it achieved nothing else, an independent inquiry of this sort would serve to 'clear the air' and reassure the concerned public that all possible steps were being taken by the State to identify those responsible.

The Chairman of such an inquiry has extensive powers to conduct investigations, subpoena witnesses, order the police to bring specified documents to the hearing, question the police about possible obstruction of the inquiry, sanction lack of cooperation and make authoritative recommendations in his report. His powers are considerably more extensive than those of the magistrate under the Code of Criminal Procedure, which merely permits the magistrate to take action in an individual case - not to make wide ranging recommendations of general application. Furthermore, the magistrate has no power to sanction a failure to cooperate by the police and must rely on what the police choose to place before him/her. The Chairman of a Commission of Inquiry can reach much further behind the scenes and is not generally subject to having his decisions overturned by the Court of Appeal.

The observer concluded that as far as he is aware, there is no facility for the provision of a special team of investigators in a case where a serious accusation is made against a police officer and takes the view that this would be a useful resource and of particular importance in a case such as that of the abduction and killing of Richard de Zoysa.

On 30 August 1990, the Attorney-General announced in Court that he would not be proceeding with a prosecution against Mr. Gunasinghe.

COMMENTARIES

United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (1990)

The 42nd session of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities took place from 6 to 31 August 1990 at the Palais des Nations in Geneva. The meeting resulted in the easy passage, in secret ballots, of every country resolution put to a vote, the adoption of a draft declaration to combat disappearances, and the appointment of a rapporteur to monitor the protection of judges and lawyers. It was also marked by long debates over the Sub-Commission's working methods, its ability to respond to "urgent situations" and the interdependence of its members.

The meeting, which took place in the aftermath of the Iraqi invasion of Kuwait, began by electing Danilo Türk (Yugoslavia) as Chairman, J.S. Attah (Nigeria), William Treat (USA) and Ribot Hatano (Japan) as Vice-Chairmen and Gilberto Vergne Saboia (Brazil) as Rapporteur.

In his inaugural speech, the Chairman Mr. Türk referred to the Sub-Commission's role as a "think-tank". He hailed the Sub-Commission's successes, but, he said, there was still much work to be done. This was the case particularly with the whole range of questions concerning the realization of economic, social, and cultural rights. "A hungry man is not a truly free man" he said, stressing that "all human rights should be seen as indi-

visible and interdependent".

The International Commission of Jurists (ICJ) intervened on the independence of judges and lawyers, the draft declaration on disappearances, human rights and the environment, discrimination against persons with AIDS, summary and arbitrary executions of street children in Latin America, violations of human rights in Burma, Mauritania and Peru and administrative detention. Having spoken out against the US invasion of Panama at the Commission (see ICJ Review No. 44), the ICJ also condemned Iraq's invasion of Kuwait. In addition, it successfully promoted a resolution on the independence of judges and lawyers, carried forward the draft declaration on disappearances and actively lobbied for the resolution on the situation in Iraq and occupied Kuwait.

The Mandate of the Sub-Commission

The outgoing Chairman, Fisseha Yimer (Ethiopia) reported on the serious consideration which the Human Rights Commission gave to the Sub-Commission's work. He called on his colleagues, however, to work within their competence and mandate and avoid duplicating work of the Commission or other

bodies or debating political issues taken up in other UN fora.

This theme was repeated time and again. In a positive innovation to strengthen the dialogue between the Commission and its Sub-Commission, the meeting was addressed by the Chairwoman of the Commission Purification Quisumbing (Philippines). She, too, called on the Sub-Commission to stay within its mandate, considering that an overbroad interpretation of that mandate had resulted in the overload of the agenda, duplication of the Commission's work rather than complementarity, politicization of the debate and too many resolutions concerning situations of human rights abuses. For better coordination and continuing dialogue between the two bodies, she suggested holding a joint meeting of the Bureaux of the Commission and the Sub-Commission and mutual visits by the Chairs to each other's annual sessions. She went on to express the concern that certain reports carried out by Sub-Commission members were not clearly defined or had no practical impact. In addition, she said, Commission members were concerned that work on reports and studies was not fairly distributed among Sub-Commission members. In discussing the independence of Sub-Commission members, Ms. Quisumbing specifically mentioned the secret ballot used in 1989 for decisions on country situations. She said that "these decisions were stated as a result of the mounting pressure applied on certain members of the Sub-Commission, threatening their independent status".

Administration of Justice

The UN General Assembly has asked the Sub-Commission to accord "priority"

to questions of human rights in the administration of justice, nevertheless, the time allotted to this topic remains insufficient. The session was marked, however, by several major achievements, including the adoption of a declaration on disappearances and the appointment of a rapporteur on judges and lawyers. With the declaration on disappearances adopted, the sessional Working Group on Detention, chaired by Mr. Joinet, established several new agenda items for the future, including *habeas corpus* in states of emergency and juvenile justice.

Over the years, NGOs have stressed the need for coordination between the UN Human Rights Centre and the UN Crime Branch in Vienna, both of which have important responsibilities in human rights and the administration of justice. Unfortunately, this year the Sub-Commission overlapped with the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders meeting in Havana, Cuba prepared by the UN Crime Branch (see commentary, this issue of the Review), making any such coordination impossible. The Working Group agreed, however, to invite the Director of the Crime Branch to next year's session.

Disappearances

The Sub-Commission adopted a draft "Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances" and transmitted it to the Commission on Human Rights for its consideration, "with the recommendation that it be endorsed and transmitted to the Economic and Social Council and the General Assembly for final adoption".

The 22-article draft not only prohibits disappearances but sets forth various

measures which states should take to ensure that disappearances do not occur, or, if they do occur, what steps should be taken to investigate alleged disappearances and punish the perpetrators. Among its key points: The "systematized" practice of enforced or involuntary disappearance is categorized as "a crime against humanity;" the absolute character of the prohibition of disappearance is reaffirmed as the rights violated thereby including several non-derogable rights; *habeas corpus* shall not be suspended as a means of locating the whereabouts of detainees; detainees shall be held in officially recognized places of detention and be brought promptly before a judge; states shall thoroughly investigate alleged disappearances and protect witnesses; a state in which a person accused of an act of disappearance is found must either try the accused or extradite him ("universal jurisdiction"); disappearances are to be considered extraditable offences, and; no statute of limitations or amnesty may apply.

The ICJ which, together with other NGOs, proposed the initial draft in 1988, has played a key role in its further elaboration and promotion. After the Working Group on Detention considered the first draft at several meetings in 1988, the ICJ carried out wide consultations and prepared a completely revised draft for consideration by the Working Group in 1989. On the basis of a new text produced by the Working Group, the ICJ organised a three-day expert meeting in Geneva in March 1990. The meeting brought together Working Group members and other Sub-Commission experts as well as members of the UN Working Group on Enforced or Involuntary Disappearances, government representatives and NGOs. By exhaustively examining the text article by article and coming to agreement

on all points, the Expert Meeting gained several years in the normal process thereby ensuring that the draft had little difficulty in gaining approval at the pre-sessional Working Group on Detention and then at the Sub-Commission.

Administrative detention

The Sub-Commission renewed its consideration of Mr. Joinet's final report, which sets forth several potential courses of action, including the creation of a special rapporteur on administrative detention, a special rapporteur on all forms of detention, and a working group of five members, each to look at a different aspect of detention. The Sub-Commission asked the Commission to consider the different proposals contained in the recommendations, for the purpose of either acting upon one of them or requesting the Sub-Commission to elaborate further upon the proposal which the Commission deems the most appropriate.

The independence of judges and lawyers

The Sub-Commission appointed its French expert, Mr. Louis Joinet, to prepare a report on measures which are strengthening or weakening the independence of the judiciary and the protection of practising lawyers in different parts of the world.

In 1989, the Sub-Commission had asked Mr. Joinet to prepare a working paper on means in the area of monitoring by which the Sub-Commission could assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers. Mr. Joinet's con-

cise working paper reviewed current activities to protect the independence of judges and lawyers. The work of the ICJ's Centre for the Independence of Judges and Lawyers (CIJL), through its regional and national seminars and its interventions in cases of harassment or persecution, was referred to at length.

Mr. Joinet noted that the Commission on Human Rights now adopts a dual approach to the independence of judges and lawyers. Standard-setting has been entrusted to the UN Crime Branch in Vienna (through which the UN Basic Principles on the Independence of the Judiciary and the Basic Principles on the Role of Lawyers have been elaborated). The task of monitoring actual situations, however, has been given to the Sub-Commission.

On the day Mr. Joinet's report was discussed, the CIJL released its report on the "Harassment and Persecution of Judges and Lawyers" describing the cases of 430 judges and lawyers in 44 countries who had suffered reprisals for carrying out their duties. The CIJL told the Sub-Commission that the report "illustrated the urgent need" for that body to monitor the protection of judges and lawyers.

The Sub-Commission endorsed the recommendations made in Mr. Joinet's paper and entrusted him with the preparation of a report to: a) propose guidelines and criteria to be taken into account in the provision of UN advisory services relating to the judiciary, and b) bring to the attention of the Sub-Commission information on legislative or judicial measures or other practices, which have served to strengthen or to weaken the independence of the judiciary and the protection of practising lawyers in accordance with United Nations standards. It also called on governments to

strengthen the independence of the judiciary and the protection of practising lawyers.

The right to a fair trial

A preliminary report on the right to a fair trial was presented by Mr. Chernichenko (USSR) and Mr. Treat (USA). The report, which was discussed both in plenary session and in the Working Group on Detention, catalogued the international status of the different aspects of the right.

Country Situations

In accordance with last year's decision, the Sub-Commission established a sessional working group to prepare an overview and analysis of the suggestions and proposals to enable the Sub-Commission to better discharge its responsibilities in dealing with violations of human rights. No agreement was reached, however.

Before reaching the substantive issues of violations of human rights, the issue of the secret ballot arose. Last year, in the face of the enormous pressure exerted by China to prevent a resolution condemning the Tiananmen Square massacre, the Sub-Commission suspended rule 59 of the Economic and Social Council (ECOSOC) rules of procedure for its subsidiary organs on an ad-hoc basis to allow secret voting on country resolutions. It was argued that voting by secret ballot on specific issues would strengthen the independence of the experts.

This year, a divergence arose among supporters of the secret ballot between those who favoured another ad hoc decision and those who felt that if the Sub-

Commission believed that it needed to change its rules of procedure, it should do so formally, rather than merely suspend a rule. In the end, both avenues were used. After a lengthy debate, Mr. Joinet's motion to suspend rule 59 on an ad hoc basis carried with Mr. Yimer (Ethiopia), Mr. Jin (China) and Mr. Martinez (Cuba) dissenting, Ms. Mbonu (Nigeria), Mr. Ilkahanaf (Somalia), Mr. Sachar (India) and Mr. Khalil (Egypt) abstaining, and Ms. Ksentini (Algeria) not participating. On Mr. Treat's (USA) proposition, the Sub-Commission also recommended by 20 in favour, two against and two abstentions (20-2-2) that ECOSOC amend the rules of procedure to permit Sub-Commission voting on a resolution pertaining to allegations of human rights violations in specific countries by secret ballot. Mr. Martinez and Mr. Jin voted against while Mr. Sachar and Mr. Yimer abstained.

Each country resolution submitted under the secret ballot gained easy passage, leading paradoxically to NGO disappointment that more were not introduced. Indeed, the number of resolutions passed remained the same (Iraq substituting for China). Notably, no resolution was introduced on Sri Lanka or Tibet.

"Urgent Situations"

The Sub-Commission was seized at the very beginning of the session with certain "urgent situations" which, it was said, called for immediate response. The situation in the Gulf elicited an appeal from the Sub-Commission to Iraq to allow all foreigners to leave Iraq and occupied Kuwait as well as a call to all those participating in the embargo against Iraq not to prevent deliveries of food or medicine to that country. These two decisions were made in a rare closed meeting the

second week of the session. Israel was asked, during the fourth week, to allow three Palestinian representatives to attend the Fourth NGO Symposium on the Question of Palestine which took place in Geneva. Throughout the session, the Sub-Commission was also kept abreast by the Canadian Government of the situation concerning the land dispute between the Canadian and Quebec authorities and the Mohawk Nation. While all these issues certainly merited consideration, it is questionable whether the Sub-Commission, without a permanent character, is really in a position to interrupt its work to tackle developing questions and, if it is, to what extent.

