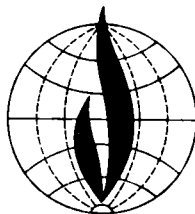


*For the Rule of Law*

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# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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# Human Rights in the World

## Coup d'Etat in Peru

On the night of 5 April 1992 the constitutional order of Peru was subverted when President Alberto Fujimori carried out a *coup d'etat*. After dissolving the National Parliament and virtually revoking the independence of the judiciary, he assumed full powers and, as Commander in Chief of the armed forces, put the entire country under the control of the military. Finally, he formally suspended the national constitution.

The *coup d'etat* was a serious step backwards for Peru, an act of aggression against the very basis of the rule of law and an outrage to democracy for all of Latin America. Any institutional breakdown has a negative effect on a country, but in this case it had repercussions for a region that had adopted democracy and had ousted dictatorial governments (with the exception of Haiti).

### Subversion and repression

Peru adopted a new constitution on 12 July 1979. When it came into effect in July 1980 it put an end to 12 years of military government and ushered in a period of constitutional democracy – which has now been interrupted. But despite the constitutional regime, Peru has been a source of serious concern to all those working for the promotion and protection of human rights.

For more than 12 years the country has been the victim of attacks by the

Shining Path guerrilla group, which originally operated in the southern highlands, in the Ayacucho and neighbouring departments, but which has now spread into other parts of the country, including Lima.

The Shining Path has clearly shown that it is an opposition group inspired by a kind of Messianic dogmatism which is difficult to understand in the contemporary world. Its objective is the destruction of the "bourgeois state". In such a context it is easy to understand why proposals for negotiations to establish peace in the country have not worked out – proposals which have been made by the government, the church and human rights organizations.

The methods practised by the Shining Path have been extremely violent and often indiscriminate – including such typical terrorist acts as car bombs in the streets of Lima – causing death and injury among the civilian population. The guerrillas have also carried out massacres in the sierra and acts of sabotage against infrastructures, for example electricity pylons and bridges.

Their other militant activities include capturing towns in rural areas mainly inhabited by indigenous peoples, holding compulsory meetings with settlers and shooting local officials (mostly indigenous persons) such as mayors, municipal councillors, magistrates, police and military officials.

It is undeniable that the Shining Path

has been able to strike a chord in the indigenous and peasant populations, a sector that has historically and traditionally been neglected by the central authorities and is the victim of obvious discrimination. This is the only explanation for the fact that, despite the heavy losses suffered at the hands of the armed forces, the Shining Path has always managed to recruit new members. Although recruitment is often forced, based on fear, this does not explain its constant increase. In recent years the recruitment of militant members has grown among the most underprivileged groups of the urban population.

Another armed group which opposes the government through acts of violence is the Tupac Amaru Revolutionary Movement, although it has much less political impact than the Shining Path.

The armed forces and police authorities have committed often illegitimate acts of repression against the members of the Shining Path as well as against those who support or allegedly collaborate with the organization or who simply view it with sympathy.

These disconcerting acts by the security forces have been made easier by the successive declarations of a state of emergency,<sup>1</sup> the gradual extension of the areas under a state of emergency and the systematic prolongation of the periods of application. The abuse of this practice and the distorted manner of its application since the country was placed under

political and military command, often to the detriment of the civil and even judicial authorities, are the most notorious aspects of the persistent violation of human rights and have helped to undermine the independence of the judiciary.

The struggle against subversion has led to repeated and persistent violations of human rights. There have been thousands of victims. In its most recent report to the UN Commission on Human Rights, the Working Group on Enforced or Involuntary Disappearances speaks of 2,497 cases of disappeared persons, reported by various sources since 1980. Of these cases, only 455 have been resolved. The Working Group reported 117 new cases for 1991. The torture and assassination of captured members of the Shining Path have become routine and the security forces have often carried out massacres in towns in the sierra. The UN Special Rapporteur on summary or arbitrary executions, S. Amos Wako (Kenya), also refers to hundreds of such cases which have occurred in Peru.<sup>2</sup>

The rural population is caught between two opposing forces – the government and the armed opposition groups – which has led to the exodus of large numbers of people towards urban areas in an attempt to escape the violence and repression. This is what international law recognizes as “internal population displacements”. Such movements have serious social consequences, since the peasants concerned swell the ranks of

<sup>1</sup> Declarations authorized by the constitution, which provides for the suspension of specific rights of the population and grants the executive branch increased powers (Article 231) in situations which threaten peace or internal order, in the event of catastrophe or any other serious circumstances affecting the life of the nation. A state of emergency was in force at the time of the coup in 86 provinces of 16 of the 24 departments of the country, i.e. 30 per cent of Peru and almost 50 per cent of the population.

<sup>2</sup> UN doc. E/CN.4/1992/198. It is estimated that the cases of “forced disappearance” are much more numerous than those reported.

those who live in poverty around the outskirts of Lima and other cities.

In this context mention should be made of the massacre on 18 June 1986 at the penitentiaries of Lurigancho, El Fronton and San Jorge in Lima and El Callao, which had been taken over by prisoners (mostly from the Shining Path). The government at that time ordered the military to intervene and gave the armed forces, backed up by the police, full powers to carry out their objective. The operation ended with the terrible result of more than 200 dead. In the Lurigancho prison all 124 insurgents died and evidence has been corroborated that many of them were killed after they had surrendered. At the island prison of El Fronton, where the navy intervened, captured prisoners were also allegedly executed. The inquiry into these deaths was finally transferred to the military courts, with the approval of the Supreme Court of Justice. The results of the inquiry have not been made known and no information is available on whether sanctions have been applied to those responsible for the deaths and the unnecessary and excessive acts of force.

In any analysis of the problems affecting Peruvian society, mention must also be made of the activities of the drugs trade. Peru is a producer of coca leaves (from which cocaine is extracted by a chemical process) and the illegal trade of drugs accounts for a considerable amount of money. As in other countries, well-established gangs often work with the complicity of government agents and military officials. In the rural areas where coca is grown – traditionally not for the production of cocaine – drug traffickers are especially active. Along with its attempts to destroy organized crime, the government has promoted the growing of substitute crops by peasants, although

the latter have not managed to achieve the same profit from the new crops.

All these factors have led to a spiral of violence and impunity in the country, which have helped to undermine public confidence in institutions. Matters are made worse by critical social problems and the fact that a large part of the population has fallen into absolute poverty. Without doubt this situation fostered the *coup d'état* and helps to explain the reaction of most Peruvians who, at least immediately after the event, supported the measures taken by President Fujimori.

## Economic and social situation

The drastic measures adopted by the Fujimori government to overhaul the economy and reduce the galloping inflation have been partly successful. The government has managed to lower the inflation rate substantially and thus protect the economy. But the success has been only partial in that the measures have led to a major reduction of expenditure on social items and development. Servicing the foreign debt also takes up a large part of the resources available to the state.

The competent inter-governmental organizations estimate that 70 per cent of the Peruvian population, i.e. almost 11 million persons, can be described as poor. This group includes persons who are unable to meet their essential needs in terms of food, health, education and clothing. Of the total population and included in the above figure, 30 per cent (almost 5 million people) are below the "extreme poverty" level. Illiteracy and child mortality rates are also extremely high.

The social situation is even more acute

in some areas of the highlands, for example in the department of Ayacucho and neighbouring regions.

## Clashes between authorities

Ever since he took office in July 1990 President Fujimori has waged a persistent and aggressive campaign to discredit the legislative and judicial branches, accusing them of corruption and of acting out of partisan interests, to the detriment of the national interest. The population also has a negative opinion of the work of both these branches.

Regarding the legislative branch, one of the arguments repeatedly used by President Fujimori was the supposed "blocking" by Congress of major initiatives proposed by the executive. It is true that of the 180 members of the Chamber of Deputies and the 60 members of the Senate, only 20 per cent shared the policy views of the President. But it is not true that this relationship prevented the President from governing. Such a situation is part of the ground rules of the democratic system. Furthermore, on 3 June 1991 the President obtained approval of Act 25.327, under which the Congress delegated legislative powers to the executive for a period of 150 days in order to "legislate in the interests of national pacification and to strengthen civil authority" throughout the country. During this period the President issued dozens of legislative decrees.

These texts give greater powers to the armed forces and the police in the fight against drug trafficking and subversion, both in areas declared to be under emergency and in other areas. The National Defence System has also been reorganized, with legal recognition being granted to self-defence committees and peasant

patrol groups, which can now obtain arms and munitions more easily. This is part of a strategy of using the civilian population as a shield against attacks by drug traffickers and subversive elements. However, the policy has been criticized by various NGOs and various sectors of society, which believe such a militarization of the civilian population to be dangerous. The President also approved amendments to the Penal Code, as well as new measures to eradicate the drugs trade, by tackling the areas used for the growing of coca leaves and the difference in the use of the land by peasants and drug traffickers. A study of these new standards shows that the concept of pacification advocated by the President has been based more on increasing the powers of the agents of repression than on the strengthening of civil authority, which is the essential premise of the delegation of legislative powers by Congress.

Act 25.327 established that legislative decrees would come into force only 30 days after their publication in the *Official Gazette*. During this period, the texts could be revised by Congress, which would also check conformity with constitutional standards. Congress exercised its powers and reviewed the texts, amending some of them. This led to a clash when President Fujimori subsequently refused to accept the amendments and vetoed them.

Another dispute arose when the Chamber of Deputies decided to summon President Fujimori's Economic Minister, Carlos Boloña, in order to answer questions concerning the government's economic policies.

Concerning the judiciary, the President had strongly criticized the way the administration of justice operated. He had referred publicly to the corruption of some

magistrates, to their complacency concerning well-known drug traffickers and terrorists whom they had released, to the "infiltration" of the Supreme Court by the People's American Revolutionary Alliance (APRA), which had blocked specific government measures on strictly political rather than legal grounds (reference was made to declarations of the unconstitutionality of some decrees issued by the President).

A further factor which helped to aggravate the conflict was the case of the former President of Peru, Alan García Pérez.<sup>3</sup> After the Fujimori government came to power it alleged that Mr. García had made illegal use of public funds and unlawful financial gain. Congress voted in favour of proceedings being initiated by the competent court – namely the Supreme Court – which would examine the allegations and determine the respective responsibility. After examining the evidence, the Supreme Court decided that there were no grounds for proceeding further. Mr. García was cleared of all responsibility and this clearly embarrassed the government.

It should be noted that, in pursuance of the above-mentioned delegation of legislative powers, the President promulgated important standards on the judicial system, such as amendments to the Penal Code, penal procedure and civil procedure. He also promulgated a basic law for the judiciary, which could have been used to establish an efficient, modern and independent administration of justice.

The final clash between the executive and the other branches of government

occurred on 31 March 1992. For the appointment of seven magistrates to the Supreme Court, the National Council of the Judiciary proposed to the President – in accordance with the law – seven sets of three names of magistrates so that the President could select the seven to be appointed, following ratification by the Senate. President Fujimori took the unprecedented step of vetoing all the proposed names and sent the files back to the Senate, on the argument that he could not accept them because the selection had been based on political affiliations.

It is easy to see how all these events gradually led to the establishment of an unhealthy climate which was detrimental to the stability and credibility of the country's institutions.

### Illegal dissolution of Parliament

President Fujimori said: "There has been no coup but simply a change in direction which reflects the will and aspirations of the Peruvian people."<sup>4</sup> But there is no doubt that a coup took place. President Fujimori was not authorized by the constitution to dissolve Congress in the way he did. Neither was he empowered to dismiss judges and magistrates of the Supreme Court and other courts, on the basis of what he called a "reorganization of the judiciary". And, of course, Peruvian law did not authorize him to suspend the constitution. In various resolutions the government appointed on a temporary basis a number of regional presidents throughout the country who replaced the authorities in

<sup>3</sup> Alan García Pérez, President of Peru from 1985 to 1990, continues to be the main figure and Secretary-General of the APRA, a party with a long tradition in the country.

<sup>4</sup> Statements to the press on 7 April 1992, published by *El País* (Madrid).

power. The university authorities were also removed.

Alberto Fujimori, an engineer, became President in July 1990 following free and legitimate elections, enabling him to have much greater support than the presidents who had preceded him. But the Peruvians gave their vote for him to govern subject to the constitution and the laws of the country, and not to put himself above those texts. Like any other citizen, the President too is subject to the law.

Articles 227, 228 and 230 of the Peruvian constitution regulate the only case in which the Chamber of Deputies may be dissolved by the President of the Republic, namely when it has "censured or expressed its lack of confidence in three Councils of Ministers". The dissolution decree must "include the convening of elections within a maximum limit of 30 days". Furthermore, "the Senate may not be dissolved" in any case or circumstance.

It is worth recalling the provisions of Article 82 of the constitution: "No one owes obedience to a usurping government or to those persons who assume public functions or powers in violation of the procedures established by the constitution and the law. The acts of any usurping authority are null and void. The people are entitled to rise up in defence of the constitutional order."

The government assumed legislative functions and began to function by legislative decree, issued by the President with the support of most members of the Council of Ministers. On 6 April the government promulgated Act 25.418, a legislative decree respecting the basis of the Emergency Government of National Reconstruction, which established the objectives of the government and referred to a "National Manifesto" read by President Fujimori on 5 April. The objectives

include the following:

- Reform of the constitution, to make it "an effective means of development". (President Fujimori subsequently announced that the reform would be submitted to a popular plebiscite.)
- "To moralize the administration of justice". Decrees were issued for the overall reorganization of the judiciary, the Court of Constitutional Guarantees, the National Council of the Judiciary, the Public Ministry and the Office of the Comptroller General. (It is clear that the executive branch does not have the powers to order such measures, since the system for the administration of justice is regulated by the constitution and by law and may not be modified according to the whim of the President.)
- "To modernize public administration", to make it an agent for productive activity.
- To bring peace to the country and apply drastic sanctions to terrorists.
- To wage a frontal attack on the drugs trade and corruption.
- To apply severe sanctions for acts of immorality and corruption in the public administration.
- To promote the market economy by encouraging national and foreign investment.
- To reorganize the social services (education, health, housing, job creation).

As one of the means for achieving these objectives, the executive branch is empowered to carry out the functions normally assigned to the legislative branch, issuing laws by legislative decree (Article 5). At the same time, the provisions of the constitution and laws which are not in harmony with the said legisla-



tive decree are suspended.

Article 6 states that the government "ratifies and respects treaties, conventions, pacts, agreements, contracts and other international commitments in force", although the measures adopted and those which were subsequently introduced actually violated several of these texts. For example, this included the American Convention on Human Rights, the International Covenant on Civil and Political Rights and an instrument that is not binding but establishes guidelines and fundamental principles for ensuring the proper functioning of justice, namely the Basic Principles on the Independence of the Judiciary (General Assembly Resolution 40/146 of 13 December 1985).

Along with the coup, the first measures introduced by force included the closing *manu militari* of all the offices of the judiciary and the arrest and detention of a number of political leaders, most of whom were members of APRA. The headquarters of this organization were searched and the former Minister of the Interior under the APRA government, Agustín Mantilla, was arrested and put on trial for the illegal possession of firearms (the official reports referred to a "partisan arsenal"). Former President García managed to escape arrest when the military officials went to his house. After hiding for 55 days, he sought asylum in the Colombian Embassy in Lima, which was granted immediately. He was provided with a document of safe conduct by the Peruvian authorities and on 2 June he left Lima in a Colombian Air Force plane.

Fortunately there was no loss of human life and the violence was limited to the actual act of the coup. The commanders in chief of the Army, Navy and Air Force and the chief of police immediately issued a communique expressing

their "firm endorsement and support" of the measures taken by the President.

Various statements made by President Fujimori in radio and television broadcasts and in interviews with the press showed considerable aggressiveness and animosity towards the "political parties" and called upon the institutional regime to put an end to "partidocracy". In remarks which discredited politicians and members of Parliament in general, President Fujimori ignored the fact that many of them had accompanied him in the elections which brought him to power and had supported his legislative initiatives. All this suggests that APRA, as a political organization, and its leaders were a central target of the coup. The *de facto* government has directed many of its actions against APRA and the judiciary.

### Independence of the judiciary

The coup shattered the independence of the judiciary, guaranteed by the constitution and various international instruments adopted by the Peruvian state. The attack on the judiciary was carried out during the early hours of the coup: the branch was prevented from functioning, troops with tanks and armoured vehicles were placed in front of the Palace of Justice and other offices of the Public Ministry. Soldiers prevented anyone from entering the buildings, including judges, prosecutors and officials. On the following days a large number of legislative decrees and ordinary decrees were issued which annihilated the judiciary branch and dismissed judges and magistrates throughout the country. During this "purge", on 8 April, the government issued legislative decree 25.419 which ordered the closing of the offices of the judiciary for

10 working days. Only "duty" criminal courts and prosecutor's offices were allowed to open. Judicial activities resumed in early May, with new magistrates appointed directly by President Fujimori.

The scope of the attack waged against the judiciary can be seen from the number of magistrates, judges and prosecutors dismissed by President Fujimori as of mid-May: 30 prosecutors and 137 magistrates and judges. In addition, the prosecutor general of the nation resigned as well as three magistrates of the Supreme Court and other judges.

In his letter of resignation, which was published in the press, Prosecutor General Pedro Méndez Jurado said he believed that the *de facto* government was incompatible with the functions which the constitution and the law entrusted to prosecutors – the defence of human rights, the fight against the drugs trade and criminality.

The legislative decree which dismissed 13 magistrates of the Supreme Court was based on alleged "misconduct, acts of proven immorality and partisan interests". Such accusations, coupled with the allegations of corruption, have been the focal point of the campaign waged by President Fujimori to discredit the judiciary. In his words, the Supreme Court and other courts and prosecutors' offices had been "infiltrated by APRA" and the magistrates had been acting in the political interests of this party.

The Centre for the Independence of Judges and Lawyers, which operates within the International Commission of Jurists, had already pointed out in a report by José Antonio Martín Pallín, who was then Prosecutor of the Supreme

Court of Spain and is now magistrate of that court, the existence of grave deficiencies in the administration of justice in Peru.<sup>5</sup> These deficiencies had not been corrected at the time of the coup. That being said, the accusations against judges and prosecutors contained in the legislative decree in question were never actually "proven". Equally serious is the fact that the dismissals of magistrates were ordered in all cases without providing the persons concerned with the indispensable right to defend themselves against the accusations. Such conduct is contrary to the provisions of the Basic Principles on the Independence of the Judiciary and the constitution of Peru.

A rapid and necessarily incomplete review of the legislative decrees adopted within the space of a few days shows to what extent the independence of the judiciary and its related institutions was compromised.

On 8 April, under legislative decree 25.420, the government dismissed the Comptroller General of the Republic, Luz Aurea Sáenz, ordering an inquiry into her actions and omissions that had been against the interests of the state. The Comptroller General is responsible for controlling the legality of the acts and contracts of the state.

On 9 April the government dismissed 13 members of the Supreme Court. Under the same legislative decree, it dismissed all eight members of the Court of Constitutional Guarantees (the appointment of the ninth member by Congress was pending), accusing them of having annulled, on the grounds of their unconstitutionality, certain decrees issued by the government. According to

<sup>5</sup> *Peru: la independencia del poder judicial*, report by the ICJ and CIJL, Geneva, 1989. See in particular its conclusions, p.75.

the President, these members had issued judgements "which had no legal or constitutional bases", with a view to "impeding the actions of the government". The same text also ordered the dismissal of all the members of the National Council of the Judiciary, alleging that they had shown partiality in drawing up the lists of sets of three candidates to fill posts in the judiciary and had "proposed candidates without merit or with partisan interests close to their own". The basis of these measures set forth in the above-mentioned legislative decree calls for no comment.

On 19 April the government dismissed three magistrates of the Agrarian Court and ordered an inquiry into their professional conduct. On 23 April it dismissed two other magistrates of the Supreme Court (and three magistrates resigned). On 24 April it dismissed 33 members of the Superior Court of Lima, 8 members of the Superior Court of El Callao, 6 superior prosecutors of Lima, 23 provincial prosecutors of Lima, one superior prosecutor of El Callao, 47 judges in Lima, 6 judges in El Callao and 10 judges sitting in juvenile courts in Lima. Under the same text an inquiry was ordered into the conduct of magistrates, judges and secretaries remaining in office, with special attention to be given to external signs of wealth by the said officials or their spouses.

On 25 April, under legislative decree 25.447, the government appointed 12 provisional magistrates of the Supreme Court. A new prosecutor general was appointed on 27 April.

On 28 April legislative decree 25.454 was issued which stipulated that during this period the appointment of magistrates to the Supreme Court shall not be subject to the requirements respecting minimum age or period of service in the

magistrature, the legal profession or the teaching of law, which had been established by the basic law respecting the judiciary promoted by the Fujimori government in December 1991. The purpose of the legislative decree was to "regulate" appointments which had been made by the government a few days before (legislative decree 25.447), in violation of the above-mentioned basic law.

The same legislative decree 25.454 completes the circle by establishing, in an unusual manner, that the protection provided for under the constitution shall not be granted for the purposes of questioning or impugning the dismissal of magistrates or prosecutors. In other words, such acts may not be questioned in any manner by the victims (or by third parties).

Legislative decree 25.455 of the same date established the new structure of the Supreme Court and the new procedure governing the appointment of judges at all levels.

