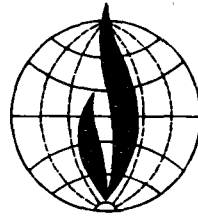


THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Human Rights in the World

China

The single night of terror on 3-4 June 1989 against the pro-democracy demonstrators, has brought universal revulsion against the Chinese government. That night, on the express orders of the Chinese government, troops converged from all directions on Central Beijing and Tiananmen Square, and with brute force cleared the Square and other parts of the city.

Thousands of civilians were fired on by troops, beaten by soldiers with clubs and other weapons, and crushed. There is evidence of extraordinary cruelty; of soldiers intentionally executing individuals, at times shooting them repeatedly after initially wounding them; of children and pregnant women being killed; and of the cold-blooded murder of nurses, doctors and others engaged in humanitarian services.

A recapitulation of the events leading up to this tragedy shows that the measures taken by the government were unwarranted and disproportionate to the alleged threat posed by the demonstrators.

It all began on 15 April 1989, following the death of the former Communist Party General Secretary, Hu Yao Bang, when about 3,000 students shouted slogans and hung banners in Tiananmen Square. In the following days, demands for reform were listed in a seven-point petition presented by several hundred students to the National People's Congress (NPC) offices in the Great Hall of

the People facing Tiananmen Square. The demands were:

- a reappraisal of Hu Yao Bang's historical role;
- a reassessment of the campaigns against 'spiritual pollution' in 1983, and 'bourgeois liberalisation' in 1987, along with rehabilitation of the victims of these campaigns;
- disclosure of the private bank accounts of the top leaders and their families;
- guarantees of freedom of speech and freedom of the press;
- increased educational spending and better treatment of intellectuals; and
- restoration of the right to demonstrate.

On 22 April, after Hu's funeral ceremony, four students were allowed to enter the Great Hall, where they met with a government official who reportedly rejected their demands for a meeting with the Prime Minister, Xi Ping. On 24 April, students at approximately 30 of Beijing's 70 colleges and universities began a strike to press for the further democratization and reform of the country's political structure. The next day, small groups of students left the campuses to meet with members of the public in Beijing to discuss their movement and its objectives.

On 26 April, the Chinese leadership issued a stern warning in an editorial in

the "People's Daily", the official organ of the Chinese Communist Party (CCP). The editorial which was alleged to have been written on the specific instructions of the elder statesman, Ding Xiaoping, described the student demonstrations as a 'planned conspiracy', the aim of which was to 'negate the leadership of the CCP and the socialist system'. It further stated that the aim of the demonstrations was also to 'sow dissension among the people, plunge the whole country into chaos and sabotage the political situation and unity'.

The students responded to this stern editorial by immediately organising a fresh demonstration on the following day. Up to 100,000 students marched through the streets of Beijing and, in view of the sheer weight of their numbers, the security forces made little effort to disperse them.

This was followed by another massive demonstration on 4 May, the occasion of the 70th anniversary of the country's first mass political campaign, the 'May Fourth Movement'. Among the demonstrators were a group of 300 journalists representing all of China's major official media.

There was a resurgence of the student demonstrations on 13 May, when over 1,000 students occupying Tiananmen Square began a hunger strike to dramatize their call for 'genuine dialogue' with the Chinese leadership. The hunger strike attracted massive attention and sympathy from workers and professionals, and at the same time distracted international attention from the Sino-Soviet Summit, which took place in Beijing on 15 to 18 May. On 16 May, for the first time, lawyers, doctors, miners, civil servants, and even members of the capital's security forces joined the demonstrations.

Meantime, the unrest was reported to have precipitated a power struggle within the Chinese party and government leadership. The party and the government were alleged to be divided into two sections, one generally supportive of the student demands, led by Zhao Ziyang, the CCP General Secretary, and the other favouring a hard-line military response to the unrest. The hard-line faction was led ostensibly by the Premier, Li Ping, but ultimately supported by Ding Xiaoping.

According to some reports, at a meeting on 16 May of the politburo's standing committee, Zhao Ziyang was said to have called upon his colleagues in the Chinese leadership to enter into serious discussions with student leaders. He was to have proposed:

- a retraction by the party of the 26 April, 'People's Daily' editorial;
- the establishment by the National People's Congress (NPC) of a body to investigate alleged corruption on the part of high ranking government and party officials; and
- the publication of the financial accounts of leading officials.

These proposals were said to have been rejected on 17 May. Zhao then issued a written statement describing as 'commendable' the students' patriotic spirit in calling for democracy and law, opposing corruption and promoting reform. On the same day, the full 16 member politburo reported to have met and relieved Zhao of his duties as CCP General Secretary, appointing Li Ping in his place in an acting capacity.

On 18 May, Li Ping and other leading party members visited hunger striking students in the hospital. Later, representatives of the hunger strikers held talks

with Li Ping in the Great Hall of the People. The meeting, which was televised, ended with students angrily rejecting Li's demand that the hunger strike be ended. Early on 19 May, Zhao met for the first time with the students in Tiananmen Square. He apologised to the students for not visiting them earlier and pleaded with them to end their hunger strike. Later that evening, student leaders announced that the hunger strike had ended, but that the Tiananmen Square sit-in would continue.

On the same day, Li Ping and Laug Shangkuri, the President, announced to a meeting of party, government and military organs that harsh measures were to be introduced to quell the unrest in Beijing. Li said that Beijing's 'anarchistic state' was 'going from bad to worse', and therefore he was 'calling on everyone to mobilize in emergency and to adopt resolute and effective measures to curb the turmoil in a clear cut manner'.

On 20 May, martial law was officially declared in Beijing. The martial law orders banned all demonstrations and strikes, prohibited the distribution of leaflets and the spreading of rumours, and imposed restrictions on foreign and local journalists. Even before the imposition of martial law, large numbers of troops had begun to converge on the capital. However, after the imposition of martial law had been broadcast on radio and television, large numbers of Beijing residents converged on six or more points around the capital, successfully halting the progress of the troop convoys towards Tiananmen Square. By the end of May, at least 150,000 troops from 13 of the country's 24 group armies were reported to have surrounded Beijing. According to some reports, the level of mobilization was far in excess of that necessary to quell the student demonstrations,

leading to speculation that the mobilization reflected the concern of Ding Xiaoping that pro-Zhao supporters might be preparing a military-political coup.

During the first week following the imposition of martial law, there were reports that the commanders of the troops surrounding Beijing were reluctant to force their way into Tiananmen Square.

As the stand-off between the army and the protesters in Beijing progressed, hard line elements within the party and the government consolidated their grip.

In the last two days prior to the brutal crackdown, the number of protesters in Tiananmen Square began to decrease, and those who remained became disillusioned. As a result, the movement allegedly changed from a peaceful sit-in where students pleaded for government reaction, to a centre of open, anti-government activities, such as a call for workers to strike. However, the radicalisation of the movement did not mean that the demonstrators were in favour of overthrowing the government or the party. According to a report published in the *Far East Economic Review* (1 June 1989), "one of the most incredible aspects of the Peking insurrection is that despite the rapid expansion of the movement, at times involving more than a million people – far beyond the capacity of the initial leadership to effectively discipline – at no time did the demonstrators openly oppose or call for the overthrow of the communist party".

Similarly, in another report (22 June 1989) the journal stated that, "even when finally surrounded by tanks and soldiers the students offered no serious resistance – a degree of passivity that is unlikely to be repeated at future confrontations".

These and other similar reports have clearly established that in spite of the

unwillingness of the leaders to enter into a dialogue, and the provocative presence of the army as well as the imposition of martial law, the demonstration remained peaceful. Furthermore, the initial demands never went as far as to include the overthrow of the government and at no point were attempts made to change the peaceful demonstration into an insurrection.

This is totally at variance with the official version that was put forward by the government to justify the use of excessive force to clear Tiananmen Square, according to which, the demonstrations by the students and others were a 'counter-revolutionary revolt' intended to 'topple the communist party, overthrow the socialist system, subvert the People's Republic of China, and establish a totally westernised bourgeois republic'. According to some reports, on the night of 3 June, when unarmed teenage soldiers tried to clear Tiananmen Square, some of them were brutally beaten by gangs of young toughs who appeared in the Square for the first time carrying iron bars and wooden clubs. Soldiers were beaten or stoned to death in several incidents later that evening. According to the *Far East Economic Review* (15 June 1989), "Reports of these actual and perhaps other manufactured incidents may have been used to fire up or frighten the troops who later assaulted Tiananmen with tanks and automatic weapons". What was most striking was that the assault was carried out with little or no use of tear gas, nor were any troops armed with non-lethal weapons such as rubber bullets.

Estimates of the dead range from several hundred to many thousands. Countless others were injured. The Chinese government went to considerable lengths to prevent the true figures from

emerging. It has prohibited hospitals and mortuaries from disclosing figures of fatalities. There is evidence that troops burnt bodies on the spot in Tiananmen Square, and that army helicopters were used to airlift other human remains to unknown locations.

The Tiananmen assault was followed by a vigorous campaign of repression aimed at identifying and punishing those who were involved in the movement. By the end of June, as many as 1,360 persons had been arrested throughout the country. On television no attempt was made to conceal that the detainees had been severely beaten. For instance, the television footage showed detainees shackled to trees, paraded in a humiliating way and manhandled in an excessively rough and degrading manner by security personnel. The arrests were also followed by execution of some after summary trials.

The large-scale arrests, torture and ill-treatment as well as summary trials and executions has shown that the regime has totally by-passed international standards and procedures. Indeed, the judicial system has been turned into a tool of repression, and law has become completely subordinate to the political needs of the party. For example, the Supreme Court was the first among official organs to express support to the Chinese communist party, and issued a circular on 21 June calling on members of courts to study closely the government's version of the events, and to punish 'without leniency' those involved in counter-revolutionary activities. In any event, the criminal law dealing with crimes such as 'counter-revolutionary activities' or acts endangering public security are arbitrary and violate established international norms.

The Criminal Law and the Criminal

Procedure Law of 1979 had provided Chinese citizens with some basic protection from arbitrary arrest and unfair trials. These safeguards included a maximum of ten days of police detention, up to seven days to appoint a defence counsel after presentation of the charges to the defendant, ten days for an appeal after delivery of the judgment, and automatic review by the Supreme Court of a death sentence.

