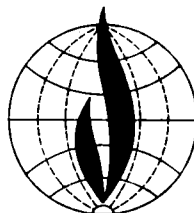


# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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# HUMAN RIGHTS IN THE WORLD

## Bolivia

### A Historic Ruling Against Impunity

On 21 April 1993, in the city of Sucre, the Bolivian Supreme Court ruled to convict former dictator, General Luis García Meza and 47 other persons, including the former Minister of the Interior, Colonel Luis Arce Gómez.

The judicial investigation, held both prior to and following what was known as the "Responsibilities trial against Luis García Meza and collaborators", was conducted over the course of ten years during which numerous testimonies, confessions and expert witnesses were heard as well as innumerable written documents presented. The proceedings were subjected to multiple setbacks in the courts of Military Justice, the National Parliament and the Supreme Court. On several occasions they were on the verge of failure owing to pressure from sectors with ties to the former dictatorship as well as from those who, although having no such ties, feared the trial would jeopardize Bolivia's institutional stability.

An important factor in the initiation of proceedings and subsequent prosecution was the strength of popular opposition to impunity spearheaded by a "Trial Investigation Committee" which received the support of victims and their relatives (the civil party in the suit) and numerous Bolivian NGOs and trade union organizations.

The outcome of this trial is a rare and nearly unprecedented occurrence on this

continent. Indeed, there are very few instances in which officials of *de facto* governments have been brought to trial. Officials, who, in order to rise to power and maintain their positions, resorted to gross violations of human rights, committed acts of murder, enforced disappearance or torture and whose practices were steeped in corruption as they freely embezzled public funds and amassed great personal fortunes.

#### Background

On 17 July 1980, a *coup d'état* was directed against the Interim Constitutional President, Mrs. Lidia Gueiler Tejada. Its leaders refused to recognize the results of the elections held on June of that same year and advanced General Luis García Meza as President of the Republic. When it had succeeded in restoring constitutional order and the Rule of Law and following a prolonged investigation the National Congress decided, in February 1986 (and later in a complementary decision in January 1989), to initiate political proceedings before the Supreme Court indicting the former dictator, as well as former members of the junta of chief commanders, the cabinet, the armed forces, the police and numerous civilians implicated for involvement in repressive paramilitary groups.

The various crimes which the Supreme Court was assigned to investigate and judge may be grouped into the following categories: **a)** constitutional violations connected with the *coup d'état*; **b)** human rights violations, in particular the attack on the *Central Obrera Boliviana* (COB), the Bolivian Trade Union Confederation, in which were killed three political and trade union leaders and eight militants belonging to the *Movimiento de Izquierda Revolucionaria* (MIR), Revolutionary Left Movement, at a house on *Calle Harrington* in La Paz; **c)** acts of corruption, including illicit dealings, embezzlement, misappropriation and swindling of government funds. The theft and subsequent sale of the *Diarios de campaña*, Campaign Diaries, of the well-known guerrillas Ernesto "Che" Guevara and Harry "Pombo" Villegas may be included in this third category.

Some of those who were accused and later convicted attended the proceedings and gave testimony (as in the case of García Meza) although they refused to appear subsequently when summoned again. These defendants, together with those who never appeared at all, were, in accordance with the Code of Criminal Procedure (articles 250 to 253), declared to be in contempt of court. They were tried *in absentia*, with the assistance of officially appointed defence lawyers as is permitted by Bolivian law. Eleven of the defendants who were arrested are now in prison; others have become fugitives from justice with sentences pending.

The following charges, which were brought against the defendants before the Supreme Court, were proven. Individual responsibility was assigned at various levels and the defendants convicted. For the sake of clarity they shall be grouped into three categories.

## First Group

### Legislative and Constitutional Violations

These offences are directly related to the *coup d'Etat* of 17 July 1980. The Supreme Court ruled that there was sufficient evidence to convict General Luis García Meza and Colonel Luis Arce Gómez on the following charges: Sedition (Article 4 of the Constitution), Armed Uprising Intended to Alter the Form of Government, Organization of an Armed Paramilitary Group led by Military Personnel and Employing Weapons Supplied by the Army (Article 121 of the Penal Code) and Adoption of Illegal and Unconstitutional Resolutions (Article 153 of the Penal Code).

The sentence took account of detailed considerations of the different aspects linked to the July *coup d'Etat* to prove that it was an attack on the constitutional stability of Bolivia which had undermined its executive, legislative and judicial branches. Indeed, the instigators of the *coup* forced the constitutionally-appointed president to resign, dismantled the Congress, preventing it from exercising its duties, and dismissed the magistrates of the Supreme Court as well as numerous other judges throughout the country.

Additional charges included the Violation of University Autonomy, given that the *de facto* government disrupted university affairs and dismissed its rectors as well as faculty and administrative staff. The Supreme Court ruled that the government had violated Article 185 of the Constitution.

With respect to these charges, García Meza's defence (he was entitled to officially appointed defence attorneys despite his failure to appear at the trial and the fact that he was held in contempt of

court) claimed "hierarchical" obedience in an attempt to exempt him from criminal responsibility. The Court held this claim to be inadmissible since the coup had been planned, organized and led by García Meza and Colonel Arce Gómez. The Court based its position on Article 13 of the Constitution which states that "attacks against personal safety render the immediate authors thereof responsible and the fact that they obeyed superior orders in committing the offence shall not serve as an excuse."

It is also interesting to note that the Court rejected the claim, advanced by the defence attorneys, that the statute of limitations for some of the offences had expired. The Court maintained that this had not been applicable ever since Bolivia acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Since some of the offences in question were crimes of this nature their perpetrators could be tried for them regardless of how much time had passed since they were committed. The Court also invoked the United Nations Declaration on Enforced Disappearance, although it did so in a manner which was technically incorrect.

## **Second Group**

### **Human Rights Violations**

These primarily concerned the attack upon the *Central Obrera Boliviana* (COB), the Bolivian Trade Union Federation, involving the murder of three well-known political and trade union leaders and the premeditated murder of eight militants belonging to the *Movimiento de Izquierda Revolucionaria* (MIR), The Revolutionary Left Movement.

On the day of the *coup* (17 July 1980), a heavily armed paramilitary group attacked the *Palacio de Gobierno*, Government Palace, and arrested the Interim Constitutional President, Mrs. Lidia Gueiler and several other ministers, officials and journalists.

Simultaneously, another paramilitary group fired upon the COB, where a meeting was underway. Following rumours of a suspected *coup* and military uprising in the city of Trinidad several high-ranking political and trade union leaders had met and decided that, in the event of a *coup*, their response would be a general strike and a closing of roads and highways. Approximately 50 persons at the COB facility were arrested, most of whom were political leaders and trade unionists, as well as a few journalists. Killed during the attack were trade union leaders, Carlos Flores Bedregal and Gualberto Vega Yapura, and the well-known socialist leader, Marcelo Quiroga Santa Cruz. Their bodies were later removed by the attackers and thrown into a ravine near La Paz.

The prisoners being held at the COB facility, including prominent Bolivian figure Juan Lechin Oquendo, were transported by paramilitary forces in ambulances to the general headquarters of the army in Miraflores where they were beaten, mistreated, and in many cases, tortured. This kind of treatment revealed the ties between the paramilitary groups and the official armed forces. The Attorney General further demonstrated this state of affairs by producing a list of the members of the paramilitary groups which they themselves had sent to the Ministry of the Interior which, at the time, was headed by Colonel Arce Gómez.

Many of the accused were convicted on charges of Murder, Organization and Membership of Irregular Armed Groups

as well as Criminal Association, based on the provisions of articles 121, 132 and 252 of the Penal Code.

Several of the accused were also convicted on charges of Deprivation of Liberty (Article 292 of the Penal Code). Evidence was found of the illegal detention, mistreatment and torture of those arrested during the attack on the COB facility, those held in the *Palacio de Gobierno* and the scores of other persons who were detained and mistreated in the days following the coup including priests, nuns and monks.

### **The Calle Harrington massacre of 15 January 1981**

The Government Attorney's Office and the victims (the civil party in the suit) produced incontrovertible evidence of the assassination of eight political leaders of the *Movimiento de la Izquierda Revolucionaria* (MIR) on the above-mentioned date in a house on *Calle Harrington* in La Paz. On that day the leadership had met in secrecy, as was the usual practice following a coup d'Etat.

Evidence was also produced to show that the authorities, with the personal intervention of Garcia Meza and Arce Gómez, had drawn up plans to physically eliminate the MIR leadership. A number of officials from various security and intelligence forces were involved in the operation. The attackers took the house by assault, held the unarmed participants prisoner, identified them and then proceeded to murder them in cold blood.

The perpetrators of these acts were convicted on charges of Genocide (Article 138 of the Penal Code). The judgment was founded on international law and, in particular, on the Convention on the Prevention and Punishment of the Crime

of Genocide. The Supreme Court understood genocide to mean "the destruction of a group of politicians and intellectuals", as was the case in the *Calle Harrington* events. However, the Convention against Genocide does not include among the persons protected those persecuted on the ground of political opinion. This reveals an important gap in the Convention given the fact that, in general, massacres are usually directed against political opponents. Yet the drafters of the Convention, in this case the UN General Assembly, expressly rejected this possibility. Given that it is a matter of criminal legislation a wide interpretation of the criminal act is not admissible. In the particular case of Bolivia, however, since the definition of genocide given in Article 138, paragraph 2 of the Penal Code, is extended to include what it refers to as a "bloody massacre", the Supreme Court was able to convict the perpetrators on these grounds.

The Supreme Court also issued convictions on charges of Violating the Freedom of the Press, in accordance with Article 296 of the Penal Code, for censorship of the means of communication, arrests and assaults upon journalists and impeding the free circulation of books and printed materials.

## **Third Group**

### **Acts of Corruption**

Acts of corruption, including illicit transactions, embezzlement, misappropriation and fraud for personal enrichment at the expense of the State were committed. As was revealed in the proceedings, corruption was rampant within the dictatorship and among its supporters. A very important number of illicit transactions, fraudulent

lent operations, misappropriations, frauds and forgery of documents permeated the functioning of this government.

### **The illegal acquisition of real estate for personal enrichment**

General García Meza and his Minister of Rural and Agricultural Affairs, Colonel Julio Molina, awarded themselves and their families titles to considerable expanses of land rightfully belonging to the State. They were charged with violating articles 148 and 167 of the Constitution and with Abuse of Power under Article 153 of the Penal Code.

### **The La Gaiba (a semiprecious stone mining concern) affair**

This proved to be a typical act of corruption. By means of various illegal and unconstitutional governmental decrees and resolutions, contracts damaging to the State were signed and mining rights unlawfully granted for purposes of personal enrichment. Some of the accused were convicted on charges of Abuse of Power and Fraud (articles 150, 153, 221, 223, 229, 326, 332 of the Penal Code).

A check was cashed in the amount of US\$ 278,085, representing a payment to the State of Bolivia in compensation for damages. It was proven that, when the check was cashed, the funds remained in the hands of General Luis García Meza. He was sentenced by the Supreme Court on charges of Embezzlement, Extortion, Fraud and Misappropriation of Funds (articles 142, 151, 153, 154, 224, 335 and 346 of the Penal Code).

### **The purchase of petroleum drilling equipment**

It was demonstrated that an unjustified payment of US\$ 4,300,000 was made at

the expense of the State to a Mexican enterprise in compliance with the President's orders. This payment did not comply with regulations in effect at the time nor with the usual procedures for government purchases and acquisitions.

García Meza and another of the accused were sentenced on charges of Abuse of Power, Anti-Economic Conduct and Adoption of Illegal and Unconstitutional Resolutions (articles 146, 153, and 224 of the Penal Code).

### **The Puerto Norte affair**

This involved the government acquisition of an Argentinean enterprise (*Puerto Norte S.A.*) specializing in farm machinery, cattle, horses, chemical fertilizers, etc. Proof furnished during the trial by the *Fiscalía*, the Government Attorney's Office, demonstrated that this involved a damaging contract to the State in which the normal bidding procedures were dispensed with, i.e., other multi-million dollar offers were not considered and the intervention of the usual competent bodies, such as the Central Bank, was not requested. The contract with *Puerto Norte, S.A.* was approved directly by García Meza by means of a decree issued in July 1981.

García Meza and his ministers at the time, General Oscar Larraín, Minister of Planning and Coordination, and Colonel Julio Molina, Minister of Rural and Agricultural Affairs, were convicted on charges of Adoption of Illegal and Unconstitutional Resolutions and Anti-Economic Conduct, as described in articles 153, 154 and 224 of the Penal Code.

The theft and unauthorized sale of the *Diarios de Campaña*, Campaign Diaries, of guerrillas Ernesto "Che" Guevara and Harry "Pombo" Villegas, which had been confiscated during the capture and kill-

ing of Guevara, were classified as military secrets and were the property of the Bolivian State.

In March 1984, after the fall of the Meza dictatorship, a report was received that a renowned English firm had published advertisements in London newspapers announcing the public auction of these classified documents. Evidence produced in the trial showed that the documents were removed from a safety deposit box located in the offices of the military intelligence service and that García Meza had handwritten a letter authorizing Mr. Erick Galatieri (a non-Bolivian, residing in Brazil) to sell the *Diarios de Campaña*. During García Meza's regime Galatieri had performed secret duties as Advisor to the Interior Minister, who at that time was Colonel Arce Gómez. With the rapid intervention of the Bolivian Government before an English court it was possible to call the auction off and recover the diaries.

García Meza and Erick Galatieri were sentenced on charges of Embezzlement and Misappropriation (articles 142 and 223 of the Penal Code).

In its final judgment, the Supreme Court requested that the record reflect that, in arriving at a decision, it had taken into consideration only those offences and those defendants contained in the February 1986 and January 1989 Accusatory Resolutions of the Congress. However, since the trial has revealed indications of the existence of additional wrongdoings and other suspects, the Attorney General should initiate the appropriate criminal proceedings.

★ ★ ★

The Supreme Court's judgment which, according to the law may not be ap-

pealed, included the following convictions:

- General Luis García Meza was sentenced to 30 years in prison without right of pardon. Luis García Meza was issued a number of sentences which, if added together, total some 229 years imprisonment. However, according to Bolivian law (articles 45 of the Penal Code and 246 of the Code of Criminal Procedure), these sentences may be reduced to a single sentence equivalent to the most severe of these, which, in this case, corresponds to the penalty for Murder (30 years of imprisonment) (Article 17 of the Constitution). These are in keeping with the principles of *absorción de la pena* (the reduction of aggregate sentencing) and that of *concurso real* (conflict between various independent actions). Nevertheless, these principles permit the addition of a significant aspect: the fact that the sentence may not be pardoned.
- Colonel Luis Arce Gómez was sentenced to 30 years in prison without right of pardon. His situation is similar to that of García Meza in that his sentences total 130 years of imprisonment. The principles of *absorción de la pena* and *concurso real* limit his sentence to 30 years without benefit of pardon. Since Arce Gómez is now serving a prison sentence in the United States of America for drug trafficking offences the Supreme Court ruled to request his extradition.
- Some 17 former State Ministers and one former member of the Junta of Commanders were given sentences ranging from 10 months to 6 years imprisonment, depending on the case. The above-mentioned legal principles also applied to these cases and the



maximum sentence pronounced totalled 6 years imprisonment.

- Some four members of paramilitary and military groups, the direct perpetrators of the killings, were sentenced to 30 years of imprisonment without right of pardon (the sentences corresponding to each of them, when added together, total a maximum of 62 years of imprisonment).
- Some eight paramilitary and military soldiers were sentenced to 15 years of imprisonment and another nine soldiers were sentenced to 20 years in prison.
- The rest of the accused, which included private citizens who profited illegally from the State, as well as gov-

ernment officials, received sentences ranging from 1 to 6 years of imprisonment.

All of the convicted were ordered to pay personal damages to the victims as well as to the State.

In conclusion, out of the 54 persons who were indicted, 48 received sentences and 6 were acquitted. As has been mentioned, many of the accused are still fugitives from justice and have, to date, not been apprehended.

The judgment handed down by the eleven Supreme Court Judges on 21 April 1993 represents a commendable step forward for Bolivia in the battle against impunity for the perpetrators of gross human rights violations.

## **India**

### **Human Rights Commission**

On 28 September 1993, the Government of India promulgated the Protection of Human Rights Ordinance 1993 providing for the constitution of a National Human Rights Commission, State Human Rights Commissions and Human Rights Courts.

The Commission will comprise a chairperson who has been a Chief Justice of the Supreme Court, a member who is or has been a Judge of the Supreme Court, a Member who is or has been the Chief Justice of a High Court and two members to be appointed from amongst per-

sons having knowledge of or practical experience in matters relating to human rights. The chairpersons of the National Commission on Minorities, the National Commission for the Scheduled Castes and Tribes and the National Commission for Women shall be 'deemed members' of the commission.<sup>1</sup>

Appointments to the National Commission shall be made by the President on the recommendations of a committee consisting of the Prime Minister, the Speaker of the House of the People, the Home

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1) Section 3(2) and (3)

Minister, the leaders of the opposition in the House of the People and in the Council of States and the Deputy Chairman of the Council of States.<sup>2</sup> It is regrettable that representatives from the bar and non-governmental organizations have been excluded from the appointments committee. Consultation with (not concurrence of) the Chief Justice of India in the case of appointment of a sitting judge of the Supreme Court or a sitting Chief Justice of a High Court is required. However, such consultation is not required in the case of retired judges.<sup>3</sup>

The Commission has the power to:

- inquire *suo moto*, or on a petition presented to it, into complaints of violation of human rights or negligence in the prevention of such violations by a public servant;
- intervene in any proceeding involving any allegation of human rights violations pending before a court with the court's approval;
- visit, under intimation to the State Government, any jail or any other institution where persons are detained or lodged for purposes of treatment, reformation or protection to study living conditions of the inmates and make recommendations thereon;
- review the safeguards provided by or under the constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
- review the factors, including acts of

terrorism, that inhibit enjoyment of human rights and recommend appropriate remedial measures;

- study treaties and other international instruments on human rights and make recommendations for their effective implementation;
- undertake and promote research in the field of human rights;
- spread human rights literacy and promote awareness of the safeguards available for the protection of these rights;
- encourage the efforts of NGOs and institutions working in the field of human rights;
- function when necessary for the promotion of human rights.<sup>4</sup>

In conducting an investigation, the Commission can utilize the services of any officer or investigation agency of the Central Government or of any State Government with the concurrence of that government. It would have been preferable if the Commission had been provided with its own independent investigative machinery under its exclusive control and accountable to it.<sup>5</sup>

In dealing with complaints of violations of human rights by members of the armed forces, the Commission may seek a report from the Central Government. On receipt of the report it may either not proceed with the complaint or may make recommendations thereon to the Government, which is to inform the Commission of the actions taken thereon within three months or such further time as the

2) Section 4(1)

3) See also 'Human Rights Commission: Remove Flaws for Credibility' by Soli J. Sorabjee, *The Times of India*, 2 October 1993

4) Section 12

5) Section 14(1)

Commission may allow. The Commission would thereafter publish a report, together with its recommendations and the action taken by the Government.<sup>6</sup> It would have been far more effective if the Commission could order an investigation of its own into alleged abuses by military personnel.