Other standards concerning justice made other amendments to the code and penal legislation. Mention may be made of the following:

- Legislative decree 25.428 punishes all those persons reaping economic benefit from the drugs trade and the "laundering" of funds from such trade.
- Legislative decree 25.444 amends Article 361 of the Penal Code which sanctions the "usurping of public functions". This provision is clearly directed against the political opposition.
- Legislative decree 25.475 amends anti-terrorist legislation. It increases the punishment for such offences, including the establishment of life imprisonment; it affects and limits the right to defence (contrary to the provisions of

the American Convention on Human Rights, a mandatory text for Peru); it empowers the police to detain persons on simple suspicion and keep them incommunicado for long periods. By derogating and replacing the chapter on terrorism included in the Penal Code, it eliminates the offence of forced disappearance, a hitherto important concept which had been achieved thanks to the efforts of national NGOs and which has now been lost.

Legislative decree 25.421 also entrusted the national police with the control of the internal and external security and administration of penitentiaries.

## International reaction

On 9 April a majority of the Peruvian Parliament – 99 out of 180 members of the Chamber of Deputies and 36 out of 80 members of the Senate – met in Lima and declared the “moral incapacity” of Alberto Fujimori to exercise the presidency. They immediately entrusted the presidency to Carlos García García, the second Vice President of the Republic. The first Vice President, Máximo San Román, was in the Dominican Republic at the time of the coup, attending a meeting of the Inter-American Development Bank.

The President appointed by the Congress was obliged to seek diplomatic asylum in the Argentina Embassy in Lima, which was granted.<sup>6</sup> Once again deputies and senators met, this time in the College of Lawyers of Lima, to entrust

the presidency to Máximo San Román, who had returned to the country. These actions by the now former members of Parliament did not bother President Fujimori, who announced that a plebiscite would be organized to approve a new constitution and that elections would then be held for a new Congress in which the number of seats of deputies and senators would be substantially reduced.

On 8 June President Fujimori took other repressive measures. He ordered a curfew in Lima from 10 p.m. to 5 a.m., granted new budgetary allocations to the security forces to “combat subversion” (in the meantime there had been several fatal attacks, including the destruction by explosives of a police station and a television station) and made provisions for the establishment of citizen “security brigades”. This last measure involved the militarization of thousands of inhabitants of the metropolitan area, providing them with arms and munitions to combat possible “terrorist attacks”. Officials of the Armed Forces were to train and direct these brigades, similar to the “peasants’ patrols” that have been set up in rural areas and which have repeatedly been accused of being responsible for serious acts of abuse against the rural population.

International reaction was widespread but, at the time this article was written, not very effective. Governments inside and outside the region condemned the coup one after the other.

The European Parliament denounced the coup on 9 April. A special meeting of Ministers of Foreign Affairs of 34 nations was convened in May by the Organization of American States (OAS), which

<sup>6</sup> However, Carlos García García left the Argentina Embassy on 18 April without harassment from the *de facto* authorities.

condemned the events in Peru and made an appeal to the authorities to re-establish as a matter of urgency the institutional and democratic order. Other action by the OAS included visits to Peru by the President of the International Commission on Human Rights and a delegation comprising the Secretary General of the OAS and the President of the ad hoc meeting of Ministers of Foreign Affairs. The case was examined once again during the General Assembly of the OAS in the Bahamas, which convened on 18 May 1992 and urged the authorities to return to the system of representative democracy within the shortest possible period of time. However, all the statements, actions and measures by the OAS to date have been excessively cautious and have lacked the necessary forcefulness to bring any real pressure on the *de facto* government and oblige it to return to the rule of law.

## Conclusion

The constitutional order of Peru has been overturned and there has been a very serious violation of democratic rights. The *coup d'état* carried out by

Alberto Fujimori marks a crucial step backwards for the country and is an affront to democracy throughout the continent.

The painful social situation affecting a large part of society and the levels of extreme poverty into which hundreds of thousands of Peruvians are plunged will not be resolved by force or by concentrating political power into the hands of the President. Nor will it be resolved by the other branches of state power thwarting the actions of the executive branch. Such a situation is precisely the antithesis of a state based on the rule of law.

There is nothing to suggest that a dictatorship based on force will be able to lift Peru out of the deplorable situation to which it has been brought. In fact, such a dictatorship may well have a negative effect and help encourage destabilizing forces, such as the Shining Path and the Tupac Amaru, to take advantage of the situation to try to "legitimize" their campaigns against what is now a *de facto* regime.

Latin America has already suffered under authoritarian regimes, both military and civilian, and has experienced the nefarious consequences of such regimes on human rights and fundamental freedoms.

## The Security Council: The New Frontier

*Theo van Boven\**

### Introduction

In recognition of the new, favourable circumstances under which the United Nations Security Council has begun to fulfil more effectively its primary responsibility for the maintenance of international peace and security, the Council held a special meeting on 31 January 1992 at the level of Heads of State and Government.

Most world leaders at the meeting made reference to human rights as an issue of concern to the international community. Some favoured a more explicit role for the Security Council in human rights matters while others warned against intervention in internal affairs and pleaded for a very cautious approach.<sup>1</sup> Of particular interest is the statement by Zimbabwe Foreign Minister Nathan M. Shmuyarira, the personal emissary of Zimbabwe President Robert Mugabe:

"In the era we are entering, the Council will be called upon to deal more and more with conflicts and humanitarian situations of a domestic nature that could pose threats to international peace and stability. However, great care has to be

taken to see that these domestic conflicts are not used as a pretext for the intervention of big powers in the legitimate domestic affairs of small states, or that human rights issues are not used for totally different purposes of destabilizing other governments. There is, therefore, the need to strike a delicate balance between the rights of states, as enshrined in the Charter, and the rights of individuals, as enshrined in the Universal Declaration on Human Rights. Zimbabwe supports very strongly both the Universal Declaration and the Charter on these issues. Zimbabwe is a firm subscriber to the principles in the United Nations Declaration on Human Rights. However, we cannot but express our apprehension about who will decide when to get the Security Council involved in an internal matter and in what manner. In other words, who will judge when a threshold is passed that calls for international action? Who will decide what should be done, how it will be done and by whom? This clearly calls for a careful drawing up and drafting of general principles and guidelines that would guide decisions on when a domestic situation warrants international action, either by the Security

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<sup>1</sup> UN doc. S/3046.

Council or by regional organizations. This could be one of the tasks this Council could entrust to the Secretary-General."

In their concluding statement the Heads of State and Government stressed the increased responsibility of the Security Council in the maintenance of international peace and security by also drawing attention to the non-military dimensions of the problem, thus stretching the notion of the threat to peace. They stated notably: "The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."<sup>2</sup>

There are good reasons to look into the role of the Security Council in human rights and related matters. It is evident that conflict situations involving the Security Council entail serious human rights and humanitarian problems which require urgent attention. Recent actions of the Security Council addressed the human rights and humanitarian aspects in El Salvador, Cambodia, Iraq (Kurdish population), Yugoslavia and Somalia, and proved that the Security Council may be instrumental in the exercise of protection and relief functions when fundamental human rights, in particular the right to life, are at stake.

Compared with most other international bodies, including bodies with a special human rights mandate, the Security Council possesses unmatched potential in terms of political weight, prompt deliberation, expeditious decision-making and setting political and operational tools

into motion. The authority of the Council was underscored by an International Court of Justice decision on 14 April 1992, based on the premise that obligations resulting from decisions of the Security Council in accordance with Article 25 of the UN Charter prevail over obligations under any other international agreement.<sup>3</sup> Unlike most UN policy organs, the Security Council can meet on very short notice so as to respond to emergencies and the Council is able to function continuously. Most significantly, the Security Council has the powers to utilize, in concert with the Secretary-General, a broad range of political means and operational tools, including making appeals to states, sending fact-finding or good offices missions, securing an international presence through observers and peacekeeping operations, encouraging regional arrangements and recommending procedures for peaceful solutions.<sup>4</sup> Moreover, the Council may act under Chapter VII of the Charter and decide upon enforcement measures when it deems that a situation or a conflict constitutes a threat to the peace, breach of the peace or act of aggression.

It is clear that the Council has unique and enormous potential at its disposal which, given the necessary political will and the appropriate circumstances, can be put into operation for the sake of human rights, human rights related matters and humanitarian causes. At the same time, since the Security Council is a master of its own decisions and may make extensive use of its authority in a politi-

<sup>2</sup> UN doc. S/23500.

<sup>3</sup> International Court of Justice, Request for the Indication of Provisional Measures in the Case of Libyan Arab Yamahiriya v. United States of America (Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie).

<sup>4</sup> See B.G. Ramcharan, The Security Council and Humanitarian Emergencies, *Netherlands Quarterly of Human Rights*, Vol. 9, No. 1 (1991), pp. 19-35.

cal climate dominated by one superpower, there is a good deal of merit in the desire expressed by Zimbabwe that criteria and guidelines be drawn up which the Council may take into account when dealing with domestic conflicts.

For the purpose of assessing the role of the Security Council in human rights and related matters, the following issues will be reviewed. First, some cases with a clear human rights focus brought to the attention of the Security Council. Second, actions taken in situations characterized by the struggle for self-determination in the decolonization context, including action against apartheid. Third, actions taken with respect to the observance of principles and rules of humanitarian law applicable in international armed conflicts. Fourth, identification of human rights and humanitarian concerns in the actions taken by the Security Council and international standards relied upon by the Security Council. Fifth, recent approaches and actions broadening the Council's involvement in human rights matters. Sixth, prospects for the future.

### **A clear human rights focus**

Occasionally, certain reports or records make reference to specific human rights cases or human rights concerns brought to the attention of the Security Council. The instances of such cases and concerns which came to my knowledge constitute probably a small fraction of the totality of human rights appeals made to the Council. Whatever the numbers might have been, it is certain that the Council did not take any public action with re-

spect to such cases and concerns. Thus, on 9 July 1963, the USSR stated in a letter to the Security Council that large-scale military operations were being launched against the Kurdish people in northern Iraq and in a parallel action the USSR requested that an item entitled "Policy of genocide which is being pursued by the Government of the Republic of Iraq against the Kurdish people" be placed on the agenda of the Economic and Social Council. The Security Council and the Economic and Social Council did not take up the matter because the issue in northern Iraq was considered a purely domestic matter.<sup>5</sup>

On 29 January 1969 the US Ambassador to the United Nations wrote a letter to the President of the Security Council concerning the public execution of 14 persons convicted for espionage in Iraq. The United States said that "the manner in which these executions and the trials that preceded them were conducted scarcely conforms to normally accepted standards of respect for human rights and human dignity or to obligations in this regard that the UN Charter imposes upon all members." There is no evidence that the Security Council dealt with the matter, but Secretary-General U Thant did express public concern.<sup>6</sup>

On 8 April 1979 the Secretary-General of Amnesty International, Martin Ennals, urged the UN Secretary-General in a letter to use Article 99 of the Charter to convene a meeting of the Security Council that would consider urgent measures to stop a wave of political executions and murders across the world. The UN Secretary-General replied that "invocation of Article 99 is not the most appropriate way

<sup>5</sup> *Yearbook of the United Nations*, 1963, pp. 73-74.

<sup>6</sup> Lillich and Newman, *International Human Rights*, 1979, p. 18-20.



of dealing with the problem since that article deals explicitly and exclusively with matters involving international peace and security".<sup>7</sup>

On 8 September 1988, Amnesty International issued an appeal to the Security Council "to act immediately to stop the massacre of Kurdish civilians by Iraqi forces". There is no public record of any consideration of this appeal by the Security Council.<sup>8</sup>

On 12 March 1989 the human rights organization Article 19 wrote to the President and the members of the Security Council in connection with the death threat against author Salman Rushdie. The letter said that "the Security Council has a long-standing practice of rapid intercession in order to ameliorate situations which may endanger international peace and security as well as to act for the lives of individuals who are in imminent danger". This phrase was apparently an implicit reference to many appeals made by the Security Council to the government of South Africa to commute death sentences pronounced against anti-apartheid fighters. Again, there is no public record of any consideration of this appeal by the Security Council.<sup>9</sup>

## Struggle for self-determination

One of the most prominent features in the historical record of the United Nations is its support for the termination of

colonialism and all practices of segregation and discrimination associated therewith. This stand in favour of peoples struggling for self-determination found clear expression in the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>10</sup> and in numerous resolutions adopted by UN organs with respect to particular situations. In situations of conflict between peoples striving for independence and their colonial rulers, the UN position was not one of neutrality but of partisanship in favour of the dependent peoples. This position is also reflected in actions by the Security Council, but the Council had to remain within the political limits set by the Western veto powers. Whenever the Council, acting in a decolonization context, took decisions with direct human rights aspects, the human rights factor was not the central concern of the Council but rather a by-product. At the same time it must be acknowledged that the right to self-determination is intimately linked with the realization of human rights but is certainly not limited to the decolonization context alone. The following cases and situations illustrate some of the Council's human rights concerns, which have to be perceived, however, in the broader political context of decolonization.

In 1948, the Security Council made repeated calls on the Netherlands to release the President of the Republic of Indonesia and all other political prisoners.<sup>11</sup>

With respect to South West Africa/

<sup>7</sup> B.G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights*, 1988, pp. 101-102.

<sup>8</sup> B.G. Ramcharan, note 5, p. 19.

<sup>9</sup> B.G. Ramcharan, note 5, pp. 19-21.

<sup>10</sup> Adopted by General Assembly Resolution 1514(XV) of 14 December 1960.

<sup>11</sup> Resolutions 63 and 64 of 24 and 28 December 1948. Also see Karel C. Wellens (ed), *Resolutions and Statements of the United Nations Security Council (1946-1989): A Thematic Guide*, 1990.

Namibia the Council reaffirmed that continued detention, trial and subsequent sentencing constituted an illegal act and flagrantly violated the rights of the South West Africans concerned as well as the Universal Declaration of Human Rights and the international status of the territory under direct UN responsibility.<sup>12</sup> The Council demanded repeatedly that South Africa, pending the transfer of power, fully comply in spirit and in practice with the provisions of the Universal Declaration of Human Rights and release all Namibian political prisoners.<sup>13</sup>

In numerous resolutions concerning the territories under Portuguese administration the Security Council affirmed and reaffirmed the right of the peoples concerned to self-determination and called for unconditional political amnesty, the free functioning of political parties and the restoration of democratic political rights.<sup>14</sup>

Of particular importance were the actions of the Security Council with respect to Southern Rhodesia after the proclamation of independence by the white minority regime in that territory. The Council determined that the situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia was extremely grave and that its continuance in time constituted

a threat to international peace and security.<sup>15</sup> This opened the way to a formal decision by the Security Council to take enforcement measures under Chapter VII of the UN Charter.<sup>16</sup> In later resolutions<sup>17</sup> the Security Council condemned all measures of political repression – including arrests, detention, trials and executions – which violate fundamental freedoms and rights of the people of Southern Rhodesia. Some commentators invoke the Southern Rhodesia case in support of the contention that the Security Council considers gross and systematic violations of human rights as a threat to international peace and security.<sup>18</sup> Such a contention, however, cannot be based on the relevant Rhodesia resolutions of the Security Council. Careful reading of these resolutions brings out that the Security Council considered the situation a threat to international peace and security because the illegal authorities were blocking the process towards self-determination of the people of Southern Rhodesia – and not because of gross and systematic violations of human rights.

The apartheid policy of South Africa, more than any other situation, prompted the Security Council to take action on human rights and related aspects. The Western permanent members had always

<sup>12</sup> Resolution 246 of 14 March 1968.

<sup>13</sup> Resolution 366 of 17 December 1974.

<sup>14</sup> Resolutions 180 of 31 July 1963, 183 of 11 December 1963, 218 of 23 November 1965 and 321 of 23 October 1972.

<sup>15</sup> Resolution 217 of 20 November 1965.

<sup>16</sup> Resolution 232 of 16 December 1966.

<sup>17</sup> Resolution 253 of 29 May 1968 and resolution 277 of 18 March 1970.

<sup>18</sup> See Thomas M. Franck, *The Emerging Right to Democratic Governance*, *American Journal of International Law*, Vol. 86 (1992), pp. 46-91. He wrote: "Security Council Resolution 253 invokes Chapter VII of the Charter to impose military sanctions on Rhodesia. It expressly proceeded on the theory that gross denials of both human rights and the democratic entitlement can constitute 'a threat to international peace and security.'"

refused to consider South Africa in the decolonization context and prevented the Security Council from adopting language to that effect. However, on political and moral grounds, they could not prohibit the Security Council from considering the implications and the consequences of the apartheid policy for the whole population of South Africa and the effects of that policy on neighbouring countries. The large-scale killings of unarmed and peaceful demonstrators at Sharpeville on 21 March 1960 led to the first Security Council resolution relating to apartheid in South Africa, which alluded that the situation, if it continued, might endanger international peace and security.<sup>19</sup> These references to international peace and security were repeated in later Security Council resolutions until the Council acted under Chapter VII of the UN Charter and determined, having regard to the policies and acts of the South African government, that the acquisition by South Africa of arms and related *matériel* constitutes a threat to the maintenance of international peace and security.<sup>20</sup> It appears that the mandatory arms embargo imposed by the Security Council on South Africa under Chapter VII of the UN Charter was mainly prompted by the aggressive actions of South Africa to destabilize the frontline states, rather than by the repressive domestic policies of the South African rulers.

In keeping with the consistent stand of the United Nations against the apartheid policy, the Security Council branded apartheid as a crime against the conscience and dignity of mankind and incompatible with human rights and dignity, the UN Charter and the Universal Declaration of Human Rights.<sup>21</sup> The Security Council acted in numerous instances where human rights of political opponents, in particular the right to life and the right to physical liberty, were at stake. Also the Council pressed for the legitimate exercise of political rights by all South Africans.

As regards the right to life, the Security Council strongly condemned the massacres in Sharpeville and Soweto,<sup>22</sup> the deaths of detainees, notably the death of Steve Biko,<sup>23</sup> and the executions of persons sentenced to death.<sup>24</sup> The Council made numerous urgent appeals to the South African authorities, in resolutions or in statements by its President, to commute death sentences pronounced against members of the African National Congress.<sup>25</sup> The Council pleaded on many occasions for the release of political prisoners, among them Nelson Mandela, the termination of political trials and the granting of immediate amnesty to all persons detained or on trial.<sup>26</sup> In connection with the legitimate exercise of political rights and freedoms, the Security Council requested the abrogation of the

<sup>19</sup> Resolution 134 of 1 April 1960.

<sup>20</sup> Resolution 418 of 4 November 1977.

<sup>21</sup> Resolution 473 of 13 June 1980.

<sup>22</sup> Resolution 392 of 19 June 1976.

<sup>23</sup> Resolution 417 of 31 October 1977.

<sup>24</sup> Resolution 190 and 191 of 9 and 18 June 1964.

<sup>25</sup> See resolutions and statements in Wellens (note 14), pp. 178-180.

<sup>26</sup> Resolutions 190 and 191 of 9 and 18 June 1964, Resolution 417 of 31 October 1977, Resolution 473 of 13 June 1980 and Resolution 560 of 12 March 1985.

bans on organizations and news media opposed to apartheid.<sup>27</sup> With reference to Article 21 of the Universal Declaration of Human Rights, it reaffirmed that only the total eradication of apartheid and the establishment of a non-racial democratic society based on majority rule, through the full and free exercise of adult suffrage by all people in a united and unfragmented South Africa, can lead to a just, equitable and lasting solution.<sup>28</sup>

### International armed conflicts

With regard to international armed conflicts<sup>29</sup> it is an obvious task of the Security Council to bring about an end to the hostilities and to achieve a just and peaceful settlement. But in this connection the Council is also concerned that "essential and inalienable human rights should be respected even during the vicissitudes of war."<sup>30</sup> The Council has repeatedly called upon parties in an armed conflict and on occupying powers to respect the humanitarian principles and provisions contained in the Geneva Conventions of 12 August 1949 and in other relevant international instruments. Thus, during the India-Pakistan conflict the Security Council called upon those con-

cerned to take all necessary measures to preserve human life, to observe the Geneva Conventions and to apply in full their provisions as regards the protection of the wounded and sick, prisoners of war and civilian populations.<sup>31</sup>

The war between Iran and Iraq and its aftermath generated disturbing violations of principles and rules of humanitarian law: military operations against civilian targets, the use of chemical weapons, excessive delays in the exchange of prisoners of war. The Security Council called for the immediate cessation of all military operations against civilian targets, including city and residential areas,<sup>32</sup> and it condemned vigorously the continued use of chemical weapons contrary to the obligations under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare of 17 June 1925, to which both countries are parties.<sup>33</sup>

In the series of resolutions adopted by the Security Council in reaction to the occupation of Kuwait by Iraq,<sup>34</sup> the Council dealt quite extensively with humanitarian and human rights aspects. It urged the release of all hostages.<sup>35</sup> It requested that all distribution of food be undertaken by humanitarian organiza-

<sup>27</sup> Resolution 417 of 31 October 1977.

<sup>28</sup> Resolution 556 of 23 October 1984.