However, between 1981 and 1983, the People's National Congress removed even these restricted safeguards for those cases involving charges of seriously endangering public security. In such cases, the seven day period between the presentation of the charges and the trial need not be observed. Also, the time limit for appeals was shortened to three days instead of ten. Furthermore, the approval of the Supreme People's Court was no longer required to be obtained before a death sentence is carried out. As a result, a defendant facing the charge of endangering public security can be tried and executed within a matter of days.

The post Tiananmen Square crackdown exposed the arbitrary nature of the judicial system, and led to restrictions of other fundamental freedoms. No independent organisations were allowed to be established and those which emerged between April and June were made illegal by the martial law decree. For example, the Autonomous Federation of Beijing University Students was established in mid-April and was one of the main groups involved in the pro-democracy movement. The Students' Federation was decreed illegal on 8 June 1989 by Martial Law Decree No. 4. A number of leaders and members belonging to this Federation were arrested and others figure prominently on the government's

'wanted list'. Similarly, the Beijing Workers Autonomous Federation, founded in May 1989, was declared illegal under Martial Law Decree No. 10, and several of its members were arrested.

Freedom of association, of expression and of the press have also been further restricted. After the imposition of martial law on 20 May, the official New China News Agency and the government-run Central China Television were placed formally under military control. Those reporters and editors who had diverged from the official line by reporting events openly and accurately have been removed from their posts. The Radio Beijing announcer, Li Dau, who reported on 4 June that thousands had been killed in the crackdown, was arrested on the same day and was not released until the end of October. The regime has also banned books considered subversive and bookstores have been prohibited from selling the works of ten leading intellectuals. The regime has also restricted outside sources of information from reaching Chinese citizens and the foreign media from contacting citizens.

The Tiananmen Square massacre, the crackdown, and further restriction on basic freedoms are by no means solutions to the underlying discontent that contributed to the massive but peaceful demonstrations between 15 April and 4 June.

The fact that these tragic events took place is an indication of the lack of political will to deal with the underlying problems. In the words of Robert Delfs, reporter for the *Far East Economic Review*:

"Even before the May-June crisis, it was increasingly evident that existing reforms, based on the political compromises of the 1978 third plenum and the 1982 12th congress were insufficient to meet the new economic and social chal-

lenges. But in the current climate, in which political correctness is again defined solely by adherence to the words of a great leader, the prospects for needed radical ownership reforms in the state

sector - much less political reforms to address the problems of corruption or to make the party more responsive to popular will - appear to be nil".

Colombia

The Other Faces of the War Against the Mafia*

Several of the recent assassinations attributed to narcotics trafficking have had a considerable impact on the Colombian judicial and political scene. These assassinations include: a judge of the High Court of Bogota, Carlos Valencia, on 16 August 1989; the Chief of Police of the province of Antioquia, Colonel Valdemar Franklin Quintero, on 18 August 1989; and the Candidate for the Presidential primaries, Senator, Luis Carlos Galan Sarmiento, on the night of 18 August 1989. While judges demanded more effective methods of protection, accompanied by strikes and massive resignations, the government declared an "all-out war against the mafia" and within days, had used the "state of siege" to produce over 20 restrictive decrees. By 29 August 1989, ten days after the initial decrees, more than 11,000 persons had been detained, the majority of whom were released after no connection to narcotics trafficking could be established. These measures were welcomed by the national and international

press as well as by several foreign governments. The most notable was the reaction of the United States which approved \$65 million in emergency aid, the bulk of which consisted of artillery, helicopters, transport teams, and a covert dispatch of military advisors. \$2.5 million in additional aid was approved for security measures for Colombian judges. The US government has earmarked \$260 million in aid to Colombia, Peru and Bolivia for the fiscal year beginning in October 1989. This sum will increase to \$2,000 million over the next five years.

Retaliation by the Mafia was immediate. A self-described group, "the extraditables", who threaten to murder ten judges for every Colombian extradited to the USA, issued a communiqué stating that they were declaring war against the authorities who had carried out searches and seizures. As military operations were undertaken, attacks were carried out against a number of companies in Medellin. On 2 September, a bomb destroyed the printing offices of the News-

* This is a summary of a report submitted to the ICJ by the Colombian Section of the ICJ affiliate, the Andean Commission of Jurists.

paper *El Espectador*. The Mafia has also carried out several killings including: the mayor of Medellin, the wife of the police chief of the third district of Risaralda, and a high-level executive during a suicide mission at the Medellin airport.

The so-called "war against the Mafia" has pushed the socio-political process of Colombia into the background. This includes the debates on constitutional reform, the dialogue with guerilla groups, and the petroleum forum on the government's policies on natural resources.

The government hastily promulgated a number of decrees under the "state of siege" which can be classified as follows:

- 1) Measures specifically against the narcotics traffic including:
 - extradition carried out through administrative procedures;
 - detentions and seizure of goods; and
 - control of air strips.
- 2) Measures for the protection of judges and other authorities:
 - through direct increase of funds for such purposes; and
 - through questionable procedural reforms which are intended to safeguard the identity of decision-making powers.
- 3) Limitation of procedural guarantees.
- 4) Increase in the political and judicial faculties of the military.
- 5) Classification of new crimes and increase in penalties for existing crimes.

The specific decrees include the following:

Decree 1860: establishes summary procedures for the extradition of Colombians or foreigners involved in narcotics trafficking or related crimes. Extraditions will be carried out through administrative channels without prior approval of the Supreme Court.

Decree 1856: establishes that all confiscated moveable or immovable property, bonds, loans and foreign exchange documents and any goods derived from or linked to narcotics traffic may be seized and used by the military, the National Police or other organs of State security until a judge has ruled on their final destination.

Decree 1893: establishes the process to be followed once the goods have been confiscated. This decree inverts the burden of proof which entails that the owners of the confiscated goods must prove within a period of 5 days that they were acquired licitly.

Decree 1859: allows authorities granted police powers relating to drugs trafficking or terrorism to detain *incomunicado* persons merely suspected of criminal activity.

Decree 1895: establishes sanctions for persons who have obtained, directly or indirectly, proceeds which are unjustified or are derived from criminal activity.

Decree 1986: stipulates control of air strips so that only those expressly authorized by the Administrative Department of Civil Aeronautics may be used.

Decree 1855: creates a Security Fund for the judiciary, the purpose of which is to provide for the judiciary's security needs. Contracts for such work do not require public or private approval.

Decree 1965: establishes an administrative system of funds to re-establish public order. This will be carried out with funds from a special account with the bank "La Nacion" which has com-

plete independence as to ownership, administration, accounting and statistical data.

Decree 1894: establishes secrecy of procedure in carrying out decisions of constitutionality incumbent upon the Supreme Court. The names of magistrates in the majority or dissenting in cases will be withheld from the public; only the ruling will be disclosed.

Decree 1966: establishes guidelines to be followed by the tribunal for public order. These are intended to safeguard the identity of the magistrates and fiscal authorities.

Decree 1857: increases the penalties for political crimes such as rebellion and sedition and excludes the possibility set forth in the penal code that acts committed in combat, unlike ordinary sedition and rebellion, will be exempt from penal sanction.

Decree 1863: confers competency on military judges to authorize unrestricted searches in localities where persons or objects related to any crime are suspected.

Decree 2013: allows the government for reasons of public order under the "State of Siege" to suspend popularly elected municipal mayors and replace them with members of the armed forces. Mayors reacted immediately with charges of unconstitutionality. Nevertheless, the mayor of Uraba was replaced in April of 1988 and several other replacements have followed, including the naming of a military governor in Coqueta and a military authority in Arauca in 1989.

The government attributes the continuing violence in Colombia largely to the drug traffickers, but uses the crack-down as a pretext to legitimise state repression. It is increasingly evident that the procedural restrictions are being ap-

plied not only to narcotics trafficking but also to various forms of social protest.

The armed forces have begun to use the new decrees to carry out searches and detentions of members of social or political organisations by alleging conspiracy with guerrillas and ties with narcotics trafficking. For example, the decrees formed the basis for the capture in Medellin of four members of the Popular Institute for Capacitation (DPC), an organisation dedicated to educating the people. After being detained for several days in military installations, where they were allegedly tortured, they were charged with: belonging to the National Liberation Army (ELN); maintaining links with narcotics traffickers, and committing terrorist acts.

Under these decrees persons can be detained on mere suspicion of criminal activity, thereby increasing the risks of arbitrary detention. They can be detained *incommunicado* for nine days (seven working days) for purposes of carrying out investigations and interrogations. During such long periods of detention, access to legal assistance is prohibited and torture and disappearances are common practice. On the tenth day, a judge will review the official interrogation report. During that period an appeal for *habeas corpus* may not be filed. 13 to 16 days may pass before a hearing is granted and the legal charges against the detainee are clarified. Five more days may pass before the decision is taken as to whether the detainee will be released. If on the 22nd day no decision has been taken, a motion for *habeas corpus* may be filed, and a further five days may pass before effective measures may be taken. Thus there may be a total of 27 days detention.

The all-out "war against narcotics" has rallied public opinion to the point

where authorities have stated that this is not the time to be concerned with judicial scrupulousness or human rights. The President has appealed to the public to support the military and to refrain from political controversy and criticism. Senator Federico Estrada Velez, chairman of the Constitutional Reform Project stated that the incorporation of international human rights norms, approved last year by the legislature, is inconvenient for the maintenance of public order. He also recommends a referendum, instead of the normal legislative procedures — once the constitutional reforms are passed — to approve judicial instruments which will freely allow the government to combat terrorism.

No one can deny the responsibility of drug traffickers in aggravating the violence in Colombia, or their involvement in the "dirty war"; nevertheless, to attribute to narcotics traffickers the sole responsibility for the serious situation of human rights in Colombia is not only inaccurate, but also jeopardizes the search for a democratic solution to the present crisis. The State's responsibility for human rights violations cannot be denied. Various human rights groups have demonstrated the complicity of high-ranking governmental authorities with armed narcotics traffickers, para-military violence, torture, extra-judicial executions, disappearances and bombings.

Israeli-Occupied Territories

Severe Ill-Treatment of an Al-Haq Fieldworker

The ICJ has an affiliated organisation in the Israeli-Occupied West Bank called Al-Haq (i.e. Justice). It is devoted to the promotion and defence of human rights in the territory and has an international reputation as a non-political human rights organisation which strives to report accurately on events in the West Bank. For this purpose it employs fieldworkers who report to the headquarters in Ramallah.