There is a period of limitation of one year from the date on which the violation of human rights occurred.<sup>7</sup> The absence of a provision to condone any delay is regrettable as many complaints will not be considered on the ground of limitation.

The Commission can make recommendations to the government concerned for prosecution and grant of immediate interim relief and can also approach the Supreme Court or the High Court concerned and ask for appropriate directions and orders.<sup>8</sup> However, it has no power to punish violators of human rights nor to grant compensation to the victims.

The Commission is required to submit an annual report to the Central Government and to the concerned State Government and special reports as and when

necessary. These are required to be tabled in parliament.<sup>9</sup>

Specific provisions have been made with regard to the constitution of State Human Rights Commissions on lines similar to the National Commission and of its five members, at least three will be judicial members.<sup>10</sup>

For purposes of ensuring speedy trial of offences arising out of the violation of human rights, the State Government may specify for each district a Session Court to be a Human Rights Court to try the said offence.<sup>11</sup>

The Government of India has already constituted the National Human Rights Commission, with Mr Justice Ranganath Mishra, former Chief Justice of India, as the Chairman. The other members of the mission are Ms Justice Meerasahib Fatima Bibi, former Judge of the Supreme Court; Mr Justice Thamarappallil Kocho Thommen, former Judge of the Supreme Court; Mr Justice Sukhdev Singh Kang, former Chief Justice of the Jammu and Kashmir High Court and Mr Virendra Dayal, former *Chef-de-Cabinet* to the UN Secretary-General.

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6) Section 19

7) Section 36(2)

8) Section 18 (1), (2) and (3)

9) Section 20

10) Section 21(1) and (2)

11) Section 30

# ARTICLES

## Land Rights in Human Rights and Development Introducing a New ICJ Initiative

*Roger Plant\**

### 1 Introduction

This article introduces a Land Rights Project which has recently been undertaken by the International Commission of Jurists (ICJ). While the project has been planned over a lengthy period of time, it was formally commenced in September 1993. It aims to address a range of issues concerning land rights in economic and social development, with particular reference to human rights concerns. It will involve conceptual and analytical research, both on the broad principles underlying different approaches to land law and land rights in different parts of the world, and on the mechanisms for addressing competing claims to the land in situations where conflicts are now arising. It will also involve a series of regional consultations and workshops, culminating in an international Land Rights Conference presently scheduled to take place in 1995. The Conference should provide the framework for a future programme of activities in an area of growing importance for human rights lawyers and activists world-wide.

The project is an original one, in that it represents probably the first attempt

by an international human rights NGO to examine, on a thematic basis, land law, land tenure and agrarian systems on the one hand; and the realization of civil, political, economic, social and cultural rights on the other. In recent years, certain aspects of land rights have in fact received attention from the human rights organs of the United Nations and its specialized agencies, but the emphasis has been almost exclusively on the land and resource rights of indigenous and tribal peoples.

While the emphasis on indigenous land rights is to be welcomed, as breaking new ground in international human rights law and providing much needed protection for highly vulnerable groups, it must be recognized that the problems of land access and land security affect far more than indigenous and tribal peoples alone. The majority of the world's population still depend on land access and security for their subsistence and livelihood. For the billions of the world's rural poor, land security must be seen as a necessary precondition for the realization of other internationally recognized human rights.

While land rights have barely been addressed in universal or regional human

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\* Co-ordinator, Land Rights Project, International Commission of Jurists

rights law and procedures, for reasons that will be examined later in the present article, a range of conflicts are now arising over principles of land law and land rights at the national level. As is argued, furthermore, there have been long-standing tensions between "strong" and "weak" notions of land and property rights. There are obvious tensions between the civil rights of the landed, and the economic and social rights of the landless, the land-poor and precarious tenant farmers. There are conflicts between customary and "modern" or statutory law; there are long-standing patterns of discrimination against women cultivators, in particular in land ownership; and there are further patterns of racial discrimination in land ownership or access, the redress of which is now causing legal and political complexities in certain regions.

The two most obvious extremes are virtually unfettered private rights to the land, and full State control under nationalized or collectivized socialist systems of land ownership. Between the two extremes, the land and constitutional law of many developing countries has, until recently, tended to represent a middle ground, recognizing private ownership (often together with customary and communal tenure), but placing certain limitations upon the rights of private land ownership, and permitting land expropriation in the public interest. The principle of land reform has often been constitutionally recognized as necessary for the realization of social justice and poverty alleviation.

The past few years have seen the progressive dismantling of collectivized agriculture, a marked trend towards land privatization, and also an erosion in many regions of the "middle ground" which empowers the State to intervene in land

distribution. In the era of structural adjustment, there have been strong international pressures for land policies to be governed exclusively by market principles, and for the land laws of developing countries to be adjusted accordingly. Similar pressures can be seen in the East European and other formerly socialist countries now undergoing a transition to a market economy.

Notably in the developing countries, national human rights groups have been expressing their increased concern at the social implications of such privatization policies. During the first "brainstorming" session organized within the framework of the ICJ Land Rights Project, held in Ethiopia in December 1993 and attended by approximately 30 human rights NGOs from different parts of Africa, the participants identified three major concerns that now merit more detailed treatment in subsequent African workshops on land rights. They were, namely: the conflicts between customary and modern law, and the need to preserve the traditional notion of land security associated with customary land tenure regimes; the principles governing redistributive land reform, in particular in the countries affected by the legacy of *apartheid*; and the urgent need to recognize and protect womens' rights to the land.

Further brainstorming sessions and land rights workshops are now planned throughout Africa, Asia, Central and Eastern Europe, Latin America, the Pacific and the Middle East. In the complex area of land rights, only time will tell whether common concerns are detected, and the extent to which this can provide the groundwork for the preparation of new international standards in this fundamentally important area.

The present article aims essentially to introduce the Land Rights Project to con-

cerned lawyers, policy makers and human rights activists. Some initial concerns are identified, in the hope that they will elicit critical response, and the maximum possible participation by the national and international human rights community in the lead-up to the World Land Rights Conference.

## **2 The Background to the ICJ Land Rights Project**

The relationship between land rights, land reform and human rights has been a long-standing concern of the ICJ in addressing the linkages between human rights and development. While not so far encompassed in a specific programme of activity, it has been addressed in a number of regional conferences and workshops concerning the protection and promotion of human rights in rural areas as well as in country mission reports.

### **a Land Rights and Human Rights: Former Regional Initiatives**

Over a decade ago, the ICJ first began to address in earnest the protection and promotion of human rights in rural areas, and the linkages between land rights and human rights concerns. These early initiatives took place in developing countries, notably in Latin America, South and South East Asia. A series of regional seminars were held to identify the main points of concern and to formulate recommendations for follow-up activities.

A seminar on Human Rights in the Rural Area of the Andes Region, jointly sponsored by the ICJ and the Latin American Council for Law and Development, was held in Colombia in 1979. The major themes addressed included agrarian reform, the rights of indigenous peo-

ples, agricultural and economic policies, agrarian justice and access to legal services. The seminar was of much importance, in that it served to bring human rights lawyers, peasant and indigenous leaders together; and to allow human rights concerns to be examined from the particular perspective of vulnerable rural communities. Above all, it identified the structural factors behind a growing pattern of land dispossession and growing human rights violations in rural areas. Agrarian reform as a goal had been abandoned throughout the Andean region and peasants and Indians were being openly deprived of their lands. The right of indigenous communities to their ancestral lands was not protected. Agricultural policies involving the concentration of land ownership, with the result that the problem of access to the land for peasants had not been solved, were seen to involve an increasing restriction of human rights in the region. As regards agrarian justice and access to legal services, the seminar stressed the importance of an autonomous system of agrarian courts to protect actively the rights of peasants in agrarian conflicts. The reversal of agrarian reform policies had resulted in limitations on the autonomy of agrarian judges and obstructive tactics in cases filed to protect peasants' rights.

A further regional ICJ seminar on Rural Development and Human Rights in South East Asia was held in Malaysia in 1981. It likewise addressed land reform and agricultural policies, concluding that, by and large, the land reform schemes in the region had not achieved their goals and that land reform had also been abused through the distribution of land to privileged groups. The objective of land reform schemes should be to assist the rural poor to achieve security of tenure and economic security and viability, and

to make land available for disadvantaged sectors of the rural community. As regards judicial mechanisms, agrarian reform law should create a truly independent specialized Agrarian Tribunal with speedy and simplified procedures.

An ICJ seminar on Rural Development and Human Rights in South Asia, held in India in December 1982, adopted a series of recommendations concerning agricultural and economic policies, land tenure and land reform, landless labour and bonded labour, and the land and other rights of tribal communities. It concluded that land reform in South Asia had not changed the conditions causing rural poverty. The main achievement of land reform policies had been to abolish "intermediary" tenures and feudal land tenure arrangements. Other objectives of land reform, such as providing security of tenure to tenants, regulation of rents, and imposition of ceilings on land holdings remained largely unimplemented. The resumption of land by former landlords had led to large-scale eviction of tenants; and provisions for land ceilings and distribution of excess land among the poor had proved "a myth in view of legal loopholes, exemptions and inadequate implementation." Women, moreover, had been virtually excluded from land reform programmes. The seminar urged a new emphasis on land reform and improved implementation mechanisms in order to reduce the manipulative power of existing local elites, and to curb, by legislative and regulatory measures, the new forms of absentee landlordism that had been emerging. Furthermore, women should be specifically included in the land reform process; and distributed land must be jointly owned by spouses, with equal ownership and mutual rights of inheritance. The communal nature of such assets as forests, fisheries and grazing

lands should also be restored, and their use and development reserved primarily for the rural poor.

At the international level, agrarian reform issues in developing countries were also taken up in the Conference on Development, Human Rights and the Rule of Law, held by the ICJ in The Hague in 1981. The Conference concluded that the phenomenon of "maldevelopment" was illustrated by the failure of agrarian reform in many Third World countries of Latin America, Africa and Asia. This process had disastrous effects upon the economic and social rights of rural populations. When those affected had sought to organize to assert their rights and reverse these trends, they had frequently been subjected to severe repression, denying their basic civil and political rights.

In recent years, the main emphasis of ICJ regional activities has been on legal services for the rural poor. Since the late 1980's a series of seminars in Africa, Asia and Latin America have addressed the difficulties of peasants, tenant farmers and indigenous and tribal peoples in familiarizing themselves with land law and complex legal procedures, and in ensuring adequate legal representation. ICJ initiatives have stressed the need for improved dissemination of customary as well as statutory law, and for the training of paralegals, in particular in order to enable greater access to the implementation machinery.

## **b National Initiatives**

Land rights and land conflict have been addressed in a number of country missions. Two such examples will suffice.

The struggle over land rights and discrimination against Palestinian peoples in land ownership and allocation, has regularly been addressed in ICJ report-

ing on the West Bank of Jordan and the Israeli Occupied Territories. The issues were first given comprehensive treatment in a report on The West Bank and the Rule of Law, issued in 1980. The report first examines restrictions on basic property rights, through, for example, the Absentee property law and the mechanisms for land expropriation. It then examines the pattern of Israeli alterations to Jordanian law, including land law. It finds that the effect of these changes is to make it possible for sponsors of Israeli settlements, and any other body of which the military government approves, to expropriate land; and to remove from the local courts the power to review decisions as to expropriation or as to the compensation to be paid for the expropriated land. More recent research sponsored by the ICJ has detected a persistent pattern of discrimination, preventing Palestinians from registering the lands to which they held valid freehold title before Israeli occupation.

The report of a 1990 ICJ mission to the Philippines during the time of the Aquino Government gives detailed consideration to agrarian conflicts and land reform, and also to the land rights of indigenous and Muslim cultural minorities. It concludes that land rights and reform for farmers were among the major mandates and promises of the Aquino administration. However, agrarian reform is proceeding too slowly, the procedures are too complex, and real reform is too easily diverted by landowners and others seeking to avoid the distribution of land to the peasants. The mission advocated an urgent inquiry into the successes and failures of the agrarian reform programme, with the power to punish for contempt those who do not cooperate with its deliberations and requirements. With regard to cultural minority

groups, the mission deplored the continuation of indiscriminate logging and mining in tribal areas, together with forced evacuations and other human rights violations in the areas inhabited by indigenous peoples. It recommended generally that the government evolve a comprehensive policy for establishing the rights of indigenous Filipinos to land and natural resources.

### **3 The ICJ Land Rights Project: A New International Initiative**

Why is the ICJ undertaking this global initiative, apparently an ambitious one, at the present time? There are a number of reasons.

First, at a time of systemic change in many developing countries and also in Central and Eastern Europe, there is an overall move towards land privatization. In some countries, this involves some radical rethinking of the legal principles that have governed land and property relations. In Russia and a few East European countries, only collective or cooperative forms of land ownership have been recognized. In others, there has been mixed ownership. Similarly, in many developing countries, customary forms of land ownership have coexisted with individual ownership. In many parts of Africa, Asia, Latin America and the Pacific, there are renewed pressures to replace customary and communal forms of traditional land tenure by private and registered forms of individual land ownership. While such reforms are being advocated by international financial institutions, among others, in the interests of greater agricultural productivity, there are concerns that they will lead to greater inequalities and further accentuate the rural poverty and landlessness which al-



ready plague many developing countries. How can a formula be found, which provides some guarantees for the land security of the rural poor at a time of structural change? What are the arguments for placing a ceiling on the size of private farms, or placing restrictions on the legal rights of landowners to alienate and mortgage their lands?

Second, the role of the State in regulating land use and ownership has become a highly contentious issue. For several decades after the Second World War, the UN and many governments expressed a strong commitment to land reform in the interests of greater equity and social justice. There are a number of declarations to this effect, adopted by the UN General Assembly and UN specialized agencies including the Food and Agriculture Organization (FAO) and the International Labour Organization (ILO). Of the developing countries, perhaps the majority of Asian and Latin American States have land reform laws on their statutes, providing for land redistribution. Since the early 1980's however, the impetus for redistributive land reform has disappeared in almost all developing countries, while levels of rural landlessness have increased and new patterns of land concentration have emerged. In a number of countries, recent constitutional reforms have reduced the scope for challenging private land rights, even upon the payment of compensation. Prevailing development orthodoxies tend to emphasize the need for secure land titles. Yet, many UN and other international fora still recognize the need for land reform in countries where the existing pattern of land ownership is highly skewed. Has the trend towards private land security gone too far? How can new principles be established, which recognize the right and duty of States to intervene in the

land market under certain conditions? How should the critical issue of compensation be addressed, when there are powerful social arguments for continuing with redistributive land reform programmes?

Third, an increasing number of claims are being made for land restitution. Particularly at a time of political transition, or in the context of negotiated political settlements, individuals or collective groups are making legal claims for the restitution of the lands of which they or their ancestors were dispossessed in the past without fair compensation. This has been a critical issue in many countries of Central and Eastern Europe, where land reform laws have accepted the principle either of physical land restitution, or at least of monetary compensation, for those who lost their lands as far back as the 1930's, during the forced collectivization programmes of the Communist era. It is also a contentious issue in South Africa, where the victims of *apartheid* land law are now making restitution claims. After complex negotiations, it was accepted in the new constitution that persons dispossessed of land rights, as a result of racially discriminatory policies, should have the right to land restoration. Another area where restitution claims may arise is the West Bank of Jordan and Israeli Occupied Territories, where Palestinians were effectively prevented from registering their freehold lands after 1967 and may have strong legal claims for physical restitution. Thus, restitution claims challenge the legitimacy of existing land laws, sometimes in cases where the present land occupiers may themselves claim valid legal title to the land. How can such conflicts be resolved? What can be learned from the disparate international experience of recent years?

Fourth, and related to the above, there are the complexities arising from indig-

enous claims to the land. The past decade has seen a tremendous resurgence of indigenous peoples' movements worldwide, with land rights figuring at the top of indigenous concerns. There is a new and evolving body of international law concerning indigenous peoples and their land rights, including the ILO's Convention No. 169 of 1989, and the draft United Nations Declaration on Indigenous Rights. At the national level the land rights of indigenous peoples have been addressed in the constitutions or special laws of a number of countries, including Brazil, Colombia, Paraguay and the Philippines. Landmark court rulings have taken place in other countries, including Australia and Canada. In some countries, the legislation provides for special protection for indigenous communal lands and territories, together with restrictions on the right to alienate or mortgage these lands. In other cases, the laws and policies go further, allowing for a degree of autonomy and self-government over ancestral lands. In a small number of cases the laws provide for the possibility of limited restitution, or at least for procedural mechanisms to address restitution claims. In general, these laws recognize the notion of "special" rights for indigenous and tribal peoples over their traditional lands and territories, based either on past immemorial possession, or on written legal title and Treaty rights to the land which predated the modern nation State, or on the special relationship between indigenous peoples and their lands and related environmental resources.

Fifth, there is a wider resurgence of interest in common property resource management, based to a large extent on the arguments of improved environmental protection. Notably in Asia, but also in other regions, human rights and environmental lobbies are converging to de-

mand the greater devolution of land rights to traditional forest-dwelling, nomadic and pastoral communities. State policies of forest management, which often involved the issuance of concessions to private logging enterprises, are widely seen as disastrous from an environmental perspective. *This is related in part to the "indigenous" and "tribal" paradigm, as an argument for greater respect for customary land tenure and law within the development of national land laws.*

Sixth, there is a growing concern with gender discrimination in land law and policies. This is an issue of particular importance in Africa, where women have traditionally provided the bulk of the agricultural labour force, but where both customary and statutory land laws have discriminated against the land rights of rural women. Such international instruments as the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provide that States Parties should grant rural women equal treatment in land and agrarian reform. How can this best be achieved, and what practical problems are arising in implementation?

Seventh, immense practical problems are arising from uncertainties over land rights, notably in conflict and post-conflict situations. Huge numbers of people have been displaced by armed conflicts, as either refugees or internally displaced persons. Often their individual or communal lands have been occupied by others in the meantime, through either spontaneous or government-sponsored settlement programmes. These issues have been of particular concern to the United Nations High Commission for Refugees (UNHCR), in its programmes for the resettlement of refugees and displaced persons in countries including Guatemala and El Salvador, Cambodia and Mozam-

bique. How are the competing claims to be reconciled? What practical measures can be taken to compensate the traditional or new occupiers?