East Timor

Numerous NGOs, including Timorese citizens, intervened to present information on continuing violations in East Timor while Indonesia exercised its right of reply on several occasions. Several NGOs compared the Indonesian invasion and occupation of the island to the Iraqi invasion of Kuwait. A memorandum circulated by the Indonesian government asserted that the human rights organization Asia Watch had visited East Timor, an assertion which was contradicted by the organization. While Mr. Treat welcomed alleged progress made by Indonesia in the field of human rights, a resolution encouraging the Secretary-General to use his good offices to promote a settlement in East Timor which would allow for the full guarantee of human rights passed by a surprisingly easy margin (14-9-1). It requested Indonesian authorities to facilitate access to East Timor by international humanitarian and development organizations and appealed to all sides to exercise restraint so as to find a durable settlement of the conflict. Fi-

nally, it recommended that the Commission consider the situation at its next session.

El Salvador

The resolution on El Salvador, which was adopted without a vote, differed slightly from the one last year, reflecting the on-going peace negotiations. The Sub-Commission welcomed the agreement between the government and the Farabundo Marti Liberation Front (FMLN) to request the Secretary-General to dispatch a verification mission to El Salvador to examine compliance by all parties with agreements on human rights once a cease-fire is in force. The Sub-Commission also noted an agreement to determine the procedures and time-frame for releasing persons detained for political reasons. The resolution recognized that actors other than states have the responsibility to observe human rights standards by stating that the FMLN "has the capacity and the will to assume the commitment of respecting the attributes inherent in the human person".

The resolution also expressed its deep concern over the persistent increase in the number of human rights violations committed for political reasons. It called upon the government to take all necessary measures to continue the investigation of the "foul murder" of the six Jesuit Priests and other members of the Central American University in San Salvador with a view to punishing all those guilty of the crime.

Guatemala

The Sub-Commission, in a resolution adopted without a vote, expressed its

concern "about reports that serious violations of human rights, such as disappearances and extrajudicial executions, continue to occur...", as well as "about the situation of the indigenous population, whose human rights and fundamental freedoms are being seriously violated". It pointed both to the persistence of abductions, threats and killings of indigenous peasants and to the violation of their rights by forced participation in civil defense patrols and by forcible recruitment into the army. Similarly, the Sub-Commission expressed its concern "about the serious shortcomings in economic, social and cultural rights, which particularly affect the majority indigenous population in Guatemala, and about the lack of effective measures to improve this situation".

In its operative paragraphs the Sub-Commission exhorted the government "to adopt and implement energetic measures to prevent violations of ... rights and freedoms, to protect and promote the organizations which safeguard human rights, and to undertake investigations of violations of human rights".

This resolution introduced some new elements not appearing in previous resolutions. First, it called on the Guatemalan government to make serious efforts "to create the conditions that will enable [refugees] to return to their places of origin, with full guarantees of their security and respect for the exercise of their human rights". Second, the Sub-Commission stressed the need to provide assistance in the field of human rights not only to the government, but also to Guatemalan NGOs.

According to Guatemalan opposition groups, the most important characteristic of this resolution is that for the first time it "goes beyond the purely humanitarian grounds to directly deal with po-

litical matters. Both in the preambular and operative paragraphs the Sub-Commission has attached a great deal of importance to the Oslo peace process".

Iran

The Sub-Commission expressed (14-5-5) its deep concern about the grave violations of human rights in Iran, namely those related to the right to life, the right to freedom from torture and from cruel, inhuman and degrading treatment or punishment, the right to liberty and security of person, the right to a fair trial, and the right to freedom of thought, conscience, religion, and expression, and urgently called upon the Commission to convey its concern to Iran; expressed its grave concern at reports of the continuing wave of arrests and executions; was pleased with the decision of the government of Iran to invite the Commission's Special Representative Galindo Pohl to visit the country, as well as by the co-operation extended; and expressed regret, however, that serious obstacles appeared to have been placed in the way of persons who sought to provide information to Mr. Pohl on violations of human rights. A new addition to the resolution this year referring to reports of violations of the equal rights of women provoked a considerable debate.

The resolution was voted on after one of the sponsors, Ms. Bautista (Philippines) withdrew her support, explaining that Iraq's invasion had left hundreds of thousands of Philippine workers stranded in Kuwait and that she could not support a resolution against Iran which had offered to assist the workers.

In a separate and unprecedented resolution, the Sub-Commission paid tribute to the memory of Professor Ka-

zem Rajavi, an Iranian exile leader assassinated in Switzerland in April 1990. The resolution called on Mr. Pohl to include information on this assassination in his next report.

Iraq

At last year's session, an Iraqi government-sponsored NGO had invited experts individually to visit Iraq to judge the human rights situation. Most experts believed that such an invitation should only be accepted if it were ensured that the visit would take place in accordance with standard U.N. fact-finding procedures. Nevertheless, four experts did take up the invitation: Mr. Martinez (Cuba), Mr. Guissé (Senegal), Mr. Ilkahanaf (Somalia) and Mr. Jin (China). Both Mr. Guissé and Mr. Ilkahanaf, who are both newly-elected, stated during this session that they believed in accepting the invitation that they would find all their colleagues when they arrived in Baghdad. They told the Sub-Commission a little about their four-day visit, which apparently took place in May 1990. They met with the Ministers of Foreign Affairs, Justice and the Interior and went to the northern Kurdish areas, including Halabja. According to Mr. Guissé, the authorities recognised that chemical weapons had been used against the town, but declined to respond when asked whether the town was at the time occupied by Iraqi Kurds or Iranian soldiers. They visited Kurdish schools and villages, he said, but were never allowed to meet opposition groups. "We never saw anything for which we could reproach the government, but then again, we only heard one side of the story" he concluded.

The ICJ, together with other NGOs,

had made passage of a resolution on Iraqi human rights abuses a priority for several years, only to see it defeated each time it was put to a vote. This year, however, Iraq's annexation of Kuwait created a political climate facilitating easy passage (19-4-1) of a resolution virtually identical to those defeated previously, save the mention of abuses in occupied Kuwait. It noted reliable reports of "mass extrajudicial executions, enforced or involuntary disappearances and arbitrary detention in Iraq" as well as the forced displacement of a part of the Shi'a population in the South. The resolution urged the government to ensure full respect for human rights and called urgently for the immediate release of all foreign nationals prevented from leaving Iraq and Kuwait. To underscore the severity of Iraq's violations, the Sub-Commission recommended that the Commission on Human Rights study the situation and consider the appointment of a special rapporteur.

Israeli-Occupied Territories

The resolution which passed (18-1-4) recognized past resolutions and reaffirmed that the Israeli occupation itself constituted a gross violation of human rights and an aggression under international law. It reaffirmed the applicability of the Fourth Geneva Convention and the rights of the Palestinian people to resist the Israeli occupation and return to their homeland, and condemned Israel for its gross violations of the international conventions and law, for establishing Israeli settlements and for its continued occupation of the Syrian Arab Golan. It supported again the call to convene an international peace conference on the Middle East with the participation of all parties including the Palestinian Libera-

tion Organization. Finally, it requested the Secretary-General to provide the Sub-Commission at its next session, with an updated list of reports, studies, and statistics on the occupied Arab territories.

South Africa

The Sub-Commission condemned the continued arrest, torture and killings of peaceful demonstrators and workers on strike as well as the arbitrary arrest of leaders and activists of mass organizations; and insisted that South Africa immediately bring to an end its policy of destabilization against its neighbours. It welcomed the introduction of measures by the government which had resulted, *inter alia*, in the unbanning of the African National Congress; the release of Nelson Mandela and some political prisoners; and the partial lifting of the state of emergency; and reiterated the call for the unconditional release of all political prisoners and detainees and the removal of all troops from the townships. The Sub-Commission also appealed to the government not to proceed with the execution of several opponents of *apartheid*, including the "Upington fourteen", who had been on death row for more than two years. It called upon the international community to continue its efforts aimed at the total isolation of the régime until that country abandoned its policy of *apartheid*. It further urged those governments that had recently established or were contemplating the establishment of diplomatic relations and economic ties with South Africa to reconsider their decision.

Confidential 1503 Procedure

In the confidential 1503 procedure, the Sub-Commission amended last year's

decision allowing governments five months to reply to charges made against them. In practice, this rule placed a difficult deadline on persons submitting communications under the 1503 procedure; a communication would need to be received by the United Nations before February to be considered at the August session. The Sub-Commission decided that this rule unnecessarily prolonged consideration of serious violations and instituted a 12 week minimum. Assuming that the Working Group, will for next year, meet as of 29 July 1991, the new date for receipt of communications is 6 May 1991. The new deadline makes possible action by the Commission untimely (which does not act on the communication until the following March).

The Sub-Commission's Working Group on Communications reportedly transmitted the cases of Bahrain, Brazil, Chad, Colombia, Guatemala, Mauritania, Myanmar, Peru, Singapore, Somalia, Sudan, Syria, Turkey and Zaire to the Sub-Commission. Only the cases of Chad, Myanmar, Somalia, Sudan and Zaire were reportedly sent on to the Commission, however, while ending its consideration of Brazil, Colombia, Mauritania, Peru and Singapore. Bahrain, Guatemala, Syria and Turkey were reportedly left pending.

Working Group on Contemporary Forms of Slavery

The Working Group on Contemporary Forms of Slavery held its fifteenth session from 30 July to 3 August 1990. Ms. Ksentini (Algeria) was elected Chairwoman-Rapporteur and the main theme discussed was the eradication of the exploitation of child labour and debt bondage.

11 NGOs including the International Commission of Jurists presented a joint statement on the main theme. The statement emphasized that given the realities of the world the most serious and inhuman forms of exploitation must be attacked first. Thus a target timetable for efforts to be undertaken, until the end of the century, to eliminate the most exploitative practices was regarded as essential. It was suggested that an international pledging conference be held in 1991 or 1992. The statement also put forward proposals that would contribute to achieving the targets set. Many of these proposals were adopted by the Working Group, and ultimately the Sub-Commission, as part of their final recommendations.

On the exploitation of child labour and debt bondage, the Sub-Commission requested the Commission to authorize it to consider the possibility of appointing a special rapporteur to update Mr. Abdelwahab Bouhdiba's report on the exploitation of child labour and extend that study to the problem of debt bondage. It invited the ILO to consider the possibility of holding a seminar or workshop on debt bondage.

The Sub-Commission recommended that:

- the Human Rights Committee, in the examination of periodic reports, give increased attention to the implementation of the provisions of articles 8 and 24 of the International Covenant on Civil and Political Rights (ICCPR), with a view to the elimination of acts which impair the rights of the child;
- the Committee on Economic, Social and Cultural Rights give particular attention to the implementation of articles 10, 12 and 13 of that Covenant, with a view to improving the situation

of children and eliminating the contemporary forms of slavery affecting children in particular the exploitation of child labour;

- that the Committee on the Elimination of Discrimination against Women give particular attention to the implementation of the provisions of article 6 with a view to the suppression of all forms of traffic in women;
- the ILO and UNESCO to pay particular attention to the implementation of provisions and standards designed to ensure the protection of children and others exposed to prostitution, pornography, bonded labour;
- The Committee on the Rights of the Child devote attention to the sale of children, child prostitution and child pornography, the exploitation of child labour and bonded labour.

The Sub-Commission adopted the Group's NGO-inspired "Programme of action for the elimination of the exploitation of child labour" a strategy which combined short, medium and long-term elements. The programme gives priority to "the eradication of the most odious forms of child exploitation, in particular child prostitution, pornography, the sale of children, the employment of children in dangerous occupations and debt bondage". According to the programme, the international community should place particular emphasis on new phenomena such as the use of children for illegal, clandestine or criminal purposes, including their implication in the drugs traffic or in armed conflicts or military activities. Action should be directed, first, towards the most dangerous forms of child labour and the elimination of work by children under 10 years of age, with a view to the total eradication of child la-

bour. Special attention should be paid to the most vulnerable categories of children: immigrant, minority and refugee children, street children, indigenous children, children in occupied territories and those living under *apartheid*. Long-term eradication needs social measures and development assistance. Prevention will require extensive structural reforms in the economic, social and cultural spheres.