One of the fieldworkers, named Sha'wan Jabarin, was arrested on 10 October 1989. Two days later, Al-Haq, issued the following statement:

"Al-Haq is calling for *immediate* action on behalf of its fieldworker, Sha'wan

Jabarin, who was hospitalised on Wednesday 11 October following severe beating by soldiers and Shin Bet agents while in custody.

The following information was obtained from eyewitnesses including Sha'wan's wife, Lamia, other detainees, and a person in Hadassah Hospital.

Sha'wan Jabarin, our fieldworker in the Hebron area, was arrested in his home in the village of Sa'ir on Tuesday, 10 October at 12:45 p.m. Soldiers dressed in civilian shirts and military slacks arrived in two civilian cars with local Hebron license plates (one a commercial Mercedes taxi, the other a private Peugeot 504), surrounded Sh-

a'wan's house as well as that of his neighbours, and broke into their homes. They arrested Sha'wan after checking his identity papers, and took him without permitting him to get properly dressed. According to his wife who was present in the house, Sha'wan was not informed of the reasons of his arrest.

Sha'wan was apparently taken to the police lock-up in Hebron ("Khashabiya"), where detainees are temporarily held before they are transferred to regular detention centres. According to reports received by Al-Haq from other detainees, Sha'wan was beaten by soldiers while en route to the Khashabiya in Hebron. On Wednesday morning 11 October, Sha'wan's wife, in her ninth month of pregnancy, saw him from a distance at the Khashabiya and was able to exchange a few words with him. According to Lamia, he appeared to be in satisfactory condition at that time, although she was told by others that he had been beaten.

According to reports received by Al-Haq, Sha'wan was severely beaten on the afternoon of 11 October by soldiers and Shin Bet agents at the Khashabiya until he lost consciousness. Eyewitnesses say that an army doctor apparently tried to intervene and examine Sha'wan, but that soldiers continued to beat him even as he was lying on the ground and being examined by the doctor. The doctor reportedly recommended that Sha'wan be taken to hospital immediately.

Sha'wan was indeed transferred to Hadassah-Ein Kerem Hospital in Jerusalem on 11 October. An eyewitness who saw him in the hospital asserts that he was receiving oxygen, that he appeared to be in poor condition, and that he had a severe bruise on the head over his eyes. The witness also says that Sha'wan appeared to have difficulties breathing. Sh-

a'wan was later transferred out of the hospital to an unknown location.

On 12 October, Sha'wan's wife again went to the Khashabiya, but did not find her husband there. Soldiers claimed that they did not know anyone by the name of Sha'wan Jabarin.

Sha'wan has suffered from serious health problems since his release after nine months administrative detention, spent mostly in the Ketsyot (Ansar 3) military detention camp in the Negev desert in December 1988. He has a heart condition, manifested by breathing difficulty, as well as back problems. He had been taking medication, Lorevan tablets, for his heart condition until his arrest two days ago, and was receiving physical therapy for his back problem. According to his wife, Sha'wan's health is dependent on the medicine he had been taking.

Al-Haq is extremely concerned about Sha'wan's condition, given his known health problems and the savage beatings he is reported to have suffered in custody. It is also feared that Sha'wan is not receiving the medical treatment that he needs, and that he may be suffering further beatings during interrogation at this moment. Al-Haq has documented many cases of torture, severe mistreatment and withholding of medical care during interrogation in the past".

On the next day, 13 October, Al-Haq issued the following further statement:

"The Israeli authorities confirmed on 12 October that Al-Haq fieldworker Sha'wan Jabarin was in fact beaten while in custody on 10 and 11 October, and required hospitalisation in Hadassah-Ein Kerem Hospital in Jerusalem on 11 October.

In a phone conversation with Al-Haq's Executive Director on the evening of 12 October, the Legal Adviser to the

military government in the West Bank confirmed information previously received by Al-Haq from eyewitnesses that Sha'wan had been beaten following his arrest on 10 October. According to the Legal Adviser, Sha'wan was beaten by Border Guards and was subsequently taken to Hadassah Hospital for examination.

We take note of the fact that Sha'wan, according to the Legal Adviser, had received medical attention at Hadassah Hospital without having been formally admitted to the hospital. Inquiries made with the hospital by the Association for Civil Rights in Israel on Al-Haq's behalf on 12 October revealed that the hospital has no record of a patient by the name Sha'wan Jabarin. The absence of medical records of a person who received treatment at the hospital raises serious questions, not the least of which is the fact that it is impossible to establish whether Sha'wan received sufficient medical care and what form of follow-up care he requires. In Al-Haq's view, this is a highly irregular and indeed repugnant procedure.

The Legal Adviser also informed Al-Haq that Sha'wan has now been transferred to the Dahariya military detention camp south of Hebron on 11 October, and confirmed our suspicion that he is currently being held there for purposes of interrogation.

Sha'wan Jabarin has worked as an Al-Haq fieldworker for the southern area of the West Bank since 1 August 1987. He is well-known in the international human rights community, and was recently nominated for the 1989 Human Rights Award. This award is conferred annually by Reebok International Ltd. upon young human rights activists who, 'early in their career and against great odds, have significantly raised awareness for human

rights and freedom of expression'.

Al-Haq continues to be extremely concerned about Sha'wan's physical well-being. Although the Israeli authorities are well aware that he has a serious heart condition that requires daily medication, Al-Haq has received no confirmation that Sha'wan is in fact receiving proper medical care at this moment. Moreover, since Sha'wan is said to be under interrogation at the moment, we fear that he is being subjected to further physical maltreatment.

The manner of Sha'wan's arrest, the severe beatings to which he was subjected, and the failure to provide him with urgent medical care together constitute a highly illegal detention. Al-Haq therefore calls for the immediate and unconditional release of Sha'wan Jabarin, as well as for a thorough and impartial investigation into the reported abuse, and punishment of the offenders".

Twelve days later, on 25 October, the Israeli Embassy in Washington issued the following statement:

"Sha'wan Jabarin is a senior activist of the Popular Front for the Liberation of Palestine (PFLP) in Hebron. He has been arrested several times in recent years for incitement and involvement in disturbances. He was involved with *al Mithak*, a newspaper which was closed in 1986 due to its close affiliation with the PFLP. *Al Mithak* appealed the decision to the Israel Supreme Court which upheld the decision to close the paper based on evidence that it operated as a front for PFLP activity and that the "journalists" were operatives of the PFLP.

Jabarin was wanted by security forces. On 10 October 1989, he was put under administrative detention for the period of one year. He resisted arrest and it was necessary to use reasonable force to put him in jail. He claimed that he was

vomiting and losing consciousness.

The physician from the Hebron prison sent him for tests to Hadassah Hospital. At Hadassah he was found to be in good general condition. He had some minor scratches above his chest, a small wound above his eye, there was no evidence of a break. His condition was stable and he was released the same day for a week of bed rest. On 11 October, he arrived at Dahariya and was examined by a physician who found nothing in particular aside from the findings of the Hadassah staff. On 15 October, he complained of a rapid heart beat.

He was examined by a physician at Dahariya. The detainee claimed that he was treated with Deralin to lower his blood pressure. An investigation was conducted and his heartbeat was stable. His blood pressure was 120/80 and his heart and lungs were stable. The physician decided against medication. On 23 October following Jabarin's request, he was examined again and was found to be in good condition. Jabarin said that he takes Deralin on occasion. His blood pressure was 130/85. His condition was stable so he was not treated with medication. He was not examined at all. His condition at present is absolutely fine and he is in Dahariya under administrative detention for a year.

As has been outlined here, he was examined by three physicians, his medical condition does not require hospitalisation. He was not beaten aside from the incident which occurred when he resisted arrest. Thus there was no choice and reasonable force was used to bring him into the cell".

Five days later, on 30 October, Al-Haq issued the following further statement:

"Al-Haq was shocked to learn on 26

October that despite the severe beatings he endured after his arrest and appeals by international human rights organisations and others for his release, a one-year administrative detention order has been issued against Sha'wan Jabarin, Al-Haq fieldworker for the Hebron area¹.

In addition, Al-Haq is very disturbed by recent assertions by the Israeli authorities that Sha'wan resisted arrest and therefore "reasonable force" was used "to put him in jail". During an interview with Sha'wan in Dahariya army detention camp on 26 October, Advocate Mona Rishmawi, Executive Director of Al-Haq, confirmed and clarified the information we previously publicised concerning the ill-treatment of Sha'wan, which provides a complete rebuttal of the allegations of the Israeli authorities. In particular, two large swellings above Sha'wan's eyebrows were still clearly visible 16 days after he was beaten.

The embassy of Israel in Washington D.C. issued a statement about Sha'wan on 25 October. The statement says that Sha'wan resisted arrest, and it was therefore necessary to use "reasonable force to put him in jail". It adds that he was treated in Hadassah Hospital but, apart from minor scratches and marks, was found to be in 'good general condition' and that he is now 'absolutely fine'. According to the statement, Sha'wan was put under administrative detention on 10 October.

Al-Haq has detailed in previous alerts how Sha'wan was savagely beaten after being arrested from his home in the village of Sa'ir near Hebron on 10 October. The beatings occurred both in transit and while Sha'wan was being held in the "Khashabiya" police lock-up in Hebron on 10 October. They included beatings

1) The order was dated 22 October 1989.

on the head, punching in the stomach, squeezing of the genitals, burning with cigarettes, and having his head, hands and chest repeatedly jumped on. At all times throughout the beatings Sha'wan was blindfolded and handcuffed. Although Sha'wan was taken to Hadassah-Ein Kerem Hospital in Jerusalem on the same day, two days later the hospital denied having any medical record in his name.

Sha'wan clarified the following details about the beatings and his subsequent treatment and health condition to Mona Rishmawi during her 26 October visit to Sha'wan in Dahariya:

On 10 October, while Sha'wan was in transit to the police lock-up in Hebron following his arrest, he was beaten severely and in particular his genitals were squeezed very hard. This was so painful that Sha'wan was on the verge of losing consciousness several times during the journey. Sha'wan was blindfolded and handcuffed throughout the beating.

Sha'wan was mistreated so severely in the car that at one stage he heard one of the people who had arrested him complain to the others saying: "You're dealing with a human being, not an animal".

On arriving at the police lock-up Sha'wan wished to complain about the way he had been treated in the car. He made it clear to police at Khashabiya that he knew he had the legal right to do so, and three times he tried to submit a formal complaint. Each time he was refused. One time he was threatened that if he wished to complain he would be taken to the interrogation area.