<sup>29</sup> See also Theo van Boven, *Reliance on Norms of Humanitarian Law by United Nations Organs, in Humanitarian Law of Armed Conflict; Challenges Ahead*, edited by A.J.M. Delissen and G.J. Tania, 1991, pp. 495-513.

<sup>30</sup> Resolution 237 of 14 June 1967, adopted in connection with Six-Day War in Middle East.

<sup>31</sup> Resolution 307 of 21 December 1971.

<sup>32</sup> Resolution 540 of 31 October 1983.

<sup>33</sup> Resolution 582 of 24 February 1986, Resolution 598 of 20 July 1987 and Resolution 612 of 9 May 1988.

<sup>34</sup> See *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, by Walter Kälin, Special Rapporteur of Commission on Human Rights, UN doc. E/CN.4/1992/26.

<sup>35</sup> Resolution 664 of 18 August 1990.

tions such as the UN specialized agencies and the International Committee of the Red Cross.<sup>36</sup> The Council also demanded that Iraq cease and desist from taking third-state nationals hostage, mistreating and oppressing Kuwaiti and third-state nationals and any other actions that violate, *inter alia*, the Fourth Geneva Convention of 1949.<sup>37</sup>

For about 25 years the Security Council has attempted to promote a just and lasting solution to the Arab-Israeli conflict, which takes into account the right to security of all states in the region, including Israel, as well as the legitimate political rights of the Palestinian people. As a matter of principle the Security Council, like all other UN bodies dealing with the situation in the Occupied Territories, has time and again affirmed that the Fourth Geneva Convention is applicable to all the territories occupied by Israel since 1967. Among the many resolutions adopted by the Security Council on the Occupied Territories, quite a number address incidents and practices which have immediate human rights and humanitarian law implications: the killing of persons, the deportation of civilians, the continued building of Israeli settlements. The Council condemned the acts of violence committed by Israeli security forces on 8 October 1990 at Haram al Sharif, or Temple Mount, in Jerusalem when 20 Palestinians were killed and more than 150 people were injured, among them Palestinian civilians and innocent worshippers.<sup>38</sup> On many occasions the Council deplored the deporta-

tion or the expulsion by the occupying power of Palestinian political leaders from the Occupied Territories.<sup>39</sup> And the Council ruled that the establishment by Israel of settlements in the territories occupied since 1967 seriously violates the Fourth Geneva Convention.<sup>40</sup>

## Humanitarian concerns

The above review brings out a representative pattern of situations and cases which traditionally involved the Security Council and which led to decision-making by the Council: the struggle against colonialism, action against apartheid, international armed conflicts and the regime in Occupied Territories. It should be noted that the Security Council did not necessarily act as a matter of course, but that the question of whether to act and in what manner depended on special political factors and interests, in particular the political interests of the permanent members who have veto power. Against this background of contextual situations and political factors, one can identify a number of special human rights and humanitarian concerns which form a notable feature in Security Council actions. These human rights and humanitarian concerns are manifested in:

- Concern for victims as a result of massacres, indiscriminate killings, unlimited use of force and violence (South Africa, Israeli Occupied Territories, Iran-Iraq).

<sup>36</sup> Resolution 666 of 14 September 1990.

<sup>37</sup> Resolution 674 of 29 October 1990.

<sup>38</sup> Resolution 672 of 12 October 1990.

<sup>39</sup> Resolutions 607 and 608 of 5 and 14 January 1988, Resolution 681 of 20 December 1990.

<sup>40</sup> Resolution 452 of 20 July 1979 and Resolution 465 of 1 March 1980.

- Urgent appeals in cases of imminent executions (South Africa).
- Appeals for the release of political prisoners and opponents (Indonesian question, South Africa, South West Africa/Namibia, Southern Rhodesia, Portuguese Territories).
- Calls for the legitimate exercise of political rights and freedoms (South Africa, Portuguese Territories).
- Protection of civilians, prisoners of war, the wounded and sick (Arab-Israel conflict, Iran-Iraq, India-Pakistan, Iraq-Kuwait).
- Condemnation of the use of chemical weapons (Iran-Iraq).
- Urging the release of hostages and the end of hostage-taking (Iraq-Kuwait).
- Calls for the cessation of deportations, expulsions and illegal settlements (Israeli Occupied Territories).

As a political organ, the Security Council appears to be reluctant to invoke instruments of human rights law. With regard to situations in South Africa and in South West Africa/Namibia, the Council did occasionally rely on the UN Charter and on the Universal Declaration of Human Rights as the legal, political and moral basis for its actions. But in general the Council is not explicitly invoking human rights standards for sustaining human rights concerns. On the other hand, the Council feels it is on safe and solid ground by referring quite frequently to legal instruments in the area of the law of armed conflicts and humanitarian law. As we observed, the Geneva Conventions of 1949 form part of the familiar vocabulary of the Security Council and the 1925 Geneva Protocol figured prominently in Iran-Iraq resolutions.

## Recent approaches and actions

Thanks to the favourable international circumstances of recent years, the Security Council is playing an increasingly prominent role in bringing peace to countries and regions stricken by internal divisions, violent internal strife and civil war. Evidently these peacemaking and peacekeeping efforts have human rights implications and it is important to note that the Security Council, acting in concert with the UN Secretary-General, takes the human rights dimension into account as an integral part of the peace process in the countries concerned. Two cases in point are El Salvador and Cambodia, whose populations have gone through a nightmare of massive and gross violations of human rights during the last two decades.

The Security Council decided to establish under its authority, based on the recommendations of the Secretary-General, a United Nations Observer Mission in El Salvador (ONUSAL) to monitor all agreements, including the agreement on human rights, concluded between the government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN).<sup>41</sup> As part of ONUSAL a special human rights component was created, composed of a director, a team of experts on human rights, a team of human rights investigators, and legal, judicial and police advisers, as well as a team of educators on human rights. The task of the human rights component of ONUSAL was broadly categorized as follows: (a) active monitoring of the human rights situation in El Salvador, (b) investigation of specific cases of alleged violations of human rights, (c) promotion of

<sup>41</sup> Resolution 693 of 20 May 1991.

human rights in El Salvador, (d) recommendations to eliminate violations and promote respect for human rights, (e) reports to the Secretary-General and, through him, to the Security Council and the General Assembly.<sup>42</sup> Detailed reports with conclusions and recommendations are being submitted bimonthly.<sup>43</sup>

In Cambodia the United Nations is engaged, under the authority of the Security Council, in a full-scale peacekeeping operation with an important human rights component. The Security Council expressed its desire to contribute to the restoration and maintenance of peace in Cambodia, to the promotion of national reconciliation, to the protection of human rights and to the assurance of the right to self-determination of the Cambodian people through free and fair elections.<sup>44</sup> For this purpose the United Nations Transitional Authority in Cambodia (UNTAC) was established by the Security Council in accordance with a plan submitted by the Secretary-General. This plan contains a human rights component, an electoral component, a military component, a civil administration component, a police component, a repatriation component and a rehabilitation component.<sup>45</sup> The tasks of the human rights component include making provisions for the development and implementation of an education programme, the exercise of general human rights oversight and the investigation of complaints and allegations of abuses and, where appropriate, corrective action. To this end a human rights office was established as part of

UNTAC, which includes specialists in human rights advocacy, civic education and investigation, as well as an officer in charge of liaison with human rights NGOs.

While the actions of the Security Council in connection with El Salvador and Cambodia are vital contributions to a comprehensive and protracted peace process in these countries, the Council has recently taken up emergencies having grave consequences for human life. This was notably the case with the beleaguered Kurdish population of Iraq in the aftermath of the Gulf crisis. The Kurds were confronted with murderous military attacks by the Iraqi army, causing large-scale human suffering and massive flows of refugees towards and across international borders. In an unprecedented action the Security Council condemned the repression of Iraqi civilians in many parts of Iraq, including the Kurdish populated areas. The Council demanded that Iraq end this repression and allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq.<sup>46</sup> It should be noted that in this instance the Security Council construed the repression of Iraqi civilians, in particular the Kurds, and the ensuing refugee flows across international borders as a threat to international peace and security in the region and consequently as a basis for action under Chapter VII of the UN Charter. It should further be noted that the Council's concern was also directed at the issue of humanitarian assistance so that this as-

<sup>42</sup> *Report of the Secretary-General, Central America: Efforts Towards Peace*, UN doc. S/22494.

<sup>43</sup> First three reports of ONUSAL Human Rights Division are in UN docs. S/23037, S/23222 and S/23580.

<sup>44</sup> Resolution 745 of 28 February 1992.

<sup>45</sup> Report of the Secretary-General on Cambodia, UN doc. S/23613 and Add 1.

<sup>46</sup> Resolution 688 of 5 April 1991.

sistance should reach all those in need. For a full appreciation of the Council's action in this case, all the circumstantial factors should be taken into account – in particular that Iraq was put under a sort of tutelage of the United Nations as a result of its aggression against Kuwait and all subsequent events. Therefore, this author agrees with a commentator who, after careful analysis of the circumstances which led to the adoption of Resolution 688, stated that "the precedent value of this resolution with regard to a more active role of the Security Council under Chapter VII in cases of gross violations of human rights threatening international peace should not be overestimated, although it will certainly serve as an important reference in the future for other cases."<sup>47</sup>

In coping with the grave situations in Yugoslavia and in Somalia, the United Nations has embarked upon a course of action which follows a pattern somewhat similar to the cases previously discussed. The Security Council characterized both conflicts in terms of heavy loss of life and the magnitude of human suffering, and it expressed concern that continuation of both situations constituted a threat to international peace and security. Under Chapter VII of the UN Charter, it decided that all states shall, for the purposes of establishing peace and stability in the two respective countries, immediately implement a general and complete embargo on all deliveries of weapons and military equipment.<sup>48</sup> Again, the Security

Council decided to establish, under its authority and in concert with the Secretary-General, a peacekeeping force: the United Nations Protection Force for Yugoslavia (UNPROFOR)<sup>49</sup> and the United Nations Operation in Somalia (UNOSOM).<sup>50</sup> In Somalia's case the Secretary-General and the Security Council stressed the urgent need for the unimpeded delivery of humanitarian assistance to the affected population.

### What are the prospects?

In the traditional practice of the Security Council, human rights considerations and human rights aspects were certainly not a central concern. If such considerations and aspects played a role at all, they were a by-product in the Council's preoccupations and tasks with regard to the maintenance or restoration of international peace and security. In more recent years, largely as a result of change in the overall political climate, new insights, new emphases and new understandings are emerging. The limits of domestic jurisdiction are receding in favour of international concern for human rights. The awareness is growing that promotion and protection of human rights is an integral part of peacemaking and peacekeeping.

It is also increasingly perceived that intra-state conflicts often cause more intense and more widespread human suffering than inter-state conflicts and that

<sup>47</sup> Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, *European Journal of International Law*, Vol. 2, No. 2, p. 129.

<sup>48</sup> Resolution 713 of 25 September 1991 (Yugoslavia), Resolutions 733 of 23 January 1992, 746 of 17 March 1992 and 751 of 24 April 1992 (Somalia).

<sup>49</sup> Resolution 743 of 21 February 1992.

<sup>50</sup> Resolution 751.



intra-state conflicts, by their repercussions on neighbouring countries or on the region, may affect international peace and security. In this regard the previous UN Secretary-General, Javier Pérez de Cuéllar, aptly observed: "Today, in a growing number of cases, threats to national and international security are no longer as neatly separable as they were before. In not a few countries, civil strife takes a heavy toll on human life and has repercussions beyond national borders."<sup>51</sup> These new tendencies and new approaches are reflected in actions undertaken by the Security Council during 1991 and 1992.

The question now arises: What are the prospects for the Security Council to play a more instrumental role in the cause of human rights? When asking this question, it should not be understood that the Security Council would assume functions already performed by other Charter based organs of the United Nations or by human rights treaty bodies. The role of the Security Council should be perceived in relation to human rights situations where other organs are not equipped to act expeditiously and effectively, such as in emergency situations. Here, the potential of the Security Council is unique. But at the same time one has to be aware that the Council, by its very nature and its mandate, has a more open eye for the *raison d'état* than for the rights of peoples and individuals. In a conflict between political expedience and moral demands, the political factor is likely to prevail. Nevertheless, recent practice of the Security Council reveals three tendencies

which, separately or in conjunction, provide new insights and new directives for future action.

- First, the recognition that in peace-making and peacekeeping efforts the human rights component is an essential part of the operation. Therefore, in the preparation and implementation of such operations special provisions have to be made to promote and protect human rights.
- Second, the recognition that under no circumstances can essential humanitarian assistance, such as the delivery of food and medicine, be prevented from reaching the victims of man-made or natural disasters and that enforcement action on the part of the United Nations may be warranted to achieve that goal.
- Third, the recognition that large-scale violations of the right to life, causing an actual or imminent heavy toll of human lives, constitute a threat to the stability, peace and security in a region and may require enforcement action under Chapter VII of the UN Charter.

It is obvious that a further evolution of the role of the Security Council in human rights and related matters should have consequences for the UN human rights programme, which is understaffed and concentrated in Geneva, separated from the political centre of the United Nations.

This is a "domestic" question within the UN structure, demanding an urgent and bold review in expectation of the needs and the challenges ahead.

<sup>51</sup> *Report of the Secretary-General on the Work of the Organization*, September 1990, UN doc. A/45/1, section IV.

# The Security Council: Maturing of International Protection of Human Rights

*B.G. Ramcharan\**

## Introduction

The potentialities and limits of the United Nations are being tested these days as never before in its history. The allure of a new international order entices the constituencies of the world body. The maintenance of peace, the promotion of development, the enforcement of human rights are the goals still sought, even as the world is tormented by new conflicts, growing poverty and severe violations of human rights. The Security Council has been kept busy. International and internal conflicts, ethnic and tribal clashes, minority problems, terrorism, humanitarian and other emergencies have competed for its attention. It has determined that the international ramifications of internal oppression breached the peace, has established United Nations protection forces to watch over the security of minority enclaves and has considered means of securing the supply of humanitarian assistance to populations in distress. These are heady days for the Council and the UN community. Debates abound about the right to humanitarian assistance. Doctrines of humanitarian intervention have returned to fill the pages of newspapers and journals and even to occupy time and attention in international fora.

How – the human rights movement asks understandably – can the Security Council be used to enforce human rights, particularly when violations of those rights threaten or cause breaches of international peace and security? The human rights movement argues, quite properly, that threats to or breaches of international peace and security ultimately boil down to violations of human rights, civil and political or economic, social and cultural. How, then, can the Security Council not gear itself to deal with the human rights root causes of conflicts? How will the Security Council respond to the growing number of internal conflicts that have their origins in ethnic, tribal or minority problems? The questions are well put.

There are those who will reply, however, that the Security Council is the pre-eminent authoritative body in the United Nations, carrying out the most important political and security functions and that it would be unwise to dissipate the efforts of the Council or to expect it to take on the whole gamut of human rights problems. One should not expect – it is asserted by this school of opinion – order or neatness in the activities of the Security Council. One should expect it to act as best it can, bearing in mind the complexities of the political order of things

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in the world, dealing with such situations as it can agree to deal with and making the best of things.

Two conceptions of the United Nations and the Security Council thus vie with each other for ascendancy and it remains to be seen which will emerge victorious. The outcome will probably depend in good measure on the precedents being built up in the Council these days and on the habits of cooperation and organization that will evolve in the Council henceforth. Will the Council, for example, simply be content to react to situations brought to its attention by its membership? Or will it try a preventive approach, establishing arrangements to give attention to potential violations of human rights that could engender conflicts or humanitarian emergencies?

The first summit of the Security Council, held on 31 January 1992, seemed to be interested in the preventive approach. Accordingly, it requested Secretary-General Boutros Boutros-Ghali to prepare and submit to the UN membership a report, together with suggestions, on ways and means for enhancing the capacity of the United Nations for preventive diplomacy, peacemaking and peacekeeping. The statement containing the request to the Secretary-General for a report recognized the existence of non-military as well as military threats to peace and security. In their interventions before the Council, many of the Heads of State and Government participating in the meeting highlighted the importance of democracy, the rule of law, respect for human rights and the protection of minority rights.

The statement also recognized that there is a role not only for the Security Council but for other competent organs of the United Nations such as, for present purposes, the General Assembly, the Economic and Social Council, the Com-

mission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities. Clearly, the Security Council cannot spread itself across the entire range of human rights activities. At the same time human rights can no longer be marginal to the activities of the Council. How shall the Council frame its future role? This essay will try to trace some elements of the practice of the Security Council with a view to distilling strands of its emerging doctrines which may be useful in shaping its future policies in this area of increasing importance.

### **Council's peace efforts advance human rights**

To begin with, the proposition may readily be accepted that the maintenance of peaceful relations within, as well as among countries, facilitates the enjoyment, promotion and protection of human rights. The UN General Assembly has recognized this on several occasions, in instruments such as the Universal Declaration of Human Rights, the Declaration on the Preparation of Societies for Life in Peace and the Declaration on the Right of Peoples to Peace. The nexus between the maintenance of international peace and security and human rights has been explored in several recent reports prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Indeed, the Charter of the United Nations sees international peace and security being built on the foundations of economic and social justice, respect for human rights and fundamental freedoms, respect for the rules of international law, the peaceful settlement of disputes and collective security. This is the peace and

security concept over which the Security Council presides. It is significant in this regard that the Security Council is required, by Article 24 of the Charter, to act in accordance with the Purposes and Principles of the United Nations, the former explicitly embracing human rights as a core objective. Further, Article 34 of the Charter gives the Council authority to investigate any dispute or any situation which may lead to a dispute, while Article 36 allows it, at any stage of a dispute or a situation of like nature, to recommend appropriate procedures or methods of adjustment. Article 40 of the Charter even permits the Security Council to suggest such provisional measures as it deems necessary or desirable.

Using these competences, human rights issues could be interwoven into the work of the Council for the maintenance of international peace and security, especially since many threats to or breaches of international peace and security turn on issues of human rights, as we shall see presently.

### **Many situations involved issues of human rights**

The Council has dealt in the past with many conflicts and disputes that revolved around the right of self-determination, the principles of equality and non-discrimination, the rights of minorities and gross violations of human rights. The right of peoples to self-determination was, and remains, at the heart of the Middle East problem. Issues of equality and non-discrimination have been at the core of the Council's efforts to deal with the threats to international peace and security posed by the apartheid system in South Africa. The rights of the two communities in Cyprus have prompted the Council's efforts

to promote a solution in that strife-torn country. The Council has had to grapple with massacres – such as at Sharpeville in South Africa in 1960 – which involved shocking violations of human rights. Thus human rights issues have been at the centre of many of the situations dealt with by the Council. Humanitarian questions have also come to the fore on occasion.

### **Long-standing humanitarian strand in Council activities**

Humanitarian aspects of past activities of the Security Council have covered: relief and assistance to the victims of conflict, upholding the principles of international humanitarian law, efforts to save the lives of persons threatened with execution or expulsion, efforts to protect civilians under occupation and arrangements to evacuate combatants facing annihilation.

A recent example of the Security Council's humanitarian activities came on 19 February 1992 when it expressed its deep concern about the renewed and rising cycle of violence in southern Lebanon and elsewhere in the Middle East. The Council statement read in part as follows:

The members of the Council are deeply concerned about the renewed and rising cycle of violence in southern Lebanon and elsewhere in the region. The Council deplores in particular the recent killings and the continued violence which threatens to claim additional lives and to destabilize the region further. The members of the Council call upon all those involved to exercise maximum restraint in order to bring such violence to an end.

## Internal conflicts and gross violations of human rights

Although, as discussed earlier, there is often an inherent human rights dimension to the work of the Council, and although the Council has had a long-standing humanitarian tradition, it has rarely dealt with issues of human rights *per se*. Instead it has preferred to leave such issues to organs like the Commission on Human Rights, the Economic and Social Council and the General Assembly, viewing itself as a political organ concerned mainly with issues of international peace and security.

Recently, the Council has had to take account of the growing number of internal conflicts which often involve gross violations of human rights. Many of these internal conflicts include ethnic clashes and refugee situations. Concern with such situations was very much in evidence during the summit in January 1992. Addressing the Council on that occasion, Secretary-General Boutros-Ghali said:

Civil wars are no longer civil, and the carnage they inflict will not let the world remain indifferent. The narrow nationalism that would oppose or disregard the norms of a stable international order and the micro-nationalism that resists healthy economic or political integration can disrupt a peaceful global existence. Nations are too interdependent, national frontiers are too porous and transnational realities – in the spheres of technology and investment, on the one side, and poverty and misery, on the other – too dangerous to permit egocentric isolationism.

The Secretary-General called for a new strategy to be adopted by the United

Nations to respond to the autonomistic or irredentist demands of ethnic or cultural communities. President George Bush of the United States advocated an irrevocable commitment to democratic principles, "including equal rights for minorities" and, above all, the sanctity of even a single individual against the unjust power of the state. Foreign Minister Géza Jeszenszky of Hungary considered that respect for human rights and the rights of national minorities were integral parts of international collective security. Therefore, it was indispensable for the Security Council to take resolute action to defend and protect those rights. The presence, whatever needed, of UN personnel to guarantee the enforcement of those rights should be seen as an integral part of United Nations peace-building activities.