The programme calls for a public awareness campaign and the targeting of key sectors (agriculture, non-structured urban sector and domestic service). To eliminate the link between child labour, illiteracy, school failure and the lack of vocational training, it calls for massive literacy programmes, combined with legislation making basic training obligatory and free, as well as measures to combat school waste and develop vocational training.

The programme called on states to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment to a legal minimum consistent with the fullest physical and mental development of a young person. The Working Group welcomed the appointment of Mr. Vitit Muntarbhorn for a period of two years as Special Rapporteur of the Commission on Human Rights to consider matters relating to the sale of children, child prostitution and child pornography, including the problem of the adoption of children for commercial purposes.

The Working Group also welcomed the adoption by the General Assembly of the Convention on the Rights of the Child and called on all states to ratify it.

Next year's main theme will be Prevention of the Traffic in Persons and the Exploitation of the Prostitution of Others.

Working Group on Indigenous Populations

This year's pre-session Working Group met for two weeks instead of one, as authorized by the Commission. The additional five days were intended to allow for informal, in-session and open-ended drafting groups of governments and indigenous representatives to "seek agreement on recommendations" for completing the draft declaration of indigenous rights. The Working Group began by establishing three informal drafting groups with the aim of "facilitating and accelerating the work on the draft ... and with the view of adopting some of the principles in the first reading". The first group, chaired by Mr. Martínez (Cuba), considered the draft provisions on land and resources; Mr. Türk (Yugoslavia) chaired the second group, which considered matters relating to political rights and autonomy; and Chairwoman Ms. Daes (Greece) chaired the third group which examined other issues contained in the draft.

At the first session, the Chairwoman Ms. Daes informed the participants that the UN would not be providing interpretation services for the first week, due to a lack of resources. The lack of interpretation affected the Spanish-speaking indigenous peoples - who represent the largest sector of indigenous peoples - most acutely, the majority of whom spoke only Spanish and their native language. Without interpretation, they were effectively excluded from contributing to the drafting process. On the third day, in a show of solidarity, all indigenous groups boycotted the drafting groups, refusing to participate until Spanish interpretation was provided. A formal resolution, explaining the reasons for the boycott, was submitted to the Working

Group members, who responded positively by expressing their intention to ensure that translation be provided for the full two weeks of the 1991 session. To keep the work on the draft declaration moving forward, the indigenous peoples' organisations held separate meetings serviced by volunteer interpreters. In a gesture of support, the Chairwoman Ms. Daes cancelled several drafting meetings to provide the indigenous group with an opportunity to inform the Spanish-speaking members of draft developments and to enable them to make their own contributions. Translators were provided for the final two plenary meetings. The three drafting groups each submitted a report and, despite enormous pressure, much substantive work was accomplished during the first week of the session. The amendments made by the three groups bring it closer to the indigenous position on many key issues, including self-determination. Very few governments participated in the drafting groups, however, with the exceptions of Australia, Norway, and Canada. This appeared to have been a deliberate decision on the part of governments to stand back and wait to deal with the declaration at higher levels.

During its annual review of developments, in the second week of the session, indigenous peoples from around the world informed the Working Group of recent developments affecting their lives and their communities. Of particular interest was the Mohawk situation in Quebec, Canada, where Canadian federal forces barricaded a Mohawk population on Oka Mohawk territory. The conflict erupted over a land dispute, in which the Canadian government appropriated land containing a Mohawk burial ground for the purposes of expanding a

golf course. Mohawk resistance and a break-down in negotiations resulted in the barricade. Many indigenous groups and NGOs expressed their support for the Mohawks, who requested the assistance of the Sub-Commission in arriving at a peaceful resolution to the conflict.

While the Working Group stuck to its past policy of not taking up "complaints," the Sub-Commission dealt with the Mohawk issue on its very first day, inviting Canada to send a representative to the Sub-Commission that afternoon. Canada responded by seeking and receiving a private meeting with the Chairpersons Ms. Daes and Mr. Türk and agreeing to report frequently to them on the conflict. Türk then gave summaries of these reports to the Sub-Commission. Fortunately, the situation was defused during the Sub-Commission's session.

The Sub-Commission passed resolutions calling for full translation of future working group meetings; stressing the need to give indigenous peoples greater control over their own resources and development; endorsing an "International Year of the World's Indigenous Peoples" beginning in 1992; calling on universities, museums and private collectors to return human remains, and objects of religious and cultural significance, to indigenous peoples.

The Mazilu Affair

It will be recalled (see Review No. 43) that the Special Rapporteur on Human Rights and Youth, and former expert from Romania, Dumitru Mazilu, had been prevented by his government from attending the 1988 and 1989 sessions of the Sub-Commission. At the request of the Sub-Commission and the Commission, ECOSOC requested an advisory

opinion from the International Court of Justice on the legal question of the applicability of Section 22 of the Convention on the Privileges and Immunities of the United Nations in Mr. Mazilu's case. That section provides that "Experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions...".

Romania argued that rapporteurs, whose activities are only occasional, could not be equated with experts on mission and that experts could not enjoy privileges and immunities in their country of residence while not "on mission." In a landmark opinion dated 15 December 1989, however, the Court took the view that:

- the section is applicable to persons to whom the UN has entrusted a mission "during the whole period of such missions...whether or not they travel";
- that members of the Sub-Commission "must be regarded as experts on mission within the meaning of Section 22", and;
- that rapporteurs of the Sub-Commission "must be regarded as experts on mission within the meaning of Section 22, even in the event that they are not, or are no longer, members of the Sub-Commission".

It decided, consequently, that the section was applicable to Mr. Mazilu.

While the opinion had no practical effect on the Mazilu case - the Ceausescu government would fall in the interim and Dumitru Mazilu attended the Sub-Commission - its holding could be important for experts within the UN system. Noting

that the Convention provides that the privileges and immunities "are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals", Mr. Joinet invoked the decision in support of his secret ballot proposal.

Mr. Mazilu gave a moving address about the difficulty he had getting out of Romania. He thanked the members of the Sub-Commission, the Under Secretary-General, the UN Centre for Human Rights, the international media and the Swiss authorities for their fight in his favour.

Further activities of the Sub-Commission

In other action taken, the Sub-Commission :

- created a sessional working group to examine the draft declaration on the *right of everyone to leave any country, including his own, and to return to his country*. Little progress was made, however, as experts clashed over whether the right to leave should be linked with the right to enter another country. Mr. Saadi (Jordan) was finally asked to prepare a revised draft declaration on the basis of comments received;
- emphasized the fact that *racism* is often caused by "conflicts over economic resources" and hence "can best be defeated by a combination of economic as well as legislative and educational measures". It recommended that the General Assembly launch a Third Decade to Combat Racism in 1993, with a focus on "indigenous peoples, migrant workers and other vulnerable groups in society";
- approved Ms. Ksentini's plan for a

study on human rights and the *environment*, and asked the Commission and ECOSOC to approve funding for her to attend the UN Conference on Environment and Development in Brazil in 1992, as well as the three remaining meetings of the Preparatory Committee for the Conference;

- heard Mr. Türk's progress report on the realization of *economic, social and cultural rights*. He stressed the need to develop statistical indicators of improvements in the enjoyment of social and economic rights, focusing on the right to housing and the right to own land. The Sub-Commission suggested that a UN seminar be organised on this question. It also encouraged the Special Rapporteur "to establish direct contact with international financial institutions" as well as UN agencies to discuss ways of better using the information they already are collecting;
- after hearing NGO interventions on forced relocations in Bangladesh, the Israeli-Occupied Territories, Kurdistan, South Africa, Tibet and Timor, and a statement by Ms. Palley (U.K.) on Cyprus, declared that "*mass population movements* invariably have serious consequences for the enjoyment of the human rights of the populations affected", and often contribute to "ethnic conflicts and unrest". It suggested that resettlement plans should be conditioned on the "free and informed consent of those people being moved, [and] the consent of those people into whose territory they are moved". The Sub-Commission's next session will contain an agenda item on *population transfers*;
- debated Mr. Eide's (Norway) report on national experiences in resolving problems involving *minorities*. Several

- experts referred to the revival of racism in central and eastern Europe.
- requested that Mr. Suescun Monroy (Colombia) prepare a plan for a study on human rights and *extreme poverty*.
 - heard Mr. Khalifa's (Egypt) annual updated report and list of banks, transnational corporations and other organizations assisting *South Africa*. Mr. Khalifa examined disinvestment trends and the mechanics of disinvestment. The paper pointed out that some means of disinvestment such as sale to local management, non-equity links, and specially created trusts allowed departing firms to continue an indirect presence in South Africa. His report also reviewed South Africa's reactions to sanctions. In his summary to the Sub-Commission, Mr. Khalifa emphasized that jubilation over reforms in South Africa was premature. He pointed to the danger of loosening what had been an effective grip to produce reforms. "Premature jubilation" had led to Great Britain lifting its sanctions. He regretted that Hungary was one of the main advocates of increased trade with South Africa and Poland was following this path. The members of the Sub-Commission agreed with Mr. Khalifa's conclusion that it was not the time to lift sanctions and several members spoke in favour of strengthening them.
 - the right to restitution, compensation and rehabilitation for victims of gross violations of human rights (Mr. van Boven, Netherlands);
 - the right to freedom of opinion and expression, (Mr. Joinet (France) and Mr. Türk (Yugoslavia);
 - traditional practices affecting women and children (Ms. Warzazi, Morocco);
 - the human rights of detained juveniles, (Ms. Bautista, Philippines);
 - human rights and disability, (Mr. Despouy, Argentina);
 - annual reports and list of countries which have proclaimed, extended or terminated a state of emergency, (Mr. Despouy);
 - report on violations of human rights of staff members of the UN system, (Ms. Bautista);
 - study on treaties, agreements and other constructive agreements concluded between States and indigenous peoples, (Mr. Martinez, Cuba);
 - study on problems and causes of discrimination against HIV-infected people or people with AIDS, (Mr. Varela Quiros, former expert, Costa Rica); and
 - human rights and youth (Mr. Mazilu, former expert, Romania),

In addition, the following preliminary working papers were prepared for this session:

- the protection of journalists (Mr. Saadi, Jordan);
- the privatization of prisons (Mr. Martinez, postponed to next session).

Studies

In addition to those mentioned above, the Sub-Commission has mandated a plethora of studies, reports on many of which were presented this year, including:

Conclusions

The Sub-Commission again spent an inordinate amount of time examining its

methods of work, particularly with respect to country resolutions.

It was announced by the western group of experts (whose turn in the chair it will be next year) at the end of the session that next year's chair will be Mr. Louis Joinet (France). This was a welcome development, not only because it elevates one of the Sub-Commission's most active and thoughtful member but also because the early decision assures better advance planning. Indeed, before the end of the session, Mr. Joinet circulated a draft proposal to better order Sub-Commission debates. The draft would group NGO interventions at the beginning of the Sub-Commission, giving each 40 minutes to make known all its country-specific and thematic concerns, followed by government statements and rights of reply, and leaving the remaining time - probably two weeks - for true debate amongst the experts. NGOs could comment on studies published later on in the session, by reserving time out of their 40 minutes.

While it might not be wise to structure the entire Sub-Commission in such a way as to marginalise those speaking first, Joinet's proposal presents a more logical, adversarial (*contradictoire*) development of debates, at least on country situations. In this respect, it echoes proposals already put forward by Mr. van Boven. It would also place a useful upper limit on the total time which could be consumed by one NGO. Unfortunately, while the vast majority of NGOs contribute constructively to Sub-Commission debates, a few small NGOs consume a disproportionate amount of time (feeling the need to speak to virtually every item), while contributing little to the Sub-Commission's substantive work. At the 1990 session, for instance, Amnesty International spoke for a total of 15 min-

utes while the World Union for Progressive Judaism spoke for 50. The vote on Iraq highlighted the political nature of Sub-Commission decision-making. Resolutions worded almost identically, referring to the Iraqi record of torture, disappearances and summary executions, had been defeated four times before. The human rights situation within Iraq in these regards had not deteriorated. What had changed, of course, was that in the interval Iraq had annexed Kuwait. While the passage of the resolution is to be applauded, it would have been more meaningful had it occurred earlier. Indeed, the ICJ was featured in several news stories asking why the world had not reacted earlier to the government's brutality. In one, the ICJ spokesperson commented "The failure of the UN to take any action on the systematic abuses in Iraq may have encouraged the government to believe that it could do as it pleased. It got away with the use of poisonous gas to exterminate villages, it got away with the routine torture of political opponents and their children, it got away with mass executions - perhaps it thought it could get away with the annexation of Kuwait".