## **4 Land Rights and Human Rights: Conceptual and Legal Issues**

### **a General Considerations**

It is perhaps surprising that land rights concerns have rarely been addressed from a human rights perspective. International human rights NGOs frequently document the civil and political rights abuses deriving from land conflicts, but rarely address the wider policy issues relating to land distribution and tenure or the legitimacy of land claims in themselves. The ICJ, as seen above, has proved something of an exception. At the international level, the land rights of indigenous peoples is the only issue so far to receive prominent and systematic attention in human rights standard-setting. Human rights NGOs in developing countries are generally more prone to include land rights and land reform within their areas of activity.

There are some obvious difficulties in addressing land rights from a human rights perspective. Land rights do not fit easily into the typological distinctions usually drawn between civil and political rights on the one hand, and economic, social and cultural rights on the other. The nature of a right to the land, whether to a specific land area or to the fruits of the land, has different dimensions depending on whether or not one owns or possesses it. Persons or groups who own a specific land parcel, with title duly registered in civil law, may be considered to have a civil right to this land. Persons who are utterly dependent on land ac-

cess for survival, and who have no alternative means of subsistence, must be considered to have an economic and social right to the land in general. Groups whose very survival as distinct cultural entities depends on continued use of the lands or forests which they have occupied since time immemorial may also be considered to have special cultural rights to these lands and territorial areas.

It makes sense to talk of a universal right to food, housing, health care, education, and even to employment, whether or not that right is realized in practice at the present time. In industrialized countries, for example, it is difficult to entertain even the concept of a general right to the land. Land rights are governed by highly complex bodies of civil and land law, the general principles of which are rarely a matter of controversial debate. In most developing countries the connection between the right to the land and the right to food and livelihood, is inevitably more direct. There are few, if any, welfare provisions on which the rural and urban landless can depend. The majority of the population continues to live in rural areas, and the prospects for employment in the urban sector are exceedingly limited. Thus, access to the land, either as cultivators or as wage labourers, can be essential for survival. In many developing countries, moreover, the concept of a right to the land is still plagued with legal ambiguities. The provisions of civil law, which usually provide for firm recognition of private land ownership, can be in conflict with those of constitutional or agrarian laws that recognize the "social function" of property and place limitations on the exercise of private land ownership.

Human rights approaches are unlikely to be of much relevance in supporting arguments for different kinds of land ten-

ure arrangements, between large and small farms, or between individual and collective systems of land use and ownership. They can be of obvious value in determining the moral authority of competing land rights claims, pitting the claims of those who need the land, but do not own or possess it, against the claims of those who may have legal rights to the land but do not necessarily need it. In other words, they can add a new dimension to land rights analysis, focusing not only on the "bundle of rights" associated with existing land tenure arrangements, but also on the relationship between land tenure systems and the realization of fundamental human rights.

#### **b The Treatment of Land Rights in International Human Rights Law**

Given the complexities, it is understandable that the question of land rights has barely been addressed in international human rights law. The 1948 Universal Declaration of Human Rights contains the one article on property rights stipulating that "[E]veryone has the right to own property alone as well as in association with others" and that "[N]o one shall be arbitrarily deprived of his property." But the reference to property rights was altogether dropped in the two human rights Covenants adopted by the UN almost two decades later in 1966. One article of the Economic, Social and Cultural Covenant is concerned with the right to an adequate standard of living, to food, and to freedom from hunger. Yet the measures to be taken by the States Parties to safeguard such rights are defined only in general terms as: (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutri-

tion and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and, (b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of food supplies in relation to need.

A number of regional human rights instruments contain provisions on property rights, but invariably with strong "claw-back" or derogation clauses. The 1952 First Protocol to the 1950 European Convention on Human Rights states that "[N]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." However, these provisions shall not "in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The 1969 American Convention on Human Rights contains the provisions (Article 21) that "[E]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society", and "[N]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." Article 14 of the 1981 African Charter on Human and Peoples' Rights reads that "[T]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." Article 21.2 of the African Charter stipulates furthermore that "[I]n case of spoliation the dispossessed people shall

have the right to the lawful recovery of its property as well as to an adequate compensation."

The above provisions relate generally to property rather than specifically to land. With more specific regard to land, there is a certain amount of "soft" international law, in the form of UN declarations that are perhaps difficult to translate into specific policy obligations. For example, the Declaration on Social Progress, adopted by the General Assembly in 1969, recognizes the social function of property, including land, and calls for forms of land ownership which ensure equal rights to property for all. The Universal Declaration on the Eradication of Hunger and Malnutrition, adopted by the UN World Food Conference in 1974, stresses the need for structural changes to remove obstacles to food production, including "effective measures of socioeconomic transformation by agrarian, tax, credit and investment policy reform and the reorganization of rural structures, such as the reform of the conditions of ownership."

The land rights of rural women are addressed, albeit briefly in the CEDAW, which entered into force in 1981. Its Article 14 is concerned with the particular problems faced by rural women, and requires *inter alia* that States Parties shall ensure to rural women the right to have "equal treatment in land and agrarian reform as well as in land settlement schemes."

Of the UN specialized agencies, the FAO and ILO have given most attention to land rights concerns in either binding Conventions or non-binding Declarations. Land, food and agrarian policies fall generally within the mandate of the FAO. Rural employment and conditions of work fall within the mandate of the ILO, which has also developed particular competence

in the area of indigenous peoples' rights.

The FAO has barely engaged in standard-setting as such, but has adopted certain principles which should form the basis of a coordinated UN approach to agrarian reform. At its World Conference on Agrarian Reform and Rural Development (WCARRD) in 1979, FAO adopted a Declaration of Principles and Programme of Action now popularly referred to as "The Peasants' Charter."

An important section of this FAO charter is concerned with the reorganization of land tenure. It advocates the imposition of land ceilings, in countries where substantial reorganization of land tenure and land redistribution to landless peasants and smallholder is needed as part of the rural development strategy and as a means to redistribution of power. It also calls for precedence in the distribution of acquired assets to established tenants, smallholder and landless agricultural workers, with particular attention to the most deprived groups. Other sections of the Charter are concerned with tenancy reform; with regulation of changes in customary tenure and with community control over natural resources.

The ILO - assisted by its tripartite structure of governments, employer and worker organizations - has given the most attention to standard setting activities. By 1993 it had adopted 174 International Labour Conventions. While most of these instruments are concerned specifically with labour rights, some of them cover broader aspects of land and social policy. Two of these ILO Conventions address land rights or policy issues directly. The Social Policy (Basic Aims and Standards) Convention, No. 117 of 1962, covers the measures to improve standards of living for agricultural producers. They are to include control of the alienation of land to non-agriculturists, regard for cus-

tomary land rights and the supervision of tenancy arrangements. The ILO's revised Indigenous and Tribal Peoples' Convention, No. 169 of 1989, is a new instrument of particular importance for evolving concepts of land rights in international law. It has seven separate articles on land rights recognizing the special relationship between indigenous peoples and their land and territories and the need for States to adopt special measures of protection on their behalf. It provides safeguards against the arbitrary removal of indigenous and tribal peoples from their traditional lands, together with certain procedural guarantees. Other provisions relate to the transmission of land rights and respect for customary procedures; penalties for unauthorised intrusion upon or use of the lands of the peoples concerned, and measures by governments to prevent such offences; and at least equal treatment for indigenous and tribal peoples under national agrarian programmes.

### **c Land Rights and Evolving International Law**

In addressing property rights, there has been an evident shift of approach since the adoption of the Universal Declaration of Human Rights in 1948. The early emphasis on a strong protection of property rights gave way in the 1950's and 1960's to a different approach, which recognized the broad principle of property rights, but also allowed for the limitation of property rights in the public interest. This was consistent with international development strategies, which placed a strong

emphasis on redistributive economic and social policies including land reform. The commitment to land reform, based on the notion of the "social function of property" is also echoed in a number of Declarations adopted by the UN and its specialized agencies throughout the 1970's.

Since the early 1980's, a number of concerns have received prominent attention in human rights standard-setting at the UN level.

One has been the concept of the right to development, stressing the indivisibility of all human rights; and the interlinkages between civil and political rights on the one hand, and economic, social and cultural rights on the other. The Declaration on the Right to Development, adopted by the UN General Assembly in 1986, is an instrument of obvious importance. It placed a strong emphasis on equity and equality of opportunity in the development process, observing that, at the national level, States should undertake "all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing and the fair distribution of income."

Another has been the efforts to give greater substance to economic and social rights necessarily related to the issues of land rights and access, notably the right to food. For example, a report on the "Right to Adequate Food as a Human Right" was published by the UN in 1989.<sup>1</sup> In its recommendations, it urges that the Sub-Commission should seek authorization, through the Commission on Human Rights, from the Economic and

1) "Right to adequate food as a human right", Study Series No. 1, United Nations, New York, 1989. Sales No. E.89. XIV.2.

Social Council to initiate an effort to consolidate and further develop existing law through the drafting of an appropriate instrument on the right to food. As the report itself indicates, the adequate realization of the right to food calls for close attention to land rights. There is an obligation to respect collective or group rights, for example implying recognition of customary land rights of indigenous peoples and generally of peasants in rural communities. There is also an obligation to protect the access by vulnerable groups to resources required to maintain their access to food. "Protection of land rights and usufruct against invading and capital-intensive enterprises; legislation to prevent absentee land ownership and thereby prevention of deprivation of the control and ownership of the land for the tiller of that land" are listed as examples which can illustrate this level of State obligation for the right to food.

A third marked trend has been the growing emphasis on the collective land and resource rights of groups that have a special relationship with the land, most particularly indigenous and tribal peoples. Mention has already been made of the ILO's 1989 Convention. The Working Group on Indigenous Peoples of the United Nations Sub-Commission is now at an advanced stage of preparing a Draft Declaration on Indigenous Rights, in which questions of land and resource rights are accorded particular prominence.

#### **d Land Rights and Human Rights: Questions of Principle and Emerging Tensions**

The tensions between different human rights traditions, as they relate to land and other property rights, are fairly evi-

dent. Strong rights over private property have been a major tenet of the liberal human rights tradition. Weaker property rights, subordinated to other societal needs, have been an equally important tenet of the post-liberal human rights tradition with its emphasis on economic and social rights. The tensions have never been resolved adequately in international human rights law.

The tensions were arguably at their most acute during the Cold War period, when the notions of land and property rights in East and West were mutually incompatible. But, in some ways, the ideological differences may be accentuated, as human rights now become an increasingly contentious issue in North-South relations. Western approaches are most likely to emphasize strong and stable property rights, as part of the enabling environment for the promotion of market forces, implicitly undermining the capacity of government to intervene in land rights on grounds other than market efficiency. Yet the legitimacy of existing private rights to the land is clearly under severe questioning in many parts of the developing world.

While a range of equity-based or efficiency-based arguments are put forward by economists, lawyers and philosophers alike for challenging private rights to the land, it is hard to point to a human rights paradigm which identifies specific criteria to this effect. Arguably the most useful approaches are those which begin with other internationally recognized human rights, and then examine the implications for land rights and agrarian systems. One example mentioned above is the right to food approach, drawing on national and international obligations under the UN Covenants. As one international lawyer has argued, approaching food systems and hunger from a human

rights perspective would help ensure that certain "spurious" rights which are often claimed to have priority, including the absolute right to private property, would be exposed as such in the international human rights framework.

Another approach, which at the country level has been tested mainly in Latin America, is to link land rights and rural labour rights. As has often been realized, labour legislation must be considered as part of the rural property system itself. Apart from a minimum living wage and security of tenure, labour law can provide for a whole range of obligations on landowners, including adequate housing, health care and educational facilities. Very often the labour law itself is highly protective of rural workers, but is either poorly enforced, or contains certain loopholes which permit landowners to reduce labour costs by dismissing permanent workers and replacing them with temporary or seasonal workers less protected by the bundle of labour rights. In those countries where the agro-industrial transformation has been most pronounced in recent decades, it is a moot point whether the principal demand of the rural landless is for the land itself, or for greater employment security through better enforcement of the existing legal guarantees. In several Latin American land reform programmes an important justification for land expropriation was the violation of labour law.

It is easy to proclaim generally that land access, land security or land reform must be seen as fundamental human rights concerns. There are countless national and regional declarations which use the language of human rights to press for more equitable land policies. Pragmatic approaches, which discuss the concepts and procedures for meeting diverse claims, seem to be rarer.

A human rights approach is of obvious relevance at a time of negotiated political transition, when the parties are aiming to reach consensus on principles for addressing land rights and land reform. This is particularly the case when land has been a contentious issue in the earlier conflicts, for example, in the South African transition or in the negotiated political settlement in El Salvador. But it is of relevance in any case where land tensions and conflicts are growing and there is limited scope for redressing grievances through the existing legal machinery. Concerned lawyers and pressure groups need to seek new principles to back their demands for law reform.

## **5 Thematic Concerns: An Initial Appraisal**

Land rights and land law are highly complex issues, and some of the concerns are necessarily specific to particular regions. Most of the issues in Central and Eastern Europe, for example, have very little in common with those of the developing countries. Many of the issues in Latin America, with its high degree of land concentration and landlessness, may have only little in common with those in Sub-Saharan Africa. In some areas, however, as with the land rights of indigenous and tribal peoples, attempts have been made to formulate common standards applicable to all developed and developing countries.

The ICJ Land Rights Project is to be based initially on a regional approach, through consultations and workshops organized in regions including Central and Eastern Europe, the Middle East, Africa, Asia, Latin America and the Pacific. They will examine broad trends in land and



agrarian law, the principles underpinning land law, implementation mechanisms and the role of agrarian tribunals, procedures for addressing diverse land claims and land conflicts, discrimination in land law and access, womens' rights to the land, special rights to the land, and the interaction between customary and statutory law, among other things.

It is nevertheless important to try and identify common concerns, which are arising in many if not all regions. The author makes an initial attempt to do this in the following paragraphs, mainly to stimulate comment and response from the readers of the present article.

#### **a Land Law and Land Rights: Basic Principles**

In many regions, there are strong pressures for land law reforms at the present time. The overall trend is towards greater security of private land rights in the interests of greater efficiency. In some areas this can be seen as a domestic and internal pressure, when farmers under collective, cooperative and even communal land tenure regimes are demanding greater individual land security. But in other cases it can be a response to external pressures, for example, when donor agencies require the liberalization of land tenure arrangements under structural adjustment programmes. The former is more the case in Central and Eastern Europe and in the developing countries which have experienced forced collectivization; the latter is more often the case in Sub-Saharan Africa and some regions of Asia.

The trend towards land privatization raises a basic dilemma, when there can be a trade off between security and productivity on the one hand, and equity

and traditional notions of land security on the other. This is by no means a new problem, but one that has increased in importance in both developing countries and those that are now undergoing transition to a market economy.

Throughout Africa, Asia and Latin America, an important principle underpinning constitutional and land law in recent decades has been the "social function of property." This is reflected in most Latin American constitutions and agrarian reform laws, in those of Asian countries, including India and Indonesia, and those of many African countries. As noted above, it provides a "middle ground" between private and State property, recognizing private land rights but limiting them by other considerations of public interest. It empowers the State to expropriate private lands, usually upon the payment of compensation, the amount of which is to be determined by the legislature or the courts. There may be a ceiling on the size of individual land holdings. Alternatively, land may be expropriated when it is not brought under active cultivation, or when the labour rights of rural workers are violated.

The principle of the "social function of property" has been under increasing attack, notably by neo-liberal economists, mainly because of the uncertainty of land rights implied. For agricultural lands, there is a growing tendency to recognize stronger private title in accordance with Western notions of freehold or Civil Code ownership. Does this rule out the scope for further redistributive land reforms, even in countries where the social need is acute? Will further land reforms be based increasingly on market models? Or can the "social function of property" still be a useful concept, for placing limitations on the rights of private land ownership and speculative land transactions?

**b Redressing Discrimination  
in Land Law and Use:  
The Principle of Restitution**

In many parts of the world, individuals or groups are demanding either the physical restitution of the land from which they claim to have been unlawfully dispossessed in the past, or at least the payment of compensation. As noted, these concerns are arising in areas including Central and Eastern Europe, the Middle East and Southern Africa. They also underlie claims by indigenous peoples against the State (see below).

In many of the Baltic and East European countries, land reform and land privatization programmes since the early 1990's have been based on the principle of restitution to previous owners. In some cases, notably in the Baltic States, the emphasis has been on physical restitution of the lands to which previous landowners lost rights during the collectivization era, without the payment of compensation. In other cases, restitution may involve the payment of compensation to previous landowners, rather than the physical restoration of the land itself.

In Latvia, for example, the present approach has been based on the restoration of rights enjoyed in the pre-1940 period. The 1937 Civil Code again entered into force in 1992 and a new law concerning Land Privatization in Rural Regions was adopted in July of the same year.<sup>2</sup> Its basic objective was to renew land ownership rights to the former landowners who possessed them on 21 July 1940 or to their heirs and to deliver land into the possession of Latvian citizens in exchange for compensation. Thus, land privatization could occur either through

restitution or through payment. A similar emphasis on restitution can be seen in the land reform law and policies of Bulgaria, the Czech Republic, Hungary and Romania since 1990. In each of these countries, Parliaments adopted new land laws in the course of 1991, recognizing the rights of landowners immediately prior to collectivization and establishing procedural mechanisms for reinstating these property rights. In the Baltic countries the restitution approach to land reform has proved highly controversial, in particular given the implications for discrimination against non-citizens from other parts of the former USSR who have occupied the agricultural collectives for several decades.

Restitution has proved a highly controversial issue in South Africa in the negotiations for a new Bill of Rights and Constitution. Much of the controversy has concerned restitution for the victims of the "black spot" removals in recent decades. These relate to the land areas where black individuals and communities obtained freehold titles to the lands, usually before the passage of the 1913 *apartheid* land legislation. Up to half a million black farmers were later removed from these black spot areas during the forced removals between the early 1960's and the mid 1980's. In certain cases the title-holders were able to press their claims effectively before the courts and public pressure resulted in the termination of the removals in 1985. But there is a legacy of hundreds of thousands of victims of such removals today demanding restitution of these lands.

When the South African Government issued its White Paper on land reform in February 1991, announcing its decision

2) Law on Land Privatization in Rural Regions, Supreme Council, Republic of Latvia, Riga, 9 July 1992.

to repeal the *apartheid* land laws, it initially refused to admit the principle of land restitution on the grounds that "the vast potential for conflict in such a programme, overlapping and contradictory claims to such land, as well as other practical problems, would make its implementation extremely difficult, if not impossible." The ANC, in the meantime, insisted that restoration of land to the victims of forced removals must form the underpinning of any credible land policy. The land provisions in a new Bill of Rights and Constitution were at an advanced stage at the time of writing. The indications were that the new Constitution would permit expropriation of rights in property by the State in the public interest; and that expropriation of rights in property for the purpose of restoring rights in land to persons who had been dispossessed of these rights as a result of any racially discriminatory policy was to be deemed expropriation in the public interest. Drafts circulating at the World Trade Centre negotiations in October 1993 suggested that particular attention would be given to compensating the victims of forced removals from their land as a result of *apartheid* policies. Persons dispossessed of rights in land as a consequence of any racially discriminatory policy within a period to be fixed by Parliament should have the right to restoration of such rights in land according to law, or to compensation or any other remedy according to law where such restoration was not feasible. It would be the task of Parliament to enact the procedures and mechanisms by which this right might be enforced, and the method by which the amount of compensation would be determined.