Federal Chancellor Franz Vranitzky of Austria said that many of the questions then on the Council's agenda related directly to internal conflicts born of ethnic, nationalistic or religious rivalries or were a result of long-suppressed grievances. Nevertheless, they all sooner or later affected regional or international peace and security.

The Prime Minister of Cape Verde, Carlos Veiga, pointed out that national conflicts sometimes were as destructive as the fiercest international conflicts. The enormous loss of life and the human tragedy they produced demanded no less attention and no less a speedy response from the international community. Apart from the loss of human lives, every major national conflict had an international dimension, for it generated massive numbers of refugees, thus creating social pressure in neighbouring countries and threatening their peace and stability.

Russian President Boris Yeltsin argued that the time had come to consider a glo-

bal system for the protection of the world community.

### **A plea concerning principle of non-interference**

On 15 January 1991 the representative of the Permanent Mission of Cote d'Ivoire to the United Nations wrote to the President of the Security Council drawing attention to the final communiqué of the extraordinary session of the Authority of Heads of State and Government of the Economic Community of West African States (ECOWAS) concerning the economic and social situation in Liberia. He requested a meeting of the Security Council. Attached to his letter was a proposed draft statement to be issued by the President of the Council.

On 22 January 1991 the Security Council met to consider the request. The representative of Liberia opened the debate and expressed his relief that the Security Council was responding, for the first time, to the tragic consequences of a civil war that had devastated Liberia for over a year. He said:

That a response is now being made, more than one year since the conflict started, raises, in my opinion, the imperative need to review, and perhaps reinterpret, the Charter, particularly its provision which calls for non-interference in the internal affairs of member states. Regrettably, the strict application of this provision has hampered the effectiveness of the Council and its principal objective of maintaining international peace and security. As a result, millions of innocent men, women and children have continued to be victimized by conflicts through-

out the world, and this world body, which has the moral obligation and authority, has been prevented from averting these human tragedies.

Following a statement by the representative of Nigeria, speaking as the Alternate Chairman of Countries Members of the ECOWAS, the President of the Security Council called upon the parties to the conflict in Liberia to continue to respect the cease-fire agreement which they had recently signed and to cooperate fully with the ECOWAS to restore peace and normalcy in Liberia.

On 13 February 1992 the Ambassador of Liberia to the United Nations wrote to the Secretary-General of the United Nations to inform him that "in a spirit of reconciliation, Liberians have reached a national consensus to hold free and fair elections, under international supervision, as a strategy for settling the Liberian conflict. As a manifestation of our commitment, we have held consultative meetings among ourselves and have established a five-member Elections Commission."

The Ambassador continued: "The elections will be held in accordance with the ECOWAS Peace Plan of the ECOWAS Standing Mediation Committee, which was approved by the Authority of the ECOWAS Heads of State and Government and endorsed by Liberians at the National Conference in March 1991."

On behalf of his government, he requested that, "in accordance with General Assembly Resolution 46/137 of 17 December 1991, the United Nations provide financial and technical assistance to help the Elections Commission prepare for and conduct the forthcoming elections. In addition, we request that United Nations observers be sent to Liberia to follow the electoral process."

## **An explicit case**

Resolution 688 (1991) is the nearest that the Security Council has come, after its actions on apartheid, to dealing explicitly with the nexus between violations of human rights and their impact upon international peace and security. In that resolution the Council expressed its grave concern over the repression of the Iraqi civilian population in many parts of Iraq, including in Kurdish-populated areas, which had led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, and which had threatened international peace and security in the region. The Council was deeply disturbed by the magnitude of the human suffering involved. Accordingly, it condemned "the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security in the region". The Council demanded that Iraq, as a contribution to removing the threat to international peace and security in the region, immediately end this repression and, in the same context, expressed the hope that an open dialogue would take place to ensure that the human and political rights of all Iraqi citizens were respected.

The Council also requested the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities. Other provisions of the resolution requested the Secretary-General to address urgently the critical needs of the refugees and displaced Iraqi

population and appealed to all member states and to all humanitarian organizations to contribute to those relief efforts. The Council demanded, further, that Iraq cooperate with the Secretary-General to these ends.

In response to the requests of the Council, the Secretary-General appointed an Executive Delegate, Prince Sadrudin Aga Khan, to help him deal with the situation in northern Iraq. The mandate of the Executive Delegate included the following:

- To facilitate the identification of needs and future problems and to suggest appropriate measures.
- To prepare, together with relevant components of the United Nations system, timely consolidated appeals and ensure their regular updating.
- To act as a catalyst to highlight humanitarian needs and stimulate a generous response from the international community, as required.
- To keep the Secretary-General informed about humanitarian issues relating to the Gulf crisis by constant monitoring and reporting.
- To maintain contacts, at a high level, with all governments, particularly those directly concerned, both in Geneva and in the field.

## **Approach of the Executive Delegate**

While recognizing that "humanitarian and political interests converge in the aversion of catastrophe", the Executive Delegate stressed the humanitarian nature of his mandate in a report to the Secretary-General dated 15 July 1991. His broad approach was stated as follows in paragraph 134 of his report:

The mandate assigned to me as the Secretary-General's Executive Delegate is of a humanitarian nature: political determinations are not in my purview. Indeed, we have consistently focused upon the needs of the most vulnerable groups, wherever they may be identified and located throughout the country. The United Nations presence in Iraq, which for the purposes of our operation has been managed through United Nations humanitarian centres with their accompanying complement of United Nations guards, has monitored and reported on the provision of humanitarian assistance and advised the authorities in this respect. This will continue to constitute a major priority. The right to food, water, shelter and adequate health care are amongst the most fundamental of all human rights and must be assured to all people in all areas. As with all the key rights and freedoms set out in the Universal Declaration of Human Rights and the International Covenants, there can be no discrimination whatsoever in their enjoyment. Due note was taken, during our stay in Iraq, of the authorities' declared objective of fostering the democratic process, with its intrinsic attributes of political pluralism and freedom of the press. The present negotiations with the Kurdish leadership were cited as an example of this trend.

A cardinal humanitarian principle emphasized by the Executive Delegate was that innocent civilians – and above all the most vulnerable – should not be held hostage to events beyond their control (paragraph 138). The creation of confidence, which is lacking in some parts of the country, was crucial in the assessment of the Executive Delegate (para-

graph 136).

A Memorandum of Understanding, signed with the government of Iraq on 18 April 1991, provided the parameters within which the Executive Delegate functioned.

On the part of the government of Iraq it included:

- Adequate measures including the provision of humanitarian assistance to alleviate the suffering of the affected Iraqi civilian population (paragraph 1).
- A pledge of full support to and cooperation with the United Nations (paragraph 2).
- Facilitation of safe passage of emergency relief commodities throughout the country (paragraph 12).
- Establishment of a relief distribution and monitoring structure to permit access to all civilians covered by the relief programme, as soon as possible (paragraph 13).
- Cooperation in granting UN field staff access to the parts of the country requiring relief by air or road as needed to facilitate the implementation and monitoring of the programme (paragraph 15).
- Help in the prompt establishment of United Nations offices in support of humanitarian centres (UNHUCS) (paragraph 17).
- Cash contributions in local currency (paragraph 19).
- Access by the Coordinator to a high-level government official (paragraph 14).

On the part of the Executive Delegate it included:

- Adequate measures including the provision of humanitarian assistance to alleviate the suffering of the af-



fectured Iraqi civilian population (paragraph 1).

- Promoting the voluntary return home of Iraqi displaced persons and taking humanitarian measures to avert new flows of refugees and displaced persons from Iraq.
- A humanitarian presence in Iraq, wherever such presence may be needed (paragraph 4).
- The establishment of United Nations sub-offices and humanitarian centres in agreement and cooperation with the government of Iraq (paragraph 4). Both sides agreed that the measures to be taken for the benefit of the displaced persons should be based primarily on their personal safety and the provision of humanitarian assistance and relief for their return and normalization of their lives in their places of origin (paragraph 3).
- UNHUCS shall facilitate the provision of humanitarian assistance to the needy and shall also monitor the overall situation in this regard to advise the Iraqi authorities regarding measures needed to enhance their work (paragraph 6).
- Securing routes of return (paragraph 7).
- Organize airlifts to the areas concerned as well as transportation by road (paragraph 8)
- Simultaneous humanitarian assistance and relief to displaced persons, returnees and all other populations covered by the relief programme.

### **General principles**

- The implementation of the above-mentioned provisions was to be without prejudice to the sovereignty, territorial integrity, political independence,

security and non-interference in the internal affairs of the Republic of Iraq (paragraph 21).

- Humanitarian assistance is impartial and all civilians in need, wherever they are located, are entitled to receive it (paragraph 11).
- The measures to be taken for the benefit of the displaced persons should be based primarily on their personal safety and the provision of humanitarian assistance and relief for their return and normalization of their lives in their places of origin (paragraph 3).
- The principle of safe passage (paragraph 12).
- The principle of access (paragraphs 15 and 13).
- The principle of cooperation (paragraphs 2 and 4).
- The criterion of all necessary measures (paragraph 4).
- The element of monitoring (paragraphs 6 and 13).
- The provision of advice (paragraphs 6 and 14).

Some resolutions of the Security Council also contained guidance. Of particular relevance was Resolution 706 of 15 August 1991 in which the Security Council flagged the following concerns:

- The need for equitable distribution of humanitarian relief to all segments of the Iraqi civilian population through effective monitoring and transparency.
- The need for unhindered access by international humanitarian organizations to all those in need of assistance in all parts of Iraq.
- The need for "all feasible and appropriate United Nations monitoring and supervision for the purpose of assuring their equitable distribution to meet humanitarian needs in all regions of

Iraq and to all categories of the Iraqi civilian population, as well as all feasible and appropriate management relevant to this purpose".

### **New avenues for dealing with internal conflict**

On 20 January 1992 Somalia's representative to the United Nations wrote to the President of the Security Council drawing attention to the conflict in that country and seeking the assistance of the Council. On 23 January 1992 the Security Council unanimously adopted Resolution 733, which expressed grave alarm at the rapid deterioration of the situation in Somalia, the heavy loss of human life and widespread material damage resulting from the conflict in the country. Concern that the continuation of the situation constituted a threat to international peace and security, the Council requested Secretary-General Boutros-Ghali to increase humanitarian assistance, to contact all the parties involved in the conflict, to seek their commitment to the cessation of hostilities, to promote a cease-fire and compliance therewith and to assist in the process of a political settlement.

The Council decided, under Chapter VII of the Charter, to implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia. It called upon all parties to cooperate with the Secretary-General, to take all the necessary measures to ensure the safety of personnel sent to provide humanitarian assistance, to assist them in their task and to ensure full respect

for the rules and principles of international law regarding the protection of civilian populations. The Council further called upon all states and international organizations to contribute to the efforts of humanitarian assistance to the population in Somalia.

On 3 February 1992 Somalia's representative to the United Nations wrote again to the President of the Security Council, expressing his "gratitude to you and the members of the Security Council for your decision to consider the problem of the worsening political and security situation in my country"<sup>1</sup> with Resolution 733. He proceeded to present views on "approaches to the problems of Somalia" and concluded as follows:

In conclusion, let me assure the Council that any measures – even if coercive – to resolve the current crisis in Somalia cannot and will not be interpreted as interference in our internal affairs since their effect will be the saving of human lives and the restoration of human dignity. The situation cries out for the help of the United Nations and particularly the Security Council. The Somali people are bewildered by what they see as the callous indifference of the international community, but their eyes are nevertheless focused on the United Nations. They are pleading with you to stop the bleeding of their country. Please help by acting now.<sup>2</sup>

In a report to the Security Council of 11 March 1992, submitted pursuant to Resolution 733, the Secretary-General observed:

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<sup>1</sup> S/23507.

<sup>2</sup> *Ibid.*, p.5.

The tragic situation in Somalia is extraordinarily complex and has so far eluded conventional solutions. New avenues and innovative methods commensurate with the humanitarian and political situation at hand need to be explored in order to facilitate a peaceful settlement. In this connection, the collaborative effort of the United Nations and the regional inter-governmental organizations undertaken in the context of Chapter VIII of the Charter of the United Nations has proved to be very effective and has set a useful precedent for future cooperation.<sup>3</sup>

The Secretary-General also said: "It would be important for the Security Council to underline the individual and collective responsibilities of the leaders of the factions to save lives and to assist in the distribution of humanitarian assistance."<sup>4</sup>

The debate on the situation in the Security Council on 17 March 1992 was interesting.

India stated: "The sheer magnitude of the problem and its continuation constitute a threat to the peace and security of the region. The Somali situation is thus *sui generis* and, as the Secretary-General points out, has eluded conventional solutions. The principles drawn from the United Nations Charter, which the Security Council must always build upon in its consideration of the issues before it, have nevertheless to be applied in this case also. But, as the Secretary-General

himself concludes, new avenues and innovative methods commensurate with the humanitarian and political situation at hand need to be explored to facilitate a peaceful settlement. In this, the collaborative role being played by the regional organizations along with the United Nations, in the context of Chapter VIII of the Charter, assumes importance."<sup>5</sup>

"The substantive problem that Somalia must face is the absence of a civil society," Venezuela said. "The international community as a whole, and the Security Council in particular, can, should and must respond effectively with the assistance and advice in this extraordinary African tragedy to which the international community too long remained dangerously indifferent."<sup>6</sup>

China – while expressing appreciation for the report of the Secretary-General and supporting the adoption by the Security Council of a resolution on this issue – nevertheless believed "that the Somali question should be peacefully settled mainly by the Somali people themselves through consultations and dialogues. Only at the request and with the support and cooperation of the Somali people can any external endeavours, including the United Nations monitoring mechanism and humanitarian relief be genuinely effective."<sup>7</sup>

Ecuador took a similar position: "It is for the Somali people and their leaders to fulfil their fundamental responsibility of seeking, through dialogue and peaceful negotiation, an appropriate and lasting

<sup>3</sup> S/23693, para. 72.

<sup>4</sup> *Ibid.*, para. 79.

<sup>5</sup> S/PV.3060, pp. 31-32.

<sup>6</sup> *Ibid.*, p. 61.

<sup>7</sup> *Ibid.*, pp. 43-44.

solution to this crisis."<sup>8</sup>

On 24 April 1992, the Security Council adopted Resolution 751 by which it decided to establish a United Nations operation in Somalia (UNOSOM) and requested the Secretary-General to facilitate an immediate and effective cessation of hostilities and the maintenance of a cease-fire throughout the country in order to promote the process of reconciliation and political settlement in Somalia and to provide urgent humanitarian assistance.

### **Protection forces: Situation in Yugoslavia**

The handling of the situation in Yugoslavia by the United Nations would merit much more extensive treatment than is possible here. In summary, the situation in Yugoslavia came to the Security Council at the request of the government of Yugoslavia (as did the situations in Liberia and Somalia). The Security Council worked closely with the Secretary-General and his representatives, who undertook a series of missions of fact-finding and good offices to the area. The Security Council, upon the recommendation of the Secretary-General, first deployed UN observers, then UN forces to promote maintenance of a cease-fire, to extend protection to vulnerable communities and to provide security for the provision of humanitarian relief and assistance.

The creation of United Nations protection forces is of special interest for present purposes. The United Nations Protection Force (UNPROFOR) was established on 21 February 1992 by Security

Council Resolution 743. It includes military, police and civilian components for a total of some 14,000 personnel. It is deployed in certain areas designated as United Nations protected areas. These are areas in which inter-communal tensions have led to armed conflict in the recent past.

The agreement of 5 June 1992 on the reopening of Sarajevo airport for humanitarian purposes is also significant for present purposes. That agreement provided for UNPROFOR to establish a special regime for the airport, and to supervise and control its implementation and functioning. All parties undertook to facilitate these processes, together with the handover of the airport to UNPROFOR. All local civilian personnel required for the operation of the airport were to be employed on a basis of non-discrimination and to be supervised and controlled by UNPROFOR. Under the supervision of the United Nations, humanitarian aid would be delivered to Sarajevo and beyond in a non-discriminatory manner and on a sole basis of need. The parties undertook to facilitate such deliveries, to place no obstacle in their way and to ensure the security of those engaged in this humanitarian work. To ensure the safe movement of humanitarian aid and related personnel, security corridors between the airport and the city were to be established and to function under the control of UNPROFOR.<sup>9</sup>

### **Measures to deal with terrorism**

In Resolution 731 (1992), the Security Council expressed its deep disturbance

<sup>8</sup> *Ibid.*, p. 52.

<sup>9</sup> S/24075, 6 June 1992, Annex. Security Council Resolution 758.

at the world-wide persistence of acts of international terrorism, including those in which states are directly or indirectly involved, "which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of states". Deeply concerned over results of investigations which implicated officials of the Libyan government and "determined to eliminate international terrorism", the Security Council strongly deplored certain conduct of the Libyan government, urged it to contribute to the elimination of international terrorism and requested the assistance of the Secretary-General.

In the comments of members of the Security Council before and after the passing of the resolution, several of them stated expressly that the resolution did not constitute a precedent. It is instructive, nevertheless, to review their rationale in support of the competence of the Council to take action on the matter. One line of reasoning advanced was that the Council had dealt with the issue of terrorism in the past, had issued statements and adopted resolutions on the matter and thus was giving continued attention to an issue with which it had already been concerned (S/PV.3033, p. 87).

The component of state involvement in terrorism made the difference for some delegations. As the British Ambassador stated in the debate: "What we are concerned with here is the proper reaction of the international community to the situation arising from Libya's failure, thus far, to respond effectively to the most serious accusations of state involvement in acts of terrorism" (p. 104). Likewise, the representative of the United States argued that "the Council was faced in this case with clear implications of government involvement in terrorism" (p. 80).

The existence of a threat to interna-

tional peace and security was seen by several delegations. The US Ambassador put the matter thus: "It is ... conduct threatening to us all and directly a threat to international peace and security" (p. 79). The Council, he added, "had to act to deal with threats to international peace and security stemming from extremely serious terrorist attacks" (p. 80).

The Hungarian representative believed that the question of eradicating international terrorism had a legitimate place among the concerns of the Security Council which, on the basis of its mandate under the Charter, is obliged to follow closely any event that might endanger international peace and security (pp. 91-92). The Austrian representative submitted that "such terrorist attacks strike at the very foundation of modern civilization and jeopardize friendly relations among states and, indeed, endanger their security" (p. 92). This was an issue of manifest concern to the international community, argued the Indian representative. The Council's need to act in the maintenance of international peace and security was therefore legitimate (p. 94).

The French representative stated: "The exceptional gravity of these attacks and the considerations connected with the restoration of law and security justify this action in the Security Council" (p. 82).

Protection of the lives and safety of people moved some representatives. Venezuela's representative said: "International impunity endangers international peace and security" (p. 100). The need to act preventively was cited by Belgium: "In accordance with the preventive approach, we should also cut off potential terrorists from their command centres" (p. 83).

From the text of the resolution and from the statements made in the Secu-

rity Council, one may conclude that deliberate state conduct jeopardizing the lives of a significant number of people could be construed by the Council as having "a deleterious effect on international relations and jeopardizing the security of states, so as to establish the jurisdiction of the Council to deal with such types of conduct".

## Conclusion

It is probably too early to draw any general conclusions from the recent practice of the Council and one should wait for a while to see whether the Council will consolidate and build upon it. Some of the models of action so far developed hold great promise for future applications.

On the fundamental issues of policy involved, we would flag the following points:

- The Security Council watches over the maintenance of international peace and security while other organs watch over human rights.
- However, the authority of the human rights organs is limited. They also lack the ability to meet whenever there is an emergency.
- Many situations of international conflict or humanitarian emergencies reach such a scale as to surpass the authority of the human rights organs to respond adequately and therefore necessitate the attention of the Security Council.
- The Security Council may *review* any situation or development from the point of a potential threat to international peace and security.
- The Security Council may *investigate* any situation or development from the

point of a potential threat to international peace and security.

Situations warranting action by the Security Council are:

- Those which entail threats to, or breaches of, international peace and security.
- Those which involve a breakdown of governmental authority in the country concerned.
- Those which entail a flouting of the authority of the United Nations.
- Those which involve a high magnitude of human suffering or crimes against humanity.
- Where the government so requests.

From the point of view of the human rights community, and of human rights NGOs in particular, it would seem that the following suggestions for the future organization and role of the Security Council may be considered.

**Regular review of emerging security threats:** The Security Council could establish an Advisory Committee of its members to meet with the Secretary-General once a fortnight to review developments affecting the maintenance of international peace and security in the different regions of the world and to report to it with recommendations.

**Annual hearings on world security:** Once a year the Security Council could arrange hearings on world security issues to which it would invite non-governmental organizations in consultative status with the Economic and Social Council to present their views. The NGOs would need to work out among themselves a method for distilling their views for presentation to the Security Council in a manageable form.

**Annual session with regional inter-governmental organizations:** Once a year for a start, the Security Council could invite representatives of the leading regional inter-governmental organizations involved in issues of peace and security for a consultation on UN/regional organizations cooperation for the maintenance of international peace and security.

**Regional and sub-regional lists of fact-finders:** The Secretary-General could establish and maintain, on a regional or sub-regional basis, lists of fact-finders who may be deployed rapidly on missions in case of need.

**Rapporteurs and investigating committees:** The Security Council could make greater use of rapporteurs and investigating committees, as did the Council of the League of Nations. The Council of the League also had recourse to Committees of Jurists for advisory purposes, Expert Assessors, Field Representatives in hot spots and monitors on the ground to watch over the implementation of its decisions.