Sha'wan believes that it was because of his insistence that his complaint be recorded that the most severe beating was administered shortly afterwards, when a soldier jumped on him repeatedly for ten minutes. Sha'wan states that

throughout the time the soldier was jumping on him he was on the point of losing consciousness, due to extreme pain.

A Druze soldier who accompanied Sha'wan to Hadassah-Ein Kerem Hospital in Jerusalem on the evening of 10 October told Sha'wan that he intended to complain about the beatings to the military police.

Sha'wan was unable to move unaided for at least five days after the beatings, due to pain in his back and chest. When the assistant of Advocate Lea Tsemel tried to see Sha'wan on Sunday 15 October, he was told that Sha'wan was not there. In fact Sha'wan was there, but was unable to walk unaided.

Sha'wan showed Advocate Mona Rishmawi the marks left by the burning of cigarettes on his right ear and right arm. Large swellings above both eyebrows were still clearly visible. This was on 26 October, 16 days after the beatings.

Sha'wan said that he had been thoroughly examined by an Israeli doctor in Dahariya a few days before Ms. Rishmawi's visit. His blood pressure was monitored and found to be acceptable.

Sha'wan thinks that his current condition is stable and that he does not need his medication, "Deralin", at present.

Sha'wan has not been interrogated at all since the time of his arrest.

Al-Haq is particularly concerned about the following points:

1. *The denial by the Israeli Embassy in Washington D.C. that Sha'wan was beaten "aside from the incident which occurred when he resisted arrest".* Sha'wan was blindfolded and according to eyewitnesses was not resisting arrest when taken from his house to the car. In addition, he was

blindfolded and handcuffed at the time he was beaten. The second beating occurred directly after Sha'wan insisted on his right to submit a complaint against those who had beaten him in the car, and from the circumstances, appears to have been a reaction to his efforts to complain.

2. *The assertion (in the same statement) that only "reasonable force" was used.* Jumping on a person who is lying on the floor handcuffed and blindfolded for 10 minutes, is not reasonable force. Squeezing a person's genitals is not reasonable force. Burning a person with cigarettes is not reasonable force. It should be noted that the ill-treatment Sha'wan suffered prompted a prison doctor to urge that he be treated in hospital.
3. *The denial by Hadassah Hospital that they had any medical records in the name of Sha'wan Jabarin.* Even though the Israeli Embassy in Washington D.C. acknowledges that Sha'wan was sent to Hadassah Hospital, the hospital has denied having any medical records for a patient of that name. Such records are crucial evidence for any investigation into the circumstances surrounding the beating of Sha'wan, and are necessary for follow-up medical care.
4. *Sha'wan's current health condition.* Although Sha'wan's current health condition appears to be stable, Al-Haq continues to fear for his physical safety in the light of the treatment he has suffered since his arrest and the harsh conditions he will face in Ansar 3. Sha'wan developed his current health problems while he was administratively detained for nine months in Ansar 3 last year. Sha'wan had been completely healthy before this. In addition, medical treatment for de-

tainees at Ansar 3 is inadequate in a number of respects; in particular it can be difficult for a detainee who is sick to gain access to a doctor.

Administrative detention order

The one-year administrative detention order for Sha'wan was issued on 22 October, not 10 October as suggested in the statement from the Embassy of Israel in Washington D.C. The order runs from 22 October 1989 to 21 October 1990, and states that Sha'wan is to be held in Ketsyot (Ansar 3). The stated reasons for his detention are that he is a senior activist in the Popular Front for the Liberation of Palestine (PFLP) in the framework of the intifada (*sic*), that he is an ex-prisoner who repeats his activities (*sic*) and that he has a lot of influence over his environment (*sic*). As with most administrative detention orders the stated reasons for the detention are vague and unsubstantiated. The lack of detail in the allegations make an effective rebuttal extremely difficult.

This is one of the first year-long administrative detention orders to be issued in the West Bank under Military Order No. 1281, issued 10 August 1989. Prior to this, six months was the maximum term for any order, although then, as now, an order can be renewed indefinitely.

Conclusions

1. On three occasions on 10 October, Sha'wan tried to lodge an official complaint about the way he had been beaten in the car taking him to the Hebron police lock-up. Each time his request was denied.

However, the Israeli authorities are clearly aware of this incident, and the subsequent beating in the Khashabiya. Al-Haq wrote to, *inter alia*, Prime Minister Yitzhak Shamir and Brigadier General Amnon Straschnow, the IDF Judge Advocate-General, on 12 October, informing them of both incidents. The Legal Adviser to the military government of the West Bank was aware of the beatings on the evening of 12 October; he confirmed in a telephone conversation with the Executive Director of Al-Haq that Advocate Lea Tsemel, also wrote to the authorities on 18 October, appending a copy of Sha'wan's affidavit to Brigadier General Amnon Straschnow, and asking if an investigation has been initiated.

Al-Haq is thus extremely concerned by the position taken by the Israeli Embassy in Washington D.C., on 25 October that: "(Sha'wan) resisted arrest and it was necessary to use reasonable force..., and "he was not beaten aside from the incident which occurred when he resisted arrest. Thus there was no choice and reasonable force was used to bring him into the cell".

Al-Haq categorically denies that Sha'wan resisted arrest, or that "reasonable force" was used. On the contrary, as detailed above he was severely beaten, punched, jumped on repeatedly, and otherwise ill-treated on two occasions, while blindfolded and handcuffed. Al-Haq has a sworn affidavit by Sha'wan to this effect.

Al-Haq calls urgently for a thorough, independent and impartial investigation into the circumstances surrounding the beating of Sha'wan on 10 October 1989.

2. The severe beatings administered to Sha'wan, detailed in a sworn affidavit to Advocate Lea Tsemel on 18 October, make Sha'wan's continued detention

clearly illegal since it is apparent that his physical safety cannot be guaranteed by the Israeli authorities. The illegality of Sha'wan's detention has now been drastically compounded by the one-year long administrative detention order issued against him.

Given the circumstances of his arrest and subsequent detention, Al-Haq calls for Sha'wan's immediate release.

Details of Sha'wan's previous arrests and past harassment by the authorities

Ten years ago Sha'wan was an eyewitness to the shooting deaths by a soldier and a settler of two students, during a demonstration in Halhoul on 15 September, 1979. He testified in both trials about the incident, and about his testimony in particular. He was not questioned about other matters, and was released after 18 days.

Since then, Sha'wan has been arrested for interrogation three more times, and in December 1986 he was sentenced to 9 months actual and 15 months suspended imprisonment for membership in the PFLP.

Most recently, he was administratively detained (i.e. held without charge or trial) in Ansar 3 for nine months. Issued with a six-month order in March 1988, he was informed that one of the reasons for his detention was his involvement in the burning of an Israeli bus in his home village of Sa'ir, on 25 March, 1988. However, this incident occurred 8 days after Sha'wan had been arrested. His appeal was nonetheless denied, and at the end of six months his detention was extended for a further three months. He was released on 8 December, 1988.

One week before his most recent arrest, Sha'wan's home in Sa'ir was raided by soldiers and Shin Bet officers. Furniture was smashed, and a considerable amount of Al-Haq documentation, including affidavits, questionnaires and photographs, was taken. Al-Haq has a report written by Sha'wan about the incident,

as well as photographs of the damage.

The quality of Sha'wan's work and the courage with which he has faced harassment by the authorities in the past have been internationally recognised by his nomination for the 1989 Reebok Human Rights Award".

Sudan

On 30 June 1989, the elected government of Prime Minister Sadiq el-Mahdi was overthrown in a bloodless coup by a group of army officers, known as the "National Movement for Correcting the Situation", led by Brigadier-General (later Lieutenant-General) Omar Hassan Ahmad al-Bashir. The new leadership declared the suspension of the Constitution, the dissolution of parliament and all political institutions. It dissolved trade unions, professional and non-religious associations including legal and human rights organisations and banned all newspapers except the army newspaper. It also announced the appointment of a 15 member "Revolutionary Command Council (RCC)", at present the highest legislative and executive authority in the country, composed of army officers with Lt. General al-Bashir as Prime Minister, Defence Minister and Commander-in-Chief. Military governors were appointed for Khartoum and other regions of Sudan.

At present, Sudan is ruled by emergency decrees which legalise detention of political opponents, limit the rights to freedom of movement, expression and assembly, and restrict the independence of the press and media. These provisions

are laid down, *inter alia*, in Decree No.2 which includes the following:

- all political parties are to be dissolved, their formation and activities banned and their properties confiscated by the state;
- the governments of regions and departments are to be dissolved;
- all trade unions set up under any law are to be dissolved until an order on their re-establishment is passed; and
- licences legalizing: all non-government institutions; the press; publications; and the mass media are to be abolished until a license is granted by a competent body.

Under the emergency powers, orders or measures may be taken on the following matters:

- banning or regulating the movement or activity of persons or things...at any place, at any time or under any other circumstances...;
- detention of persons suspected of threatening political or economic security, while preserving the right to appeal to the Council;

- the banning of any form of political opposition to the regime;
- the banning of strikes, closures, and any obstruction to public or private production or the running of public life;
- the banning of any assembly for political purposes in a public or private place without special permission; and
- any offence or resistance to the provisions of this law is punishable by no less than one year and no more than ten years imprisonment, and may be punishable by a fine as well. If the offence or resistance is by conspiracy or criminal league with others, it may be punishable by death... .

Immediately after the coup, 300 people were arrested and imprisoned including all leading political figures and supporters of the previous regime. Among these was Sadiq el-Mahdi, former Prime Minister of Sudan. The majority are still being detained without charge.

On 4 July, the new regime announced the formation of special courts to try members of the previous government and others suspected of corruption or sedition. These courts are composed of three army members or anyone selected by the RCC. The courts' criminal procedures are laid down in the 1983 code of law — the 'September laws' introduced by former President Nimeiri. The 'September laws' prescribe punishments such as amputation, stoning, flogging, crucifixion and the death sentence. These amount to cruel, inhuman or degrading treatment or punishment and are therefore incompatible with the provisions of the international human rights instruments which Sudan has ratified including the International Covenant on Civil and Political Rights and the African

Charter.

In these courts, the defendant has the right to appeal to an appeal court if the special courts pass the death sentence, a sentence of one year's imprisonment or more, or a fine of 10,000 or more Sudanese Pounds. The decision of the appeal court is irreversible, save that Lt. General al-Bashir has to approve all death sentences.