It is an open question whether restitution will now surface as a major issue in the Jordanian West Bank and Israeli Occupied Territories, in the context of the Israeli-Palestinian peace agreement. Since 1967, Palestinians have been systematically prevented from registering their lands; and a variety of mechanisms have been used by the Israeli authorities to dispossess Palestinians and free the land for Jewish settlements. The ICJ affiliate *Al Haq* observes that four basic methods have been used since 1967 to acquire Palestinian land in the Occupied Territories. The first method – and the one used most extensively prior to 1979 – was to seize the land for "military purposes". In fact, much of the land thus expropriated was reportedly used for non-military purposes such as Jewish settlements, settlement roads and settlement agriculture. The second method, used more extensively since 1979, has been to declare non-registered property as State land. Military Order 364 of 1979 facilitated the transfer of land from Palestinians to Jewish settlers in this way, by rendering a mere declaration from the authorities that land is State land as sufficient proof that the land is to be considered as such "until the opposite is proven." The last two methods are to seize land as "abandoned" property or to expropriate it for "public purposes."

Human rights organizations have detected a dramatic increase in Israeli acquisition of Palestinian land in the Occupied West Bank and Gaza Strip since early 1990. As the NGO *Al-Haq* has observed,<sup>3</sup> this increase in illegal land acquisition and settlement has accompanied the most significant rise in Jewish immigration since the first few years of

3) *Al Haq*, "Israeli Land Acquisition and Settlement in the Occupied Territories", Human Rights Focus, 20 August 1991.

Israel's history. Moreover, the fact that land registration records in the Occupied Territories have been closed to the public since 1967 makes it virtually impossible to assess the full extent of Israeli land acquisition. As in South Africa, it is uncertain whether the past victims of racially discriminatory land policies will now settle for formal equality, together with limited compensation through land claims procedures, or will pursue demands for more comprehensive land restitution.

Thus, the principle of restitution raises huge complexities in a number of national and regional situations. The main arguments for restitution are that the land was acquired and expropriated in a manner contrary to the principles of international human rights law, either being based on a clear pattern of racial discrimination, or because it was forcibly expropriated without the payment of fair compensation. But how far back in history does one go? How, and in accordance with what principles, can fair claims procedures be established? To what extent, and in accordance with what criteria, should the claims of existing land occupiers or owners be taken into account in the settlement of land disputes?

### **c Customary and Statutory Rights to the Land**

The conflicts between customary and statutory rights to the land are clearly greatest in Africa. But conflicts are arising in other developing regions, including South-East Asia and the Pacific. Tensions have been particularly acute in forest regions, where the State appropriates exclusive rights over forest management to the detriment of traditional forest users.

In many African countries there are

long-standing conflicts between customary and statutory land rights, but they have been intensified in the era of structural adjustment. There are pressures to replace customary land tenure regimes by private and registered forms of ownership in the interests of greater agricultural efficiency. There are debates as to the effect that land privatization will have on traditional African notions of land security. Post-independence land law has been influenced strongly by the colonial precedent. Colonial models tended to provide for dual systems of land ownership, with foreign settlers enjoying private and alienable rights to the land, while most indigenous Africans were deemed to enjoy communal land rights under the traditional systems of allocation. Many governments have since retained the distinction between communal and freehold lands, though the relative responsibilities of the central government, local and traditional authorities have been a matter of continuing controversy.

Many Africans are concerned by the present trends towards land privatization. They may accept the need for greater individual security over their farms, for improved access to agrarian credits and inputs, and to markets. But they know that landlessness is already on the rise, and express justified fears that a market-driven approach to land will provoke a further growth in land dispossession. Among donor agencies and policy analysts there are debates concerning the arguments for or against land registration programmes as a mechanism for promoting security of tenure and inducing greater investment in agricultural production. Economists often argue that traditional land tenure arrangements constrain agricultural development and farm productivity and that a shift to formal individual land rights is therefore needed.

Others deny that there is a policy choice between more equitable customary systems of tenure on the one hand and more efficient private property systems on the other. They question the need for extensive land registration and titling programmes.

Many African communities seem to resent attempts by governments to undermine traditional authorities and to impose national systems of land allocation. On the other hand, concerns are expressed that some traditional authority systems have become corrupt, and are no longer in tune with the needs or aspirations of local community members. In some countries, chiefs and headmen are demanding money for land allocation and are penalizing women farmers, in particular upon the death of their husbands. The issues have proved particularly sensitive in African countries, where traditional authority systems were often manipulated by the white minority regimes during the liberation struggles of the 1980's. In Zimbabwe, after independence, the 1982 Communal Land Act recognized the concept of communal tenure but vested land allocation powers in elected District Councils rather than chiefs or headmen. There has been much conflict between the traditional and new authority structures, with chiefs demanding the restoration of their powers of land allocation. In Namibia, since its recent independence, traditional authorities have retained effective powers of land allocation within their respective Communal Areas. The government has aimed to exercise more control over land use and allocation, without alienating traditional leaders too much. The 1991 National Land Conference resolved that all payments for land should be made to the government rather than traditional leaders and that the role of traditional leaders in allocat-

ing communal land should be recognized, but properly defined under law.

In attempts to find a middle ground between traditional and governmental systems of land allocation, much interest has been displayed in the notion of Land Boards, in particular as they have developed under the Botswana model. The Botswana Land Boards allocate land under both customary and common law for traditional and other uses. They have wider responsibilities than land allocation itself, also covering dispute settlement, the imposition of restrictions on land use, the cancellation of any land rights, and the implementation of rural development policies and programmes. Countries including Namibia, South Africa and Zimbabwe have expressed their interest in this approach. At the Namibian 1991 land conference, for example, it was resolved that land boards should be introduced at an early stage to administer the allocation of communal land, accountable to the Government and local communities.

In South East Asia, the rapid growth of the logging industry in recent decades has led to pressure on primary forest areas which, until quite recently, were under exclusive occupation by traditional forest dwellers. In Indonesia, for example, some serious conflicts are now occurring between the claimants of "adat" customary rights and State agencies. Nation-wide, some three quarters of all land is now classified as forest, rights to which are vested exclusively in government forest departments without regard to claims based on traditional occupancy. In terms of law, the main point of controversy is the relationship between *adat* customary rights to the land, and statutory land rights as recognized in national agrarian law. During the Dutch colonial period, land ownership was regulated along ra-

cial lines. "Western" lands appropriated by Dutch colonists were governed under European law with rights of private ownership as defined by the Civil Code. The land rights of Indonesians were governed by customary rules and procedures.

After independence, the Indonesian Basic Agrarian Law (BAL) of 1960 recognized a single unified system of rights based on customary law, though modified by the principles enshrined in the BAL itself. Agrarian law was to be based on *adat*, but only to the extent that customary laws and procedures were not in conflict with the national interest. A declared aim of the BAL was that all customary rights would eventually be replaced by registered rights. In practice, large-scale land registration has not taken place, and many communities in the Outer Islands have never been informed about the need to register their land rights with the requisite government agencies. The problems are compounded by forestry laws and policies, which are arguably in conflict with the provisions of the BAL itself, and which provide little or no scope for forest-dwelling peoples to register claims to the lands in their long-standing traditional possession.

#### **d "Special" Rights to the Land**

In evolving national and international law on indigenous rights, there are two major elements that are linked but nevertheless conceptually different. First, there is the idea that States must give special protection to these peoples, including special protection over their land and resources. In countries where the land is otherwise treated as an alienable commodity, this means that certain lands are reserved for the exclusive use and occupation of indigenous or tribal peoples,

with restrictions on its alienation, mortgaging or other form of encumbrance to outsiders. The second idea is that indigenous peoples have special rights *against* the State, as peoples whose original rights over their territorial lands and resources predate the nation State and should, therefore, be governed by their own customary laws and institutions. The second element embraces the concept of self-determination or autonomy within the nation State, rather than protection by the State.

Some indigenous demands, seeing land rights as a territorial issue, necessarily challenge the prevailing trend towards the exclusive recognition of private property rights. There are legal issues of enormous complexity, regarding the extent to which ancestral land rights have been extinguished by law, or the degree of control which they may exercise over the land areas reserved in law for their exclusive use.

The recent emphasis on the land and territorial rights of indigenous and tribal peoples in both national and international law raises some difficult questions. How do you define the beneficiaries of such special protection? Under what circumstances can "special protection" actually constitute discrimination, by restricting the rights of certain groups to determine their land use, or to alienate and mortgage their lands?

Few questions arise when the peoples concerned are forest-dwellers, bushmen or other traditional cultivators who need a large and contiguous territory to preserve their traditional lifestyles and who obviously require special protection against encroachment. Different issues arise when (as in parts of Latin America) indigenous peoples, forming a large proportion or even a majority of the rural population, are intermingled with other

peasants, or have been reduced over time to a state of landlessness. How do they express their land claims? And to what extent are they demanding a separate land regime with the ensuing restrictions on land use, alienation and transfer?

In Asia, it is only in the Philippines that the concept of ancestral domain and land rights for indigenous cultural communities is constitutionally recognized. Yet, in India there are special safeguards for the land rights of certain tribal groups and communities and in Malaysia historical land claims are now being pursued before the courts by tribal groups on the basis of customary law and possession in the pre-independence period.

Highly complex issues arise where, as in much of Africa, communal tenure regimes have been in part a colonial imposition, preventing indigenous farmers from participating in settler land markets, and even refusing to recognize private land transactions among African farmers themselves. A major issue in Southern Africa is whether or not land distribution programmes should aim to extend these communal tenure regimes, and what should be the degree of State intervention regarding land use and allocation within them.

### **e Womens' Rights to the Land**

Agrarian reform programmes, and more recently the land titling and modernization programmes associated with structural adjustment, have rightfully drawn attention to the land rights of rural women. The formalization of land rights systems has almost invariably involved discrimination against rural women, vesting title in male heads of households. In terms of numbers, women must constitute the largest group of vulnerable persons whose land and income security

is threatened by prevailing policy trends.

There is general consensus that past agrarian reform programmes have proved prejudicial to women's land security, though the problems may derive not so much from legal barriers as from the practical criteria by which land redistribution has taken place.

In Sub-Saharan Africa, the protection and promotion of women's land rights are now issues of particular importance in the light of recent land tenure reforms. In some countries, recent law reforms have addressed the issue of land inheritance for women, though they appear to have had only limited impact on the reality of women's land access and security. The importance of women's role in African agriculture is widely accepted. They account for almost three quarters of food production. Even under traditional systems of patrilineal inheritance, however, women may suffer from a basic insecurity of land use rights, in that they are allocated land only for as long as women are married to a lineage member. Customary tenure regimes generally provided women with effective land security. Obviously for as long as land was in surplus women had no difficulty in obtaining access.

Tenure reforms since independence, and particularly land registration programmes, appear to have prejudiced women's land security. Even when women are *de facto* farmers and managers, the law tends not to recognize them as such. The result of modern legislation, particularly the laws creating individual title on the Kenyan model, has been to deny women their traditional right to a plot of land given by their husband. The spread of cash crops results in the loss of both their incomes and inheritance.

Land titling programmes have brought

serious problems for rural women. Even the World Bank, while generally supportive of individual titling, has observed in the African context that legal systems have discriminated in land titling, by putting newly registered land in men's names and often overriding women's traditional rights to land use. But attempts to develop uniform systems of land tenure, even if based on customary law, have involved similar discrimination. Even in cases where women do secure legal title, this may provide no effective protection if there are conflicts with principles of customary law. In Kenya, for example, there are no legal barriers to women obtaining freehold title. But there are cases where women have been dispossessed, though holding land titles registered in their own names.

## **6 Conclusions**

Finding the balance between equity and efficiency in land tenure policies, in

adapting principles of land law to changes, needs and competing demands, has never been easy and never will be.

One important challenge is to ensure that land rights becomes an important part of human rights discourse, human rights standards setting and implementation mechanisms. A start has been made in recent years with the land rights of indigenous and tribal peoples. But they are only a small part of the many millions of landless and land-poor, who depend on the land for their subsistence and livelihood.

The present article is best concluded with an invitation to concerned readers. Critical comments, together with suggestions as to the issues that merit particular attention in regional workshops on land rights, are welcomed. And critical appraisals of land law and policies at the national level, together with proposals for law reform, will also facilitate the future development of the ICJ Land Rights Project.



# Protection and Promotion of Fundamental Rights by Public Interest Litigation in India

Soli J. Sorabjee\*

Fundamental Rights occupy a place of pride in the Indian Constitution. Part III of the constitution guarantees certain basic human rights such as equality, freedom of expression, assembly and association, freedom of movement, freedom to carry on a profession or business, freedom of conscience and religion. There are guarantees against retrospective criminal laws, double jeopardy and self-incrimination and against deprivation of life and personal liberty.

Under the Indian Constitution, the judiciary is entrusted with the power of judicial review. Fundamental rights are mainly enforced by filing a writ petition invoking the writ jurisdiction of the High Courts to issue prerogative writs under article 226 of the constitution, and also by approaching the Supreme Court directly under article 32 of the constitution. The right to move the Supreme Court is itself guaranteed as a fundamental right.

In the early years, the Supreme Court followed the traditional rule of *locus standi* and ruled that only an aggrieved person could challenge the constitutionality of a statute or the validity of any executive action.<sup>1</sup> The latter part of the 1970s marked the advent in the Supreme Court of class actions in public interest, generally described as Public Interest Litigation (PIL).

PIL is a form of legal proceeding in which redress is sought in respect of injury to the public in general. For example, the discharge of effluents into a lake or a river which may cause harm to all who are deprived of clean water, or emission of noxious gas which may cause injury to large numbers of people who inhale it. In PIL, the collective rights of the public are affected and there may be no direct specific injury to any individual member of the public.

Recourse can also be made to PIL for the enforcement of the rights of a determinate class or group of people directly injured by the act or omission complained of but unable to approach the court on account of indigence, illiteracy or social or economic disabilities. For example, prisoners or inmates of care centres or mental homes.

The main objective of PIL is to secure easy and effective access to justice for disadvantaged classes and groups, for the meaningful realization of their guaranteed fundamental rights. This objective would be difficult to achieve without liberalizing the requirement of *locus standi*.

In India's legal system if A's rights are affected but he does not choose to enforce them, B cannot approach the court on A's behalf. The courts would not entertain B's petition, on the ground that he is not personally aggrieved and

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\* Senior Advocate, Supreme Court of India

1) Charanjit Lal v. Union of India - AIR 1951 SC, 41, 44. Hans Mueller v. Supdt. Presidency Jail, Calcutta - AIR 1955 SC 367, 373 [para 26]

has no *locus standi* to maintain the petition.

At the same time, it is well-established that in the case of a person who, because of some handicap or disability, is unable to exercise his rights, as in the case of a minor or a mentally disturbed person, another person appointed by the court can petition the court on his behalf. PIL, in essence, is a recognition and, indeed, an extension of this legal position.

In India, there are numerous persons who, owing to poverty, illiteracy and social and economic disabilities are totally unable to secure access to courts for enforcement of their fundamental rights. Consequently, there is widespread and continued violation of their rights with impunity. In view of these harsh realities, the Supreme Court has departed from the traditional requirement of *locus standi* and, in its landmark judgment in Gupta's case, declared that where judicial redress is sought for legal injury to disadvantaged persons, any member of the public acting *bona fide* and not for oblique considerations, can maintain an action on their behalf.<sup>2</sup> [Emphasis added]

The major concern of the Court was that if its doors were closed to a party who, though not personally affected, is espousing a genuine cause and has drawn the court's attention to continuing violations of constitutional obligations, governmental agencies would be left free to transgress the law. That would lead to subversion of the Rule of Law and would also be detrimental to public interest, because people who are unable

to seek redress for violation of their fundamental rights may well turn to the streets. And "it is essential that Rule of Law must wean the people away from the lawless street and win them for the court of law."<sup>3</sup>

The Supreme Court has also emphasized that in Public Interest Litigation, particularly for the enforcement of the rights of the downtrodden sections of society, "it is necessary to depart from the adversarial procedure and to evolve a new procedure... and forge new tools, devise new methods and adopt new strategies."<sup>4</sup> The Supreme Court has evolved the practice of appointing commissions for the purpose of gathering facts and data in regard to a complaint of breach of fundamental rights made on behalf of weaker sections of society. It has sometimes appointed a district magistrate, or a district judge, sometimes a professor of law, sometimes a practising advocate for the purpose of carrying out an inquiry and making a report to the court. Once the report is received, copies of it are supplied to the parties concerned and if any of these would intend to dispute any of the facts stated therein, they may do so by filing affidavits. The court then considers the report of the commissioner and the affidavits which may have been filed and proceeds to adjudicate upon the matter.<sup>5</sup>

The Supreme Court also adopted the practice of treating letters and telegrams addressed to it as writ petitions and acting upon them. This has been described as the Court's "epistolary jurisdiction."

Although the concept of *actio popularis*

2) S.P. Gupta v. Union of India 1981 Supp SCC 87 at 235.

3) Fertilizer Corporation Kamgar Union (Regd.) v. Union of India 1981 [I] SCC 568.

4) Bandhua Mukti Morcha v. Union of India 1984 (3) SCC 161, 189, 190-191.

5) Ibid fn 4 at 190, 191.

has not been accepted in the Indian legal system, citizen's action has, in reality, gained access and secured acceptance in suitable cases in the realm of public law. It has resulted in making fundamental rights living realities for certain segments of the population, thanks to the dynamic approach of the Supreme Court, reflected in a few illustrative cases below.

A writ petition was filed in the Supreme Court by an advocate on the basis of a news report that several persons, including women and children, had been in prison in the State of Bihar awaiting trial for years. The Court issued notices to the concerned authorities and called for information. The horrific situation which emerged was that numerous persons had been languishing in jails for periods longer than the maximum period of sentence they would have received had they been found guilty.

