



The Review

International Commission of Jurists

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Articles

Minimum Humanitarian Standards - from Cape Town Towards the Future

Anna-Lena Svensson-McCarthy *

Introduction

For a considerable number of years attempts have been made at developing a *Declaration on minimum humanitarian standards* for the protection of the individual at all times, including, in particular, in situations of internal turmoil, which undeniably cause very serious human suffering. The rationale behind these efforts is that the international humanitarian law and the international law of human rights are not providing sufficient protection of the human person in intra-state conflicts in view of their normative gaps and legal ambiguities. An early appeal for the elaboration of a new legal instrument to cover these alleged legal lacunae

was launched in 1983 by Meron, who later also proposed a declaration on internal strife, as did Gasser in his draft Code of Conduct to be applied in situations of internal disturbances and tensions¹. Then, in 1990, a group of experts which met in Turku, Finland, adopted a *Declaration of minimum humanitarian standards*, which was slightly modified in 1994². These various drafts were elaborated in the hope that a clear and simple statement of the minimum obligations binding States in the so-called grey area of legal uncertainty would make it more difficult for them to avoid accountability by relying on legal concepts for the qualification of the crisis situations concerned.

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- 1 For proposals on a new declaration on internal strife, see Meron Theodor, *Human Rights in Internal Strife: Their International Protection*, (Hersch Lauterpacht Memorial Lectures), Cambridge, Grotius Publications Limited, 1987, 135-164; as to the same author see also "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument", *American Journal of International Law (AJIL)*, Vol. 77, No. 3, 1983, 589-606 and "Draft Model Declaration on Internal Strife", *International Review of the Red Cross*, No. 262, 1988, 59-76; see also Gasser Hans-Peter, "A measure of humanity in internal disturbances and tensions: a proposal for a Code of Conduct", *ibid.*, 38-58.
- 2 For the 1990 version of this Declaration, see U.N. doc. E/CN.4/Sub.2/1991/55, *Declaration of minimum humanitarian standards*, Working paper submitted by Mr. Theo van Boven and Mr. Asbjørn Eide. For the text as modified at a meeting at the Norwegian Institute of Human Rights in 1994, see Eide Asbjørn, Rosas Allan and Meron Theodor, "Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards", *AJIL*, Vol. 89, No. 1, 1995, 215-223.

By resolution 1994/26, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities transmitted the Turku Declaration to the Commission on Human Rights with a view to its further elaboration and eventual adoption. After having obtained comments on the Declaration from governments, inter-governmental and non-governmental organizations in accordance with resolution 1995/29, the Commission recognized in resolution 1996/26, "the need to address principles applicable to situations of internal violence and disturbance of all kinds in a manner consistent with international law including the Charter of the United Nations" (first operative paragraph). It also welcomed the offer by the Nordic countries "to organize, in cooperation with the International Committee of the Red Cross, a workshop to which governmental and non-governmental experts from all regions" would "be invited to consider this issue ..." (fourth operative paragraph).

The Workshop on Minimum Humanitarian Standards was hosted by the Government of South Africa in Cape Town from 27-29 September 1996. Although the participants were unable to agree on the need of a specific legal text on this important subject, they did adopt a proposal asking the United Nations Commission on Human Rights to request the Secretary-General of the Organization "to undertake, in coordination with the International Committee of the Red Cross... , an analytical study of the legal issues addressed at the Cape Town

Workshop". This proposal was subsequently also accepted by the Commission in resolution 1997/21. The outcome of the Cape Town Workshop is however a clear reflection of the complex issues to which the proposed declaration of minimum humanitarian standards do give rise, as well as the sharp differences of opinion that were reflected in the course of the discussions in the Workshop. It is therefore imperative to examine the well-foundedness of the main arguments advanced by the proponents of minimum humanitarian standards in order to enable a more objective, balanced and effective legal approach to the tragic situation facing millions of people in what is now commonly internal rather than international armed conflicts. It is believed that such a critical approach is indispensable in devising improved methods for dealing with human rights in crisis situations.

A first issue to be considered generally is thus whether contemporary international law for the protection of the individual actually does contain a so called grey area with shortcomings which might justify the adoption of a new legal instrument. For this purpose it will, in the second place, be particularly significant to examine the *original understanding of the derogation clauses in the major human rights treaties*. Thirdly, it is necessary to critically analyse the notion of non-derogable rights, which is subjected to serious misconceptions by legal experts, including the proponents of a declaration of minimum humanitarian standards. Fourthly, this article will make an assessment of the alleged usefulness of a new declaration

for the protection of the individual in the light of recent legal and political trends in the field of human rights. Fifthly, it will briefly consider the question relating to the legal responsibility for human rights violations committed by members of opposition groups for whom the governments concerned cannot, in principle, be held responsible. Finally, some proposals will be made as to how to proceed in the future with a view to improving the application of present international law and strengthening the accountability of States failing to comply with their international legal obligations.

Alleged Gaps in Humanitarian and Human Rights Law - Some General Reflections

Both the organisers of the Workshop as well as some other participants argued that both international humanitarian law as well as international human rights law contain "gaps" or "deficiencies" in their protection of the individual in situations of internal strife that require "corrective action"³. A serious flaw in this criticism is that the authors thereof are only making relatively general allegations as to the insufficiencies of these two branches

of law, without engaging in any detailed analysis of the extent of the field of application of specific rights guaranteed by human rights law in particular. Of equal seriousness is the fact that they do not analyse the *root causes* of the numerous intra-State conflicts that have caused immense human suffering since the Second World War, *inter alia* in terms of increased flows of refugees and internally displaced persons. They are principally arguing that problems of protection exist where the level of violence for the applicability of international humanitarian law has not been reached and where governments invoke derogations from international human rights law to avoid international responsibility for their conduct⁴. Whilst this view is pertinent with regard to humanitarian law, it is, however, less convincing *de jure* insofar as it concerns human rights law.

It is true that 1949 Geneva Conventions were intended to deal primarily with armed conflicts of an international character, which was indeed normal since humanity had suffered greatly from two long and devastating world wars during a little over three decades. Indeed, common Art. 3 to these four Conventions provides only limited protection to persons in armed conflicts not of an international character and who are

3 See *Issue Paper for the Cape Town Workshop on Minimum Humanitarian Standards*, 6-7 (hereinafter referred to as *Issue Paper*) and also *i.a.* key-note address by Eide Asbjørn, *The need for a Declaration on minimum standards of humanity*, p. 1 (hereinafter referred to as Eide, *The need for a Declaration*), as well as paper delivered by Drzewicki Krzysztof, *Observations on the Concept of Minimum Humanitarian Standards*, 6-8 (hereinafter referred to as Drzewicki, *Observations on the Concept*).

4 See Eide, "The need for a Declaration", p. 5 and Drzewicki, "Observations on the Concept", pp. 4-6.

"taking no active part in the hostilities". It is interesting to note, however, that the International Committee of the Red Cross (ICRC) has attempted to extend its activities to all situations of internal conflict and tensions, that is to say to situations which do not strictly speaking reach the level of violence required by Art. 3⁵. This extension of its activities under Art. 3 has been made possible because of the laconic character of this provision, which neither defines the lower or higher threshold of its field of applicability, nor provides a procedure for the determination of the existence of an internal armed conflict⁶. However, as has been pointed out by Abi-Saab, the text of common Art. 3 is so "dense and elliptic" that it is far from being self-executing, and it thus gives rise to a considerable "margin of interpretation" even in situations where it is clearly applicable⁷.

Whilst the adoption in 1977 of Additional Protocol II to the 1949 Geneva Conventions improved in theory the legal protection of persons "affected by an armed conflict as defined in Article 1" thereof⁸, the Protocol expressly excludes from its field of application "situations of internal dis-

turbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (Art. 1(2)). The most revealing hiatus in the Protocol is no doubt the fact that it does not contain any mechanism of implementation whatever, not even any right of initiative for the ICRC. As compared to armed conflicts of an international character, the victims of non-international armed conflicts are thus subjected to a less detailed and significantly less effective legal regulation. It has on this point been convincingly shown that this difference in approach is due to a lack of political will by many governments who, by relying on their reserved domain of exclusive domestic jurisdiction, consistently resisted attempts at having the non-international armed conflicts regulated in a more detailed and effective manner⁹. *This does not mean, however, that these conflictual situations are to be situated in some kind of legal no man's land. On the contrary, they fall squarely within the wide range of detailed regulation based on human rights law, by which the States are undisputedly bound at all times, and this is a legal regulation which could increasingly inspire also the ICRC in its future work.*

5 Abi-Saab Georges, "Conflits armés non internationaux", in *Les dimensions internationales du droit humanitaire*, Paris/Genève, Pédone/ Institut Henry Dunant/Unesco, 1986, 251 at 260.

6 *Ibid.*, 260 and 257.

7 *Ibid.*, 258.

8 See Art. 2(1) of the Protocol.

9 Abi-Saab Rosemary, *Droit humanitaire et conflits internes - Origines et évolution de la réglementation internationale*, Genève/Paris, Institut Henry-Dunant/Editions A. Pédone, 1986, see in particular the clear and interesting account on this point, Chapter V, 131-189 as well as the "Conclusion", 191-196.

It is clear that there should be no misunderstanding as to the ultimate object of both humanitarian law and the international law of human rights: they both aim at protecting the human person¹⁰ who, admittedly, despite gains in theoretical legal protection, appears increasingly vulnerable *inter alia* as a result of internal unrest characterised by serious and multiple human rights violations. However, humanitarian law is, in a certain sense, a legal anomaly, in that it applies in most cases to situations which are by definition unlawful under international law, such as wars of aggression, unlawful armed intervention and foreign occupation. Moreover, as also stated in the *Issue Paper*¹¹, it is basically only aimed at outlawing *excessive suffering and destruction* in the light of *military necessity*.

The international law of human rights, on the other hand, acknowledges rights which are *inherent* in the individual person and, since it is applicable both in times of peace and upheaval, it is thus binding on States even in situations covered by humanitarian law. Because of the wide range of rights that it is aimed at guaranteeing, it has the special strength of also being capable of allowing the creation of a constitutional order within which political, social, economic and other conflicts can be permitted to be managed peacefully through the

means of a free exchange of views, based on mutual respect between opposition groups. Thus, it may be possible to regulate problems and divergences before conflicts deteriorate to such an extent that the resort to force is seen as the only remaining alternative to peaceful negotiations. The effective protection of individual rights has consequently an indispensable role to fulfil in *preventing* the upsurge of armed conflicts, be they of an international or non-international character. Moreover, when the conflict is there, the international law of human rights indisputably contains the very seeds for solving community problems and thus also for moving towards the establishment of a just and peaceful society.

The question that now has to be addressed is, however, whether the possibility of derogating from certain legal obligations in the human rights field in severe crisis situations actually weakens this important role that the law should fulfil. It has in this respect been argued by Deng with regard to internally displaced persons that, in some situations which fall short of armed conflict, and which are not, therefore, covered by international humanitarian law, "human rights law may be restricted or derogated from, and protections thereby suspended that are critical for the well-being or survival of the displaced"¹². However, as this

10 See *Seguridad del Estado, Derecho Humanitario y Derechos Humanos, Informe Final*, San José, Costa Rica, 1984, Comité Internacional de la Cruz Roja/Instituto Interamericano de Derechos Humanos, statement in "Comentario general para los participantes", 5 at 8.

11 *Issue Paper*, 5.

12 See U.N. doc. E/CN.4/1996/52, *Internally displaced persons - Report of the Representative of the Secretary-General, Mr. Francis M. Deng*, 10.

article shows, the major human rights treaties in force do explicitly provide significant protection of those rights which are essential to ensure the very well-being and survival of the human person even in crisis situations. It has further been held by Eide that, when dissident groups refuse to comply with domestic law, "the State concerned is often induced to declare a state of emergency and to suspend most of the human rights that it has undertaken to respect"¹³. From this statement the Norwegian expert draws the conclusion that this kind of "situation must be met with clear standards applicable to all"¹⁴, that is to say, some minimum humanitarian standards. However, although this view may appear to provide a tempting solution to some of the existing problems within the human rights field, it fails to take into account the legal issues to which the right of derogation do give rise.

Yet, it is admittedly understandable that there is growing concern about the effectiveness of the major human

rights treaties in view of the derogations therefrom to which the States Parties have frequently recourse in real or fictitious emergency situations¹⁵. Whilst it is beyond doubt that States do not only have a *right* but even a *legal duty* in certain circumstances to resort to special measures in order to defend a constitutional order protective of the human person, it is equally clear that, if the States Parties were allowed to literally opt out of their legal duties under cover of the emergency provisions found in both Art. 4 of the International Covenant on Civil and Political Rights as well as in Arts. 27 and 15 of the American and European Conventions respectively, these important treaties would be sapped of virtually all their positive impact in crisis situations¹⁶. However, it is by an improved understanding of the very purpose of the derogation provisions in human rights law that it is going to be possible to permit these provisions to fulfil the legitimate aim that was originally designed for them.

13 Eide, "The need for a Declaration", 9.

14 *Ibid.*, *loc. cit.*

15 For further details on derogations from international human rights treaties, see the unpublished version of the author's doctoral thesis: *The International Law of Human Rights and States of Exception* - with special reference to the preparatory works and the case-law of the international monitoring organs, Geneva, Graduate Institute of International Studies/University of Geneva, 1996 (hereinafter referred to as Svensson-McCarthy, *The International Law of Human Rights and States of Exception*). An updated version of this study will be published by Kluwer Law International during 1998.

16 Derogation provisions are also contained in Art. 4 of the Arab Charter on Human Rights as well as in Art. 35 of the Commonwealth of Independent States Convention on Human Rights. However, since these treaties had not yet entered into force as of 1 May 1997, they will not be further dealt with in this context. - For derogation notices submitted under Art. 4 of the International Covenant up to the end of 1993, see U.N. doc. ST/LEG/SER.E/12, *Multilateral Treaties Deposited with the Secretary-General*, 140-156. It is noteworthy that Peru submitted no less than 90 notifications between March 1983 and March 1992, see *ibid.*, 145-152.

The Original Ratio Legis of the Derogation Provisions

Whilst the preparatory works to the derogation provisions contained in the American and European Conventions are not helpful in explaining the reasons for their existence, the preparatory works to Art. 4 of the Covenant provide useful evidence of the purpose that this provision was intended to serve at the universal level. They do however also supply illustrative information about the serious concerns that were expressed in the United Nations Commission on Human Rights about the introduction of a derogation provision in the future Covenant, as suggested by the United Kingdom in 1947¹⁷. However, once the Commission had *narrowly* decided at its second session in 1947, over protests *inter alia* by the United States, to adopt the British proposal to insert a derogation provision in the draft Covenant¹⁸, the major attention was focused on drafting the provision in such a way so as to *minimise the risk of abuse*.

Although the United Kingdom had originally presented the proposed derogation provision as a "loophole for not enforcing the Bill in the case of national emergency or some similar reason"¹⁹, it later wisely explained in the Commission that it was "most important that steps should be taken to guard against" the "eventuality" of having States "suspend the provisions of the Convention" in time of war²⁰. The United Kingdom thus wanted to insert a safeguard in the Covenant to make sure that the States would be bound by their legal obligations in the human rights field even in armed conflicts as opposed to their other conventional obligations under the general principles of international law²¹. The original idea was in other words to provide governments with the possibility of resorting to some *further controlled restrictions* on the enjoyment of human rights in difficult crisis situations, without for that sake providing them with a *carte blanche* in suspending treaty obligations to deal with societal upheaval. As will be seen below, this view was confirmed by the drafters in

17 See first proposal contained in U.N. doc. E/CN.4/AC.1/4, Annex 1, 5 at 7 as submitted to the Drafting Committee of the Commission on Human Rights in 1947. See also slightly amended version in U.N. doc. E/CN.4/AC.3/SR.8, 10. The Working Group set up by the Commission on Human Rights in 1947 to discuss the Covenant actually *rejected* the British proposal by 3 votes to 2, see *ibid.*, at 11. See further the United Kingdom proposal as submitted in 1949, in U.N. doc. E/CN.4/188.

18 U.N. doc. E/CN.4/SR.42, 5. The vote was 4 to 3, with 8 abstentions. From 1947 until the Commission's fifth session in 1949, the United States favoured a general limitation clause; even after having abandoned its proposal for such a clause, it preferred to see the derogation provision deleted as well, see e.g. U.N. doc. E/CN.4/SR.126, 3.

19 U.N. doc. E/CN.4/AC.1/SR.11, 6. This proposal was introduced during the first session of the Drafting Committee set up by the Commission in 1947.

20 U.N. doc. E/CN.4/SR.42, 4 at 5; see also United Kingdom statement made in the same vein, in U.N. doc. E/CN.4/AC.3/SR.8, at 10.

21 Cf. United Kingdom statement in U.N. doc. E/CN.4/AC.3/SR.8, at 10.

general in the course of the discussions that followed in the Commission until the final adoption of the derogation provision.

Although the proposed derogation provision as submitted by the United Kingdom to the Commission in 1949 now contained a list of non-derogable rights²², serious concern persisted as to the possibility of abuse to which such a provision would lay open. Apart from the well-known opposition to the term "war"²³, criticism was expressed as to the vagueness of the concept "other public emergency" in the British text²⁴. In order to limit the scope of the draft provision, the USSR therefore proposed to insert the terms "directed against the interests of the people" after the words "in time of war or other public emergency"²⁵. This amendment would make clear what was the "exclusive purpose of the *limitation*, which must only be put into effect as a measure of defence

against aggression and other acts of war directed against the interests of the people"²⁶, their interests constituting "the critical test"²⁷. Whilst France did not think that the article should be limited to war²⁸, it considered that "there were three principles to be recognized", namely, "1) that *limitations* on human rights were permissible in time of war or other emergency; 2) that certain rights were not subject to limitation under any conditions", and "3) that derogation from the Covenant must be subject to a specific procedure and that such derogation, undertaken under exceptional circumstances, must accordingly be given exceptional publicity"²⁹. Although having earlier opposed the British proposal, "fearing the arbitrary suppression of human rights on the plea of a national emergency", France now approved the same for two reasons: *primo*, the principle of non-derogable rights "was a sound and permanent safeguard" and, *secundo*, "there was an essential

22 See U.N. doc. E/CN.4/188; the proposed article read as follows:

"1. In time of war or other public emergency, a State may take measures derogating from its obligations under Part II of the Covenant to the extent strictly limited by the exigencies of the situation.

2. No derogation from Articles 5, 6, 7, 8(i) or 14 can be made under this provision.

3. Any State party hereto availing itself of this right of derogation shall inform the Secretary-General of the United Nations fully of the measures which it has thus enacted and the reasons therefor. It shall also inform him as and when such measures cease to operate and the provisions of Part II of the Covenant are being fully executed".

23 See e.g. as to: *Uruguay*, U.N. doc. E/CN.4/SR.127, 8 at 9; *France*, *ibid.*, 7 at 8.

24 See e.g. views expressed by *Lebanon*, *ibid.*, 6 and 8 as well as *Chile*, *ibid.*, 10.

25 For the text of the amendment, see U.N. doc. E/CN.4/319, at 4 and as to the oral explanations, see U.N. docs. E/CN.4/SR.126, at 6 as well as E/CN.4/SR.127, at 7.

26 U.N. doc. E/CN.4/SR.126, at 6; emphasis added.

27 U.N. doc. E/CN.4/SR.127, at 7.

28 U.N. doc. E/CN.4/SR.126, at 8.

29 *Ibid.*, *loc. cit.*; emphasis added.

distinction between the *restrictions* of certain rights and the *suspension* of the Covenant's application"³⁰. An amended version of the aforementioned Soviet proposal was finally agreed upon³¹, but Lebanon was still not entirely happy with these terms, emphasising prior to the vote thereon that, in order to "avoid any abuse, the article should make it clear that it referred to emergencies threatening fundamental rights"³².

As can be seen, when discussing the possibility of derogating from the future Covenant, the drafters generally used the terms "limitations" or "restrictions" on, as opposed to the word "suspension" of, rights. This significant distinction is a further indication that they never intended to let the future Art. 4 provide a legal basis for not applying the Covenant in public emergencies including armed conflicts, but that, as previously stated, they simply aimed at granting the States Parties an additional narrow power to limit, a little further, the enjoyment of rights and freedoms when strictly necessary to do so.

During the Commission's sixth session in 1950, France criticised the terms adopted in 1949 as being "much too vague"³³, proposing that they be substituted by the phrase "In the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster"³⁴. As to the addition of the condition of "official proclamation", the purpose "was to prevent States from derogating arbitrarily from their obligations under the covenant when such an action was not warranted by events"³⁵. France also again underlined the importance of a list of non-derogable rights, such a list being "necessary to prevent abuses by dictatorial regimes"³⁶. As to Uruguay, it "supported the retention of Article 4 in spite of the serious problems it raised", because it "set forth a new principle in international law", namely, "that of the responsibility of States towards the members of the community of nations for any measures derogating from human rights and fundamental freedoms"³⁷. Both Uruguay and Lebanon urged, however, that the text of Art. 4(1) be improved so as to limit the scope thereof

30 U.N. doc. E/CN.4/SR.127, at 7; emphasis added.

31 The first part of Art. 4(1) thus read: "In time of war or other public emergency threatening the interests of the people", see U.N. doc. E/1371 (E/CN.4/350), *Report of the Fifth Session of the Commission on Human Rights 1949*, Annex I, 27 at 29.

32 U.N. doc. E/CN.4/SR.127, at 11.

33 U.N. doc. E/CN.4/SR.195, at 9, para. 42.

34 U.N. doc. E/CN.4/353/Add.8, at 3. See also U.N. doc. E/CN.4/SR.195, at 9, para. 42 for the oral explanation and a different wording of the proposal.

35 U.N. doc. E/CN.4/SR.195, 15 at 16, para. 82.

36 *Ibid.*, 14, para. 69.

37 *Ibid.*, 11, para. 52.

and thus minimise the risk of abuse³⁸. To that end, Lebanon thought it "advisable" either to adopt the French amendment to Art. 4(1) or to modify the provision in the following way: "seriously threatening the vital interests of the people"³⁹.

The Commission finally adopted the aforementioned French amendment⁴⁰, although it was again modified during its last substantive discussion on Art. 4(1) (then Art. 2(1)), which took place at its eighth session in 1952, when various amendments were filed in order to improve the definition of the circumstances that might justify derogations⁴¹. The winning proposal was submitted by the United Kingdom, which had suggested that Art. 4(1) read "In time of public emergency threatening the life of the nation", thus making the text similar to that of Art. 15 of the European Convention on Human Rights adopted in 1950⁴². France made however a successful counter-proposal to have the second part of this British text

replaced by the expression "which threaten(s) the life of the nation and the existence of which is officially established"⁴³. Art. 4(1) (then Art. 3(1)) was thus adopted in its final form on 11 June 1952, although a couple of stylistic changes were made at a later date⁴⁴.

Whilst there may have been some uncertainty at the very outset in 1947 as to the original purpose behind the United Kingdom proposal to have a derogation provision inserted into the Covenant, there can be no shadow of doubt that, as this provision was finally adopted, this treaty, which provides *universal minimum standards for the protection of the individual*⁴⁵, is valid in all circumstances, whether in times of peace, internal disturbances, or in war, with the States Parties incurring international responsibility, even in public emergencies, for restrictions on the exercise of human rights that cannot be justified under Art. 4. It is thus also clear both from the text of Art. 4 itself, as well as from the preparatory works, that,

38 *Ibid.*, 11, para. 54 (*Uruguay*) and *ibid.*, p. 11 at p. 12, para. 56 (*Lebanon*).

39 *Ibid.*, 11 at p. 12, para. 56.

40 *Ibid.*, 18, para. 97; the vote was 6 to 3, with 4 abstentions.

41 See e.g. the unsuccessful attempt by the U.S.S.R. to have the terms "caused by circumstances threatening the interests of the people" reinserted after the terms "public emergency", U.N. docs. E/CN.4/L.121 and E/CN.4/SR.331, at 5.

42 U.N. doc. E/CN.4/L.139/Rev.1.

43 U.N. docs. E/CN.4/L.211 and as to the vote E/CN.4/SR.331, at 5; the vote was 13 to none, with 5 abstentions. The French proposal used the term "threaten" rather than "threatens".

44 For the text as adopted, see U.N. doc. E/2256 (E/CN.4/669), *Report of the Eighth Session of the Commission on Human Rights 1952*, Annex I, 44 at 47. The term "established" was changed to "proclaimed" at the same session.

45 See statement of the Human Rights Committee in its comments with regard to the Libyan Arab Jamahiriya, *General Assembly Official Records, Fiftieth Session, Supplement No. 40, (A/50/40)*, para. 137 (the Committee's reports will hereinafter be referred to as: U.N. doc. G.A.O.R., A/40/etc., *Report HRC*).

when the term "derogation" is used in Art. 4(1), it is in no way synonymous with the "suspension of obligations" under the Covenant, since the States Parties continue to be bound thereby, albeit, if strict need be, with some adjustments in particularly serious crisis situations.

This is indeed but a logical legal consequence of the fact that Art. 4 was intended to fulfil the two-fold purpose of providing the States Parties with adequate means of defending the imperilled existence of the nation, whilst at the same time guaranteeing maximum protection of human rights, that is to say, *the maximum strictly allowed by the conditions imposed by the severity of the crisis*. This purpose was made clear by the drafters when they *inter alia* agreed to insert the *principle of strict proportionality* in Art. 4(1), according to which a public emergency threatening the life of the nation only justifies such limitative measures that can be considered to be "strictly required by the exigencies of the situation". In other words, and as previously noted, the derogation provision was never thought of as a means of providing the States Parties with total freedom of action in combating emergencies. Indeed, it can be said that rather than containing a philosophy that favours the limitation of rights, it gives expression to the opposite principle, namely, that all rights are to be

fully guaranteed and enforced unless very special circumstances justify the limitation of the exercise of some, and that some rights may never be limited, irrespective of the severity of the emergency⁴⁶.

Consequently, temporary derogations from international human rights obligations in public emergencies can more accurately be referred to as *extraordinary limitations on the exercise or enjoyment of human rights*, as opposed to the *ordinary limitations*, which can in some cases be permanently imposed thereon in normal times. The term "extraordinary limitations" does, in other words, more closely reveal the real legal nature of *derogations* from international human rights obligations, in that it indicates how closely linked the ordinary and extraordinary limitations are. Rather than being two distinct categories of limitations, they actually form a *legal continuum*, which is evidenced by the fact that it is only when the ordinary limitations or restrictions on human rights have proved to be manifestly insufficient to maintain peace and order, that the extraordinary restrictions may, on certain strict conditions, be applied⁴⁷.

It is finally plain that, once the idea of including the derogation provision in the Covenant was accepted - and, as partly seen above, it was only accepted after

46 See *mutatis mutandis*, *Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*), *Advisory Opinion OC-8/87, Series A, No. 8*, para. 21, 38 at 39 (hereinafter referred to as: *I-A Court H.R., Advisory Opinion OC-8/87, Series A, No. 8*).

47 Cf. the particularly clear statement on this interpretative principle by the European Commission of Human Rights, "*Greek Case*", 12 *Yearbook of the European Convention on Human Rights*, 72, para. 153.

adequate safeguards against abuse had been inserted therein - it was considered to be an element essential in preventing undue restrictions on the exercise of human rights by dictatorial or other regimes. More particularly, the specification that the public emergency must be of such severity as to threaten the life of the nation was the result of a fear, consistently emphasised, that derogations might be resorted to in situations which would not really require them and *for purposes moreover that are alien to the protection of the fundamental rights of the human person*. It might thus be said that, if a crisis situation does not threaten the fundamental rights of the people constituting the nation, the States Parties would not be authorised to act under Art. 4 of the Covenant, since the purpose of any actions taken by virtue of this article must be aimed at defending or restoring the democratic constitutional order within which people are capable of effectively enjoying their human rights and fundamental freedoms. Although the notion of a democratic society is not mentioned expressly in Art. 4, it follows from an interpretation of this provision in its legal context *in toto*, that this essential notion must be regarded as forming an

inherent part of the entire Covenant. It thus conditions the interpretation also of the derogation provision⁴⁸.

Having thus established the original *ratio legis* of the derogation provision in Art. 4 of the Covenant, a *ratio legis*, which it can be considered to share with Art. 27 of the American Convention and Art. 15 of the European Convention, it is necessary to make a somewhat closer examination of the real nature of the link between the so called non-derogable and derogable rights.

The Link Between the Non-Derogable and Derogable Rights

It has also been held with regard to Art. 4 of the Covenant, that "only the hard core of fundamental human rights remains guaranteed" in situations of armed conflict, and that, therefore, the "specific contribution of human rights instruments to the content of humanitarian law is ... not very significant"⁴⁹. However, to reduce the role of human rights to a bare minimum in crisis situations is contrary

48 On the role of the notion of an effective exercise of representative democracy with regard to the suspension of guarantees under Art. 27 of the American Convention on Human Rights, see *I-A Court H R, Advisory Opinion OC-8/87, Series A, No. 8*, 38, para. 20 and as to the notion of a democratic society in general under the International Covenant and the American and European Conventions, see Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Chapter 3, 123 *et seq.*

49 See Abi-Saab Rosemary, "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern", in *Humanitarian Law of Armed Conflict Challenges Ahead - Essays in Honour of Frits Kalshoven*, ed. by Astrid J. M. Delissen and Gerard J. Tanja, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1991 (hereinafter referred to as Abi-Saab, "Humanitarian Law and Internal Conflicts"), 209 at 222.

to both the text of the derogation provisions referred to above, the intentions of the drafters of in particular Art. 4 of the Covenant, and the views expressed by the international monitoring organs. *Such misconceptions do indeed undermine the role to be played by the international law of human rights in public emergencies and must be avoided.*

It is, therefore, necessary in the first place to examine the concept of non-derogable rights, because the apparent uncomplicated nature of this notion belies both its factual and legal complexities.

As to the factual level, in the first place, it must, however reluctantly, be admitted that, in spite of the importance attached by international law to certain basic rights, such as the right to life, the right to freedom from torture and the right to freedom from slavery and servitude, these rights are precisely those which are often abused in *de jure* or *de facto* emergency situations. As regards these rights, among others, the actual respect for international law is thus inversely proportionate to the peremptory nature of the legal norms in question. This situation cannot be attributed to a lack of clarity of the norms but, rather, to an in many cases cruel unwillingness, and possibly sometimes also inability, on the part of governments to fulfil their international legal obligations. The intentions of the drafters of Art. 4 of the Covenant

that at least some basic human rights be efficiently protected at all times, have not, consequently, been implemented.

As to the theoretical level in the second place, and as indicated above, a serious misunderstanding appears to exist with regard to the interpretation of the various derogation articles found in the Covenant and the American and European Conventions, in that it is believed that only the non-derogable core of rights need to be respected in public emergencies.

Inadvertent terminology

As already shown, neither the derogation articles themselves, nor the preparatory works, provide any basis whatever for the *a contrario* reasoning that only the rights enumerated in the non-derogation provisions would have to be guaranteed in armed conflicts or other serious crisis situations to the exclusion of the other rights. Nevertheless, this kind of misunderstanding may well be facilitated by the various infelicitous terms used in the doctrine to describe the non-derogable rights, which are often also referred to as "inalienable" or "intangible" rights, or as rights that constitute the "hard core" (*noyau dur*)⁵⁰ or "intangible core"⁵¹ of human rights and so forth. These terms actually tend to sow

50 Abi-Saab, "Humanitarian Law and Internal Conflicts", 209 at 222.

51 As to the use of the term "noyau intangible", see the various contributions in *Le noyau intangible des droits de l'homme*, Actes du VII^e Colloque interdisciplinaire sur les droits de l'homme, ed. by Patrice Meyer-Bisch, Fribourg, Editions Universitaires Fribourg Suisse, 1991.

confusion which may indeed have adverse consequences for the interpretation of the international law of human rights, and thereby also for the effective enjoyment of this law.

As to the term "inalienable" at the universal level, it does comprise, *as a minimum*, all rights recognised in the International Bill of Rights, that is to say, the Universal Declaration of Human Rights and the two International Covenants on Human Rights. This conclusion follows from the first preambular paragraphs of the Declaration and the two Covenants, which in an identical language refer to the "recognition of the inherent dignity and of the equal and *inalienable* rights of all members of the human family", as "the foundation of freedom, justice and peace in the world" (emphasis added).

Whilst the term "inalienable" does not figure in the European Convention on Human Rights, the States Parties to the American Convention on Human Rights recognise, in the second preambular paragraph, "that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human

personality". Also the States Parties to the African Charter on Human and Peoples' Rights recognise, in the fifth preambular paragraph, "that fundamental human rights stem from the attributes of human beings". Although the American and African texts thus differ from those contained in the International Bill of Rights, the meaning thereof is the same, in that the rights concerned are inherent to the human person because of his and her specific and exceptional nature. Thus, they are also inalienable and, indeed, rights that are "inalienable" to someone mean that they cannot, in principle, be given away, taken away⁵² or transferred to somebody else⁵³. This conclusion thus covers not only the rights that can never *expressis verbis* be derogated from but also those other rights that are *recognised, but not granted by*, the international law of human rights. This view is supported by the Inter-American Court of Human Rights which has stated in unequivocal terms that Art. 27 of the American Convention does not deal with the suspension of *rights* as such, "for the rights protected ... are inherent to man"⁵⁴. Consequently, "what may only be suspended or limited is *their full and effective exercise*"⁵⁵. *It clearly follows that it is incorrect to reserve the term*

52 See *Oxford Advanced Learner's Dictionary of Current English*, Oxford, Oxford University Press, 1989, 4th. ed., 627.

53 See *The Concise Oxford Dictionary*, Oxford, Clarendon Press, 1990, 8th. ed., 595. - However, in some circumstances, a person may none the less be allowed to renounce some aspects of the exercise of rights, such as the right to a fair trial, provided, in particular, that it is to the individual's advantage and that there is no constraint involved, see e.g. *Eur. Court H. R., Deweer judgment of 27 February 1980, Series A, No. 35*, at 24-29, paras. 48-54.

54 *I-A Court H.R., Advisory Opinion OC-8/87, Series A, No. 8*, p. 36, para. 18 at 37.

55 *Ibid.*, *loc. cit.*; emphasis added.

"inalienable" for those rights that cannot be suspended in crisis situations⁵⁶.

To limit the word "intangible" to the non-derogable rights is wrong for very much the same reasons, with the further drawback that this term is not even to be found in any of the aforementioned legal texts. Moreover, it does admittedly convey the idea, *a contrario*, that some rights can actually be touched in emergency situations. But, as was just said, the rights form an inherent part of the human person, who cannot lawfully be deprived of their substance in any circumstances.

What about "hard core" or "intangible core" then? These expressions are equally vague and inadequate in denoting correctly the legal difference and intrinsic links between the derogable and the so called non-derogable rights, since there is not, in any event, such a thing as a "soft" of "tangible core".

It is evident that, by giving the non-derogable rights wrong or inadequate epithets, a serious risk is being run of overemphasising these rights to the detriment of those the enjoyment of which can in principle to some extent be further restricted in public emergencies. Strictly speaking, it is even wrong to talk about "derogable

rights", and these terms are not in any event found in either Art. 4 of the Covenant or Arts. 27 and 15 of the American and European Conventions respectively, which only foresee derogations from the legal "obligations" undertaken by virtue of these treaties. The distinction between the non-derogable and the derogable rights is thus used in this context for pure reasons of convenience.

Intrinsic interdependence of rights

The actually rather inappropriate distinction between derogable and non-derogable rights conceals a further legal complexity, namely that relating to the *intrinsic interdependence* of rights. This interdependence has perhaps so far been most apparent in the opinions given by the Inter-American Court of Human Rights, but it is increasingly evident also from the work of the Human Rights Committee. In this particular context it will however only be possible to provide a glimpse of this interesting legal issue.

Art. 27(2) of the American Convention has no doubt facilitated the work of the Inter-American organs in that it also protects, as being

* 56 This was however done by Mrs. Questiaux in her *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, U.N. doc. E/CN.4/Sub.2/1982/15. The title of the relevant part of her study refers to "The principle of inalienability of certain fundamental rights" (p.18), although, as has been shown, *all* relevant human rights recognised by international law are inalienable, because inherent in the human person. Mr. Despouy, the current UN Special Rapporteur on the question of human rights and states of emergency has continued to use the term "inalienable" in the same limited sense, see e.g. his *Eighth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, U.N. doc. E/CN.4/Sub.2/1995/20, at 9-11.

non-derogable, "the judicial guarantees essential for the protection of such rights", that is to say, the rights cited as non-derogable in that paragraph. On the basis of that provision, the Inter-American Court has held that the determination of what judicial remedies can be considered as "essential" for the purposes of Art. 27(2) will depend on the right in question, but that they are in all cases "those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction endanger their full enjoyment"⁵⁷. The concept does at least necessarily imply "the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency"⁵⁸. The Court concluded, consequently, that both the right to *amparo* guaranteed by Art. 25(1) of the Convention as well as the right to *habeas corpus* as laid down in Art. 7(6) thereof were remedies that had at all times to be effectively guaranteed with regard to the so called non-derogable rights. It is essential to point out, furthermore, that the Inter-American Court has held with regard to Art. 27(1) of the American Convention, that it contains the "general requirement that in any state of emergency there be appropriate means to control

the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it"⁵⁹. This actually also signifies that the States Parties' undertaking, as laid down in Art. 1(1) of the Convention, to "respect" and to "ensure" the full enjoyment of human rights, applies with full force also in emergency situations.