**Advisory panel on peacemaking:** The Secretary-General could designate an advisory panel on peacemaking to assist him in his tasks. The panel could be used individually, in groups or collegially. Its

membership should include reputable human rights experts.

**Advisory committee on peacekeeping:** An advisory committee of the Council could be designated to assist the Secretary-General on the planning and conduct of peacekeeping operations. It should also have access to competent human rights expertise.

**Annual report on the world security situation:** Once a year the Security Council could invite governments, concerned United Nations bodies, relevant specialized agencies, regional inter-governmental organizations and non-governmental organizations in consultative status with the Economic and Social Council to submit their views, through the Secretary-General, on the world security situation. Their replies could be presented in analytical form in a report of the Secretary-General to the Security Council and could provide the basis for an annual debate in the Council on the state of world security. The submissions of human rights NGOs would fill a void presently existing in the information base as well as in the perceptions of the Security Council. A partnership between the world of the Security Council and the human rights community is long overdue.

# The Lockerbie Case Before the International Court of Justice

*Christian Tomuschat\**

## The facts

On 14 April 1992, by a large majority of eleven to five votes, the International Court of Justice dismissed an application by Libya to be provided interim protection in its dispute with the United States and the United Kingdom over the extradition of two persons who allegedly masterminded the bombing of the Pan Am jet (flight 103) on 21 December 1988 over Lockerbie, Scotland. Libya had asked the Court to enjoin the two states from taking "measures calculated to exert coercion on it or compel it to surrender the accused individuals to any jurisdiction outside of Libya".

Its main argument was that according to Article 7 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Montreal Convention")<sup>1</sup> of 23 September 1971, to which all three states involved are parties, each contracting state has a choice between extradition and trial of an alleged offender. Either the case must be submitted to the competent prosecuting authorities or else the state concerned must comply with a request for extradition. Arguing that it was doing everything in its power to prepare formal charges against the two persons identified by the

United States and the United Kingdom as the authors of the bombing, which killed 270 people, Libya took the view that it had a right to try those persons before its own tribunals. Therefore, the request made by the United States and the United Kingdom in a joint declaration of 27 November 1992 to the effect that Libya "must surrender for trial all those charged with the crime"<sup>2</sup> was inconsistent with the obligations undertaken by the two powers in the Montreal Convention. However, the Security Council supported the request for extradition. The Council deplored that Libya had not yet positively responded to the joint declaration and urged it to provide "a full and effective response" in Resolution 731 (paragraph 3) adopted on 31 January 1992. After that exhortation had proved fruitless, the Security Council adopted Resolution 748 on 31 March 1992, three days after the close of the oral hearings on the request for the indication of provisional measures. By that resolution, acting explicitly under Chapter VII of the UN Charter, it decided that the Libyan government "must now comply without any further delay with paragraph 3 of Resolution 731 (1992) regarding the requests contained in documents S/23306, S/23308 and S/23309". In other

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<sup>1</sup> Reprinted in *International Legal Materials* 10 (1971), p. 1151.

<sup>2</sup> UN doc. S/23308, annex.



words, the Security Council made a binding determination that Libya was obligated to extradite the suspected offenders.

## Jurisdiction of the World Court

The International Court of Justice has developed clear rules governing jurisdiction concerning requests of a litigant party to indicate provisional measures. Because in such instances an element of urgency is necessarily involved, the Court does not feel compelled to consider the issue in an exhaustive fashion. It need not be fully satisfied that, as far as the principal claims of the applicant state are concerned, it will be able to entertain those claims as to their merits. Rather, some cursory assessment is deemed to be sufficient. *Prima facie* it must appear that the Court has jurisdiction over the case.<sup>3</sup> Article 14 (1) of the Montreal Convention confers jurisdiction on the Court to settle any dispute concerning its "interpretation or application" if, after negotiations have proved to be of no avail, within a period of six months following a request for arbitration the parties are unable to agree on the organization of such an arbitration proceeding. Given the fact that Libya, on 18 January 1992, had formally invited the United States and the United Kingdom to agree to arbitration,<sup>4</sup> without receiving a response to that request, the World Court apparently felt

entitled to conclude that it enjoyed jurisdiction to hear the case. No explicit argument is devoted to the issue of jurisdiction. The Court confines itself to stating that it would not be fitting to indicate provisional measures. Substantially, however, the Court is right to assert its *prima facie* jurisdiction. The United States and the United Kingdom had made clear that they regarded the dispute as unsuitable for negotiation.<sup>5</sup> Arbitration was no viable alternative either. If a request for arbitration is made, the other party has to deal with such a request in good faith by exploring the possibilities of a friendly settlement. It cannot simply remain passive. To accord a period of six months is justified only if active steps to establish an arbitration mechanism are undertaken. If a state that was presented with the offer of arbitration reacts with total silence, the state seeking a solution through third-party settlement may legitimately conclude that the potential defendant is not interested in arbitration and will not cooperate in establishing an appropriate mechanism. It may then turn to the World Court, which has been established as the jurisdiction of last resort. It is true that in the present case little time had elapsed between Libya's request for arbitration and the initiation of proceedings by an application which was received by the Registry of the Court on 3 March 1992. Still, it would appear that it was incumbent on the two governments to show at least some reaction to

<sup>3</sup> Nuclear Tests, Interim Protection, International Court of Justice Reports 1973, p. 99, at 102; Military and Paramilitary Activities in and against Nicaragua, Provisional Measures, International Court of Justice Reports 1984, p. 169, at 179; Passage through the Great Belt, Provisional Measures, International Court of Justice Reports 1991, p. 12, at 14.

<sup>4</sup> UN doc. S/23441, annex.

<sup>5</sup> US delegate T. Pickering, statement at the Security Council, 21 January 1992, S/PV.3033, p. 79; UK delegate D. Hannay, *ibid.*, p. 104.

the Libyan move.<sup>6</sup> In any event, one may safely conclude that the requirements of a *prima facie* evaluation were fully met.

It is certain that the six-month period will have elapsed before the Court can deal with the principal submissions of Libya. The only issue which will then have to be decided by the Court is whether *ratione materiae* Libya's submissions are covered by the jurisdictional clause of the Montreal Convention. Here, strict scrutiny is required. Article 14 (1) of the Montreal Convention is restricted to disputes arising under that Convention, but does not extend to any controversial issues which have only an indirect connection with such disputes. Thus, Libya's request for a finding that "the United States has breached and is continuing to breach its obligations to Libya under Article 5, paragraph 2, Article 5, paragraph 3, Article 7, Article 8, paragraph 2, and Article 11 of the Convention" qualifies easily as falling within the purview of Article 14 (1). Libya's wish to have the Court rule "that the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity and the political independence of Libya" sounds more like a war trumpet, which raises issues of general international law under the Charter and has little to do with the Montreal Convention. As far as the main proceeding is concerned,

the World Court will at the most be able to cut out for legal review some small portions of the large pie which Libya has submitted to it. It is a truism that under Article 2 (4) of the Charter any use or threat of force is unlawful. But even if the United States and the United Kingdom had indeed resorted to such actions, for which there seems to be no convincing proof available, the Court could not investigate such a charge, being confined *ratione materiae* by Article 14 (1) of the Montreal Convention to look into issues relating to the interpretation and application of that convention.

In recent years the issue of delimiting the areas of competence between the Security Council and the International Court of Justice has arisen in a number of cases.<sup>7</sup> Each time, it was a state alleging a breach of an international obligation to its detriment that came before the Security Council as well as the Court. In the Tehran hostages case, the United States turned to both institutions to request support for the members of the diplomatic and consular staff being detained by Iranian authorities. Here, the picture is different. The United States and the United Kingdom are pressing their claims via the Security Council, while Libya as the alleged wrong-doer puts its hopes for legal backing on the Court. In legal terms this difference of factual configuration does not shed a new light on the legal issues concerned. In all of the earlier cases the Court held that Security Council involvement in settling a dispute

<sup>6</sup> The opinion to the contrary, expressed by Judge Ni in his declaration, is hardly convincing, see International Court of Justice Reports 1992, p. 132, at 135.

<sup>7</sup> For a full discussion see E. Klein, *Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten*, in *Völkerrecht als Rechtsordnung. Internationale Gerichtsbarkeit. Menschenrechte*, Festschrift für Hermann Mosler, 1983, pp. 467 *et seq.*; see also L. Gross, *Some Observations on Provisional Measures*, in *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne*, 1989, p. 307, at 310.

did not affect its own jurisdiction.<sup>8</sup> One cannot but share this view. The Charter does not establish precedence of the Security Council over the World Court. According to Article 36 (3), the Security Council is even reminded that, as a rule, legal disputes should be submitted to the Court. Rightly, the Court concluded, albeit implicitly by responding to Libya's request for indication of provisional measures, that the relevant resolutions of the Security Council on the subject matter of the dispute did not prevent it from entertaining that request. The World Court is no second-rate organ of the international community. The Charter has not subordinated it to the Security Council. Rather, both organs are duty-bound to cooperate and mutually respect their areas of competence, taking into account their different nature: The Security Council is an action-oriented political organ, whereas the Court is a judicial organ whose function is limited to evaluating in strict legal terms disputes or other legal questions submitted to it.

## The merits

The two orders of the Court of 14 April 1992 are based on extremely narrow grounds. The reader has more to guess than to actually glean from the text of the decisions, inasmuch as the juridical rationale is condensed in three short paragraphs (42 to 44), which essentially underline the importance of Resolution

748 (1992) for the outcome of the controversy between Libya and the defendant states. Considering that this resolution was adopted under Chapter VII of the Charter, the Court additionally refers to Article 103 of the Charter, according to which Charter commitments take precedence over any other treaty commitments of a member state of the United Nations. In these circumstances, concludes the Court, it would not be appropriate to indicate provisional measures since such a step might impair the legal effects of Resolution 748. It is difficult to challenge this line of reasoning, the Court enjoying a wide margin of discretion under Article 41 of its Statute. It therefore seems necessary to examine the case outside the loose framework of this provision, where even hard legal questions can be turned into terms of flexibility. In particular, the demarcation lines between the areas of jurisdiction of the World Court on the one hand, and the Security Council on the other hand, will come into sharp focus only during the proceedings on the main claims that Libya seeks to vindicate against the United States and the United Kingdom.

It is obvious that for Libya to win the case at its final stage is dependent upon those two countries having breached their commitments under the Montreal Convention or possibly even other rules closely related to that Convention so that a dispute concerning compliance with them would be covered by the jurisdictional clause of Article 14 (1).

<sup>8</sup> Aegean Sea Continental Shelf, Interim Protection, International Court of Justice Reports 1976, p. 3, at 12; United States Diplomatic and Consular Staff in Tehran, International Court of Justice Reports 1980, p. 3 at 21/22; Military and Paramilitary Activities in and against Nicaragua: Provisional Measures, International Court of Justice Reports 1984, p. 169, at 185/186; Jurisdiction and Admissibility, International Court of Justice Reports 1984, p. 392, at 433-435.

The first question is whether the request for extradition made by the United States and the United Kingdom constitutes an interference with Libya's right under Article 7 of the Montreal Convention to try the two alleged offenders before its own tribunals. It is hard to doubt that such an interference does in fact exist. By formally inviting Libya to surrender the suspects, and also involving the Security Council to put pressure on Libya to that effect, the United States and the United Kingdom have been substantially denying Libya its right to have the charges determined by its national system of criminal jurisdiction. These actions go far beyond a simple request for extradition which a state is always free to make even if it is not entitled to see its wish fulfilled.<sup>9</sup> Essentially, the two countries asserted that Libya was duty-bound to surrender the two suspects. There is no doubt that to try an alleged offender present in its territory is also a normal outflow of territorial sovereignty. Since this right has been confirmed and strengthened by the Montreal Convention, Libya can, in principle, base its claim to jurisdiction on two grounds – general international law as well as treaty law. The judgement of the Court in the Nicaragua case<sup>10</sup> has shown how important it is to keep these two sets of rules apart, even if they run largely parallel to one another. The fact that Libya's claim has its first support in general international law does not change the legal position in the sense that the Montreal Convention

provides an additional justification for that claim. By challenging Libya's power to conduct the criminal proceedings, the United States and the United Kingdom are calling into question Libya's jurisdiction over the case in general, including its conventional basis. The clash of divergent views on what mutual rights and obligations exist between the two sides exceeds by far the confines of an abstract issue of treaty interpretation, but amounts to a true international dispute, characterized by the fact that one party comes up with a concrete demand which the defendant party dismisses.<sup>11</sup> The instant case is almost a model for that configuration: Whereas the United States and the United Kingdom feel entitled to take the prosecution into their hands, Libya contests that such a right exists and asserts that, instead, its domestic tribunals are competent.

The true question raised by the complex facts of the case is of a different nature. One may legitimately ask whether there exists some justification for the interference with the rights which, in principle, the Montreal Convention confers on Libya. Two different constructions may be conceived of in this connection.

In the first place, one could proceed from the proposition that the Montreal Convention cannot be held to grant rights of prosecution to a state which has no intention whatsoever of making actual use of those rights. Indeed, the Convention seeks to establish an effective system of criminal prosecution with regard

<sup>9</sup> The joint declaration by Judges Evensen, Tarassov, Guillaume and Aguilar seeks to play down the thrust of those actions, *International Court of Justice Reports* 1992, p. 136, at 136/137.

<sup>10</sup> *International Court of Justice Reports* 1986, p. 14, at 95/96.

<sup>11</sup> See, for instance, C. Tomuschat, commentary on Article 2 (3) of the Charter, in B. Simma (ed.), *Charta der Vereinten Nationen, Kommentar*, p. 63 para. 15.

to persons endangering the security of international air traffic. If, on the contrary, a state just seeks to frustrate the objectives of criminal justice, it must be debarred from invoking to its benefit the stipulations of the Convention. In such a case, only the alternative of extradition can apply.

One may safely assume that the United States and the United Kingdom formulated their requests precisely because they had good reason to believe that the state of Libya of was implicated in the bombing of flight 103. For the same reason, they had no confidence in the impartiality and objectiveness of Libya's judicial system. But it may be extremely difficult to prove that the Libyan government – or some agencies forming part of the governmental structure – is behind the bombing. It is only by a thorough investigation and trial that full light may be shed on the destruction of the Pan Am jet. To draw negative conclusions for Libya at the very outset, before an investigation with access to all available evidence has been carried out, could be legitimate only under exceptional circumstances, if it could be established beyond reasonable doubt by recourse to evidentiary materials assembled outside Libya that Libya was, first, involved in the crime itself and, second, in a cover-up. It is hard to believe that such allegations can be proven on the basis of circumstantial evidence. This conclusion means, at the same time, that until Resolution 748 was adopted by the Security Council, the United States and the United Kingdom may have had certain suspicions vis-à-vis Libya, but could hardly have had the upper hand in their dispute with Libya, lacking conclusive evidence that Libya's demonstration of efforts to prosecute the alleged offenders was just a smoke screen to hide its true intention

to shield those persons from being made accountable. Resolution 731 (1992), as a simple recommendation of the Security Council, could not produce the same legal effect. It is one of the peculiar features of the Lockerbie case that the Security Council, by adopting Resolution 748, acted at the last minute to provide support to the case of the two defendant states, certainly not in ignorance of their delicate procedural situation before the Court.

Another legal justification of the interference with Libya's rights under the Montreal Convention can be derived from Resolution 748. Since that resolution explicitly decided that Libya "must comply" with the request for extradition, it is tempting to take the view that the whole problem was definitively settled through that resolution. After the Security Council took a binding decision, Libya, like all other states, simply had to implement that decision by surrendering the two suspects to the United States and the United Kingdom.

Resolution 748 is based on the UN Charter and derives its binding character from that instrument. Normally, international treaties are independent of one another. What happens during the implementation of one treaty does not affect the rights and obligations arising from another treaty, except that between the same parties the rule *lex posterior derogat legi priori* applies (Article 39 of the Vienna Convention on the Law of Treaties). However, with regard to the Charter, the Montreal Convention is the later instrument. Any precedence to be given to the Charter has therefore to be derived from Article 103, the primacy clause of the Charter. Theoretically, it is not easy to explain why the Charter should take precedence over any other conventional commitment of a member

state. The fact is, however, that the purported effect of Article 103 has never been called into question. According to all probability, states today view the Charter as the constituent instrument of the international community, which sets the framework for any permissible governmental activity. In any event both Libya and the United States, as well as the United Kingdom, have recognized Article 103 by becoming members of the United Nations. Libya, at the present stage, is definitely precluded from insisting that Article 103 amounts to an unacceptable derogation from traditional rules on the mutual relationship between different treaties.

As a rule, resolutions of UN organs can be deemed to bind member states, with the particular effect bestowed upon them by Article 103, only if they are lawful, having been brought about in full consonance with the procedural as well as substantive requirements of the Charter. The Charter has not conferred unlimited powers on the various organs acting on behalf of the world organization. Throughout the relevant provisions, a painstaking effort has been made to lay down some defining criteria which condition recourse to the powers concerned. Any other conclusion would lead to the arbitrariness of majority rule, which is unacceptable within an institutional framework made up of sovereign states.<sup>12</sup>

## Security Council and extradition

A first objection could be raised on account of the extraordinary nature of the action taken by the Security Council. Never before in its history has the Security Council taken a stand on an individual case of extradition. It is this unusual character of its substantive contents which, at first sight, seems to cast a shadow of bias on Resolution 748. To be sure, no state may be singled out on discriminatory grounds. On closer reflection, however, one finds little which gives rise to serious objections. Extradition of major criminals is a legitimate concern within the framework of a strategy aimed at combating terrorism. Eradication of terrorism presupposes the effective elimination of any shelter and refuge to terrorists. A network of reciprocal duties of extradition is one of the core elements of the project to establish a Code of Crimes against the Peace and Security of Mankind, currently pursued by the International Law Commission. It should also be recalled, in this connection, that under Article 227 of the Treaty of Versailles the then allied powers demanded the surrender of the German Kaiser, who was made responsible for the unleashing of the First World War. No matter how doubtful this request was – because in 1914 resort to war was not regarded as an unlawful act entailing individual

<sup>12</sup> We agree in principle with the views expressed by H. Kelsen, *The Law of the United Nations*, 1950, pp. 95, 293, strongly supported by Judge Fitzmaurice, dissenting opinion to the advisory opinion of the International Court of Justice on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, p. 208, at 294. For the contrary view see J. Delbrück, commentary on Article 25 of the Charter, in *Charta der Vereinten Nationen* (*supra* note 11), p. 381, paras. 17, 18.

criminal responsibility – it shows what great importance may be attached to the extradition of key figures blamed for committing grave breaches of international law. The fact remains, however, that this is the first case where the Security Council has endorsed a claim to that effect by the victim states concerned. In order to fend off Libya's complaint that it is being singled out, the Security Council must in the future take up similar cases, showing that it does not act inconsistently simply because the requesting states happen to be two of its most influential permanent members. In a dispute so heavily fraught with political tension, third-party observers might additionally question the objectiveness of the tribunals of the victim states. The establishment of an international criminal court, which has become an almost fashionable request these days,<sup>13</sup> would help overcome such difficulties and pave the way for trials that nobody could seriously challenge as being marred by bias and prejudice.

It might also be argued that the Security Council has no authority to deal with individual cases, its primary function being to ensure international peace and security in interstate relationships (Articles 24 and 39 of the Charter). To respond to such a line of reasoning, one may first observe that the Charter does not specify the meaning of international peace and security. It would seem artificial to maintain that only a general situation, involv-

ing a state as such, is susceptible of endangering peace and security between nations. On the contrary, historical experience has shown that the actions of one single person may ignite a tense situation, leading to the outbreak of hostilities. Furthermore, there is a rich practice of the Security Council taking care of the fate of individuals, albeit in a protective sense. Thus, one may recall the many instances where the Security Council has deplored politically motivated killings that occurred in Israel or in the Occupied Territories.<sup>14</sup> With regard to South Africa, too, one may refer to many similar pronouncements of the Security Council. One of the most prominent cases was that of the Sharpeville Six: Although the Security Council urged South Africa not to execute a number of persons convicted of murder, the appeal unfortunately was not heeded.<sup>15</sup> In sum, the Security Council has never drawn a distinction between "general" issues of international peace and security and "individual" cases affecting international peace and security. Hence, Resolution 748 cannot be attacked on grounds of inconsistency with constant practice.

The next question to be asked is whether the Security Council is duty-bound to respect general rules of international law. In the instant case the judges, in individual opinions, agreed with the proposition that no state, failing an extradition treaty, has a duty to extradite an alleged offender.<sup>16</sup> Additionally,

<sup>13</sup> The International Law Commission completed a comprehensive study in July 1992 on an international criminal jurisdiction, which the General Assembly will consider during its 47th session in autumn 1992.

<sup>14</sup> See, for instance, Resolutions 592 of 8 December 1986, 605 of 22 December 1987 and 672 of 12 October 1990.

<sup>15</sup> Resolution 610 of 16 March 1988.