How could relief be judicially provided to them under the Constitution? The Supreme Court invoked article 21<sup>6</sup> and ruled that speedy trial, that is, a reasonably expeditious trial "is an integral and essential part of the fundamental right to life and liberty enshrined in article 21."<sup>7</sup> The Court ruled that a person cannot be deprived of personal liberty unless the procedure established by law was "fair, just and reasonable." It further held that a procedure which sanctioned the continued detention of people awaiting trial for periods longer than the maximum period of sentence imposable upon conviction was unfair and unreasonable. Consequently, the fundamental rights of the

prisoners guaranteed by Article 21 of the constitution had been violated and they were entitled to release. The Court ordered their release on personal bond.<sup>8</sup>

In the case of persons living in a condition of servitude known as "bonded labourers", the Supreme Court promptly intervened. The system of bonded labour has been prevalent in various parts of India since long before independence. Under this pernicious system, a person can be bonded to provide labour to another for years, until an alleged debt is paid off. This seldom seems to happen during the lifetime of the bonded labourer and the evil effects of this system operate from generation to generation. The labourers are not allowed to leave their place of work, are held captive by their employers and are consigned to a miserable existence without proper shelter or adequate food. Article 23 of the Constitution prohibits "traffic in human beings and other similar forms of forced labour" and the bonded labour system clearly fell within this provision. Yet, for 26 years, no legislation was passed until the enactment of the Bonded Labour System (Abolition) Act 1976. Even thereafter, no serious effort was made by the authorities to redress this shocking state of affairs.

In these circumstances, a writ petition was filed in the Supreme Court by an organization – *Bandhua Mukti Morcha* – for implementation of the provisions of the 1976 Act and also for release and rehabilitation of the bonded labourers. The Supreme Court appointed two Supreme Court advocates as Commission-

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6) Article 21 : Protection of life and personal liberty : No person shall be deprived of his life or personal liberty except according to procedure established by law.

7) *Hussainara Khatoon v. Home Secretary, State of Bihar*, 1980 [I] SCC 81, 89.

8) *Ibid* fn 7.

ers to ascertain the facts and make their report in relation to workers in certain stone quarries.<sup>9</sup> After elaborate hearings, the Court ordered the release of several bonded labourers and also issued directions for their rehabilitation by way of monetary assistance or the provision of cattle.<sup>10</sup> The Court realized that release and rehabilitation have necessarily to be worked out together. Otherwise, without provision for means of survival, the "unbonded" labourers could well be forced or lured back into servitude.

The Supreme Court has also been concerned with environmental protection and pollution. M.C. Metha, an active social worker, filed a writ petition to restrain certain industries from discharging trade effluents into the river Ganga until such time as the necessary treatment plants were installed by them. After hearing the concerned parties, the Supreme Court ordered the tanneries to close down, unless the trade effluents were subjected to a pre-treatment process by setting up primary treatment plants as approved by the State Board. The Court was conscious "that closure of tanneries may bring unemployment [and] loss of revenue", but firmly ruled that "life, health and ecology have greater importance to the people."<sup>11</sup>

In the case of Veena Sethi,<sup>12</sup> the Supreme Court was faced with a horrendous situation. Persons who were detained on account of their alleged insanity continued to be incarcerated for years, even after medical reports had certified

that they had regained their sanity. The court directed immediate release of these persons and further ordered the State government to provide them with the necessary funds to cover the expenses of travel to their native place, together with maintenance for one week after their release.

Article 21 of the constitution was again invoked by the Supreme Court for the rescue of women inmates of the "Care Home", a tragic misnomer, in Patna. The Court swung into action on the basis of a letter from a youth organization which alleged that the women of the "Care Home" were compelled to live in subhuman conditions. The Court directed the District Magistrate to visit the Home and make a report. The report revealed that the "Care Home" was a "crowded hovel, in which a large number of human beings had been thrown together, compelled to subsist in animal survival conditions which blatantly denied their basic humanity."<sup>13</sup>

The Court directed the State Government to provide, expeditiously, suitable alternative accommodation to house the inmates of the "Care Home" and, in the meantime, "to put the existing building, in which the inmates are presently housed, into proper order immediately, and for that purpose to renovate the building and provide sufficient amenities by way of living rooms, bathrooms and toilets within the building, and also to provide adequate water and electricity. A suitable range of furniture, including

9) Ibid fn 4.

10) Ibid fn 4, 219-223; *santhal Pargana Antyodaya Ashram v. State of Bihar*, writ petition 13450 of 1983; orders dated 19.12.1986 and 2.8.1988.

11) *M.C. Metha v. Union of India* 1987 [4] SCC 463.

12) 1982 [2] SCC 583.

13) *Vikram Deo Singh Tomar v. state of Bihar* 1988 Supp SCC 734, 736.

cots must be provided at once, and an adequate number of blankets and sheets, besides clothing, must be supplied to the inmates".<sup>14</sup> The Court also directed that a full time Superintendent be appointed and that a doctor should visit the "Home" daily. The Court warned that in event of non-compliance or insufficient compliance with its directions it "would have no hesitation in reopening the case for such fuller steps as may be considered necessary for enforcing the order."<sup>15</sup>

What were the approach and reasoning of the Court? Justice Pathak, speaking for the Court stated : "we live in an age when this Court has demonstrated, while interpreting article 21 of the constitution, that every person is entitled to a quality of life consistent with his human personality. *The right to live with human dignity is the fundamental right of every Indian citizen.*"<sup>16</sup> (Emphasis added)

One message which comes through clearly in these cases is that, thanks to PIL, the basic human rights of life and liberty have received the greatest judicial protection. This is commendable because, to the downtrodden and the deprived, fundamental rights of deep and daily significance are survival or subsistence rights without which, enjoyment of their other basic freedoms becomes unreal and illusory.

Public Interest Litigation has had its share of cynics and critics in India, who

include judges, lawyers, administrators and academics. Although the Supreme Court of India in 1981 refused to be deterred by the floodgates argument,<sup>17</sup> some justices have started having second thoughts. What has prompted this change in attitude is the increasing flow of PIL petitions, coupled with the tremendous backlog of cases in the apex Court and the High Courts. Some justices are disturbed that "today, public-spirited litigants rush to courts to file cases in profusion under this attractive name."<sup>18</sup> They have warned that PIL poses a threat to Courts and the public alike and "if courts do not restrict the free flow of such cases in the name of public interest litigation, the traditional litigation will suffer."<sup>19</sup> Current judicial thinking is that only when the court is apprised of the gross violation of fundamental rights of a group, or when there are complaints of acts which shock the judicial conscience, should the courts discard procedural shackles and hear such petitions.<sup>20</sup>

The court's practice of entertaining letters and telegrams addressed to it as writ petitions and acting upon them has come under strong criticism because of its potential for mischief. According to some justices, such letters should be sent to the Supreme Court Legal Aid Society by the Registrar with a request to examine whether there is any *prima facie* case which requires consideration by the court. If it is felt that there is a good

14) Ibid fn 13, 737.

15) Ibid fn 13, 737.

16) Ibid fn 13, 736

17) Ibid fn 3.

18) Sachidanand Pandey v. State of West bengal 1987 (2) SCC 295 at 33 per Khalid J.

19) Ibid fn 17, 334.

20) Ibid fn 17 per Khalid J. Also Ramasharan Autyanuprasi v. per Mukharji J.; M/s Raja Enterprises v. S.K. Sharma 1989 [2] SCC 499, per Thommen J.

*prima facie* case, then a formal petition may be filed after collection of the necessary material.<sup>21</sup>

What can be the response to these criticisms? No doubt PIL has added to the dramatic backlog of cases in India. Undoubtedly it has taken precedence over old matters pending in courts. But courts are meant to redress constitutional violations and if, in so doing, precedence is accorded to those persons whose basic human rights have been violated for years and who hitherto have had no access to justice, so be it. The constitution exists also for their benefit, and life and liberty are not less important than trade or property.

Another apprehension which is frequently voiced is that PIL is likely to be abused by parties to further their private ends and that public interest litigation can become an oppressive instrument of private pressure litigation. There have been instances where petitions have not been filed to vindicate any public cause, nor to enforce the rights of the down-trodden, but for the personal benefit of an individual or to harm a rival industrialist – for example, by alleging that environmental pollution was caused by the rival's factory.<sup>22</sup>

True, PIL can be and has been abused. But abuse of the process of Court is as ancient as legal ingenuity and cunning and is not unknown in the field of private law. Judges have taken care of such situations and there is no reason why they cannot be depended upon to deal with them in the case of PIL. In response

to this danger, the court has insisted that the person who approaches it must be a "public spirited person" or "responsible representatives of the public" or a member of the public "*acting bona fide*" and not for personal gain or private profit or political motivation or other oblique considerations. The court has strongly deprecated use of PIL for personal interest or the settling of personal scores.<sup>23</sup>

The main thrust of the criticism is that the judiciary, by recourse to PIL and its directives to the administration, is usurping the functions of the legislatures and of the executive and is running the country.

Government by judiciary is an ancient and oft-repeated complaint. It was heard in 1771, when Lord Mansfield declared the detention of the coloured slave, James Somerset, held in irons on board a ship on the Thames and bound for Jamaica, to be unlawful and set him free with these memorable words: "the air of England is too pure for any slave to breath. Let the black go free."<sup>24</sup> And the slave went free.

In 1954, the United States Supreme Court, by its historic decision in *Brown vs. Board of Education*<sup>25</sup> outlawed segregation of black students in the field of public education and gave necessary directives to achieve desegregation with "all deliberate speed." Critics howled that the court had no business to run and ruin the country.

Indignant critics in India, who vociferously charge that the Supreme Court is acting as a super legislature, overlook the

21) *Sudip Mazumdar v. State of Madhya Pradesh* 1983 (2) SCC 258.

22) *Chetriya Pardushan Mukti Sangarsh Samitri v. State of U.P.* 1990, SCC 449.

23) *Subhash Kumar v. State of Bihar* 1991 [1] SCC 598, 605.

24) *Somerset v. Stuart*, 1772, Lofft.1.

25) 98 Law.ed., 873.

fact that when the Court entertains PIL it is to ensure observance of constitutional obligations and to protect the have-nots and the handicapped against violation of their basic human rights. The court is really assisting in the realization of constitutional objectives. The directions and orders passed by the court are incidental or ancillary to its jurisdiction of enforcement of fundamental rights. Once violation of one or more fundamental rights has been established, it is necessary to pass appropriate directives in such manner as the overall circumstances and justice of the case require. It must be emphasized that the judiciary "does not act in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it."<sup>26</sup>

Moreover, the notorious tardiness of legislatures and the callous inertia of the executive in redressing violations of fundamental rights provide a proper occasion for judicial intervention. When the Court is apprised and convinced of gross violations of basic human rights, it can neither prevaricate nor procrastinate. It must readily respond by adopting certain operational principles within the framework and parameters of the constitution.

True, much remains to be done. PIL needs to be structured. Post-judgment monitoring needs to be strengthened. Contempt power to secure compliance with Court's orders and directions needs to be used with tact and firmness. In

some cases, the judicial pendulum has swung rather sharply and even erratically, and some orders and directions passed by the Court are beyond the judicial sphere and do more credit to the heart than to the head.

Yet, on balance, the gains from PIL in India have been considerable. The heartening feature is that the Supreme Court has started "taking suffering seriously."<sup>27</sup>

The most significant achievement of PIL has been that enjoyment of fundamental rights has become a living reality, to some extent, for at least some illiterate, indigent and exploited Indians. Numerous prisoners languishing in prison awaiting trial have been released; persons treated like "serfs" and held in bondage have secured freedom and have been rehabilitated; conditions of prison inmates and in asylums for the insane, and of workers in stone quarries and brick kilns, have been ameliorated. Jurist activism in the arena of environmental and ecological issues, and accountability in the use of the hazardous technology, has been made possible and has yielded salutary results.

The prospects of using PIL for the advancement of public good, despite the dangers and problems, are immense and challenging. Yes, there are risks, "but in a society where freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken."<sup>28</sup>

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26) Ibid fn 4.

27) [Upendra Baxi, taking Suffering Seriously : "Social action litigation in the Supreme Court of India", in *Law and Poverty*, 387-89 (1988)]

28) Ibid fn 3, c 585.

# COMMENTARIES

## Establishment of an Independent Judiciary in the States of the Former USSR

### The Case of Moldova

*Justice Michael D. Kirby\**

The sudden collapse of the Union of Soviet Socialist Republics (USSR) has presented acute constitutional problems for the successor States. But it has also provided unexpected opportunities to create State structures based upon democratically elected legislatures; pluralistic philosophies and an independent court system. The importance of independent courts in law-abiding societies was seen in the decision of the Russian Constitutional Court on 23 March 1993. That Court held that the declaration by President Boris Yeltsin of "direct Presidential rule" was in breach of the Constitution and laws of the Russian Federation. The decision was arrived at by a split vote of the Court. However, having been publicly declared, it was accepted by all participants in the unfolding events, including Mr Yeltsin.

This incident is but one of many which have occurred in the States of the former USSR. Between 28-30 January 1993, an international conference took place in Chisinau (in Russian, "Kishinev"), the capital of the Republic of Moldova – formerly the Moldavian Soviet Socialist Republic (MSSR) within the USSR. The pur-

pose of the conference was the study of juridical reform and the reform of the law in a new Moldova. The conference was attended by judges, parliamentarians and high level officials from Moldova. Foreign participants included the Director of Juridical Affairs of the Council of Europe (Dr Erik Harremoes), the President of the Juridical Chamber of Rome, Italy (Dr A Sciolla-Lagranga), a Judge of the Supreme Court of Norway (Hon Arne Christiansen), representatives of the newly independent States of Central and Eastern Europe, lawyers and judges from the United States and speakers from international human rights organizations. Also participating were a number of experts from the Conference on Security and Cooperation in Europe (CSCE), led by Mr Vladimir Weissman. The writer took part in his capacity of Chairman of the Executive Committee of the International Commission of Jurists (ICJ), Geneva and representative of that body's Centre for the Independence of Judges and Lawyers (CIJL).

A notable feature of the conference in Chisinau was the strong empathy between lawyers in Moldova and practis-

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\* President, New South Wales Court of Appeal, Australia; Chairman, Executive Committee of the ICJ.



ing lawyers and legal academics from other newly liberated countries nearby. As a sign of the strong ethnic and historical links between Moldova and Romania, for example, the Romanian Minister of Justice (Hon Petre Ninosu) attended and addressed the opening session of the conference on the development of the new Constitution of Romania, 1991.

Another close link exists between Moldova and Italy. The Moldovan language is of Romance origin. Through Romania, strong contacts existed with legal and governmental bodies in Italy before these were severed on the establishment of the Moldavian SSR in 1940 as a Union Republic of the USSR. The links are now being re-established.

### **Establishment and Dismantlement of the Moldavian SSR**

Moldova is found to the north-east of Romania (in Bessarabia) and the south-west of Ukraine. Control of the territory shifted after the 14th Century between the Ottoman Empire to the south and the Tsarist Russian empire to the north. In 1878 most of the territory which is now part of Moldova was annexed by Russia. It set about discouraging the use of the Romanian language, the dismantlement of institutions and a policy of what would now be called "ethnic cleansing". Following the First World War, Bessarabia was returned to Romania by the Treaty of Paris of 28 October 1920. However, the USSR, as successor to the Tsarist claims, maintained its designs upon the territory of Moldova. By a secret protocol to the Soviet-German Non-Aggression Pact of 23 August 1939 (the Ribbentrop-Molotov Pact), Germany ceded control of what is now Moldova to the USSR. In June 1940,

the USSR submitted an ultimatum to Romania demanding the surrender of the territory. Romania did not resist. A large part of Moldova was thus incorporated in the USSR in August 1940, as the Moldavian SSR.

Part of the territory annexed was actually included in the neighbouring Ukrainian SSR. Over the years of Soviet rule, it was often difficult to secure local officials of the Communist Party who were Moldavian nationals and who could be trusted by Moscow. At one stage, during the 1950s, Leonid Brezhnev (later the Soviet leader) served as head of the Communist Party in Kishinev.

The dissolution of the Soviet Union in 1991 presented the Moldovans with a new opportunity for independence. The attempted coup d'Etat against President Gorbachev in Moscow in August 1991, led to the proclamation by the Parliament of Moldova (the *Statul Tarii*) of independence from the USSR under the name of "the Republic of Moldova." The declaration was carried by a two-thirds vote of the members of the Parliament on 27 August 1991. However, this declaration coincided with two separate independence movements within the territory of the Moldavian SSR. In the south, the "Gagauzian SSR" had been proclaimed in August 1990. This is a Christian enclave left over from the former Ottoman rule. It comprises mainly Orthodox Christians, many of whom speak the Bulgarian language. In the north, a so-called "Dniestr Moldavian SSR" was proclaimed by mainly Russian-speaking Moldovans on 2 September 1990. This "republic" comprises a large minority of ethnic Russians living in the region which formerly made up, or supported, the XIV Soviet Army. The total population of Moldova is about 4.5 million.

The actual decision to dissolve the So-

viet Union and to replace it by the Commonwealth of Independent States (CIS) occurred in Minsk, Belarus, in December 1991. By March 1992 the Republic of Moldova had been admitted to the United Nations and had been recognized as an independent State by more than one hundred States around the world. Australia is one of the countries to which an Ambassador is accredited by Moldova. One of the principal industries of Moldova is wine growing. Cooperative economic arrangements for advice on improving the quality and marketing of wine have already been negotiated with Australian wine growing interests.

On 19 June 1990, the Parliament of Moldova established a Commission to prepare a draft constitution (Fundamental Law). The Commission's task was to create a "sovereign, independent, democratic and legal State, which is free to decide its present and future."<sup>1</sup>

The constitution draft which emerged from the Commission's work was designed to avoid the lawlessness of the recent past. According to a commentary:

"Taking into consideration the fact, that a real democracy is realized on the basis of political and ideological pluralism, the Constitution Draft stipulates, that no ideology can be established in the quality of the official ideology and any political party association or movement cannot create alternative bodies (to) the State power, to decide the destiny of the people, or to intervene (in) the activity of the State bodies."<sup>2</sup>

It was against this background that the conference in Chisinau in January 1993 assembled. Tabled at the Chisinau conference was a discussion paper prepared in the Ministry of Justice titled "The Principles of Judicial and Law Reform."<sup>3</sup> The object of the conference, from the Moldovan point of view, was to secure assistance in the design of judicial and legal institutions. Moldovan speakers repeatedly stressed their long period of isolation from Rule of Law societies, the absence of a tradition of an independent legal profession and judiciary, and the need for guidance based upon the experience of societies which had long enjoyed constitutionalism. It is a remarkable tribute to the resilience of the democratic idea that the conference could take place at all while the Republic of Moldova was facing severe economic difficulties in its heartland and separatist ethnic conflicts to the north and south.

### Proposals for Constitutionalism

The discussion paper acknowledged that judicial and law reform was one of the most important steps by which the former totalitarian system of administration would move to a "democratic State based on law." The paper acknowledged the complex character of the planned reform, requiring as it did "not a partial modification, but the total reorganization of a State power, based on new principles." The necessity to take reform measures in stages and to institute programmes for the education and improvement of judicial personnel was acknowledged. The

1) See the Republic of Moldova, *A short History*, Chisinau, 1992, 50.