Under the American Convention it is thus established that judicial remedies must always be available to those who need to vindicate their non-derogable rights, which means that an independent and impartial judiciary must also be allowed to function effectively at all times. Whilst the Court has not yet explained what measures of control must be available to examine the lawfulness of derogatory measures under Art. 27(1), such measures should at least also be clearly independent, impartial and efficient as well as be able to provide due process of law.

As to the Human Rights Committee, it has on several occasions found a violation of Art. 6 of the Covenant when a death sentence has been imposed following trials that have not complied with the standards laid down in Art. 14 of the Covenant⁶⁰. Whilst such conclusions

57 I-A Court H.R., *Advisory Opinion OC-8/87, Series A, No. 8*, at 41-42, paras. 28-29.

58 *Ibid.*, at 42, para. 30.

59 I-A Court H. R., *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights, Advisory Opinion OC-9/87, Series A, No. 9*, 31, para. 21.

60 See e.g.: *Communication No. 349/1989, C. Wright v. Jamaica (views adopted on 27 July 1992 at the 45th session)*, G.A.O.R., A/47/40, *Report HRC*, 308 at 316, para. 8.7; *Communication No. 250/1987, C. Reid v. Jamaica (views adopted on 20 July 1990 at the 39th session)*, G.A.O.R., A/45/40 (II), *Report HRC*, 85 at 92, para. 11.5 and *Communication No. 16/1977 D. Monguya Mbenge v. Zaire (views adopted on 25 March 1983)*, G.A.O.R., A/38/40, *Report HRC*, 134 at 140, para. 21.

are also facilitated by the requirement in Art. 6(2) that no death sentence may be imposed "contrary to the provisions of the present Covenant", they do illustrate the fact that the derogable and non-derogable rights are intrinsically linked and that it is a legal impossibility to deal with the enjoyment of rights separate from their entire legal context. One of the salient features of the Committee's various views on the imposition of the death penalty under Art. 6, as read in conjunction with Art. 14 of the Covenant is, therefore, that an independent and impartial judiciary has at all times to be available to render justice in fairness even to civilians accused of criminal conduct in public emergencies.

That the question of non-derogability cannot be determined under the Covenant by exclusively relying on the terms of Art. 4(2) was further highlighted in the Committee's recent comment on the proposal by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to have a third optional protocol to the Covenant elaborated in order to strengthen the right to a fair trial⁶¹. In reply to this proposal, the Committee noted that the purpose thereof was to add Art. 9(3) and (4) as well as Art. 14

to the list of non-derogable provisions in Art. 4(2) of the Covenant⁶². It did not, however, share the need for such Protocol, since it "was satisfied that States parties generally understood that the right to *habeas corpus* and *amparo* should not be limited in situations of emergency"⁶³. More importantly, it was of the view "that the remedies provided in Article 9, paragraphs 3 and 4, read in conjunction with Article 2 were *inherent to the Covenant as a whole*"⁶⁴. The Committee was consequently of the opinion that such protocol would imply a risk in that the States Parties might "feel free to derogate from the provisions of Article 9 ... during states of emergency if they do not ratify the proposed optional protocol"⁶⁵. In other words, "the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency"⁶⁶.

This interesting reply to the initiative of the Sub-Commission shows that, in the opinion of the Committee, the provisions of Art. 9(3) and (4), which provide essential judicial guarantees for individuals deprived of their liberty, are in fact non-derogable, in spite of their not being contained in Art. 4(2) of the Covenant. The same conclusion appears to hold true also with regard to the provisions of Art. 2 of the

61 See Resolution 1993/26 in U.N. doc. E/CN.4/Sub.2/1993/45, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Fifth Session 1993*, 65.

62 G.A.O.R., (A/49/40 (I)), *Report HRC*, p. 4, para. 23.

63 *Ibid.*, *loc. cit.*

64 *Ibid.*, emphasis added.

65 *Ibid.*

66 *Ibid.*, 4-5, para. 23. See also reiteration of these views by the Committee, in G.A.O.R., A/50/40 (I), *Report HRC*, 14-15, paras. 32-34.

Covenant, which concerns the States Parties' general legal obligations thereunder. The fact that the field of non-derogability also depends on which obligations can be considered to be *inherent* in the Covenant is, of course, a question which is particularly relevant with regard to the availability of "effective" remedies for alleged human rights violations, and this significant legal development means that the interpretation of the Covenant is on this matter approaching that of the American Convention on Human Rights.

Since the non-derogable rights cited in Art. 4(2) of the Covenant and Arts. 27(2) and 15(2) of the American and European Conventions respectively cannot be separated from their wider legal context which is instrumental in ensuring their efficient application, it also follows that *no declaration on so called minimum humanitarian standards should be envisaged on the basis exclusively of the rights that are expressly enumerated therein*⁶⁷. Any such solution is bound to result in a weakened, rather than a strengthened, protection of the human being in crisis situations.

On the Alleged Usefulness of a Declaration on Minimum Humanitarian Standards

The proposal for a new declaration on minimum humanitarian standards surprises in many respects because of its lack of logic. Whilst criticism is launched as to the effectiveness of the present international humanitarian law and international law of human rights in situations of internal unrest, the inadequacies of these branches of law are proposed to be filled by a mere declaration, which clearly can only have a moral or political impact. However, without being legally binding and accompanied by efficient monitoring mechanisms, the usefulness of the declaration would be of doubtful value. The time, energy, expertise and money that would be required in order to elaborate such minimum standards would no doubt be better invested in seeing to it that the already existing norms be more efficiently complied with. In any event, there is no sign that the world governments would be any more inclined to abide by new minimum humanitarian standards in this field than they are to comply with their

⁶⁷ See however suggestion to this effect by Brett, Rachel, in her *Paper for the Workshop on "Minimum Humanitarian Standards"*, submitted on behalf of the Quaker United Nations Office, Geneva, 7.

already existing legal obligations under in particular the 1949 Geneva Conventions, the two 1977 Additional Protocols and the international law of human rights.

The trend of lowering standards

A recent example to illustrate the dangers involved in the elaboration of new legal standards, as well as the dangers in not seeing them applied, is the 1991 *Document of the Moscow Meeting on the Human Dimension of the CSCE*⁶⁸. In paragraph (28.1) of this *Document* it is stated with regard to the use of force in public emergencies that, if "recourse to force cannot be avoided, its use must be *reasonable and limited as far as possible*"⁶⁹. This phrase cannot but be considered to lower the level of protection of the right to life as compared *inter alia* with the non-derogable text of Art. 2 of the European Convention on Human Rights, where the use of force in self-defence, for instance, must correspond to what is no more than "*absolutely necessary*" (emphasis added). Ghebali considers that the *Moscow* text, which was suggested by the USSR, is an "innovation"⁷⁰. However, as can be seen, this innovation is rather of a negative nature, since it risks lowering the protection of the non-derogable right to life as compared to the strict legal obligations that

most of the member States of the OSCE incur under Art. 2 of the European Convention on Human Rights. In any event, the inefficiency of enforcing even this lower level of protection of the fundamental right to life referred to in the *Moscow Document* has been sadly demonstrated during the subsequent crisis in Chechnya, where the Russian troops have engaged in the unrestrained use of force which has resulted in the unnecessary loss of thousands of lives.

Whilst the *Moscow Document* is thus a useful illustration of the risk of trying to elaborate new standards or redefine already existing ones, it is also a reminder that governments are not necessarily intending to abide strictly even by these new and sometimes lower standards, although they have taken an active part in their drafting, as was the case with the USSR with regard to the aforesaid *Document*.

A further serious lowering of the level of protection of the right to life can be perceived in Art. 2(4) of the Commonwealth of Independent States Convention on Human Rights, where it is provided that deprivation "of life shall not be regarded as inflicted in contravention of the provisions of this Article when it results from the use of force solely in such cases of extreme necessity and necessary defence *as are provided for in national legislation*"

68 For the text of this document, see 30 *I.L.M.* (1991), 1671-1691.

69 *Ibid.*, 1683; emphasis added.

70 Ghebali Victor-Yves, "The Human Dimension Regime on States of Public Emergency", *Bulletin of the OSCE Office for Democratic Institutions and Human Rights*, Vol. 4, No. 1, 1995/1996, 32 at 34.

(emphasis added). As noted by Frowein, the rule of self-defence is here, again, "weaker" than in Art. 2 of the European Convention on Human Rights, since "there is a full reference to national legislation in the provision"⁷¹. This former member of the European Commission of Human Rights believes that this provision "will be interpreted in the way national legislation provides for" and that, consequently, "national legislation is given a wider field of limiting the right to life" in the Commonwealth Convention as compared to the European Convention⁷².

The tendency in some of the most recent legal and political texts to narrow the protection of the right to life does give rise to profound concern, which is of particular relevance in view of the attempts by the Nordic countries to see a new declaration on minimum humanitarian standards developed. The above mentioned examples show that, unless drafted with utmost care, such an endeavour could rather, however unwittingly, lead to a lowering of fundamental legal standards in crisis situations rather than to a reinforcement thereof. Indeed, as will be shown, the 1990 Turku Declaration, as modified in 1994, provides further proof of this danger.

Whilst several articles of this Declaration regulate the right to respect for the person, including, of course, the right to life, some of the relevant provisions do give cause for concern. For instance, Art. 5(2) provides that whenever "the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the situation, or the objective to be achieved". This is, admittedly, unduly wide language which is no doubt the result of the fact that the Declaration is a blend of principles drawn both from international humanitarian law and international human rights law. It is noted, in particular, that this provision does in no way identify the objectives that might justify the resort to force, nor does it contain the principle of absolute necessity as does Art. 2 of the European Convention on Human Rights, for instance. In its important work on the right to life, also the Human Rights Committee has emphasised that this supreme right "should not be interpreted narrowly"⁷³. It has thus held, for instance, that domestic law "must strictly control and limit the circumstances in which a person may be deprived of his life by" the State's own security forces⁷⁴. The Committee members' concern about the excessive use of force by police and security forces as well as arbitrary and extrajudicial executions is also consistently

71 See Council of Europe doc. SG/INF (95) 17 *Analyses of the Legal Implications for States that Intend to Ratify both the European Convention on Human Rights and Its Protocols and the Convention on Human Rights of the Commonwealth of Independent States (CIS)*, prepared by A. A. Cançado Trindade and J. A. Frowein, see page 38 of the paper prepared by Frowein.

72 *Ibid.*, loc. cit.

73 See General comment 6 (16) on Art. 6 of the Covenant in U.N. doc. G.A.O.R., A/37/40, Report HRC, 93, para. 1.

74 *Ibid.*, 93, para. 3.

reflected in their questions to States Parties under Art. 6 in connection with the consideration of their periodic reports.

In engaging in such a complex task as that of developing minimum standards to be applied by all in domestic turmoil, it is no doubt an almost impossible task to define the situations in which governments, opposition groups or even individuals could have justified resort to violence. However, by not referring to *any* legitimate criteria for the use of violence in Art. 5(2), the protection of the right to life that this provisions is intended to have is going to be weak at best. It is not improved by Art. 6, which states that "Acts or threats of violence the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited". What if the purpose of such acts or threats are just, say, ancillary or incidental? And who does the qualification thereof for opposition groups or individuals, because, it is worth noting that the Declaration is intended to be applied not only by Government authorities but also by opposition groups and individuals.

These are but some of the serious issues that do arise in connection with the interpretation of the resort to force in the Turku Declaration and they are not clarified by the fact that also Art. 8 deals with the right to life and that paragraph 1 thereof has been taken verbatim from Art. 6(1) of the International Covenant on Civil and Political Rights. Again, this legal complexity and confusion stems from the fact that the Declaration tries to cover both humanitarian law principles and

human rights law. By thus mixing humanitarian rules intended merely to alleviate the suffering of the human person with human rights law based on the respect for his or her inherent rights, there is clearly a significant risk that the legal protection of individuals will be diminished rather than strengthened in situations of internal turmoil. This is a result that must be avoided.

One of several other striking aspects with the Turku Declaration is that, although it states that all persons "are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices" (Art. 3(1)), it omits such essential rights as the freedom of expression including the freedom of information as well as the freedoms of assembly and association. It is true that these latter rights can usually to some extent be subjected to derogations under human rights law, provided that it is strictly required by the exigencies of the situation but, by leaving them out of a legal text to be applied in internal strife, the authors give the appearance of having ignored the fundamental problem underlying domestic turmoil. *This problem is that much of this turmoil has its roots in too little application of human rights standards, rather than in an excessive application thereof.* Extrajudicial killings, involuntary disappearances, arbitrary detentions and other kinds of human rights abuses have thus all too often their origin in disrespect for the views expressed by others through the spoken and written word or through the activities of political, cultural and trade union associations. What is of imperious

importance in conflictual situations is to keep channels of communication open between the various opposition parties so as allow the seeds to grow that might harbour the potential power and impetus for solving the strife concerned based on respect for the rights of all. The drafters of the International Bill of Human Rights were aware of this intrinsic link between the rights recognised therein, and their work is the result of a carefully balanced approach towards the rights and duties of the individual and the rights and duties of the State. Extreme care is, therefore, advised in drafting new standards that might compromise the result of their unprecedented efforts.

It is true that the proponents of a Declaration on minimum humanitarian standards are arguing that it shall not be interpreted to lower the standards existing under either present humanitarian or human rights law⁷⁵. However, although it may well be possible to avoid this *stricto jure*, there is nevertheless a considerable risk that this will not be the result *de facto*. Governments and opposition groups may well be more inclined to take a relatively brief, non-binding declaration as a frame of reference for their activities rather than more complex, but strictly binding legal texts. Such a declaration may also slowly but

steadily undermine the work carried out in situations of domestic turmoil by the already existing human rights organs, such as the European and American Commission and Court of Human Rights, the African Commission on Human and Peoples' Rights and the UN Human Rights Committee. These organs are frequently dealing with cases stemming from domestic unrest and their experience in this important field is increasingly significant. It is, therefore, also surprising that, in spite of the insight that they are having into these problems, the said monitoring bodies had not been invited to participate in the Cape Town Workshop.

It finally has to be asked whether, as argued by Mr. Sandoz of the International Committee of the Red Cross (ICRC), a relatively simply drafted declaration could be of interest as "an effective vehicle for dissemination of the fundamental principles common to international humanitarian law and human rights law"⁷⁶. This view actually seems to contrast with the opinion expressed both by Mr. Sandoz himself as well as by the President of the ICRC, Mr. Sommaruga, at a symposium held in Geneva in October 1995, when they both submitted in clear terms that, rather than elaborating new norms, efforts should now in particular be

75 See Arts. 1(2) and 20 of the Declaration and Eide, "The need for a Declaration", 8.

7 See speech given by Director Yves Sandoz of the ICRC at the Cape Town Workshop, 3.

aimed at finding more efficient means of enforcing the already existing standards⁷⁷. In any event, the argument that a declaration could be useful as some kind of means of instruction is not convincing. If teaching material is needed for governments and opposition groups, it could easily be drafted in truly simple terms on the basis of already existing strictly binding legal texts, without efforts being invested in the elaboration of a new declaration of doubtful legal value, and which possibly would not provide the comprehensive protection of the individual that is generally required under the international law of human rights.

Legal Responsibility for Breaches of the Law

One of the purposes behind the proposal to draft a new Declaration on minimum humanitarian standards is that it should extend the scope of application of the law to cover all participants in conflicts that is, including non-governmental entities⁷⁸, although their legal responsibility would not be accompanied by any recognition of a particular status⁷⁹. In view of its com-

plexity, the issues relating to the extended legal responsibility for breaches of international humanitarian and human rights law can however only be briefly commented upon in this context.

It is admitted that the important question of legal responsibility has not yet been given any full and satisfactory answer in international law. Although the 1949 Geneva Conventions and the First Additional Protocol of 1977 contain provisions on the punishment of grave breaches thereof and on the duty to take measures necessary for the suppression of all other breaches of these treaties, it is noteworthy that these provisions are limited to armed conflicts of an international character, and that no corresponding provisions are found in either common Art. 3 or in the Second Additional Protocol of 1977 which regulate conduct in non-international armed conflicts⁸⁰. It is also true that, under the international law of human rights, governments and not individuals are legally responsible at the international level, a fact that has been criticised by the organisers of the Cape Town Workshop⁸¹. However, this is, again, a rather logical reflection of the fact that some of

77 See Sommaruga Cornelio, *Allocution d'ouverture*, page 3 of the unpublished version of the speech and Sandoz Yves, *Rapport introductif*, page 13 of the unpublished version of the report. Both contributions were submitted to the International Symposium on the occasion of the fiftieth anniversary of the UN: *The United Nations and International Humanitarian Law*, held in Geneva, 19-20 October 1995.

78 See Eide, "The need for a Declaration", 4-5 and *Issue Paper*, 4 and 9.

79 See *Issue Paper*, 4.

80 See Arts. 49-51 of the First Geneva Convention, Arts. 50-52 of the Second Geneva Convention, Arts. 129-131 of the Third Geneva Convention, Arts. 146-148 of the Fourth Geneva Convention and Arts. 85-91 of the First Additional Protocol of 1977.

81 *Issue Paper*, 8.

the principal human rights treaties were drafted in the aftermath of the Second World War, when the major concern was focused on unlawful and illegitimate State actions. In spite of this, the relevant treaties are the fruit of a carefully struck balance between the general and individual interests. An expression of this balance, without which human rights will have no real meaning for all, can in particular be found in the various ordinary and extraordinary limitation provisions, where the individual rights have to be weighed against the rights of others to enjoy their freedoms as well. The opinion was that any violations of the rights protected by these instruments should be punished and/or remedied by the State concerned within the framework of its domestic law. In spite of the many intra-State conflicts now facing the world, this basic general rule continues to be valid.

However, whenever governments either do not want to act, or are unable to do so because they are not having control over a certain part of their territory, additional means of prosecuting human rights abuses must be devised. On the other hand, considerable care should be taken in this respect. For instance, if opposition groups should be required to prosecute their own people for violations of human rights or humanitarian law they must also be required to administer justice in conformity with the fundamental principles laid down in international law, and it must be considered highly unlikely that they would generally be able to do so. Another problem stems from the fact that it might be necessary to distinguish opposition groups depen-

ding on whether they are pursuing a legitimate aim with their struggle. What if a group is fighting an authoritarian government for the purpose of establishing a democratic constitutional order respectful of human rights? Or, what if a minority group is simply acting in order to have their own language and culture recognised and respected by the central government? Whilst such struggle should no doubt conform to basic standards laid down in humanitarian and human rights law, the question must be asked whether the activities of such opposition groups should be treated at the same level as acts committed by groups aiming at overthrowing a social and political structure respectful of human rights in order to establish some form of dictatorship. The point is, in other words, that the repression of international humanitarian and human rights standards must not be devised in such a way so that it can be used by authoritarian governments in order to quell undesired opposition. It is important to recall in this respect that the third preambular paragraph of the Universal Declaration of Human Rights provides that "*Whereas* it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". It follows that, contrary to humanitarian law, the international law of human rights is anything but neutral with regard to a country's constitutional order. The world governments still have the primary responsibility for - and possibility to - creating the conditions necessary for a full and effective enjoyment of the rights and freedoms of the indivi-

dual, and no action should be taken to sap this responsibility.

Conclusions and Proposals For Future Action

A general improvement in the number of grave human rights abuses could no doubt be achieved if the following conditions were fulfilled in particular: 1) if all governments took effective measures to carry out their already existing obligations under humanitarian and human rights law, including consistent action to *prevent, repress and remedy* violations of this law; 2) whilst international monitoring organs do depend on the States' acceptance and cooperation for their success, they should try to do their utmost to invent ways of making their work more efficient; they should also adopt a strict interpretative approach to the derogation provisions and harmonise their case-law so as to maximise the protection of the individual in all circumstances, including in situations of domestic upheaval; 3) if the existing domestic and international control systems fail, a *permanent International Criminal Court* should be competent to act swiftly to punish particularly severe violations of the rights of the human person⁸². Efforts must thus be focused on the creation of such a Court, an event that should take place no later than in 1998. This

is however an issue that will seriously test the world governments' genuine willingness to enhance the protection of the human person in crisis situations. In this respect, non-governmental organisations should increase their efforts in trying to persuade the States to go ahead with this important initiative. It is further interesting to note on this issue that, in its *Draft Code of Crimes against the Peace and Security of Mankind*, the International Law Commission has adopted a proposal implying that there would be individual responsibility and punishment for crimes of aggression, genocide, crimes against humanity and war crimes as defined in the draft Code⁸³. At this time of history, it is possibly by linking individual criminal responsibility for crimes against the peace and security of mankind with the jurisdiction of an independent and impartial international criminal court that would provide the most efficient prospects of success in areas where governments are unable to act. It is hoped therefore that, for the benefit of humanity, who continues to suffer in the hands of despots, big and small, governments will do their utmost to overcome their political controversies and go ahead with this important project.

On the basis of the research carried out with regard to derogations from human rights obligations it can more specifically be concluded in the first place that, if the derogation provisions

82 On the importance of the establishment of an International Criminal Court, see address to the Cape Town Workshop of Mr. Adama Dieng, Secretary-General of the International Commission of Jurists.

83 See U.N. doc. A/CN.4/L.522, draft Art. 2, pp. 2-3 and draft Arts. 15-18, at 6-10.

contained in the International Covenant and the American and European Conventions are going to be able to play a constructive role in the protection of the individual in the crisis situations facing many of today's governments, it is imperative that the States Parties be firmly reminded of the *ratio legis* of these provisions, which were intended to serve as an ultimate tool for enabling them to create or defend a constitutional order respectful of human rights. Unless this original understanding of the concept of derogation be understood and consistently applied both by the governments themselves as well as by the international monitoring organs, there is a genuine risk that the positive legal impact of these treaties will be slowly but steadily eroded. To accept, as some authors seem to do, the abusive resort to derogations as if they were actually normal and lawful under the international law of human rights, also debases this law and consequently undermines its effectiveness in crisis situations contrary to the clear intentions of the drafters. Both the Human Rights Committee and the other international and regional control organs should thus always closely examine the very *aim* of the derogations concerned, before allowing the derogating States to enjoy the strictly controlled benefit thereof.

In the second place, derogations cannot be allowed to compromise the *substance* of human rights since these rights are inherent in the individual. The fact that the States are only allowed to impose such *extraordinary* limitations on the enjoyment of rights to a strictly limited extent is interesting in

that it is actually an expression of the view that crisis situations can be more easily and adequately solved by maximising the enjoyment of human rights and fundamental freedoms, rather than by minimising or even suppressing the same.

It has been shown, in the third place, that legal obligations that *a priori* appear to be derogable in public emergencies may in actual fact be non-derogable on several grounds, such as either because their exercise is essential for the effective enjoyment of the rights cited *expressis verbis* as non-derogable in the treaties concerned, or because they are considered to be inherent in these treaties. This positive legal trend, which enhances the legal protection of the individual in public emergencies, is of course fully consistent with the fact that all rights and freedoms are interdependent. This interdependence signifies in other words that the non-derogable rights cited in Art. 4(2) of the Covenant and Arts. 27(2) and 15(2) of the American and European Conventions cannot be separated from their wider legal context which is instrumental in ensuring their effective application.

Fourthly, since there now exists a voluminous international case-law on the contents of the so called non-derogable rights, these rights can no longer be fully understood by merely reading the rather terse legal texts, because many of them have by now acquired a precise legal meaning which cannot be ignored. Although the interpretation of the non-derogable rights is not static but continuously evolving in order to adjust to changes in society, the case-

law of the monitoring organs now provide considerable substantive precision to the States' legal obligations under the international law of human rights. This is, regrettably, an aspect that is all too often overlooked in the debate over the States' legal responsibilities in public emergencies.

Fifthly, whilst it cannot be said with any certainty, of course, that the present state of humanitarian and human rights law provides in all respects sufficient protection to human beings, such as refugees and internally displaced persons, there appears to be no acute need for the development of a new legal instrument with selected *minimum* standards which would run the risk of lowering even further the minimum already existing at least in the human rights field. If precise legal gaps do exist with regard to special groups of people, for instance, and this cannot be excluded, they should only be defined after a careful examination of the precariousness of the situation *in the light of the already existing legal standards as interpreted and applied by the international monitoring organs*. Only such detailed and objective research would be able to give an adequate answer to the question whether the development of further standards are required or whether it might simply be enough to draw the attention of the international control organs to shortcomings in the interpretation of already existing legal texts.

As to the urgent situation of refugees and internally displaced people in particular, it must not be forgotten that their fate is more often than not the result of a lack of respect for the rights of the individual and the lack of a working democratic constitutional order. In other words, these groups of people constitute a *symptom* of what has gone profoundly wrong in their country of origin. Increased efforts have therefore imperatively to be undertaken to deal with the root causes of these wrongs, rather than paying exclusive attention to their symptoms. Unless this reality is understood, accepted and effectively acted upon, little progress is going to be visible in the protection of the human person in the near future. Seen in this light, the efforts aimed at drafting a Declaration on minimum humanitarian standards with the possible ultimate aim of setting up a new control machinery⁸⁴ could perhaps rather be seen as a useful warning signal to governments and international monitoring organs that the existing law, in particular human rights law - in spite of its *wide* field of personal and material application - is not effectively fulfilling its original purpose. This means however that, what is primarily needed is not more standards of doubtful legal value but *more efficient implementation of already existing legal rules*.

The Workshop's suggestion, as adopted by the United Nations Commission on Human Rights, that the Secretary General undertake an

84 Eide, "The need for a Declaration", 6.

analytical study of the issues addressed by it, may thus become an excellent opportunity not only to define the extent of present law and possible deficiencies in the protection provided by it, but also to pinpoint the difficulties faced by both governments and international monitoring organs in effectively meeting their responsibilities under international humanitarian law but most particularly under the international law of human rights. It is thus also of primordial importance, that not only governments, but also human rights treaty bodies, international organisations, particularly the UNHCR, as well as all regional human rights organs and non-governmental organisations will efficiently contribute to the preparation of the study.

Pending the outcome thereof, efforts can however already be devised to focus concrete attention on the issues discussed in Cape Town. Firstly, the United Nations High Commissioner for Human Rights, UNESCO, the UNHCR, the ICRC and non-governmental organizations, amongst others, should elaborate a simple but comprehensive education programme that could be adapted to all levels of society and which should comprise a part dealing specifically with the respect for the human being in public emergencies threatening the life of the nation. This would be particularly opportune in view of the present United Nations Decade for Human Rights Education. It is actually surprising that, after more than its fifty years of existence, the United Nations have not yet established such a programme.

Secondly, in particularly the UN Human Rights Committee should improve its methods in dealing with countries derogating from their legal obligations under Art. 4 of the Covenant. Special reports can be requested more frequently under Art. 40 of the Covenant and the comments adopted by the Committee at the end of the consideration of these reports should address in some further detail the problems raised under Art. 4 thereof. The long overdue general comment on Art. 4 should also be swiftly and carefully drafted, so as to enable the States Parties to act with a greater degree of conformity with their international legal obligations in crisis situations. In drafting the general comment the Committee should pay due regard to the preparatory works and to the specific needs of providing efficient protection to the human person in emergency situations, as evidenced by numerous studies carried out both by UN bodies and other inter-governmental and non-governmental organisations.

On the more practical level, finally, the UN, the OAS, the OAU, the Council of Europe and/or the OSCE, as the case may be, should be authorised to send monitors to countries facing public emergencies in order to stimulate improvements in the human rights situations and in order to prevent abuses from being committed. The UN Human Rights Committee or any other competent international or regional organ could thus let one or more of its members visit the country concerned in order to establish contacts with the government. A monitor could also be sent to the

relevant country in order to follow the evolution of the crisis. This is actually a quite realistic proposal in view of the increasing number of field operations already organised in particular by the Office of the United Nations High Commissioner for Human Rights in several countries such as in Rwanda and Cambodia. These important operations should be intensified in the future.

The international law of human rights was intended to be an instrument of peace and justice in the widest sense, and the derogation provisions were consequently aimed at providing a strictly controlled and temporary tool to ensure this purpose in very exceptional situations. It is hoped, therefore, that all actors of the international community will finally give the problems caused by the abusive or otherwise unlawful resort to derogations from human rights obligations the prompt, adequate and efficient attention that it so urgently needs.

The European Social Charter, an Instrument for the Protection of Human Rights in the 21st Century?

Nathalie Prouvez*

I - Introduction

In accordance with Article 1 of its Statute, the aim of the Council of Europe is "to achieve a greater unity between its members for the purpose (...) of facilitating their economic and social progress". In the Final Declaration of the Second Summit of the Council of Europe (Strasbourg 10-11 October 1997), the Heads of State and Government decided to "promote and make full use of the instruments which are a reference and a means of action (...), in particular the European Social Charter". The principle of the promotion of social rights and social cohesion was included in the Action Plan adopted at the Summit.

Compared with the European Convention on Human Rights, the 1961 European Social Charter¹ has for many years appeared as the poor relative. Over the last ten years, however, it has undergone a major revitalisation process. The success of this process and its speed have to be assessed and appreciated in the light of the difficult socio-economic context, both in Western and Eastern Europe, and of the general reluctance of States to implement and monitor economic and social rights. The principle that the two major categories of rights, civil and political rights on the one hand, and economic, social and cultural rights on the other, are interrelated, interdependent and indivisible is beyond question and has been endorsed on numerous occasions by the

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1 529 UNTS No. 89; ETS No. 35. Thirty States have signed the 1961 Charter, and 21 States have ratified it (Austria, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Turkey and the United Kingdom).

On the European Social Charter, see, Brillat, *D.Q.M.*, No 12, 1996, 2; D.J. Harris, *The European Social Charter*, 1984; id., Chap. 1 in L. Betten, ed., *The Future of European Social Policy*, 2nd. ed., 1991; id., Part. II in D. Gomien, D. Harris, Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, 1996; T. Jaspers and L. Betten, eds., *25 Years: European Social Charter*, 1987; P. O'Higgins, Chap. 11 in R. Blackburn and J. Taylor, eds., *Human Rights for the 1990s*, 1991; T. Ohlinger in F. Maatscher, ed., *The Implementation of Economic and Social Rights*, 1991, 335-354 (in German); L. Samuel, *Fundamental Social Rights*, 1997.

Member States of the Council of Europe². In practice, however, there is still a clear dichotomy between economic, social and cultural rights on the one hand, and civil and political rights on the other³. States have placed an emphasis on the effective monitoring of civil and political rights as opposed to economic and social rights. Furthermore, the lack of adversarial justiciability of economic and social rights has been a major obstacle to their enjoyment⁴.

The celebration of the European Social Charter's 25th anniversary in Grenada in 1987 provided an opportunity for a recognition of the Charter's needs for new impetus. In May 1988, new rights were introduced into the Charter through an Additional Protocol⁵. However, the decision to revitalise it through more important amendments was not taken until the end of 1990. Two factors led to this

decision: the desire to strengthen further the role of the Council of Europe in the area of human rights and, above all, the need to provide a pan-European social model which could be used by the States of both Western and Eastern Europe.

Five major weaknesses were identified as hindering the Charter's effectiveness: its heavy and slow procedure; uncertainty as to what were the respective roles of the various bodies involved in the supervision of the Charter; the absence of actual participation of the social partners in the supervisory procedure; the lack of any significant political sanction as the outcome of this procedure; and the inadequacy of certain provisions of the Charter. In 1991, the Charte-Rel Committee⁶ was appointed, with the task to draft proposals aimed at remedying these weaknesses. The work of this Committee has led to the re-launch

2 As stated in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 ((UN Doc. A/CONF. 157/25), "all human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis".

3 See the special issue of the *Review* of the International Commission of Jurists, on Economic, Social and Cultural Rights, December 1995, no 55, in which several papers discuss the lack of justiciability of economic and social rights and the arguments used by States in order to maintain a difference between civil and political rights on the one hand and economic and social rights on the other; see in particular the article by Mr. Pierre-Henri Imbert, "Rights of the Poor, Poor Rights? Reflections on Economic, Social and Cultural Rights", 85-97.

4 See for a critique of the existing conclusions on the non-justiciability of economic and social rights, M.K. Addo, "Justiciability Re-Examined", in Beddard and Hill (ed.), *Economic, Social and Cultural Rights, Progress and Achievement*, Macmillan (1992), chapter 5, 93-117.

5 ETS No. 128. On the 1988 Additional Protocol, see L. Betten, 6 *NQHR* 9 (1988) and V. J. Shrubalsall 18 *ILJ* 39(1989).

The 1988 Additional Protocol has been signed by twenty States and ratified by six of them (Denmark, Finland, Italy, the Netherlands, Norway and Sweden). The condition for its entry into force was three ratifications.

6 The Committee on the European Social Charter, also known as the Revitalisation Committee (Charte-Rel), met from 1991 to 1994, when its mandate expired.

of the Charter through the adoption of two other Protocols⁷ and of the Revised Charter⁸.

II - The Revised European Social Charter

The process of revitalisation of the Charter was completed with the adoption in October 1994 by the Charter-Rel Committee of a draft Revised Social Charter⁹ which was opened for signature on 3 May 1996 and has been signed by thirteen States¹⁰. To date, no State has ratified the Revised Charter, which is meant to replace the 1961 Charter¹¹.

The Revised Charter takes account of the developments which have occurred in labour law and social policies since the Charter was drawn up in

1961. It brings together into a single instrument all the rights guaranteed in the Charter and the 1988 Additional Protocol¹², improves protection in some areas and introduces new rights.

The Revised Charter provides for better conditions of health and safety in the workplace. The new Article 3 adds to the previous text the undertaking to implement a "coherent national policy" with the main aim of minimising the causes of occupational hazards and of promoting "the progressive development of occupational health services for all workers". The Contracting Parties will now consult employers' and workers' organisations on the implementation and assessment of all the undertakings, and no longer only "when necessary" in relation to certain measures for improvement. The protection of children has also been strengthened, in particular by

7 Second Additional Protocol (ETS No. 142), adopted on 21 October 1991; third Protocol (ETS No 158), adopted on 9 November 1995.

8 ETS No 163.

9 On the Revised Social Charter, see F. Vandamme, "The Revision of the European Social Charter", *International Labour Review*, 1994, Vol. 133, No 5-6, 635-655.

10 Belgium, Cyprus, Finland, France, Greece, Italy, Lithuania, Portugal, Romania, Slovenia, Sweden and the United Kingdom.

11 Three ratifications are needed for the entry into force of the Revised Social Charter.

12 The 1988 Protocol added four rights to the nineteen fundamental rights guaranteed by the Charter. These rights can be divided into three categories:

- protection of employment: the right to work: including the right to vocational guidance and vocational training;
- protection in the work environment: the right to just conditions of work and to fair remuneration including the right of women and men to equal pay for work of equal value; the right to organise, the right to bargain collectively and the right of workers to information and consultation as well as the right to participate in the determination and improvement of working conditions and the working environment; special protection of special categories of workers: children and young persons, women, handicapped persons, migrant workers;
- social protection for the whole population: the right to protection of health, the right to social security and the right to social and medical assistance, the right to benefit from social welfare services; and
- special protection outside the work environment: rights for children and young persons, mothers, families, handicapped persons, migrant workers and their families, elderly persons.

the inclusion of Article 7 in the group of hard core Articles of the Charter, i.e. the provisions required as minimum acceptance¹³. The Revised Charter gives new guarantees of protection to young people under the age of eighteen outside the workplace¹⁴. In the area of the rights of women workers, the length of maternity leave has been extended to fourteen weeks¹⁵. The protection afforded to the disabled has also been reinforced¹⁶.

The Revised Charter introduces the right of protection against poverty and social exclusion. The Parties undertake "to take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance"¹⁷. The Revised Charter also provides that "with a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed to "prevent and reduce homelessness with a view to its gradual elimination; promote access to housing of an adequate standard;

make the price of housing accessible to those without adequate resources"¹⁸. The lack of precision of these provisions is somewhat disappointing, considering the alarming progress of poverty and homelessness throughout Europe. It is hoped that the supervisory bodies of the Social Charter will give substance and full effect to the provisions of the Revised Charter in this area.

Finally, a new general clause of non-discrimination is provided in the revised Charter¹⁹. The benefit of all the rights enshrined in the Charter should be ensured without any discrimination on any ground such as "race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status". However, differential treatment based on an objective and reasonable justification is not considered as being discriminatory. Furthermore, the Social Charter protects foreigners "only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned"²⁰. As mentioned in Recommendation 1354 (1998) of the

13 At the time of ratification, each Contracting Party can decide to accept a limited number of rights beyond a list of hard core Articles of the Charter. The provisions not ratified must nevertheless constitute social objectives that they must strive to achieve.

14 Article 17, Revised Social Charter.

15 Article 8, Revised Social Charter.

16 Article 15, Revised Social Charter.

17 Article 30, Revised Social Charter.

18 Article 31, Revised Social Charter.

19 Part V, article E, Revised Social Charter.

20 Appendix to the revised Social Charter: "Scope of the Revised European Social Charter in terms of persons protected".

Parliamentary Assembly of the Council of Europe, The European Social Charter should be considered as "a document of a universal nature and it should be applied to all persons lawfully resident in the signatory States, irrespective of whether they originate from another Contracting Party or from a State that is not a member of the Council of Europe". This would ensure that the scope of the Charter is similar to that of the European Convention on Human Rights²¹ which provides that rights in the Convention are to be enjoyed by "everyone within (the state's) jurisdiction"²².

III - The Supervision Mechanism

The initial system of supervision of the Charter is based on reports submitted by the Contracting Parties on its implementation. This system was modified by the Protocol amending the European Social Charter, opened

for signature on 21 October 1991 in Turin and by the Protocol providing for a system of collective complaints adopted in Strasbourg on 9 November 1995.