<sup>16</sup> Emphasized in the joint declaration by Judges Evensen, Tarassov, Guillaume and Aguilar, *supra* note 9.

no one contested the empirical finding that many states do not extradite their own nationals, sometimes even going so far as to include such a prohibition in their national constitutions. Such reluctance accords perfectly with present-day international law. Therefore, it may seem unacceptable to impose on a state a duty which is not derived from general international law and which openly seeks to restrict the sovereign powers normally held by a state.

In legal doctrine, the question whether and to what extent the Security Council must respect rules of general international law has hardly been discussed. It is submitted that no single answer can be given. When acting within the framework of Chapter VI of the Charter, where its powers are in principle confined to making recommendations, the Security Council should not be allowed to propose solutions which contravene general rules of international law.<sup>17</sup> In particular, Article 36 (3) of the Charter reminds the Security Council that "legal disputes" should as a general rule be referred to the World Court, and it is clear that the Court is required under Article 38 (1) of its Statute to apply general rules of international law.

However, concerning instances where the Security Council avails itself of its powers under Chapter VII of the Charter, different considerations apply. Whenever it finds that a threat exists to international peace and security, the Security Council is free to take appropriate action. All the measures listed in Articles 41 and 42 of the Charter would be un-

lawful if taken by one state against another, unless justified under Article 51 of the Charter as self-defence or possibly, to some extent at least, as counter-measures. The basic guarantees of sovereign independence, as enshrined in the Charter and set out in more detail in Resolution 2625 (XXV), do not hinder action by the Security Council.<sup>18</sup> In this connection, it should be noted that the Security Council is by no means obligated to direct measures under Articles 41 and 42 of the Charter only against an aggressor state. It suffices that the Security Council finds a situation in the sense contemplated by Article 39 of the Charter. If it had to sort out who is the aggressor and who is the victim, before being authorized to make use of its powers, it could be completely paralysed. The system of collective security as envisioned by the Charter does not admit of such distinctions which may only be determined *ex post*, after a conflict has been settled.

More delicate is the issue of what procedure the Security Council has to follow before rebuking a country under Chapter VII. Quite certainly, the government of that country must be heard in accordance with Rule 37 of the Rules of Procedure of the Security Council. No sanctions may be imposed out of the blue. In the instant case Libya was given an unrestricted opportunity to explain itself. On 21 January and 31 March 1992 it appeared before the Security Council and made lengthy statements, which were taken duly into account. However, the presumption of innocence does not and cannot apply in proceedings before the

<sup>17</sup> Rightly underlined by Judge Weeramantry in his dissenting opinion, International Court of Justice Reports 1992, p. 160, at 176.

<sup>18</sup> See J.A. Frowein, commentary on Article 39 of the Charter, in *Charta der Vereinten Nationen* (*supra* note 11), p. 569, para. 33. See also Judge Weeramantry, *loc. cit.* (*supra* note 17).



Security Council. Measures taken by the Security Council under Chapter VII of the Charter have nothing in common with the conviction and sentencing of an individual on a criminal charge. The Security Council was established as a guardian of international peace and security. It cannot wait until it has exhaustively investigated an explosive situation as described in Article 39 of the Charter. Here, the aim of extradition is precisely to find out whether the government of Libya was involved in the fatal bombing of Pan Am flight 103. It would be inconsistent with this aim to allow Libya to shield behind the presumption of innocence. The presumption is a device exclusively designed to protect individuals. The effective maintenance of international peace and security would be severely threatened if it is extended to states which can rely on other mechanisms for their protection.

## Libyan defence

A further defence to which Libya could resort is to contend that the requirements of Article 39 of the Charter were not satisfied because neither a threat to the peace nor a breach of the peace, let alone an act of aggression, should have been found to exist. It is true, as said above, that the Security Council has no unfettered power as to the legal assessment of facts which have been brought to its knowledge. On the other hand, it certainly enjoys a wide margin of discretion when it is called upon to evaluate a situation.<sup>19</sup> Resolutions 731 (1992) and 748 (1992) must be seen in a wider context

of terrorist activities undoubtedly imputable to Libya. From a legal viewpoint, there can be no doubt that state-sponsored terrorism endangers international peace and security. It is incontestable, for instance, that opponents of the present Libyan regime have been killed in other countries by secret agents of the government. Certain indications exist that Libya now wishes to rejoin the community of civilized nations. In that respect, however, the requests for extradition endorsed by Resolution 748 (1992) constitute the litmus test. Given the publicly available amount of evidence showing Libya's past involvement in terrorist activities, it was not illegitimate for the Security Council to also assume a relationship with the destruction of Pan Am flight 103, considering the additional facts it had before it. Therefore, to base Resolution 748 on Chapter VII was no arbitrary act.

Lastly, it must be asked whether the Court is at all empowered to review the lawfulness of Security Council resolutions. The starting point here must be the jurisdictional clause set forth in Article 14 (1) of the Montreal Convention. According to this clause, the Court has jurisdiction over the dispute existing between Libya on the one hand, and the United States and the United Kingdom on the other. Article 14 (1) contemplates only controversies between states parties to the Montreal Convention. This means that in the present proceeding the Court is not competent to act as a constitutional judge whose task it would be to measure Resolutions 731 and 748 against the yardstick of the Charter. For that

<sup>19</sup> See, for instance, G. Cohen-Jonathan, in J.-P. Cot/A. Pellet (eds.), *La Charte des Nations Unies*, 2nd ed. 1991, pp. 650, 655 and L.M. Goodrich/E. Hambro/A.P. Simons, *Charter of the United Nations*, 3rd ed. 1969, p. 293.

purpose, the specific procedure under Article 96 of the Charter, permitting the General Assembly or the Security Council to request an advisory opinion, is available. In principle, by virtue of a compromise agreed upon between them, states cannot be permitted to submit to judicial scrutiny resolutions of the main organs of the United Nations. There is a clearly perceivable danger that such procedural detours might be manipulated and misused.

What is true in principle, however, may have to be superseded in particular circumstances. Such an exceptional situation would appear to exist in the instant case. Under the Montreal Convention, Libya holds the right to try the suspects before its own tribunals, and the only conceivable justification for denying it that right may be derived from Resolution 748. It is this resolution which the United States and the United Kingdom invoke to justify their demands, notwithstanding the system established by the Montreal Convention. Because of this intimate connection with the subject matter of the dispute, Resolution 748 cannot remain outside the scope of examination by the Court. The outcome of the dispute hinges on the legal effect of that resolution in the specific relationship between the litigant parties. If the Court proceeded to leave Resolution 748 totally aside as not being comprised within the jurisdiction clause of Article 14 (1) of the Montreal Convention, it would have to grant Libya's claims. Thereby, it would undermine the authority of the resolution.

To ignore Resolution 748 is therefore no viable solution. If, however, the resolution is deemed as required to be taken into account, since a true and comprehensive picture of the legal position cannot be obtained otherwise, this should not be done to the detriment of the applicant party. The Security Council is not sacrosanct, and if the World Court is called upon to apply a resolution of the Security Council, it must be satisfied that the resolution concerned complies with the requirements of lawfulness as established by the UN Charter.<sup>20</sup>

## Conclusion

The order of the World Court of 14 April 1992 does not appeal to the professional instincts of an international lawyer. But its defects, if any, lie more in its rather cursory reasoning, not in its results. A forecast concerning the outcome of the main proceeding reveals only slight chances of success for Libya. The requests of the United States and the United Kingdom for surrender of the two suspects, originally in violation of Libya's rights under Article 7 of the Montreal Convention, have a firm support in Resolution 748 (1992) of the Security Council. This resolution does not disclose any legal deficiencies, although the reader remains somewhat puzzled by the fact that, through multiple reference, it appears to try to hide what specific demands are addressed to Libya.

<sup>20</sup> In the Namibia case, the International Court of Justice embarked on such an inquiry as an incidental issue prejudging its response to the request for an advisory opinion: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, International Court of Justice Reports 1971, p. 16, at 45.

# COMMENTARIES

## Human Rights Defenders: Drafting a Declaration

*Allan McChesney and Nigel Rodley\**

It seems elementary to assume that when a human rights instrument is voted for or ratified by a state, its citizens have the right to know about the contents of the instrument and to act upon them. This common-sense link between promise and practice is rarely spelled out in plain words, however, and it is often ignored by states. A Working Group reporting to the UN Commission on Human Rights has been meeting annually to draft a Declaration embodying the right to know about and to promote human rights. In January 1992, the seventh yearly session, the Working Group completed its first reading of a draft document. Many long-standing issues still have not been resolved.

A statement on human rights knowledge and action is found in Principle VII of the 1975 Helsinki Final Act ("Helsinki Accord"). This clause talks simply of "the right of the individual to know and act upon his rights and duties in this field". During the Cold War representatives of Western governments relied upon this tenet to chide members of the Eastern bloc for hampering the activities and lives

of political dissidents. Some of these activists had organized specifically to promote the human rights principles proclaimed in the Helsinki Final Act. The oppression that such individuals experienced was a regular topic at the Conference on Security and Cooperation in Europe, which meets periodically to build upon and to monitor the implementation of the Helsinki Accord and subsequent accords.

Having seen the usefulness of Principle VII in the support of political dissidents in Central and Eastern Europe, some Western nations and non-governmental organizations (NGOs) worked in the 1980s to create a Declaration on the "Right to Know and Act" within the United Nations system. Canada and Norway were the main governmental proponents of such a Declaration.

As is suggested by the name of the Working Group created to draft the Declaration, the political realities of the day assured that the mandate of the body extended to responsibilities not only of states but also of human rights activists.<sup>1</sup> From the perspective of NGOs, the inclu-

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\* Allan McChesney, a Canadian lawyer and human rights consultant, represented the ICJ at the 1991 and 1992 Working Group sessions. Nigel Rodley, who has represented Amnesty International at the Working Group since 1990, is a reader in law, Human Rights Centre, at the University of Essex and Dean of the School of Law as of August 1992.

<sup>1</sup> The mandate of the group is indicated by its name: Working Group on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

sion of an examination of possible duties of human rights defenders was unfortunate, since governments had already been quite inventive in finding ways to restrict the exercise of human rights.

Since the inauguration of the Working Group, there has been a constant tension between those who want the proposed instrument to reinforce existing human rights as they apply to "human rights defenders" and those who seek to restrict non-governmental freedom of action through provisions that place duties and limitations on individuals and groups. Support for both points of view can be found in the important and voluminous work carried out in this field by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, guided by Erica-Irene Daes (Greece) as Special Rapporteur.<sup>2</sup>

A main task of the Working Group "was not to set forth new rights but to elaborate existing rights which states are already obliged to implement".<sup>3</sup> The Working Group is open-ended so that any government can take part. Certain NGOs have been active participants, although officially they take part only as observers. In the first couple of years the International League for Human Rights carried most of the weight for the NGOs. The International Commission of Jurists (ICJ) has been a fairly consistent contributor. In recent sessions the ICJ and Amnesty International have provided the main

NGO input.

Generally speaking, NGOs have shared the perspective of the governments promoting the Declaration and this was perhaps especially so at the earlier sessions. The NGOs have been somewhat more vigorous, however, on the question of whether any duties or limitations should be included in this Declaration with respect to the human rights work of individuals and groups. It has been our position that existing instruments already contain sufficient restrictions. The purpose of the new Declaration is to shore up rights in the face of real and sometimes violent suppression by governments and their agents, rather than to protect governments from those seeking to exercise human rights.<sup>4</sup>

## Conflict and compromise

During the deep Cold War the Soviet Union and its allies appeared (from an NGO standpoint) to obstruct progress in the Working Group, so that reaching agreement on any provision was difficult. Nonetheless, negotiators slowly agreed to language reinforcing rights or freedoms of expression, association and assembly.

Some more contentious elements were left to be resolved in the latter stages of negotiation. These came to the fore in 1991 and 1992. Among points of difficulty addressed in these sessions were:

<sup>2</sup> Draft Body of Principles and Guidelines on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, E/CN.4/Sub.2/1985/30 and explanatory Addendum, E/CN.4/Sub.2/1985/30/Add.1.

<sup>3</sup> Observer delegation of Amnesty International, Report of the Working Group, E/CN.4/1991/57, 4 March 1991, para. 53.

<sup>4</sup> This point has also been made at times by government representatives. A good example is the statement of the Netherlands delegation in 1986, Report of the Working Group, E/CN.4/1986/40, p. 3.

- The desire by some states to impose on individuals and groups specific duties towards the state or towards prevailing ideologies or cultural constraints.<sup>5</sup>
- The desire by some states to make all activities of human rights defenders subject to national legislation and even to ordinary administrative measures.<sup>6</sup>
- The responsibility of states to protect human rights defenders and the duty to investigate abuses of their rights.
- The reluctance of some states to accept international NGO cooperation in monitoring violations of human rights, e.g. in the form of trial observation.
- The duties and freedoms of members of professional groups (e.g. doctors and lawyers) and others whose work involves potential violation or protection of human rights (e.g. prison officials and police).
- The question of receipt by individuals and groups of funding from outside the country in which they carry on their work.
- The desire by some governments to

place responsibilities on individuals to react to human rights abuses by non-state actors within their countries.

- The desire by some states to import language from other international human rights instruments not directly related to the purposes of this Declaration (e.g. peoples' rights) and the problems seen by other governments with the deceptive prioritization that this might indicate.<sup>7</sup>

A continuing problem for NGOs has been that attempts to reach compromise, to accommodate opposing views, have led to an overly long Declaration. The draft articles and preamble contain many clauses which do not focus on the central objectives of the Declaration and are likely to confuse the general or non-expert reader. In the 1992 session NGO speakers exhorted the Working Group on the need for a short, practical and understandable instrument. Though this perspective was endorsed by a number of government speakers – and indeed was voiced by some governmental repre-

<sup>5</sup> NGO representatives consistently voiced the view that, ideally, no specific duties should be placed on human rights defenders in *their* Declaration. There was a fairly wide consensus among Working Group participants that inclusion of the words of Article 29, para. 1 of the Universal Declaration of Human Rights would be acceptable: "Everyone has duties to the community in which alone the free and full development of his personality is possible." The observer representing the ICJ stated: "It would seem illogical to spell out restrictions that went beyond those found in other human rights instruments". Report of the Working Group, E/CN.4/1992/53, 27 February 1992, para. 119.

<sup>6</sup> The inclusion of such ideas in the Declaration could create a dangerous precedent, as was pointed out in the ICJ intervention, paras. 154 and 155 of E/CN.4/1991/57. The Portugal delegation stated that "the declaration was not intended to give national legislation the scope to determine how the instrument was to be applied" and the delegations of the United Kingdom and Austria agreed. Report of the Working Group, E/CN.4/ 1992/53, 27 February 1992, para. 121.

<sup>7</sup> "The observer delegation of the International Commission of Jurists said that, whatever the language adopted, it was for the victims themselves, as well as for human rights defenders, to decide which human rights violations were more deserving of their attention at any one time." Report of the Working Group, E/CN.4/ 1992/53, 27 February 1992, para. 49.

sentatives and NGOs in the 1980s<sup>8</sup> – the results of the 1992 negotiations continued the trend towards complexity and inaccessibility for the ordinary reader or non-specialist human rights defender.

Some governments at the 1992 session displayed a great deal of flexibility in trying to find compromise language that would assist in reaching a consensus, even when the consensus came close to endorsing ideas which had not been accepted by their governments in the international arena. Furthermore, there were significant moves in the 1990, 1991 and 1992 sessions from governments that for many years had been strongly at odds with NGO viewpoints on certain issues. In 1992 both Senegal and Russia withdrew contentious drafts presented at previous sessions, thus speeding up and otherwise assisting the deliberations.<sup>9</sup>

A report on the first reading of the Draft Declaration was submitted to the UN Commission on Human Rights in February 1992. Governments and NGOs will examine the text in preparation for the second reading, expected to begin in Geneva in January 1993. During the interim, the UN Human Rights Secretariat is conducting a "technical review". This is to ensure adequate uniformity of language within the draft text and between terms used in the Draft Declaration and

in other international human rights instruments already in force. Other considerations will be gender-neutral terminology and harmonization among the different language versions.

To encourage human rights defenders throughout the world to make their views known in the coming months, we have appended excerpts of some draft provisions which directly relate to the work of non-governmental human rights thinkers, educators and actors.<sup>10</sup>

### **Chapter I, Article 3**

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of [universally recognized] human rights and fundamental freedoms at the national and international levels. Each state shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in this Declaration are effectively guaranteed.

### **Chapter II, Article 1**

All persons have the right to know and, individually as well as together with others, to be informed about, and to make known their rights and freedoms and those of [others/all other members of the community].

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<sup>8</sup> For example, see the statements made by the ICJ, the International League for Human Rights and Amnesty International in 1986, and the opening statement by the Chairman-Rapporteur from Australia. Report of the Working Group, E/CN.4/1986/40.

<sup>9</sup> Russia withdrew draft provisions introduced by the former USSR.

<sup>10</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, E/CN.4/1992/53, 27 February 1992, Annex I.

Please note: Some words are in brackets to indicate that full consensus has not been reached for their adoption. An accurate understanding of the implications of these draft provisions cannot be reached without reference to the full reports of the Chairman-Rapporteur for 1992 and for earlier years. A number of important provisions and competing versions have not been included in this brief excerpt.

## Chapter II, Article 2

Everyone has the right, individually as well as together with others,

- (a) To seek, obtain, receive and hold information about these rights and freedoms, including having full access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) To publish, impart or disseminate freely to others views, information and knowledge of [universally recognized] human rights and fundamental freedoms.

## Chapter II, Article 3

Everyone has the right, individually and in association with others, to study, discuss and form opinions as to whether these rights and freedoms are observed, both in law and in practice [in their own country and elsewhere, and to solicit public attention on these matters].

## Chapter II, Article 5

1. The state has the responsibility to take legislative, judicial, administrative or other appropriate measures to promote the understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights.
2. Such measures shall include:
  - (a) The publication and widespread distribution of national laws and regulations and of basic international human rights instruments;
  - (b) Full and equal access to international documents in the field of human rights, including the

state's periodic reports to the bodies established by the international human rights treaties to which it is a party, as well as the official report of these bodies.

## Chapter III, Article 1

For the purpose of promoting and protecting [universally recognized] human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

- (a) To meet or assemble peacefully;
- (b) To form, join and participate in non-governmental organizations, associations or, where relevant, groups;
- (c) To communicate with non-governmental or inter-governmental organizations.

## Chapter III, Article 2

Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his country and in the conduct of public affairs. This includes, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work which may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

## Chapter III, Article 4<sup>11</sup>

[In order to guarantee the independ-

<sup>11</sup> There were many proposals concerning draft Article 4. See the discussion notes in the Report of the Working Group, E/CN.4/1992/53, paras. 76-100 and the commentary in the Annex, p. 35.

ence and freedom of action in their activities, individuals, groups and associations [should] have the right to solicit, receive and utilize voluntary financial and other contributions, for the sole purpose of promoting and protecting [universally recognized] human rights and fundamental freedoms.]

[Such contributions from abroad shall be subject, on a non-discriminatory basis, to the national legislation generally applicable to the entry of funds, goods and services and such legislation shall not be applied in such a manner as to frustrate the application of the contributions to the promotion and protection of [universally recognized] human rights and fundamental freedoms.]

#### **Chapter IV, Article 1**

In the exercise of the right to promote and protect the human rights referred to in the present Declaration, as well as in the exercise of other [universally recognized] human rights and fundamental freedoms, everyone has the right to protection and recourse to effective remedies in the event of violations of those rights.

#### **Chapter IV, Article 2**

To this end, everyone has the right, *inter alia*, to:

- (a) Draw public attention to violations of human rights and to complain about the policies and actions of individual officials and governmental bodies by petitions or other means to competent national judicial, administrative, or legislative authorities or any other competent authority provided for by the legal system of the state, as well as to any relevant competent international bodies;
- (f) Unhindered access to and communication with international bodies with general or special competence to re-

ceive and consider communications on matters of human rights in accordance with applicable international instruments and procedures.

#### **Chapter IV, Article 3**

To the same end, each state shall, *inter alia*:

- (a) Ensure the protection by the competent authorities of everyone, individually or in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as the consequence of their legitimate exercise of the rights referred to in this declaration;
- (b) Encourage and support the development of further institutions for the protection and promotion of [universally recognized] human rights and fundamental freedoms in all territory under its jurisdiction, such as ombudsmen, human rights commissions and other appropriate mechanisms;
- (c) Conduct or ensure that a prompt and impartial investigation or inquiry takes place whenever there is reasonable ground to believe that a violation of [universally recognized] human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

#### **Chapter IV, Article 4**

Individuals or groups whose professional or occupational activities may affect the enjoyment of [universally recognized] human rights and fundamental freedoms have, in the exercise of their profession or occupation, the right and responsibility to promote, respect and observe these rights and freedoms and the dignity and self-respect of every individual as well as such national and international standards of professional or



occupational conduct or ethics as may be applicable. This right and responsibility is also incumbent upon those who establish or supervise the implementation of such standards.

#### **Chapter V, Article 1**

Nothing in this present Declaration shall be construed as impairing or contradicting the purposes or principles of the Charter of the United Nations nor as restricting or derogating from the provisions of the Universal Declaration of Human Rights and the International Covenants on Human Rights [and other international instruments in this field].