Several experts lamented the lack of any substantive discussion of the numerous reports. This problem seems inherent in a system in which the vast majority of the reports are released only when the experts have already arrived in Geneva and are busy from morning to night with working sessions, lunches and nightly diplomatic receptions. Under these circumstances, it would be a difficult task for experts to read even half the reports produced for the Sub-Commission. In addition, comments on a report, when they are made, usually get lost in general floor discussion of many items or reports at the same time, hindering real

debate. Many experts, it is well known, do not even write their own reports, counting on the over-burdened UN secretariat to do their work for them. Resolutions authorizing further study of an issue are routinely prepared by the author of the report or sympathetic NGOs, without taking into account the comments made by other members.

A solution might be for the Sub-Commission, when authorizing a study or report, to also assign a number of its members to receive and critique the report.

Alternately, ad-hoc working groups could devote one hour or more to discussion of each report. In either event, the author would then have to "defend" the report. This would also facilitate NGO coordination as certain NGOs could informally be solicited to discuss certain reports. Resolutions prepared by the assigned reviewers or the ad-hoc working groups might then reflect an informed expert consensus rather than narrow interests.

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders

The Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders meeting in Havana, Cuba, from 27 August to 7 September 1990, adopted two important new human rights instruments: Guidelines on the Use of Force and Firearms by Law Enforcement Officials and Basic Principles on the Role of Lawyers. A new initiative on the death penalty, however, failed to garner the necessary two-thirds majority.

The United Nations quinquennial Crime Congresses have a long tradition, tracing their origin to the international penitentiary congresses organized by

the International Penal and Penitentiary Commission since the nineteenth century. Since the United Nations began organising these congresses in 1955, they have played a crucial role in the formulation and adoption of international standards of human rights in criminal justice including: the Standard Minimum Rules for the Treatment of Prisoners; the Code of Conduct for Law Enforcement Officials; the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Safeguards Guaranteeing Protection of the Rights of those Facing the Death Pen-

alty; the Standard Minimum Rules for the Administration of Juvenile Justice; the Basic Principles on the Independence of the Judiciary, and the Principles of Justice for Victims of Crime and Abuse of Power.

The choice of site for the Eighth Congress assured that the Congress would not be an ordinary one. In 1987, the Cuban government offered to host the Congress. The United States, after failing to convince any other country to rival Cuba's offer, dissented from the Economic and Social Council's decision to accept the offer and made known that it would not attend the Congress. It also reportedly put pressure on other states either not to attend or to send low-level delegations. The U.S. government also refused to make general waiver of the prohibition on U.S. citizens visiting Cuba, thus forcing U.S. experts and NGO representatives wishing to attend the meeting to apply individually to the government for a "license".

For its part, the Cuban government, in apparent violation of its agreement with the U.N., refused to allow the International League for Human Rights to accredit three Cuban dissidents living in Cuba who had earlier sought unsuccessfully to attend the meeting as individual experts. These three were denied entrance into the conference centre and have reportedly been the subject of official harassment.

The Congress was opened by President Fidel Castro who spoke of the need for international cooperation to combat crime. He stressed, as did the Cuban delegation throughout the meeting, that success in the fight against crime depended on success in the fight against poverty, marginalization and exploitation. He claimed that in Cuba, because there were no socio-economic differ-

ences between sectors of the population, there was also no organised crime, homelessness, abandoned children, prostitutes or beggars. He also spoke of the need for a more just international economic order. The Congress elected Juan Escalona Reguera, President of the National Assembly of Cuba, as its President.

The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (reprinted in this issue of the Review), which was strongly supported at all stages of its consideration by Amnesty International, develops the principle set forth in the Code of Conduct for Law Enforcement Officials that such officials may use force only when strictly necessary and only to the extent required for performance of their duty. The document sets forth general rules, special provisions, and provisions for policing unlawful assembly and policing persons in custody or detention as well as guidelines concerning the training of law enforcement officials and reporting and review procedures. One of the key provisions is Principle 9:

"Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

The Basic Principles on the Role of Lawyers elaborated with the assistance of the International Commission of Ju-

rists' Centre for the Independence of Judges and Lawyers (also reprinted in this issue), were adopted to complement the 1985 Basic Principles on the Independence of the Judiciary. The 29 Basic Principles provide guidelines on access to lawyers and legal services, special guarantees in criminal justice matters, principles on qualifications and training, guarantees for the functioning of lawyers, and provisions on professional associations of lawyers and disciplinary proceedings.

The Congress also adopted a "Statement of Basic Principles for the Treatment of Prisoners" which, *inter alia*, encouraged "efforts addressed to the abolition of solitary confinement as a punishment" and called for the creation of conditions "enabling prisoners to undertake meaningful remunerated employment which will facilitate their reintegration".

A resolution on pre-trial detention recommended its use only when "strictly necessary and a last resort" and called on the Committee on Crime Prevention and Control to submit proposals for action to the next Congress based on re-

strictive principles of application.

Traditionally those resolutions adopted by the Crime Congress are approved in due course by the succeeding General Assembly.

The most divisive battle of the Congress came over an Italian draft resolution of the death penalty, the proposal, co-sponsored by 36 countries, reaffirmed "the desirability of abolishing this form of punishment" and invited retentionist states to consider the possibility of a three year moratorium on the use of capital punishment. Islamic states came out in adamant opposition to the proposal and, as efforts at compromise failed, the debate in committee became unusually heated. Accusing the committee chairman, Minoru Shikita of Japan, of procedural rulings favouring the retentionist side, the Austrian delegate (and coordinator of the Western European group) even called on him, unsuccessfully, to step aside. The proposal was voted out of committee by a clear majority but failed by 48-29-16 to achieve the necessary two-thirds majority for adoption in plenary.

The Constitution of Fiji*

The "Constitution of the Sovereign Democratic Republic of Fiji" promulgated by decree of the "President" of the "interim government" provides a means by which Fiji may be ruled in perpetuity by an oligarchy of Fijian chiefs and their associates. The government will not be answerable to the governed. Racial and geographic divisions and discrimination against citizens of all races are enshrined in the Constitution which the majority is powerless to alter.

For most of the 20th Century there has been no significant migration to Fiji. Virtually all present citizens are descendants of families who have lived in Fiji for several generations.

In the 1986 census there were 329'000 Fijians, 348'000 Indians, and 37'000 people of other races. Since the coups in 1987 there has been extensive Indian emigration so that the indigenous Fijians may now outnumber Fijians of Indian origin.

In the Constitution, a central role is given to the Great Council of Chiefs. This body was originally set up by the British Colonial Government in the last century, when it adopted a communal system, dominated by the chiefs. Fiji was divided into 14 provinces each with its own council, which submitted names, usually of local chiefs, to the government for appointment as Roko Tui (provincial governor), and a separate legal system was set up for Fijians with its own courts and separate taxes. The provincial councils comprised (a) members chosen by traditional Fijian clan units, (b) since Inde-

pendence some members elected by people of the area who had moved to towns, and (c) a number of chiefs appointed by the government. The land was (and is) owned communally - 82% of all land in Fiji is held on behalf of the traditional owners in perpetuity. Because of the traditional prerogatives and status claimed by the chiefs, the confirmation of their authority under colonial rule and the respect given to the chiefs in Fijian society, this whole system has been feudal and oligarchic.

The Council of Chiefs, prior to the coups, comprised all elected Fijian members of the lower House of Parliament, eight chiefs appointed by the Minister for Fijian affairs, seven other Fijians appointed by him, and representatives of each of the provinces (two or three depending upon the size of the population). After the coups the members of the House of Representatives were excluded. Since then there have been no elections for the provincial councils. However, appointments to those councils have been made by the President. The rump Council of Chiefs which met on 9 June 1990 (i.e. with a membership decreed by regulation made by the Minister of Fijian Affairs in the "interim government") determined that in future it will consist of 42 representatives of provincial councils, i.e. three each, to be chosen at each council's discretion, three nominees of the President, three nominees of the Minister, one nominee of the Rotuma Council, and five ex-officio members, namely the President, the Prime

* Statement on the Constitution of Fiji by the Australian Section of the International Commission of Jurists.

Minister, Major-General Rabuka, the Minister for Fijian Affairs and the Permanent Secretary for Fijian Affairs. Any "representative" capacity of the 42 provincial council representatives is distorted by the fact that the provinces have widely different populations (e.g. at the last census Ba had 55'343 and Rewa 49'841 while Lau had 14'021, Serua 6'877 and Namosi 4'462). It is well known that the regime draws most of its support from the more sparsely populated areas.

Under the Constitution this body:

- chooses the President;
- chooses 24 of the 34 members of the Senate (the upper house), the remainder being one member chosen by the Council of Rotuma (a tiny Polynesian dependency) and nine chosen by the President; and
- must be consulted by the Cabinet on measures to advance and protect Fijians.

The President has executive authority vested in him (section 82). The executive, by regulation, may alter the Constitution of the Council of Chiefs, and it has appointed its supporters to fill the six nominated positions.

The President chooses the Prime Minister from the House of Representatives (the lower house) and, on his advice, the other Ministers, who may be chosen from either House of Parliament. A majority of the Cabinet can thus be appointed without ever having been elected by the people. While by section 88 (1) the President is required to act in accordance with the Cabinet's advice in the exercise of his functions under the Constitution and the general law, by section 88 (3) his failure to do so may not be questioned in any court. Moreover, by section 83 he is empowered to appoint a

minority government. In the elections for the House of Representatives all voting is to be on racial rolls, i.e. one roll for Fijians, one for Indians, and one for other races. Racial divisions are thus institutionalised. Under the 1970 Constitution nearly half the members were elected on a common roll for all races. The "other races" (Europeans, part-Europeans, Chinese, and other Pacific Islanders) are to have five seats (an over-representation), the Indians 27 seats (a serious under-representation) and the Fijians 37 seats (a substantial over-representation). It is clear that the Indians are effectively made second-class citizens. They have a much smaller voice in the lower house than their numbers would require, and an insignificant, if any, voice in the Senate, and then only as nominees of the Fijian ruling elite.

The worst discrimination, however, occurs in relation to parts of the Fijian population. Of the 37 Fijian seats, five are allotted to the towns, and 32 to the provinces. At the 1986 census 33% of Fijians lived in the towns. So two-thirds of Fijians get 32 seats, one-third only five. In 1987 it was urban Fijians who voted in significant numbers for Dr. Bavadra. In addition, the provincial seats are unevenly distributed, heavily favouring the supporters of the regime particularly in the East and the North. Ba, with a population at the 1986 census of 55'000 is to have three seats, but so is Lau, Ratu Mara's home base, with a population of 14'000. Rewa/Naitasiri which returned a Fijian who became a member of Dr. Bavadra's Cabinet is to have four seats for a population of 98'000 while Namosi will have two for 4'000.

There is still another obstacle facing indigenous Fijians. While all voters by section 49 (4) must have two years' residence in the constituency in which they

are enrolled, section 49 (6) requires Fijian voters to be enrolled or establish that they are eligible to be enrolled in the whole "Vola Ni Kawa Bula", the register of Fijians in their traditional clan units.

A great many of them are not so enrolled. Not only have one-third of the Fijians moved into the towns, but many have moved to other provinces. Many of these Fijians have sought in this way to escape the burdens and restrictions of the communal system under chiefly rule. The "Report of the Fiji Constitution Inquiry and Advisory Committee 1989" (the Manueli Report) remarked:

"The Committee notes that a considerable number of Fijians live in rural areas of other Fijian provinces and, as such, would not fulfil the requirements for registration as urban Fijian voters. They could well be disenfranchised if not catered for in another way. The Committee also notes that a considerable number of Fijians, many of them adults, are not registered in the VKB (Vola ni Kawa Bula) The complicated and lengthy process to be followed to register these adult Fijians in the VKB could inhibit a sizeable number of Fijians from voting. They will therefore be ineligible to vote as Fijians".

Precisely. The "interim government" consulting only with the Council of Chiefs appointed by them, has ignored the problem raised by its own committee, in order to force Fijians to "re-establish their traditional ties with their own provincial communities" (above). It is clear therefore that significant numbers of Fijians will be unable even to vote despite the claim of the army and the military-backed regime that the overthrow of the elected government and subsequent rule by military-backed decree have been undertaken to protect and advance the indigenous Fijians.