A. The 1991 Protocol Amending the European Social Charter

Currently ratified by ten States and signed by five other Contracting Parties, the 1991 Protocol will enter into force when it has been ratified by all the Contracting Parties to the Charter. However, in compliance with the final resolution of the Turin Ministerial Conference during which it was opened for signature and with the decision taken by the Committee of Ministers on 11 December 1991, the provisions of the Amending Protocol are applied "before its entry into force, in so far as the text of the Charter will allow". Only a few provisions, in particular those concerning the election of members of the Committee of Independent Experts²³

21 Opinion No 185 (1995) of the Parliamentary Assembly.

22 Article 1, European Convention on Human Rights.

23 The following bodies are involved in the supervisory procedure of the European Social Charter:

- the Committee of Independent Experts, composed of nine experts elected by the Committee of Ministers and assisted by an International Labour Organisation (ILO) observer. It examines reports submitted by the Contracting Parties and gives a legal assessment of these States' fulfilment of their undertakings;
- the Governmental Committee, composed of representatives of the Contracting Parties to the Charter and assisted by observers from European labour and management organisations. It prepares the decisions of the Committee of Ministers;
- the Committee of Ministers adopts a resolution on the whole of the supervision cycle, and, since 1993, has issued recommendations to States which fail to fully comply with the Charter's requirements;
- the Parliamentary Assembly is also associated with this mechanism. Since 1992, it has used the conclusions of the Committee Independent experts as a basis for the organisation of periodic social policy debates.

by the Parliamentary Assembly²⁴, have not been put into practice.

From the very first cycle of supervision of the Charter, criticisms were expressed concerning the lack of clear provisions in the 1961 Charter on the respective role of the Committee of Independent Experts and the Governmental Committee. As a result, conflictual situations and a certain degree of legal uncertainty arose, with the Governmental Committee challenging the exclusive right of the Committee of Independent Experts to interpret the Charter. Following the new provisions introduced by the 1991 Protocol, only the Committee of Independent Experts is qualified to make a legal assessment of the conformity of national law and practice with the Charter. The task of the Governmental Committee is now to select, in order to bring them to the attention of the Committee of Ministers and on the basis of social, economic and other policy considerations, the national situations which it feels should be the subject of a recommendation²⁵. Consequently, the Governmental Committee no longer has a reactive attitude and plays a positive role by initiating the debate on social and economic matters.

Before the adoption of the Protocol, the political will to address individual recommendations to States could never be expressed at the Committee of Ministers level. This could be partly explained by the requirement of a two-third majority vote of the members entitled to sit on the Committee, i.e. including States that had not ratified the Charter, for the adoption of such recommendations. The Protocol improves the procedure by providing that only Contracting Parties may participate in the vote and that the majority of two-thirds is calculated on the basis of the votes cast²⁶.

The 1991 Protocol has undoubtedly increased the efficiency of the supervisory procedure. Additional steps, however, remain to be taken in order to strengthen this procedure and make it more democratic. There is an urgent need to increase the membership of the Committee of Independent Experts and of the Secretariat of the Charter in order to alleviate their workload and speed up the procedure. The supervisory procedure should be complemented by the inclusion of the observance of the Social Charter and of social rights in general in the monitoring procedure set up by the Committee of Ministers of the Council of Europe²⁷. The role of

24 Article 3 of the 1991 Amending Protocol.

25 1991 Amending Protocol, Article 4.

26 1991 Amending Protocol, Article 5. In the past, abstentions often prevented the required majority from being obtained.

27 This procedure was established following the Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe adopted by the Committee of Ministers on 10 November 1994 at its 95th Session.

the Parliamentary Assembly of the Council of Europe in ensuring that the monitoring procedure is democratic should be fully acknowledged²⁸. In an Order adopted on 28 January 1998²⁹, this Assembly has entrusted its Social, Health and Family Affairs Committee with the task to control the extent to which Member States respect the provisions of existing legal instruments in the social field to which they are party, and in particular the European Social Charter, its Protocols and the revised Social Charter. This Committee will present a report to the Assembly at regular intervals. Suitable structures should also be set up in each member State which has ratified the Charter where government officials, representatives of employers and employees and competent NGOs could cooperate on a regular basis for the drafting of the reports, the follow-up of recommendations and the domestic

implementation of the rights enshrined in the Charter³⁰.

B. The Protocol Providing for a System of Collective Complaints (1995)³¹

This new mechanism is based on the complaints procedure applied in the International Labour Organisation (ILO)³² and complements the State reporting system³³. The Protocol will enter into force when five parties to the Charter have agreed to be bound by it³⁴. By December 1997, the Protocol had been signed by ten countries³⁵ and ratified by three. It is likely to enter into force in the course of 1998.

The efficiency of the control mechanism established through the 1995 Additional Protocol will depend

28 See the Report of the Social, Health and Family Affairs Committee of the Parliamentary Assembly on the Future of the European Social Charter, Doc. 7980 of 12 January 1998.

29 Parliamentary Assembly, Order No. 539 (1998).

30 This recommendation is supported by the Parliamentary Assembly of the Council of Europe. See recommendation 1354 (1998) of the Parliamentary Assembly of the Council of Europe, adopted on 28 January 1998.

31 This paragraph formed part of a paper presented at the Intergovernmental Colloquy on the European Social Charter organised by the Council of Europe in Strasbourg on 14-16 May 1997. See N. Prouvez, "Opinion of the Non-Governmental Organisations on the Collective Complaints Procedure", in *The Social Charter of the 21st Century*, Council of Europe Publishing, 1997, 140-151.

32 Complaints may be brought before the Freedom of Association Committee of the Governing Body of the ILO. See Valticos, "Droit International du Travail", 2nd. ed., 1983, 614-8; *ibid.*, in *Essays in Honour of Henry G. Schermers*, 1994, PP. 99-113.

33 On the Collective Complaints Protocol (hereinafter CCP), see Harris, in *The Social Charter of the 21st Century*, Colloquy, Strasbourg, 14-16 May 1997; Brillat, 1 *E.H.R.L.R.* (1996) 52; and Sudre, *R.G.D.I.P.* 1996, 600.

34 Article 14, CCP.

35 The following Charter Parties have signed the Protocol subject to later ratification, acceptance or approval: Belgium, Denmark, Finland, France, Italy, Portugal and Sweden. Cyprus and Italy ratified it. Norway accepted the CCP on signature without reservation as to ratification in 1997.

on the interpretation of the provisions of the Protocol and of the Social Charter itself by the various bodies involved. When confronted with problems of interpretation of the Charter and of the Protocol on the collective complaints procedure, The Committee of Independent Experts, the Governmental Committee and the Committee of Ministers should bear in mind the principle of effectiveness as developed by the European Court of Human Rights³⁶. This principle is a means of giving the provisions of a treaty the fullest weight and effect consistent with the language used and with the rest of the text. The Court's preference for what it terms a "practical and effective" interpretation as against a "formal" one has frequently proved an important and creative technique³⁷ which should also guide the organs in charge of monitoring the implementation of the Social Charter.

Organisations which may bring a complaint

The Protocol gives the right to make complaints not only to international organisations of workers and

employers³⁸ and to the most representative national organisations of employers and workers³⁹, but also to international⁴⁰ and national non-governmental organisations⁴¹ (NGOs).

The participation of non-governmental entities in the system of control of the Social Charter highlights the originality of the Charter compared to other international systems. It is an acknowledgement that several provisions of the Charter are not exclusively concerned with the world of work and do not, therefore, appropriately fall within the exclusive competence of management and labour. The optimum use of the Protocol will depend, however, upon the availability of resources for NGOs which have insufficient means to pay the expenses incurred in the proceedings. This will be of particular importance for Eastern and Central European NGOs which have very limited financial resources.

In order to have the right to submit complaints, international NGOs must have consultative status with the Council of Europe and must have been put on a list established for this

* 36 See, on the effectiveness principle, J.G. Merills, *The development of International Law by the European Court of Human Rights*, chapter 5, 89- 112.

37 See, for examples of the Court's applications of the effectiveness principle: *Artico v Italy* (1980) Series A, no. 37, para.33 ; *Adolf v FRG* (1982) Series A no. 49 ; *Minelli v Switzerland* (1983) Series A no. 62; *Golder v UK* (1975) Series A no. 18; *Airey v Ireland* (1979) Series A no. 32 ; *Marckx* (1979) Series A no. 31; *X and Y v Netherlands* (1985) Series A no. 91; *Abdulaziz, Cabales and Balkandali* (1985) Series A no. 94 and; *Soering* (1989) Series A no. 161.

38 Article 1 (a), CCP.

39 Article 1 (c), CCP.

40 Article 1 (b), CCP.

41 Article 2(1), CCP.

purpose by the Governmental Committee⁴². The list is valid for a four-year period after which it will lapse, unless the organisation applies for renewal. It is hoped, however, that NGOs will be able to apply to be added to the list at any time and not only at the end of each four-year interval. Furthermore, the principle of effectiveness requires that, when establishing and revising this list, the Governmental Committee's approach be as open and non-restrictive as possible. All decisions on inclusion in or exclusion from the list should be published and reasons for the decision given.

The role of national NGOs in the monitoring of economic and social rights is crucial. They have daily contact with the civil society and are the most apt to assess the extent to which social and economic rights are enjoyed by its members. Unfortunately, the 1995 Protocol provides that NGOs may only submit a complaint against a State if the latter has previously issued a declaration recognising that they are entitled to do so. Furthermore, such declarations may be made for a specific period⁴³. It is hoped that States will not shy away from granting their NGO sector the possibility to submit complaints.

Some provisions of the Additional Protocol will require flexible interpre-

tation. For instance, the right of both international and national NGOs to complain is limited to the only areas in which their particular competence⁴⁴ has been recognised. This limitation of the right to complain according to the area of specialisation of the NGOs is valuable in so far as it avoids ill-informed communications, but it may also block valid complaints if it is interpreted too restrictively. The overlap which often exists among the social rights protected by the Charter will have to be taken into account in the determination of competence.⁴⁵

Additionally, Article 2 of the Protocol requires not only that national NGOs have particular competence but also that they be representative. This quality will have to be assessed taking into account as large a number of factors as possible, bearing in mind that in Eastern and Central Europe in particular, civil society is still in its infancy. Representativeness will, therefore, have to be assessed in relative terms depending on the national context. The same approach should apply when considering the particular competence of the organisation. If, in a given State, there is no NGO with particular competence in the area concerned, other NGOs should be allowed to present a complaint in order to comply with the principle of effective protection. Furthermore, the national NGO lodging a complaint may be a national section or affiliate of

42 Article 1 (b), CCP.

43 Article 2 (1) and 2 (2), CCP

44 Article 2(1) and 3, CCP.

45 Such an overlap may exist, for instance, between the right to housing and the right to work, or between the right to health and the right to work.

an international NGO which has consultative status in the Council of Europe. If the competence of the international NGO to make complaints has been acknowledged, this factor should also be taken into account in assessing the competence and representativeness of its national sections or affiliates.

Collective nature of the complaints

According to the explanatory report to the Additional Protocol providing for a system of collective complaints, "complaints may only raise questions concerning non-compliance of a State's law or practice with one of the provisions of the Charter. Individual situations may not be submitted"⁴⁶. The collective nature of complaints should not mean, however, that individual situations may not be used to illustrate the failure of a State to comply with the obligations of the Charter.

will be able to submit all their comments in writing⁴⁷. If the complaint is presented by an international or a national NGO or by a national organisation of employees or employers, Article 7 of the Protocol provides that the international organisations of employees or employers will be invited to submit observations in writing. Unfortunately this possibility is not offered to international or national NGOs when the complaint is presented by international or national organisations of employees or employers. It is hoped, however, that the Committee of Independent Experts will accept to receive the observations which national and international NGOs take the initiative to submit. This would be in line with the considerable evolution over the years of the European Court of Human Rights' receptiveness to intervention by third parties. The Court accepts submissions from individuals or groups able to show that they have a discernible interest in the case and that their intervention is in the interest of the proper administration of justice⁴⁸.

Submission of comments

The complaint will be, at an initial stage, examined by the Committee of Independent experts, to which Parties

Transparency of the procedure

In accordance with the openness of the procedure relating to the European Convention on Human

46 Explanatory report to the CCP, para.31.

47 Article 7 (1), CCP.

48 See on third party interventions before the Court, Gomien, Harris and Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, 80-81; A. Lester, "Amici Curiae: Third Party Interventions before the European Court of Human Rights", in F. Matscher and H. Petzold, *Protecting Human Rights: The European Dimension*, Carl Heymanns Verlag K.G., 1988, 341.

Rights, the various bodies involved in the collective complaints procedure should strive to achieve as high a degree of transparency as possible. Decisions as to admissibility should be reasoned and made public. Oral hearings should be held in public and all documents of the proceedings should be published. In line with the current practice of the Committee of Independent Experts,⁴⁹ dissenting opinions of the members of the Committee on the admissibility and the merits of a complaint should also be published.

Non-binding nature of recommendations issued against a State

The fact that recommendations issued against a State are not legally binding is to be regretted, particularly if one compares this situation with the case of individual applications under the European Convention on Human Rights⁵⁰. States should abide by the recommendations addressed to them by the Committee of Ministers and

bring their law and practice into line with their Charter obligations.

A procedure with insufficient judicial character

The insufficiently judicial character of the collective complaints procedure, stemming from the high level of involvement in the procedure of two political bodies - the Governmental Committee and the Committee of Ministers - is a cause for concern among NGOs. This high level of involvement is out of step with the approach taken in the Eleventh Protocol to the European Convention on Human rights which has not retained the power of the Committee of Ministers to decide whether or not there has been a violation of the Convention in cases which have not been referred to the Court. The suggestion put forward by the Parliamentary Assembly of the Council of Europe⁵¹ to establish a new independent body which would examine collective complaints, would have better secured the judicial

49 See, in the Rules of Procedure of the Committee of Independent Experts of the European Social Charter, Rule 9 (2), according to which "in the Committee's conclusions, the dissenting opinions of the minority on particular questions of substance shall, at the request of their authors, also be reported".

50 Article 52 of the European Convention on Human Rights states that judgments of the Court shall be final and Article 53 demands that the High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties. There are also sanctions not established by the Convention and which can be used in relation to rights other than those enshrined in the European Convention on Human Rights. For example, Article 3 of the Statute of the Council of Europe provides that respect for human rights is a fundamental principle underlying participation in the Council. Article 8 of the Statute empowers the Committee of Ministers to suspend or even to expel from the Council of Europe any member State guilty of serious human rights violations.

51 Recommendation 1168 (1991) of the Parliamentary Assembly of the Council of Europe.

character of the procedure. More specifically, NGOs are concerned by the following rules of the procedure:

- firstly, the Protocol authorises the State about which the complaint is made to sit in the Committee of Ministers and, furthermore, to vote. The State is thus both judge and party, and this obviously affects the impartiality of the Committee of Ministers;
- secondly, according to Article 9 of the Protocol, a report which concludes that the State party is in compliance with the Charter can be adopted by the Committee of Ministers by a simple majority, whereas a two-third majority is required for the adoption of a recommendation that the Charter has been violated. This rule of a two-third majority was abandoned through the Tenth Additional Protocol to the Convention in 1992 for decisions of the Committee of Ministers under the European Convention on Human Rights. The fact that it was adopted three years later in the collective complaints procedure Protocol suggests that an unwelcome distinction persists between, on the one hand, civil and political rights and, on

the other hand, economic and social rights;

- thirdly, according to the explanatory report to the Protocol, the Committee of Ministers cannot reverse the legal assessment made by the Committee of Independent Experts, but the decision of the Committee of Ministers may be based on considerations of social and economic policy⁵². NGOs fear that such considerations may also guide the Governmental Committee which can be consulted by the Committee of Ministers when the report of the Committee of Independent Experts raises new issues concerning the interpretation of the Charter⁵³. It should be stressed that the possibility of taking into account considerations of social and economic policy is not provided in the Protocol itself and that explanatory reports to Council of Europe conventions are not authoritative sources of interpretation. In any event, NGOs hope that both the Governmental Committee and the Committee of Ministers will exercise restraint if and when they invoke considerations of social and economic policy as distinct from legal considerations.

52 Explanatory Report, Para.46.

53 Article 9 (2), CCP.

IV - NGO Contribution to the Promotion of the Social Charter and of the Protocol on the Collective Complaints Procedure

The Social Charter provisions reflect the needs and aspirations of civil society throughout Europe. A large group of international and national NGOs have launched a campaign to encourage ratification of the Charter and of the collective complaints Protocol and to contribute to making the implementation of these instruments effective.

In 1996, the Council of Europe convened two informal NGO/expert consultations on the Additional Protocol which brought together the representatives of 17 international and national NGOs and six independent experts. The work initiated in the course of these two consultations was pursued during the parallel NGO meeting which took place on 12 and 13 May 1997, just before the opening of the intergovernmental colloquy on the Social Charter which was held in Strasbourg on 13-15 May 1997. The existing *ad hoc* consultative group of independent experts/NGOs convened as a steering group on 12 May 1997 and a larger group of NGOs, foundations and experts attended the NGO forum on 13 May 1997.

The objective of these meetings was twofold: to raise awareness amongst NGOs of the European Social Charter and the Additional Protocol on the collective complaints procedure and; to organise a coordinated campaign of NGO action to inform civil society about the renewed potential to protect social rights offered by the revitalised Social Charter and the complaints Protocol.

A campaign booklet, outlining specific actions which NGOs might take in relation to the Social Charter, has already been produced⁵⁴. An internet site has been launched to encourage a wider set of NGOs to become familiar with the Social Charter and use it⁵⁵. An overall plan of action on the promotion of the Social Charter and of the complaints Protocol, as well as a set of issue-specific action plans and supporting materials, have been drafted and adopted.

At the end of its meeting on 13 May 1997, the NGO forum adopted, endorsed and stated its commitment to contributing to the full implementation of the Revised Charter.

V - Conclusion

The Council of Europe has, after the radical political changes of the last

54 Tom Kenny, *Securing Social Rights across Europe, How NGOs can make use of the European Social Charter*, Oxfam UK and Ireland, February 1997.

55 The address of the World Wide Web site is: <http://www.oneworld.org/oxfam/>

few years, grown to forty members. In the light of the pioneering role it has played so far in the international protection of human rights, the Council of Europe should again take the lead by adopting some bold initiatives with the aim to further the effective protection of social and economic rights throughout these States.

The European Social Charter is very important for the consolidation of democracy, human rights and the Rule of Law in Europe. The application of the 1961 Social Charter has already prompted, *inter alia*, Cyprus to introduce a proper social security system, France to raise the age-limit for family reunion to 21, Ireland and the United Kingdom to adopt legislation on equal rights for children born in and out of wedlock and the Netherlands to have a law securing at least 12 weeks' maternity leave. The Revised Charter affirms a series of social rights shared by European democracies, both old and new, and should become one of the major points of reference for social rights in the 21st century. Unfortunately the number of States which have ratified the Revised Charter and the protocols is still very limited. Furthermore, additional steps should be taken in order to speed up

the supervisory procedure, to strengthen its democratic nature, and to ensure that measures are taken if governments do not properly implement their commitments under the Charter.

The European Court of Human Rights stated its will to protect concrete and effective rights and that there is no watertight barrier separating the sphere of economic and social rights from the domain of the Convention⁵⁶. However, the protection of social rights in the framework of the European Convention on Human Rights remains very limited⁵⁷. The 1995 Additional Protocol to the European Social Charter excludes individuals from the right of complaint. In other regions of the world, this possibility has already been granted in relation to some economic, social and cultural rights, by the San Salvador Additional Protocol to the Inter-American Convention on Human Rights⁵⁸, and by the African Charter on Human and Peoples' Rights⁵⁹. At the universal level, the UN Committee on Economic, Social and Cultural Rights, has pronounced itself in favour of an individual complaints mechanism on 11 December 1992. The creation of a system of

56 Airey judgment 9 October 1979, Series A, no32, page 15, para. 26.

57 The only social right protected both by the European Social Charter and by the European Convention on Human Rights is the freedom to join and to form a trade union, protected under Article 5 of the Social Charter and under Article 11 of the Convention which provides for the right to freedom of association.

58 Opened for signature 17 November 1988, O.A.S.T.S., no.69, reprinted in 28 *ILM* 161 (1989); This Protocol, however, only foresees a system of individual petitions for the rights enshrined in Subsection (a) of Article 8 of the OAS Charter (right to freedom of labour associations) and in Article 13 (right to education).

individual petitions was envisaged by the Parliamentary Assembly of the Council of Europe as early as 1978⁶⁰. The Parliamentary Assembly also suggested the creation of a judicial organ of control, either a social European court, or a social chamber within the European Court of Human Rights⁶¹.

In the meantime, the steps already taken by the Council of Europe in order to turn the Social Charter into a reference point for the States of the European Union and also for the new and prospective member States of Central and Eastern Europe are to be welcomed. The system of collective complaints complements the State reporting mechanism under the Social Charter. It is hoped that, according to

the provisions enshrined in its preamble, the Additional Protocol of 1995 on the collective complaints procedure indicates a true commitment of the Member States of the Council of Europe to ensure that the rights guaranteed in the Social Charter are effectively implemented. States which have not yet done so should ratify the revised Social Charter and the Additional Protocol providing for a system of collective complaints without delay or reservation. Following the indivisibility principle, States which apply to join the Council of Europe should be requested to sign and ratify within one year not only the European Convention on Human Rights but also the revised Social Charter.

59 Reprinted in M.D. Evans, *International Law Documents*, second edition, Blackstone's (1991), 251.

60 Recommendation 839 (1978) of the Parliamentary Assembly of the Council of Europe, 28 September 1978.

61 See *ibid.* and recommendation 1354 (1998) adopted by the Assembly in January 1998.

The Role of the Prosecutor of an International Criminal Court from a Comparative Perspective

Kai Ambos*

Preliminary Remarks

The following paper is based on the answers given to 13 questions in the national reports of Argentina, England and Wales, France, Germany, Italy, Japan, Netherlands, Nigeria, Poland, Russia, Singapore, Scotland, Spain, Togo and the USA, as well as on the report on Sharia, prepared for the international workshop "Toward a procedural regime for the International Criminal Court" (London, 6-7 June 1997). The paper deals with the role of the prosecutor at the pre-trial stage in the different national systems, summarising, on the one hand, the answers of the reports given to the three first questions and including, on the other hand, further

research on comparative criminal procedure¹ and the invaluable knowledge of some colleagues at the Max-Planck-Institute for Foreign and International Criminal Law.

I have done my best to interpret the country reports correctly and to avoid superficial generalisations. However, given the spatial constraints, the comments made must remain rather "impressionistic"² and focus on the major procedural systems. In my view, these are the English and US systems on the one hand, and the French and German on the other. The English adversarial common law model was imposed on the former colonies worldwide, the USA being its first and most

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¹ See Perron (ed.), *Die Beweisaufnahme im Strafverfahrensrechts des Auslands*, Freiburg 1995; Hatchard/Huber/Vogler (eds.), *Comparative Criminal Procedure*, London 1996; Delmas-Marty (ed.), *The Criminal Process and Human Rights*, Dordrecht et. al. 1995; Fennel/Harding/Jörg/Swart (eds.), *Criminal Justice in Europe: A Comparative Study*, Oxford 1995. See also the country reports on the role of the Prosecutor in 63 RIDP/IRPL (1992), 533-699, 1189-1252 and Jescheck/Leibinger (eds.), *Funktion und Tätigkeit der Anklagebehörde im ausländischen Recht*, Baden-Baden 1979.

² See Hatchard/Huber/Vogler (eds.), *supra* note 1, at 5 (quoting Leigh/Zedner).

enthusiastic inheritor. The French 1808 *Code d'instruction criminelle* was not only imposed by the Napoleonic empire but also voluntarily accepted by former authoritarian regimes which wanted to liberalise their criminal justice, e.g. the newly unified German Empire (1877).³

I - What Role Does the Executive Play in Initiating and Terminating Criminal Proceedings (cf. Art. 23 International Law Commission (ILC) Draft Statute)?

The question deserves a closer look to discover its true purpose. Art. 23 of the Draft Statute is quite controversial⁴ because it gives the Security Council (SC) a privileged right to initiate proceedings before an International Criminal Court (ICC) in case of the "normal" crimes listed in Art. 20 - notwithstanding a State's acceptance according to Art. 21 or a complaint according to Art. 25 (par. 1). In cases of aggression and breaches of the peace within the meaning of chapter VII UN-Charter, the SC can even hinder proceedings (par. 2 and 3). Although this provision is far from clear, two basic objectives are easily identifiable: on the one hand,

the SC should be able to make free use of an ICC in case of international crimes within the meaning of Art. 20 and not feel obliged to create *ad-hoc* Tribunals and, on the other hand, it should have a "first right to act" (*Recht des ersten Zugriffs*) in matters falling under ch. VII of the Charter, i.e. matters belonging to its inherent power. This is problematic in fair trial terms if an ICC, as in the case of aggression (par. 2), is to be bound by the SC's determination. This could amount, as Swart rightly states,⁵ not only to a violation of the right to be tried by an independent and impartial tribunal (Art. 14 ICCPR) but also of the *nullum crimen* principle as it depends on an *ex-post* interpretation whether the offence of aggression was committed.⁶

Comparing this competence of the SC to the role of the executive in national criminal justice systems, as required by question 1, implies that the SC is comparable with national governments (possibly in the sense of a world government?). Otherwise, it would not make a lot of sense to compare its role in commencing an investigation with the role of national governments. You can not compare apples with oranges. If we, despite this considerable methodological problem - which, given my limited function, I have no other choice than to ignore - approach Art. 23 from a national perspective, we have to ask *whether the*

3 See for the historical background Hatcher/Huber/Vogler (eds.), *supra* note 1, 8 ff.

4 Report of the PrepCom on the establishment of an ICC, vol. II (A/51/22), 75 ff.

5 Report Swart, 1-2.

6 See Ambos 7 *EJIL* (1996), at 532 note 75 with further references. See also Report Okagbue, 5.

Executive in national systems has the power to initiate or restrict criminal investigations. The answer depends on the very notion of the term "Executive". The reports do not address this question and therefore it remains unclear which concept of the Executive they use. Understanding Executive as only the government itself and its immediate and direct organs or authorities (ministries, administrative institutions and the like) we can ask whether national criminal justice systems allow the government or these organs to initiate or restrict proceedings (I suspect that a national Executive can be compared with the SC only in this sense). The answer is generally, that they cannot; the executive is allowed to intervene only in cases involving offences considered to be of public or national interest. Let us consider some examples. In the Japanese system the prosecutor cannot indict a company for a violation of the Anti-Trust Law unless the Fair Trade Commission (a government body) has made a complaint;⁷ in Germany certain (political) offences require an authorisation to prosecute (§§ 90 b II, 97 III StGB) or a demand for prosecution (§ 194 StGB) by the organ concerned⁸ (not so in the case of aggression, §§ 80, 80 a StGB); in Italy, the Ministry of Justice must request the prosecution of crimes committed abroad;⁹ in

England and Wales the Attorney General, who is a member of the government and its highest judicial representative, may stop trials on indictment or hinder prosecution of offences concerning "issues of public policy, national security, etc." via a consent requirement;¹⁰ in Togo, there is a special procedure for the misappropriation of public funds whereby the government may take action on behalf of the State and initiate proceedings.¹¹ Certainly, all other criminal systems based on "western" models have similar provisions allowing the direct intervention of the Executive understood in this strict sense. As a *first conclusion* one might suggest that *Art. 23 Draft Statute finds a basis in national law and practice.*

However, the bulk of the caseload of the national criminal justice systems consists of "ordinary" offences (from theft to murder) which are dealt with in an ordinary criminal procedure where the roles of judges, prosecutors, defence and private parties are relatively clear. Insofar the reports and other comparative research show that pre-trial proceedings tend to differ only in normative terms - notwithstanding the different roles of the aforementioned actors in countries with a rather *inquisitorial* (judicially-led) procedural structure (France, the

7 Report Murayama/Dean, 1.

8 Report Perron, 2.

9 Report Iluminati, 1.

10 Report Birch, 2. The position of the Nigerian Attorney General, following English law as a former British colony, seems even to be stronger Report Okagbue, 3-4.

11 Report Afande, 1.

Netherlands, Spain, Portugal, Austria, Germany, Latin America, former socialist countries like Poland¹² and certain African countries like Togo¹³), a *mixed* procedural structure (Italy, Japan, Sweden, Scotland¹⁴) or an *adversary* procedural structure (USA, UK, Commonwealth countries like Canada and Australia and certain African countries like Nigeria¹⁵).¹⁶ Thus, some procedural laws provide for formal control of the police investigation by the prosecutor who accordingly guides the investigation, while others give more power to the police leaving it a certain period or a period it deems convenient to investigate the case before presenting its results to the prosecutor. Examples of the former are the German and the French systems insofar as in both countries - typical for the inquisitorial model - the police are, at least normatively, subordinate to the prosecutor.¹⁷ One of the legal ramifications of this subordination is the police's obligation to inform the Prosecutor immediately and without delay (see § 163 II StPO, Art.

19, 54 CPP). Examples of the latter are the US and English models. These leave the investigation in the hands of the police until they have gathered sufficient evidence to present a formal charge ("probable cause") to the prosecutor who decides, *inter alia*, to continue or discontinue proceedings. Comparing these two models, the US-prosecutor is certainly stronger than the English Crown Prosecution Service whose creation did not lead to a better supervision of the Police.¹⁸ A similar freedom of police investigation is reported from Sweden as an example of a country with a mixed procedure.¹⁹ A completely unique case is Spain insofar as the pre-trial proceedings lie in the hands of an examining judge (*juez de instrucción*) while the prosecutor (*Ministerio Público*) has a relatively minor role guaranteeing the legality of the proceedings.²⁰ Given these differences as to the status of the Prosecutor one could, following Delmas-Marty, generally argue for a threefold distinction: either the Prosecutor is dependent and strong

12 For Poland, see report Tomaszewski, 1-2.

13 Report Afande, 1 (Togo was a former French colony).

14 Scotland is an interesting case as it belongs to the UK but has quite a different criminal procedure characterised by a formal direction of the investigation by the Lord Advocate and its deputy advocates (see report Macphail; also Hatchard/Huber/Vogler (eds.), *supra* note 1, 231, 232).

15 Report Okagbue, 2-6.

16 For the differentiation see Perron, *supra* note 1, 560. Socialist or religiously influenced systems (like Russia on the one hand and Sharia on the other) do not fit into these categories, although the former introduced many "Western-style" changes since 1989.

17 Report Perron, 1-2; for the Netherlands report, see Swart, 3.

18 Critically also Delmas-Marty in: the same (ed.), *supra* note 1, 197; Hatchard/Huber/Vogler (eds.), *supra* note 1, 232-3.

19 Cornils, in: Perron, *supra* note 1, 443.

20 Cf. report Serrano, 6-7.

(as in Germany and France), or dependent and weak (as in England) or independent and strong (as in Italy, Portugal and Colombia).²¹

In practice, however, these differences should not be overstated as - in all systems - the police have the task of carrying out the actual investigation *in situ* - the prosecutor visits the scene of the crime only if the crime is an important one.²² The police are always closer to the case than the prosecutor. This situation gives them wide discretion, if not *de jure* at least *de facto*, how and when to present the evidence to the prosecutor. Consequently - returning to the initial question - the Executive, understood *in a broader sense*, directly interferes in the pre-trial proceedings if the police are answerable to it, i.e. to the Ministry of the Interior. This is the case in most countries - with the exception of a real "judicial" police which, however, not even in its motherland France exist in the sense of a separate police belonging to the judiciary.²³ However, this interference is not really comparable to the one provided for in Art. 23 Draft Statute, i.e. it does not appear as a direct initiating or hindering of the investigation by an organ comparable to the SC. The Executive, in this

sense, has rather, as Maier/Guariglia rightly point out, "influence on the criminal procedure through the initial reaction and investigation".²⁴ If, further, the prosecutorial function also belongs to or depends on the Executive branch, this interferes with the whole phase of the pre-trial proceedings.²⁵ This is particularly the case in the adversary model, while in the inquisitorial model the Prosecutor (*Ministerio Publico*) is, at least formally, an autonomous and independent body.²⁶ In any case, as a second conclusion one can state that the role of the Executive via police and prosecutorial organ is hardly comparable to the role of the SC according to Art. 23 Draft Statute.

II - Is a Federal Prosecutor Able to Conduct On-Site Investigations (cf. Art. 26 Draft Statute)?

Art. 26 of the Draft Statute, as relevant to question 2, gives the Prosecutor the right to conduct on-site investigations [lit. 2 (c)] thereby infringing upon the territorial sovereignty of the State where the crime was

21 Cf. Delmas-Marty in: the same (ed.), *supra* note 1, 194.

22 See also Jörg/Field/Brants, in: Fennel/Harding/Jörg/Swart (eds.), *supra* note 1, 41-56 (55) arguing for a "gradual convergence" of the adversarial and inquisitorial systems.

23 In France the members of the judicial police are recruited from the *Police nationale* or the *Gendarmerie nationale* which belong to the Ministry of the Interior or Defence (cf. Grebing, in Jescheck/Leibinger, *supra* note 1, 31 note 48).

24 Report Maier/Guariglia, 1.

25 This would also apply to the *Sharia*, see report, 5-8.

26 Similarly the Russian model, see report Pashin, 1. On recent influence of the Dutch central government see report Swart, 1.

committed. Consequently, the investigation must be authorised by this State, which is only bound to do so if it has signed and ratified the Draft Statute. On a national level, this question does not really arise in this form. In countries with both federal and State/local criminal law (such as the USA, Argentina, Mexico) the central government retains its competence to investigate the (so called federal) crimes falling within its jurisdiction, no matter where they occur. Therefore, the national law enforcement agencies - such as the FBI or the DEA - conduct their investigations throughout the whole territory without the need for the formal consent of the affected state, although cooperation with local police forces is expected in the USA²⁷ and there are some rules of courtesy in Argentina.²⁸ In federal States with only one code of criminal procedure (such as Germany and Nigeria) the states are even obliged to cooperate with the Federation because of the principle of "loyalty to the Federation" (see Art. 20, 37 GG). The Prosecutor General investigates freely throughout the whole territory in cases involving offences falling within its competence and makes use of local police forces whenever it sees fit to do so.²⁹ The same applies to *Sharia* law, in which nationwide investigation without prior authorisation of the affected State is possible.³⁰

In conclusion, one can state that the right to conduct on-site investigations in different States does not present a problem in federal States.

However, the situation of an ICC prosecutor here is comparable to that of international and regional organisations seeking access to the territory of their member States. An authorisation of the central government might only be dispensable if member States were to delegate certain administrative or executive powers to a supranational organ; as is the case of the European Union in certain areas. Interestingly enough, however, in the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) the International Prosecutor does not seek a formal authorisation of national governments but only notifies them "as a matter of courtesy" (cf. Art. 18 par. 2 ICTY-Statute).³¹

3. Is there Judicial Supervision of Prosecutorial Investigation and what Is its Scope (cf. Art. 26, 27 Draft Statute)³²

The Presidency may, on the one hand, issue subpoenas and warrants requested by the Prosecutor (Art. 26 par. 3; see also 28, 29) and, on the other, control the decisions of the

27 Report Weinstein/Turner, 3-4.

28 Report Maier/Guariglia, 2.

29 Report Perron, 2-3; report Okagbue, 6-7.

30 Report Sherif, 8.

31 Report Fenrick, 2.

Prosecutor to file an indictment or not to do so. The latter is of special interest here as it refers to a general judicial supervision of the prosecutorial investigation, while the judicial role in the authorisation of coercive measures - as a much more specific control - is more or less universally recognized.³³ If the Prosecutor decides *not to file an indictment* (because there is no *prima facie* case) it has to inform the Presidency which, at the request of a complainant State or the SC (ref. to Art. 23 par. 1), must review this decision and may ask the Prosecutor to *reconsider* its decision (Art. 26 par. 4, 5). The same procedure applies if the Prosecutor decides not to initiate an investigation (Art. 26 par. 1). Thus, a careful judicial review is introduced which leaves the ultimate decision to the Prosecutor: upon a request of the Presidency the Prosecutor must *reconsider* his decision. The Presidency may not decide about the outcome of that reconsideration, since the ultimate decision *not to indict* belongs to the Prosecutor. In principle, this seems to be correct, but one might wish that the Draft Statute provided for criteria on which a decision not to indict could be taken.³⁴ - The situation is different if the Prosecutor decides *to file an indictment*. In this case, the Presidency examines the indict-

ment and either confirms (Art. 27 par. 2), does not confirm (Art. 27 par. 3) or amends it (Art. 27 par. 4). In other words, the Presidency decides how to proceed with an indictment (cf. Art 19 ICTY-Statute). While this kind of intermediate procedure before the actual trial is not unusual in national law, the authority of the Presidency to make a decision without having heard the suspect can be criticised. Therefore, the so-called Siracusa Draft provides the suspect and/or his or her counsel the opportunity to be heard (Art. 27 par. 2 Alt. 2).³⁵

When analysing national systems, it is worthwhile distinguishing between judicial authorisation of coercive measures and judicial scrutiny of the indictment. As far as *coercive measures* are concerned, practically all systems, as already mentioned, require judicial authorisation. This applies clearly to the inquisitorial (e.g. Germany, France, Netherlands, Latin America) and also, though less, to the mixed (Japan, Italy, Scotland) and adversary procedure (USA, England). In Italy, the prosecutor has a very strong position and may order searches and seizures, but requires judicial authorisation for arrest and wiretapping.³⁶

32 Art. 30 Draft Statute, also referred to in the question, deals with the notification and does not really belong to the issue of judicial supervision.