2) *Ibid.*

3) The Parliament of the Republic of Moldova, *The Principles of the Judicial and Law Reform*, discussion paper, 1992.

sensitive problem of the revocation of Soviet judicial appointments and the bringing of disciplinary action against judges who had abused their offices was mentioned. So was the difficulty which all involved in the law faced with the proliferation of new laws apt for a market economy. The growth of lawlessness, which has tended to accompany such significant changes was another topic of discussion. One of the new problems which the greater freedom that accompanied independence produced in Moldova was the provision of passports and departure visas for Moldovan citizens – previously severely limited during Soviet times. Travel by air into Moldova is still heavily restricted and usually routed through Moscow. Road journeys (as the writer witnessed) involve extremely long delays, even for Moldovan officials.

Amongst the highest priorities assigned by the Moldovan discussion paper was the reorganization of the bodies of State security and the removal from them of the functions of the former political police. The need for a broad-based investigation into the Ministry of National Security and the necessity to bring it under constitutional power was repeatedly stressed. In the future, this Ministry would be confined to investigating and combating attacks on the Moldovan Constitution; defending the borders of the State and fighting contraband, currency speculation and commerce in drugs.

Of the greatest importance for the conference was the discussion paper's chapter on the "third power" – the judiciary. The stated objects of proposed judicial reform in Moldova are to establish a system of laws based on the national traditions of the State and basic human rights; to form legal conditions which would guarantee the independent functioning of the judiciary; to replace the "repres-

sive" accusatory system of law by one protective of human rights; and to improve the access of citizens to courts of any instance, in accordance with law. The provision of wider rights of appeal and accessible courts in all parts of the country together with the specialization of judges in particular fields of jurisprudence were also mentioned in the paper. It seems that courts of appeal were abolished under the former Soviet system. The discussion paper proposes their re-establishment.

As an indication of the kind of assertions of judicial independence which the Moldovan paper writers had in mind, proposals are made to leave it to the judiciary to determine where the courts will sit in different parts of Moldova. For ethnic reasons, former judicial sitting arrangements did not necessarily suit the convenience of the majority of the Moldovan – (Romanian) – speaking people.

For the supreme judicial body, a jurisdiction of cassation (the power to quash) is proposed with a general right of re-examination. The paper proposes a strict separation of the Supreme Court from the Presidium structure which has hitherto been observed after the Soviet model of courts. It states that the administration and coordination of the activities of employees in judicial bodies should be kept apart from the independent determination of cases before the courts.

At the apex of the proposed judicial system described in the discussion paper is a Constitutional Court designed to "ensure the correspondence of the laws and other normative acts (with) the constitution and international obligations of the Republic." Under the proposal, the interpretation of the constitution would be exclusive to the Constitutional Court, in order to ensure a high level of consistency and authority in the application of

the new Moldovan Constitution.

In chapter four of the discussion paper, proposals are made for the appointment of judges. In deference to the principle of judicial independence, the chapter proposes electing the judges to office for life, after a preliminary "trying" (probationary) term. The removal of judges is to be confined to "a needed" case and performed "exclusively by the people through its representative bodies by a special act, stated by law." This power was explained as necessary to "guarantee the corresponding professional level and the moral purity of the (judicial) personnel."

The fifth and sixth chapters of the discussion paper attracted the greatest interest amongst the large audience of Moldovan lawyers who gathered in the *Statul Tarii* for the conference. These concerned the office of the Public Prosecutor and other public order bodies. The office of the Public Prosecutor, inherited from the Soviet legal system, has a number of features which strike a Western lawyer as crossing the borderline between the judicial and executive powers.<sup>4</sup> But, naturally enough, many careers are bound up in the system. A number of the Public Prosecutors spoke passionately of the way in which, during Soviet times, they had used their offices to avoid the worst abuses of tyranny and oppression in the prosecution of the criminal and public law.

The remaining sections of the discussion paper dealt with the investigatory functions of the judicial system (typical of an inquisitorial regime), the penitentiary system and the role of the independent legal profession. The need for

legal aid, for the reorganization of the Moldovan Bar and for the definition of the monopoly rights of lawyers was examined. At the end of the paper a long list of necessary laws for the implementation of the component parts of the process of legal judicial reform is collected. No fewer than 44 laws are listed as essential. The list looks daunting. However, the methodical approach to the task of rebuilding legalism is reassuring. It is interesting to note that amongst the priorities, the adoption of a law for the elaboration of judicial reform and reform of the law is placed first, even before the adoption of the new Constitution of the Republic and the election of a fully democratic Parliament and presidency.

## Help From Outside

The international participants in Chisinau offered comments on the general problem of creating an independent judiciary. Dr. Harremoes specifically offered the assistance of the Council of Europe which has become an important source of basic materials on legal and human rights for the newly emerging nations of Central and Eastern Europe. The re-establishment of links with Western Europe is a reassurance to many of the new nations, and the Council of Europe plays a vital function in this process. Several of the Moldovan participants spoke vigorously of the difficulty of providing fully the essential legal protections for human rights when, as they alleged, serious abuses of human rights were occurring within the territory of the country on the part of the Russian XIVth Army. Others were quite

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4) See e.g. R. David and J.E.C. Brierly, *Major Legal Systems in the World Today*, London, Stevens, 1978, 247.

direct. It was insufficient to change the system. It would also be painfully necessary to change some of the personnel who were left over from the old regime.

Dr. Sciolla-Lagranga, a judge from Rome, explained the Italian procedures for the recruitment of judges. He gained the sympathy of the audience by describing the way in which Italy, like Germany, had endured a period of dictatorship. After its end, it had to accommodate the Rule of Law to the judges left over from the period of autocracy. He suggested that Moldova could learn from the Italian experience.

Mr Nikolai Gorea, a member of the Supreme Court of Moldova, spoke strongly against the establishment of *ad hoc* courts. He explained the need, in the transitional period, to accept an increasing role for the judiciary in keeping the various branches of the Moldovan Government in harmony.

A lawyer from the United States of America, Mr Richard Ensels, described that country's constitutional arrangements and the importance of ensuring that persons appointed to the Bench were immune from political influence. He advocated the jury system which, he suggested, spread respect for the law and its institutions amongst ordinary citizens. Judge Christiansen of Norway emphasized the importance of satisfactory salaries and working conditions for the judges. Otherwise, the recruitment of well-educated people of strong personality would be impossible. He described the difficulties which judges in the West had suffered from poor salaries, enormous workloads and serious attacks upon them in the mass media. He outlined the limits accepted by judges upon extra-judicial activity, especially in the higher courts.

Professor Andrzej Rzeplinski of the University of Warsaw outlined the way

the Polish judiciary had emerged from the period of communist autocracy. He said that judicial independence depended, in large part, upon the personality of the judges who were appointed. An attitude of independence was something which began in the mind of the judge. The allocation of judges to sit in cases had to be reserved to the judicial branch in order to assure against manipulation.

Professor Paolo Ungari, a Professor at the Free University of Rome outlined the judicial training of magistrates in Italy. He urged instruction in basic human rights law, particularly for judges who had grown up in a system of abuses of power. This message was also reflected by Mr Mihai Petracki, Chairman of the Legislative Department in the Parliament of Moldova. He described how the State structure of the country had been inherited from the totalitarian regime. It was important to ensure that this structure should not impede the path to political and economic reform. But he did not underestimate the complexity of security legal reform or the relative inefficiency of a democratic parliament as a means of doing so.

One of the most stirring speeches was given by Professor Giuseppe Di Federico of the Centre for Juridical Studies at the University of Bologna, Italy. He explained the basics of an independent and credible judiciary and the need for judges both to be, and to appear to be, impartial. He explained the increasing role played by the judiciary in Western countries. He said that influence upon the judiciary was to be watched. It could occur not only from outside but also from inside the ranks of the judges, e.g. in promotion, salaries and the provision of other advantages. He also stressed the importance of a strong legal culture to support

the judicial branch of government. Similar messages were brought from several participants from the United States.

The writer's contribution contained a description of the independence of the Australian judiciary and the way in which this is sometimes undermined, as by the abolition of courts and tribunals.<sup>5</sup> The role of conducting hearings in public and the giving of reasoned explanations for judicial decisions was outlined. The manner in which judges in their day-to-day work could call upon international human rights law, to spread a culture of human rights was illustrated with a number of recent Australian examples.<sup>6</sup> The work of the ICJ's Centre for the Independence of Judges and Lawyers was mentioned, as was the offer of the ICJ and the CIJL to help and support colleagues in Moldova and in other former Republics

of the ex-USSR. Reservations were expressed about the possible dangers of a probationary term for judges and the need for care in judicial training, lest it become a vehicle for orthodoxy and State propaganda.

In the streets of Chisinau, the people of this newly independent country went about their activities blissfully unaware of the intensive debates proceeding in their Parliament affecting their future. The great statue of Lenin, which formerly dominated the main street, has been removed to a museum. Otherwise, in appearance, life goes on much as before. Yet, in the Moldovan judiciary and legal profession the moves towards a pluralistic State, respectful of human rights, have begun. It behoves Western lawyers, and other citizens, to give whatever assistance they can.

## The 1993 OAS General Assembly in Nicaragua

*Felipe Gonzalez\**

The Organization of American States (OAS) held its twenty-third Ordinary General Assembly in Managua, Nicaragua on 7 – 11 June. Like last year's General Assembly, it was dominated by the debate

over the Organization's role in supporting democracy in the Americas. Special *Ad-Hoc* Meetings of Ministers of Foreign Affairs were convened to consider the situation in Guatemala and Haiti. How-

5) See note P.W. Young, "Dismissal of Judges" (1993) 67 Aust Law Journal 83. See also M.D. Kirby, "Judicial Independence Reaches a Moment of Truth" (1990) 13 Uni NSW LJ 187.

6) A case cited was *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (NSWCA), 422, 426.

\* The author is Legal Officer for Latin America at the International Human Rights Law Group, Washington, D.C., an ICJ affiliate, and Professor of Law at Diego Portales University in Santiago, Chile. He attended the OAS General Assembly on behalf of the Law Group and the ICJ.

ever, as the NGOs attending the General Assembly noted, no attention was given to the situation in Peru, where full restoration of civil liberties has not yet been accomplished.

Immediately following his dramatic election by Congress, President Ramiro de León Carpio of Guatemala addressed the General Assembly and received support from the delegates of the member States of the OAS.

In addition to Amnesty International, FEDEFAM, the International Commission of Jurists (ICJ) and the International Human Rights Law Group, NGOs this year included Americas Watch and the Center for Justice and International Law (CEJIL). The NGOs circulated documents before and during the Assembly, calling the attention of delegates to major human rights concerns, and held a press conference on human rights.

### **The Declaration of Managua for the Promotion of Democracy and Development**

Following the Declarations of Santiago (1991) and Nassau (1992), the General Assembly issued a declaration committing the OAS to take further action for the strengthening of democratic values in the hemisphere.

The declaration also stressed the link between "improving the quality of life of the American peoples and consolidating democracy," and recognized the need for more effort to be oriented towards preventing democratic crises.

### **Inter-American System on Human Rights**

The Inter-American Court and the Inter-American Commission on Human Rights

presented their reports to the General Assembly. NGOs have criticized Honduras' failure fully to comply with the Court's decisions in the Velasquez Rodríguez and Godínez Cruz cases, ordering Honduras to provide inflation-adjusted compensation to the relatives of "disappearance" victims. Since then, three OAS General Assemblies have passed and no action has been taken against Honduras. Yet, Court President Judge, Héctor Fix-Zamudio (Mexico) did not mention this issue in his principal address, nor did any delegation raise this matter.

The climate surrounding the discussion on the Commission's report was less virulent than last year. Only a couple of delegations questioned the Commission's legitimacy. Several countries stressed that dealing with individual cases must continue to be the Commission's principal task, as opposed to the emphasis on its advisory role, sought by Nicaragua and some other States. Uruguay proposed an amendment to the draft resolution on the Commission, which asked it explicitly to explain in its reports the democratic processes among OAS Member States, in particular when they are accomplished according to the rules established in the Constitution and when these processes are based on free public consultation. The Chilean delegation argued that this was an attempt by Uruguay to obtain support from the General Assembly in a case pending before the Court relating to its amnesty law upheld by referendum (Advisory Opinion 13). Canada and Chile stated that the General Assembly's role is not to enter into an analysis of the contents of the Commission's decisions on individual cases, but simply to analyze the Commission's compliance with the formal requirements for its reports and decisions. Although the Commission chal-

lenged the conformity of its amnesty laws to the American Convention in recent decisions, Argentina was very supportive of the Commission, stressing that its appreciation for the Commission's strictness in applying the American Convention has increased and will continue to grow in proportion to its advancement in the consolidation of democracy.

Nicaragua proposed an amendment to the Convention aimed at increasing the number of members of the Commission from seven to eleven, arguing that the Commission's independence and effectiveness would thereby be strengthened. The NGOs lobbied against this proposal, firstly because increasing the number of commissioners might mean that geographic distribution – rather than a reinforcement of their independence – would take precedence, and secondly because the commissioners meet regularly only twice a year in Washington DC, and co-ordination would become even more difficult if the Commission were enlarged. Delegates from Antigua and Barbuda, Argentina, Canada, Chile, and the United States expressed their concern over this proposal, worrying that its approval might lead to "two Commissions": one composed of eleven members for those States ratifying the amendment, and another of seven members for those States who did not do so. Costa Rica and Venezuela stated that the proposal required careful scrutiny. Only Brazil enthusiastically backed the proposal, while the delegate from Mexico said the proposal seemed interesting only in its initial approach. Although no resolution on the actual content of the Nicaraguan proposal was issued, the parties resolved to refer the matter to the Secretary General, to start consultations on the best way to proceed, not only with the States parties to the Convention (the only ones with

the capacity to approve an amendment), but also with all member States of the OAS.

Three vacancies were filled on the Inter-American Commission on Human Rights. Elected in their personal capacities, as required by the Convention, were Mr John S. Donaldson from Trinidad & Tobago, Mr Claudio Grossman from Chile (a Board member of the Law Group) and Mr Oscar Fappiano, the current president of the Commission, from Argentina.

### **Draft Inter-American Convention on Forced Disappearances**

The draft Inter-American Convention on Forced Disappearances, which begun in 1987, underwent significant improvement in the last year. During the General Assembly debates, many delegates commented on this progress. They also emphasized the important contribution from several NGOs, notably the ICJ and the Law Group, who prepared an exhaustive analysis of the draft convention (CP/CASP.890/93), suggesting important modifications, many of which were incorporated into the most recent draft. Argentina, Brazil, Canada, Colombia, Chile, Mexico and the United States also made written proposals, as did the President of the Working Group, Ambassador Monroy Cabra (Colombia). As a result, the most recent draft eliminates "due obedience" as an exculpation for those who commit this crime under the orders of their superiors. It further recognizes that forced disappearances constitute a crime against humanity, requiring States to adopt a number of measures in their domestic legislation to prevent and punish this crime.

Many delegates asked the Working Group to complete a final draft for adop-



tion at the next General Assembly. They also stressed that NGOs should actively participate in the final stage of drafting. The most important remaining issue for NGOs is the creation of a special emergency procedure in the Inter-American system for the prevention of forced disappearances and for rescuing the victims alive.

## Guatemala

Developments in Guatemala took an unexpected turn just days before the General Assembly. Following the "autogolpe" (self-coup) of May 25, a broad coalition of Guatemalans forced President Serrano to resign. Although he had initially supported President Serrano, Vice President Gustavo Espina subsequently attempted to secure the presidency through Parliament. However, Vice President Espina failed to get enough support and, on the night of 5 June, the Parliament elected Ramiro de León Carpio as President for the remainder of Serrano's term through 1996. As Ombudsman for Human Rights, Mr de León Carpio played a major role in pushing for improvement of human rights conditions in his country, getting strong support from the international community.

Following the coup, the OAS called for an Ad-Hoc Meeting of Ministers of Foreign Affairs, sending a delegation led by the Secretary General to Guatemala, according to Resolution 1080 for the protection of the hemisphere's representative democratic systems. After the crisis' successful denouement, the General Assembly ended its session on Guatemala and noted "with satisfaction that the political crisis in that country has been solved peacefully and autonomously, with strict regard for legal and constitutional

procedures and complying with verdicts issued by the Constitutional Court." NGOs attending the General Assembly would have preferred to keep open the Ad-Hoc Meeting to monitor the situation in Guatemala. Indeed, it was the delegation from Guatemala itself which asked the General Assembly to continue assisting the Guatemalan Government in adopting new measures for the country's democratization.

Following the debates on Guatemala, President de León Carpio travelled to Nicaragua and addressed the General Assembly, stating that his government will effectively ensure full respect for political, civil, economic, social and cultural rights.

Based on its *in loco* visit in late 1992, the Inter-American Commission on Human Rights circulated at the Assembly a Special Report on Guatemala. The report describes the existence of a systematic pattern of human rights violations in Guatemala, particularly against indigenous populations. The report names the Guatemalan authorities – through commission and omission – as the principal executors and organizers of this discrimination, which is reflected in the most unequal distribution of wealth in the Americas, with the exception of Haiti. The report, which liberally gathered information provided from the Office of the Ombudsman for Human Rights (then Ramiro de León Carpio), was enthusiastically received by the new Guatemalan authorities.

## Haiti

Prior to the General Assembly, the ICJ and the Law Group wrote to the OAS Government representatives before the OAS to emphasize that the "final pur-

pose of any negotiation with the *de facto* Government of Haiti should be the early return of President Aristide with the power given to him by the Haitian people." The letter further stressed that full investigation of human rights abuses committed by the *de facto* authorities and punishment of those responsible are necessary steps for the enforcement of the Rule of Law in the country. The two organizations additionally criticized the U.S. policy of forcible repatriation of Haitian refugees as a violation of the American Declaration on the Rights and Duties of Man and of the UN Protocol Relating to the Status of Refugees, as the Inter-American Commission on Human Rights stated in a recent decision.

In its resolution on Haiti, the General Assembly reaffirmed previous decisions regarding that country and, reiterated "its serious concern over the military regime's continuous violations of human rights," called on the Inter-American Commission on Human Rights to continue "its ongoing and close monitoring of the situation in Haiti" and decided "to commend those member States that are adopting measures to strengthen the embargo, which is an important complement to the current negotiation process, and stress the need for the member States of the OAS and the UN to reinforce such measures, particularly as regards the supply of oil and its by-products to Haiti, and the suspension of commercial flights."

## Peru

In December 1992, several NGOs explored the OAS' closing of the *Ad-Hoc*

Meeting of Ministers of Foreign Affairs on Peru, which had been opened as a result of President Fujimori's self-inflicted coup in April of 1992, arguing that an independent judiciary did not exist and a return to a democratic system had not been ensured.