The government is required to maintain a majority in the House of Representatives but given the way that voting rights and electorates have been arranged, there is no risk of the present regime failing to secure a majority.

All money bills must originate in the Representatives, and for bills originating in the Representatives the Senate only has delaying powers except in the case of bills altering the operative parts of the Constitution, for those, such as the composition of the Houses, the position and powers of the President, the distribution of seats, any alteration must pass with a vote of two-thirds of the members of both Houses, and the two-thirds in the Senate must include the votes of at least 18 of the 24 members appointed by the Council of Chiefs. The same requirement applies to alterations to laws governing the Constitution of provincial councils and the Council of Chiefs.

The Manueli Report contended that provided fundamental rights and freedoms (other than equal voting rights) were enacted in the Constitution it should function successfully "despite such disproportionate representation". Chapter II of the Constitution sets out these rights and freedoms, but in many cases there are unacceptable qualifications. Freedom of expression may be limited by laws "for the purpose of protecting the reputation, the dignity and esteem of institutions and values of the Fijian people, in particular the Bose Levu Vakaturaga (Great Council of Chiefs) and the traditional Fijian system and titles". Freedom of movement may be modified by laws restricting movement or residence in Fiji or persons or any class or persons "in the interests of defence, public safety or public order". To alter the provisions of Chapter II a two-thirds majority of both Houses is required, but

Chapter II may be set aside by an act invoking special powers against "subversion" passed by simple majorities or by the President declaring a state of emergency. Given recent history in Fiji where guarantees of rights in the 1970 Constitution were set at nought by military coups there can be no confidence in the guarantees of rights offered by Chapter II.

That view must be strengthened by the provision in section 94 for the "Republic of Fiji Military Forces". Section 94 (3) reads:

"It shall be the overall responsibility of the Republic of Fiji Military Forces to ensure at all times the security, defence

and well being of Fiji and its peoples".

This is a recipe for continued military intervention in the life of the community.

To sum up: This examination of the Constitution reveals that it is an elaborate attempt to clothe entrenched rule by a self-perpetuating feudal oligarchy with the trappings but not the reality of representative government, denying to a large majority of the people, particularly a large proportion of indigenous Fijians and the overwhelming majority of Indo-Fijians, an effective and equal voice in the choice of those who should govern them and the laws by which they should be bound.

ARTICLES

Realizing the Human Rights of the Disadvantaged

*Clarence J. Dias**

It is indeed fitting, as we gather here on the 40th anniversary of the Universal Declaration of Human Rights, that our theme is "Human Rights and the Disadvantaged". After all, the 40th Anniversary provides the international human rights community with an opportunity for both sober and sombre stocktaking of the international human rights system. Much has indeed been achieved over the last 40 years, especially at the level of standard setting. An International Bill of Human Rights (comprising the Universal Declaration and the two human rights Covenants) has come into existence. The Universal Declaration (adopted without a single vote of dissent) has come to acquire a universal and fundamental legal, political and moral authority. The universality of the Declaration is now beyond serious challenge, even by the developing nations who were not parties to the Declaration because their independence came after 1948. Nation States are no longer able to claim that human rights issues are beyond the reach of the international community of nations because they are a matter of domestic jurisdiction

of the concerned State. Indeed, some international law scholars are of the view that customary international law has emerged embodying the principles of the Universal Declaration and the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Moreover, in addition to the Universal Declaration and the two human rights Covenants, the last 40 years has witnessed the creation of numerous other human rights standards in the form of Conventions (such as those dealing with the rights of women and rights against racial discrimination) and UN Declarations (such as the UN Declaration on the Right to Development). A number of international treaties and procedures have been established for the international protection of human rights. Moreover, the Universal Declaration's impact has not been confined to the international level. The Declaration has helped inspire both regional human rights instruments (for example, in Europe, in the Americas and in Africa) and national human rights law enshrined in constitutions and domestic legislation. The Universal Declaration

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This article is the text of a speech of a Conference in UNESCO to mark the 40th anniversary of the Universal Declaration of Human Rights.

has also had considerable impact on the legal practice concerning human rights in very many countries. In sum, the worldwide acceptance of the generality and universality of the Declaration has helped launch a human rights movement with international agencies, governments and non-governmental organisations, all taking appropriate actions in defence of human rights. There is indeed cause for celebration and admiration of the vast amount that has been done during the last 40 years for human rights. But such celebration and admiration cannot be allowed to breed a sense of complacency or indifference regarding the vast amount that remains undone - the challenging tasks that lie ahead and which need to be addressed with an urgency that makes 40-year time spans an unaffordable luxury. Because the fact remains that human rights are and continue to be unattainable, irrelevant or, even worse, a cruel irony for the large majority of the world's population - the impoverished, the powerless, the disadvantaged, the exploited women and men of this earth who continue to live in cruel and subhuman conditions characteristic of abject poverty.

Human misery and suffering, like human rights violations in the abstract, can tend to lose their power to generate ruth and indignation when they are so frequent as to be endemic and so pervasive as to become commonplace. The printed word documents horror story after horror story and yet the international community seems unmoved and unmoveable. Three examples from the part of the world I come from, Asia, are capable of being replicated in most other parts of the developing world today:

- a few years ago an infant was used by drug carriers to smuggle narcotics

from Thailand into Malaysia. The drug carriers killed the child, stuffed it with heroin, then wrapped it up and carried the "sleeping" child across the border. Though the gruesome incident has been denied by the authorities, the fact remains that, for the last decade, children have been smuggled from Thailand to Malaysia for crime, prostitution, cheap labour, and especially for illegal adoption. The reason behind this active trade is the great demand for babies in Malaysia. The gangs involved in the trade abduct the children or else buy them from prostitutes, unwed mothers, others desperate enough to sell their child for a pittance. In 1984, the Malaysian Marine Police rescued four babies who had been stuffed in suitcases and were being smuggled from Thailand into Malaysia. They had almost suffocated to death. In December 1987, a one-year-old baby girl was thrown into the river by her captors when police raided the house in Southern Thailand where she was being hidden. The child was in a serious condition when she was found by the police and died later;

- in February 1988, nine deaths, all suicides by cotton farmers (including three women) were reported within a two-month period in the Prakasam district of Andhra Pradesh in India. All the victims were young, below 30 years of age. They were all small farmers cultivating cotton for the last four years. They had pledged their families' ornaments to meet the cost of raising the crop. The farmers borrowed heavily to make huge investments. But the returns were poor. Two factors were responsible. One was the "white fly" menace. The other, even more dangerous, was the

sale of spurious pesticides, supplied by "vultures" out to exploit them. One such "vulture" was reportedly the son of a Minister. The heavy debt burden and consequent humiliations prompted some of the suicides. In the case of the three women, there were pressures from their in-laws. The District Collector of the area stated that arrangements were being made to provide compensation of Rs 3000 to each victim's family under the Social Security insurance scheme. He assured that no criminal action would be taken against the victim's families on humanitarian grounds;

- residents in a northeastern province in China are fighting against serious and unabated ecological degradation occurring as a result of the government's developmental activities. They claim that their livelihood and their very survival are threatened. They are faced with leaving their homes and lands or else face slow death.

These, and countless other "case studies" are not generally viewed by the international community as involving human rights problems and therein lies the key to the dismal record, over the last 40 years, in the realization of the rights of the disadvantaged. Crucial but disturbing questions need to be asked. Who are the disadvantaged and how did they become victims of denial of human rights? Who are the victimizers and why have they not been held accountable to human rights standards? What gaps in existing international human rights machinery and what flaws in existing international human rights conceptualization have led to a frustrating impotence, not only in realizing the human rights of the disadvantaged but also in preventing utterly inhuman wrongs?

Certain myths and fallacies have grown around the international human rights system which reduce its effectiveness so far as the disadvantaged are concerned. The first of these is the harmony myth. It is generally assumed that the process of realization of the human rights of *all* persons can be a harmonious one in which there are no losers and everyone is a winner. But this is far from true in the real world. Realizing the rights of the "have nots" will often be at the expense of the "haves". Empowerment of the poor and disadvantaged will often entail disempowerment of the rich and privileged. The process of realization of the rights of the disadvantaged will inevitably entail struggle and conflict, with the State and the international community being called upon to abandon neutrality and impartiality and take sides with the poor and disadvantaged. Human rights are very much an instrument of empowerment and disempowerment, if they are taken seriously.

A second myth relates to governmental lawfulness. When the Universal Declaration of Human Rights was drafted, the assumption was that states and governments were willing to abide by human rights norms and be held accountable to them. Most western states, at the time, were adopting the role of benign, paternalistic welfarism. It was generally assumed that the institutions of the State worked well and that the "rule of law" prevailed. The role of human rights activism was to check and correct the occasional aberrations and malfunctions of State institutions. By contrast today, many states, in the self-proclaimed tasks of nation-building and development, are assuming a more authoritarian character. What prevails is not the rule of law but the law of the ruler! The phenomenon of governmental lawlessness has become

increasingly pervasive. Aside from the Amins and Duvaliers of the World, we find several benign dictators who purport to act under colour of the law. Laws and constitutions are amended to suit the dictator's will. The independence of the judiciary and the legal profession is being ruthlessly eroded. Government officials routinely exceed and abuse their powers and discretion with impunity. The government has become both the chief lawmaker and the chief lawbreaker. In such a situation, human rights become a last-resort instrument for imposing accountability upon governments. Hence the growing need for improving the grievance processing machinery of the human rights system and the frequent calls for a UN High Commissioner for Human Rights at the international level and for counterpart ombudsman-type institutions at the national level.

A third myth relates to equality. Human rights are indeed universal and all human beings enjoy, in theory, equal rights. But, in practice, it is indeed a myth that all human beings are equally capable of asserting such rights. Human rights must not be allowed to become just human rights of the rich, the powerful and the strong. Yet, unfortunately, the unbridled assertion of their rights by the strong has often become the source of violation of the rights of the weak and disadvantaged as the experience with attempted land reform in most developing countries demonstrates. Jose Rizal reminded us that "those who have less in life should have more in law". Human rights advocacy, on behalf of the disadvantaged, is vitally needed to prevent human rights from degenerating into little more than the right to oppress, the right to exploit and the right to perpetuate dependency relationships.

In sum, human rights must be made a more effective instrument of empowerment, participation and accountability, if the disadvantaged are to redress the persistent inhuman wrongs of exclusion, marginalization, exploitation and lawlessness.

Several flaws in the human rights conceptualization also prevent the greater realization of the rights of the disadvantaged. The first of these relates to basic human needs and to economic, social and cultural rights. Both classical and contemporary western liberal thought - from John Stuart Mills to John Rawls - has tended to ignore the problematic of basic human needs. This problematic often gets translated, both in human rights thought and in action, as a conflict between "bread" and "freedom". Freedom usually wins with the liberal conceptions of rights. Despite the awareness that, as the Indian jurist Upendra Baxi reminds us, "without bread, freedom of speech and assembly, of association, of conscience and religion, of political participation (even through symbolic universal adult suffrage) may be existentially meaningless for its victims". The issues are not really "bread" and/or "freedom" in the abstract. But rather *who* has how *much* of each, for how *long*, at what *cost* to others, and *why*. Some have both bread and freedom; others have freedom but little bread or none at all; yet others have half a loaf with or without freedom; and still others have a precarious mix where bread is assured if certain (and possibly all) freedoms are bartered away. We witness this cruel formula for exploitation at work throughout the developing world, both between the disadvantaged and their governments as well as between the disadvantaged and powerful private actors. The problem of human rights, in

situations of mass poverty, is one of redistribution, of access and of needs. It is one of taking economic, social and cultural rights seriously and, in this regard, the experience of the last 40 years has been disappointing. There has been repeated reaffirmation that all human rights are of equal importance and repeated reaffirmation of the interdependence of the two sets of rights (civil and political on the one hand and economic, social and cultural on the other). Nevertheless, civil and political rights have tended to become the focus of international human rights advocacy while economic, social and cultural rights have tended to become the focus of international development assistance. Somehow, in the process, economic, social and cultural rights have suffered a downgrading. They have become something to be realized gradually within the resource constraints of states and governments. They have moreover been used as a justification for curbing civil and political rights. Thus, certain developing country governments have been advocating a "trade-off" whereby certain curbs on civil and political rights are justified in order to attain the economic development necessary to meet economic, social and cultural rights. Yet history has shown that such a trade-off has produced neither development nor human rights. The dichotomy between the two sets of rights has been greatly exaggerated and the symbiotic nature of their relationship often ignored. Failure to realize the economic, social and cultural rights of the disadvantaged has meant that their ability to effectively exercise civil and political rights has been considerably curtailed. Rural elites are able to deliver block votes of entire villages and some trade union leaders are able to do the same with their workers. In such a

situation elections conducted in an ostensibly free and fair manner do not represent genuine realization of civil and political rights of the disadvantaged. On the other hand, efforts to meet the economic needs of the disadvantaged by assisting them to mobilize and form their own self-help organisations to undertake group income generating projects have yielded dramatic results. Not only have they produced greater realization of economic, social and cultural rights but they have also enlarged opportunities for participation in decision making and political processes. So far as civil and political rights are concerned, the international human rights community, over the last 40 years, has been able to identify violations and violators and devise appropriate sanctioning processes. But so far as economic, social and cultural rights are concerned, there appears to have been both a conceptual as well as an institutional stalemate in identifying violations and violators and in imposing effective sanctions. This stalemate must be broken if any significant progress is to be made in the realization of the rights of the disadvantaged.