33 See also rule 54 ICTY according to which orders, subpoenas, summonses and warrants must be obtained from a judge.

34 See report Swart, 3.

35 AIDP/IISCS/MPI et al., 1994 ILC Draft Statute for an ICC with suggested modifications (updated Siracusa-Draft) prepared by a Committee of Experts, Siracusa/Freiburg/Chicago, 1996. See the corresponding commentary: "... in order to reach a balanced decision, the suspect should have an opportunity to state his views on the merits of the indictment and the material available."

36 Report Iluminati, 1.

The wide discretion of the investigating authorities and the strict separation of investigative and judicial functions in the US and England do not mean that the investigative agencies are totally free to decide - without judicial control - to, for example, arrest a person or search a building. The so-called investigative measures³⁷ which are within the exclusive competence of the investigators refer to the conditions of certain coercive measures and are in all systems to be determined by the "people in the field". Birch, referring to England, states that "judicial involvement at the investigative stage of proceedings is minimal"³⁸ and seems to think of these investigative measures and the lack of judicial involvement in the pre-trial proceedings *in general* because she gives quite typical examples of coercive measures (search, arrest, surveillance devices) where a judicial authorisation is required. These have arisen as a result of recent reforms that are, apparently, far from perfect. On the other hand, Birch's assessment is absolutely correct if one doesn't consider control by laypersons as *judicial* in the true sense of the word. I will come back to this point. - Even in former socialist systems, Russia for example, characterised by almost unlimited powers of the police belonging to the Ministry of the Interior and a kind of self-control of the prosecutor (requiring guidance

of the prosecution and supervision of its lawfulness) judicial controls restraining coercive measures have been introduced recently (1993).³⁹

As far as the judicial scrutiny of the indictment is concerned - the central issue of the ILC draft in this context - the situation is more difficult. The solution presented by the ILC resembles most the control of the indictment by the Grand Jury in the US-(federal) procedure. When prosecution is pursued by indictment, the Grand Jury, composed of up to 23 members,⁴⁰ decides on its admissibility in private session, without the participation of the suspect and in an inquisitorial manner, relying exclusively on the evidence presented by the Prosecutor or gathered by itself.⁴¹ The ILC - unlike the Siracusa Draft - did not follow the solution pursued in cases of prosecution via *information*, i.e. control by public and adversarial preliminary hearing before a judge of a lower court. Interestingly, the English model takes a different position and the judiciary must not encroach upon the domain of more competent institutions.⁴² As stated by Lord Salmon in a decision of the House of Lords:

a judge has not and should not appear to have any

37 See report Weinstein/Turner, 4.

38 Report Birch, 4; cf. Nigeria: report Okagbue, 6.

39 Report Pashin, 1. The new Russian constitution requires more judicial controls but contravening laws as the Code of Criminal Procedure exist as long as they are not amended.

40 See V. Amendment of the US Constitution.

41 See Thaman, in: Perron, *supra* note 1, 500.

42 See report Weinstein/Turner, 5.

responsibility for the institution of prosecution, nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought.⁴³

It is worthwhile noting, however, as already has been mentioned, that in English terminology, *judicial* control implies control by *judges* - as opposed to control by a jury or laymen (as US-lawyers, at least Weinstein and Turner, seem to understand it). Indeed, the English committal proceedings have the same effect as the US-Grand Jury or the preliminary hearing procedure: to ensure - examining the indictment - that there is a (*prima facie*) case against the suspect.⁴⁴ However, this can be considered as a substantial difference, neither the Grand Jury nor the English magistrate courts in the committal proceedings (in most cases) are composed of professional judges. Indeed, in neither system is there a judicial scrutiny of the prosecution comparable to Germany and France. From an inquisitorial perspective, this situation is worsened by the fact that the Crown Prosecution Service has neither a formal supervisory function over the police investigation nor the capacity to fulfil

such a function since his staff is not judicially trained (as public prosecutors in Germany and France).⁴⁵

If we take a look at the *inquisitorial* systems we find approaches requiring quite strict judicial scrutiny of the indictment. In Germany, the decision to admit the indictment (*Anklage*) to the actual trial (*Hauptverfahren*) is taken in an intermediate judicial procedure. The competent tribunal must determine if there are sufficient grounds/suspicions to indict the suspect(s) and may accept, reject or amend the indictment (§§ 199 ff. StPO). In practice, it takes this decision in private and without a public hearing; the collection of further evidence (§ 202) may, however, lead to a public hearing. The actual difference to the ILC's solution lies in the degree of suspicion ("sufficient suspicion" - *hinreichender Tatverdacht* - vs. "*prima facie* case") required.⁴⁶ The French system - similar to the Argentinean law still in force - is based on a division of the pre-trial proceedings into two phases (*poursuite* and *instruction*): the prosecutor guides the police investigation (*poursuite*) and requests - if there is enough evidence to prosecute and particularly in cases involving serious offences - the examining magistrate/investigating judge (*juge d'instruction*) to open the (preparatory) judicial investigation

43 Quoted according to report Birch, 4. Formal judicial controls are, however, allowed (*ibid.*, note 20).

44 See for the highly disputed committal proceedings Hatchard, in: Hatchard/Huber/Vogler, *supra* note 1, 200; Huber, in: Perron, *supra* note 1, 28-30. See for the similar consent requirement in Nigeria report Okagbue, 7.

45 See Hatchard/Huber/Vogler (eds.), *supra* note 1, 231, 232.

46 Report Perron, 4.

(instruction); the judge investigates further with the assistance of the judicial police and decides to discontinue proceedings or to refer the case to the indictment chamber (*chambre d'accusation*); only this court, composed of three investigating judges, decides to file or not to file a formal indictment and opens, in the former case, the actual trial. Thus, the judicial control consists of double self-scrutiny by the investigating judges.⁴⁷ This model of pre-trial proceedings is currently in the process of being abandoned by Argentina and the rest of Latin America, as the continent goes through a reform process fundamentally based to a great extent on the Model Code of Criminal Procedure for Hispanic America.⁴⁸ This draft introduces an intermediate procedure similar to the German model (Arts. 267 ff.) and provides for judicial scrutiny of the indictment in this context (see Arts. 273-4). In the Netherlands, judicial scrutiny depends on the initiative of the accused; consequently, if it takes place, the suspect or his lawyer will be heard. In recent years case law has widened the powers of the courts to dismiss cases because of "improper prosecutorial conduct".⁴⁹ As mentioned before, the Spanish system presents a quite unique case; the predominant role of the examining judge seems to lead to a pure inquisitorial approach as the judiciary is

both responsible for the investigation and for the sentencing. Consequently, there is a kind of judicial self scrutiny partly comparable to the French model.⁵⁰

The mixed model, in this case the Japanese, establishes a "Prosecution Review Board", composed of 11 persons selected from among the electorate, which reviews *non prosecutions*, but without binding effect. The review of *prosecutions* is almost impossible, as the competent courts have to prove that the prosecutor acted with malice. Thus, the Japanese courts do not have the same powers of discontinuance as the American courts.⁵¹ In Italy, the prosecutor guides the investigation but has to request the competent judge to either close the case or to accept the accusation. In the former case, the judge can compel the prosecutor to indict (unlike Art. 26). In the latter case, if the judge accepts the indictment, it will again be examined in a preliminary hearing (*udienza preliminare*) in private attended by judge, prosecutor and counsel. Thus, there exists at least one judicial scrutiny of the indictment, which includes the parties.⁵² In Sweden, there is a clear separation between the pre-trial proceedings and the actual trial. The prosecutor concludes the former - based on a

47 Cf. Barth, in: Perron, *supra* note 1, 100-108.

48 Instituto Interamericano de Derecho Procesal, *Código Procesal Penal Modelo para Iberoamérica*, Buenos Aires 1989; see also report Maier/Guariglia, 3-4.

49 Report Swart, 2-3.

50 Report Serrano, 6-7.

51 Report Murayama/Dean, 2-3.

52 Hein, in: Perron, *supra* note 1, 158-162; report Illuminati, 1.

record of evidence prepared by the police - without any judicial control, closing the case or filing an indictment. This decision can be reviewed only by the superior prosecutorial authority.⁵³ In Scotland the indictment is scrutinised in the so called preliminary diet on the initiative of the accused. This again confirms that the Scottish procedure differs substantially from the English one as far as the role of the prosecutor and the judicial control at the pre-trial stage is concerned.⁵⁴

In the former socialist systems there was no judicial control of the indictment nor of the actual investigation. Only recently, due to integration within regional organisations, in particular the Council of Europe, reforms giving greater weight to judicial control have been introduced. Whether this leads to real judicial supervision of the indictment or not could - due to lack of information - not be clarified, but the trend seems to be in that direction. Thus, the new Polish Code of Criminal Procedure, to enter in force in January 1998, resembles very much the German procedure, distinguishing three phases of the process and submitting the indictment to a judicial control in a kind of intermediate procedure.

In *Sharia* law the prosecutorial investigation is totally within the control of the judge.⁵⁵

As a conclusion regarding question 3, therefore, one could say that supervision of prosecutorial investigation, in particular judicial scrutiny of an indictment, is the rule in most systems but differences exist: first, with regard to the procedural phase in which the judicial control applies; second, to the method of control (private or public; participation of suspect or not); third, to the role of the different organs (prosecutor vs. judge; prosecutor vs. investigating judge; investigating judge vs. judge).

If this is undoubtedly true, it is less clear which conclusions may be drawn. The common law systems do not exclude judicial control but only postpone it - as a logical consequence of the strict separation between pre-trial and trial phase - to a later stage of proceedings. On the other hand, it might be argued, particularly from the continental standpoint - that most cases are decided at the pre-trial level, maybe even more so in a system where the evidence is freely gathered by the parties. For that reason, a more efficient and earlier pre-trial review in these systems is certainly desirable but the right balance between such a "civil law review" and the additional resources and procedural delay it implies must be found.⁵⁶

53 Cornils, in: Perron, *supra* note 1, 441-444.

54 See report Macphail, 3, and *supra* note 14.

55 Report Sherif, 7-8.

56 Cf. Hatchard/Huber/Vogler (eds.), *supra* note 1, 250. See also Field/Alldridge/Jörg, in: Fennel/Harding/Jörg/Swart (eds.), *supra* note 1, 227-249 examining the defects of both systems.

Concluding Remarks

As far as "question 1" is concerned national law and practice support Art. 23 ILC Draft only in exceptional procedures where the government itself, or its organs, initiate or restrict criminal proceedings.

As to "question 2" national law and practice supports the solution adopted by the ILC Draft if the investigative activities of an International Prosecutor in sovereign national States and the activities of a Federal Prosecutor in the States of the Federation can be equated.

As to "question 3", national law and practice differ but it can be said that judicial supervision of prosecutorial measures, including the

indictment, is widely recognized. The mechanics of judicial supervision, however, have been dealt with in a variety of different ways.

Let me close with a general remark. As to the structure of the pre-trial proceedings in the ILC-Draft it is evident that they follow an adversary common law model. Therefore, lawyers trained in a continental tradition which is characterised, at least on a normative level, by an objective and impartial prosecutorial investigation and, in consequence, a much less important or active role for the defence will always feel uncomfortable with this solution⁵⁷. It remains to be seen if the defence rights provided for in the ILC Draft Statute compensate this rather unequal balance.

⁵⁷ See report Swart, 4: "Whether rightly or wrongly, they are easily inclined to think that it does not pay sufficient respect to the legitimate interests of the defence."

Human Rights in Development:

UN Technical Cooperation in the Field of Human Rights

*Mona Rishmawi**

I - Introduction

Bilateral and multilateral technical cooperation programmes in the field of human rights are widely sought and granted. This is because there is an increasing recognition that observing human rights demands more than the political determination of States; it also requires the resources to translate this will into concrete action.

A growing number of governmental, intergovernmental and non-governmental sources are engaged in providing such assistance.¹ They respond to requests by States which argue that they have been acting in good faith and if there are violations of

human rights in their countries, it is because they lack the human and material resources to fully discharge their obligations under international human rights law.² Their law-enforcement officials, for instance, require adequate training to understand human rights norms so that they can translate them into practice. Fundamental rights such as the freedom from torture and the rights to free expression and privacy, will then be better understood and therefore fully guaranteed.

Human rights activists meet such arguments with cynicism. They believe that requests for technical assistance and cooperation in the field of human

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1 Many groups and entities made it part of their mandate to lend assistance to governments in the field of human rights. The United Nations, the Council of Europe, the OSCE, ACCT, the Commonwealth Secretariat, are all engaged in technical cooperation programmes. Governments such as that of the United States of America, mainly through its USAID, Canada through CIDA, and Sweden through SIDA, also have active programmes in this field. The non-governmental sector operating at the international, regional, and national level provides technical assistance and cooperation as well. Governments, entities like the European Union, as well as private foundations, fund these programmes.

2 Non-State actors also sometimes require and request technical assistance in the field of human rights. The position of this author is that building national capacities to deal with human rights concerns also includes the strengthening of the non-governmental sector in this field.

rights are often made by States to disguise other motives.³ States invoke their need for such assistance to immune themselves from the international scrutiny of their human rights record. Activists argue that some governments simply lack the political will to bring about the necessary change.

These are key elements when considering whether technical cooperation programmes should be provided for in the first place and in assessing the impact of these programmes after their implementation. Technical assistance is indeed not effective if there is no genuine commitment from the recipient government to carry out meaningful reforms to improve its human rights record. This is specially the case because it is often said that the aim of technical cooperation programmes is to strengthen national capacities to deal with human rights concerns in order to prevent human rights violations.⁴ Before agreeing to engage in technical cooperation activities, recipient States should demonstrate in concrete terms that they want their national capacity to be strengthened in the human rights field.

The objective of such programmes in preventing violations is also central in determining their value. While acknowledging that they mostly have a long term rather than immediate effect, these programmes should be considered successful only if the regular monitoring of the human rights situation in the benefiting State reveals that violations have decreased. The expectation of improvement should be realistic and should be clearly articulated, however. It should not be too broadly or vaguely defined.

This paper considers the link between development activities and human rights work with regard to technical assistance programmes. The discussion mainly examines the inter-connection between the role of the office of UN High Commissioner for Human Rights (UNHCHR)⁵ with regard to advisory services and technical cooperation programmes and that of the United Nations Development Programme (UNDP).

The significance of the UN programme lies in its almost universal acceptance by various governments throughout the political spectrum. While some bilateral donors try to link

3 N. Rodley, "The Work of Non-Governmental Organisations in the World-Wide Promotion and Protection of Human Rights", *UN Bulletin of Human Rights*; 84; at 85.

4 See, e.g., the current description of the Office of the UN High Commissioner for Human Rights, Centre for Human Rights, *Advisory Services and Technical Cooperation in the Field of Human Rights: Fact Sheet No. 3 (Rev.1)*, Geneva, United Nations 1996 (Hereinafter "*Fact Sheet No. 3 (Rev.1)*").

5 In his reform of the United Nations' report, *Renewing the United Nations: A Programme for Reform*, UN Secretary-General Kofi Annan, consolidated the two previously separate structures of the UN High Commissioner for Human Rights and the UN Centre for Human Rights into a single unit, to be called "The Office of the High Commissioner for Human Rights". Report to the General Assembly (A/15/950) of 14 July 1997, 64.

their aid programme to their idea of human rights and promote their own legal and judicial structures in the recipient country,⁶ multilateral cooperation inspires more diverse ideas and approaches. Even those critical of the UN programme do not question its desirability; rather, they express concern about its ability to bring about the required change.

Following this introduction, the presentation explores the conceptual framework of the discussion by briefly addressing the link between human rights and development. The institutional link between UNHCHR and UNDP is examined. The paper pays a special attention to the July 1997 UN Secretary-General's reform package.⁷ The paper argues for a need for a rights-oriented approach to development.

The paper then examines the dichotomy between the monitoring and technical cooperation work. It submits that these two methods of operation need to be conceptually and institutionally connected. It argues that at least the impact of the technical cooperation programmes on the actual human rights situation in the recipient State should be regularly monitored

and evaluated. Special attention is paid to UNDP proposals in this regard as well as the UNHCHR's restructuring approach.

The fourth part of this paper gives a quick overview of the work of UNHCHR in the field of technical cooperation. The sustainability of the programmes is explored by referring to specific situations and practical examples. Some concluding remarks and observations are finally offered.

II A Conceptual Framework:

The Link with Development in General

It has long been suggested that traditional human rights work which focuses only on the monitoring of and the reporting on human rights violations considers the symptoms of the violations without paying adequate attention to the complex structural questions which bring about oppression.⁸ These problems are often connected to development. It has been maintained that an effective programme to prevent human rights violations must, hence, link its objectives to those of development.⁹

6 That has been the attitude, of USAID, for instance, in its work in Central and Eastern Europe and the former Soviet republics. It is also the approach of the ACCT when it conducts technical assistance programmes in the Francophone countries.

7 A/51/950, note 5 *supra*.

8 See for instance, P. Alston, "Development and the Rule of Law: Prevention Versus Cure As a Human Rights Strategy", in *Development, Human Rights and the Rule of Law* (International Commission of Jurists), Oxford, 1981, 31-108. See also the report of the mission "Evaluation Report: Slovak National Centre for Human Rights" (an internal report of the UN Centre for Human Rights), April 1996, 6.

9 *Ibid.*

Until today, however, human rights norms have had little impact on bilateral and multilateral development aid programmes. The term "human rights" does not, for instance, appear even once in the UNDP First Country Cooperation Framework for Tunisia (1997-2001), which has a budget of 10,190,000\$.¹⁰ It is also totally absent in the UNDP First Country Cooperation Framework for Morocco (1997-2001) which has a budget of 18,169,000\$.¹¹

While economic growth is today a popular goal pursued by most governments, its human dimension remains overlooked. The term "development" is often used in relation to this process. Little attention is given, however, to the essence of development: the impact of such programmes on guaranteeing an equitable standard of living for all citizens and on the promotion and protection of human rights. Political decisions are often taken bearing in mind their economic, rather than human, consequences.

The direct connection between human rights and development has recently been recognised by several

UN Conferences. Their final documents stress human rights as a mean and end of development.¹² Despite this growing theoretical recognition, in practice human rights work and development activities have grown apart. This is why there is an inherent value in the UN Secretary-General's priority objective of integrating human rights into all the United Nations activities and programmes.¹³

The Institutional Link

A. The Size and Scope of UNDP and UNHCHR Activities

The experience until today has been that despite the conceptual affirmation of the link between human rights and development, the interaction between programmes such as UNDP and the UNHCHR, although growing, remains inadequate. UNDP, for instance, not only has embraced the concept of "sustainable development", it has further recognised that it is difficult to sustain development efforts in a context where the Rule of Law is being undermined. In fact,

10 Executive Board of the United Nations Development Programme and of the United Nations Population Fund; Annual Session 1997; "UNDP: Country Framework and Related Matters - First Cooperation Framework for Tunisia" (1997-2001); 3 March 1997; (DP/CCF/TUN/1).

11 Executive Board of the United Nations Development Programme and of the United Nations Population Fund; Annual Session 1997; "UNDP: Country Framework and Related Matters - First Cooperation Framework for Morocco" (1997-2001); 28 February 1997; (DP/CCF/MOR/1).

12 These include the 1993 World Conference on Human Rights, 1994 the World Summit for Social Development; the International Conference on Population and Development and the 1995 Fourth World Conference on Women.

13 A/51 950, note 5 *supra*, 8.

UNDP indicates that it perceives "human rights as a means and an end of development."¹⁴

As a result, UNDP elaborated a programme on the promotion of good-governance. Governance for UNDP purposes is

... the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.

The goal of governance initiatives should be to develop capacities that are needed to realise development that gives priority to the poor, advances women, sustains the environment and creates needed opportunities for employment and other livelihoods.¹⁵

This description demonstrates that there is an obvious nexus between the categories of issues and target groups identified by UNDP under the Governance Programme on one hand, and human rights concerns on the other hand. Assisting groups in explaining their concerns and claiming their rights, strengthening women and empowering disadvantaged groups, all are goals that have bearing on both human rights and development. As part of the Governance Programme, UNDP supports democratic institution-building, including elections and the development of legislative and judicial systems.

Hence, programmes that deal with the above-mentioned issues should not be designed without addressing human rights concerns. The Tunisia UNDP Framework (1997-2001), mentioned earlier included, for example, specific programmes that promote the role of women.¹⁶ After acknowledging that various legal, economic, and social policies have improved the status of Tunisian women, the document finds that "... there is still room for improvement, both as regards employment and as regards participation in public life."¹⁷

14 "Human Rights, Governance, and Sustainable Human Development", an internal draft policy document for UNDP in the area of human rights, (in the possession of the author), (hereinafter "UNDP Policy Document" 15. The same approach and statistics were presented by UNDP in the to the International Diplomatic Seminar held in Salzburg-Austria, 28 July - 1 August 1997 on *The Universal protection of human rights: Translating international commitments into national action*.

15 *Id.*

16 DP/CCF/TUN/1, note 10 *supra*, 4-5.

17 *Id.*

The Tunisia UNDP Framework fails to recognise, however, the basic problem that is at the root of depriving a large sector of Tunisians, not only women, of their right to effectively participate in the public life of their country. Although the Tunisian government often pays lip-service to the human rights discourse, its actual policies include widescale suppression of fundamental rights and freedoms. These include the right to free expression and the freedom from torture. Such a grave human rights situation affects the ability of most Tunisians - women and men - to effectively participate in the public life of their country.¹⁸ Without tackling these deep-rooted human rights concerns, the development programmes that are designed to empower Tunisian women in this area cannot meet their stated goal. Since the time-framework for the Tunisia programme is 1997-2001, it is unfortunate that UNDP is not planning to link its work on Tunisia to human rights within these crucial and important years.

The significant scope of UNDP Governance Programme means that this programme cannot be easily ignored.

A UNDP survey of its activities in the field of human rights since 1993 revealed that since 1994, UNDP has spent \$44 million on projects in this area.¹⁹ This represented almost 13% of the total UNDP funding for governance in 1994/1995 and 11% of the total number of projects. The activities concentrated mainly in Latin America and the Caribbean (29 projects) and the African region (20 projects).²⁰ There were 5 projects supported in Asia, 5 in Europe and the CIS countries, and none in the Arab World. The UNDP maintains that its activities in this field have substantially increased since 1996.²¹ UNDP programmes have supported 62 activities in the area of strengthening legislative and judicial systems since 1996. The additional projects include 6 in Latin America and Africa, 7 in Asia, 5 in Europe and countries of the former Soviet Union, and 1 in the Arab world.²² In 1997, these activities have continued to increase.

The above-mentioned figures are significant specially when taking into account that the entire budget of the UNHCHR's technical cooperation programmes as of 31 January 1997

18 See for instance, the chapter on Tunisia in, *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers, January 1996-February 1997*, Geneva, Centre for the Independence of Judges and Lawyers, 1997, 329-337.

19 UNDP Policy Document, note 14 *supra*, 17. These figures must be compared with approximately \$15,000,000 being the total budget for the UNHCHR's activities in this field in 1994. See UN Secretary-General's report to the Fifty-first session of the UN Commission on Human Rights "Advisory services in the field of human rights, including the Voluntary Fund for Technical Cooperation in the Field of Human Rights, (E/CN.4/1995/89), 32.

20 UNDP Policy Document, note 14 *supra*, 17.

21 UNDP Policy Document, note 14 *supra*, 17.

22 UNDP Policy Document, note 14 *supra*, 17.

has been \$18,700,028.²³ The UNHCHR programme serves 44 projects in the world; 11 in Africa; 6 in Asia and the Pacific; 6 in Central and Eastern Europe; 9 in Latin America and the Caribbean; 2 inter-regional; and, 10 global. In other words, the UNDP budget for such activities is almost double that of the UNHCHR. The number of UNDP country-specific projects is close to double too.

There is also a disparity with regard to on-going country-presence between UNDP and UNHCHR. UNDP has 132 field offices around the world.²⁴ The UNHCHR has only started to dispatch field operations in 1994 and currently has technical cooperation presence in 7 countries.²⁵ UNHCHR offices implement a specific programme and are not designed as permanent institutions. Other country-related projects are carried out from Geneva. UNHCHR often relies on the UNDP office in the country for logistical support.

As both UNDP and UNHCHR technical cooperation programmes are

inter-connected, specially at the country level, it is essential that cooperation is enhanced, not only to avoid duplication, but also that the various UN units speak with one voice on the same country. To enhance such coordination at the country-level, the UN Secretary-General reforms, which will be elaborated on below, create a system of a country UN Resident Coordinator.²⁶ The Coordinator is designated by the UN Secretary-General and selected from all organisations operating in the country.²⁷

This is a welcome move. In addition to the objective problem of difference in perceptions, which will later be discussed,²⁸ tension and unhealthy competition between the heads of the UN agencies operating on the ground is often too visible and counter-productive as it affects the proper elaboration and implementation of strategies and programmes.²⁹ A smooth relationship based on mutual understanding of concepts, roles, and methods of operation between all the UN agencies is essential for a proper functioning of the UN activities in the country.

23 "The Technical Cooperation Programme of the Office of the High Commissioner for Human Rights", Status Paper by Georg Mautner-Markhof, prepared to the Salzburg seminar (see note 14 *supra*), 6.

24 UNDP presentation in the Salzburg Seminar. See note 14 *supra*.

25 These are Burundi, Cambodia, Gaza (Palestine), Malawi, Mongolia, Rwanda, and Togo. *Id.*

26 Note 5 *supra*, 51.

27 *Id.*

28 Under the heading "The Need for a Rights-Oriented Approach".

29 This tension was too obvious to this author when she visited the various agencies that deal with Somalia from Nairobi-Kenya in her capacity as the Independent Expert on Somalia. There was very little cooperation in between the agencies and visible lack of unity of purpose with regard to their action in Somalia.

B - The Potential Impact of the UN Secretary General's Reform Package

When Mr. Kofi Annan took office as the UN Secretary-General in January 1997, he promised major reforms to the United Nations' Secretariat. Some measures were implemented immediately. His ideas for reform culminated in his 14 July 1997 report to the UN General Assembly "*Renewing the United Nations: A Programme for Reform*".³⁰ This report, which forms one of the major issues debated during the fifty-first session of the UN General Assembly, not only reflects the Secretary-General's vision for a future United Nations, but also sets out the practical steps to be taken in order to fulfil this vision.

The main problem facing the effective functioning of the United Nations, as the UN Secretary-General has himself diagnosed, is that the

organisation operates as a "disparate collection of units with little strategic focus".³¹ Enormous structural reform, as well as a major shift in the attitude of the UN staff are required to meet Mr. Annan's objective in transforming the organisation into "a more coherent, horizontal, more strategic and agile structure".³² Collaboration and coordination between the various units of the organisation need to be greatly enhanced.

Relevant to the present discussion is Mr. Annan's goal in integrating human rights into the overall UN activities as well as the emphasis he placed on the promotion of "sustained and sustainable development".³³ Human rights and development are traditionally two different themes within the work of the United Nations, as was earlier explained. There is little collaboration between the bodies that carry out UN activities in these two fields.

30 A/51/950, note 5 *supra*.

31 *Ibid*, 16

32 *Id*.

33 Mr. Annan spoke about "extending human rights activities by reorganising and restructuring the human rights secretariat...", an effort that has been going on for almost two years. In the development field, Mr. Annan announced:

"- The grouping of United Nations funds and programmes with development operations into a United Nations Development Group, which will facilitate consolidation and cooperation amongst them without compromising their distinctiveness or identity;

- Proposing a "development dividend" to shift resources from administration to development activities;

- The establishment of a new Office of Development Financing with Deputy Secretary-General taking the lead in initiating innovative means of mobilising new financial resources for development;

- Proposals for burden sharing and greater predictability through multi-year negotiated and voluntary pledges for the financing of United Nations development operations

- Strengthening the environment dimension of the United Nations activities, particularly UNEP.

A/51/950, note 5 *supra*, 7 -8.

Mr. Annan has taken various measures that have the potential of advancing the efficiency of the organisation.³⁴ As the UN work with regard to "sustained and sustainable development" has been mainly carried out by UNDP, the Secretary-General has assigned to UNDP, under the new reform, the task of serving as the convenor of the Development Group Executive Committee.³⁵

The Development Group Executive Committee is one of four Executive Committees created by Mr. Annan.³⁶ These committees are described as instruments of top-level policy development, decision making and management.³⁷ Although human rights was identified as a main priority theme, it was considered a "cutting across" theme. Therefore, no specific committee was set up to deal with human rights. This might prove to be a useful way to help the integration of human rights within the overall UN activities.

It is within the work of the Development Group Committee that

integrating human rights into development activities should be carried out at the policy level. UNHCHR participates in the work of this Committee, (as well as the three other Executive Committees). This would hopefully lead to a better appreciation of human rights concerns when designing development programmes.

The impact of human rights on the work of the four Committees has yet to be felt. However, three days after taking office, Mrs. Mary Robinson, the new UN High Commissioner for Human Rights, stated that she considered the issue of integrating human rights within the overall UN activities a matter of priority.³⁸

Much will depend on the liaison Office of the High Commissioner for Human Rights in New York. The four Executive Committees meet in New York. The High Commissioner is based in Geneva. Practical considerations will prevent her from attending every meeting of the Executive Committees. This is why it is imperative for the High Commissioner to be

34 *Ibid* 7.

35 The membership of this Committee also includes UNICEF and the United Nations Population Fund (UNFPA). *Ibid*, 50-51.

36 Under the UN new reform package, the UN Secretary-General has reorganised the work of the UN Secretariat under five areas, reflecting the core issues of the United Nations: peace and security; economic and social affairs; development cooperation; humanitarian affairs; and human rights. Four Executive Committees were created for the first four areas. Human rights was considered as "cutting across" and therefore "participating in, each of the other four". *Ibid*, 15.

37 The Executive Committees were designed as "instruments of policy development, decision-making and management". The objective behind creating them was "to sharpen the contribution that each unit makes to the overall objectives of the Organisation by reducing duplication of effort and facilitating greater complementarity and coherence." *Ibid*.

38 This was affirmed by Mrs. Mary Robinson, the new UN High Commissioner for Human Rights, in her first week in office, during her much-welcome meeting with non-governmental organisations in Geneva on 18 September 1997. The author was present.

represented in New York by a highly-qualified human rights expert in concepts as well as operational issues. While the High Commissioner is not in New York, the New York representative will attend the meetings of the Executive Committees on her behalf. As the task of liaising between the various agencies is now a priority, the office should be better staffed.

The Need for a Rights-Oriented Approach

During the period of Mr. José Ayala Lasso as UN High Commissioner for Human Rights, discussions transpired between the UNHCHR and UNDP to elaborate a more coordinated rights-oriented approach.³⁹ Policy papers have been drafted exploring the possibilities of further cooperation.⁴⁰

It is still a one-way street, however. While UNHCHR has been learning from UNDP, amongst others, it has yet to succeed in affecting UNDP's actual programme. Staff from UNDP were seconded to UNHCHR to

strengthen its capacity in project formulation and management. UNDP experts have joined UNHCHR's project evaluation missions, such as the case of evaluating the work of the UN Centre for Human Rights in Cambodia.⁴¹

Policy discussions between the two institutions may clarify and affirm the distinct roles assigned to them by the UN Secretary-General. This is an important task for the new High Commissioner for Human Rights. In addition to charging UNDP with being the convenor of the Development Group Executive Committee, the UN Secretary-General's reform package foresees a central role for the UNHCHR in the technical cooperation field. The reform recognises that there is an increasing demand for technical cooperation in areas that "have bearing on human rights", such as strengthening the Rule of Law and governance - areas also typically addressed by UNDP.⁴² Highlighting the need for better coordination, Mr. Annan assigned UNHCHR with the task of providing advice "for the design of technical assistance and participation] in the needs-assessments

39 Mr. José Ayala Lasso took up his office as the first UN High Commissioner for Human Rights on 5 April 1994. He stayed in office until 15 March 1997, when he was re-selected as the Foreign Minister of Ecuador.

40 The main policy document on this matter is the "UNDP Policy Document", note 14 *supra*.

41 See, United Nations High Commissioner for Human Rights/Centre for Human Rights, *Evaluation of the UN Centre for Human Rights in Cambodia*, September/October 1996 ("hereinafter "the Cambodia Evaluation").

42 "... such as the promotion of democratic governance, strengthening of the rule of law, reform of the judiciary, training of police forces and programmes that touch on the Convention on Economic, Social and Cultural Rights (sic) and on the Convention on the Rights of the Child." A/51/950 note 5 *supra*, 65.

missions." More specifically, the UN Secretary-General pledges that the following *action* will be taken:

The High Commissioner will undertake an analysis of the technical assistance provided by the United Nations entities in areas related to human rights and formulate proposals for improving complementarity of action.⁴³

This is a huge, but vital task. The UN activities in this field are extremely large. A system should be devised to see how the High Commissioner for Human Rights can effectively discharge this duty. In general, the human and financial resources given to the High Commissioner for Human Rights should be significantly strengthened to enable her to effectively discharge her duties and meet the high expectations and hopes that were generated by having a person of such an exceptionally high calibre as Mrs Mary Robinson assuming this office.

It could be wise for the High Commissioner for Human Rights to start at a policy level. A priority for the UN High Commissioner could be to vigorously pursue that UNDP adopts as a framework for its activities the International Covenant on Civil and Political Rights (ICCPR) as well

as the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

This discussion is not abstract. UNDP carries out its work, which clearly affects human rights, as was demonstrated earlier, without an institutional point of reference to international human rights law. The UNDP's support for human rights work at the country level, depends to a great extent on the convictions of its Resident Representatives, rather than on an overall UNDP policy.

Many UNDP Resident Representatives tend to be supportive of human rights work. The UNDP office in Malabo, for instance, lends significant support to the work of the UN Special Rapporteur on Equatorial Guinea.⁴⁴

Some other UNDP offices are not enthusiastic about human rights work, however. They consider that UNDP's involvement in human rights issues could affect its acceptance by the government of that country. They feel that because many authorities negatively perceive the monitoring of their human rights record, UNDP relations with such authorities will be hindered if those authorities thought that UNDP is engaged in assessing their human rights performance. As a result, some

⁴³ Action 15, *Id.*

⁴⁴ In fact, in this case UNDP has been more supportive of the initiatives of the Special Rapporteur than the technical cooperation staff of the UNHCHR. See High Commissioner for Human Rights/Centre for Human Rights, "Project of Technical Cooperation in the Field of Human Rights with the Government of Equatorial Guinea: Evaluation mission (3-16 February 1997)- Final report. (Hereinafter "Equatorial Guinea Evaluation").

UNDP offices attempt to either distance themselves from the substance of UN human rights work, or to restrain it.

In February 1997, for example, the Resident Representative of the UNDP Somalia unit in Nairobi - Kenya, wrote to the UN Independent Expert on Somalia (and the author of this paper) asking her not to promote human rights during her visit to Somalia. The Independent Expert wrote back affirming that her work derives only from the mandate assigned to her by the UN Commission on Human Rights which is composed of 53 States and that only the Commission may make such demands.

A conceptual rights-oriented framework for UNDP's approach to development could significantly enhance the effectiveness of UNDP activities. In an attempt to learn from UNICEF's experience in embracing the Convention on the Rights of the Child, an early draft of an internal UNDP policy document suggested that the UN Declaration on the Right to Development provides "a similar conceptual and legislative umbrella" for the UNDP programme.⁴⁵ Further drafts seem to exclude this reference.

What could be more effective than the integration of the controversial Declaration on Right to Development is the incorporation of ICCPR as well as the ICESCR. The two Covenants can help UNDP to develop qualitative,

rather than quantitative indicators as is presently the case. There is an obvious advantage in incorporating the ICESCR into the development discourse. A rights-oriented approach clarifies that the ultimate aim of development activities is to advance the rights of every individual to adequate standard of living, shelter, health care, education, etc. Such approach provides a yardstick against which development activities can be measured and makes development work less obscure. It also places the individual at the centre of the development policies and plans.

The ICCPR should serve as a framework for the UNDP's Governance Programme. The relevance of reforming the legal and judicial structures, for example, should be assessed in relations to its impact on improving the enjoyment of human rights of every individual. There will be little justification for the enormous expenses incurred in building new courts, modernising their equipment, and creating more efficient systems to administer justice, if the protection of every individual's rights such as to freedom of expression, association, and from torture, is not considered as the ultimate objective behind supporting these institutions.

Integrating the two Covenants into the work of UNDP requires some adjustment to its method of work. In this respect, it could be useful to work out an approach similar to that of UNICEF's in adopting the UN

45 "UNDP Policy Document", note 14 *supra*. This policy paper is still in a draft form.

Convention on the Rights of the Child. In January 1996, UNICEF adopted its Mission Statement. The Statement places the Convention on the Rights of the Child at the centre of UNICEF's activities.⁴⁶ The organisation is now defined as an advocate for children's rights. According to the Statement, UNICEF's activities are to be guided by the principles and the provisions of the Convention. These activities include advocacy, programming, analysis of economic and social policies, monitoring the situation of children, and international cooperation.