On 31 July, members of professional associations, including representatives of the Sudanese Bar Association and the Association of Legal Advisers in the Attorney General's Chambers, submitted a memorandum to the government protesting the dissolution of trade unions and professional organisations and calling for the lifting of the ban on non-religious associations. In response, the government detained a number of executive members of the Bar Association including its President, Abdalla al-Hassan. Following a strike organised by the judges on 21 August, 57 judges were dismissed and over 20 were detained. A memorandum to the RCC was submitted by the judges protesting against these dismissals and detentions, arguing that the courts could not be said to be independent, as they were chaired by military officers. This resulted in further dismissals, and some judges resigned fearing dismissal. It is alleged that there is a number of judges the RCC intends to purge.

The judges' fears, regarding the impartiality of justice, were well founded. The trial of Idris el-Banna on 2 September is a case in point. He was the former Deputy-Chairman of the Council of State and was charged with corruption and misappropriation of road-building equipment. He was granted only four days to prepare his defence, was not allowed legal counsel except for a 'friend' in court and was not permitted access to the evi-

dence of the prosecution. The trial lasted under two hours during which the defendant was interrupted and verbally abused by the adjudicators. At 73 he was sentenced to 40 years imprisonment. A number of others charged with corruption or sedition have been tried since, but have been released.

On 27 September, the special courts were abolished and replaced with 'Revolution Security Courts'. These courts are no longer composed of army members but of judges allegedly appointed, to replace those who were dismissed or resigned, by one of the initiators of the Islamic law. Any death sentence or imprisonment exceeding 30 years has to be confirmed by the appeal court and as under the previous system, the death sentence has to be approved by the head of state.

The military government is composed, *inter alia*, of sympathisers of the National Islamic Front which strongly supports the imposition of Islamic law throughout Sudan, one of the main causes of the civil war with the rebel Sudan Peoples' Liberation Army (SPLA) in the South. On 12 June, the former government of Sadiq el-Mahdi and the SPLA of Dr. John Garang had agreed to participate in a Constitutional Conference. The SPLA demanded that the government agree to an indefinite cease-fire and the lifting of the state of emergency, thereby seeking a negotiated settlement to the five year long war based on auton-

omy for the South and a guarantee against the imposition of Islamic law. In a statement made on 7 July, Lt. Gen. al-Bashir rejected the peace accord approved by the former government in March 1989, and later spoke of introducing conscription and increasing army resources so as to prosecute the war in the South. Fighting has resumed. On 19 July, 34 civilian prisoners were summarily executed by soldiers in Wau, a town in southern Sudan, apparently in reprisal for the death of a soldier when an army lorry hit a mine, and on 7 October, 21 soldiers, suspected of collaborating with the SPLA, were killed.

Consequent peace talks resulted in a proposal to establish a federal system of government, however, this was rejected by the SPLA which favours a united Sudan. Both the government and the SPLA stated that they would attend a new round of peace talks to be held on 1 December in Nairobi.

It appears that the Sudanese government is gradually dismantling the democratic institutions which the country has enjoyed since independence, including an independent secular judiciary. As the process of islamisation proceeds, the hope of a peaceful resolution to the conflict in the South fades. The recent moves by the RCC in establishing military control and denying basic human rights and fundamental freedoms to its citizens seem to pave the way for a prolonged military dictatorship.

COMMENTARIES

United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (1989)

The 41st session of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities took place from 7 August to 1 September 1989 at the Palais des Nations in Geneva. The meeting was marked by the passage, in an unusual secret vote, of a mildly-worded resolution criticising China for its suppression of the "democracy" movement and by a plethora of new studies.

The meeting began by selecting Fiseha Yimer (Ethiopia) as Chairman, Miguel Alfonso Martinez (Cuba), Theo van Boven (Netherlands) and Ion Diaconu (Romania) as Vice-Chairmen and Ribot Hatano (Japan) as Rapporteur. The selection of Diaconu as a member of the Bureau while the previous Romanian expert was under house arrest (see below) and while the Romanian government was blocking the visit of the UN Commission on Human Rights Special Rapporteur, caused dismay among many observers. On the other hand, western members' fears that the presence of three 'hard-line' Marxists on the Bureau might lead to obstruction on their initiatives proved groundless.

The ICJ intervened on discrimination against persons with AIDS, the independence of judges and lawyers, disap-

pearances, the privatisation of prisons, violations of human rights in China, administrative detention, minorities and the right to leave and return. It also joined interventions on the human rights situation in Iraq and the imposition of the death penalty on youthful offenders. In addition, it successfully promoted a resolution on the independence of judges and lawyers, carried forward a draft declaration on disappearances and actively lobbied for the resolution on China. It also lobbied, unsuccessfully, for a resolution on the situation in Iraq.

Human Rights Violations

Voting on human rights violations was dominated by the question of *China*. Meeting two months after the brutal suppression by Chinese troops of the student-led "pro-democracy" movement, the Sub-Commission could hardly avoid the question. Yet, no permanent member of the Security Council had ever been condemned by a UN body for violations of human rights, and China lobbied hard to avoid being the first.

From the beginning of the debate, NGOs applied a coordinated strategy. The first speaker was Li Lu, a 23-year old

economics student on Beijing's "most wanted" list who had been in Tiananmen Square on 4 June and witnessed the onslaught of the troops. The Chinese observer left the room while Mr. Li spoke, later explaining that Mr. Li was "a criminal, wanted by the security organs of a member state of the UN" who should not be allowed to address UN bodies. The French expert Joinet retorted that if national definitions of "criminal" prevailed at the UN, then Yasser Arafat could never have addressed the UN and Nelson Mandela would never be able to.

Subsequently, clusters of NGOs delivered interventions focusing on the situation of students, trade unions, the press and the legal system in China. Finally, ICJ Secretary-General Niall MacDermot delivered a closing speech on behalf of the NGOs summarising the evidence the Sub-Commission had heard and calling on it to take action.

As the debate wore on, informal head-counts began to show that a resolution critical of China would succeed by a margin of several votes — as in other votes, four of the five Latin Americans (excepting Alfonso Martinez of Cuba) were lining up with the six western experts and enough of the Africans and Asians to carry the day. Nevertheless, the government of China began to exert such enormous pressure on the experts and their governments that no one could be sure. China reportedly called in the Beijing ambassadors of the experts' governments, and several experts were told outright that a negative vote could have repercussions on bilateral economic relations.

To ease the pressure on the experts, and to protect their independence, Joinet (France) proposed a suspension of the rules to allow voting by secret ballot on all resolutions under item 6 on "gross

violations". After hours of debate, that motion carried 14-6-3. (Voting against were Alfonso Martinez (Cuba), Bandare (India), Chernichenko (USSR), Diaconu (Romania), Ilkanahaf (Somalia) and Jin (China). Agoyibor (Togo), Attah (Nigeria) and Sadi (Jordan) abstained. Ksentini (Algeria) did not participate).

Finally, voting began on the resolution itself. The draft on China had been considerably watered down in an attempt to attract votes. No longer did the draft refer to specific violations. It now merely read that, the Sub-Commission was "Concerned about the events which took place recently in China and about their consequences in the field of human rights; 1. requests the Secretary-General to transmit to the Commission on Human Rights information provided by the Government of China and by other reliable sources; 2. makes an appeal for clemency, in particular in favour of persons deprived of their liberty as a result of the above-mentioned events".

In the secret ballot, the vote was: 15 in favour, 9 against. China reacted by calling the resolution "null and void" as an interference in its internal affairs and it is expected that China will seek to take revenge against the Sub-Commission as well as the members who most actively supported the resolution.

The secret ballot also made it possible to pass country resolutions which had been defeated in previous years (East Timor), and to strengthen others (El Salvador, Guatemala):

- *El Salvador*: a strong resolution (12 - 7- 5) expressed alarm at the intensification of death squad activities and "deep concern at the continuing increase" in human rights violations and urged the government and the guerillas to negotiate. Weakening

amendments by Carey (U.S.) and Warzazi (Morocco) were defeated in a 10 - 10 - 2 vote while an amendment by Alfonso Martinez calling on the government to bring to justice the assassins of Archbishop Romero was passed 12 - 7 - 4;

- *East Timor*: reversing last year's narrow defeat of this resolution, the Sub-Commission regretted (12 - 9 - 3) the reported increase in executions and torture, took note of the Catholic Bishop's call for a referendum and requested the Indonesian government to allow human rights groups to visit East Timor;

- *Guatemala*: the original draft resolution sponsored by four latins: Despouy (Argentina), Fix-Zamudio (Mexico), Suescún (Colombia) and Varela Quiros (Costa Rica) was quite mild, given the gravity of the situation in Guatemala. A no-action motion by Warzazi (Morocco) was defeated 9 - 12 - 2. The westerners van Boven and Eide proposed amendments to include references to serious violations and to call on the government "to adopt concrete measures to improve the economic and social conditions of the indigenous people". While Despouy agreed to the changes, Varela Quiros objected, but the secret ballot allowed their easy passage (13 - 6 - 4);

- *Iran*: the Sub-Commission (17 - 4 - 4) expressed "grave concern" at reports of "a wave of summary executions" and "deep concern" about other "grave human rights violations" including torture, denial of justice and repression of religion and expression. In a separate vote, the Sub-Commission also expressed concern (17 - 3 - 4) over the persecution of members of the Baha'i community. The decisive

votes contrasted with past results and were surely attributable as much to the secret ballot as to changes in the situation in Iran;

- *Iraq*: the only resolution put to a secret vote which was defeated was that which sought to criticise Iraq for the forced resettlement of its Kurdish minority, disappearances, executions and the use of chemical weapons. A motion to take no action on the resolution was carried by 14 - 10. Once again, questionable circumstances surrounded the voting on Iraq. Shortly before the vote, the members of the Sub-Commission received an invitation from an "Iraqi Human Rights Commission" to visit Iraq to investigate the charges. Even leaving aside the question of whether this Commission, which no one had ever heard of, was independent of the government (in which case it would have no standing to commit the government of Iraq), some members expressed concern that a government could avoid responsibility by inviting individual members (rather than the Sub-Commission *qua* Sub-Commission) for a visit to its territory without any of the procedural guarantees normally accompanying UN fact-finding exercises. (Indeed at this year's Commission on Human Rights, the government of Romania had made just such a vague offer, only to withdraw it when presented with a list of guarantees which it would have had to accept). The Iraqi delegation confirmed that members would be free to visit as they wished and this apparently carried enough votes to ensure passage of the no-action motion. NGOs will watch closely the development of this visit to Iraq;