A second flaw in conventional and modern human rights thinking results from it being excessively state-centred, thereby neglecting the problems of human rights in the domain of civil society. The liberal discourse on rights is focused primarily on the rights of citizens against the State. Rights may not be transgressed by State power and authority. But from the point of view of a victim of human rights violations, it makes little difference whether the violator is the State; or a powerful landowner or employer; or a multinational corporation; or a bilateral or multilateral development assistance agency. The human harm and human suffering remains as acute and

indeed problems of securing relief and redress may be greater in pursuing non-state actors than the State. As Upendra Baxi reminds us, "The rights of the citizen against the State are also rights of man over man and man over nature. Rights become manifestations of politically protected power ... Thus liberty, as freedom with which the State and the law shall not interfere, is everyone's human right: of the prince as well as of the pauper. At the same time, in civil society, the very exercise of liberty creates space for domination by some over others. There is no assurance at all that human rights, as rights against the State, will not be employed so as to cause lawful harm to others. Indeed, heretical though it may seem, one way to formulate rights to liberty will be to say that these rights consist in the conferral of capacities in men to engage in causing lawful harm to others". Thus, a capitalist farmer in a "green revolution" area has the right to hire migrant labour at low wages. He has the right to use any amount of chemical fertilizers, herbicides and defoliants, all affecting, sooner or later, both the quality of the soil and genetic diversity. In exercising this right he may generate microtoxicity in foods and vegetables, often with a carcinogenic effect on consumers. He may also exploit groundwater with a rapacity which eventually causes drought in the region. Since the State and law does not treat these actions as causing "harms", the farmer is at liberty to do all this. Thus, rights become the resources for powerful persons to cause lawful harms to others, with the power and legitimacy of the State standing as a sentinel of their freedom. Hence, it is essential that the reach of human rights be extended to sanction non-state actors so that rights can become a resource for the disadvantaged in

their struggle for amelioration.

A third flaw in the liberal paradigm of human rights stems from the unwillingness to address issues relating to the use of violence in the claimed assertion of human rights. Violence by the State, resulting in violation of human rights, is clearly proscribed. But what about violence by non-state actors purporting to be exercising their rights. This is an issue that has been tended to be swept under the rug of inadequately defined concepts of self-defence and self-determination. It is a historical truth that violence can create rights. Certainly, both the violence of the oppressed and the violence of the oppressor play a crucial role in the creation, promotion, and protection of human rights. Violation of the elites' rights is usually labelled as violence. But violation of the rights of the impoverished to remain human is not labelled as violence. This is a perplexing issue which *must* be addressed. The use of violence by any person must be brought under a regime of human rights law. Otherwise, as the experience in Sri Lanka and the Punjab shows, the grossest violations of human rights can be justified in the very name of human rights. Violence spawns violence and force begets force in a vicious, ever-escalating spiral towards self-destruction. Terrorism provokes and promotes State terrorism in response. State terrorism incites and inflames terrorist responses. Internal armed conflict is a fact of life in many modern states. If the weak and disadvantaged are to be protected, the violence of both state and non-state actors must be denounced as giving rise to human rights violations. In this respect, the growing gap between international human rights law and international humanitarian law must be closed.

Let us address, for a moment, the

question as to who are the disadvantaged and how did they come to become so? Poverty is not a product of happenstance. Poverty is deliberate and man-made. The disadvantaged victims of human rights violations are often the product of exploitation resulting from the unbridled exercise of the rights of a few. Paradoxically enough, the disadvantaged have often been created by processes of development which are synonymous with self-aggrandizement and self-perpetuation of the few. Development is supposed to be the instrument for the realization of the economic, social and cultural rights of all. But development based upon the growth-trickle-down theory, upon uncontrolled industrialisation and upon export promotion at the expense of meeting basic human needs at home, has created and exacerbated widespread impoverishment, exploitation, and powerlessness. Such "perverse development" (to use the graphic phrase of the late Ernest Feder) has led to:

- profligate resource exploitation and consumption which converts, hitherto, renewable resources into non-renewable resources;
- expropriation of the survival resources of the poor and of the public commons, such as communal forests and public grazing grounds;
- energy intensive, industrial and agricultural development leading to an insatiable need for large-scale, energy-generation projects (e.g. large dams and nuclear power plants) whose implementation often involves human and ecological degradation;
- chemically intensive agriculture creating problems of soil and water destruction;
- over-reliance on technology rather than human skills often pitting sci-

ence against man and man against nature;

- imposition of risks, burdens, and sometimes forced resettlement on powerless and vulnerable groups and communities;
- secrecy, covertness and a clandestine atmosphere surrounding developmental decision taking which fosters rampant corruption with greed often masquerading as development;
- profligate environmental management creating ecological deficits which imperil the survival of future generations as yet unborn; and
- wanton indebtedness prompting the adoption of debt and structural adjustment policies which lead to food and job riots and virtual genocide for certain sections of society, including vulnerables such as children and women.

Neglect of human rights in the process of development produces human harms and human suffering on an intolerable scale. It produces gross and massive human rights violations. This has been the historical experience in Dickens' England, in Boris Pasternak's Soviet Union and all over the developing world today. In the name of realizing economic rights through development, massive human rights violations have become commonplace today. Powerful individuals, governments, multinational corporations and bilateral and multilateral development assistance organisations are the witting or unwitting violators responsible for such inhuman wrongs. Exclusion, domination, exploitation, and covertness are used, unabashedly, to create ever-increasing numbers of the disadvantaged. And then, with supreme irony, charitable social work programmes are devised to help ameliorate the harms

created. So far as the disadvantaged are concerned, the need of the moment is clear: human rights advocacy and not paternalistic charity. Alternative approaches to development built upon organisation of the poor for their own participatory, self-reliant human rights advocacy must be employed to press for increased adoption of such alternative development approaches. For the disadvantaged, human rights must be fashioned into an instrument for empowerment, for participation and access, and for securing accountability. There must be growing recognition of that most basic of all human rights: *the right to be human*.

The renowned human rights practitioner, Theo van Boven, rightly states, "In some areas, however, effective international norms and mechanisms are weak or conspicuously absent. They relate to the rights of groups and collectivities who often find themselves in most vulnerable positions and who are victims of 'superior' interests, exploitation, domination and even liquidation". From a human rights activist's perspective, the 40th anniversary of the Universal Declaration is a time for devising strategies to address the gaps and shortcomings in the present human rights system:

- the primarily individual orientation of human rights often means that rights of a powerful individual take precedent over those of large but powerless, poor and vulnerable groups and communities;
- there is a need to extend the reach of human rights, not merely to deal with acts of commission but also acts of omission. Only then can economic, social and cultural rights be seriously addressed;
- there is a need to extend the reach of

human rights to sanction violations, not only by state actors but also by non-state actors;

- there is a crucial need to devise more effective relief, redress and remedies for the victims of human rights violations and less onerous procedures for obtaining such relief and redress; and
- there is also an urgent need to develop preventive strategies that seek to avert human rights violations.

Moreover, in the countries of the developing world, there is a need to examine more closely, the relationship between development and human rights. Extreme poverty (and its attendant powerlessness and dependency) breed widespread human rights violations. Lack of resources seriously impedes the realization of human rights of the poor. Yet present-day development programmes and projects aimed at generating economic growth and development have often tended to exacerbate rather than alleviate the problem. In most developing countries there is an urgent need for development and economic growth but such development must be sustainable and such growth must be economic growth with a human face. This can only be realized if an effective human right to development is articulated and implemented.

So far as realizing the human rights of the disadvantaged is concerned, the international human rights community, even after 40 years, still has many promises to keep and miles to go before we sleep. The time for reservations, rationalizations and recriminations is over. The time for reaffirmation and creative renovation is very much at hand. The noted Czech writer, Milan Kundera, once remarked, "The struggle of man over power is the struggle of memory over

forgetting". Human rights activists need to serve not only as the conscience but as the memory of the global community. Traditionally, human rights activism has taken the form of standard setting, promotion, monitoring and enforcement. To all these very important activities we need to add efforts aimed at securing for the disadvantaged who are victims of human rights violations, damage limitation, relief and rehabilitation, redress including compensation, and the imposition of sanctions to act as a future deterrent. We must strive to make human rights an equally effective weapon in

addressing the problems of children in Thailand, of subsistence farmers in India, of threatened communities in China and their counterparts all over the world.

It behooves all of us, imbued with the spirit of human rights and fortunate enough to be able to exercise that most precious right - the right to be human - to press right now, not only for universal declaration and universal reaffirmation, but also for universal realization of *all* the human rights of *all* persons of whatever age, gender, race, or creed on this fragile spaceship earth.

The Kurds in Turkey: Further Restrictions of Basic Rights

*Martin van Bruinessen**

In August 1990, the Turkish government notified the Council of Europe that it had enacted two decrees with force of law (Nos. 424 and 425) that might derogate from rights enshrined in the Articles 5,6,8,10,11 and 13 of the European Convention on Human Rights and Fundamental Freedoms. The decrees give the governor of "the region under the State of Emergency" (i.e. the Kurdish-inhabited provinces of southeastern Turkey) extraordinary powers, notably to censor all news concerning the region and to deport individuals. The decrees, issued on 10 May 1990, subsumed the earlier, similar decree No. 413 (of April 1990).

The Official denial of Kurdish ethnic identity and the rise of Kurdish nationalism

The Kurds are, after the Turks, the second largest ethnic group of Turkey, making up perhaps 15 to 20% of the total population. Their language is not related to Turkish but to Persian. Most of them live in Turkey's relatively underdeveloped southeast, while several million have migrated to other parts of the country. The contiguous parts of Iran, Iraq and Syria are also inhabited by Kurds. Although many Kurds took active part in the War of Liberation that resulted in the establishment of the Republic of Turkey

in 1923, they were discriminated against almost from the beginning. This led to a series of local Kurdish rebellions in the 1920s and 1930s, that were put down with great brutality. Since then, every expression of Kurdish ethnic identity has been considered a threat to national security. The government embarked upon a policy of forced assimilation and denied the very existence of Kurdish ethnicity, speaking of "Mountain Turks" instead. The Kurdish language, Kurdish folklore, Kurdish dress, Kurdish names were banned, only those who would call themselves Turks enjoyed civil rights. For several decades, moreover, the government withheld infrastructural investment from the region.

These policies relaxed a little during the relatively liberal 1960s and 1970s. More Kurds had by then access to modern education and took part in the student movement: this and improved communications contributed to a re-emergence of Kurdish ethnic awareness. Many of those who had been assimilated rediscovered their ethnic roots. People demanded measures to redress the underdevelopment of southeastern Turkey, the recognition of the existence of the Kurds and the freedom to speak and write Kurdish. Semi-legal Kurdish organisations were established and the first publications in Kurdish or on Kurdish history and society appeared. Almost

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without exception these were banned and the organisers, publishers and authors were tried and sentenced to prison terms for "weakening national feelings". The 1970s especially were a period of rapid political polarisation in Turkey. When none of the Kurdish demands were granted, the Kurdish movement also radicalised and started speaking of the right to self-determination. By the end of the decade, there were some ten different Kurdish organisations, representing a wide spectrum of ideological orientations, and often in conflict with each other as well as with Turkish political organisations¹.