The impact of UNICEF's work on the implementation of this Convention is clear. This Convention is now one of the most ratified human rights treaties throughout the world. It is ratified by 191 States and entities entitled to enter into international agreements.⁴⁷ Moreover, UNICEF supports the work of the Committee on the Rights of the Child. It also includes the Convention in its technical assistance work, including the translation of the Convention into local languages, the revision of school curricula, the training of teachers and officials working on the welfare of the child etc.⁴⁸

UNDP's adoption of the two Covenants could enhance States' ratification of these two treaties. It could also lead to better understanding of human rights and conceptually integrates human rights into the work of development as the UN Secretary-General directed. It could also seriously enhance the domestic implementation of human rights norms, and make development work more relevant not only in a structural manner, but also to the life of individuals.

III - The Monitoring /Technical Cooperation Dichotomy in General

Carrying out relief and development work in the context of oppression could lead to counterproductive results. Governments use such work to highlight the support of the international community to their policies. Any real commitment to development requires speaking out against the powers that prevent individuals and communities from developing themselves.⁴⁹ Technical cooperation programmes ought, therefore, be considered as one component of a

46 See, e.g., UNICEF's presentation during the Salzburg Seminar, note 41 *supra*.

47 The only two States that have not yet ratified the Convention are Somalia, (for the obvious reason of lack of central government), and the United States of America.

48 See UNICEF's presentation, note 43 *supra*.

49 In his powerful book, Michael Maren brings home this very basic notion of the political nature of development work. Citing examples of the corruption of not only the Government of Somalia, but also some of the international development institutions that "aided" Somalia before the 1991 famine, Maren argues that the famine was man-made. M. Maren, *The Road to Hell: The Ravaging Effects of Foreign Aid and International Charity*, New York, The Free Press, 1997, 88.

comprehensive human rights strategy that aims at creating a society respectful of human rights. Effective technical cooperation projects should be carefully designed so that they do not undermine or compete with other essential methods of human rights work.

Although monitoring human rights violations is often disliked by those who are being monitored, this method of operation still forms the ground work upon which any further human rights activity could be built. It is difficult to see how relevant structures or projects can be designed for any country without knowing the actual human rights situation in that country. This is how what needs to be done can be diagnosed.

While the above-mentioned process is logical, it is not always appreciated by States. Monitoring human rights violations leads to the possibility of public reporting, hence, exposure. Governments feel that this paints a negative picture about their method in governance. At a time when aid to a particular country is increasingly linked to its degree of respect of human rights, monitoring the human rights situation in that country is also increasingly perceived in the negative by the targeted States. Governments obviously prefer to be given assistance and that their good faith is assumed rather than their human rights record is examined and exposed.

The tension between monitoring human rights violations on one hand, and cooperation and assistance in the field of human rights on the other

hand, is also mirrored in the tension between two other related concepts: the promotion and protection of human rights. Promotional activities assume the recipient's lack of knowledge rather than bad faith. Protection work focuses on the attempts to redress the abuse without necessarily looking at its causes. Both promotional and assistance activities in the field of human rights target the violators, while monitoring and protection is victim-oriented.

The role of government officials and victims also dramatically differs when the two types of activities are carried out. When promotional activities are conducted, the law enforcement officials, for instance, are trainees who are selected to participate in an educational exercise. Various tactics are employed to stimulate their minds and win them to the side of human rights through persuasion.

In a monitoring and protection exercise, law enforcement officials or their units, for example, are accused of carrying out unacceptable and illegal acts. Their personal behaviour or that of their group is questioned. They are being personally or institutionally judged. Violators have little moral standing.

While victims are referred to in abstract and they are far away in the background when promotional activities are performed, they are at the centre of attention when the monitoring exercise is carried out. Pursuing the interests of victims is the subject of the entire protection activity. Victims have high moral standing.

Due to this changing dynamics, it is often said that the two roles of monitoring and technical assistance cannot be easily reconciled by the same unit.⁵⁰ It is also said that each activity also requires different skills and has a different way of operation.⁵¹ Those who are mandated to fulfil both functions are considered as constantly striking "a delicate balancing act".⁵²

As it was said earlier, however, technical cooperation programmes should aim at strengthening national capacities to deal with human rights concerns in order to prevent human rights violations. These programmes achieve their impact if there is a marked improvement in the human rights situation on the ground. Hence, the positive progress in human rights situation in the country is the main indicator of the success or failure of the technical cooperation activity.

This objective in improving the human rights situation in the country

should be formulated in a specific and precise manner at the time of designing the project. This objective should not be formulated in broad, vague or even ambitious terms. It should be so specific as to make possible the conduct of an objective particle evaluation and assess the quantification of its results. Tangible results should be expected from the project. It is precisely this impact of the technical cooperation programme on the actual human rights situation in the country that must be systematically monitored and assessed.

This complex and controversial relationship between the monitoring and technical assistance aspects has led to some calls to separate the two functions. The experience on the ground, however, testifies for the need of an integrated approach. For example, when evaluating the work of the UN Centre for Human Rights in Cambodia,⁵³ the independent team of experts that conducted the evaluation, recommended "that the Centre

50 See, e.g., UN High Commissioner for Human Rights/Centre for Human Rights, Internal memorandum from Mr. Jamal Benomar, Team Leader, Technical Cooperation Coordinator a.i., Voluntary Fund for Technical Cooperation, to Mr. Karl Th. Paschke, Under Secretary General for Internal Oversight Services, Office of Internal Oversight Services, on Technical Cooperation and the Restructuring of the Centre for Human Rights, dated 25 April 1997 (Hereinafter "Internal memorandum").

51 *Id.*

52 As Mr. Kofi Annan said in reference to the mandate of the UN High Commissioner for Human Rights, who is required "to promote and protect the effective enjoyment by all of all civil, cultural, economic, political, and social rights." K. Annan, "Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities", *Harvard Human Rights Journal*, V. 10, Spring 97, 4.

53 The UN Centre for Human Rights in Cambodia was established in 1993 at the direction of the UN Commission on Human Rights to provide continuing UN presence in Cambodia following the election of a new government and the termination of the mission of the United Nations Transitional Authority in Cambodia (UNTAC). See UN Human Rights Commission's Resolution 1993/6.

continue to engage in its important activities of monitoring and investigating human rights violations".⁵⁴

The UN Centre for Human Rights in Cambodia, which was created mainly to provide technical assistance to the country, was also assigned the task of monitoring the human rights situation there. The monitoring aspect derives from the task given to this office in assisting the Special Representative of the UN Secretary-General, in the fulfilment of his mandate to promote and protect human rights in Cambodia. While the monitoring dimension was questioned by the Cambodian government, and even the staff of UNHCHR in Geneva, the evaluation report has convincingly argued that the two tasks are complementary and inter-connected.

In Equatorial Guinea the situation was the reverse. The mandate over this country started as a monitoring mandate. The Special Rapporteur on Equatorial Guinea recommended that technical cooperation to this country be provided by UNHCHR.⁵⁵ The team evaluating the programme also confirmed the value of combining technical cooperation and monitoring.

ring.⁵⁶ The Technical Assistance Services at UNHCHR were reluctant to act on his recommendations to provide technical assistance despite the fact the UN Commission on Human Rights endorsed the recommendation by resolution 1994/8.⁵⁷ The evaluation team found that:

Consideration should also have been given to the fact that technical assistance could and should operate in conjunction with the activities of the Special Rapporteur, and thus could be used as a powerful tool for increasing pressure on the Government so as to make effective changes in the human rights situations of Equatorial Guinea.⁵⁸

The UNDP Vision

UNDP suggests a distinction between the UN human rights monitoring activities and the UN technical cooperation projects concerning its work with UNHCHR. A UNDP

54 The evaluation was carried out at the request of the Centre for Human Rights in Geneva in September/October 1996. *Fact Sheet No. 3*, p. 23.

55 See (E/CN.4/1994/56).

56 Equatorial Guinea Evaluation, note 41 *supra*.

57 Equatorial Guinea Evaluation, note 41 *supra*, 11-13. The report mentions the tension that was created between the Special Rapporteur on Equatorial Guinea, the UNHCHR, and the office of UNDP in Malabo - Equatorial Guinea. The Evaluation report takes issue with the approach and serious delay in designing and implementing the project on the part of the staff of UNHCHR.

58 Equatorial Guinea Evaluation, note 41 *supra*. 13.

policy document proposes the following division of tasks:

In the case of monitoring a country's performance with regard to human rights, the [UNDP country] Office will have no substantive role but only provides logistic support for representatives of the Secretary-General or the UNHCHR.

In the development of activities intended to develop a country's capacity to deal with human rights, UNDP will have an active role, as is already the case. The country Office will here often act in the close cooperation with the UNHCHR.⁵⁹

This division of tasks reflects UNDP's fear of adverse impact on its regular work if it became involved in investigating human rights violations. The new UN High Commissioner for Human Rights, will have to carefully consider this area. At a minimum, a "unity of purpose" between the various UN activities regarding a particular country is required. Human rights should also be integrated into these activities as directed by the UN Secretary-General. The impact of the technical cooperation programmes on the human rights situation on the

ground should be regularly monitored and evaluated.

The UNHCHR's Restructuring Approach

In June-August 1994, the UN Office of Internal Oversight and a private consulting firm carried out a review of the programme and administrative practices of the secretariat of the Centre for Human Rights. The process identified several problems in the operation of the UN Centre. According to the UN Secretary General:

Over the years, secretariat structures had been created to respond to the ever increasing mandates assigned to the Centre, which resulted in separate management units carrying out research or undertaking activities in the same fields. This gave rise to duplication of effort, lack of unity and difficulty in developing Centre-wide expertise. Key process, including handling complaints, supporting activities in the field, technical cooperation, research and servicing meetings were spread across almost all branches.⁶⁰

59 "UNDP Policy Document", note 14 *supra* 10.

60 Report of the UN Secretary General to the UN General Assembly of 17 June 1996, *Programme Budget for the Biennium 1996-1997, Restructuring the Centre for Human Rights* (A/C.5/50/71).

With regard to technical cooperation, the review found that

... an increasing number of Governments requested technical cooperation projects but the rate of implementation of these projects was low and staff dealing with them required more substantive backstopping and expertise in project formulation.⁶¹

The review recommended "significant changes to be made to improve the effectiveness and efficiency of the human rights programme and projects".⁶² A new structure was proposed. It created three branches:

1. Research and Right to Development Branch;
2. Support Services Branch; and

3. Activities and Programme Branch.

Pending the endorsement of Mrs. Mary Robinson, the new High Commissioner for Human Rights, an interim structure was put in place. The chiefs of the three branches have been nominated on an *ad interim* basis. Their task, in addition to supervising the daily work of their units is "to help define the structure, activities and corresponding resource requirements of each branch."⁶³

The new structure has been met with criticism from various staff members, specially the leadership of the technical cooperation activities of UNHCHR. The third branch amalgamates the activities of technical cooperation and monitoring and investigation. These two operations were previously carried out by two different units.

⁶¹ *Ibid*, 2.

⁶² As a result several needed measures were identified:

- a. "the management structure, roles, responsibilities and staffing resources of the Centre needed to be aligned with the objectives of the programme". The purpose is to clarify responsibilities of various individuals and groups, reduce overlapping and increase accountability;
- b. Information and training also needed to be enhanced to allow for better planning as well as the monitoring of the use of resources;
- c. Staff development;
- d. "coherent vision" on the use of information; and,
- e. "ways for establishing more fruitful relations with partners within and outside the United Nations system that play significant roles in human rights..."

Ibid, 3-4.

⁶³ *Id*.

The proposed structure specified eight responsibilities for this Third Branch.⁶⁴ The first seven of them reflect technical cooperation type activities. The eighth refers to the task of assisting the UN special rapporteurs, special representatives, experts and working groups in monitoring human rights violations. This illustrates the sensitivity in which monitoring activities are perceived.

Critics of the new structure say that the merger of the monitoring activities with technical cooperation will undermine the technical cooperation work.⁶⁵ Those governments that view the actions of investigating and monitoring human rights violations as contentious, but still nevertheless apply for technical assistance and

advisory services, will now be reluctant to do so.⁶⁶ UNHCHR's technical cooperation work will hence become more difficult.⁶⁷

The same critics further charge that the new structure does not recognise the need for special expertise in technical cooperation.⁶⁸ It also does not take into account the achievements made by the Technical Cooperation unit from 1994 until now.⁶⁹

Largely elaborated in 1996, the new structure does not indeed take into account the enormous effort that was invested by the leadership of the technical cooperation programme of UNHCHR to create a more relevant, professional and effective programme.

* 64 According to the UN Secretary-General, the Activities and Programme Branch will have the following responsibilities:

- a. To provide advisory services and manage technical cooperation projects at the request of Governments;
- b. To organise and deliver lectures and training courses and similar activities;
- c. To manage the Voluntary Fund for Technical Cooperation;
- d. To plan, support and evaluate activities and missions;
- e. To organise seminars, training courses, information and educational activities and the development of advisory services and technical cooperation activities for the right to development;
- f. To implement the Programme of Action for the United Nations Decade for Human Rights Education;
- g. To organise seminars, training courses, educational material and information activities in the context of the Third Decade to Combat Racism and Racial Discrimination and the International Decade of the World's Indigenous People;
- h. To support special rapporteurs, special representatives, experts and working groups mandated to deal with situations or types of alleged violations of human rights.

Ibid., 7-8.

65 See Internal memorandum, note 47 *supra*.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

Since 1994, the leadership of the programme has placed substantial emphasis on introducing better project management policies, advancing know-how as well as developing staff capacities in this field.⁷⁰ Progress has in fact, been made to address many of the previous managerial concerns.⁷¹

The specificity of the task of rendering technical assistance should also be recognised. Much of the technical cooperation work of the UNHCHR

includes training workshops and seminars for government officials, law enforcement agencies, and the judiciary. Adult education is a specific field. Its effectiveness requires the elaboration of relevant methodologies and techniques. Although much remains to be done, the programme has been recently able to progress in this area.⁷²

Despite the validity of some of the criticisms, there is, nevertheless, a sound and useful conceptual link bet-

70 See for instance, The High Commissioner/Centre for Human Rights, Programme of Technical Cooperation in the Field of Human Rights; *Human Rights Trainers Guide*, 1996, Geneva.

71 For instance, from 11-15 September 1995, the UN Centre in cooperation with the International Training Centre of the ILO, organised a staff training workshop on the Management of the Project Cycle. A useful document was produced for this purpose. The Workshop discussed relevant topics such as project formulation, work plan and project management, success indicators, project monitoring, project evaluation and self-evaluation.

See, The United Nations Centre for Human Rights Advisory Services and Technical Assistance Programme, *Revised Guidelines for Project Formulation: Staff training course on Management of the Project Cycle.*, The UN Centre for Human Rights (Geneva), The International Training Centre of the ILO, (Turin).

72 Under the heading "The Approaches of the United Nations High Commissioner/Centre for Human Rights to Human Rights Training for Adult Audiences, *The Human Rights Trainers Guide* states

The HC/CHR's approach is composed of the following fundamental elements, which provide useful guidance for the conceptualisation, planning, implementation and evaluation of human rights training programmes:

- a) Collegial Presentations ...
- b) Training the Trainers ...
- c) Pedagogical Techniques ...
- d) Audience-Specificity ...
- e) Practical Approach ...
- f) comprehensive presentation of standards ...
- g) Teaching to sensitise ...
- h) Flexibility of design and Application ...
- i) Competency-Based...
- j) Evaluation tools...
- k) The role of self-esteem..."

See, for instance, The High Commissioner/Centre for Human Rights, Programme of Technical Cooperation in the Field of Human Rights; *Human Rights Trainers Guide*, 1996, Geneva, 2-5.

ween monitoring and investigating human rights violations on the one hand and lending technical cooperation on the other hand as was argued earlier. Governments should learn that technical cooperation in the field of human rights should lead to measurable and tangible results. In monitoring the human rights situation in a particular country, improvements of a government's human rights record can be detected.

Within the context of UNHCHR, both approaches of either amalgamating the two functions under one unit, or keep the two separately, could be valid. The essential is that the conceptual link between monitoring and technical cooperation is understood. A range of strategies could be employed to ensure that effective human rights work is conducted. The UN Commission on Human Rights as well as the UN High Commissioner for Human Rights have a crucial role to play in devising this strategy.

Mr. Annan has affirmed in his report on UN reforms that "the reorganisation of the human rights secretariat is to be fully implemented."⁷³ The restructuring is now in the hands of the new UN High Commissioner for Human Rights. She will be faced with

the difficult task of implementing and restructuring an office with a team that inter-personnel fighting outmark its impact on substance.⁷⁴

It might be sufficient to indicate that in any case, much will also be dependent on who will head Branch Three. The head of the Branch should have sound knowledge of both fields.⁷⁵

IV - An Overview of UNHCHR

Technical Cooperation Programme Background

The importance of technical cooperation in the field of human rights has been recognised by the United Nations as far back as 1955, during the decolonisation phase. Interest in such programmes has been renewed after the Cold War, when it became clear that countries in transition from totalitarian regimes to more liberal ones, needed assistance to review policies and create new legal structures and mechanisms to advance human rights protection.⁷⁶ Adherence to human rights principles has become a yardstick to measure how far transition has gone.

73 A/51/950, note 5 *supra*, 64.

74 It is highly unfortunate that the discussion concerning the restructuring of UNHCHR are not conducted in a positive atmosphere. They are marred by inter-personnel power-struggle, territoriality rather than collegial approach and vicious personal competition by the staff of the UNHCHR.

75 See, United Nations Secretariat, Internal/External Vacancy Announcement, Chief, Activities and Programme Branch, High Commissioner/Centre for Human Rights. Vacancy Announcement No. 96-L-CHR-710-GE.

76 Countries in transition normally also seek assistance in other major areas such as the economy.

In 1955, the UN General Assembly decided to create a programme it named the "Advisory Services in the Field of Human Rights."⁷⁷ The programme originally offered three types of assistance: advisory services of experts; fellowships and scholarships; and international and regional seminars. Regional or national training courses were added in 1967.⁷⁸

There are three significant landmark years in the development of the UN human rights technical cooperation programme. First, 1955 when the programme was established;⁷⁹ second, 1987 when the Voluntary Fund was created; and, third, 1993 when the commitment to the programme was renewed during the UN World Conference on Human Rights.

The Current Content of the Programme

Since 1993, the UN literature relating to this programme, has incorporated developmental concepts. The programme now is referred to as technical cooperation, rather than assistance. The stated aim of the programme is also described in developmental terms:

The Centre's technical cooperation activities are ... placed in the context of a

single unified pursuit of national development objectives through cohesive national programmes which merge United Nations-system inputs with national inputs and those of other actors to achieve government objectives for the promotion and protection of human rights. In every case, the focus is on capacity building, aimed at sustained development progress and the eventual obsolescence of external assistance.⁸⁰

According to UNHCHR, the programme is currently capable of extending assistance in many areas. These include:⁸¹

- the preparation of National Plans for Action;
- the inclusion of human rights norms in national constitutions;
- electoral assistance;
- the legislative reforms in order to bring national law in conformity with international human rights standards;
- the establishment and strengthening of national institutions;
- the training of judges, lawyers, prosecutors, police and prison officials in the field of human rights;

77 UN General Assembly Resolution 926 (X) of 14 December 1955.

78 The UN Centre for Human Rights; *Advisory Services and Technical Assistance in the Field of Human Rights*; *Fact Sheet No. 3*, ((hereinafter "*Fact Sheet No. 3*,")) Geneva, United Nations, 1988, 5

79 Resolution 926 (X), note 74 *supra*..

80 *Fact Sheet No. 3 (Rev.1)*, note 4 *supra*, 21.

81 *Ibid*, 7-20.

- the training of members of the armed forces in human rights and humanitarian law;
- the assistance to national parliaments in carrying out their human rights functions;
- the development of curricula for human rights education;
- the training of governments to prepare properly the reports required under the various international human rights treaties;
- the support of the non-governmental sector;
- the provision of human rights information and documentation and the building of the capacity to utilise and manage such materials properly through the establishment of documentation centres; and
- the development of human rights infrastructures at the regional levels.

These categories provide a significantly expanded list in comparison to how the programme was described in 1988.⁸²

Such programmes have traditionally been generated by direct applications submitted by governments to UNHCHR. In recent years, assistance has also been triggered as a result of a visit by the UN High Commissioner on Human Rights to a particular country.⁸³ Some UN monitoring mechanisms created by the UN Commission on Human Rights such as the Special Rapporteur on Equatorial Guinea, and the Working Group on Arbitrary Detention have also recommended that technical assistance be given to specific countries.⁸⁴

When a request for technical assistance is made, UNHCHR often carries out a needs-assessment of the country in the human rights field.⁸⁵ Assistance programmes are then designed. The needs-assessment report

82 Compare *Fact Sheet No. 3*, note 75, *supra*, with *Fact Sheet No. 3 (Rev.1)* note 4 *supra*.

83 See, for instance, the report of the United Nations High Commissioner for Human Rights: *Building a Partnership for Human Rights*, to the fifty-third session of the UN Commission on Human Rights (E/CN.4/1997/98).

84 See *e.g.*, the report on the Working Group on Arbitrary Detention's visit to Bhutan (E/CN.4/1995/31/Add.3).

85 In Equatorial Guinea, no needs-assessment mission was carried. The project was formulated on the basis of the reports of the UN Special Rapporteur on Equatorial Guinea. This was considered inadequate by the Mission that evaluated the project. The Mission felt that the project should have been preceded with "an analysis of the structure of social relations present in Equatorial Guinea, its causes and its cultural political and social effects."

The Mission found said that the Special Rapporteur's reports "focused on a detailed description of the effects of this power structure on the human rights situation of Equatorial Guinea. The reports also surveyed the legal structure of the State... However, these reports did not include an analysis of the power structure that caused the human rights problems that the Special Rapporteur so thoroughly described."

See, The Cambodia Evaluation, note 38 *supra*, 6.

then is presented to the concerned government. The report, with its recommendations, is submitted to the UN Voluntary Fund. Upon approval, an allocation of funds to carry out the programme is made and an agreement is finally signed between the UNHCHR and the concerned government.

Impact and Sustainability

Technical assistance programmes in the field of human rights must be relevant and sustainable. It is the benefiting government that can best ensure the sustainability of these programmes. To secure such impact, the positive political will of the benefiting government should be clearly demonstrated and ascertained before any commitment to render such services is made.

In addition, the timing of granting assistance is very important. Proper timing helps sustainability. According to the first UN High Commissioner for Human Rights, UNHCHR "focuses on countries in transition to democracies and the less developed countries."⁸⁶ While there is a great attraction in assisting countries in transition, it is essential that the inter-

national community does not move in, or out, fast. Some minimum requirements should be fulfilled before the international community decides to provide technical assistance. In addition to the demonstrated political will of the government, there must be a minimum of social and political stability that makes this assistance sustainable. The experience of the 1997 *coup d'état* in Cambodia, in which the elected First Prime Minister was ousted by the unelected Second Prime Minister is a lesson to be kept in mind.

In support of the Paris Peace Agreement, the United Nations established in 1992/1993 the United Nations Transitional Authority in Cambodia (UNTAC).⁸⁷ This approximately 2 billion dollars operation aimed at preparing Cambodia for democratic rule through the establishment of peace and the holding of free and fair elections.⁸⁸ After the lapse of UNTAC, the United Nations continued this effort of technical cooperation. It established in 1993 the UN Centre for Human Rights in Cambodia. The office initially started with a staff of twenty internationals and locals, including UN volunteers.⁸⁹ By 1997, it became the largest UNHCHR technical assistance field presence, with a staff of about 50 members.⁹⁰

86 E/CN.4/1997/98, note 80 *supra* 12.

87 For a review of UNTAC's work, see D. MacNamara, "UN Human Rights Activities in Cambodia: An Evaluation", *Honouring Human Rights and Keeping the Peace*, Aspen Institute, Washington, 1995, 57-81.

88 *Id.*

89 The Cambodia Evaluation, note 38 *supra*, 5.

90 *Id.*

Unlike other UNHCHR field presence, salaries and operational expenses of this office are totally incorporated in the budget of UNHCHR.⁹¹ Despite the enthusiastic evaluation report of this office's performance, this year's *coup d'état* questions and undermines the basis of this massive financial and material investment and puts in doubt the success and sustainability of this effort.⁹²

On more technical grounds, technical cooperation programmes should be based on written-clear objectives, measurable indicators, results and activities. Reporting, monitoring and evaluation procedures should be envisaged from the project's inception. Not only government sources, but also the non-governmental sector should be involved in designing the project and in its implementation.⁹³

The programme had been in the past criticised for lacking focus and vision and for being poorly managed.⁹⁴ It was spread so thin that it was difficult to determine its impact. This rendered it unable to meet its goal in strengthening national capacities in dealing with human rights concerns.⁹⁵

Following the World Conference on Human Rights in Vienna in 1993, the programme now offers a more comprehensive country programme and targeted projects.⁹⁶ Assistance is offered through the advisory services of experts, training courses, workshops and seminars, information and documentation projects, and fellowships.⁹⁷ Useful factsheets introducing human rights matters are produced. Manuals and educational tools are prepared to improve the training

91 *Ibid.*

92 *Ibid.*

93 The evaluation report of Romania included very useful general recommendation on how technical assistance projects should be conducted. (E/CN.4/1995/90/Add.1), (Hereinafter "The Romania Evaluation"), at 34-36.

94 Swedish Save the Children and the Swedish Section of the International Commission of Jurists, *UN Assistance for Human Right: An analysis of present programmes and proposals for future development of the UN Advisory Services, technical assistance, and information activities in the field of human rights*, Sweden, Swedish Save the Children and the Swedish Section of the International Commission of Jurists September 1988.

95 *Ibid.*

96 According to UNHCHR, during 1996, 39 technical cooperation projects were carried out in 21 countries. In addition, 9 projects were conducted at the regional level and 9 at the global level. This a massive increase in the projects that were carried out in the last years. 2 projects were carried out in 1984, 37 in 1989, 130 in 1994, 215 in 1995, 402, which were conducted in 49 countries. These are Albania, Argentina, Armenia, Azerbaijan, Bangladesh, Belarus, Benin, Bolivia, Botswana, Burundi, Cambodia, Cameroon, Chile, Croatia, Ecuador, El Salvador, Equatorial Guinea, Gabon, Georgia, Guatemala, Guinea-Bissau, Haiti, Kuwait, Latvia, Lesotho, Madagascar, Malawi, Mauritius, Moldova, Mongolia, Morocco, Namibia, Nepal, Palestine, Panama, Papua New Guinea, Paraguay, the Philippines, the Russian Federation, Rwanda, Sao Tome and Principe, Slovakia, South Africa, Sri Lanka, Sudan, Thailand, Togo, Uganda, and Viet Nam. See the report of the United Nations Secretary General, *Technical Cooperation in the field of Human Rights*, to the fifty-third session of the UN Commission on Human Rights (E/CN.4/1997/86).

97 *Ibid.*

quality.⁹⁸ Some training activities are carried out in cooperation with the International Labour Organisation (ILO).⁹⁹

Although some conceptual and managerial criticisms seem to be currently addressed by UNHCHR, the evaluation reports of several projects reveal that there are still major problems. The following clusters of issues were remarked by the evaluating teams of recent UNHCHR country-projects. These relate to Equatorial Guinea, Romania, and Slovakia.¹⁰⁰ The below remarks are also based on the author's personal observations as the UN Independent Expert on the Human Rights Situation in Somalia:

- *Rigidity*: A major valid criticism of UNHCHR technical cooperation programmes remains in their inflexibility. The categories for rendering assistance are set in advance, beforehand. This does not allow it to have the necessary flexibility in order to adapt the activities to a country's specific needs. For instance, the Independent Expert on Somalia approached the UNHCHR technical cooperation programme to aid the authorities in Hargeisa in North West Somalia in
- *General and abstract goals*: Most of the projects are mainly composed of training activities. Training is a field where indicators for the achievement of objective is difficult to formulate. UNHCHR often considers that its objective are to "sensitise" government officials, the judiciary as well as members of civil society, on human rights issues.¹⁰¹ A goal formulated in broad terms such as "sensitisation" is weak, vague and non-committal.

98 See for instance, Professional Training Series. It includes *Human Rights Training Manual for Police* (draft 1995), and *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges and Lawyers* (draft 1997).

99 See note 68 *supra*.

100 The Equatorial Guinea Evaluation, note 41 *supra*, the Romania Evaluation, note 90 *supra*, and Slovakia Evaluation, note 8, *supra*.

101 See, e.g., *Ibid*, the Equatorial Guinea Evaluation.

- *Lack of focus:* The programme has been generally criticised for its lack of focus. Many projects were not well thought throughout. For example, the evaluation mission of the Slovak National Centre for Human Rights, which came to existence in 1993 and was conceived as a national institution, concluded that

the project concept and design have not been sufficiently thought through and in retrospect have not resulted in a common understanding of the direction and substance of the project. Both context and focus have not been thoroughly analysed and debated and different expectations seem to have remained implicit to a large extent. These differences have manifested themselves during the past two years and have been subject to the forces grown within the board and management.¹⁰²

Similar criticisms were made with regard to the Equatorial Guinea and the Romania projects.

- *Inadequate attention to quality and thoughtfulness of the design and implementation of the programmes:* Extensive experience is required to

be able to detect the major human rights violations in a given country. The quality, integrity, and independence of the needs-assessment exercise, as well as the eventual programme, is highly crucial. It is extremely important that those who design the projects are qualified to do so.

The project carried out in Equatorial Guinea failed to redress one of the most elementary and basic problems facing the respect of human rights in the country, i.e., the government's failure to publish existing legislation.¹⁰³ Although this fact was considerably emphasised in the Special Rapporteur's report to the UN Commission on Human Rights, which formed the basis of the evaluation, the staff of UNHCHR failed to design a project to deal with this problem. The evaluation mission found that:

The lack of publication of existing laws and decrees allows pervasive impunity and constitutes a powerful mechanism for reproduction of unawareness, the subtle glue of authoritarian regimes. Moreover, this lack of publication hinders any possibility of revision of existing laws to ensure their conformity with international human rights standards thus seriously limiting all efforts to correct human rights abuses.¹⁰⁴

102 See e.g., the Slovakia Evaluation *Ibid.*

103 The Equatorial Guinea Evaluation, note 41 *supra*, 7.

104 *Id.*

The evaluation mission found that the technical assistance programme should have given priority to "the assistance of the Government in the compilation and publication of existing legislation, and, subsequently, in its revision in order to ensure that it is in conformity with international human rights principles and standards."¹⁰⁵

In addition, and although UNHCHR has designed several manuals to help guiding the trainers, it was found that in some situations, the teaching in the courses and the seminar was done in the abstract. Participants were not also informed of the incompatibility of specific laws, decrees, and traditional practices enforced in the country with international human rights law.¹⁰⁶ The harmonisation of these laws with international instruments was not specified in the project document as was stated before.

V Concluding Remarks

A discussion on international technical cooperation in a field such as human rights becomes more relevant when these activities are placed within the larger context of the international effort to enhance development. Until today, however, human rights norms have had little influence on bilateral and multilateral development aid programmes. The present paper tried to emphasise the significance of this link.

The paper argued that UNDP should make ICCPR and ICESCR a framework for its work. Support for UN human rights activities cannot be left to the understanding and whim of UNDP officials. It must become institutional. A discussion amongst UNDP, UNHCHR, and UNICEF on the ramifications and adjustments that need to be taken into account in incorporating the Covenants into UNDP work is worthwhile. This is a step in the direction of integrating human rights into the overall UN activities as UN Secretary-General Kofi Annan aspires. The integration is an enormous task that requires the rapid attention of Mrs. Mary Robinson.

Moreover, technical cooperation programmes should be considered as a component of an overall human rights strategy to improve the human rights situation in a particular country. While monitoring is generally perceived as a punitive method, technical cooperation, is considered reflective of the international community's acceptance of a government's demonstration of good faith. The perception is that the monitoring approach leads to the condemnation of a specific government, while the technical assistance approach leads to financial and other material benefits. The paper argued that this perception is erroneous and that there is a useful link between monitoring and technical assistance work in the field of human rights.

¹⁰⁵ *Id.*

¹⁰⁶ *Ibid.*, 9-10.

But above all, independent observers fear that technical cooperation programmes in the field of human rights have been exploited by governments who are engaged in extensive human rights violations to avoid international scrutiny of their actions. The existence of political will and ability to transform the government's human rights record, are vital. This is why technical cooperation programmes in this field should not have abstract and vague goals. They should rather lead to tangible results. Such programmes should be granted and designed only where it is possible and realistic to transform the benefiting government's human rights record. This is essential

also because these programmes are costly and their impact is difficult to detect.

Furthermore, there is a need for a greater unity of purpose between all the UN programmes specially when dealing with a country-specific situation. Thus, programme impact could be maximised, duplication avoided, and administrative costs minimised. There are increasing efforts to improve the professionalism, approach and methodology of conducting technical cooperation programmes in a manner which ensures that they become cost-effective. Above all, they should become better focused, more coherent, and more responsive.

Democracy and the Rule of Law in Slovakia

Spencer Zifcak*

*"What is so unfortunate is that when I don't agree with one side,
I am automatically considered to be that side's enemy.
This is the diagnosis of our nation."*

Stefan Herenyi, Jesuit Priest, Bratislava,
Slovakia**

Introduction

The Constitution of the newly formed State of Slovakia came into effect on 1 October 1992. With its proclamation, the new country joined the international community as an independent and democratic nation. The Constitution created a parliamentary system of government, separated executive, legislative and judicial power, introduced a constitutionally entrenched charter of rights and committed the republic to the pursuit of a socially and ecologically oriented market economy. In doing so, it established the preconditions for Slovakia's development as a free and liberal member of an expanded European Union.

Since that time, however, Slovakia's fledgling democracy has

experienced considerable stress. In part this has been the result of the tremendous economic and social changes that have taken place since the revolutions of 1989. The failure of democracy to deliver tangible economic and hence material benefits has shaken the faith of many and initiated a call by some for a return to a command economy and interventionist State. In part, however, this stress has been caused by the Slovakian government itself. Nationalist in orientation, authoritarian in style and administratively inexperienced, the government of Vladimir Meciar (HZDS) has shown scant respect for constitutional propriety, the Rule of Law and individual rights. As a result the democratic foundations of Slovakia are less certain than at any time since 1989. Political consensus has given way to damaging polarisation.

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** Quoted in the 'Slovak Spectator', March 13-26, 1997, 2.

In this article I will describe and analyse the constitutional, political and judicial aspects of the current, problematic situation. The thread which runs through it is plain. By seeking systematically and relentlessly to weaken institutional sources of opposition to its policies and actions, the current government has begun to undermine the constitutional foundations of the democratic State. While democracy and the Rule of Law are not under immediate threat, the actions being taken now may weaken their prospects for survival in the future, particularly if popular disappointment with the country's economic and social situation continues to spread.¹

The Constitutional Framework

The Slovak Constitution establishes a parliamentary system of governance.² It defines the government as the central locus of executive power and the parliament as the sole locus of legislative power.³ The government is drawn from the parliament which is unicameral. The Prime Minister is designated by the constitu-

tion as the head of the government.⁴ Normally the head of the party having obtained most votes at a preceding election, the Prime Minister chooses who will form his or her ministry from the members of parliament.⁵ The Prime Minister and government are responsible to parliament for their policies and their administration. The government, in turn, governs with the consent of parliament. If, at any time, the government loses the confidence of parliament it must resign. If a vote of no confidence is successful, a new government is formed either from a different coalition of parties in parliament or following a general election.⁶

Executive power is shared with the President. The President is elected by a three-fifths majority of the parliament for a five year term.⁷ The President represents Slovakia internationally, convenes sessions of the parliament, dissolves it where it fails to obtain a vote of confidence, appoints and recalls ministers and senior officers of State, exercises a suspensive right of veto over legislation and acts as the chief commander of the armed forces.⁸ The President is responsible to parliament for his actions. The President

1 Both the European Union and the US Government have recently reached similar conclusions reflected in demarches delivered by both to the Slovakian Government in late October 1995 and again in September 1996.

2 The Slovak Constitution came into effect on October 1, 1992.

3 Articles 108 and 72 respectively.

4 Article 109.

5 Article 111. The President appoints and recalls ministers on the Prime Minister's recommendation.

6 Article 116.

7 Article 101.

8 Article 102.

may be removed by parliament where he or she commits treason or acts in some other way to prejudice Slovakia's sovereignty or democracy.⁹

Next, the Constitution provides for the creation of a Constitutional Court.¹⁰ The Constitutional Court is designated as the guardian of the Constitution. It determines whether Acts of Parliament, subordinate legislation, governmental decrees, ministerial orders and local government laws are consistent with the Constitution. It rules on the division of powers between the central institutions of State and it also hears petitions from individuals who allege that their constitutionally guaranteed rights have been infringed.¹¹ The judges of the Court are nominated by the Minister for Justice and elected by a three fifths majority of parliament for a term of seven years.¹²

The Constitution provides that judicial power will be exercised by ordinary courts of justice.¹³ The courts of justice deal with civil, criminal, administrative and commercial cases.¹⁴ These courts are organised in a hierarchy consisting of local,

regional and central courts at the apex of which is the Supreme Court of Slovakia. The judges of the ordinary courts are declared to be independent and bound only by law.¹⁵ They are nominated by the Minister for Justice and elected by a three fifths majority of the parliament. A judge may be removed from office only where it is demonstrated that he or she has been sentenced for a criminal offence, where a disciplinary court determines that he or she has acted in a manner incompatible with his or her judicial duties or where a judge's state of health does not permit him or her to continue in office.¹⁶ Judges are elected for an initial term of four years and may either be re-appointed indefinitely or removed upon the expiration of this initial period.¹⁷

Finally, the Constitution entrenches a Charter of Rights.¹⁸ The Charter provides for the protection and enforcement of civil and political rights and also for the pursuit of economic and social rights. In many cases, however, the rights conferred by the Constitution may be circumscribed by law. International human rights conventions take precedence

9 Articles 106 and 107.

10 Article 124.

11 Article 125.

12 Article 134.

13 Article 141.

14 Article 142.

15 Article 144.

16 Article 147.

17 Article 145.

18 The Charter is contained in Chapter Two of the Constitution.

over rights conferred by the Slovak Constitution when they have been ratified by the Slovak Government and where the protection they afford is greater than that provided for in the Constitution.¹⁹ Individuals who believe their rights have been transgressed by State instrumentalities may petition the ordinary courts for relief and if this is not provided they may take their case to the Constitutional Court.²⁰

These Constitutional provisions provide the legal framework for the operation of the Slovak State. As described they provide a sound foundation for the development of a democratic and market oriented nation. In practice, however, they have provided much less protection than one might have anticipated against a Government which has sought systematically to draw power to itself.