The General Assembly took no further action regarding Peru. In a press conference, NGOs attending the General Assembly underlined the fact that insufficient attention to Peru on the part of the OAS might have encouraged the "*auto-golpe*" of President Serrano in Guatemala. In addition, information was received before the end of the Conference regarding a recommendation made by Peru's Constituent Assembly to expand the death penalty to cover acts of terrorism, crimes for which it had been abolished – a move which would clearly violate the American Convention on Human Rights, to which Peru is a party. According to the NGOs, this is further justification for a close monitoring of the situation in Peru.

## Conclusion

Consolidation of democracy in the Americas remains one of the most important issues facing the Organization of American States, but the Organization appears unwilling to follow each crisis situation to its conclusion. At the same time, democracy does not always ensure human rights, and strengthening the Inter-American human rights system is a necessary part of the process of enforcing the Rule of Law throughout the hemisphere.

# REPORT OF A TRIAL OBSERVATION MISSION

## Civilians Before Military Courts

### The Trial of Muslim Fundamentalists in Egypt

*Dr. Anis F. Kassim\**

#### I Background Information

Since the early 1970s, Egypt has witnessed a wave of violence conducted by splinter groups of Muslim fundamentalists and counter violence by the government, police and security forces. Even though Egypt was the place of birth of the first organized Muslim party, better known as the Muslim Brotherhood Movement, in the late 1920s, the contemporary wave of Muslim fundamentalism has introduced an unprecedented level of radicalism. While the Muslim Brotherhood had remained largely in the centre of the political arena, the Muslim fundamentalists have drifted towards extremes in their ideological orientation and the modalities used to implement their declared objectives.

Muslim fundamentalists, whose movement has been augmented by the *Afghani Jihad* movement, declare that their objective is the creation of an Islamic State. The means used to achieve this objective involve violence to undermine the establishment, its capabilities, economic base and prestige. They claim to have targeted prominent government figures like President Anwar El Sadat,

Rifa'at Al-Mahjoub, the speaker of the Parliament, Faraj Foda, an eminent writer, known for his strong criticism of the Muslim fundamentalist movement, the Ministers of the Interior and Information, in addition to several attacks on police and security officers.

Egypt's income from tourism reached U.S.\$3 billion a year. It appears that the fundamentalists have targeted this source of income in an attempt to wipe it out with the obvious objective of undermining this economic base and thus increasing the difficulties of the government.

Aware of these objectives, the government launched a campaign to demonstrate its authority and prestige. There are reports that the government, in achieving its objectives, has been involved in many activities which can be characterized as "counter State terrorism". Following American and Israeli practices, the Egyptian Government is labelling every fundamentalist a "terrorist." In the late 1960s, the media of the USA used to label every Vietnamese a "communist", to justify the killing of civilians whether in a combat or non-combat situation. Realizing that American

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\* Jurist, Member of the Jordanian Bar, mandated by the ICJ to monitor this trial.

public opinion is anti-communist, labeling a victim a "communist" provides the military with "impunity" as it is not questioned by an informed public. The Israeli officials use the same ideological weapons against the Palestinians. Every Palestinian is a "terrorist" unless proven otherwise. This technique has been used to the maximum during the *Intifada*.

It is not uncommon to hear or read in the Egyptian pro-government press or news media that the security forces have killed three "terrorists" in, for example, Assiût. The Egyptian officials appear to be shielding themselves against charges of using unwarranted or unnecessary State violence.

## II The "Tourism" Cases

### a Decree 370 of 1992

One of the most drastic steps taken by the Egyptian authorities to combat Muslim fundamentalists is to refer the cases involving attacks on tourists and tourist sites to military tribunals. According to Decree No. 370 of 1992, issued by President Hosni Mubarak on 26 October 1992, the President ordered the transfer of the "tourism cases" to the Supreme Military Courts in Alexandria and Cairo. The President explained the reasons which compelled him to move these cases from the jurisdiction of the ordinary civil courts to the military tribunals. He stated that this type of case involved issues that left no room for extended procedures since it was a matter concerning the stability of Egypt, its economy and the entire Egyptian people; that using military tribunals was better than "resorting to illegal methods" and would "keep the civilian judiciary safe from any terrorist threats by these groups."

### b The Alexandria Military Tribunal

Two such military trials were held in Alexandria in late 1992. The first was designated by the Military Prosecutor as the trial of the "Assassination Group", and the other, as the "Returnees from Afghanistan." The trial of the former group, consisting of 21 defendants, began on 29 October 1992, and the latter, consisting of 26 defendants, began on 5 November 1992. The military tribunal handed down its judgment, in both cases, on 5 December 1992. Eight men were sentenced to death. The only defendant who was in custody was hanged on 13 June 1993. The seven defendants who were sentenced *in absentia* are still free.

### c The Cairo Military Tribunal

#### i) The Court Location

The Cairo trial was as hasty as the Alexandria trials. On 9 March 1993, the trial of 49 defendants (six of them *in absentia*) commenced before a three-judge Supreme Military Court at the Hakstep Military Base, located off the Cairo to Isma'ilia desert road. The court itself stood about four kilometres away from the main entrance of the base and no civilian cars were allowed to enter. For Defence lawyers to reach the courtroom, they had to wait for the army mini-bus to pick them up and drive them to the court.

The court itself was a theatre that had been converted into a courtroom. The three judges, headed by Maj. Gen. Mohammad Wajdi Al-Laythi, were seated at the centre of the theatre stage, and the military prosecutors, headed by Brig. Gen. Ali Bedree occupied the far left corner of the theatre. The defendants were squeezed into about six boxes of iron bars with a passageway connecting them. The

court proceedings were officially public but it was not easy for the public to reach the courtroom, and those that attempted it faced checkpoint and interrogation at the main gate of the military base.

## **ii) Meetings of the ICJ Observer**

On 20 March 1993, the ICJ observer set off to attend the session. He was prevented from entering, along with other Egyptian lawyers who happened to be there at the same time, on the grounds that the proceedings had already commenced and that orders were given not to allow anyone to proceed to the courtroom once the session had started.

On the next day, 21 March, the ICJ observer went much earlier. He, along with other Egyptian lawyers, were subjected to interrogation and hand search by security elements before they were allowed to take the military bus that carried them to the courtroom. There was another interrogation at the entrance to the court, and the ICJ observer was advised that it was an Egyptian court dealing with an Egyptian matter and foreigners were not allowed in. Further, they argued, this was a military base to which non-Egyptians were not allowed. Dr. Abdul Halim Mandour, the leading Defence lawyer in the case, intervened and the officer finally allowed the ICJ observer to enter the room.

During the proceedings, Dr. Mandour introduced to the court Dr. Anis F. Kassim, a member of the Jordanian Bar, as the ICJ observer. The President welcomed him along with other observers. During the court recess, the President invited the observer to his chambers, welcomed him again and was very courteous, striving to give a positive impression of the court and of his impartiality.

During the session, the court allowed

the observer to talk to the defendants, who spoke of being tortured, maltreated and denied the visits of their families, and about the lack of medication, especially for those who were suffering from chronic illness, as well as the lack of contact with the outside world through radio, television or newspapers. Some of them pulled up their *gallabiyas* to show scars from torture. Some reported several instances of house demolitions by the police or the taking as hostages of family members of accused persons who had been able to escape the police. This short encounter with the defendants was interrupted by the security elements.

The case was adjourned until 29 March, which was the first working day after the *Eid* Holiday, beginning on 24 March 1993.

On 7 April, the observer attended the third round of the proceedings. He was allowed to talk in private with the defendants, who repeated their complaints and added that, due to the accelerated pace of the proceedings, they were not given time to wash themselves or their clothes, or even to rest. They were normally woken up at an early hour (which the defendants normally used for their morning prayer service), they stayed most of the day in the court, and by the time they were sent back it would be early evening. If such procedures lasted for several continuous days the defendants would be extremely exhausted as a result of this routine.

Again, the President of the court invited the ICJ observer to his chambers, welcomed him and asked about his impressions. The observer repeated the defendants' complaints and urged the President to take adequate measures. The President turned to the prosecutor to verify the complaints and the prosecutor denied the charges. The observer noted

that since the defendants were currently on trial, they were presumably under the cognisance of the court, not the prosecutor. Further, the observer drew the attention of the President to the fact that there were at least four minors among the defendants who should be subject to a juvenile tribunal and observed and assisted by social and psychological experts. The President said these minors would not receive the same punishment that might be given to adults, but that they had to be tried by the same tribunal. When the observer raised these points with the Defence counsel, the latter contested the President's views.

When the court resumed the session, the President publicly ordered a list of the defendants who were sick and those who needed special care, so as to allow family members to visit them, enable them to buy food and be given enough time to wash and use facilities.

These gestures were apparently intended to give a positive image of the military tribunal and to illustrate its claim to impartiality. Whatever cosmetic effect they may have had, they did not cover the more serious aspects of the trial which should be reviewed from a judicial point of view.

### **iii) The Trial**

The charge sheet prepared by the Prosecutor provided that the defendants be charged with the crimes of contacting foreign countries for the purposes of damaging Egypt's interests, damaging Egypt from within, forming irregular groupings and using arms for damaging both the public and the country. Punishment for such acts is the death penalty.

Another set of charges involved the crime of sabotaging production facilities with the intention of undermining the

national economy. Anybody involved in such action shall be punished with life imprisonment or temporary hard labour.

Anybody who uses explosives with the intention of committing certain crimes, such as those allegedly committed by some of the defendants, or with the intention of committing political murder, or damaging buildings, places or facilities that are dedicated to the service of the public, will be sentenced to death.

The defendants, all civilians and not military personnel, were originally subject to the jurisdiction of the ordinary courts. Even the crimes they allegedly committed did not involve military installations. Nor were they committed in military ones. Nevertheless, the Presidential decree No. 370 of 1992 moved this type of case to the military justice. The decree was based on Article 6 of the Military Law No. 25 of 1966 which reads: "This Law shall be applied to the crimes (referred to above)... and shall be referred to the military judiciary by virtue of a decree issued by the President of the Republic."

The leading defence counsel challenged the constitutionality of both the Presidential decree and aforementioned article 6 of the Military Law before the Administrative Tribunal, which will be discussed below. The Defence further stated that the file containing the names of the investigation witnesses and the charge sheet were made available to the Defence on 16 March 1993 only, which did not give it sufficient time to prepare the defence. The Defence pointed out that the file contained about 4000 unnumbered pages and was not organized in any form or content.

The military court gave the Defence lawyers only a week to review the file and to prepare their defence. The Defence again objected on the ground that

the week in question was a holiday week, the Muslim *Eid*, which follows the fasting month of *Ramadan*. The Defence was questioning the wisdom of "rushing" the case and pointed out the hazards involved, especially since there was another case still pending before the administrative court, the subject of which was to challenge the constitutionality of the Presidential Decree No. 370. The defence lawyers pleaded that the crimes allegedly claimed to have been committed by the defendants were very serious and could involve the death penalty and that any judgment issued by the court would be final and not subject to appeal. The military court nevertheless ruled that the next session would be held after a week, i.e. on 29 March.

On 29 March, the court held its session and decided to hear the Prosecution witnesses who numbered about twenty. The Defence pleaded that it had not been possible for the Defence lawyers to complete their review of the file within the week granted and requested the court to give them more time. The court declined the request. The Defence lawyers then declared that they were withdrawing from the case.

On 30 March, the pro-government press quoted the President of the Court as saying that the Defence lawyers showed their lack of interest in the case, that their request for more time was not for the purpose of reviewing the investigation file and preparing the defence, but rather to deal with other cases and that their request was intended to draw out the proceedings. The press commented that the Defence lawyers withdrew in a theatrical move with the intention of obstructing the proceedings.

The Egyptian Bar Association lashed back denying the accusations and defending the professional ethics and stand-

ards of the lawyers who were defending the accused. The statement said that the investigation file did not even include the list of the Prosecution witnesses nor the charge sheet, a situation which would not enable the Defence lawyers to ascertain on which facts the witness would testify and which charges were levelled against which of the defendants. The statement concluded that the lawyers' request was a demonstration of their seriousness in desiring to prepare the defence adequately. In fact, the leading Defence counsel requested the court, at the 21 March session, for an adjournment of one month to enable the Defence lawyers to prepare their files. The period requested was extremely reasonable, considering the complexities of the case and the penalties attached to the crimes with which the defendants were charged.

The military court handed down its judgment on 22 April 1993. Seven defendants (one *in absentia*) were sentenced to death and hanged on 8 July. Two were students, one of whom had only just turned 18 years of age. Seventeen were acquitted and the remainder received sentences ranging from life to two years imprisonment.

Judgments rendered by military tribunals are final and not subject to appeal or review by a higher tribunal. They are executed only after the President of the Republic endorses them.

### III The Administrative Tribunal Cases

Egypt, having followed the French model for codifying its laws and structuring its judicial system, established its *Conseil d'Etat* in 1946. This is the administrative tribunal which is an integral part of the Egyptian Judiciary. It is, *inter alia*, in

charge of reviewing all decisions issued by government officials and agencies.

When the President issued his Decree No. 370 of 1992 in which he ordered the transfer to the military courts of the two "Tourism Cases", his decree was challenged before the Administrative Tribunal.

On 11 November 1982 a case was filed before the Administrative Tribunal by some of the defendants in the Alexandria case. The plaintiffs request was to have the Presidential Decree suspended as an urgent measure, and then to order its cancellation. Having reviewed the plaintiffs' request, pleadings and documents and the defendants' counter arguments, the tribunal rendered a judgment on 8 December 1992 in which it summarily ordered the suspension of the Presidential Decree. In its decision, the tribunal referred to the fact that such a judgment contradicted a judgment in a similar case that was previously rendered by the High Administrative Tribunal in 1983. It affirmed that its reasoning was based on establishing the principle of supremacy of law, without which there would be no order and stability in society. The tribunal, pointing out that the decree was intended to refer specific cases and specific individuals to a court that does not have jurisdiction, held that it was likely to be overruled when the case was reviewed on its merits. The Decree, the tribunal added, touched on fundamental issues relating to the designation of the proper venue in accordance with the constitution and the relevant laws, and to the individuals' freedoms and their constitutional guarantees – such considerations compelled the tribunal to order the suspension of the decree.

On 12 December 1992, the government appealed against that summary judgment before the *Conseil d'Etat* which, on 23

May 1993, overruled the judgment of the Administrative Tribunal.

It is to be noted that, while the Administrative Tribunal judgment was under review by the *Conseil d'Etat*, the Alexandria and Cairo military courts proceeded with their deliberations and issued their judgments which involved death penalties. It is also to be noted that the death penalties were not executed until June and July 1993, that is, a few weeks after the *Conseil d'Etat* handed down its decision.

#### IV Conclusion

With due regard to the Administrative Tribunal and *Conseil d'Etat* judgments, which are exemplary of Egyptian judicial decisions, the military court proceedings were dubiously swift and conducted in a hasty manner. The Defence lawyers were not given adequate time to prepare their defence and rebuttals. Furthermore, when the Defence counsel withdrew from the court, the court designated alternative Defence lawyers who were not prepared, their defence was rhetorical and, sometimes, theatrical. It is difficult for any objective observer to hold the opinion that the "due process of law" was observed.

The "tourism cases" were very controversial. Emotions ran high on both sides of the fence. The defendants were widely besmirched in the local press and news media; they were routinely characterised as "terrorists." While the Defence counsel was putting up a reasonable request to be granted sufficient time in which to review the investigation file, the President of the Court accused it in the press of not being serious in defending its clients and only interested in prolonging the proceedings. This was not the usual practice of Egyptian judges,



who are exemplary for their discipline.

The trial of minors before a military tribunal was another disturbing fact. One of these minors was sentenced to death and hanged.

The Egyptian authorities would better serve public order and social tran-

quillity by providing the standard guarantees of the due process of law in such controversial cases. The consequence of these trials and the execution of death penalties in such circumstances is that Egypt is experiencing even more havoc and damage.

# **BASIC TEXT**

An International Conference on the Protection of War Victims, organized by the Government of Switzerland was held in Geneva from 30 August to 1 September 1993. The representatives of 160 countries, the United Nations, its specialized agencies and other intergovernmental organizations, the International Committee of the Red Cross (ICRC), the European Union, the Council of Europe, the Arab League, the Organization of the Islamic Conference, etc., as well as a dozen NGOs, including the International Commission of Jurists (ICJ), contributed to the debates.

## **International Conference for the Protection of War Victims Geneva, 30 August to 1 September 1993**

### **Declaration adopted by consensus by the Conference on 1 September 1993**

The participants in the International Conference for the Protection of War Victims, held in Geneva from 30 August to 1 September 1993, solemnly declare the following.

#### **I**

1. We refuse to accept that war, violence and hatred spread throughout the World, and fundamental rights of persons are violated in an increasingly grave and systematic fashion. We refuse to accept that wounded are shown no mercy, children massacred, women raped, prisoners tortured, victims denied elementary humanitarian assistance, civilians starved as a method of warfare, obligations under international humanitarian law in territories under foreign occupation not respected, families of missing persons denied information about the fate of their relatives, populations illegally displaced, and countries laid to waste.
2. We refuse to accept that, since war has not been eradicated, obligations under the international humanitarian law aimed at limiting the suffering caused by armed conflicts are constantly violated. We vigorously condemn these violations which result in a continued deterioration of the situation of persons whom the law is intended to protect.
3. We refuse to accept that civilian populations should become more and more frequently the principal victim of hostilities and acts of violence perpetrated in the course of armed conflicts, for example where they are intentionally targeted or used as human shields, and particularly when they are victims of the odious practice of "ethnic cleansing". We are alarmed by the marked increase in acts of sexual violence directed notably against women and children and we reiterate that such acts constitute grave breaches of international humanitarian law.
4. We deplore the means and methods used in the conduct of hostilities which cause heavy suffering among civilians. In that context we reaffirm our determination to apply, to clarify

and, where it is deemed necessary, to consider further developing the existing law governing armed conflicts, in particular non-international ones, in order to ensure more effective protection for their victims.

5. We affirm the necessity to reinforce, in accordance with international law, the bond of solidarity that must unite mankind against the tragedy of war and in all efforts to protect the victims thereof. In that spirit, we support peaceful bilateral and multilateral initiatives aimed at easing tensions and preventing the outbreak of armed conflicts.
6. We undertake to act in cooperation with the UN and in conformity with the UN Charter to ensure full compliance with international humanitarian law in the event of genocide and other serious violations of this law.
7. We demand that measures be taken at the national, regional and international levels to allow assistance and relief personnel to carry out in all safety their mandate in favour of the victims of an armed conflict. We also demand that the members of peacekeeping forces be permitted to fulfil their mandate without hindrance and that their physical integrity be respected.