- *the Israeli-Occupied Territories*: the

Sub-Commission (15 - 5 - 2) reaffirmed that the Israeli occupation itself constituted a gross violation of the human rights in the Occupied Territories, and a crime prejudicial to the peace and security of humanity under international law. It affirmed once again the right of the Palestinian people to resist the Israeli occupation by all means. The resolution supported the call to convene an international peace conference, including the PLO in accordance with Security Council resolution 242;

- *Lebanon*: the Sub-Commission expressed concern (18-2-3) at the increase in violence and stressed that humanitarian aid should be allowed to reach all sectors of the population. A reference to the role of foreign powers in the situation was kept in the resolution by a 12 - 11 - 1 vote;
- *South Africa*: the Sub-Commission reaffirmed that *apartheid* was a crime against humanity and demanded once again the immediate lifting of the state of emergency, immediate cessation of all acts of brutality by the South African army and security forces and the immediate release of all political prisoners; it urged the Government of South Africa to lift promptly the ban on anti-*apartheid* organizations; and reaffirmed the right of all persons to refuse service in military or police forces which are used to enforce *apartheid*. The resolution called upon the international community to assist the front-line States to safeguard their independence and territorial integrity against the aggression and destabilization carried out by the Government of South Africa, and urged all states to provide, both individually and collectively, moral and material assistance

to the oppressed people of South Africa and Namibia;

- *Compensation for victims*: van Boven (Netherlands) was asked to study and report to the Sub-Commission on the proposal of Professor John Humphrey, the former director of the UN division for Human Rights, for a declaration on the right to compensation for victims of gross violations of human rights;
- "*1503*" *Procedure*: in the confidential "*1503*" procedure which considers communications addressed to the UN alleging gross violations of human rights, the Sub-Commission took the unprecedented step — later repeated in the public procedure — of holding secret ballots on country situations whenever any member so requested. The Sub-Commission also voted, however, to postpone consideration of all complaints on which the government had not had five months to respond. As a result, of 13 cases transmitted to the plenary by the Working Group on Communications, only three were reportedly transmitted to the Commission (Burma, Brunei and Somalia). In the future, complaints will apparently have to be received by the UN Secretariat by 15 December of the previous year.

Administration of Justice

The Working Group on Detention met for the first time since the General Assembly adopted, in December 1988, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment which was first drafted by the Working Group. This year, under the constructive chairmanship of Miguel Alfonso Martinez (Cuba), the Working

Group was once again the source of important standard-setting work.

Last year, the International Commission of Jurists presented the first draft of a Declaration on the Protection of all Persons From Enforced or Involuntary Disappearances. The Working Group devoted several sessions to that draft, which the Sub-Commission sent to governments, NGOs, the Working Group on Enforced or Involuntary Disappearances, and the UN Crime Branch in Vienna for their comments. On the basis of all the comments received, and taking into account the draft Inter-American Convention Against Enforced or Involuntary Disappearances, the ICJ prepared a revised draft for consideration by this year's Working Group. The Working Group spent three formal sessions in general debate over the Draft Declaration and then seven informal sessions examining the ICJ revision article by article. The result of these working sessions was the adoption by the informal group of a second revised version of the draft declaration with several articles still in brackets. In its final formal session, the Working Group asked its Chairman, Alfonso Martinez, to prepare, without financial implications, a revised text for next year's Working Group with a view to submitting it to the Sub-Commission next year. Mr. Alfonso Martinez let it be known that he would delegate the task to expert Hatano (Japan) and his alternate Yokota as the latter had chaired most of the informal sessions. Because of the importance of this item, the Working Group decided to give "maximum priority" at its next session to the analysis of the revised draft.

The Working Group also took up two new issues which had been first proposed last year by expert Alfonso Martinez: the privatisation of prisons and the

execution of juvenile offenders. On the first issue, the ICJ made a presentation, drawing attention to the risk that privatisation of prisons could lead to a sacrifice in prison conditions in favour of a maximization of profits. The ICJ, together with Amnesty International and the members of the Working Group, all of whom joined the debate, also cautioned that privatisation would not relieve a state of its international responsibility for maintaining prisoners' rights. The Sub-Commission asked the Chairman Alfonso Martinez to prepare a study of the issue for the next session.

Regarding the execution of youthful offenders, expert Joinet (France) objected to considering the question of the death penalty in the context of minors only, as this might give the impression of condoning the penalty when applied to adults. Amnesty and Defence for Children International (in an intervention joined by the ICJ) pointed out that only in Barbados, Iran, Iraq, Nigeria, Pakistan and the USA had capital punishment been carried out in the 1980's against persons committing offences before the age of 18. Participants regretted the 1989 decision of the United States Supreme Court allowing the execution of minors. The Sub-Commission passed a resolution calling on states to cease executing persons under the age of 18 and to enact legislation to this effect.

In a rare move, Chairman Alfonso Martinez attached to the report of the Working Group interventions made by Amnesty International, Defence for Children International and the ICJ. Under the group's policy of rotating its officers, this year's Rapporteur, Louis Joinet, will be next year's Chairman.

On other matters relating to the Administration of Justice:

- Special Rapporteur Leandro Despouy (Argentina) reported that at least 25 states had proclaimed or continued a state of emergency since November 1988 while eight others had terminated states of emergency. In an addendum on South Africa, which will be a model for next year's report on all countries, he detailed the motives for the emergency, and its effect on human rights. The Sub-Commission took up the Special Rapporteur's proposal that he prepare model legal provisions to serve as a reference for states wishing to bring their internal legislation in conformity with international standards.
- Louis Joinet (France) presented his final report on the practice of administrative detention, reviewing its widespread use throughout the world. "In view of the serious risk of violations of human rights involved in the practice of administrative detention and the fact that there is no United Nations procedure for monitoring all the situations in which administrative detention is practised", he recommended "that a special report on the development of all forms of administrative detention throughout the world should be submitted each year to the Commission for its consideration". For lack of time, the Sub-Commission postponed its consideration of the report to next year, when it would give "high priority" to Joinet's recommendations.
- The Sub-Commission proposed that Mr. Chernichenko (USSR) and Mr. Treat (USA) be appointed as rapporteurs to prepare a brief report on existing international norms and standards pertaining to the right to a fair trial. It requested that the rapporteurs recommend which provisions guaran-

teeing the right to a fair trial should be made non-derogable; and decided to add the issue of a right to a fair trial to its agenda for the 42nd session.

Independence of Judges and Lawyers

At its 40th Session in August 1988, the Sub-Commission transmitted to the Commission on Human Rights the draft "Declaration on the Independence of Justice" prepared by Special Rapporteur, L.M. Singhvi of India. It also created a special item on its future agenda to examine the independence of judges and lawyers. In March 1989, the Commission on Human Rights requested that the Sub-Commission use its new agenda item to "consider effective means of monitoring the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers". The Centre for the Independence of Judges and Lawyers of the ICJ presented the Sub-Commission with a report on "The Harassment and Persecution of Judges and Lawyers: January 1988 - June 1989" listing 145 jurists against whom reprisals were taken for their professional work and called on the Sub-Commission to respond urgently to the Commission's request. The Sub-Commission did so, declaring itself "disturbed at the continued harassment and persecution of judges and lawyers in many countries" and requesting its French expert, Mr. Louis Joinet, to prepare a working paper on means by which the Sub-Commission "could assist in ensuring respect for the independence of the judiciary and the protection of practising lawyers". (Mr. Joinet is *avocat général* at the Cour de Cassation and former Secretary-General of the French

Syndicat de la Magistrature (Magistrates' Union)).

Indigenous Peoples

The pre-sessional Working Group on Indigenous Populations was attended by some 300 participants, including indigenous peoples and government representatives. While the Working Group remains one of the UN's most vital organs, the 25% decline in participation from 1988 raised questions as to the Working Group's direction, as little progress was expected or made this year on the draft declaration of indigenous rights being prepared by Chairwoman Daes (Greece).

Nevertheless, the Working Group again provided a forum for the testimony of indigenous peoples from all over the world. The plight of the Yanomami Indians of Brazil, who risk genocide due to the invasion of their lands for gold mining, was evoked by numerous participants. There was strong pressure for a mission to Brazil, but in the face of strong lobbying by the Brazilian government, no resolution was adopted on the subject. Chairwoman Daes stated, however, that the question was being dealt with at the "highest level", implying that the Secretary-General had contacted the Brazilian government. The question of the relocation of more than 7,500 Navajo and Hopi people from their traditional homes in Arizona, USA, which was the subject of separate visits by experts Carey (US) and Daes, also became controversial when the two submitted separate reports and tabled separate draft resolutions: Mr. Carey's to discontinue consideration of the matter and Mrs. Daes' calling for a halt in resettlement pending a negotiated solution. In the end the two agreed on a joint text along the

lines of Mrs. Daes' draft, which was then adopted without a vote.

Numerous indigenous participants expressed their discontent with the just-completed revision of ILO Convention 107 and staged a walk-out when the ILO representative took the floor. They criticised the new Convention 169 for its failure to move forward in the key areas of land rights and self-governance and worried that these new standards might make it harder for them to realise their aspirations in the UN draft declaration. (See ICJ Review Nos. 41 and 42).

The Sub-Commission recommended to the Commission on Human Rights that the Working Group be authorised to meet for 10 days before the next two sessions of the Sub-Commission. This will allow for informal, in-sessional and open-ended drafting groups of governments and indigenous representatives to "seek agreement on recommendations" for completing the draft declaration.

Experts Eide (Norway) and Mbonu (Nigeria) were asked to prepare a working paper on possible UN activities for an International Year for Indigenous Rights which the General Assembly was urged to proclaim for 1993.

Contemporary Forms of Slavery

Following the practice established last year, the rejuvenated Working Group on Contemporary Forms of Slavery focused on one particular theme, namely the "sale and prostitution of children, including their use for pornography". With a year to prepare for the meeting, NGOs, governments and specialised agencies exchanged information on sex tours to Asia, the exploitation of addicted children, the sale of children for adoption,

incest, debt bondage, etc. Surprisingly, UNICEF was not represented. Norway's Minister of Justice, together with a group of specialists, made a presentation, including a film, on the question of the sexual abuse of children.