The Government and the President

The Slovak Constitution does not make it clear which powers the President exercises independently and which he must exercise on the advice of the government. A literal reading of the Constitution suggests, therefore, that the President may possess very considerable authority. In effect, executive power appears to be shared between the President and the govern-

ment. Consequently, the President's position in relation to the government appears to be strong. His position in relation to the parliament, however, is weak. The Constitution provides that the parliament may remove the President from office at any time during his term. The President may be recalled if he 'undertakes activities directed against the sovereignty and integrity of the Slovak Republic or if his activities undermine the democratic order of the Slovak Republic'. These unusual and somewhat confusing provisions provide the background to understanding how and why the recent Constitutional crisis in which the Prime Minister sought to remove the President from office came about.

In 1993 a bitter dispute erupted between Prime Minister Vladimir Meciar and his foreign minister, Milan Knazko. Meciar accused Knazko of persuading some members of their party (MDS) to vote against his favoured candidate for President. In response, Knazko accused Meciar of authoritarianism and of failing to consult in parliament and the wider community. Meciar responded by branding Knazko as incompetent and as a traitor to the party. Meciar recommended to the President that Knazko be recalled from his office as a minister. President Kovac at first cavilled at this request, preferring instead to refer the matter to the Constitutional Court. More specifically, Kovac petitioned the Court to determine whether or not

¹⁹ Article 11.

²⁰ Articles 127 and 130.

he was obliged to follow the government's advice in determining whether to appoint or recall ministers of State. Meciar, however, raised the stakes by threatening to resign unless Knazko was removed. To defuse the crisis, Kovac recalled Knazko before obtaining a ruling from the Court on his petition.

The Constitutional Court's decision appeared in June 1993 and favoured the President. After an extensive examination of the relevant Constitutional provisions and an exploration of the Constitutional and political history of the office of President, the Court decided that the President was not obliged to follow the Prime Minister's recommendations. In doing so, it provided the President with the judicial imprimatur to increase his authority.

Next, the Prime Minister proposed to amend privatisation laws to concentrate power over privatisation in his own hands and to wind the privatisation process down. President Kovac publicly criticised the Prime Minister, warning that his dictatorial style could produce significant problems for Slovak democracy. With Kovac's tacit approval, a number of opposition parties joined together to pass a motion of no confidence in the government. Meciar resigned and Kovac installed a new government headed by the more moderate Josef Moravcik.

Another election occurred in September 1994 and Meciar's new party (HZDS) emerged with the largest single block of votes. His supporters were infuriated, however, when

President Kovac failed immediately to appoint Meciar as Prime Minister, preferring instead to allow the new parliamentary deputies to explore a number of different governmental configurations. A Meciar led coalition was finally appointed on 3 November 1994.

After its first formal session, the governing parties reconvened parliament immediately for an unscheduled sitting which took place throughout the night. During that night, the new coalition parties moved a vote of no confidence in two former Moravcik ministers still in place as caretakers, dismissed a swathe of senior government officials including members of the boards of Slovak radio and television, members of the National Property Fund and the chairman and vice chairman of the supreme auditing office. The coalition also attempted to introduce retrospective amendments to privatisation laws instituted by the previous government but this initiative met with a Presidential veto a few days later.

By this time it was clear that the relationship between the Prime Minister and President had broken down. Soon after, the Prime Minister initiated action in parliament to remove the President from office. On 5 May 1995, and without notice, the governing coalition moved a motion of no confidence in President Kovac. The motion was based on a confidential report produced by the OKO, the parliamentary committee responsible for overseeing the operation of the State Intelligence Services (SIS). This committee was comprised of government

members only. It was chaired by Ivan Lexa, whose appointment as privatisation minister the President had rejected one year before.

The contents of the report are unknown. Nor has the content of the parliamentary discussion about it been made public. This occurred because the government and some members of the opposition voted to close the session of parliament at which the report was considered and at which the fate of the President was discussed. The Constitution permits the closure of parliament if three-fifths of deputies vote in favour of doing so.²¹ In the event, the parliament voted in favour of the motion of no confidence but failed narrowly to achieve the three-fifths majority that was required to remove him from office.

The President was not given a copy of the OKO report and it was not until six days later that he was permitted to deliver his defence in parliament. As he stood to address the parliament, every member of the governing coalition rose and left the chamber, leaving the parliament in disarray. In his address the President denied rumours against him which included the allegation that he had requested the SIS to produce confidential security reports on his political opponents. He criticised the Meciar government's propensity to concentrate power in its own hands and concluded by affirming that he would not be driven from his position. The following day, the Prime

Minister attacked again, asserting that the President's mandate had concluded with his own re-election. In the light of the parliament's vote of no confidence, therefore, he argued that the only principled position the President could take would be to resign.

The President has remained in office since, despite continued attacks by the Government as to his credibility and competence. He has, in his turn, cast doubt on the democratic credentials of the Meciar government and been one of its fiercest policy critics. The tension between the two branches of government has dominated Slovak politics and damaged the new nation's standing in Europe. In early 1997, for example, the German Chancellor, Helmut Kohl, told the government bluntly that its application to become a member of the European Community would be jeopardised if what he regarded as anti-democratic tendencies in the country continued.

In reviewing these events there are a number of observations that might usefully be made. First, the Constitution itself established the preconditions for the recent political antagonism. It juxtaposes a strong government with a strong presidency, leaving it quite unclear, therefore, how the respective roles of President and Prime Minister should be reconciled. In key respects, the constitutional text is indefinite. Whether and when the President should exercise his

²¹ Article 83.

constitutional powers independently provides the clearest and most pressing example of this textual ambiguity. The lack of clarity in these two respects is aggravated by the lack of established constitutional conventions governing the relationship between the two offices. In the absence of mutual respect and good will between the protagonists, the political traditions that are now being established are likely to create more conflict and uncertainty in the future.

Secondly, the stability of the presidency and, hence, the effective separation of powers between President and government is substantially undermined by the parliament's power to remove the President from office. Such a provision does not exist in other, comparable Constitutions in the region and this for good reason. Symbolically, the role of the President is to unify the nation and to protect its democratic institutions. In practice, the President can cause a government to think before it acts precipitately, either to misuse or enhance its own power or to deny other institutions and individuals the capacity to exercise theirs. It is a recognition of the fact that the President represents the continuity and certainty of fundamental constitutional values that the office holder is, in most cases, elected for a term which exceeds that of any one government. But the Slovak Constitution fails to recognise this. Instead, it establishes an irreconcilable tension between a President, with the power to check the actions of the government, and a parliament which can remove the President at the government's behest.

Thirdly, it is clear that major political differences have emerged between President Kovac and Prime Minister Meciar. This is despite the fact that the two were close party colleagues both before and after the 1989 Czechoslovak revolution. For whatever reasons, it is apparent that Kovac's sympathies now lie more with the liberal, democratic parties in opposition than with the government. It is not surprising, therefore, that Prime Minister Meciar should be dissatisfied with the President's performance. These personal disagreements, however, mask considerably more significant problems. For what is lacking in the current debate, in my view, is a proper appreciation by both of the very important institutional dimensions of the battle between them. In his eagerness to remove an oppositional Kovac, Meciar appears willing to undermine the Slovak presidency. In his concern to curb Meciar's authoritarianism, Kovac has sometimes trespassed too far into the Prime Minister's political domain.

The Government and the Parliament

The National Council of the Slovak Republic, the country's parliament, possesses all the powers one normally associates with a national legislature. Among other things, it debates and adopts constitutional and ordinary laws, approves the government's programme, ratifies international agreements, approves the budget and

calls referenda.²² It also holds the government accountable for its actions. It may reject the government's programme and, if it does so three times within the first six months of a new government's term of office, the President may dissolve the Council and call new elections.²³ The Council may censure the government if an absolute majority of members votes in favour of doing so.²⁴ The President must recall the government if three fifths of the deputies in the council agree to a motion of no confidence.²⁵

The present government which is drawn from the parliament is comprised of a coalition of three parties. The largest, led by Prime Minister Meciar is the HZDS, which obtained 34% of the popular vote. HZDS has joined forces with two smaller parties from quite different parts of the political spectrum to form the ruling coalition. Meciar's coalition partners are the Slovak National Party, an extreme nationalist organisation and the Slovak Worker's party, an extreme socialist/marxist organisation. Together the coalition has 80 of the 150 seats in the Council. It has used this majority ruthlessly to advance its political programme and, wherever possible, to weaken or destroy its political opponents.

The first and most striking example of the government's ruthlessness occurred at the snap session of the National Council convened by the coalition to sit through the night immediately after its formal opening session had concluded. As previously described, during this night long session, the coalition partners moved votes of no confidence against two caretaker ministers, obtained parliamentary authorisation to dismiss large numbers of senior officials including some in sensitive posts such as the directors of State radio and television, the prosecutor general and the auditor general, pushed through legislation which retrospectively invalidated the privatisation of public enterprises and prohibited those who would suffer financial loss from taking action for compensation. The speed and callousness with which this was done sent a clear message that the new government would have little sympathy with those who stood in its path.

Next, soon after reclaiming the government benches the Meciar government announced the establishment of the parliamentary Commission for the Investigation of the Causes of the Constitutional Crisis of March 1994. The constitutional crisis referred to was that in which Meciar's former government was

22 Article 86.

23 Article 102.

24 Article 115.

25 Article 115.

removed from office by the President following the success of a motion of no confidence in the National Council. In fact there was no constitutional crisis at all. The government was defeated simply because, with the tacit approval of the President, several members of Meciar's parliamentary party defected and joined with opposition deputies to prosecute the no confidence motion successfully. Nevertheless, it is clear that Meciar was still smarting from this defeat when he was again re-elected. The establishment of the Commission, which was comprised solely of members of the governing coalition, therefore gave the government a perfect opportunity to subject its opponents to political harassment. Recognising this many have refused to provide the commission with evidence. The Commission itself has been conducted in secret and its procedures have, more recently, been the subject of challenge before the Constitutional Court.

The third and most worrying example of the government's ruthlessness has consisted in its attempts to remove one of the major opposition political parties from the parliament. In the six months prior to September 1994, Slovakia had been ruled by a coalition of parties led by Josef Moravcik. Externally, the Moravcik government had adopted a pro-European foreign policy and internally it had added significant momentum to the process of economic liberalisation. When it fulfilled its commitment to go to the polls in September, the coalition could not present a united front and the fragmentation of the right wing vote allowed Mr. Meciar and his allies

to assume power yet again. Moravcik, another former Meciar foreign minister, formed his own new party to fight the election. This party is known as the Democratic Union (DU). It received a total of sixteen seats in the new parliament. Under Slovak law, to fight an election, a party must either have received the votes of 5% of the electorate at the previous election or have collected the signatures of 10,000 eligible voters. The DU collected these signatures and was, therefore, authorised to contest the election.

Immediately after the election, however, the organisational wing of Mr. Meciar's party, HZDS, challenged the election of the DU representatives. HZDS argued that the 16 DU members could not take their seats in parliament because a significant number of the signatures collected in support of the establishment of the party were false or had been collected improperly. The matter was referred to the standing electoral committee of the parliament which, after having consulted with the regional and national electoral commissions, declared the party's registration to be valid. Dissatisfied with this result, HZDS petitioned the Constitutional Court for a declaration that the DU was illegitimate. The Court declined to hear the case deciding correctly that it lacked the jurisdiction to do so. Undeterred, the government returned the matter to the National Council establishing a new parliamentary committee of inquiry. Unlike the standing electoral committee, however, the new committee was comprised only of deputies from the ruling coalition. Thus, a HZDS com-

mittee was established to review the registration of its DU opponents. The government appeared unconcerned by the self evident lack of procedural fairness in such a proceeding.

Beneath this internecine disputation, much larger issues have been at stake. The governing parties hold a majority of 80 to 70 in the 150 member National Council. With 90 votes they would control the three fifths majority required to engineer constitutional change. For the time being it appears unlikely that the extra votes will be forthcoming. But the Prime Minister has made no secret of his desire to make fundamental constitutional changes including, for example, amending the powers possessed by the President and the Constitutional Court. Failing the achievement of the three fifths majority, however, the government appears intent on pursuing an alternative strategy. That is, if it can successfully remove the DU from the parliament, sixteen seats in the parliament will become vacant. Should this occur the coalition would obtain an extra eight or nine members and be within one or two votes of acquiring the Constitutional majority to which it aspires. And, if its present performance is any guide, this would produce a set of constitutional amendments designed to strengthen its hand at the expense of those individuals and institutions charged with holding it to account and ensuring that it acts within the four corners of the law. Of these the Constitutional Court is one of the most important and it is to the relationship between the government and the Court that I now turn.

The Government and the Constitutional Court

When appointments to Slovakia's first Constitutional Court were announced, few observers held out much hope that the Court would act independently. Mr. Milan Cic was named as President of the Court. Cic had been Attorney General in the former communist regime, transitional premier of Slovakia immediately after the revolution, and later the leader of a political party with close affiliations to Mr. Meciar's HZDS. In the negotiations which followed the election of the first Meciar government, Cic, having made certain political concessions to Meciar, was nominated by the latter as the Constitutional Court's first leader. Nine other judges were named at the same time. None had any experience of constitutional law, only one was an international lawyer and all were, by most accounts, of fair, rather than outstanding ability. Neither of the two Slovak lawyers who had been judges on the Czechoslovak Constitutional Court were named on the new one, and the country's outstanding constitutional scholar was ignored - only later obtaining appointment to the Czech Court.

Nevertheless, despite these considerable disabilities, the Slovak Court has proven to be significantly more assertive than had been predicted and on several occasions its independence has earned it the government's wrath. Two examples will suffice to illustrate the problem. The first and most contentious case in which the Court and government locked horns was

that concerning the power of the President to appoint and recall ministers on his own initiative. The government argued that the Constitution allowed the President no discretion in determining whether or not to accept the Prime Minister's advice with respect to the nomination and recall of ministers of State. This advice, it submitted, had to be followed without question. The Court rejected the submission. The judges examined the text of the Constitution, the history of the presidency and prime ministership in the twentieth century, and constitutional theory relating to the relationship between the two executive posts. It concluded that text, history and theory compelled the conclusion that the President had important reserve powers one of which was the power finally to determine which of the Prime Minister's nominees should be appointed to or dismissed from the ministry.

The government reacted strongly to this setback. Interviewed on Slovak television the Prime Minister said that the Court's decision was wrong. But it was what he added to that statement that was telling. The Court, he said, had one view of the Constitution. He, himself, had another. No doubt in the rest of the community there would be still other and different views of its meaning and effect. No one of these views was necessarily superior to another and, in those circumstances, the government would simply have to proceed in accordance with its best judgment of what the political situation required. In saying this, Mr. Meciar discredited the Court's decision, undermined its

constitutional authority and provided a rationale for the government to ignore the Court in future should it choose to do so.

In a second case, the Constitutional Court rejected the government's submission that the Court should rule on the validity of the petitions gathered in favour of the DU's registration as a political party. Instead, the Court decided that it had no jurisdiction to act as a court of disputed returns. In the first instance, it said, the responsibility for resolving electoral disputes rested with the National Electoral Commission. After the commission had reached its decision, an appeal could be determined only by the parliament itself. The Prime Minister had been relying heavily on the Court to resolve the DU matter in his favour. When it did not, his reaction was swift. He had a senior official inform the President of the Court that his bodyguards had been removed, that he would no longer be entitled to a government car and that the Court faced heavy budgetary cuts in the next financial year. Subsequently, the Prime Minister has described the Court as 'the next sick part of the Constitution.' It would need to be dealt with in due course.

Late in 1996 two vacancies arose on the Court. To the dismay of many in the legal profession, in February 1997 the government nominated two active members of its own political party as replacements. Neither had any significant credentials as constitutional lawyers. Their nomination has yet to be ratified in parliament.

The Government and the Judges

The Constitution declares that judges of the courts of justice in Slovakia are independent and bound only by law. The judges are nominated by the government and elected by a simple majority of the deputies in the National Council. They may be removed from office only where they have been convicted of a criminal offence, their health has failed, they have reached the age of 65 or a disciplinary court has found that they have acted in a manner that is incompatible with the proper performance of their judicial duties. By this method and with these limited safeguards, judges are appointed to the Magistrates, District and Supreme Court of Slovakia.

In relation to the independence of judges, however, the Constitution contains significant weaknesses. The first and most obvious is that, in the first instance, judges are appointed only for a term of four years. Upon the expiration of this first, elected period, the government may nominate judges again and the National Council may then appoint them for an indefinite time. The Constitution, therefore, creates a probationary period during which the performance of judges may be evaluated critically. If the government determines, for whatever reason, that a judge has not performed in a proper manner it may choose not to renominate him. At the time this constitutional provision was debated, the first Meciar government argued that its insertion was essential to ensure that only judges of high quality and proven performance would be granted tenure. In the legal community, however, it is

generally accepted that the probationary period was created to allow the government to exercise firmer control over appointments to the bench. By way of comparison, neither the Czech nor the Hungarian Constitution contains a comparable probation provision despite facing similar difficulties in effecting the difficult transition to democracy.

A second weakness is that the Constitution does not specify how a disciplinary court should be composed and does not provide any specific criteria to assist in determining whether a judge has acted in a manner that is incompatible with the proper exercise of his or her functions. The Constitutional Court Act, however, states that disciplinary action shall be initiated by the chair of the relevant court and that any charges of incompatible behaviour shall be heard and determined by a panel of judges drawn from the same court. Such a procedure is unlikely to accord with the rules of natural justice.

Thirdly, neither in the Constitution nor in legislation is any process for judicial self government set down. Instead it appears to be assumed that a hierarchical form of court governance should be created in which judges are deemed to be responsible to the chairmen of their respective courts and in which the chairmen, in turn, report and are accountable to the Minister for Justice for the courts' performance. This hierarchical conception of court governance has already created significant difficulties. The following examples will serve to illustrate the point.

The appointment of presidents and vice presidents of the courts is clearly in the gift of the Minister for Justice. There is very little consultation with the either the legal profession or with the judges prior to such appointments. The Minister may, therefore, exercise considerable influence upon the direction of a court when such an appointment is made. This is particularly the case since it is court presidents who are responsible for managing the affairs of the court and, in this context, for initiating disciplinary proceedings against judges for whom they are responsible.

Since the advent of the third Meciar government, the presidents of the courts have been required to report to the Minister for Justice on a number of important matters. If there are delays in hearing cases, judges are required to report these to their presidents who, in turn, report their nature and extent to the ministry. Similarly, but in reverse, the presidents are responsible for carrying out instructions from the Minister for Justice. Thus the minister under a recent programme known as the 'clean hands' initiative asked presidents to give priority to hearing commercial, bankruptcy, privatisation and corruption cases, to appoint special panels of judges to hear them and to provide reports on the progress and outcome of every case.

Recently, the Minister for Justice wrote to each of the presidents of the courts requesting them and their judges to attend a policy briefing to be provided by the government. The briefing was not, as might have been

expected, a presentation on aspects of policy and legislation affecting the operation of the courts or even discussion of proposals for relevant law reform. Rather, it was a much wider briefing on current directions in government economic, social and budgetary policy. At the conclusion of the briefing judges were required to sign a register of attendance. Few, apparently, found this latter requirement out of order.

In citing examples like this, it should not be assumed that the ministerial actions described are necessarily or fully motivated by a desire to undermine the autonomy of the judiciary although clearly some of them are. Rather, there is still, in Slovakia, a poorly developed understanding in governmental circles of the nature of and justification for the separation of powers generally and the importance of judicial independence in particular. Deriving in part from Slovakia's recent totalitarian history and in part from civil law understandings of the status and role of junior magistrates, ministers and governmental officials seem to regard judges as an extension of the administrative arm of the State. Requests that judges be accorded increased independence, social recognition and proper monetary remuneration tend, therefore, to fall on somewhat uncomprehending ears.

Nevertheless, the judges themselves have become significantly more active in pressing just such demands. The Association of Slovak Judges has been established and 70% of Slovakia's 1050 judges have joined. Its charter describes its aims as being to

represent the interests of judges, to assist with their professional preparation, to strive to ensure their independence and to promote the Rule of Law. Since its establishment its principal task has been to make representations to the Minister of Justice with respect to legislation concerning the appointment, employment and government of judges at all levels.

Ever since Slovakia's inception, the Meciar government has promised to overhaul the existing legislation governing the judiciary. To that end, the Association of Judges has met with government officials on many occasions to negotiate a new statute embodying measures which it believes desirable. The judges' reform programme is straightforward. They seek:

1. to establish judicial self governance through the establishment of self governing judicial councils;
2. through such judicial councils to:
 - a) influence the amount and allocation of court budgets;
 - b) play an active part in the appointment of new judges and make representations with respect to the appointment of court presidents;
 - c) monitor, evaluate and improve judicial performance;

d) ensure that judges are adequately remunerated and that proper judicial career structures are created;

e) nominate candidates for membership of disciplinary tribunals;

3. to define more precisely the circumstances under which judges may be censured or removed from office for disciplinary reasons and to develop appropriate forums and procedures through which disciplinary matters may be determined;
4. to define more precisely those offices and positions which, if occupied by judges, would place them in a situation where they may have a conflict of interest;
5. to press for the abolition of probationary appointments and its replacement with life tenure for all appointees to the bench.²⁶

To this point, however, negotiations on each and every one of these requests has proven unfruitful and the government has set back the date for the introduction of amending legislation.

The judges' lack of success, however, cannot be attributed to governmental incomprehension or intransigence alone. A number of other factors, some referable to judges themselves, have also contributed to the

²⁶ This is a summary of the major components of draft legislation submitted by the Judges Association to the Government. A copy of the draft legislation is in the author's possession.

current impasse. Most lawyers with whom I spoke observed that many, if not most, of the very good judges left the bench to practise privately when the opportunity arose in 1990. The salaries promised in private practice were much higher than those offered to judges and a mass exodus of highly motivated and qualified personnel resulted. Since that time the difference between salaries earned by private practitioners and judges has continued to widen. This has left Slovakia with a bench of very variable quality.

The problem is exacerbated by the method of judicial selection. Law graduates may apply to become judges immediately after having completed their basic legal studies. They then undergo a further four years of judicial training after which they may be appointed to the bench. Consequently, particularly at lower levels in the court hierarchy, the bench is peopled by very young and inexperienced adjudicators. This does little to enhance the image of judges either in government or in the legal community at large.

During the previous regime, the public's perception of the judiciary was tainted by the close connection between the Communist Party, the government and the bench. After 1989, a number of judges who were known to have acted under instruction in political trials and other trials in which the government had an interest either resigned or were removed. But, principally because of the lack of suitable replacement candidates, a much larger number of judges appointed before 1989 have remained in

place. In the wider community, therefore, a strong legacy of mistrust remains.

In most Western countries, one would expect that the Bar would stand firmly behind judges' requests for greater judicial independence and financial autonomy. But such a commonality of interest has failed to develop. Members of the private legal profession spoke condescendingly and sometimes scathingly about judges, particularly those appointed as magistrates. Most preferred to pursue the lengthy negotiation of disputes to placing their client's interests in the hand of inexperienced and, perhaps, mediocre adjudicators. Many commercial lawyers avoided litigation altogether by developing extensive contacts in relevant departments of State upon whom they could call to resolve or to fix the problems with which they were concerned.

The Judges Association, on the other hand, was dispirited by the lack of cooperation and support forthcoming from the private profession. The more active judges expressed regret that their colleagues in the private sector appeared to place their own interests above those of the profession and the judiciary more generally. Instead of forming a constructive alliance, the Association has been forced to rely heavily on the advice and assistance of the local representative of the American Bar Association in formulating their strategies and making suggestions for legislative reform.

In summary, then, while the Constitution purports to guarantee

judicial independence the reality is that judges face considerable pressure from the government to conform to its expectations. For this situation to change not only the government's but also the private legal profession's appreciation of the role and standing of the judiciary will need to alter very substantially. Such a change might then be reflected first in the attraction and appointment of candidates of high calibre and secondly in providing appointees with a measure of self governance, proper remuneration and appropriate guarantees of independence including that of life tenure. Clearly, the International Commission of Jurists could play an important role in promoting such measures.

Commentary and Conclusion

After this brief exploration of the interaction between the government and competing sources of institutional power, it is difficult to avoid drawing somewhat pessimistic conclusions regarding the current health of Slovakia's constitutional democracy. Certainly, after six months in the country, I returned disheartened, lacking confidence in the country's capacity to effect a successful transition from authoritarianism to pluralism. But, perhaps, I ought not to have been surprised. It was never likely that any such transition would be quick or easy. And in Slovakia in particular there has been much that has militated against it. Let me conclude, therefore with some broader observations which may assist in contextualising the events I have described.

1. The new Slovakian Constitution contains many flaws which have made the task of political transition more difficult than it might have been. The lack of clarity in the division of powers between the President and Prime Minister; the confusion in their respective responsibilities to parliament and the public; the absence of straightforward procedures to resolve electoral disputes; uncertainty as to the effect of Constitutional court decisions; and the contingent position of judges provide just some examples to illustrate the point.

2. Constitutions which work effectively rely heavily on well established conventions of institutional and political behaviour. In Slovakia, behavioural conventions consistent with the operation of a democratic polity have not yet taken root. Rather, institutional and political conventions consistent with centralised and authoritarian government are still very much in evidence. What has become very apparent is that the mere adoption of a democratic form of government has not, in and of itself, engendered either the respect its democratic institutions require or the codes of political conduct necessary to sustain them.

Instead, institutions tend to be identified with individuals. Disputes which involve the creation and preservation of a proper balance between say, the Executive and the Constitutional Court are reinterpreted by politicians and the public as battles between Mr. Meciar as Prime Minister and Mr. Cic as the President of the Constitutional Court. Where conflict occurs, the question asked is

not whether the Constitutional Court's independence should be protected in the face of executive encroachment but whether it is right for Mr. Cic and his judges to tell Mr. Meciar and his ministers that they cannot act in a particular way.

This reflects the fact that under communism, institutions meant very little. What mattered was who in the Party could obtain the upper hand when conflict broke out and what ideological and material advantages might flow for one party faction over another when victory was theirs. Institutions, which were all ultimately under party control, formed part of the political terrain upon which and through which such battles were fought. The idea that they might have an integrity and value in themselves was only dimly appreciated and did not, therefore, play any part in political calculation. The perpetuation of these modes of thought and action does much to explain why the recent conflicts in Slovakia between the President and Prime Minister and the Prime Minister and the Constitutional court have assumed the very personal character that they have.

3. The situation is similar when the relationship between the Minister for Justice and the judges of the ordinary courts is considered. Under the former regime, the judiciary was notionally independent of executive government. Its independence, however, was undermined substantially by the Communist Party's influence over both. Those appointing judges were part of the Party's apparatus in government. Those selected as judges

were either members of the Party or, at least, had its endorsement. Between the two there was a tacit, and sometimes explicit, understanding that the judges would make their decisions in the interest of Party and State.

Unsurprisingly, therefore, it has been difficult for some now in government to appreciate the importance and sensitivity attaching to judicial independence. Although the Party connection has disappeared, in governmental circles the idea that judges, and junior judges in particular, perform administrative functions on behalf of the State rather than judicial functions in the interests of parties to a dispute has stubbornly persisted. The judiciary's tenure, role, status, remuneration, administration and freedom are all perceived through this prism and their value is discounted as a result.

4. The present government's attitude to the parliamentary opposition provides yet another instance of the same general problem. The idea that it is *The Party* that rules is one that is still strongly in vogue. Of course, *The Party* is now elected democratically once every four years. Once in power, however, *The Party* - for which read the present coalition - appears simply to have assumed that the powers, entitlements and methods formerly attached to governing under communism remain more or less the same in the new, more liberal era. There is no sense, then, in which the government perceives itself and the opposition as collaborating in a larger democratic enterprise. Rather, the parliamentary opposition is characterised as the enemy, every avenue for

its destruction is pursued and wherever possible it is deprived of legitimacy and influence. Thus, the opposition's successful motion of no confidence in the government instead of being understood as part and parcel of the parliamentary process has been reinterpreted as treachery. In response, a 'trial', this time in the form of a parliamentary inquiry has been established to determine complicity.

5. Genuine confusion prevails about the standing and authority of the Constitution. Communist Czechoslovakia was also governed by a Constitution which delineated the functions of the important institutions of State and purported to guarantee civil and political rights. Everyone knew, however, that the Constitution meant nothing in practice. Instead, State law was uncovered in Party resolutions, parliamentary laws, governmental decrees, ministerial orders and administrative practices. The platitudinous Constitution had purely symbolic value and not even much of that. The present Constitution has not recovered from this legacy. Inside government and out, people are genuinely bemused by the idea that the Constitution represents and incorporates the country's fundamental law. The Constitution never meant anything before so why, people ask, should we believe that it means something now. In consequence, the government, and indeed the community at large places much greater store on the authority of legislation. In my experience most people believe that where the Constitution and legislation are in conflict, priority is and should be given to legislation. For a

Constitutional scholar this perception seems very curious indeed but it serves to explain how it is that the Prime Minister can be so dismissive of the rulings of the Slovakia's Constitutional Court and why it is that both government and opposition seem so often to misinterpret or neglect the Constitutions' requirements.

6. Slovakia has also lacked a clear democratic tradition upon which to build. It was the Czech Republic rather than Slovakia which chose to draw upon the political and Constitutional traditions established during Czechoslovakia's first democratic republic, formed immediately after the First World War under Tomas Masaryk's leadership. The Czech Constitution drew very consciously on that adopted by the First Republic. Not only did the structures of government created there resemble those established by the first Constitution but the political experience of that former time provided a rich source of convention upon which the new Czech nation could draw in effecting its transition to democracy. In contrast, Slovakia, which has sought actively to differentiate itself from its Czech counterparts, has been left somewhat rudderless in this respect. For this reason, it should come as no surprise that Slovakia still borrows heavily from the constitutional thought and political practice prevalent in the communist era.

7. Slovakia's progress towards democracy and the Rule of Law has, in my view, been substantially retarded by the nationalist focus of its

politics. 'State' has been replaced by 'nation' in the political consciousness of its people. The idea that either State or nation should surrender their sovereignty to society or community has not yet taken root. The preamble to the Slovak Constitution begins "We the Slovak nation..." not "We the people..." as in the American model and the contrast is pointed. The implications for Slovak political life are clear. The government perceives itself as the embodiment of the nation rather

than as the guardian of democracy. It rules in the national interest rather than governing in the interests of a wider, civil society. It apportions blame for its misfortunes too readily to other nations rather than seeking their causes at home. It interprets substantive opposition too rapidly as anti-Slovak instead of acting constructively to remedy the weaknesses that have been identified. In summary, it centralises power in the nation's cause rather than decentralising it in the peoples'.

The Universality of Human Rights

*Bertrand G. Ramcharan**

Introduction

The history of human rights, the experience of the League of Nations, the philosophy and practice of the United Nations bear out the universality of rights. All Member States of the United Nations, by the very act of joining the organisation, commit themselves to the principle of universality in the Charter and in the Universal Declaration of Human Rights. The commitment to universality is, itself, universal.

The concept of human rights is part of the intellectual patrimony of humankind. As civilisations interacted and learnt from one another, concepts of dignity, law, freedom, equality, liberty and rights developed over time. The Universal Declaration of Human Rights drew upon the intellectual well-springs of Africa, the Americas, Asia and Europe in a distillation of universal rights that are as valid today as the day they were proclaimed fifty years ago, on 10 December 1948. The Universal Declaration of Human Rights has subsequently been re-endorsed in international and regional

treaties, and in authoritative policy pronouncements by governments and peoples of Africa, the Americas, Asia and Europe. The universality of the Declaration is thus unassailable. It is also well-established in the United Nations that there is a common standard for all peoples when it comes to dealing with serious violations of human rights.

The idea that all human beings, at the end of the twentieth century, possess as part of their birthright a core of inalienable rights is not disputed. What is sometimes debated is the content of particular rights and the need for change. This is a legitimate debate. The international human rights treaties inspired by the Universal Declaration contain amendment procedures that could deal with claims for modernisation or updating. The Universal Declaration, however, stands on its own as a historic, inspirational document, with its place secure in the pantheon of world human rights instruments that have excited the imagination of its and subsequent generations. The universality of core human rights is quite compatible with cultural

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diversity. The argument of cultural diversity should not challenge the core universal human rights but, rather, might influence the mode and manner of their application in the contexts of particular societies. One can, for example, proclaim freedom of religion or belief, while leaving it to each person or unity to choose a religion or belief. The notion of good faith in the application of universal human rights norms comes into the picture here.

The existence of duties does not negate the universality of human rights. Rather, as is explicitly recognised in Article 29 of the Universal Declaration of Human Rights, "Everyone has duties to the community, in which alone the free and full development of his personality is possible". In the selfsame article of the Universal Declaration, it is further provided, however, that in the exercise of rights and freedoms, one may be subject only to such limitations as are determined by law, solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

There is an irrefutable democratic test that confirms the concept of the universality of rights. It is a simple matter. Just ask any human being: Would you like to live or be killed? Would you like to be tortured or enslaved? Would you like to live freely or in bondage? Would you like to have a say in how you are governed? If there is any critic of universality who

would argue that an individual would choose execution to life, and bondage or serfdom to freedom, let him or her come forth. The democratic test of universality is, in our view, the basis for its strongest affirmation.

I - Third World Representatives Played a Key Role in Drafting the Universal Declaration of Human Rights

It is a misunderstanding of history to say that the Universal Declaration of Human Rights was a Western product. To insist on this would be to sully the memory of Africans, Asians and Latin Americans who contributed substantially in the Commission on Human Rights and the General Assembly of the United Nations when the Universal Declaration was drafted.

In the Commission on Human Rights, the drafting of the Universal Declaration took place between its first and third sessions, from 27 January 1947 to 18 June 1948. The membership of the Commission in 1946 consisted of Australia, Byelorussian SSR, Chile, China, Egypt, France, India, Iran, Lebanon, Philippines, USSR, United Kingdom, USA, Uruguay and Yugoslavia. The overwhelming majority of the Commission, 11 to 4, was thus from Africa, Asia, Latin America and Eastern Europe. The developing and East European countries were also in the majority, 4 to 2, in the

Commission's drafting group on the declaration. At the second session, for example, the Drafting Group consisted of the Byelorussian SSR, France, Panama, the Philippines, the USSR, and the USA. These proportions existed at all three sessions of the Commission.

The drafters from the developing countries included General Romulo from the Philippines, Dr. P. C. Chang from China, Mr. Omman Obeid from Egypt, Mrs. Hansa Mehta from India, Dr. Ghasseme Ghani from Iran, Dr. Charles Malik from Lebanon (Rapporteur), Dr. José Mora from Uruguay, and Mr. Hernan Santa Cruz from Chile. Their contribution, each one of them, to the drafting of the Declaration was stellar.

At the very first meeting of the first session of the Drafting Committee of the Commission on Human Rights, the Australian member, Col. Hodgson, asked the Secretary, Professor Humphrey, about the principles adopted and the philosophy behind the draft outline submitted by the Secretariat. Professor Humphrey replied that the Secretariat outline "contained no statement about the philosophy on which the Secretariat document was based because this document had not been based on any philosophy". "The Secretariat", he explained, "had merely prepared an

outline to serve as a basis for the discussion of the Drafting Committee. In doing so, it had attempted to include all of the rights mentioned in various national Constitutions and in various suggestions for an International Bill of Human Rights".¹

In the drafting process, detailed draft declarations were submitted by Chile, Cuba and Panama. Furthermore, in compiling materials from all over the globe for submission to the Commission as the basis of its work in drafting the Declaration, the Secretariat drew upon the constitutions and legislation of 55 countries, among whom the following were from Africa, Asia, Latin America and Eastern Europe: Afghanistan, Argentina, Bolivia, Brazil, Byelorussian SSR, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Poland, Saudi Arabia, Syria, Turkey, Ukraine, USSR, Union of South Africa, Uruguay, Venezuela, Yugoslavia. Only 14 were from Western countries: Australia, Belgium, Canada, Denmark, France, Greece, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Sweden, UK and USA.²

1 E/CN.4/AC.1/SR.1, at 5.

2 See E/CN.4/AC.1/3/Add.1.

Dr. Malik of Lebanon is recorded as urging at the fourteenth meeting of the first session of the Commission on Human Rights, on 4 February 1947, that the Commission should base itself on the following four principles:

1. The human person is more important than the racial, national, or other group to which he may belong;
2. The human person's most sacred and inviolable possessions are in his mind and his conscience, enabling him to perceive the truth, to choose freely, and to exist;
3. Any social pressure on the part of the State, religion, or race, involving the automatic consent of the human person is reprehensible;
4. The social group to which the individual belongs, may, like the human person himself, be wrong or right: the person alone is the judge.⁵

At the same meeting of the Commission, Mr. Obeid of Egypt is recorded as observing that in the course of the debate until then "no mention had been made of the duties of the individual, which were a corollary to his rights".⁴ A few days earlier, Mr. Obeid made the following plea for justice for the peoples of the world:

Mr. Obeid (Egypt) recalled the disillusionments and conflicts which had followed the proclamation of President Wilson's fourteen points, after the First World War. The principles of human rights should be set forth in clear terms. *The peoples of the world would greet with enthusiasm the first action taken by the United Nations to enforce redressment of wrongs.*⁵

The spirit animating the members of the Drafting Committee is inspiring to read, even fifty years later. At the second meeting of the first session of the Drafting Committee, Professor Cassin of France complimented the outline of the Secretariat as a solid and interesting basis for the work of the Committee. He proposed that two or three fundamental principles should be incorporated in the outline.