## II

We affirm our responsibility, in accordance with Article I common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war. We urge all States to make every effort to:

1. Disseminate international humanitarian law in a systematic way by teaching its rules to the general population, including incorporating them in education programmes and by increasing media awareness, so that people may assimilate that law and have strength to react in accordance with these rules to violations thereof.
2. Organise the teaching of international humanitarian law in the public administrations responsible for its application and incorporate the fundamental rules in military training programmes, and military code books, handbooks and regulations, so that each combatant is aware of his or her obligation to observe and help enforce these rules.
3. Study with utmost attention practical means of promoting understanding of and respect for international humanitarian law in armed conflicts in the event that State structures disintegrate so that a State cannot discharge its obligations under that law.
4. Consider or reconsider, in order to enhance the universal character of international humanitarian law, becoming party or confirming their succession, where appropriate, to the relevant treaties concluded since the adoption of the 1949 Geneva Conventions, in particular:
  - the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of June 1977 (Protocol I);
  - the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of June 1977 (Protocol II);
  - the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and its three Protocols;
  - the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.
5. Adopt and implement, at the national level, all appropriate regulations, laws and measures to ensure respect for international humanitarian law applicable in the event of armed conflict and to punish violations thereof.
6. Contribute to an impartial clarification of alleged violations of international humanitarian law and, in particular, consider recognizing the competence of the International Fact-Finding Commission according to Article 90 of Protocol I mentioned in Part II, paragraph 4 of this Declaration.

7. Ensure that war crimes are duly prosecuted and do not go unpunished, and accordingly implement the provisions on the punishment of grave breaches of international humanitarian law and encourage the timely establishment of appropriate international legal machinery, and in this connection acknowledge the substantial work accomplished by the International Law Commission on an international criminal court. We reaffirm that States which violate international humanitarian law shall, if the case demands, be liable to pay compensation.
8. Improve the coordination of emergency humanitarian actions in order to give them the necessary coherence and efficiency, provide the necessary support to the humanitarian organisations entrusted with granting protection and assistance to the victims of armed conflicts and supplying, in all impartiality, victims of armed conflicts with goods or services essential to their survival, facilitate speedy and effective relief operations by granting to those humanitarian organisations access to the affected areas, and take the appropriate measures to enhance the respect for their safety, security and integrity, in conformity with applicable rules of international humanitarian law.
9. Increase respect for the emblems of the Red Cross and Red Crescent as well as for the other emblems provided for by international and humanitarian law and protecting medical personnel, objects, installations and means of transport, religious personnel and places of worship, and relief personnel, goods and convoys as defined in international humanitarian law.
10. Reaffirm and ensure respect for the rules of international humanitarian law applicable during armed conflicts protecting cultural property, places of worship or the natural environment, either against attacks on the environment as such or against wanton destruction causing serious environmental damage; and continue to examine the opportunity of strengthening them.
11. Ensure the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations.
12. Take advantage of the forthcoming Conference for the review of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and the three Protocols thereto, which provides a platform for wider accession to this instrument, and to consider strengthening existing law with a view to finding effective solutions to the problem of the indiscriminate use of mine explosions maiming civilians in different parts of the world.

★ ★ ★ ★ ★

In conclusion we affirm our conviction that, by preserving a spirit of humanity in the midst of armed conflicts, international humanitarian law keeps open the road to reconciliation, facilitates the restoration of peace between the belligerents, and fosters harmony between all peoples.

# BOOK REVIEW

## Human Rights in Africa

by Kéba Mbaye

Publishers A. Pedone, Paris and ICJ, Geneva

Foreword by Adama Dieng

*The history of human rights and the history of humankind are one and the same. The history of human rights is a reflection of the various stages of human history marked by the evolution of thought in general and the praxis of each stage. The religious, philosophical and political beliefs which assert, analyze or explain a particular web of social life also provide the foundation for human rights. These rights are articulated around the ideas (material sources) which shaped and conveyed them as concepts and the instruments (formal sources) through which they are proclaimed and made effective.*

Kéba Mbaye

The long-awaited *Human Rights in Africa* by the Senegalese magistrate Kéba Mbaye is a significant, exhaustive and necessary *magnum opus*.

Significant, first of all, because the author is an internationally renowned personality whose scope and influence stretch well beyond the borders of his own country and the African continent. Kéba Mbaye effectively shows himself to be a relentless defender of human and peoples' rights, fundamental liberties and democracy. His cause? Africa. The Africa of people and of peoples, Africa his "mother." His professional path of forty years is exemplary. For eighteen years he was the First President of the Supreme Court of Senegal. He was Member, then Vice-President, of the International Court of Justice in the Hague; Chairman of the United Nations Human Rights Commission, of the International Commission of

Jurists, of the Special Group of Experts responsible for the inquiry into human rights violations in Southern Africa; Vice-President of the International Institute of Human Rights and the International Institute of Humanitarian Law, as well as President of the International Academy of Human Rights. Kéba Mbaye is universally considered as the "father of the right to development." Finally, he also contributed to the drafting of the African Charter of Human and Peoples' Rights, adopted by the OAU in 1980.

Exhaustive too, because the author explores and revues all the themes which make human and peoples' rights a field in perpetual transition, a complex and multidimensional subject moving within the heart of history itself. For Kéba Mbaye, human rights, the material corpus of the basic aspirations and profound feelings of society – the community of

beings capable of judgment, lies at the basis of History, is founded in it, and gives it therefore strength and direction. This is notably what permits the book *Human Rights in Africa* to be considered a philosophical and didactic work, universal and even timeless in spirit. However, Kéba Mbaye is not content to write a purely academic work marked by brilliant concepts, indubitably proving his absolute intellectual mastery of the subject; no, more than a lawyer and historian with an encyclopaedic memory, Kéba Mbaye is a grassroots person who possesses an intimate knowledge of, and knows how to reproduce in great detail and perfect order, the formal collection of legal cogwheels – instruments and mechanisms – which command both nationally and internationally the tragically banal situations faced by Africans in the search and enjoyment of their fundamental rights. This mastery of applied praxis is reflected equally well in his fascinating description of the labyrinth of conventions and different national, regional and international laws, instruments and mechanisms created to ensure the happiness of the individual and the community, as in the criticism he makes of their imperfect operation. Beginning with a description and then an exhaustive analysis of the universal system of the promotion and protection of human rights – the United Nations Charter, the Universal Declaration, etc – the author leads us to the heart of his penchant for Africa: the African Charter of Human and Peoples' Rights, otherwise called the "Charter of Banjul", and the African Commission of Human and Peoples' Rights. Kéba Mbaye traces the two main parallel themes of the evolution of human rights in Africa: the universal sphere and the African sphere.

Necessary, finally, because Kéba

Mbaye offers us a global picture of what human and peoples' rights actually are in Africa. Notably, no such complete work had yet been written on the theme. Hence, the book fills an enormous gap, a gap proportional to the dimensions of a vast continent, and a continent which has remained a virtual *terra incognita* in the geography of human rights. But the greatest contribution this work brings to promoting and protecting human rights in Africa lies essentially in its instructive worth, that is to say in the really dynamic use which can be made of it. For if, as we have said, Kéba Mbaye considers human rights to be a constitutive element of History, his book, which is also an important element of the vast galaxy of human rights, might also prove one day to be a mover of history. Conscious of this, Kéba Mbaye states, "[W]e have the clear feeling that the first step towards the rule of human rights is that the people for whom these rights are promulgated fully know them. This popular knowledge cannot be transmitted unless it is done by teachers at all levels(...) and intellectuals(...) It is these first whom we entreat, and then all militants of human rights."

Kéba Mbaye has composed "Human Rights in Africa" to the glory of the Rule of Law and democracy, not only for Africans, but for all of humanity. For, as he himself explains,

"to speak of human rights in Africa is paradoxical in that human rights essentially concern all of humanity and all people at the same time."

If, in his introduction, Kéba Mbaye laments and denounces a certain "indigence of the heart", a contrast to the progress seen in technical fields in the modern world, he does so with the sole

intention of bringing answers which we seem to lack. To do this, he quotes great thinkers of all time: Léopold Sédar Senghor, who epitomizes the African eternal humanism and its profound respect for the human person with a phrase taken from Senegalese folklore,

"Man is the remedy for man."

But also Protagoras, the Greek, who summarized the totality of thought behind the very notion of human rights with the phrase,

"Man is the measure of all things."

Kéba Mbaye's book contains two parts.

The first is given over to a deep and necessary reflection on the question of what exactly are human and peoples' rights. Among the themes he develops, the first to be noted is the relation between civil authority (the State) and the individual or group of individuals; second, the fact that individuals and groups (as entitled to human rights) are more and more often recognized as potentially direct subjects of international law; third, that the "human condition", that is the mere fact of being a human being, implies the right to human rights without distinction.

This first part contains an interesting exegesis of the tensions of human rights doctrine which have broken out in recent decades; tensions notably between, on the one hand, the representatives of the primacy of the so-called political rights over economic, social and cultural rights and, on the other hand, the advocates of the contrary. But also tensions between the rights of individuals and the rights of peoples. These debates create a context in which the author can show us the importance of economic, social and

cultural rights and invite us to witness the dawning of the notion of peoples' rights. Living up to his reputation as the "father of the right to development", the author teaches us that henceforth there exists a third generation of human rights, rights stemming from the solidarity between people and States. These are rights which stem from, amongst other things, a network of cooperation on the planetary level. They include the right to development, the right to peace, the right to a healthy natural environment.

From this stems the particular interest of the author in the eternal debate between the universality and the diversity of human rights, and the existence of African specificities in the field of human rights:

"[T]he antagonism between Western and Third World conceptions of human rights has become considerably more vicious, which has led to the notion of specificity. In any case, at present there is a discussion of human rights which is proper to the countries of Africa."

Kéba Mbaye's book is founded on this postulate.

The author insists particularly on the fact that "to suit the needs of colonization, the universality of human rights had been demolished." The author remarks that a "frame of mind" dominated by the opinion that "to each and every people its rights and conception of law" was a result of the fact that "colonized countries were always excluded from the unrestricted benefit of the precepts of human rights." Thus, we learn that the African Charter of Human and Peoples' Rights is deeply imbedded in this paradigm. Yet the African Charter, the author tells us, is even more a specific out-

come which can be explained by the particular historical context of the continent.

"[I]t strikes at the domination of one people by another while it underlines the principle of non-discrimination."

One of the great merits of the work by Kéba Mbaye is the clear reasoning with which he upholds the existence of a certain African particularity:

"[I]n the African system of human rights, the right to life infers the obligation to bring life to those who do not have the means of subsistence, those necessities which assure their existence. The right to life then, over above the right to not be killed, is the right to live..."

This passage expresses everything which makes human rights in Africa unique. Here is situated the philosophical mooring of the book.

The first chapter also reviews the different stages of Africa's pursuit of human rights. Here, human rights are brought to light in pre-colonial Africa, as well as in the colonial "possessions", in the dependencies, as well as in the independent States. The extent of human rights violations and the aspects and causes of these violations also receive careful attention.

In his conclusion to the first chapter, Kéba Mbaye exposes and analyzes the notions of "promoting" and "protecting" human rights.

The second chapter of the first part of the book is devoted to analyzing the universal system of the promotion and protection of human rights. All the most important international instruments and organs are examined, including the general instruments such as the United Na-

tions Charter, the Universal Declaration of 1948, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights. But instruments relating to particular subjects are also included, particularly discrimination, international crimes, slavery, the slave trade, forced labour, torture and other similar treatment, self-determination (of peoples), refugees, workers, women, children, and finally, combatants, prisoners and civilians.

The sections which deal with the functioning of the different human rights organs are just as complete. These are *inter alia* the several bodies created within the framework of the United Nations, such as the Human Rights Commission, the Sub-Commission, the Commission on the Status of Women, the Committee on the Elimination of Racial Discrimination, the Special Group of Experts on Southern Africa, the Special Committee against *Apartheid*, as well as numerous actions taken by the specialized agencies. The work of the NGO's, "so important" for the author, is nevertheless not neglected.

In conclusion to this first part, Kéba Mbaye examines the conventions of co-operation between the EC and the ACP or "Lomé Countries" concerning human rights and the Arab system. The examination of the Arab regional system, as the author sees it, leads us naturally to a penetrating study of the Islamic conception of human rights and a consideration of the Declaration of Human Rights in Islam. From a practical angle, Kéba Mbaye approaches the subject of the regional Arab human rights commission and mentions the proposal for a practicable regional Arab Charter of Human and Peoples' Rights.



The second part of Kéba Mbaye's book, which examines and explains the promotion and protection of human rights in Africa by the African system (African Charter and Commission of Human and Peoples' Rights) is thoroughly researched and detailed. These pages, the heart of the book, certainly constitute the most exhaustive writing on the topic.

They begin by describing the historical movement towards human rights in Africa in recent decades. Here we learn that the forces which led to the adoption in June 1980 of the African Charter of Human and Peoples' Rights, "the Banjul Charter", originated in a history which began with the first comings of independence in 1961, and in which the International Commission of Jurists (ICJ) played a more than important role. The circumstances behind the adoption of the African Charter, the directions given to the conference of ministers in Banjul and the work of this constitutive conference are historically delineated.

The essential features of the Banjul Charter are generously portrayed: African civilizational values, the specifically African concept of human rights, the rights which Africa sanctifies and the duties she imposes. Reasons are given to explain why there is at present no court of human rights in Africa, as there are in Europe.

A long and instructive essay on the whole array of rights and liberties covered in the Charter (civil and political; economic, social and cultural; rights of peoples and rights of the third generation), considered one after another, demonstrate the will of the author to support his message with meticulous order. Hence, he establishes an impressive and useful catalogue of rights. There follows an explanation of the obligations of States vis-à-vis human and peoples' rights: the

free flow of information and the guarantee of independent justice. And the obligations of people vis-à-vis the community and the State, duties derived from moral and traditional imperatives, largely dictated by the necessity of preserving good relations, the cohesion of society and, *inter alia*, the family unit. This is the point at which, explains Kéba Mbaye, there is a definite African distinction. However, even if this particularity has a laudable philosophical basis and expresses the most praiseworthy humanist considerations, the author reminds us that when "used by an unscrupulous government, it can serve to justify repression."

After dissecting all the aspects of the Charter, Kéba Mbaye reveals to us the organ responsible for applying it "in the field": the African Commission of Human and Peoples' Rights. Its internal organization, how it functions, its competence and procedural methods are all scrutinized by the author. Not content with a merely scholastic description of the institution, he adds comments to this descriptive inventory which allow us to place the different aspects in historical and political context.

The last chapter of Kéba Mbaye's book deals with refugees. Armed conflicts of all kinds, political instability, persecutions, human rights violations, natural catastrophes and insecurity are identified by the author as primary causes for one of the greatest tribulations of Africa, the phenomenon of displaced persons. All the means used to combat this (conferences, instruments, regional and national institutions, legislation and humanitarian aid) are examined with precision in this last part of *Human Rights in Africa*.

In his conclusion, Kéba Mbaye discusses the future of the African Commis-

sion, the compatibility of the protection of human rights and development, the duty of humanitarian interference and the national African systems of protection of human rights. His reasoning on these topics of actuality is precious, for it illuminates the work which must still be done. This is proof that human rights are a multidimensional domain in perpetual evolution.

It is the political testament of a true militant of human rights which stands out in this book. In *Human Rights in Africa*, Kéba Mbaye leaves to posterity a monumental reference book, an indispensable tool for those jurists, historians, stu-

dents, journalists, philosophers of law and human rights militants who wish to know more about the Africa of today and tomorrow.

In the preface to the book, Adama Dieng, the ICJ Secretary General, notes that: "Judge Mbaye's work reminds us of the Egypt of the great Pharaohs." Just as the Pharaoh was the "sun of men", Kéba remains "at the heart of the collective entity" of Mother Africa, "the centre of history in the centre of society."

The eulogy is amply merited.

The French Academy of Moral and Political Science has recently added its praise by bestowing upon *Human Rights in Africa* the René Cassin Prize for the year 1993.

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## RECENT ICJ PUBLICATIONS

### Justice – Not Impunity

*Published by the ICJ, Geneva, and the Commission nationale consultative des droits de l'homme (CNCDDH), Paris, (1993). Available in English., French and Spanish 259 pp.  
35 Swiss francs, plus postage.*

The ICJ and the CNCDDH organized, under UN auspices, an International Meeting on Impunity, held at the UN office in Geneva in November 1992, the elements of which are presented in this book. Authors from Africa, the Americas, Asia, Eastern and Western Europe, including government officials, philosophers, historians, magistrates, lawyers, lecturers in law, human rights activists, journalists and priests, contributed to this book, enriching the debate with their own national and international experiences of and approaches to the world-wide problem of impunity.

### Towards Universal Justice

*Proposals of the ICJ at the June 1993 World Conference on Human Rights, Vienna  
Published by the ICJ, Geneva 1993  
In English, French and Spanish. 88 pp. 15 Swiss francs, plus postage.*

In publishing this booklet, the ICJ submits some practical recommendations to the UN World Conference in order to strengthen the international mechanisms for the protection of human rights. The book is divided into two main parts. The first argues for the establishment of a new UN instrument: a permanent International Penal Court to confront the problem of the impunity of war criminals and human rights violators globally. The second offers suggestions on reforming some of the existing human rights mechanisms, known as the extraconventional mechanisms, to counter more effectively State non-compliance of existing international law.

### CIJL Yearbook

*Published by the CIJL, Geneva 1993  
In English, French and Spanish. 103pp. 25 Swiss francs, plus postage.*

The second volume of the Yearbook of the Centre for the Independence of Judges and Lawyers (CIJL) is devoted to an analysis of the legal protection of lawyers. This issue provides a forum for several distinguished lawyers from all over the world to evaluate this protection at the national and international levels. Special emphasis is given to how legal protection, or the lack thereof, affects the lawyer's role to protect human rights.

### Attacks on Justice

*Published by the CIJL in English. 224pp. Geneva 1993. 25 Swiss francs, plus postage.*

The fifth Annual Report of the Centre for the Independence of Judges and Lawyers (CIJL) reports that at least 352 jurists from 54 countries were targets of persecution in the last year as they carried out their work. Of these, 32 were killed, three disappeared, 34 were attacked, 107 suffered reprisals for carrying out their professional duties, 81 received threats of violence and 95 were detained. The report consists of two parts: the first is a description of the legal system as it affects the independence of the judiciary and the second lists individual cases of persecution, country by country.

### Report on the Trial of Xanana Gusmao in Dili, East Timor

*Published by the ICJ in English. 56pp. Geneva 1993. 15 Swiss francs, plus postage.*

This is the report on the trial of Mr Xanana Gusmao in the district court at Dili, East Timor, which concluded on 21 May 1993. Mr Fredun De Vitre, a jurist from India observed the trial for the ICJ. The observer's main concern related to the fairness of the trial process. The East Timorese resistance leader was sentenced to life imprisonment; the sentence was later reduced to 20 years by presidential decree.

*Publications available from: ICJ, P.O. Box 160, CH-1216 Geneva*

*or from: AAICJ, 777 UN Plaza, New York, N.Y. 10017*