#### **Chapter V, Article 2**

Domestic law consistent with the United Nations Charter and other international obligations and commitments of the state in the field of human rights and fundamental freedoms is the juridical framework within which human rights and fundamental freedoms should be implemented and enjoyed, and within which all activities referred to in this Declaration for the promotion, protection and effective realization of those rights and freedoms should be conducted.

#### **Chapter V, Article 3**

In the exercise of the rights and freedoms referred to in this Declaration, everyone, acting individually or in association with others, shall be subject only

to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society and in accordance with applicable international obligations and commitments.

#### **Chapter V, Article 4**

Nothing in the present Declaration shall be interpreted as implying for any individual, group or organ of society the right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms referred to in this Declaration or at their limitations (sic) to a greater extent than is provided for in this Declaration.

#### **Chapter V, Article 5<sup>12</sup>**

[Everyone has duties to the community in which alone the free and full development of his personality is possible.]

[Everyone, individually and in association with others, should have and promote respect for the rights, freedoms, identity and human dignity of all other members of the community, as well as for the identity of the community as a whole.]

[The establishment of a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized is the responsibility of everyone.]

<sup>12</sup> Many competing proposals were put forward in an attempt to forge a compromise for this Article. The various permutations are noted in E/CN.4/1992/53, p. 39. As was their duty, NGO observers suggested that it might be inappropriate to insert any such Article imposing duties on individuals. The more acceptable compromises will be those based on words already agreed to in universal human rights instruments.

# An Enlarged UN Commission on Human Rights

The 48th session of the UN Commission on Human Rights, held in Geneva from 27 January to 6 March 1992, was marked by action on a record 22 countries. Procedures for scrutinizing abuses in Cuba, Equatorial Guinea, Haiti, Myanmar (Burma), Somalia, Sudan and Zaire were upgraded. But the Commission failed to act on violations in China and Tibet and in Syria while an initiative on East Timor was watered down. New draft declarations on disappearances and minorities were approved and transmitted to the General Assembly (through the Economic and Social Council) for adoption. The Commission made progress towards adopting an optional protocol to the Convention against Torture, which would establish a system of periodic visits to allow action on human rights violations between sessions.

The Commission met as the new UN Secretary-General Boutros Boutros-Ghali named Antoine Blanca (France) as Under-Secretary-General for Human Rights and Director of the UN Office in Geneva, and Jan Eliason (Sweden) as Deputy Secretary-General for Humanitarian Affairs and Human Rights. Mr. Blanca succeeded Jan Martenson (Sweden).

While the records of African countries dominated the "confidential" sessions, Asia was the primary region under public scrutiny for human rights violations in Myanmar, East Timor, Tibet, Iran, Iraq and Sri Lanka. This completed a historical shift away from Latin America, which was the focus of public attention in the 1980s. The Asian group acted powerfully as a bloc from the start, nominating the Iranian representative as a Commission Vice President. The choice of Iran, being examined by a special representative for

its grave violations of human rights, was seen by many as a challenge and a sign of intransigence.

By contrast, Eastern European representatives did not hold meetings as a regional bloc, taking their cue from the Western group. A North-South division has thus increasingly taken the place of the East-West conflict in the Commission's decision-making process.

Western fears that the recent expansion of the Commission's membership from 43 to 53 would blunt its critical examination of human rights abuses proved unfounded, as more country situations came under scrutiny. The addition of 10 countries from the South created a more equitable regional distribution, while the end of the Cold War and increasing world-wide democratization provided a potential majority for the aggressive denunciation of violations.

At its first meeting the Commission elected Pál Solt (Hungary) as its Chairman, Ligia Galvis (Colombia) as its Rapporteur and Roland Alfred Walker (Australia), Mohamed Ennaceur (Tunisia) and Sirous Nasser (Iran) as its three Vice Chairmen. During the course of the session, the Commission adopted 82 resolutions and 17 decisions. A large number of guest speakers appeared, including deposed Haitian President Jean-Bertrand Aristide, Swiss Confederation President René Felber, Somali Prime Minister Omer Arteh Ghalib, Chairman Stanislav S. Shushkevich of the Belarus Supreme Soviet, US Vice President Dan Quayle and Chief Justice Galal Ali Lutfi of Sudan.

The International Commission of Jurists (ICJ) intervened on four points: to support the proposal to request an advisory opinion from the International Court

of Justice on the legal consequences of Israeli settlements in the Occupied Territories; to criticize the fraudulent enrichment of top state officials; to detail country concerns especially in East Timor, Myanmar and Tibet; and to address issues including the Declaration on Disappearances, the Working Group on Detention, the issue of *habeas corpus* and the draft optional protocol to the Convention against Torture. In a joint intervention, the ICJ and the Federation Internationale des Droits de l'Homme expressed concern over the draft declaration on human rights and Islam before the Organization of the Islamic Conference. The intervention noted that the declaration threatens the intercultural consensus on which international human rights instruments are based and introduces an intolerable discrimination against non-Muslims and women. The ICJ also spoke on behalf of 30 NGOs to express profound distress at the rise of intolerance, racism, religious extremism and xenophobia world-wide.

### **Confidential "1503" procedure**

This year saw unprecedented advances in the confidential "1503" procedure. In one of the Commission's most positive actions, Myanmar was removed from the confidential procedure, under which first Professor Yozo Yokota and then Professor Sadako Ogata (now UN High Commissioner for Refugees) had visited the country and filed reports. A special rapporteur was assigned to monitor the human rights situation in Myanmar and to report publicly to the Commission's next session. The Commission "deplored" the government's

failure to institute a democratic state and noted "with concern the seriousness of the human rights situation".<sup>1</sup> The resolution was passed without a vote.

The majority of countries remaining under confidential consideration were African: Chad, Zaire, Sudan and Somalia. On the initiative of the United States, a special rapporteur was appointed to report next year on the human rights situation in Sudan. Although the report will be examined in private session, the appointment of a rapporteur brings Sudan one step closer to public scrutiny. This positive move might signal the crumbling of the wall of silence surrounding sub-Saharan Africa. (Only South Africa and Equatorial Guinea, long-standing targets of UN attention, have previously been the subjects of Commission monitors, public or confidential.) The situations in Zaire and Somalia are to be studied by the Secretary-General or his designate. Chad remains under confidential review along with Bahrain.

In a serious setback the Commission, without a vote, dropped Syria from consideration under the 1503 procedure.

### **Agenda items 12 and 19**

One disturbing trend in recent years has been the politicized shuffling of countries between agenda items 12 ("Question of the violation of human rights and fundamental freedoms in any part of the world") and 19 ("Advisory services in the field of human rights"). This year, however, the distinctions were clarified by the removal of two gross and persistent violators of human rights from the category of advisory services. In a

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<sup>1</sup> 1992/58.

scathing report on Equatorial Guinea, the independent expert Fernando Volio Jimenez (Costa Rica) said that while "the population is bowed down by poverty, ill health and inadequate food and education ... exercising absolute political power is at the top of [the government's] agenda".<sup>2</sup> The Commission "deeply deplored the serious deterioration of the human rights situation" and appointed an expert to report on Equatorial Guinea under item 12 next year.<sup>3</sup> Similarly, Haiti was taken from advisory services and assigned a special rapporteur following a critical report by the Commission's expert, Marco Tulio Bruni Celli (Venezuela), and an eloquent plea by deposed President Jean-Bertrand Aristide. The Commission expressed<sup>4</sup> "deep concern over the flagrant human rights violations committed under the illegal government set up following the coup" in September 1991 and placed Haiti under item 12 for next year.

The Commission expressed "deep satisfaction" with the peace agreements signed between the government of El Salvador and the Frente Farabundo Marti para la Liberacion Nacional.<sup>5</sup> In recognition of the changing human rights situation and the presence of the UN Observer Mission in El Salvador, the Commission replaced the special representative (who had reported under item 12) with an independent expert. The expert is mandated to provide assistance in human rights matters to the government, to consider the effects of the peace agree-

ments on human rights and to investigate the implementation of UN recommendations. If the human rights situation substantially improves, the expert's report will be considered under the agenda item on advisory services.

The Commission's actions did not always serve to enhance the distinctions between items 12 and 19. Although the Commission's expert, Christian Tomuschat (Germany), said the Guatemalan army had instilled a "state of fear"<sup>6</sup> in the populace, Latin American countries and the United States blocked a European move to appoint a special rapporteur to report on abuses there under item 12. The resolution, passed by consensus, renews the mandate of the independent expert to "examine the human rights situation" in Guatemala and to "provide assistance to the government", but leaves open the agenda item for his report in 1993.<sup>7</sup>

### China and Tibet

The Commission's inability to act on massive human rights abuses committed by China in Tibet or in China proper was the major failure of its 48th session. The Sub-Commission on Prevention of Discrimination and Protection of Minorities had set a precedent by passing a resolution on the "Situation in Tibet" that expressed "concern at the continuing reports of violations of fundamental human rights and freedoms which threaten the distinct cultural, religious and national

<sup>2</sup> UN doc. E/CN.4/1992/51.

<sup>3</sup> 1992/79.

<sup>4</sup> 1992/77.

<sup>5</sup> 1992/62.

<sup>6</sup> UN doc. E/CN.4/1992/5.

<sup>7</sup> 1992/78.

identity of the Tibetan people" and requested the Secretary-General to prepare a report.<sup>8</sup> The 71-page report, which was before the Commission, contained information provided by the government of China and several NGOs, although information provided by the government of Tibet in exile was not included.

A draft resolution, also entitled "Situation in Tibet", was proposed by the 12 members of the European Community and other states. It similarly expressed concern at human rights violations "which threaten the distinct cultural, religious and ethnic identity of the Tibetans".<sup>9</sup>

The Chinese delegation exerted powerful pressure against the draft resolution, asserting that the very title challenged its territorial integrity. To the surprise of many, the United States opposed the resolution, thus effectively assuring its defeat as states that might have voted in favour defected. The justification advanced by the United States was that the Commission should deal with violations in China as a whole.

On the eve of the vote, to persuade the United States, the European Community reworded the text to cover abuses in China proper as well as in Tibet. The compromise draft of the "Situation in China/Tibet" referred to Tibetans and "other citizens" of China.<sup>10</sup> Many of those lobbying for a condemnation found this implicit recognition of China's claims on Tibet unacceptable. Pakistan's motion to take no action on the resolution was approved.

## Cuba

In 1991, at the request of the Commission, the Secretary-General appointed Rafael Rivas Posada (Colombia) to report on the human rights situation in Cuba. The government, alleging that the Commission's action was politically motivated, refused to allow the representative to conduct a visit. He thus presented a report based on allegations given to him by exiles and human rights groups. The Commission noted that it was "profoundly concerned at numerous uncontradicted reports of continued violations in Cuba of human rights".<sup>11</sup> Cuba's growing political isolation, combined with its refusal to receive the Commission's representative, led to the easy passage of a resolution which upgraded the monitor to the level of a special rapporteur.

## East Timor

The Commission issued a consensus statement, read by the Chairman, expressing concern at "the deteriorating human rights situation in East Timor" and condemning the "unjustifiable action by the armed forces of Indonesia that cost the lives of many innocent and defenceless citizens" on 12 November 1991. The statement, accompanied by a letter signed by the Indonesian delegate to the Commission, asked Secretary-General Boutros-Ghali to keep the Commission informed about the situation on the island, which has been brutally occupied

<sup>8</sup> Sub-Commission Resolution 1991/10 of 23 August 1991.

<sup>9</sup> UN doc. E/CN.4/1992/L.49.

<sup>10</sup> UN doc. E/CN.4/1992/L.49/Rev.1.

<sup>11</sup> 1992/61.

by Indonesia since 1975.

This end result was disappointing to NGOs and others who had hoped that international concern over the massacre in Dili would give the Commission the impetus to issue a stronger condemnation of Indonesian practices in East Timor. Portugal, with the backing of the other European Community countries, took the lead to lobby for a strong resolution. Australia – supported by Japan, Canada and the United States – worked to dilute the condemnation. These countries cited Indonesia's establishment of a national commission of inquiry to look into the massacre as evidence of the government's good-will. The ICJ, Amnesty International and other organizations have criticized Indonesia's investigation for its "fatally flawed" procedures combined with "further serious violations, including arrest for political reasons, torture, ill treatment and extrajudicial executions".<sup>12</sup>

The Chairman's statement at least places East Timor on the Commission's agenda for next year. Additionally, S. Amos Wako (Kenya), the departing Special Rapporteur on summary or arbitrary executions, has been sent to the island as a personal envoy of the Secretary-General. His report to the Secretary-General, if it is made public, should provide another source of information on the human rights situation in East Timor since it is difficult for journalists and human rights workers to maintain contact with the Timorese.

## Iran

Only a last-minute compromise in 1991 renewed the mandate of the Special Representative on Iran, Reynaldo Galindo Pohl (El Salvador). It was agreed that the mandate would be terminated "if there is further progress achieved regarding its recommendations".<sup>13</sup> An ICJ intervention underlined the hypocrisy of this decision, questioning whether Iran's human rights performance had progressed "or merely its geopolitical standing?" This year the Commission had a scathing report by Mr. Pohl, who found that "in 1991 the Islamic Republic of Iran made no appreciable progress towards improved compliance with human rights".<sup>14</sup> The Commission voted to express "deep concern at continuing reports of human rights violations" in Iran and extended the Special Representative's mandate for another year.<sup>15</sup> The day of the vote, Iran circulated compromise proposals that would have softened the language and eliminated the Special Representative's interim report to the General Assembly. With the United States urging firmness, the Western co-sponsors rejected Iran's bid.

## Iraq

The Special Rapporteur on Iraq, Max van der Stoep (Netherlands), reported that "the violations of human rights which have occurred are so grave and are of

<sup>12</sup> Amnesty International, "Santa Cruz: The Government Response", February 1992, London. AI Index: ASA 21/03/92. See also International Commission of Jurists, *Blaming the Victims: The 12 November 1991 Massacre in Dili, East Timor, and the Response of the Indonesian Government*, February 1992, Geneva.

<sup>13</sup> 1991/82, UN doc. E/CN.4/1991/L.11/Add.6, at 3 (1991).

<sup>14</sup> UN doc. E/CN.4/1992/34 para. 474.

<sup>15</sup> 1992/67.

such a massive nature that since the Second World War few parallels can be found". He further concluded that "the present order precludes full respect of human rights standards" and suggested sending a team of human rights monitors to Iraq as an exceptional response. He suggested that the team be mandated, *inter alia*, to investigate alleged violations, to observe trials and court proceedings, and to visit places of detention without prior notification.<sup>16</sup>

The Commission renewed the Special Rapporteur's mandate and expressed "strong condemnation of the massive violations of human rights of the gravest nature" in Iraq. However, the United Kingdom and France blocked the Special Rapporteur's proposal for a monitoring team while the United States supported it. In a compromise, the Commission requested the Special Rapporteur, "in consultation with the Secretary-General, to develop further his recommendation for an exceptional response and to report thereon to the General Assembly".<sup>17</sup>

### Israeli-Occupied Territories

The Commission passed several resolutions condemning Israel's human rights abuses in the Occupied Territories. One resolution stated "that the installation of Israeli civilians in the Occupied Territories is illegal".<sup>18</sup> Another reaffirmed "the right of the Palestinian people to self-determination" and that "the Israeli occupation of Palestine constitutes a gross

violation of human rights and an act of aggression against the peace and security of mankind".<sup>19</sup> All of the resolutions were passed by wide margins, with the United States often providing the sole dissenting voice.

A draft resolution had been proposed by the Sub-Commission, with the support of the ICJ, to request an advisory opinion from the International Court of Justice on the legal consequences of Israeli settlements in the Occupied Territories. It was deferred by the Commission to a later session.

### Occupied Kuwait

The Commission had before it a strongly critical report from Special Rapporteur Walter Kälin (Switzerland) on abuses in Kuwait under Iraqi occupation.<sup>20</sup> Despite a Sub-Commission resolution expressing "hope that the Special Rapporteur ... will give due attention to alleged gross violations of human rights currently occurring in Kuwait and will inform the Commission of developments affecting the situation of human rights in Kuwait since the withdrawal of Iraqi forces",<sup>21</sup> the Special Rapporteur chose not to examine Kuwaiti human rights abuses following Iraq's withdrawal.

The Commission issued a strong condemnation of Iraq's treatment of prisoners of war and detained civilians. It demanded that Iraq "cooperate with and facilitate the work of international humanitarian organizations, notably the In-

<sup>16</sup> UN doc. E/CN.4/1992/31.

<sup>17</sup> 1992/71.

<sup>18</sup> 1992/3.

<sup>19</sup> 1992/4.

<sup>20</sup> UN doc. E/CN.4/1992/26.

<sup>21</sup> Sub-Commission Resolution 1991/7.

ternational Committee of the Red Cross, in their search for an eventual repatriation of Kuwaiti and third-country nationals detained and missing in Iraq".<sup>22</sup> An amendment proposed by Iraq, to extend the request to the governments of Kuwait and Saudi Arabia, was defeated.

## **South Africa**

Several resolutions denounced the continuing practices of the apartheid regime in South Africa, while welcoming the changes so far introduced. A six-member team, the Ad Hoc Working Group of Experts on Southern Africa, will again report on the human rights situation for next year. The Commission recommended a draft resolution to Economic and Social Council renewing the mandate of the Sub-Commission's Special Rapporteur to "update the list of banks, transnational corporations and other organizations assisting the racist regime of South Africa".<sup>23</sup> This resolution – along with one that labels political, economic, financial and military aid to the government "a hostile action against the people of South Africa" – passed even with the negative votes of Eastern and Western European countries and Japan.

## **Sri Lanka**

The Chairman read a consensus statement on behalf of the Commission, in particular stating concern that despite "an overall decline, incidents of disappearance continue to be reported" in Sri Lanka. The action came after the Working Group on Enforced or Involun-

tary Disappearances visited Sri Lanka and reported that the 12,000 cases of disappearances since 1983 was "by far the highest number ever recorded by the Working Group for any single country".<sup>24</sup> The report concluded that the army, the police, death squads (operating with the acquiescence of government forces) and civil defence units (armed and trained by the army) have been involved in disappearances.

The Sri Lankan delegation indicated the country's willingness to comply with most of the Working Group's recommendations and to welcome a follow-up visit. In so doing, it disarmed attempts to issue a stronger condemnation of government practices detailed in the Working Group's report. The government's actions also indicated the importance of the thematic mechanisms and the constructive role they can play in the Commission's work.

## **Other country situations**

The Commission also expressed concern regarding the human rights situations in Afghanistan (where the monitor was retained), Albania and southern Lebanon. The mandate for the Special Rapporteur on Romania was terminated, although the Commission requested that the Secretary-General report on the implementation of the Rapporteur's final recommendations. Political settlements in Western Sahara and Cambodia were welcomed and the Commission will keep these situations under review.

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<sup>22</sup> 1992/60.

<sup>23</sup> 1992/7.

<sup>24</sup> UN doc. E/CN.4/1992/18/Add. 1, para. 192.



### Three-year mandates

The Commission's thematic mechanisms have proved to be among the most effective means for the monitoring of human rights abuses around the world. Pursuant to the 1990 agreement in the Economic and Social Council concerning the enlargement and enhancement of the Commission, the mandates of all of the thematic mechanisms were to be renewed for three years. This would allow more continuity in the planning and budgets of the mechanisms and enhance their independence by guaranteeing their tenure.

The three-year renewals were approved over the strong protests of several countries. The Philippines initiated a public attack on the mandate of the special rapporteur on torture. Joined by other Asian countries, it claimed that the duties of this rapporteur overlapped with the Committee against Torture and therefore his mandate should be kept under annual review. When Latin American and African countries joined the Europeans in defending the three-year renewals, the opposition ended. The Philippines repeated its protests, however, when the mandates of the special rapporteur on summary and arbitrary executions and the special rapporteur on the sale of children were renewed.

### Working Group on Arbitrary Detention

The first report of the Working Group on Arbitrary Detention, created in 1991, was submitted to the Commission and was strongly approved. The Working Group's mandate, wider than that of any

other mechanism, permits it to investigate cases of detention rather than simply to receive and report information. The fact that two of the Working Group's members – Peter Uhl (Czechoslovakia) and Roberto Garreton (Chile) – have been victims of arbitrary detention reinforced the Working Group's determination to carry out its broad mandate. Indeed, the Working Group correctly followed UN precedent in concluding that a detention is arbitrary if it is either on grounds of or in accordance with procedures other than those established by law, or under the provisions of a law whose purpose is incompatible with international human rights. Its mandate to investigate cases implies reaching some form of conclusion as to whether a particular detention is "arbitrary" or not.

On one point the Working Group narrowed its scope. The report said a case is closed when a person is released, for whatever reason.<sup>25</sup> The ICJ, in an oral intervention, pointed out that by preventing the Working Group from reaching conclusions on such cases, this decision essentially immunizes cases and even patterns of short-term arbitrary detention from scrutiny. It also overlooks the enforceable right to compensation, set out in Article 9(5) of the International Covenant on Civil and Political Rights. Responding to this criticism, Chairman Louis Joinet (France) stated that the Working Group would review the practice and it did so at a later meeting.

### Torture

The Special Rapporteur on torture, Peter Kooijmans (Netherlands), submitted his seventh report to the Commission.

<sup>25</sup> UN doc. E/CN.4/1992/20, para. 13 (14) (a).