1. The unity of the human race or family;
2. The idea that every human being has a right to be treated like every other human being;
3. The concept of solidarity and fraternity among men.⁶

³ E/CN.4/SR.14, at 3-4.

⁴ Ibid, 2.

⁵ E/CN.4/SR.8, at 3.

⁶ Id, SR.2, at 2.

Mr. Santa Cruz of Chile thought "that in his opinion the Committee must draw up a Charter of Human Rights giving it not only legal but real human content... [It]... should be a true spiritual guide for humanity enumerating the rights of man which must be respected everywhere".⁷

For Mr. Malik of Lebanon

The first attempt would be to lay down the fundamental principles to be enunciated, which would ... constitute the Manifesto or Credo of the United Nations concerning human rights. The second step would be to distil from this general basis of principles certain positive laws which will then be entered into by the parties who wish to subscribe to them.⁸

The opening article of the Universal Declaration was significantly influenced by Asia. During the second session of the Drafting Committee, on 5 December 1947, General Romulo of the Philippines proposed a redraft of Article 1 as discussed at the first session of the Drafting Committee, in June 1947. The Chairman then invited the

representatives of France and the Philippines to submit a new text of the article.⁹ At the ninth meeting of the Drafting Committee, on 10 December 1947, General Romulo proposed the following text:

All men are brothers. Being endowed by nature with reason and conscience, they are born free and possess equal dignity and rights.¹⁰

Following a discussion, the following text proposed by the Philippines and France was adopted:

All men are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another like brothers.¹¹

Article 1 of the Universal Declaration, as adopted exactly a year later, on 10 December 1948, read:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

7 Id, SR.2, at 3.

8 Id, SR.5, at 4.

9 E/CN.4/AC.2/SR.2, at 4-7.

10 E/CN.4/AC.2/SR.9, at 21.

11 Ibid.

General Romulo was particularly active in the Drafting Committee. The record of the meeting on 9 December 1947, shows him proposing the following wording:

Everyone has the right to take an effective part in his Government directly or indirectly through elections which should be periodic, free and by secret ballot.¹²

The day after General Romulo made this proposal in the Drafting Committee, Mr. Amado of Panama is recorded as proposing the following text to be included in the Declaration:

The State has a duty to maintain, or to ensure, that there are maintained, comprehensive arrangements for the promotion of health, for the prevention of sickness and accident, and for the provision of medical care and of compensation for loss of livelihood.¹³

Two days earlier, Dr. Malik of Lebanon, in a parallel working group, had argued "that the social and economic rights and the problem of discrimination were very important and should form the subject of a Convention".¹⁴ Earlier, in the plenary Commission on 5 February 1947, the Chinese representative, Mr. Chang,

had "warned" against the danger of producing a document which would not accord with the times owing to its being out of touch with the spirit and atmosphere of the post-war era. He would like to see the expression "freedom from want" appear.¹⁵

In the Commission on Human Rights on 31 January 1947, as the Commission set about the elaboration of a Universal Declaration of Human Rights, the representative of India submitted one of the pathfinding proposals that would subsequently influence the Commission (E/CN.4/11). The document took the form of a draft resolution for adoption by the General Assembly as a declaration of rights. It is an instructive document. In its preambular part it recognised "the fact that the United Nations has been established for the specific purpose of enthroning the natural rights of man to freedom and equality before the law, and for upholding the worth and dignity of human personality". It went on to propose that the following be incorporated into a "General Act" of the United Nations General Assembly:

(a) Every human being is entitled to the right of liberty, including the right to personal freedom; freedom of worship; freedom of opinion; freedom of assembly and

¹² E/CN.4/AC.2/SR.7.

¹³ E/CN.4/AC.2/SR.8, at 11.

¹⁴ E/CN.4/AC.3/SR.5, at 3.

¹⁵ E/CN.4/SR.4, at 6.

association; and the right to access to the United Nations, without risk of reprisal, wherever there is an actual or threatened infringement of human rights.

(b) Every human being has the right of equality, without distinction of race, sex, language, religion, nationality or political belief.

(c) Every human being has the right of security, including the right to work, the right to education, the right to health, the right to participation in government, and the right to property, subject only to the overriding considerations of public weal when the State or its appropriate organs acquire it after paying equitable compensation.

The draft added that:

Nothing mentioned in this Act shall be construed as not obligating the individual to his corresponding duties to his own State and to the international community under the United Nations.

The document foresaw subsequent developments in the United Nations when it proposed that:

The Security Council of the United Nations shall be seized of all alleged violations of human rights, investigate them and enforce redress within the framework of the United Nations.

This is a mere sampling of the defining contributions of the representatives of Africa, Asia and Latin America in the drafting of the Universal Declaration of Human Rights. The same pattern is to be found in the deliberations of the General Assembly. It is true that at this time large parts of the developing world were under colonial tutelage. But they had their champions and spokespersons among the drafters of the Universal Declaration, who did them proud. The Universal Declaration, beyond a doubt, drew on the intellectual patrimony of the peoples of the world. The Economic and Social Council was particularly attentive to take account of the historical development of human rights. By a resolution adopted on 21 June 1946, during its second session, it requested the Secretary-General to make arrangements for, among other matters, "the preparation and publication of a survey of the development of human rights".¹⁶

16 See on this document E/CN.4/30, 12 November 1947.

II - Regional Affirmations of Universality

The Universal Declaration of Human Rights has inspired regional instruments for the protection of human rights throughout the globe, all of which have reaffirmed its precepts. In the **African Charter on Human and Peoples' Rights** (1981), members of the Organisation of African Unity (OAU) reaffirmed the pledge they had solemnly made in the OAU Charter to coordinate and intensify their cooperation and efforts to "achieve a better life for the peoples of Africa and to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". In adopting the African Charter, they took into "consideration the virtues of their historical tradition and the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights". They recognised that "fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality of peoples' rights should necessarily guarantee human rights".

The **Arab Charter on Human Rights** (1994) "reaffirmed the principles of the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social

and Cultural Rights and the Cairo Declaration on Human Rights in Islam".

In adopting the **Cairo Declaration on Human Rights in Islam** (1990), the Member States of the Organisation of the Islamic Conference wished "to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Sharia. They declared their belief "that fundamental rights and universal freedom in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible - and the Ummah collectively responsible - for their safeguard".

The **LAWASIA Statement of Basic Principles of Human Rights** (circa 1980) noted that all governments in the region are committed to the Universal Declaration of Human Rights. It encouraged all governments in the region to ratify the International Covenant on Economic, Social and Cultural Rights and on Civil and Political Rights and the Optional

Protocol thereto. While recognising that there were differences of culture, religion, historical progress, educational standards and economic development amongst the countries of the LAWASIA region, it affirmed the common humanity of all people and proceeded to set out basic human rights as the minimum standard that all governments in the region should abide by.

The American Convention on Human Rights (1969) recognised that essential human rights are not derived from one's being a national of a certain State, but are based upon attributes of the human personality and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States. It noted that these principles had been set forth in the Charter of the Organisation of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they had been reaffirmed and refined in other international instruments worldwide as well as regional in scope.

III - Universality Is Consistent with Cultural Diversity

Far from negating the existence of universal rights, cultural diversity reinforces and is protected by those very rights. Article 27 of the International Covenant on Human

and Peoples' Rights is evidence of this. It provides that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the rights, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

The international body with the longest experience in the application of international standards is the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations. In a review of the first fifty years of its experience, the Committee laid down the best doctrine to date on the application of international standards in the light of national conditions:

The Committee discussed the approach to be adopted to evaluating national law and practice against the requirements of international labour conventions. It reaffirms that its function is to determine whether the requirements of a given Convention are being met, whatever the economic and social conditions existing in a given country. Subject only to any derogations which are expressly permitted by Conventions itself, these requirements remain constant and uniform for all countries. In carrying out this work the Committee is

guided by the standards laid down in the Convention alone, mindful, however of the fact that the modes of their implementation may be different in different States. These are international standards, and the manner in which their implementation is evaluated must be uniform and must not be affected by concepts derived from any particular social or economic system".¹⁷

The late Senator José Diokno of the Philippines summarily dispatched spurious arguments about the cultural diversity affecting universality as follows:

Two justifications for authoritarianism in Asian developing countries are currently fashionable ...

One is that Asian societies are authoritarian and paternalistic and so need governments that are also authoritarian and paternalistic; that Asia's hungry masses are too concerned with filling their stomachs to concern themselves with civil liberties and political freedoms; that the Asian conception of free-

dom differs from that of the West; that, in short, Asians are not fit for human rights.

Another is that developing countries must sacrifice freedom temporarily to achieve the rapid economic development that their exploding populations and rising expectations demand; in short, that governments must be authoritarian to promote development.

Well, the first justification is racist nonsense - and I will say no more than that. The second is a lie: authoritarianism is not needed for development; what it is needed for is to maintain the status quo.

Regardless ... of what dictators and social scientists may say, we Asians know that the loss of freedom does not lead to a better life. On the contrary, we know that life cannot become better - it cannot even be good - unless people are free.¹⁸

This issue was also addressed by the highest judges from South Asian countries on the eve of the Vienna

17 Report of the Committee of Experts on the Application of Conventions and Recommendations; International Labour Conference, 63rd Session, 1977, para.31.

18 Text of the Amnesty International 1978 Sean MacBride Human Rights Lecture delivered by José Diokno, former Senator of the Republic of the Philippines, AI Index: ICM 01/11/78. 8 (Emphasis added).

World Conference on Human Rights. Chief Justices from Bangladesh, India and Pakistan adopted a statement on human rights stressing that "human rights is not a Western concept. Human rights have been invoked by the peoples of this region both historically and contemporaneously. Human rights formed the basis of the Non-cooperation Movement against the British in colonial India. Human rights in this region have also formed on the basis of struggles against authoritarian regimes and military rule. Mass movements (e.g., for gender justice, for environmental protection) have gained strength and sustenance from human rights. Such movements have in turn empowered the peoples of the SAARC region and they will not tolerate any attempts at turning the clock back on human rights".

"It is worth recalling", they continued, "that three countries in the (SAARC) region, India Pakistan and Sri Lanka, subscribed to the Universal Declaration of Human Rights as independent States after achieving decolonisation. Nepal has been quick to recognise international human rights instruments immediately after their mass-based movement brought democracy to the country by ousting an authoritarian regime. Bangladesh, Bhutan and the Maldives of course

subscribed to the Universal Declaration on becoming Member States of the United Nations".

They insisted: "Human rights are already universal for the peoples of Asia. It is they who press for more effective human rights mechanisms even while their governments demur and desist. So far as human rights are concerned, the peoples of South Asia are running - their governments are crawling. South Asian peoples are asserting and exercising their human rights. This is evident, to give just one example, in the electoral turnouts".

"The concept of human rights has already proved itself to be vital to the peoples of the SAARC countries".¹⁹

An eminent group of Commonwealth human rights judges and lawyers meeting in Georgetown, Guyana, in September 1996, building upon previous declarations in Africa, Asia and Europe, authoritatively affirmed that:

Fundamental human rights and freedoms are universal and are inherent in all human kind. They find expression in constitutions and legal systems throughout the world, they are anchored in the internatio-

19 South Asian Judiciary Task Force Appeal signed by Justice M.N.Bhagwati (Former Chief Justice of the Supreme Court of India), Chairperson of the Task Force; Justice Dorab Patel (Former Justice of the Supreme Court of Pakistan) and Justice K.M. Subhan (Former Justice, Appellate Division of the Supreme Court of Bangladesh), in Bangkok on 29 March 1993. (Emphasis added).

nal human rights instruments by which all genuinely democratic States are bound; their meaning is illuminated by a rich body of case law in international and national courts.

The universality of human rights and freedoms derives from the moral principle of each individual's personal and equal autonomy and human dignity. That principle transcends national political systems and is in the keeping of the independent judiciary.

IV - Rights and Duties Go Hand in Hand

It is a commonplace proposition of the law that rights entail duties. It has never been asserted in any legal system that the existence of duties negates the existence of rights. When the Universal Declaration of Human Rights was being drafted, towering figures such as Mahatma Gandhi, when asked for their views, pointed out that in some societies the value-system had a starting-point of one's duties to the community. The drafters of the Universal Declaration took this into account in elaborating the document. What the declaration offers are guiding precepts to be fleshed out in all societies, regardless of their political, legal, economic or social systems, or their philosophies or values. As

Gandhi noted, Hinduism emphasises duties. But that has not precluded the inclusion of fundamental rights in the Indian Constitution, or their enforcement by the Indian Courts. The African Charter on Human and Peoples' Rights places due emphasis on one's duties to the community while, at the same time, vigorously asserting the right of Africans.

The duties correlating to rights are to be determined in the interpretation and application of each particular right stated in the treaties to which governments have subscribed. It is a task of the implementation bodies and of the courts. It surely cannot be upheld as a proposition that because some societies place emphasis on the individual's duties to the community there can be no universal human rights.

Concluding Observations: A Debate About Power rather than about Rights

The foregoing discussion has demonstrated, we hope, the existence of a global consensus that human rights are universal and should be protected and protected globally. Evidence of this comes from no less a personality than the Prime Minister of Malaysia, an ardent critic of the assertiveness of the West. In a speech delivered at the 29th International General Meeting of the Pacific Basin Economic Council at Washington D.C. on 21 May 1996, Dr. Mahatir bin Mohamad addressed the "Asian

Values Debate" and advanced, among others, the following propositions:

- There is a large common ground of values which we all share, arising out of the fact that we are human, that we are parents, and that we, being gregarious, must live in society, and so on. ...
- Any atrocity anywhere cannot be tolerated. It should be punished. No one should be allowed behind the cloak of cultural relativism. ...²⁰

This is the very essence of the universality of human rights. What Dr. Mahatir takes umbrage about is

the unlevel playing field in the allocation of world power: He pleads: "If it is preposterous and mad for Asian leaders to threaten sanctions when Europeans fail to measure up to their standards and norms, could it not be a little preposterous for Europeans to threaten sanctions when decent Asian societies prefer their own standards and norms, and not Europe's?" It is not so much that the standards are different, but rather that the North holds the power and can wield sanctions whereas the South cannot reciprocate. In the philosophy of human rights, there would be nothing wrong with Asians using sanctions against Western violations of human rights, and lecturing the West.

20 Dato Seri Dr. Mahatir bin Mohamad, "The Asian Values Debate", *The Perdana Papers*, published by the Institute of Strategic and International Studies, Kuala Lumpur, Malaysia. ISIS, Malaysia, 1997. See also, Anwar Ibrahim, "The Asian Renaissance", *Times Books International*, Singapore/Kuala Lumpur, 1996. Anwar Ibrahim is Deputy Prime Minister of Malaysia.

The Universal Declaration of Human Rights - Is it Universal ?

*Dato' Param Cumaraswamy**

On 26 July 1997, the Economic Adviser to the Malaysian government, Tun Daim Zainuddin, in his acceptance speech after receiving the honorary doctorate in philosophy from the University Utara, Malaysia, called for a review of the 1948 Universal Declaration of Human Rights. He claimed that the fundamentals that influenced the Declaration should be reviewed as the document is outdated. He went on to say *inter alia* :

When the Declaration was proclaimed on 10 December 1948, there were only about 40 Members in the United Nations. Today, there are more than 180 Members.

He proposed that the review of the Declaration be done as part of the ongoing process of reforming the structure of the United Nations. However, he explained:

Reform does not mean that the present Declaration is fundamentally flawed from the very beginning – what it

means is that the passage of time and the emergence of new situations and issues necessitate the formulation of a new Declaration or major overhaul of the present Declaration to make it relevant for present time and to make it acceptable to all nations and peoples.

That speech was given wide coverage in the media. It was at a time of the 30th meeting of the ASEAN Foreign Ministers in Kuala Lumpur. The following day, the Prime Minister of Malaysia was reported to have supported the call for review. Several ASEAN Foreign Ministers joined and endorsed the call for review. Recently, the Premier of China supported the call. Hence the present concerns over the 1948 Declaration.

In 1998, the international community is celebrating the Fiftieth anniversary of the Universal Declaration of Human Rights. The United Nations, learning lessons from the devastating war, placed unprecedented importan-

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ce in human rights. Article 1 of the organisation's Charter states that one of the purposes of the United Nations is "to achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". In December 1948, the General Assembly adopted the Universal Declaration of Human Rights by 48 votes to none with eight abstentions, giving a substance to the concept of human rights mentioned in the Charter. Until present, the Universal Declaration of Human Rights has been considered and generally accepted as the manifestation of common standards for all governments and individuals. The Declaration is of a universal nature.

During the past 49 years, the international community has witnessed the gradual but steady advancement in the direction of the internationalisation of human rights.

First, this development is seen in the increasing awareness, with an international dimension, that human rights must be respected and protected whichever nationality one may have, wherever one may live, and whatever status one may hold. This is awareness of the universal nature of human rights. It has now been made clear that human rights are matters of legitimate concern of the international community.

Secondly, this advancement has been taking place in the form of codifi-

cation, namely drafting and adopting various international human rights instruments. At present, a large number of international human rights instruments embodies the common understanding of human rights by the international community.

Thirdly, and this is the most recent and most difficult aspect, the advancement has been seen in the establishment of international machinery to monitor human rights situations in various parts of the world and to ensure that human rights are protected as stipulated in the international instruments.

In the course of the two-year preparation for the World Conference on Human Rights held in Vienna in June 1993, the universal nature of human rights as contained in the Universal Declaration of Human Rights was questioned by representatives of a number of governments, notably of the Asian regional group. Although they recognised that some human rights were universal, they asserted that there were other human rights which were founded on the Western ideal of individual autonomy and did not accord with "Asian values". It was also argued that the Universal Declaration of Human Rights had been drawn up without their participation, therefore was not considered truly universal. It was further stated that in the absence of economic development and social stability, emphasis on civil and political rights as in the developed countries would be inappropriate.

These views were reflected in the Bangkok Declaration which was adopted in March 1993 by the Asian regional group States, prior to the World Conference on Human Rights.

In Article 8, the Ministers and representatives of Asian States recognised:

that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

In Article 10, they reaffirmed:

the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights.

It must be noted, however, that even though the majority of the current member States of the United Nations did not participate in the drafting and adoption of the Universal Declaration, many of those new States subsequently joined in the codification process, confirming the universal concept of human rights put forward by the Universal Declaration. Indeed, the relativist positions were inconsistent and confusing in the sense that

they accepted, on the one hand, universal human rights in general terms, and, on the other hand, emphasised on the legitimacy of a different understanding and practice of human rights arising from different historical, cultural and religious traditions.

Many Asian non-governmental organisations, intellectuals, ethnic and cultural minorities, which met in Bangkok at the same time as the Asian States met, issued the NGO Bangkok Declaration (document A/CONF.157/pc/83) which presented a clear contrast to the human rights relativism. They upheld the universality of human rights and argued that cultural and religious traditions did not constitute an obstacle to the realisation of international human rights norms.

The World Conference on Human Rights, held in Vienna in June 1993, was the first global conference to review the subject of human rights in the contemporary world. Some 171 Member States participated. They adopted, by consensus, the Vienna Declaration and Programme of Action.

The Vienna Declaration and Programme of Action is the outcome of intensive diplomatic negotiations. Its final text shows traces of political compromise. However, the Declaration did not leave any doubt or ambiguity about the universality of human rights. This is proven by the following paragraphs of the Declaration:

Reaffirming their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights,

Reaffirming the commitment contained in Article 56 of the Charter of the United Nations to take joint and separate action, placing proper emphasis on developing effective international cooperation for the realisation of the purposes set out in Article 55, including universal respect for and observance of human rights and fundamental freedoms for all, ...

Emphasising that the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,

...

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for and observance and protection of all human rights and fundamental freedoms

for all in accordance with the Charter of the United Nations, other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.

...

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

32. The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.

...

11.(4) The World Conference on Human Rights strongly recommends that a concerted effort be made to encourage and facilitate the ratification of and accession or succession to international human rights treaties

and protocols adopted within the framework of the United Nations system with the aim of universal acceptance. The Secretary-General, in consultation with treaty bodies, should consider opening a dialogue with States not having acceded to these human rights treaties, in order to identify obstacles and to seek ways of overcoming them.

Attention must also be drawn to the Joint Communiqué of the 26th ASEAN Ministerial Meeting in Singapore in July 1993 wherein the ASEAN States declared their commitment to the Vienna Declaration and Programme of Action.

When the States accept human rights as stated in the Universal Declaration and other international human rights instruments, they still need to deal with the difficult and delicate task of interpreting and applying these rights in the local contexts. Realisation of human rights and implementation of international human rights norms could be conditioned by historical, cultural and social particularities of the country concerned. This, however, does not deny nor diminish the importance of the principle of universality of human rights as enshrined in the 1948 Declaration.

From what I have outlined it will be realised that the 1948 Declaration came under close scrutiny as recently as 1993 and was reaffirmed by 171 Member States. Further, the large number of international codifications

on human rights derive their source from the 1948 Declaration. Some figures are of interest. As on 31 December 1996, of the twenty-five UN treaties on human rights the number of Member States who have ratified some of them are:

- The Covenant on Civil and Political Rights 137
- The Covenant on Economic, Social and Cultural Rights 135
- Convention on the Elimination of All Forms of Racial Discrimination 148
- Convention on the Rights of the Child 89
- Convention on the Elimination of All Forms of Discrimination against Women 154
- Convention Relating to the Status of Refugees 126

The very fact that so many Member States have ratified or acceded to these codifications is further testimony of universal acceptance of the 1948 Declaration. Any review of the source of these codifications would have a far-reaching and destabilising effect on international human rights law and could very well threaten world peace.

In his recent speech delivered in Helsinki, Finland, the Secretary-General of the United Nations stated:

There is no one set of European rights and another of African rights. Human rights assert the dignity of each and every individual human being, and the inviolability of the individual's rights. They belong inherently to each person, each individual, and are not conferred by, or subject to, any governmental authority. There is not one law for one continent, and one for another. And there should be only one

single standard - a universal standard - for judging human rights violations.¹

The moving words of the late Filipino patriot, José Diokno, should remind us of what these rights are all about. He said:

Human rights are more than legal concepts; they are the essence of man. They are what make human. That is why they are called human rights: deny them and you deny man's humanity.²

1 Address by Secretary-General, Kofi Annan, to the Foreign Institute of the Paasiviki Association in Helsinki on 13 August 1997.

2 Lecture delivered at a Conference on Human Rights at Siliman University on its 80th Foundation Day, 31 August 1981.

*Rhetoric, Regret, and Reform -
The Need for an Appropriate UN Response
to the Killing of Human Rights Workers*

*Todd Anthony Howland**

Introduction

On 4 February 1997, five unarmed United Nations human rights workers were ambushed and killed in Rwanda.¹ They were employees of the UN High Commissioner for Human Rights.

To mark the anniversary of the tragic execution of my colleagues from the UN Human Rights Field Operation in Rwanda, it seems appropriate to review the lessons learned and to evaluate the action taken to minimize the risk of another such tragedy. While similar tragedies continue to unfold, the UN institutional response has not gone beyond rhetoric. Immediate action is needed.

What merits the attention of the leadership of the UN and action from it as an institution, is not that the lives of its workers are worth more than the hundreds of thousands who have already been killed in Rwanda and elsewhere, but that the workers represented a hope that the international community could contribute through their peace-building efforts to the creation of a society where human rights are respected.² It is time to act when that hope is being extinguished.

The five were members of Human Rights Field Operation in Rwanda (HRFOR) and part of its Cyangugu prefectural team. Cyangugu is a region that borders the Democratic Republic of the Congo (ex-Zaire) and Burundi and is furthest from the

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- 1 Killings of Five Members of the HRFOR in Karengera Commune, Cyangugu Prefecture, on 4 February 1997, HRFOR/STRPT/43/1/27 February 1997/E.
- 2 "Peace-building is action to identify and support structures which will tend to strengthen peace in order to avoid a relapse into conflict." Boutros Boutros-Ghali, *Agenda for Peace* 46 (2d ed. 1995). See also, Reed Brody, "UN Peace-Building and Human Rights", 53 *Int'l Com. Jur. Rev.* 1 (1994).

Rwandan capital Kigali. In an attempt to underline the viciousness of the attack, the victims were riddled with bullets and one was even decapitated. The victims were: The British team leader for the region, Graham Turnbull, who abandoned legal practice for social change work in Rwanda. The Cambodian specialist, Sastra Chim-Chan, father of two small children, had studied human rights at Columbia University, and was the only human rights officer in the HRFOR with combat experience. He had been regiment commander in the war of liberation against the genocidal Khmer Rouge. Before coming to Rwanda, he worked with the UN High Commissioner for Human Rights' office in Cambodia and had decided to come to Rwanda as a means to repay the international community for its attempts to help bring respect for human rights to Cambodia.³ He was killed just one month before he was scheduled to return home to his family. Agripain Ngabo, Jean Bosco Munyaneza, and Aimable Nsensiyumvu were instrumental in the Cyangugu team, the team that had created Rwanda's first human rights theatre troupe, which travelled village to village promoting

the development of a human rights culture.

Since mid-1994, members of the UN Human Rights Field Operation in Rwanda (HRFOR) served as peace-builders. The HRFOR employed an average of about 100 international and 100 Rwandan staff working to help Rwanda's transition into a society ruled by law. It had an office in each of the 12 regions of the country.⁴ After requesting the UN peace-keepers to leave, the Rwandan government encouraged the HRFOR to stay and work with it and donor organizations to implement projects such as training for communal police and human rights awareness campaigns.⁵ The government did this even after the HRFOR had been appropriately criticized for not meeting its potential. At the same time, the opposition used HRFOR reports criticizing human rights violations by the government. But over the last few months of 1996, seismic demographic shifts were occurring that would topple this delicate balance. UN headquarters in New York and Geneva were silent, lacking any structural mechanisms to minimize the risk to peace-builders.

- 3 Seth Mydans, "UN Aide Left Legacy of Asia Role on Rights", *New York Times* A5 (February 12, 1997).
- 4 For an overview of the structure and functioning of the HRFOR, see William Clarence, "The Human Rights Field Operation in Rwanda: Protective Practice Evolves on the Ground", 2 *Int'l Peacekeeping* 291 (1995). The HRFOR was thoroughly criticized in the early stages. *African Rights, Rwanda: A Waste of Hope, the United Nations Human Rights Field Operation* (1995). Criticism of the HRFOR eventually softened into mixed reviews. See e.g. Amnesty International, Rwanda and Burundi, A call for action by the international community, 3-14 (September 1995).
- 5 See Letter from Permanent Representative of Rwanda to the United Nations addressed to the Secretary-General, U.N. Doc. S/1995/1018 (December 8, 1995); Report of the United Nations High Commissioner for Human Rights on the activities of the Human Rights Field Operation in Rwanda, E/CN.4/1996/111, para. 57 (April 2, 1996).

In the last four months of 1996, more than a million refugees returned to Rwanda, among them a sizeable number of the former genocidal militia.⁶ The five UN workers were killed not because of an occupational hazard, but because they were worth more dead than alive to a political faction then alive. Until that day, the precarious position that human rights workers occupied as a fulcrum between opposing forces in Rwanda had been a source of their security.

Their deaths followed the killing of a Canadian priest and three Spanish medical workers just weeks earlier.⁷ It was followed by the killing of two employees of the World Food Program.⁸ These killings are part of an ominous new trend in which civilian peace-builders in Burundi, Cambodia, Colombia, Chechnya and Tajikistan have become targets.⁹

The response to such killings can be divided into four areas: rhetorical, legal response, death policy and proactive measures.

Rhetorical Response

It is not a surprise that this is the only area in which the UN has excelled. Routinely the Secretary-General, the Security Council, and the relevant agency head have condemned these killings.

"This tragedy highlights again the absolute and unconditional urgency of providing international relief personnel with adequate security in the face of criminal terrorist activity which recurs all too often in different parts of the world."¹⁰

Former Security Council President Ambassador Osvald of Sweden urged the Security Council to take every possible measure to enhance the safety and security of all those serving the UN in conflict situations.¹¹

The UN Security Council denounced attacks on its personnel and urged agencies to strengthen safety precautions.¹²

6 Gerard Prunier, "The Great Lakes Crisis", 96 *Current History* 193 (May 1997); Alan Zarembo, "Rwanda's Genocide Witnesses Are Killed As Wheels of Justice Slowly Begin Turning", *Christian Science Monitor* 7 (January 23, 1997).

7 United Nations, IRIN Emergency Update No. 94 on the Great Lakes (5 February 1997). (Hereafter IRIN.)

8 IRIN 198, 20 June 1997.

9 See e.g., "Albania: European Union Pushes for Secure Humanitarian Aid", Inter Press Service (March 25, 1997); Eduardo Gomez Ortega, "Human Rights: EU, ASEAN Asked to Take Measures", Inter Press Service (February 10, 1997).

10 UN Under-Secretary-General for Humanitarian Affairs Yasushi Akashi. (Dec. 2) XINHUA News Service.

11 UN Daily Highlights (Central News Section) July 22, 1997.

12 IRIN 198, 20 June 1997.

The UN Security Council condemned the killing of the HRFOR officers.¹³

Typically the real response has been limited to whether the mission or project should be suspended and the personnel evacuated.

One of the few suggestions to go beyond the rhetoric was a proposal made by the Minister of Foreign Affairs of Canada, Lloyd Axworthy, who proposed to expand the Convention on the Safety of United Nations and Associated Personnel to include peace-builders.

Legal Response

There are domestic and international legal responses possible to the killing of peace-builders.

Murder is a crime in each country where peace-builders have been killed. It is an obligation of the host government and its justice system to investigate and try those responsible.¹⁴ In reality, peace-builders are not operating in States with fully functioning justice systems. It is possible one of the reasons such peace-builders are in that country is to monitor, criticize,

and help facilitate the creation of a functional justice system.

There is an irony of a State, with a weak justice system and a plausible motive to kill peace-builders, being the sole entity to investigate and bring to justice the perpetrators.

In the case of the killing of the UN Human Rights Field Operation personnel, the Rwandan government conducted a swift investigation. While no entity took credit for the killing, the government found that elements of the genocidal militia that had returned to Rwanda with the massive refugee repatriation were responsible. The government believes the militia's apparent motivation for the killings was to show to the world community that it was still in existence and operating openly in Rwanda in defiance of the government in Kigali. The government made numerous arrests within two weeks of the killings. According to the government, some of the suspects resisted arrest and were killed.¹⁵

While the UN had the ability to augment the government's efforts or to even mount a separate investigation under the mandate of the HRFOR, no major effort was mounted. An internal and not well publicized HRFOR investigation basically concurred with the government's investigation and

¹³ IRIN 96, 7 February 1997.

¹⁴ This idea has been reinforced with the adoption by the UN Commission on Human Rights of the Declaration on Human Rights Defenders, E/CN.4/1998/WG.6/CRP.1/Rev. I, 4 March 1998. (It should be noted that while the Declaration is an important achievement it does not address the issues raised in this article.)

¹⁵ IRIN 102, 15-17 February 1997; IRIN 121, 7 March 1997.

findings. This left much of the general public puzzled by the question of how the HRFOR understands the human rights situation in general, given its dependence on the government to carry out the investigation of the killing of its own staff members.

In many countries, those serving in dangerous positions are covered by an additional law and even an additional justice system. For example, the killing of a federal police officer is a murder in a local jurisdiction, a special or aggravated murder in that jurisdiction, and a murder and aggravated murder in the federal jurisdiction.¹⁶

Analogously, there is a similar law to protect UN peace-keepers. It is an international crime to kill peace-keepers. Amazingly, the peace-builders are not covered - even the UN human rights workers - by the Convention on the Safety of United Nations and Associated Personnel.¹⁷ While it institutionalizes some procedures designed to protect peace-keepers, its main concern is the criminal responsibility for intentionally violating the safety of UN workers during a peace-keeping operation of the Security Council or

General Assembly.¹⁸ No such operation existed in Rwanda at the time the peace-builders were killed or for that matter exist in most of the countries where peace-builders have been targeted.

At the very least, there should be a recognition by the UN leadership that the Convention on the Safety of United Nations and Associated Personnel should be modified to include missions organized by UN agencies, and not simply missions authorized by the Security Council and the General Assembly. The Convention should be updated to include peace-builders, and reformed to make explicit reference to future jurisdiction over such incidents by the International Criminal Court for such offences.

Who is a peace-builder or human rights worker will need to be defined. There are international and local employees of the UN, its agencies, and other intergovernmental entities in the areas of human rights (narrowly defined), humanitarian/relief and development. There are international and local employees of international and local NGOs.¹⁹

16 See generally, 29:39 *Crime Control Digest* 6 (29 September 1995). (Upholding Florida law making attack on police officer an aggravated offense.) See also, 13:1 *Am. J. Police* 65 (June 1994).

17 U.N. Doc. A/RES/49/59 (1994).

18 Id.; Christiane Bourloyannis-Vrailas, "The Convention on the Safety of United Nations and Associated Personnel", 44 *Int'l & Comp. L.Q.* 560 (1995); Virginia Morris and Christiane Bourloyannis-Vrailas, "The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly", 88 *Am. J. Int'l L.* 343 (1994) (discussing the drafting and relevant debate involved in the creation of the Convention on UN Personnel).

19 For a discussion of previous efforts to protect human rights activists, see Laurie Wiseberg, "Protecting Human Rights Activists and NGOs - What More Can be Done?" 13 *Hum. Rts. Q.* 525 (1991).

One option, to avoid the pitfall of extended debate about who is a peace-builder, is to integrate the Declaration on the Protection of Human Rights Defenders into the Convention on the Safety of United Nations and Associated Personnel. The Declaration covers those actively engaged in work designed to protect and promote human rights law broadly defined (e.g., work to support basic needs and development would be covered). Given that their work is based on international law and values, it makes sense that the international community would rally behind them if they were killed in furtherance of such law and values.

Another option would be to ensure that the jurisdiction of the International Criminal Court includes the killing of peace-builders.

Field Officers in Rwanda are best left to an internal inquiry, but it is sufficient to say that it can be characterized as inappropriate and inefficient. Given the lack of procedures, such a response is most likely the norm.

The individuals struggling to cope with the trauma of the death of their colleagues are not to be blamed. There is a need for a death policy in the UN, similar to those that exist in many professions, such as the police.²⁰ Model death policies exist and can be easily modified to suit the present needs. Such policies, for example, would call for the immediate intervention of trained personnel to help ensure the response is carried out appropriately, and provides detailed formal line of duty responsibilities to minimize confusion and problems.²¹

Death Policy

While UN regulations touch on aspects of death in service, such as insurance, there is no systematic procedure in place that facilitates an efficient and dignified response. The actual details regarding the response to the deaths of the Human Rights

Proactive Measures

In many countries when a police officer is killed in the line of duty, there is an investigation for prosecution purposes, but also an investigation for policy purposes.²² Each incident is compiled and examined for possible policy recommendations that are designed to minimize risk in the

20 See e.g., Harvey Rachlin, "Need for Death Policy and What They Should Include", 42:9 *Law and Order* 129 (Sept. 1994).

21 In 1995 the organization Concern of Police Survivors surveyed 188 police departments. It found 1/3 of the departments had a death policy. From this survey the organization developed a model death policy.

22 See e.g., George Williams and Charles Moorman's regular evaluation of the killing of police officers in California. 27:4 *J. Cal. Law Enforcement* 101 (Dec. 1993); 28:2 *J. Cal. Law Enforcement* 36 (June. 1994).

future.²³ The head law enforcement officer is normally in charge of these policy investigations and responsible for making recommendations to improve security.²⁴

An Inter-agency task force is needed with a budget that can integrate consultants with relevant experiences from other fields. This task force should draw lessons from the past tragedies and devise ways to institutionalize the lessons learned, e.g.,

- Compile information on all killings. This would be much more than a list, but a detailed case file on each incident.
- Study the case files to draw possible lessons.
- Integrate those lessons into the initial and ongoing training of peace-builders.
- Institutionalize lessons learned, e.g., use holistic security.

- Communication: Communication is much more than a working radio. It must include an ongoing two-way interaction about the political context in which the peace-builders are operating. This

communication must include field worker, operational headquarters staff in country, and organizational headquarters staff in Geneva and New York.

- Stress reduction: Peace-builders are involved in stressful situations. They can become too tied to their work or stressed to be fully aware of the changes going on around them. A staff advocate should be hired to help ensure that the peace-builders' best security mechanism is fully functioning: their own analysis and judgment.