The ICJ in its intervention called for the Working Group to deal with the effective implementation of the relevant Conventions. This would include: defining the scope of the problems with the Working Group's mandate; evolving guidelines for the receipt of information and for monitoring governmental compliance; indentifying the long and short term measures necessary to eradicate specific problems such as debt bondage and child labour; and recommending coherent national policies to deal with contemporary forms of slavery.

The Working Group decided, in the interests of democracy and fairness, to rotate its Chairmanship in the future. While many NGOs considered it unfortunate to lose Chairman Eide (Norway), who has built up considerable expertise in the field and has shown himself to be a devoted year-round Chairman, this only underscored the need of the Working Group to establish effective procedures which do not depend on one individual. Next year's main theme will be bonded labour.

The Sub-Commission recommended that the Commission on Human Rights appoint a Special Rapporteur to look into the sale of children, child prostitution and pornography.

Review of the Work of the Sub-Commission

The Sub-Commission considered a second working paper presented by Eide

(Norway) and van Boven (Netherlands) proposing to change the manner in which the Sub-Commission deals with human rights problems. The two experts proposed that a five-member working group prepare a two-part report. The first part would consist of a factual and objective synopsis of information provided by experts and observers. The second part would seek to identify trends in violations of human rights and to bring to the attention of the Commission those situations which warranted its attention. Van Boven stressed that the Sub-Commission "should not simply be a forum, but also a meaningful instrument vis-à-vis the Commission on Human Rights". While most participants agreed that the report envisaged would be more suited to the independent expert or "think-tank" nature of the Sub-Commission, many raised serious practical problems. Finally, the Sub-Commission appointed an open-ended working group of five members to meet next year to review the various proposals for changes in its methods of work.

Economic, Social and Cultural Rights

A preliminary study on the realisation of economic, social and cultural rights was prepared by Danilo Türk (Yugoslavia). The study examined the priority to be accorded to the two sets of rights — economic, social and cultural versus civil and political. While noting that "most United Nations activities in the field of human rights have related to civil and political rights", Türk also observed that there has been "a strongly held view among the majority of the Members of the United Nations in favour of consider-

ing economic, social and cultural rights as the priority", but that over the past few years, particularly in some socialist and developing states "certain change is taking place in the approach to human rights", in favour of the view that the two sets are indivisible and interdependent. In the final analysis, he pointed to human "dignity", referred to in Article 1 of the Universal Declaration and the preamble of both covenants, as the "core concept" around which both sets of rights are based. He called for steps to identify the core concepts of each of the enshrined rights as well as the obligations of states to provide those rights.

Turning to the problem of the realization of economic, social and cultural rights at the national level, he looked at the question of extreme poverty — or "impoverishment" to use a more "dynamic" term —, both in developing countries and in industrial societies and the question of structural adjustment. Citing the ICJ-promoted Limburg Principles, he noted in conclusion that the duty of States to achieve progressively the full realization of economic, social and cultural rights exists independently of the increase of resources and that it requires effective use of resources available. However, he stated, "in the context of medium-term and long-term policies, growth of available resources becomes a necessary element of the realization of economic, social and cultural rights. The real difficulty here seems to be in the method of ascertaining the quantitative proportions of available resources and of assessing States' policies". He next looked at the international dimensions of the problem, including areas of cooperation with specialized agencies and the impact of the activities of international financial institutions such as the IMF and the World Bank.

Racism and *Apartheid*

An updated report on investment in South Africa was presented by Mr. Khalifa (Egypt). The report noted that since 1984 a number of large transnational corporations (TNCs) have sold their South African subsidiaries or affiliates or announced their intention of doing so. There was evidence, however, that several of the disinvesting companies maintain non-equity ties with the host country in licensing agreements, thus defeating the purpose of disinvestment. With regard to mechanisms of disinvestment, the report noted that investment withdrawals took several forms and could be broadly distinguished into three categories: total shut-down of operations, including sales and representatives' offices and subsidiaries; reduction of direct investment, i.e. partial sale and dilution; and sale of ongoing operations to third party, local management and trust.

Asbjørn Eide, Special Rapporteur on the Question of the Elimination of Racial Discrimination, referred to *apartheid* as the most critical and serious problem in the world today. He reported the results of attempts to combat *apartheid* and racial discrimination, and summarised worldwide UN activities during the Decades to Combat Racism. He emphasised that *apartheid* itself should be the major focus of attention; reforms legislated by the South African minority White government being cosmetic and not of substance. Racial categories, he noted, are the core of *apartheid* and any minor extensions of political rights have been granted along racial lines. Whites still control over 80% of the land.

Eide advocated a three-pronged programme of international action which included: much more rigorous application of sanctions; adoption of a systematic

policy of cooperation with anti-apartheid groups; and development of alternative contacts within the sporting, cultural and economic fields, according to circumstances and specifications laid down by anti-apartheid organisations.

The report recommends that more resources be given to the Centre for Human Rights in order to assist the Under-Secretary for Human Rights in coordinating cooperation and interaction between different groups with similar aims. It also urges ratification of the new ILO Convention on Indigenous Peoples, and adoption of the Convention of Migrant Workers and Their Families as well as research with descendants of slaves to detect the continuing impact of slavery on their lives.

Dr. Eide suggested that attention be given to linguistic and cultural rights, and focus be directed to determining the effectiveness of affirmative action programmes. In order to better recognise problems of ethnic conflicts and protection of minorities, he urged suspension of UN attempts to obtain definitions, and direction of attention to issues of substance.

Studies

The Sub-Commission was presented this year with a record number of studies, and approved even more for next year. While most of these were of high quality, lack of time and the fact that most of the studies became available on the eve of, or during, the Sub-Commission meant that there was little opportunity to engage in a meaningful exchange of views on the subjects treated. As the Sub-Commission has authorised an even greater number of studies for next year, new methods of analysing these studies

are urgently needed if the Sub-Commission is to perform a useful role. In addition to requiring that studies be available sufficiently in advance of the Sub-Commission meeting, other methods might include the creation of small Working Groups to debate each study. In addition to the studies already noted (on states of emergency, administrative detention, economic, social and cultural rights, investment in South Africa, racism), the Sub-Commission considered the following studies:

- *Minorities*: expert Palley (U.K.) presented a preliminary report on "possible ways and means of facilitating the peaceful and constructive resolution of situations involving minorities". She concluded that "a study of minorities must initially focus on the analysis of examples of successful national action so that it is possible to determine what kinds of UN action, if any, can strengthen the process of resolution in States where practical accommodation of the rights of minorities is still an ongoing concern". On her suggestion, expert Eide (Norway) was appointed as Rapporteur to carry out a two-year study of national experiences in the protection of minorities, with a focus on autonomy arrangements;
- *The Status of the Individual and International Law*: Mrs. Daes (Greece) introduced her report, stating that international law is experiencing a period of transition which would lead to the establishment of a new legal order in which the individual would play an increasingly important role. Though states are the subject of international law, the individual is becoming more and more visible in the arena, especially in the field of human rights.

Mrs. Daes proposed that individuals have direct access to the International Court of Justice;

- *The Right to Leave and Return*: the final report on the Draft Declaration on the Right to Leave and Return by Mr. Mubanga-Chipoya (former expert from Zambia) was discussed at the session after being held over for two years. NGOs and some observer states noted that the right to leave a country is linked to the possibility of entering another country and that the prerogative of admitting a foreigner lies in the hands of the host state. Since the right to leave is meaningless without the right to enter, further elaboration of the draft declaration was suggested. Based on these and other comments, the Sub-Commission passed a resolution asking the Secretary-General to prepare an analytical compilation of comments on the Draft Declaration and decided to establish a sessional working group at its 42nd Session to revise it;
- *Religious Intolerance*: in a two-part working paper, Theo van Boven (Netherlands) examined the factors which would have to be considered before the elaboration of an international convention on the subject. In particular, he stressed that the drafting of a convention should not prevent the implementation of existing norms. Most participants agreed with van Boven that much preparatory work was needed before a new instrument could be drafted;
- *AIDS*: a concise note was presented by Varela Quiros (Costa Rica) on the proposals for a possible Sub-Commission study on discrimination against persons infected with the HIV virus or suffering from AIDS. The report provides an overview of the problem; discusses the medical and legal aspects of AIDS; and deals with questions and methods to be considered. The Sub-Commission entrusted Varela Quiros to make a preliminary report to its 42nd session;
- *Traditional practices affecting the health of women and children*: Warzazi (Morocco) orally presented a first report. The Sub-Commission extended her mandate for two years so as to enable her to present a more complete report; urged that field missions be undertaken if possible to two countries where harmful traditional practices were prevalent; and suggested that international regional seminars be held on the subject of harmful traditional practices in Africa and Asia;
- *Freedom of opinion and expression*: a working paper on the freedom of expression was presented by Mr. Danilo Türk (Yugoslavia). It examined the content of the right as well as permissible limitations, concluding that "the proponent of a limitation bears the burden of proof regarding the necessity and legality of the proposed limitation as well as regarding its compatibility with the principle of the right to freedom of expression". He also referred to "those States which are constitutionally committed to certain public philosophy (i.e., ideology or religion) and which permit freedom of expression only in so far as it is in accordance with that philosophy". He wrote that "A debate about the compatibility of such legal systems with the universally accepted standards of human rights could be interesting". Much more interesting, he said however, would be the prospect for peaceful and orderly change in the political structures of such States. For the fu-

ture, he suggested that the Sub-Commission consider "the political dimension of the right ... and that it should be considered in close connection with the notion of political participation".

Some experts pointed out that effective freedom of expression required not only the absence of negative sanctions by the government but also protection by the government against third forces which prohibit the freedom of expression. Khalifa (Egypt) stated that man in the contemporary world did not form his opinions in isolation but is dependent on contacts with, and on information from, others. Man's freedom, he added, could be lost due to monopolies of information. The Sub-Commission authorised experts Türk and Joinet to work together on a more comprehensive study along the lines suggested by Mr. Türk.

The Mazilu Affair

The Sub-Commission again grappled with the absence of its Special Rapporteur on Human Rights and Youth, the former expert from Romania, Dumitru Mazilu, who has been prevented by his government since 1987 from coming to Geneva. This year, the experts received copies of a report on human rights and youth which Mazilu had succeeded in smuggling out of the country as well as a private letter in which he explained the conditions of his detention. The report which constituted a denunciation of the Ceausescu dictatorship was circulated, despite the objections of expert Diaconu (Romania), as an official UN document.