In addition to hundreds of allegations transmitted to 55 countries for clarification, the report detailed 64 urgent appeals sent for the immediate attention of the government concerned. The Special Rapporteur observed that an increasing number of governments reply to his communications, although many fail to provide satisfactory information. He said that "under circumstances in which torture is practised or condoned by the authorities, it is the judiciary which forms the last bastion for the protection of the citizen's basic rights. Nevertheless, it is tragic to note that in many cases the judiciary does not seem to be aware of the role it can play in upholding the rule of law."<sup>26</sup>

### Working Group on Disappearances

In its 12th annual report to the Commission, the Working Group on Enforced or Involuntary Disappearances said it had received 17,000 reports of disappearances in 1991. Of these, it transmitted 4,800 cases to 25 governments. Approximately 12,000 cases were not yet analyzed at the time of the report due to a serious lack of resources. The Working Group noted an "unexpected resurgence" of the problem of disappearances – Sri Lanka alone accounted for 3,841 of the cases transmitted.

The Working Group emphasized that "abuses of power, as manifested by enforced disappearances, would be severely curtailed if there existed an independent and efficient judiciary capable of investigating accusations promptly and of giving

adequate protection to individual rights".<sup>27</sup> Further, it "noticed with alarm that, regrettably, *habeas corpus* has remained virtually inoperative in situations of widespread violence and disappearance".<sup>28</sup>

### Summary or arbitrary executions

Mr. Wako, the Special Rapporteur on summary or arbitrary executions, reviewed the first decade of his activities in his ninth annual report to the Commission. He noted that the number of reported cases has grown dramatically, especially in recent years. He listed the countries that have systematically failed to reply to his appeals for action and requests for information: Chad, Haiti, Libya, Pakistan, Somalia, South Africa, Thailand, Uganda and Zaire.

Over the past year, the Special Rapporteur sent 125 urgent appeals to 44 countries, concerning 345 identified cases of imminent or threatened executions. He received 21 replies to his appeals for protection and information on these cases. He also contacted 49 governments concerning alleged summary or arbitrary executions in their countries and received replies from 17 governments.

### Declaration on disappearances

The Commission approved by consensus a draft Declaration on the Protection of All Persons from Enforced Disappearance, which had been finalized at a two-week intersessional meeting. The ICJ had

<sup>26</sup> UN doc. E/CN.4/1992/17, para. 280.

<sup>27</sup> UN doc. E/CN.4/1992/18, para. 367.

<sup>28</sup> UN doc. E/CN.4/1992/18, para. 368.

helped to prepare a first text in 1988 and then convoked a three-day expert meeting in 1990 which produced the version adopted by the Sub-Commission later that year. The Declaration states that systematic disappearances are "of the nature of a crime against humanity" and authorizes any country in whose jurisdiction an alleged offender is found to bring that person to justice. While not as clearly or as strongly worded as the ICJ and other non-governmental organizations had hoped, the Declaration sets forth a realistic and constructive approach to this pervasive phenomenon. It states that: disappearances are absolutely prohibited, detainees shall be held in officially recognized places of detention, relatives have the right to go to court to locate detainees, states shall thoroughly investigate complaints of alleged disappearances and protect relatives and witnesses who complain, and no special amnesty laws should exonerate perpetrators. The Declaration now goes to the General Assembly for final approval.

### **Optional protocol to Convention against Torture**

The ICJ and the Swiss Committee against Torture, with support from the governments of Switzerland and Costa Rica, have been instrumental in drafting an optional protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The protocol would create a preventive system of visits to places of detention, similar to the procedures used by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. In an important first step towards approving such a protocol, the Commission set up

an open-ended working group to meet immediately prior to its next session and to elaborate a text based on the proposal submitted by the government of Costa Rica.

### **Declaration on Minorities**

A draft Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities was approved without a vote and transmitted to the General Assembly via the Economic and Social Council. The drafting process commenced in 1978. The completion of the text this year hopefully portends a greater willingness by the Commission to pay closer attention to minority issues.

### **Declaration on human rights defenders**

An intersessional working group presented the first reading of a draft declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms (commonly known as the "declaration on human rights defenders").

### **Emergency mechanism**

A proposal by the Austrian delegation to establish an emergency mechanism for the Commission gathered strong support but was eventually postponed for consideration to the next session.

Under the proposal, a UN member state may call the Secretary-General's attention to an alleged case of gross violations in another country. The Secretary-

General then requests the views of the state concerned and transmits the original request and the state's comments to members of the Commission. If a majority of members responding within one week agree, the Commission's Bureau will pick five independent experts (from a list established by the Secretary-General based on nominations by each regional group), mandated to collect information and produce a confidential report. A fact-finding mission may be undertaken, but only with the consent of the state concerned. The group's report is then submitted to the state concerned, which has two weeks to reply to the Secretary-General. States members and relevant mechanisms of the Commission receive copies of the report and the response. If most of the states concur, an exceptional meeting of the Commission can be scheduled. If a majority is not secured, the report is submitted to either the General Assembly or to the Commission, whichever meets first.

### **Internally displaced persons**

The Commission last year requested an analytical report from the Secretary-General on the legal situation of the world's 20 to 30 million displaced persons and possible mechanisms for their protection. At this session, a draft resolution calling for the appointment of an independent expert on the issue was strongly opposed by India and others. After lengthy negotiation the Commission passed a compromise draft, requesting that the Secretary-General designate a representative to seek views and information from governments, UN organs,

NGOs and others; examine existing laws and standards, and present a comprehensive study to the Commission on the implementation of existing laws and mechanisms and possible alternatives for protecting the internally displaced. The end result, although weaker than the original proposal, leaves the door open for more constructive action to be taken in the future.

### **Fraudulent enrichment**

The Commission amended and adopted a Sub-Commission resolution which criticized the fraudulent enrichment of top state officials, stating that "corrupt activities of public officials could destroy the potential effectiveness of all types of governmental programmes, hinder development and victimize individuals and groups".<sup>29</sup> The Commission amended the resolution slightly and it passed easily, with only the United States and Japan abstaining. One controversial paragraph – which stated that "developed countries have a special responsibility to contribute diligently to the restitution to despoiled peoples of the funds which their leaders have extorted from them" – was the subject of a separate vote. Despite the lack of support from Western countries, the paragraph was retained.

### **Habeas corpus**

The Commission adopted by consensus a Sub-Commission resolution, drafted with ICJ assistance, calling on states to establish and to maintain at all times the

<sup>29</sup> Draft Resolution VIII of the Sub-Commission 1991.

right to *habeas corpus*. This right is of capital importance to those deprived of their liberty. It protects the personal freedom of a detainee by requiring that the legality of his or her detention be determined and, if it is necessary that the detainee be brought before a judge, ensuring that his or her life and physical integrity be respected. The Working Group on Disappearances has noted that "*habeas corpus* ... is potentially one of the most powerful legal tools for unearthing the fate or whereabouts of a disappeared person".<sup>30</sup> The call to preserve *habeas corpus* even during emergencies follows the precedent set by the Inter-American Court of Human Rights.

### Other developments

Several resolutions concerning indigenous peoples were passed by consensus. They approved further work on a draft universal declaration on the rights of indigenous peoples and on preparations for the International Year of the World's Indigenous Peoples in 1993.

The Commission for the first time passed a resolution on the protection of Roma (gypsies). It invited states to adopt appropriate measures to eliminate discrimination against the Roma and asked that the Sub-Commission's study on facilitating solutions to problems involving minorities accord special attention to living conditions of the Roma people.

Resolutions were also passed expressing concern over the question of human rights and AIDS and human rights and disabilities. At the initiative of the Russian Federation, the Commission took note of the potential for forensic science

to play a role in the investigation of human rights abuses. The Sub-Commission decision to prepare a report on the independence of the judiciary and the legal profession was endorsed by consensus.

### Conclusion

The success of the Commission's 48th session lay in its ability to deal with a greater number and wider range of countries than in any previous year. Thus, despite the built-in tendency of states to protect each other, seven monitors were appointed or given stronger mandates. The four new monitors on Africa represent a historical breakthrough: only once before had a monitor been named to investigate abuses in a black African country. The Commission now has a potential majority for strong action on situations of abuse. The session revealed, however, that while it is now possible for the once-timid United Nations to confront abuses wherever they occur, these confrontations will largely be resolved in accordance with the selective aims of the United States.

The role of the United States in this session deserves special attention. In recent years, the United States viewed the Commission almost exclusively as a tool in its campaign to isolate Cuba. From 1988 to 1990 the US ambassador to the Commission was the former Cuban political prisoner Armando Valladares, whose lack of diplomatic skills and single-minded pursuit of Fidel Castro angered even the closest US allies while leading the United States to ignore more pressing issues. In 1989, for example, at the first Commission meeting after

<sup>30</sup> See, e.g., UN doc. E/CN.4/1990/13, para. 346.

Saddam Hussein laid waste to Kurdish villages with poison gas, the US refusal to co-sponsor a resolution expressing the Commission's concern aided in its narrow defeat. Since then, Mr. Valladares has been replaced by Kenneth Blackwell, whose negotiating skills and willingness to listen has won the United States a new-found respect.

Vice President Dan Quayle, addressing the Commission this year, said that in the past the United States had backed regimes with unsavoury rights records to prevent them from shifting "their support to the other side – the Soviet camp" but "no global evil today forces such dis-

tasteful dilemmas on the United States". Indeed, the United States this year spearheaded the efforts to condemn Iran and Sudan, two of the world's worst human rights violators. Before the session the United States also played a key role in shaping the draft declaration to prevent, investigate and punish disappearances. Nevertheless, the Commission's four major disappointments – on East Timor, Guatemala, Syria and Tibet – occurred as the United States retreated on the human rights records of its allies. A truly less selective approach by the United States would enhance both its and the Commission's credibility.

## Human Rights Development at OAS General Assembly

*Reed Brody and Felipe Gonzalez\**

The 22nd General Assembly of the Organization of American States, which took place on 18-23 May 1992 in Nassau, Bahamas, was dominated by the debate over the OAS role in supporting democracy in the hemisphere in light of the coups in Haiti and Peru. A special meeting of Foreign Ministers on Haiti and Peru, which preceded the formal opening of the General Assembly, was marked by the surprise appearance of President Alberto Fujimori of Peru.

The most important human rights de-

bates focused on the report of the Inter-American Commission on Human Rights and a draft convention on enforced disappearances. For the four non-governmental organizations (NGOs) present, the largest number to attend an OAS General Assembly, this was an opportunity to strengthen their lobbying efforts and to envision the day when they would be formally recognized with consultative status at the OAS.

The Assembly adopted the "Declaration of Nassau" whose purpose is to

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strengthen, defend and promote the democratic system of human rights in the hemisphere. The member states expressed their commitment to condemn any attempt to disrupt the democratic order and reaffirmed their commitment to the resolution of Santiago de Chile in 1991, which established emergency procedures to protect democracy in the hemisphere. The Declaration of Nassau also stressed the necessity of adopting and implementing programmes to eliminate extreme poverty, as well as for promoting the protection of the environment, regional integration, the liberalization of commerce and support for health and education. In addition, it supports efforts to eradicate racial discrimination and to improve the situation of indigenous populations.

Following a US-originated proposal formally introduced by Argentina, the General Assembly voted to convene an Extraordinary Session of the General Assembly before the end of 1992 to consider a modification to the OAS Charter, which would allow suspension of membership for any governments that destroy representative democracy. Another potential reform would strengthen the means to confront extreme poverty in the hemisphere.

## Situation in Peru

Meeting in Washington in the aftermath of the *coup d'état* on 5 April 1992 by President Fujimori, OAS foreign ministers had issued a strong condemnation, sent a high-level delegation to Peru and requested a special country report from the Inter-American Commission on Human Rights.

President Fujimori's arrival at the General Assembly took the ministers by

surprise. In his presentation he sought to justify his recent decisions by reference to Peru's particular situation and the extensive corruption in its legislature and judiciary, with a virulent attack on the political parties in Peru. Most important, however, President Fujimori promised to schedule elections for a Constituent Assembly within five months, asking the OAS to assist and send observers.

In their response, several foreign ministers defended the indispensable role of political parties in a democracy. Some warned that President Fujimori's example was a recipe for *coups d'état* in developing countries, where weak democracies are often confronted with economic and social quagmires.

In the end, it was President Fujimori's personal attendance and his proposed timetable that carried the day. The foreign ministers limited their role to ensuring that his intended return to democracy would be punctually and satisfactorily accomplished. The resolution's language – which did not “condemn” or even “deplore” the coup – was much weaker than OAS resolutions after the coup. President Fujimori was asked only to ensure “the return to a representative democratic system in the shortest time”.

## Situation in Haiti

The tough measures adopted by the OAS after the coup that overthrew President Aristide on 30 September 1991 have proved to be mostly ineffective. The General Assembly thus adopted even stronger measures while approving humanitarian initiatives to relieve the disastrous situation in the country. The new provisions called for OAS member states to “deny access to port facilities to any vessel” that violates the embargo and to

monitor compliance with the embargo. The resolution urged states to deny visas to "perpetrators and supporters of the coup" and to freeze their assets. The foreign ministers rejected requests to impose a naval blockade to enforce the embargo, or a ban on commercial passenger flights to Haiti.

### **Draft convention on forced disappearances**

The General Assembly reviewed progress in drafting an Inter-American Convention on Forced Disappearances. A first draft had been presented to the General Assembly in 1987 by the Inter-American Commission on Human Rights, calling for special measures to prevent, investigate and punish forced disappearances both at the domestic and regional levels. The 1987 Assembly referred this draft to the Permanent Council for further review. The Permanent Council established a working group which presented a new draft in Nassau. The new text severely watered down the Commission's draft in many important respects:

- A due obedience clause exculpates those who commit this crime while following superior orders, unless the order was an "obvious punishable offence".
- The reference to forced disappearances as a "crime against humanity", which had been highlighted by the Inter-American Commission as probably the most important provision of the Convention, was eliminated.
- Emergency OAS procedures in cases involving disappearances were dropped.
- Measures regarding the investigation of complaints, the protection of com-

plainants and civil compensation for victims also were dropped.

These factors led Deputy Foreign Minister Edmundo Vargas Carreño of Chile, a former Executive Director of the Inter-American Commission on Human Rights, to call the new draft a "serious step backwards" and "a shame instead of a contribution". Notably, the draft omits many greater protections found in the draft Declaration on the Protection of All Persons from Enforced Disappearance, adopted in March 1991 by the UN Commission on Human Rights.

All of the NGOs present (Amnesty International, Federation of Associations of Relatives of Disappeared Detainees, International Commission of Jurists and International Human Rights Law Group) had worked on the UN declaration and they decided to press for participation in the next stages of the Inter-American convention.

The Chilean delegation presented a proposal to the General Assembly's Legal and Political Commission, requesting the working group to consult with NGOs. Representatives of Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Haiti, Jamaica, the United States and Venezuela spoke in favour of the proposal, some expressing concern at the lack of openness in OAS debates. They drew comparisons with the United Nations where NGO work is more integrated. The representative from Argentina went so far as to propose that a future amendment to the OAS Charter should include an explicit recognition of the NGO role, such as the "consultative status" which exists at the United Nations.

Mexico and Uruguay strongly opposed the Chilean proposal, arguing that the General Assembly was not competent to decide on these matters but could only



set general policy. Both delegations suggested that the Permanent Council should set criteria in regard to NGO participation at the OAS. After several failed attempts to reach a consensus, two proposals were voted upon, one put forward by Chile and the other by Mexico and Uruguay. But neither motion attained the majority 18 votes needed.

Finally, Uruguay proposed a compromise for the working group: "To urge the Permanent Council to make use, when it deems it necessary during its preparation of the draft convention, of studies and reports prepared by non-governmental organizations and institutions on the subject matter of the convention." Another Chilean proposal, adopted by consensus, asked the working group to take into account the work of the United Nations on the disappearance issue.

### **Inter-American system of human rights**

The Inter-American Court on Human Rights and the Inter-American Commission on Human Rights presented their annual reports. Court President Hector Fix Zamudio (Mexico) made only passing reference to the most controversial issue currently affecting the Court: the lack of compliance by Honduras, after almost two years, in paying full compensation to the relatives of Manfredo Velasquez Rodriguez and Saul Godinez for causing their disappearance. There was no debate on this matter.

In a letter sent to delegates before the session, Americas Watch warned that the Inter-American human rights system was in "a deep crisis of credibility and efficacy" and called for "an effective display of support for the Court and the Commis-

sion, an unequivocal expression of political will by member states to permit them to exercise their roles independently and impartially". Nevertheless, the report of Commission President Marco Tulio Bruni Celli (Venezuela) gave rise to such heated debate that the delegate of Antigua and Barbuda – one of the Commission's leading supporters – spoke of an "atmosphere of a trial".

This year's report contained decisions in 19 cases, including 13 from El Salvador, and sections on the situation of human rights in Cuba, El Salvador, Guatemala, Haiti, Nicaragua, Panama and Surinam. There was a special chapter on the situation of Haitians in the Dominican Republic.

While no delegation proposed amendments to the resolution at the General Assembly, criticism of the Commission's performance was sharp. The representative from Mexico stated that the Commission should focus on the promotion of human rights, and reaffirmed his support for transferring individual cases to the Annual Report's Appendix. He asked for the establishment of criteria to determine which member states should be reviewed in the Commission's Annual Report. Mexico also questioned the Commission's competence to examine the situation of human rights in Cuba, whose government was expelled in 1962 and "is not here to defend itself".

Hector Gros Espiel of Uruguay explicitly supported the statements made by Mexico, adding that "the Commission's deviation from international law devalues the Inter-American system". He also called on the Commission to distinguish between member states governed by democratic systems and those governed by dictatorships. He said that Uruguay and Argentina – whose laws granting amnesty to perpetrators of human rights

violations have been rejected by the Commission – had asked the Inter-American Court for an advisory opinion on the Commission's jurisdiction to deal with that question. Uruguay concluded by requesting new rules of procedures to be prepared for the Commission by the time of the 1993 OAS General Assembly.

El Salvador and Peru also criticized the Commission. The El Salvador Minister of Defence, General Emilio Ponce, arrived unexpectedly and criticized the Commission for referring in its Annual Report to a report made by a task force, headed by US Congressman Joseph Moakley. The task force report had stated that, according to reliable sources, General Ponce was the intellectual author of the murder of six Jesuit priests and a mother and daughter. General Ponce rejected the accusation and asserted his innocence.

The representative of the Fujimori government criticized the recent report by the Commission on its mission to Peru, alleging inaccuracies and a failure to provide a complete picture of the activities of the Shining Path guerrilla group.

The Commission President responded that the inclusion of individual cases in the Annual Report, started in 1965, was oriented towards publicizing the situation of human rights in the member states for the whole OAS community. He asserted that transferring the individual cases to an appendix would lessen their impact and would also damage the victims' image of the Commission's work. The purpose of special reports on certain countries in the Annual Report, he said, was to update the special reports issued over the years.

A strong majority of delegations defended the Commission. The representative of Canada stressed the need to safeguard the Commission's independence.

Speaking for Chile, Mr. Vargas Carreño noted that the Commission often plays a unique and necessary role, not only through key *in loco* visits and country reports but also by preparing drafts for the Inter-American conventions on torture and disappearances, among others. The US delegation stated that country reports are still necessary because the existence of democracies in the region does not necessarily imply the absence of human rights violations.

The General Assembly recommended that the Commission should include in its next Annual Report a general description on the activities of irregular opposition forces and how such activities produce a negative impact on the human rights situation. Additionally, while some delegates equated guerrilla violence with human rights violations – a thesis not supported by the OAS instruments – other delegates only wanted the Commission to consider activities by irregular forces as a factor while reporting on the human rights situation in various countries.

## Conclusion

The steps taken in the Bahamas to adopt new mechanisms to strengthen the protection of democracy and of human rights in the hemisphere make the NGO participation in OAS activities more vital than ever. The delegation from Argentina suggested that NGOs should enjoy consultative status with the OAS as they already do at the United Nations. Indeed, 29 states currently enjoy permanent observer status at the OAS. Consultative status for NGOs would be a logical next step, allowing NGOs to participate actively and constructively in OAS debates.

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The ICJ mission – which visited townships, hostels and officials in Natal and Transvaal – concludes that violence is the most serious challenge facing South Africa. The report not only pinpoints where problems lie but also offers recommendations, including tougher law enforcement by the government.

★ ★ ★

### **Countdown to 1997: Report of a Mission to Hong Kong**

*Published by the ICJ, Geneva 1992*

*In English. 124 pp. 10 Swiss francs plus postage*

As the date for handing over Hong Kong to China draws nearer, this report finds that the British government showed a disturbing lack of concern for the human rights of Hong Kong citizens. And China in many respects is evading obligations it assumed when it signed the Joint Declaration in 1984, the report says.

★ ★ ★

### **CIJL Yearbook**

*Published by the CIJL, Geneva 1992*

*In English, French and Spanish. 20 Swiss francs plus postage*

For the first issue of the Yearbook, the Centre for the Independence of Judges and Lawyers asked leading jurists around the world to express their views on constitutional guarantees for the independence of the judiciary. The Yearbook examines Algeria, France, India, Italy, Japan, Poland and Syria.

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