Conclusion/Recommendations

Human rights workers armed only with the law and their ability to persuade should not be targets. But interventions into highly complex crises could result in the peace-builders being worth more dead than alive to a political faction or even a government.²⁵ Being something to everyone is not always possible or sustainable. The human rights field officers are being asked to walk a tight rope for the international community, the least the international community should do is to create the mechanisms needed

23 Another example is the U.S. Department of Justice's yearly publication, *Law Enforcement Officers Killed and Assaulted*.

24 M.D. Whittingham, "Police/Public Homicide - A Current Assessment", 3:10 *Canadian Police Chief Newsletter* 4 (Dec. 8, 1994).

25 This should underscore that interventions are not always worthwhile, or *de facto* have a positive affect. See e.g., Alex de Waal, "Becoming Shameless: The Failure of Human-Rights Organizations in Rwanda", 3 *Times Literary Supplement* (21 February 1997).

to minimize risk to them. For without such mechanisms, the only thing shocking about the dismay expressed by embassies and the UN hierarchy when peace-builders are gunned down,²⁶ is level of cynicism found in such rhetoric.

Peace-building is a new field. It will take time for effective efforts and worthwhile ideas to be institutionalized. Nonetheless, the learning curve for this extremely serious aspect has been too long. Action to minimize risk to peace-builders is long overdue.

Somebody needs to act. The UN High Commissioner for Refugees or Human Rights should use one of the newly organized UN "cabinet" meetings to form an inter-agency task force. This task force should include representatives of the relevant UN agencies and international and national NGOs. It should have a mandate to:

1. Investigate and make recommendations as to how peace-builders can be afforded greater legal protection.
2. Research and provide model death policies. Recommend mechanisms to make effective.

3. Create investigatory team(s) from member States to develop case files on peace-builders who have been killed. Maintain investigatory team(s) for future incidents until a team is housed at the International Criminal Court. Develop sustainable responses where investigatory teams provide assistance to local efforts as well as for possible international responses. A completely separate international investigation should be the exception, reserved for instances where the domestic justice system is not functioning.

4. Recommend changes in training and structure to minimize risk based on study of the incidents. Devise mechanisms to make effective.

The UN system-wide response to the killing of peace-builders tends to indicate that their execution is an acceptable occupational hazard, as no real attempt has been made to examine the incidents and to create structures whereby risk could be minimized. The work of the inter-agency task force hopefully will ensure a coherent and productive UN system-wide response to the killings.

* 26 See e.g., IRIN 95, 6 February 1997.

Commentary

The 49th Session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities

August 1997

Introduction

In the context of an increasingly globalized world, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities held its 49th session from 4-30 August 1997 at the *Palais des Nations* in Geneva, Switzerland. Mr. José Bengoa (Chile) was unanimously elected Chairperson of the session.

Mr. Bengoa opened the session by reminding members of their decision, adopted at the Commission's urging, to refrain from taking action on countries already under public consideration by the Commission on Human Rights. The Chairman urged members to work in an efficient manner and to remain independent and impartial. He raised the question whether international standards are adequate to address today's challenges, suggesting the need to look beyond the UN human rights system.

Under Chairman Bengoa, the Sub-Commission took significant action in the areas of economic, social and

cultural rights, the human rights of women and the girl-child, population displacements and combating impunity of perpetrators of violations of civil and political rights. The body also made significant progress in its discussions on terrorism and human rights. In the area of country resolutions, however, the lack of independence among some members of the Sub-Commission continued to plague the UN body, resulting in the passage of only three country resolutions: Bahrain, the Republic of Congo (Brazzaville), and the Democratic Peoples' Republic of Korea.

Methods of Work

Sub-Commission action to reform working methods, discussed in closed session, suffered from lack of time. In particular, the Sub-Commission postponed discussion on working procedures until next year's session when Mr. Hatano (Japan) will present a revised version of his working paper on this subject.

The two resolutions adopted under this agenda item addressed reforming the meeting schedule and last year's decision not to duplicate the work of the Commission. In order to facilitate cooperation and dialogue between members, governments and NGOs, the Sub-Commission requested the Commission approve its proposal to implement, on a three year trial basis, a meeting schedule of five week sessions of five working days per week, with one week of two daily meetings and four weeks of only one meeting day. The second resolution adopted on methods of work decided to make no resolution or decision henceforth in respect of human rights situations which the Commission is considering under public procedure.

Politics Dominate Action on Country Situations....

The Sub-Commission, working under its new mandate meant to avoid duplication of Commission action, rejected by secret ballot five of the eight draft violation on human rights country resolutions before the body. A draft resolution on the human rights situation in the Palestinian and other Occupied Arab Territories was rejected (17-7) under a motion not to pronounce after several members asserted that it was a duplication of the Commission's work. Draft Resolutions on India and Pakistan, sponsored by Mrs. Palley (UK) only, were also rejected (20-3-2); though, the reasons sighted focused more on the perceived irreverence of the two

resolutions, which coincided with the 50 years of independence celebrated by both countries.

A resolution on Algeria, which condemned both terrorist activity and State violations, failed (9-15-1) under charges that it would only complicate the situation. The Sub-Commission also rejected the resolution on Turkey (8-14-3), although the situation in Turkey was raised by NGOs more than any other country during the debate.

Particularly indicative of the lack of independence among some members was its action on the resolution on Turkey. Although the human rights situation in Turkey is widely known as serious and systematic, evinced by the number of NGOs that intervened on Turkey - including the International Commission of Jurists (ICJ) - a block of experts unexpectedly voted against the resolution; and, in the words of one Sub-Commission member, country resolutions appeared as a dying agenda item.

Bahrain

The situation of human rights in the State of Bahrain was the subject of much NGO scrutiny during the discussions on country situations, leading the Sub-Commission to adopt a resolution condemning the "serious deterioration" of human rights in Bahrain (12/11/1). This resolution noted that Bahrain has been without an elected legislature or any democratic

institution for 22 years, and has persistently tortured and abused its citizens, including women and children. While the Sub-Commission took note of the problem of terrorism in Bahrain, it called upon the Government of Bahrain to comply with applicable human rights standards, and requested the Commission on Human Rights to consider the situation in Bahrain at its next session.

The Democratic Peoples Republic of Korea (DPRK)

Concerned about the allegations of mass internment in the DPRK and the impossibility of obtaining information to ascertain the truth of the allegations, the Sub-Commission passed a resolution (13-9-3) urgently calling upon the Government of North Korea to submit its delayed report to the Human Rights Committee, cooperate with UN procedures and services, and to ensure full respect for Article 13 of the UDHR and Article 12 of the ICCPR. The international community was invited to devote greater attention to the situation of human rights in the DPRK and to assist further in helping the country overcome its food shortage. In bold response, the Government of the DPRK announced its withdrawal from the ICCPR, and refusal to send a delegation to the *Committee on the Rights of a Child*, which convenes in September, as a direct result of the resolution.

Republic of Congo (Brazzaville)

After debating the potential adverse affects of a resolution on the human rights situation in the Congo, a matter under OAU consideration, the Sub-Commission passed a resolution expressing concern that the Peace Pact of December 1995 had not been fully implemented (13-10-2). The resolution also expressed concern at the grave deprivations of human rights reported in the Congo, most particularly at the reports of hundreds of deaths incurred during the inter-communal strife and the continuing loss of life in the City of Brazzaville. The Sub-Commission called upon the Government of Congo and all parties to the conflict, *inter alia*, to develop mechanisms for transparency in government operation, to select an independent commission to arrange for free and fair elections and to agree to abide by the results. It was requested that the Commission consider the human rights situation in the Congo at its next session, or, in the alternative, that the Sub-Commission should re-examine the situation in 1998.

Declaration on Palestine

In response to a double suicide attack in Jerusalem on 30 July 1997, the Israeli government imposed a severe closure on the Palestinian Territories. Under agenda item 2, the Chairman read a declaration expressing profound concern for the suffering of the Palestinian people on behalf of members of the Sub-

Commission. The declaration made express reference to the heads of households, who suffered restrictions on their movement, and thus, were unable to feed and care for the families in Gaza and the West Bank. The Chairman condemned all acts of violence and terrorism wherever they originate, including that which precipitated the most recent closure and called upon all parties to resume dialogue towards a just and lasting peace.

Statement on Guatemala

The Chairman of the Sub-Commission, Mr. Bengoa, read a consensus statement welcoming the formal end to 36 years of armed conflict in Guatemala. The Sub-Commission thus concluded its consideration of the human rights situation in Guatemala, 15 years after first taking it up. Despite a hopeful outlook, the Chairman called for continued international assistance to ensure full implementation of the peace accords. The Government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* (URNG) also spoke.

Impunity

One of the main achievements was made on the fundamental question of the impunity of perpetrators of violations of civil and political rights. Special Rapporteur Mr. Joinet (France) submitted a revised set of principles on the protection and

promotion of human rights through action to combat impunity. The ICJ was instrumental in expanding the scope of this set of principles to address general situations of impunity. Through repeated consultation with the Special Rapporteur and a joint intervention made on behalf of several NGOs, the ICJ secured amendments to the set of principles regarding the scope of the principles, as well as the application of amnesty. The Sub-Commission, through a resolution adopted without a vote, thanked the Special Rapporteur for having undertaken extensive consultations in order to revise the set of principles and decided to transmit the principles to the Commission, with a view to transmission to the General Assembly, through the ECOSOC.

Administration of Justice

In addition to the impunity of perpetrators of violations of civil and political rights, the Sub-Commission considered the issues of human rights in states of emergency, privatization of prisons, and *habeas corpus* as a non-derogable right. The special rapporteur on states of emergency and former Sub-Commission member, Mr. Leandro Despouy, introduced his tenth annual report and list of States affected by states of emergency (E/CN.4/Sub.2/1997/19; Add.1) by stressing the need to develop and implement international supervision mechanisms during times of emergency. Mr. Despouy further suggested that communication be established

between those countries under states of emergency and the UN in order to protect fundamental freedoms threatened in times of crisis. The Sub-Commission recommended to the Commission on Human Rights that Mr. Ioan Maxim (Romania) be appointed as the new special rapporteur on this subject so that he can continue monitoring which States are imposing a state of emergency.

In its resolution on the privatisation of prisons, the Sub-Commission requested its parent body to appoint Mr. Khan (India) as Special Rapporteur in order to take an in-depth study on all issues relating to the privatisation of prisons, which would be completed by the Sub-Commission's 52nd session. The report of the sessional working group on the administration of justice was also adopted (E/CN.4/Sub.2/1997/16), along with a clause that the Human Rights Committee consider preparing a new general comment on Article 4 of the ICCPR reaffirming the developing thought that *habeas corpus* and other related aspects of *amparo* should be considered non-derogable in all circumstances.

The Sub-Commission also called for Mrs. Gwamnesia (Cameroon) to prepare a detailed working paper on juvenile justice to be considered at the next session of the Sub-Commission. A second resolution on children called for the Commission to consider appointing a special rapporteur on the human rights situation of street children, who are so often manipulated by criminal groups. Finally, Mr. Chernichenko's (Russian

Federation) working paper on the recognition of gross and massive violations of human rights as an international crime was transmitted to the International Law Commission, so that the body's comments may be considered at the next session of the Working Group on the Administration of Justice.

Freedom of Movement

Much of the discussion under item 10 centred around the two studies presented - the final report of Special Rapporteur Mr. Al-Kasawneh on population transfer ((E/CN.4/Sub.2/1997/23), which includes a draft declaration on population transfer and the implantation of settlers, and the working paper by Mr. Volodymyr Boutkevitch (Ukraine) on the freedom of movement and the right to leave any country and to return to one's own country (E/CN.4/Sub.2/1997/23).

Several resolutions reflected the discussion which occurred in the Sub-Commission. A resolution on freedom of movement and population transfers was adopted, urging governments to do everything possible to stop and prevent all practices of forced displacement, population transfer, and "ethnic cleansing", as well as to convene an expert seminar in order to make practical recommendations for the further work of the Sub-Commission on the right to freedom of movement. The resolution called for the final report of the Special Rapporteur on human

rights and population transfer to be published and widely disseminated. The second resolution requested the Commission to endorse the appointment of Mr. Volodymyr Boutkevitch as Special Rapporteur with the task of analysing current trends and developments with respect to his working paper on the right to freedom of movement, and to study in particular the extent of restrictions permissible under Article 12, paragraph 3 of the ICCPR.

The third resolution under this item concerned the right to return, expressing the Sub-Commission's great concern over the plight of refugees by reaffirming the fundamental rights of refugees and internally displaced persons. The resolution urged the governments of both host States, and of countries which refugees originated from, to actively negotiate with each other, and called upon them to allow for third party mediation when the negotiations reach an impasse. Most importantly, it called upon governments to revise their citizenship laws to bring them into accordance with international human rights law and with the Convention on the Reduction of Statelessness.

The Human Rights of Children and Youth

The promotion and protection of human rights of children and youth was added to the provisional agenda following debate on the necessity of considering this issue, considering the

work of the Committee on the Rights of the Child and UNICEF. The ICJ intervened on this item, calling for the permanent addition of an item to the agenda of the Sub-Commission. In order to make the work of the Sub-Commission on the issue of children more efficient, the ICJ requested the body to consider all violations of children's rights under this one unified agenda item concerning the "human rights of children and youth". In this way, cohesive and deliberate consideration of children's human rights by the Sub-Commission would occur, replacing the more fragmented efforts it now undertakes. The Sub-Commission did decide to consider the human rights of children at its next session. The UN body also recommended that the Committee on the Rights of the Child consider preparing general comments on Articles 2, 37, and 40 of the Convention on the Rights of a Child, and offered the assistance of the Sub-Commission in formulating such.

The Elimination of Racial Discrimination

The problem of increasing racism and xenophobia, documented in Europe and other parts of the globe, was raised by many participants present at the 49th session of the Sub-Commission. Many NGOs and Sub-Commission experts pointed to the pending World Conference on Racism as a forum in which the problem of intolerance could be discussed and action against racism taken. As Ms. Gay McDougall - alternate member

(USA) with Mr. David Weissbrodt - pointed out, this conference must emphasize practical steps to combating racism.

Further, as determined at its previous session, the Sub-Commission devoted close attention to the human rights situation of migrant workers and members of their families. The discussion under this agenda item focused on the increasingly serious situation of migrant workers, whose numbers are growing in the post-cold war era, and ended in a resolution considering the phenomenon of migratory labour patterns in the context of neo-liberal policies and rising poverty. The resolution, adopted without a vote, noted the vulnerability of migrant workers, who are often the object of racist treatment. The Sub-Commission affirmed the need for governments to implement effective legislation to combat discrimination against migrant workers and members of their families.

Indigenous People

The Working Group on Indigenous Populations met this year under the theme: "environment, land and sustainable development". Both NGOs and members of the Sub-Commission stressed the importance of land rights to full realisation of the human rights of indigenous peoples. Special Rapporteur Mrs. Daes (Greece) presented her preliminary working paper on indigenous people and their relationship to land, in

which she confirmed the critical role of land in the survival of indigenous people. Mrs. Daes also noted the importance of protecting the knowledge of indigenous people as an aspect of their heritage. Accordingly, the Sub-Commission requested Mrs. Daes, as Special Rapporteur, to continue to exchange information with governments, indigenous peoples and all parts of the United Nations system on the heritage of indigenous peoples. The Sub-Commission also requested that the United Nations High Commissioner for Human Rights convene a seminar on the draft principles and guidelines for the protection of the heritage of indigenous peoples.

The Sub-Commission adopted another resolution recommending that a permanent forum on indigenous people be established during the course of the International Decade of the World's Indigenous People. The mandate should include questions regarding the rights of indigenous peoples as well as all matters in the programme of activities for the International Decade. However, the Sub-Commission emphasised that the establishment of a permanent forum should not be considered an alternative to the continued existence of the Working Group. In that spirit, the Sub-Commission requested that the Working Group focus on the questions of membership, participation and mandates of a possible permanent forum on Indigenous People, with a view to an early establishment of such a forum within the present structure of the United Nations and preferably under ECOSOC.

Further, the Sub-Commission celebrated the International Day of the World's Indigenous People on 8 August.

Contemporary Forms of Slavery

The Working Group on *Contemporary Forms of Slavery* met under the leadership of Chairperson-Rapporteur Ms. Embarek Warzazi (Morocco) to consider questions of child and bonded labour, sexual exploitation, the traffic in persons, migrant and domestic workers and sexual violence during wartime. On the issue of child and bonded labour, the Working Group observed that countries which had to deal with these practices passed constructive legislation, but that they needed to implement these laws more effectively. At future sessions, the Working Group decided to give priority to the consideration of domestic and migrant workers, particularly girl-child domestic workers. Additionally, the Sub-Commission resolved that the Working Group should give greater priority to measures for preventing violence against women, especially violence in the context of armed conflicts. In this regard, the Sub-Commission decided to entrust to Ms. McDougall the task of completing the study on the situation of systemic rape, sexual slavery and slavery-like practices during periods of armed conflict. The Special Rapporteur on this subject, Ms. Linda Chavez (USA), resigned and was unable to complete the study for presentation at the 49th session.

The Sub-Commission also adopted a decision urging governments, non-governmental organisations and individuals to respond favourably to requests for contributions to the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, which is used to assist representatives of non-governmental organisations to participate in the deliberations of the Working Group, as well as to extend humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of contemporary forms of slavery. The Sub-Commission also reiterated its support for observing a World Day for the Abolition of Slavery in all its Forms on 2 December of each year.

The ICJ and more than 20 other NGOs highlighted in a joint statement the importance of education, particularly education regarding equal rights for women and men, as a step toward preventing violence, including sexual violence.

Further, the Sub-Commission requested that the Special Rapporteur on the sale of children, child prostitution and child pornography continue to examine issues relating to the traffic in children, such as organ transplantation, disappearances, the purchase and sale of children, adoption for commercial purposes or exploitation, child prostitution and child pornography.

On other fronts, the Sub-Commission invited the Secretary-General, in cooperation with the International Telecommunication Union, to continue to examine the adverse effect on children of new tech-

nologies, such as the Internet, which may be used to promote child pornography and sex tourism.

The Realization of Economic, Social and Cultural Rights

The forty-ninth session of the Sub-Commission gave ample attention to the matter of the realization of economic, social and cultural rights adopting numerous resolutions on several thematic issues relative to these fundamental rights. Following through with its decision to mainstream women's rights into its general work, the Sub-Commission addressed the discrimination of women in the area of housing, land and property, asking relevant UN bodies, specialized agencies and special rapporteurs, as well as governments to take up the problem of women's lack of access, due to gender-biased laws, policies, customs and traditions, to housing, land and property and the corollary of poverty.

Linking the right of access to drinking water with the right to development, the Sub-Commission sought to address the world's 1.4 billion people who are deprived of access to drinking water supply by requesting Mr El Hadji Guissé to submit a working paper on the question of the promotion of the realization of the right of access of all to drinking water supply and sanitation services.

The Sub-Commission also decided to continue discussing the problem of forced evictions, which were reaffir-

med as gross violations of a string of rights. The ultimate responsibility of governments in preventing and eliminating forced evictions was emphasized and it was recommended that all governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land to persons and communities which have been forcibly evicted.

Human rights and education, including the right to human rights education was raised often during the session. The Sub-Commission discussed the fundamental nature of education in improving human rights situations. A sub-agenda item was added on this issue under the broader topic of the realization of economic, social and cultural rights, encouraged States to ensure the right to education; decided to keep the right to education on its agenda for the duration of the United Nations Decade for Human Rights Education (1995-2004); and requested Mr. Mustapha Mehedi to prepare a working paper on the content and interrelatedness of the right to education.

Attempting to address the global dimension of the realization of the right to development and against a backdrop of repeated mention - by NGOs and experts alike - of the threat of "globalization", the Sub-Commission entrusted Mr. El-Hadji Guissé with the task of preparing a working document on the relationship between the enjoyment of human rights and the working methods and activities of transnational corporations.

The Sub-Commission had before it the final report on impunity of perpetrators of economic, social and cultural rights violations, prepared by Mr. El Hadji Guissé (E/CN.4/Sub.2/1997/8). The report, containing few changes from last year's submission, recommends *inter alia* the creation of an optional protocol on economic, social and cultural rights and the international criminalization of violations of such rights. But the final report failed to more clearly define the justiciability of economic social and cultural rights and focus on the widespread and devastating problem of official corruption. The Sub-Commission decided to transmit Mr. Guissé's final report to the Commission, and also recommended that a special rapporteur of the Commission be appointed to continue the study of impunity of perpetrators of violations of economic, social and cultural rights.

Mr. José Bengoa (Chile) submitted his report on the relationship between economic, social and cultural rights and income distribution (E/CN.4/Sub.2/1997/9) but due to translation difficulties, discussion of the report was postponed until next session.

The Sub-Commission also decided to request Mr. Asbjorn Eide (Norway) to review and update his study on the right to food for consideration at the next session.

Women's Rights

The Sub-Commission took strong action in the domain of women's rights. An update on the Plan of Action on the elimination of traditional practices affecting the health of women and children was submitted by Special Rapporteur, Mrs. Warzazi, who expressed concern over the continuation of female circumcision in some countries despite the strong and coordinated efforts undertaken at the international and local levels (E/CN.4/Sub.2/1997/10). Encouraging the exceptional momentum undertaken to combat the practice of female genital mutilation, a resolution was adopted without a vote urging governments to implement the Plan of Action, including reporting action taken under that instrument. That resolution referred to Article 5 of CEDAW and the need to combat the practice by affecting public opinion through education, information and training.

The ICJ intervened to note these concerns and urge governments, UN special agencies and international NGOs to provide the necessary material, technical and financial support necessary to abolish the harmful practice of female circumcision. As well, the ICJ noted the sensitivity surrounding the practice and urged those involved with combating female circumcision to continue pursuing methods that focus on communal transformation.

A comprehensive resolution towards the implementation of the human rights of women and the girl-

child was adopted addressing the many forms of gender-biased traditions, which prevent women from fully participating in society, as well as the serious problem of violence against women and violations occurring during periods of armed conflict, such as systematic rape and sexual slavery. The resolution supported the Commission's efforts on drafting an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women and decided to consider the Beijing Platform for Action more fully in the work of the Sub-Commission.

Working Group on Minorities

The discussion on minority rights emphasised the need to promote conflict prevention; encourage inter-group exchange; and balance minority rights and the value of pluralism.

The Sub-Commission noted the success of the inter-sessional Working Group on Minorities and requested the Commission to extend the Working Group's mandate with a view to holding one session annually. The Working Group itself was invited to elaborate guidelines concerning the content and scope of the principles in the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, including implementation, and recommended to continue consideration of the issue of citizenship and nationality within the context of minority rights.

Other Fields of Activity

The Sub-Commission acted in the following fields of activity:

- It requested the Secretary-General to bring the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties to the attention of the six human rights treaty bodies and ask them to transmit their views on the preliminary conclusions to the International Law Commission and the Sub-Commission;
- invited members of the Sub-Commission and governmental and non-governmental observers to carry out constructive dialogue and consultations on human rights, taking into account the important role of the Sub-Commission as a "think-tank";
- requested the Secretary-General to disseminate the Guidelines for United Nations Forces Regarding Respect for International Humanitarian Law and recommended that the rules of engagement applicable to UN peacekeeping operations should contain explicit references to norms of international human rights and humanitarian law;
- re-affirmed its support for a total ban on the production, stockpiling, transfer and use of anti-personnel landmines and urged member States to promote the establishment of regional and sub-regional zones free of anti-personnel mines;

- decided to devote a meeting during its fiftieth session to celebrating the fiftieth anniversary of the Universal Declaration on Human Rights. The ICJ, along with several other NGOs, joined in an oral statement supporting the commemoration of the 50th anniversary of the Universal Declaration of Human Rights;
- decided to keep the issue of HIV/AIDS-related human rights violations and discrimination under review and strongly urged the Commission to do the same;
- appealed to States concerned to reconsider their adoption of or support for economic sanctions against a State;
- appealed to the international community and all Governments, including Iraq, to alleviate the suffering of the Iraqi population and to facilitate the supply of food and medicines to meet the needs of the civilian population;
- authorised Ms. Forero Ucro (Columbia) to prepare a working paper assessing the utility, scope and structure of a study on the human rights and humanitarian implications of weapons of mass destruction, including the question of illicit transfer of arms;
- entrusted Mr. Marc Bossuyt (Belgium) with the task of preparing a working paper on the concept of affirmative discrimination in order to enable the Sub-Commission to make a decision at its 50th session regarding the feasibility of such a study; and
- requested the Commission on Human Rights to authorize the appointment of Mr. El-Hajjé as Special Rapporteur to conduct a detailed study on potentially adverse and positive consequences of scientific progress and its applications for the integrity, dignity and human rights of the individual.

Human Rights and Terrorism

The Sub-Commission engaged fruitful debate on the question of terrorism and human rights after Ms. Kalliopi Koufa (alternate expert from Greece) presented her working paper on the subject. The working paper was praised as appropriately cautious and contextualized. The paper, describing terrorism as a criminal phenomenon, noted that expert opinion was divided as to, *inter alia*, the definitions and causes of terrorism and the appropriate responses to its occurrence. Though, Ms. Koufa stressed in her report that terrorism in particular threatens constitutional order and the rule of law in those States where it occurs. In the discussion, Mr. Eide agreed that terrorism leads to the breakdown of national law and suggested the need to elaborate some minimum standards of humanity as a defence of human rights during times of conflict. Finally, the Sub-Commission recommended to the Commission that Ms. Koufa be appointed Special Rapporteur to conduct a comprehensive study on terrorism and human rights.

Basic text

*Universal Declaration on the Human Genome and Human Rights**

The General Conference,

Recalling that the Preamble of UNESCO's Constitution refers to "the democratic principles of the dignity, equality and mutual respect of men", rejects any "doctrine of the inequality of men and races", stipulates "that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of men and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern", proclaims that "peace must be founded upon the intellectual and moral solidarity of mankind", and states that the Organization seeks to advance "through the educational and scientific and cultural relations of the peoples of the world, the objectives of international peace and of the common welfare of mankind for which the United Nations Organization was established and which its Charter proclaims",

Solemnly recalling its attachment to the universal principles of human rights, affirmed in particular in the Universal Declaration of Human

Rights of 10 December 1948 and in the two International United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights of 16 December 1966, in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the International United Nations Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, the United Nations Declaration on the Rights of Mentally Retarded Persons of 20 December 1971, the United Nations Declaration on the Rights of Disabled Persons of 9 December 1975, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, the United Nations Convention on the Rights of the Child of 20 November 1989, the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities of 20 December 1993, the Convention on the Prohibition of the Development,

* Adopted unanimously and by acclamation by the General Conference of UNESCO at its twenty-ninth session, on 11 November 1997.

Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 16 December 1971, the UNESCO Convention against Discrimination in Education of 14 December 1960, the UNESCO Declaration of the Principles of International Cultural Cooperation of 4 November 1966, the UNESCO Recommendation on the Status of Scientific Researchers of 20 November 1974, the UNESCO Declaration on Race and Racial Prejudice of 27 November 1978, the ILO Convention (N° 111) concerning Discrimination in Respect of Employment and Occupation of 25 June 1958 and the ILO Convention (N° 169) concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989,

Bearing in mind, and without prejudice to, the international instruments which could have a bearing on the applications of genetics in the field of intellectual property, *inter alia* the Bern Convention for the Protection of Literary and Artistic Works of 9 September 1886 and the UNESCO Universal Copyright Convention of 6 September 1952, as last revised in Paris on 24 July 1971, the Paris Convention for the Protection of Industrial Property of 20 March 1883, as last revised at Stockholm on 14 July 1967, the Budapest Treaty of the WIPO on International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedures of 28 April 1977, and the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) annexed to the Agreement establishing the World Trade Organization, which

entered into force on 1st January 1995,

Bearing in mind also the United Nations Convention on Biological Diversity of 5 June 1992 and emphasizing in that connection that the recognition of the genetic diversity of humanity must not give rise to any interpretation of a social or political nature which could call into question "the inherent dignity and (...) the equal and inalienable rights of all members of the human family", in accordance with the Preamble to the Universal Declaration of Human Rights,

Recalling 22 C/Resolution 13.1, 23 C/Resolution 13.1, 24 C/Resolution 13.1, 25 C/Resolutions 5.2 and 7.3, 27 C/Resolution 5.15 and 28 C/Resolutions 0.12, 2.1 and 2.2, urging UNESCO to promote and develop ethical studies, and the actions arising out of them, on the consequences of scientific and technological progress in the fields of biology and genetics, within the framework of respect for human rights and fundamental freedoms,

Recognizing that research on the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole, but emphasizing that such research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics,

Proclaims the principles that follow and adopts the present Declaration.

A. Human Dignity and the Human Genome

Article 1

The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.

Article 2

- a) Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics.
- b) That dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.

Article 3

The human genome, which by its nature evolves, is subject to mutations. It contains potentialities that are expressed differently according to each individual's natural and social environment including the individual's state of health, living conditions, nutrition and education.

Article 4

The human genome in its natural state shall not give rise to financial gains.

B. Rights of the Persons Concerned

Article 5

- a) Research, treatment or diagnosis affecting an individual's genome shall be undertaken only after rigorous and prior assessment of the potential risks and benefits pertaining thereto and in accordance with any other requirement of national law.
- b) In all cases, the prior, free and informed consent of the person concerned shall be obtained. If the latter is not in a position to consent, consent or authorization shall be obtained in the manner prescribed by law, guided by the person's best interest.
- c) The right of each individual to decide whether or not to be informed of the results of genetic examination and the resulting consequences should be respected.
- d) In the case of research, protocols shall, in addition, be submitted for prior review in accordance with relevant national and international research standards or guidelines.
- e) If according to the law a person does not have the capacity to consent, research affecting his or her genome may only be carried out for his or her direct health benefit, subject to the authorization and the protective conditions prescribed by law. Research which does not have an expected direct

health benefit may only be undertaken by way of exception, with the utmost restraint, exposing the person only to a minimal risk and minimal burden and if the research is intended to contribute to the health benefit of other persons in the same age category or with the same genetic condition, subject to the conditions prescribed by law, and provided such research is compatible with the protection of the individual's human rights.

Article 6

No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity.

Article 7

Genetic data associated with an identifiable person and stored or processed for the purposes of research or any other purpose must be held confidential in the conditions set by law.

Article 8

Every individual shall have the right, according to international and national law, to just reparation for any damage sustained as a direct and determining result of an intervention affecting his or her genome.

Article 9

In order to protect human rights and fundamental freedoms, limitations to the principles of consent and confidentiality may only be prescribed by law, for compelling reasons within the

bounds of public international law and the international law of human rights.

C. Research on the Human Genome

Article 10

No research or research applications concerning the human genome, in particular in the fields of biology, genetics and medicine, should prevail over respect for the human rights, fundamental freedoms and human dignity of individuals or, where applicable, of groups of people.

Article 11

Practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted. States and competent international organizations are invited to cooperate in identifying such practices and in taking, at national or international level, the measures necessary to ensure that the principles set out in this Declaration are respected.

Article 12

- a) Benefits from advances in biology, genetics and medicine, concerning the human genome, shall be made available to all, with due regard for the dignity and human rights of each individual.
- b) Freedom of research, which is necessary for the progress of knowledge, is part of freedom of thought. The applications of

research, including applications in biology, genetics and medicine, concerning the human genome, shall seek to offer relief from suffering and improve the health of individuals and humankind as a whole.

D. Conditions for the Exercise of Scientific Activity

Article 13

The responsibilities inherent in the activities of researchers, including meticulousness, caution, intellectual honesty and integrity in carrying out their research as well as in the presentation and utilization of their findings, should be the subject of particular attention in the framework of research on the human genome, because of its ethical and social implications. Public and private science policy-makers also have particular responsibilities in this respect.

Article 14

States should take appropriate measures to foster the intellectual and material conditions favourable to freedom in the conduct of research on the human genome and to consider the ethical, legal, social and economic implications of such research, on the basis of the principles set out in this Declaration.

Article 15

States should take appropriate steps to provide the framework for the free exercise of research on the human

genome with due regard for the principles set out in this Declaration, in order to safeguard respect for human rights, fundamental freedoms and human dignity and to protect public health. They should seek to ensure that research results are not used for non-peaceful purposes.

Article 16

States should recognize the value of promoting, at various levels as appropriate, the establishment of independent, multidisciplinary and pluralist ethics committees to assess the ethical, legal and social issues raised by research on the human genome and its applications.

E. Solidarity and International Cooperation

Article 17

States should respect and promote the practice of solidarity towards individuals, families and population groups who are particularly vulnerable to or affected by disease or disability of a genetic character. They should foster, *inter alia*, research on the identification, prevention and treatment of genetically-based and genetically-influenced diseases, in particular rare as well as endemic diseases which affect large numbers of the world's population.

Article 18

States should make every effort, with due and appropriate regard for

the principles set out in this Declaration, to continue fostering the international dissemination of scientific knowledge concerning the human genome, human diversity and genetic research and, in that regard, to foster scientific and cultural cooperation, particularly between industrialized and developing countries.

Article 19

a) In the framework of international cooperation with developing countries, States should seek to encourage measures enabling :

1. assessment of the risks and benefits pertaining to research on the human genome to be carried out and abuse to be prevented;
2. the capacity of developing countries to carry out research on human biology and genetics, taking into consideration their specific problems, to be developed and strengthened;
3. developing countries to benefit from the achievements of scientific and technological research so that their use in favour of economic and social progress can be to the benefit of all;
4. the free exchange of scientific knowledge and information in the areas of biology, genetics and medicine to be promoted.

b) Relevant international organizations should support and promote the initiatives taken by States for the abovementioned purposes.

F. Promotion of the Principles Set Out in the Declaration

Article 20

States should take appropriate measures to promote the principles set out in the Declaration, through education and relevant means, *inter alia* through the conduct of research and training in interdisciplinary fields and through the promotion of education in bioethics, at all levels, in particular for those responsible for science policies.

Article 21

States should take appropriate measures to encourage other forms of research, training and information dissemination conducive to raising the awareness of society and all of its members of their responsibilities regarding the fundamental issues relating to the defence of human dignity which may be raised by research in biology, in genetics and in medicine, and its applications. They should also undertake to facilitate on this subject an open international discussion, ensuring the free expression of various socio-cultural, religious and philosophical opinions.

G. Implementation of the Declaration

Article 22

States should make every effort to promote the principles set out in this Declaration and should, by means of

all appropriate measures, promote their implementation.

Article 23

States should take appropriate measures to promote, through education, training and information dissemination, respect for the abovementioned principles and to foster their recognition and effective application. States should also encourage exchanges and networks among independent ethics committees, as they are established, to foster full collaboration.

Article 24

The International Bioethics Committee of UNESCO should contribute to the dissemination of the principles set out in this Declaration and to the further examination of issues raised by their applications and by

the evolution of the technologies in question. It should organize appropriate consultations with parties concerned, such as vulnerable groups. It should make recommendations, in accordance with UNESCO's statutory procedures, addressed to the General Conference and give advice concerning the follow-up of this Declaration, in particular regarding the identification of practices that could be contrary to human dignity, such as germ-line interventions.

Article 25

Nothing in this Declaration may be interpreted as implying for any State, group or person any claim to engage in any activity or to perform any act contrary to human rights and fundamental freedoms, including the principles set out in this Declaration.

Erratum

In issue No 56 of this Review, we provided an English translation for the Arab Charter on Human Rights. With regard to Article 40 para. (D) of the Charter, the translation read as follows:

"The nominees must have a high level of expertise and *financial capability* in the area of the Committee work. Experts shall work in their individual capacity, and with total impartiality and integrity."

It was brought to our attention that the original text of the Charter in Arabic, does not mention "financial capacity" as one of the requirements for the nominees of the Committee. We apologise for the technical error which arose from the font type used in the original version.

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Recent ICJ Publications

Tibet : Human Rights and the Rule of Law

*Published by the ICJ in English, 370pp. Geneva 1997,
25 Swiss francs (US\$17.00) plus postage.*

The ICJ has recommended that China allow a United Nations supervised referendum in Tibet to determine the future of the region which it invaded in 1950 and occupied since. In this 370-page report, the ICJ describes the Tibetans as a "people under alien subjugation", and entitled under international law to the right of self determination. It is found that the autonomy which China claims Tibetans enjoy, is "fictitious", as power is really, in effect, in Chinese hands. Chinese repression in Tibet has escalated since the beginning of 1996, together with the widespread use of torture and other forms of violence. Choekyi Nyima, the eight year old boy designated by the Dalai Lama as the reincarnation of the Panchen Lama, the second most important figure in Tibet's Buddhist hierarchy, remains in detention. At the same time, Chinese leaders have begun a campaign against certain aspects of traditional Tibetan culture identified as both obstacles to development and links to Tibetan nationalism. China has sought to suppress Tibetan nationalist dissent and extinguish Tibetan culture by encouraging and facilitating the mass movement of ethnic Chinese population into Tibet, where they dominate the region's politics, security as well as the economy. According to the report, Tibetans and other persons resident in Tibet before 1950 and their descendants, as well as Tibetan refugees and their descendants should be eligible to vote in the referendum.

Economic, Social and Cultural Rights - A Compilation of Essential Documents

Published by the ICJ in English, 103pp. Geneva 1997, 12 Swiss francs, plus postage

The purpose of this compilation of essential documents of economic, social and cultural rights, is to provide lawyers, inter-governmental organisations, non-governmental organisations, governments and academics with a ready reference tool when tackling problems in the field of economic, social and cultural rights. Reproduced *in extenso* in this compilation, is the International Covenant on Economic, Social and Cultural Rights - together with State reservations and dates of accession -, the current draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, the Limburg Principles on the implementation of the Covenant, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, and the ICJ Bangalore Declaration and Plan of Action.

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