The military coup of 1980 and military repression of the Kurds

In September 1980, the armed forces, impatient with the civilians' apparent failure to stop the increasing polarisation of society and the concomitant political violence, carried out a coup d'état (as it had done before 1960 and 1971). It took draconic measures against the labour movement and the left in general, against the Islamic movement and against the Kurds. The existing Constitution was suspended and a new, much more restrictive Constitution drafted, followed by numerous new laws severely restricting basic rights and freedoms². "Brutal and systematic abuse of human rights" (as Amnesty International sum-

marised the situation) continued throughout the 1980s.

The repression was most severe in the Kurdish provinces: arrests were on a larger scale, violent abuses of the civilian population more widespread, torture more systematic and prison conditions far worse than elsewhere in the country. The military authorities considered Kurdish nationalism and by extension every expression of Kurdish identity as a major threat to national security. A new concerted effort was made to eradicate Kurdish culture, among other things by legally banning the use of the Kurdish language and setting up obligatory Turkish literacy courses in Kurdish villages. A spate of officially sponsored books "proved" that the people of southeastern Turkey are of Turkish origin. People were prosecuted and sentenced to years of imprisonment for no greater crime than calling themselves Kurds. Mass trials against suspected members of Kurdish organisations resulted in numerous death sentences and long-term prison sentences³.

Guerilla war

In a few years, the Kurdish movement seemed virtually eliminated by these measures, its leaders killed, imprisoned or in foreign exile. In August 1984, however, a small and radical Kurdish organisation, the PKK⁴, apparently operating

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1. Martin van Bruinessen, *The Kurds in Turkey*, *Merip Reports*, No. 121 (February 1984).
 2. Turkey, *ICJ Review* No. 42, 1989.
 3. Arrests, trials, allegations of torture and prison conditions are well documented in Amnesty International's Periodical reports. A general though very incomplete survey of state repression as of the late 1980s is given in the Helsinki Watch reports *Destroying Ethnic Identity: The Kurds in Turkey* (March 1988 and September 1990).
 4. PKK: Workers' Party of Kurdistan. Also known as *Apocu*, followers of Apo ('Uncle'), as they call their leader Abdullah Öcalan.

from bases in Syria and northern Iraq, began a guerilla war, attacking Turkish military personnel and Kurdish "collaborators". Its brutal actions, leading to even more brutal counter-measures, did not initially gain it much sympathy among the population⁵. As the war continued, however, the PKK won a grudging admiration for the courage of its partisans and its success in putting the Kurdish question on Turkey's political agenda. In the late 1980s journalists and politicians of all persuasions openly discussed the Kurdish question, something unthinkable a few years earlier. Extremely brutal repressive measures taken by the authorities meanwhile proved counter-productive: the PKK found it easy to recruit many new activists. A recent visit to southeastern Turkey by this author confirms the impression that the PKK still has relatively few active supporters there but now enjoys widespread sympathy, even among erstwhile opponents.

In order to fight the PKK more effectively, the government recruited paramilitary units (called 'village guards') among the Kurdish tribes, offering them a bonus for every 'terrorist' killed. There were soon numerous reports that the village guards used their powers to terrorise other civilians. The number of these

village guards was gradually increased and reached 21'480 by mid-1990⁶. Army and police forces in the region number around 60'000 (official) or 100'000 (unofficial estimate). The search for 'terrorists' repeatedly leads to serious abuse of the civilian population. Several cases of innocent civilians shot or tortured to death and posthumously declared PKK activists have been documented⁷. Maltreatment of civilians includes beatings, destruction of property, sexual humiliation, and sexual abuse. In a widely reported case, men and women were undressed and forced to touch each other's genitals; in another, villagers were forced to eat human excrement.

The State of Emergency, the 'super-governor' and his extraordinary powers

In most of the country, martial law had been lifted by 1984. In the four Kurdish-inhabited provinces of Siirt, Mardin, Diyarbakir and Hakkari, however, it continued until mid-1987, when it was replaced by a State of Emergency. A State of Emergency also exists in four other southeastern provinces, Elazig, Tunceli, Bingöl and Van. The State of Emergency was described by the Turk-

5. See Martin van Bruinessen, *Between Guerilla and Political Murder: The Workers' Party of Kurdistan*, *Middle East Report* 141, July-August 1988; Michael M. Gunther, the Kurdish problem in Turkey, *Middle East Journal* 42 (3), 1988; Lothar A. Heinrich, Die Arbeiterpartei Kurdistans (PKK): Kult des Opfers und Kult der Tat als Programm, *Orient* (Hamburg) 29, 1988.
6. *Daily Cumhuriyet*, 12 June 1990. According to the governor of the region under the State of Emergency, only 581 of them had been accused of violence and sexual assault against civilians, and 279 had been arrested (*2000'e Dogru*, 3 June 1990).
7. The most recent case, reported by the Diyarbakir branch of the Human Rights Association, was that of Hüseyin Akaslan, who was shot dead in the village of Kurudere on 5 September 1990. The army claimed that he was one of a band of five PKK 'Terrorists', the other four of which had escaped. Akaslan's relatives claimed, however, that he was physically handicapped and mentally ill, and showed a medical report proving that he had been released from a psychiatric hospital in Elazig only the day before.

ish press as a 'civilian' form of martial law; although the highest authority is no longer the provincial military commander but a civilian governor, most of the restrictive measures taken under military rule remain in effect. The military courts were replaced with State Security Courts with extraordinary judicial powers, that try all political cases.

In order to coordinate operations against the PKK and Kurdish-related issues in general, the new office of a coordinating governor of the region under the State of Emergency was created, whose powers override those of the provincial governors. This 'super-governor', as he is usually called for short, is responsible to the Minister of the Interior, who formulates the general policy, but has wide-ranging powers to give this policy concrete form and implement it as he deems fit. The para-military 'village guards' operate under his authority. In security matters, he works closely together with the commander of the military security forces in the area. While elsewhere in the country a gradual political liberalisation was perceptible, this development did not extend into the southeast, where every Kurdish citizen continued to be regarded as a potential enemy of the state. The repressive powers of the 'super-governor' were even extended in 1990, further curtailing basic human rights.

On 10 April 1990 the Council of Ministers enacted decree 413 that gave the

'super-governor' extraordinary powers to:

- censor the press by banning, confiscating and heavily fining publications that 'by misrepresenting the (government's) activities, or by printing incorrect news or analyses, seriously disturb public order in the region, cause anxiety among its inhabitants, or obstruct the security forces in the performance of their jobs;
- shut down printing plants in or outside the region that print such publications;
- exile internally persons whose activities are harmful to public order;
- control or prohibit all trade union activities such as strikes and referendums, and prevent actions such as slowdowns, occupations, and boycotts;
- transfer without prior notice state employees considered as harmful or ineffective;
- evacuate villagers for security reasons.

No legal appeal is possible against these measures⁸. Note that the governor's power of censorship concerns not only the region under the State of Emergency but the entire country!

After objections by the parliamentary opposition that the decree was unconstitutional on formal grounds, the government issued on 10 May 1990 the revised

8. Text of the decree in *Cumhuriyet*, 11 April 1990: an English summary in Helsinki Watch's *Destroying Ethnic Identity: The Kurds of Turkey, an Update* (September 1990). The 11 provinces affected by the decree are, besides Siirt, Mardin, Diyarbakir and Hakkari, that were mentioned already, Bingöl, Elazığ, Tunceli and Van (which had long been under a State of Emergency) and the contiguous provinces of Mus, Bitlis and Adiyaman. In mid-1990, two districts where there had been much guerrilla activity were made into separate provinces: Batman (previously part of Diyarbakir) and Sırnak (previously in Siirt), raising the total number to 13 provinces.

decrees 424 and 425, whose contents are substantially identical with decree 413, except that they further expand the 'super-governor's' powers to exile persons⁹.

Background of the decrees

In its note to the Council of Europe, the Turkish government justified the decrees by the 'threat to its national security in Southeast Anatolia'. During 1989, it stated, 136 civilians and 153 members of the security forces had been killed by 'terrorists', and in the first seven months of 1990 alone 125 civilians and 96 members of the security forces. The government also complained of a 'campaign of harmful disinformation of the public'. It is true that the guerilla, in spite of massive military counter-measures, keeps increasing in scope and that the number of victims on both sides keeps growing. Though most of the press is violently inimical to the PKK, press reports on military abuse of civilians have contributed to the disaffection of the people of the southeast. Moreover, several newspapers had recently published interviews with the leader of the PKK, Öcalan, in his Lebanese headquarters, resulting in an improvement of his public image.

The more immediate reason of the decrees, however, seems to have been the popular uprising in the towns of Nusaybin and Cizre of March 1990, that was soon dubbed the 'Kurdish *intifadah*'. The rising was triggered by a relatively minor incident, the funeral of a young PKK activist, who had been killed by the army. He belonged to a prominent family of Nusaybin, and 5'000 people took part in the funeral, while all shops in town

were closed, a traditional expression of protest. When special army units tried to disperse the procession, people resisted and shouted slogans against the army. The troops shot at the crowd, killing one and wounding many more; around 500 people were arrested. In protest, all shops in Nusaybin remained closed for three days. The uprising then spread to the neighbouring town of Cizre, where the shops were also closed down and there were several large demonstrations, throwing stones and challenging the security forces with Kurdish slogans. Here too, the troops fired into the crowd, killing five. The protest actions spread to several other towns, including Diyarbakir, where the shops were also closed down in solidarity with Nusaybin and Cizre.

Reports on the uprising had a great impact on public opinion in Turkey and to some extent abroad as well. The events definitively refuted the official view that the army was only up against foreign-supported bandits who terrorised the local population. The mayor of Nusaybin was quoted as saying that in his town everybody sympathised with the PKK. The press coverage of the events represented a major psychological victory for the PKK, which seemed to be shedding its terrorist image. It is most likely that this was the 'campaign of harmful disinformation' to which the authorities referred.

Effects of the decrees

The effects of the decrees were immediate. Editors of journals such as *2000'e Dogru* (an influential left-wing weekly)

9. *Cumhuriyet*, 11 May 1990.

and the smaller *Halk Gerçeği* (left-wing) and *Deng* (pro-Kurdish) no longer found a printer willing to print them (all printers had apparently been expressly warned against these journals, that were the major sources of news on southeastern Turkey). When they succeeded nevertheless in bringing out clandestinely printed or photocopied issues, they were banned and charges brought against their editors¹⁰. The daily press exercised careful self-censorship; journalists apologised to their readers for not being able to report or comment on events in the southeast. Journalists working in the region under the State of Emergency found their movements severely curtailed. Large areas are off limits to journalists.

Among the 'harmful' people exiled from the region was the chairman of the Siirt branch of the Human Rights Association, Zübeyr Aydar. He was, however, after three months allowed to return, probably because of strong protests by other human rights organisations in Turkey and abroad. No statistics are known about the total number of persons exiled and/or transferred from the region since the decrees went into force.

The most disconcerting effect of the decrees is the forced evacuation of numerous mountain villages in the provinces of Sirnak, Hakkari and Van (near the Iraqi border). Deportation of villagers from this area had, in fact, been started before the decrees were issued, but was now continued on a larger scale. According to eyewitness reports, the villagers

are given the choice between joining the village guards and actively fighting the PKK or leaving their districts. Those refusing to sign up as village guards are forced to leave and their houses, stables and stocks of fodder destroyed without compensation. In June it was reported¹¹ that 60 villages in Hakkari had thus been destroyed. The district town of Yüksekova alone had to accommodate 3'000 of these evacuated villagers. In a few other cases, in Cukurca district (Hakkari province), villages have been surrounded by minefields, which have already claimed civilian victims. The latest report on these evacuations that could appear in the Turkish press¹² concerns the central district of Sirnak, where out of 38 villages, 27 have been evacuated and destroyed along with crops, trees and beehives. Some of the villagers who had the financial means have migrated to western Turkey, but large numbers of families without any means live in light summer tents near the towns of Sirnak, Yüksekova and Van. These tents offer insufficient protection against the winter, which especially in Yüksekova is severe. Given the severe restrictions the press is facing, the real dimensions of the forced evacuations may well be even more serious than these reports indicate.

Conclusion

Turkey systematically violates the fundamental rights and freedoms of its

10. The 2000'e Dogru staff succeeded in establishing a new weekly, *Yüzyıl*, that continues publication. Similar attempts by the other journals failed because printers were expressly warned not to print them. At least 16 other small periodicals had to suspend publication for the same reason.

11. In the last issue of *Halk Gerçeği*, 24 April 1990. This report was the reason for the definitive ban of the journal.

12. *Yüzyıl*, 23 September 1990.

Kurdish citizens. Kurdish ethnic identity is systematically denied, Kurdish language and other cultural expressions banned. Because the Kurds are not considered as an ethnic (or national) minority, they do not enjoy the rights granted to minorities under the international treaties signed by Turkey. Freedom of expression and association, curtailed throughout Turkey, are virtually non-existent in the Kurdish-inhabited region. The army and the para-military 'village guards' frequently engage in serious abuse of the civilian population. Entire districts are being depopulated through forced deportations, without any compensation given. Press coverage of the events in the Kurdish-inhabited region and public discussion of the situation

have been severely curtailed by the recent decrees. The available information suggests that repression in the southeast has further increased since the onset of the Gulf crisis has diverted attention away from the Kurdish question.

Because of its unambiguously pro-western attitude in the Gulf crisis, the Turkish government may expect from its western partners a lenient attitude towards its Kurdish policies. There is however no cogent reason why the international community should not make greater efforts to persuade Turkey to stop its large-scale violations of human rights, especially in the southeast, to recognise the Kurds as a separate ethnic group and grant them basic cultural rights.

BASIC TEXTS

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling the Milan Plan of Action,¹ adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985,

Recalling also resolution 14 of the Seventh Congress,² in which the Committee on Crime Prevention and Control was called upon to consider measures for the more effective implementation of the Code of Conduct for Law Enforcement Officials,

Taking note with appreciation of the work accomplished, in pursuance of resolution 14 of the Seventh Congress,³ by the Committee, by the interregional preparatory meeting for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on United Nations norms and guidelines in crime prevention and criminal justice and implementation and priorities for further standard setting,⁴ and by the regional preparatory meetings for the Eighth Congress,

1. **Adopts** the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials contained in the annex to the present resolution;

2. **Recommends** the Basic Principles for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;

3. **Invites** Member States to take into account and to respect the Basic Principles within the framework of their national legislation and practice;

4. **Also invites** Member States to bring the Basic Principles to the attention of law enforcement officials and other members of the executive branch of government, judges, lawyers, the legislature and the public in general;

5. **Further invites** Member States to inform the Secretary-General every five years, beginning in 1992, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into domestic legislation, practice, procedures and policies, the problems faced in their implementation at the national level and assistance that might be needed from the international community, and requests the Secretary-General to report thereon to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;

1) See *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August - 6 September 1985* (United Nations publication, Sale No. E.86.IV.1), chap. I, sect. A.

2) *Ibid.*, sect. E.

3) *Idem*

4) A/CONF.144/IPM.5.

6. *Appeals* to all Governments to promote seminars and training courses at the national and regional levels on the role of law enforcement and the need for restraints on the use of force and firearms by law enforcement officials;

7. *Urges* the regional commissions, the regional and interregional institutes in crime prevention and criminal justice, the specialized agencies and other entities within the United Nations system, other intergovernmental organisations concerned and non-governmental organisations in consultative status with the Economic and Social Council to become actively involved in the implementation of the Basic Principles and to inform the Secretary-General of the efforts made to disseminate and implement the Basic Principles and the extent of their implementation, and requests the Secretary-General to include this information in his report to the Ninth Congress;

8. *Calls upon* the Committee on Crime Prevention and Control to consider, as a matter of priority, ways and means of ensuring the effective implementation of the present resolution;

9. *Requests* the Secretary-General:

- (a) To take steps, as appropriate, to bring this resolution to the attention of Governments and all United Nations bodies concerned, and to provide for the widest possible dissemination of the Basic Principles;
- (b) To include the Basic Principles in the next edition of the United Nations publication entitled *Human Rights: A Compilation of International Instruments*;
- (c) To provide Governments, at their request, with the services of experts and regional and interregional advisers to assist in implementing the Basic Principles and to report to the Ninth Congress on the technical assistance and training actually provided;
- (d) To report to the Committee, at its twelfth session, on the steps taken to implement the Basic Principles;

10. *Requests* the Ninth Congress and its preparatory meetings to consider the progress achieved in the implementation of the Basic Principles.

ANNEX

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Whereas the work of law enforcement officials⁵ is a social service of great importance and there is, therefore, a need to maintain and, whenever necessary, to improve the working conditions and status of these officials,

Whereas a threat to the life and safety of law enforcement officials must be seen as a threat to the stability of society as a whole,

Whereas law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights⁶

5) In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

6) General Assembly resolution 217 A (III)

and reaffirmed in the International Covenant on Civil and Political Rights,⁷

Whereas the Standard Minimum Rules for the Treatment of Prisoners⁸ provide for the circumstances in which prison officials may use force in the course of their duties,

Whereas article 3 of the Code of Conduct for Law Enforcement Officials⁹ provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty,

Whereas the preparatory meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Varenna, Italy, agreed on elements to be considered in the course of further work on restraints on the use of force and firearms by law enforcement officials,¹⁰

Whereas the Seventh Congress, in its resolution 14¹¹, *inter alia*, emphasizes that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights,

Whereas the Economic and Social Council, in its resolution 1986/10, section IX, of 21 May 1986, invited Member States to pay particular attention in the implementation of the Code to the use of force and firearms by law enforcement officials, and the General Assembly, in its resolution 41/149 of 4 December 1986, *inter alia*, welcomed this recommendation made by the Council,

Whereas it is appropriate that, with due regard to their personal safety, consideration be given to the role of law enforcement officials in relation to the administration of justice, to the protection of their right to life, liberty and security of the person, to their responsibility to maintain public safety and social peace and to the importance of their qualifications, training and conduct,

The basic principles set forth below, which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.

General provisions

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

7) General Assembly resolution 2200 A (XXI), annex.

8) See *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.88.XIV.1), sect. G.

9) *idem*.

10) A/CONF.121/IPM.3, para.34.

11) See *Seventh United Nations Congress ...*, chap. I, sect. E.

3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) Minimize damage and injury, and respect and preserve human life;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

Special Provisions

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

- (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
- (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
- (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
- (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
- (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

Policing unlawful assemblies

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.

Policing persons in custody or detention

15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54.

Qualifications, training and counselling

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.

Reporting and review procedures

22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an

effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death or serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

24. Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

Basic Principles on the Role of Lawyers

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling the Milan Plan of Action¹, adopted by consensus by the Seventh United Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985,

Recalling also resolution 18 of the Seventh Congress², in which the Congress recommended that Member States provide for the protection of practising lawyers against undue restrictions and pressures in the exercise of their functions,

Taking note with appreciation of the work accomplished, in pursuance of Seventh Congress resolution 18, by the Committee on Crime Prevention and Control, by the interregional preparatory meeting for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on United Nations norms and guidelines in crime prevention and criminal justice and implementation and priorities for further standard setting³ and by the regional preparatory meetings for the Eighth Congress,

1. *Adopts* the Basic Principles on the Role of Lawyers set forth in the annex to the present resolution;

2. *Recommends* the Basic Principles for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;

3. *Invites* Member States to take into account and to respect the Basic Principles within the framework of their national legislation and practice;

4. *Also invites* Member States to bring the Basic Principles to the attention of lawyers, judges, members of the executive branch of government and the legislature, and the public in general;

5. *Further invites* Member States to inform the Secretary-General every five years, beginning in 1992, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into domestic legislation, practice, procedures and policies, the problems faced in their implementation at the national level and assistance that might be needed from the international community, and requests the Secretary-General to report thereon to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;

6. *Appeals* to all Governments to promote seminars and training courses at the national and regional levels on the role of lawyers and on respect for equality of conditions of access to the legal profession;

7. *Urges* the regional commissions, the regional and interregional institutes on crime prevention and criminal justice, the specialized agencies and other entities within the United Nations system, other intergovernmental organizations concerned and non-governmental organizations in consultative status with the Economic and Social Council to become actively involved in the implementation of the Basic Principles and to inform the Secretary-General of the efforts made to disseminate and implement the Basic Principles and the extent of their implementation, and requests the Secretary-General to include this information in his report to the Ninth Congress;

1. *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985: Report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. A.

2. *Ibid.*, sect. E.

3. A/CONF.144/IPM.5.

8. *Calls upon* the Committee on Crime Prevention and Control to consider, as a matter of priority, ways and means of ensuring the effective implementation of this resolution;

9. *Requests* the Secretary-General:

- (a) To take steps, as appropriate, to bring this resolution to the attention of Governments and all the United Nations bodies concerned, and to provide for the widest possible dissemination of the Basic Principles;
- (b) To include the Basic Principles in the next edition of the United Nations publication entitled *Human Rights: A Compilation of International Instruments*⁴
- (c) To provide Governments, at their request, with the services of experts and regional and interregional advisers to assist in implementing the Basic Principles and to report to the Ninth Congress on the technical assistance and training actually provided;
- (d) To report to the Committee on Crime Prevention and Control, at its twelfth session, on the steps taken to implement the Basic Principles.

ANNEX

Basic Principles on the Role of Lawyers

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

Whereas the Universal Declaration of Human Rights⁵ enshrines the principles of equality before law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights⁶ proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights⁶ recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁷ provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners⁸ recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards Guaranteeing Protection of Those Facing the death penalty⁹ reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights⁹,

4. United Nations publication, Sales No. E.88.XIV.1.

5. General Assembly resolution 217 A (III) of 10 December 1948.

6. General Assembly resolution 2200 A (XXI), annex, of 16 December 1966.

7. General Assembly resolution 43/173, annex, of 9 December 1988.

8. See Human Rights: A Compilation of International Instruments (United Nations publication, Sales No. E.88.XIV.1), sect. G.

9. *Ibid.*, sect. G.

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁰ recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

10. General Assembly resolution 40/34, annex, of 29 November 1985.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

- (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
- (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. *Lawyers shall always loyally respect the interests of their clients.*

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

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

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall co-operate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

MEMBERS OF THE INTERNATIONAL COMMISSION OF JURISTS

President

ANDRES AGUILAR MAWDSLEY

Venezuelan Ambassador to UN; former Pres. Inter-American Commission on Human Rights

Vice-Presidents

Mrs TAI-YOUNG LEE

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ADAMA DIENG

The Independence of the Judiciary in India

A CIJL Seminar

Published by the ICJ, Geneva, 1990.

Available in English. 59 pp. Swiss Francs 12, plus postage.

The seminar papers reproduced in the report provide an overview of the problems facing the Indian judiciary with particular reference to three key questions which have in the past tended to undermine judicial independence: excessive executive discretion in appointments to the higher judiciary, the transfer of judges from one High Court to another without their consent and the non-confirmation of "additional judges" by the executive on political considerations. The report also contains the conclusions and recommendations of the seminar and two important documents which were examined and endorsed at the meeting, namely: the United Nations Basic Principles on the Independence of the Judiciary and the Bangalore Principles on the Domestic Implementation of International Human Rights Norms.

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The Harassment and Persecution of Judges and Lawyers July 1989 to June 1990

A CIJL study

Published by the ICJ, Geneva, 1990.

Available in English. 108 pp. Swiss Francs 15, plus postage.

The report, published annually, lists the cases of 430 judges and lawyers who have been killed, detained or harassed in 44 countries between July 1989 and June 1990. It includes 67 lawyers and judges killed, 167 detained, 40 who have been attacked and 67 who have received threats. Cases of violence described in the report were carried out by governments, death squads, big landowners and drug traffickers. In almost none of the cases listed has the perpetrator of the violence been brought to justice.

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Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza

A report of a mission to the Occupied Territories in June/July 1989

Published by the ICJ, Geneva, 1990

Available in English. 74 pp. 15 Swiss Francs, plus postage.

The report gives a factual account of the justice system in the Israeli Occupied Territories, accompanied by conclusions and recommendations. The participants of the mission expressed concern about the continuing reports of mistreatment and torture of suspects during interrogation, the inability of defence lawyers to visit their clients until after interrogation and the "confession", and the inadequacy of charges often in a language the accused cannot understand. Members of the mission made numerous recommendations for improving the treatment of arrested persons in accordance with the Geneva Conventions and other international law.

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