The Romanian response to inquiries into Mazilu was even more clumsy than

in the past, when the government alleged that he was suffering from heart trouble and was too ill to travel. This year the Sub-Commission was told that Mazilu "does not possess the intellectual capacity" to prepare a report. In a document circulated to the Sub-Commission, the government cited articles written by Mazilu in the 1970's praising the government and said that his change of views cast doubt on "his intellectual and moral integrity". More than one expert cited that dissident opinion as evidence of lack of mental capacity was hardly the way for a government to show its commitment to human rights.

The resolution on Mazilu's report gave rise to over 10 votes on its different aspects. The Sub-Commission finally, by 12 - 4 - 2: requested Mr. Mazilu to update his report and to present it to the 42nd session of the Sub-Commission; expressed its deep concern at the reports of the personal situation of Mr. Mazilu and his family; and requested the Secretary-General to follow closely the personal situation of Mr. Mazilu and his family in order that he inform the Special Rapporteur on the human rights of United Nations staff members, experts and their families accordingly.

In other developments, the Sub-Commission:

- emphasized that the problem of inter-relationship between human rights and international peace in all its aspects required further examination; in particular taking account of the desire for transparency which in certain regions of the world was producing positive effects with respect to disarmament and peace; and decided to recommend that Mr. Bhandare (India) be appointed as Special Rapporteur on the question of the interrelation-

ship between international peace and the effective materialization of human rights, particularly of the rights to life and to development;

- requested the Secretary-General to consider convening not later than in 1991 an international meeting of experts on issues related to the international monitoring in the field of human rights;
- asked expert Ksentini (Algeria) to prepare, without financial implications, a concise note setting forth methods by which a study on the problem of the environment and its relation to human rights could be made;
- affirmed that any foreign debt strategy must be designed not to hamper the steady improvement of conditions guaranteeing the enjoyment of human rights and must be intended, *inter alia*, to ensure that debtor developing countries achieve an adequate growth level to meet their social and economic needs and their development requirements. It stressed the need to revive the economic growth and development of these countries and reduce the political and social costs of structural adjustment programmes so that they might guarantee the necessary conditions for the full enjoyment of all human rights. It also considered it necessary to invite the developed countries and multilateral financial institutions to take particular account, in formulating their debt policies, of social objectives, growth and development priorities.

Role of Governments, NGOs and alternates

A large amount of time was given to a discussion on the role of governments

and NGOs in the Sub-Commission. During the opening debate, one expert, without having consulted with NGOs, proposed that NGOs be given the floor to comment on proposed country resolutions before the Sub-Commission. At one point, it looked as if the issue was headed towards a vote or a legal opinion, which, if unfavourable, could have set a dangerous precedent. This would have been particularly unfortunate as the right to speak on resolutions had not been sought by any NGO. Fortunately the matter never came to a vote.

During the debate on violations, as the US and some other western governments sought to take the floor to comment on the situation in China, a session-long polemic was opened as to the right of governments to speak on human rights violations in other countries. According to ECOSOC rules, non-members of one of its subsidiary bodies may be invited "to participate in its deliberations on any matter of particular concern to that State". Several experts argued that the universality of human rights made it a particular concern to everyone. Other experts and many NGOs believed that uncontrolled government interventions would further turn the Sub-Commission into a mini-Commission. Indeed, the European Community and Scandinavian countries had already decided not to intervene in order to emphasize the expert and independent nature of the Sub-Commission. (In addition, many NGOs, which had a carefully elaborated strategy of interventions on the China question, were urging western governments not to poison the atmosphere through political attacks). A legal opinion was sought from the UN office of legal affairs which stated that, while it is the standard practice of the United Nations bodies that each might interpret the rules of

procedures applicable to it, to the extent that such an interpretation did not constitute an amendment or suspension of the rules, the interpretation of the term "particular" was normally a judgment to be made by the observer. In the end, it was decided, for this session only, to allow governments to intervene while appealing to them for restraint.

Several alternate members played important and constructive roles in the work of the Sub-Commission. Yokota (Japan), chaired most of the informal meetings on the disappearances draft, where Flinterman (Netherlands) also played a key role. Carey (US), Mbonu (Nigeria) and Ramishvilli (USSR) also took on major substantive responsibilities while their experts were also working, thus increasing the productive ca-

capacity of the Sub-Commission. Controversy erupted, however, when the original draft resolution on compensation for victims of gross human rights violations proposed that Flinterman be appointed to carry out the study. Several experts from developing countries objected, noting that the Sub-Commission's rapporteurs were already disproportionately in the hands of its European experts without giving new ones to their alternates. They pointed out that, as the UN does not pay the costs of travel for alternates, it is very difficult for most alternates from poorer — and more distant — countries to be present in Geneva. The draft resolution was withdrawn and a new one presented and adopted naming van Boven to prepare the study.

Human Rights Committee

Since October 1986¹ Algeria acceded to both the Covenant and the Optional Protocol. Austria, Gambia, Libyan Arab Jamahiriya, New Zealand, and the Philippines acceded to the Optional Protocol. The number of States parties to the Covenant as of October 1989 was 88 and to the Optional Protocol on communications 47. In January 1988 Spain renewed its declaration under article 41 on inter-state communications and in June 1988, Gambia made an indefinite declaration

under this article. The number of states having made the declaration under article 41 on inter-state communications remains at 18.

Between October 1986 and October 1989 (the 37th session reviewed in this report), the Committee considered the initial reports of the Congo, Zaire, a supplementary report to an initial report from El Salvador, the Central African Republic, Guinea, Zambia, Togo, Philippines, Bolivia, Cameroon and the second

1) See last report on the Human Rights Committee (ICJ Review, December 1986, No. 37)

periodic reports of Iraq, Poland, Romania, Senegal, Tunisia, Australia, Barbados, Colombia, Denmark, Norway, Mexico, UK dependent territories, Netherlands, Uruguay, New Zealand, Mauritius and Italy.

During this period a number of important developments have taken place.

The Committee repeated its concern that general comments were either omitted or neglected by many States parties in their reports. It was hoped that future periodic reports would more fully reflect previous general comments made by the Committee. Guidelines were adopted for States parties making third periodic reports which should include information about progress made on issues raised by the Committee on second periodic reports and any new information on relevant issues or events.

The Committee expressed concern at the fact that States parties provided little information concerning domestic provisions set up to ensure that judicial, administrative and legislative organs effectively protect the rights under art. 17 on arbitrary or unlawful interference with a person's privacy. Specifically the Committee requested that States parties' reports incorporate the redress available to any individual complaining of violations of art. 17 on privacy.

Two communications dealt with by the Committee during this period are considered of particular importance since they have contributed to the development of jurisprudence of some of the articles of the Covenant:

In *Ivan Kitok v Sweden* No. 197/1985² a violation of art. 27 was claimed on the grounds that a Swedish citizen of Sami ethnic origin was prohibited from breed-

ing reindeer. The Committee was of the view that there had been no such violation. It was guided by the ratio decidendi in the *Lovelace* case (No. 24/1977) namely that "a restriction upon the rights of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole". This interpretation produced some surprise.

In *Floresnilo Bolanos v Ecuador*³, the alleged victim claimed violations of arts. 3, 9 and 14 of the Covenant. He had been detained without charge or trial since November 1982 in connection with a murder investigation. In April 1988 the Committee decided that the communication was admissible on the grounds that the judicial proceedings had been unreasonably prolonged and the State party had not provided certain information and clarifications with regard to detention without trial and delays in the proceedings. The duty of the State party is implicit in art. 4 para. 2 of the Optional Protocol. The Committee was of the view that the facts of the case disclose violations of art. 9 paras 1 and 3, because Mr. Bolanos was deprived of liberty and not tried within a reasonable time and of art. 14 paras 1 and 3 (c) because he was denied a fair and prompt hearing⁴. The Committee decided that the State party was under an obligation in accordance with art. 2 of the Covenant to remedy the violations, to release him pending the outcome of criminal proceedings and to grant him compensation pursuant to art. 9 para. 5 of the Covenant. Mr. Bolanos was subsequently released.

At the 35th session (April/May 1989)

2) 33rd session, July 1988

3) 36th session, July 1989

4) See *Munoz v Peru* (No. 203/1986, views adopted 4 November 1988, para. 11.2

a new procedure was instituted to speed up and simplify the handling of new communications. Formerly, a new communication with recommendations from the Secretariat, had to await authorization by the Working Group on Communications before being sent to a State party for its observations on admissibility (Rule 91). Under the new procedure the function is performed by a Special Rapporteur, Mrs. Rosalyn Higgins (Member from the UK). The advantages are not only a reduction in the time taken on admissibility, but also the saving of much needed funds formerly spent on the preparation, translation and reproduction of documents for the Working Group before transmission of all relevant documents to the State party.

Reports under Article 40

The Committee examined the reports of Chile, Democratic Yemen, Portugal and the Union of Soviet Socialist Republics. The reports of San Marino and the German Democratic Republic were scheduled for examination but their respective governments requested deferment of consideration.

Chile

Chile presented its third periodic report which described the legal and practical aspects regarding provisions under the Covenant. The delegation stressed that Chile was moving towards the full restoration of democracy, a process which was to culminate on 11 March 1990 with the presidential and parliamentary elections. One important milestone was the election of the President of the Republic in October 1988 by popular vote.

One major event was the publication of the Covenant in Chile in April 1989. Some changes had been made to the Constitution, in particular art. 5 para.1 which states that it is the duty of all state organs to respect and promote such rights as guaranteed by the Constitution, as well as by the international instruments ratified by Chile. Some courts however do not recognise the Covenant, in contravention with art. 2 paras 2 and 3 of the Covenant.

According to the report the lifting of the state of emergency had led to the removal of all restrictions on personal freedom such as the freedom of movement, association, information and opinion. The right to enter and leave had been re-established and persons can only be detained for a period of 5 to 15 days in their homes or in places other than prisons.

The Committee felt that progress had been made towards the re-establishment of democracy. Nevertheless, concern was expressed with regard to continuing information about human rights violations and complaints.

Among these was the existence of military tribunals which continued to try civilians and the excessively long periods of *incommunicado* detention (10 days under the anti-terrorist law, 5 days for other laws) thereby exposing those detained to the risks of torture and inhuman or degrading treatment. Although the ICRC can visit Chile, its access to certain prisoners is still restricted. The members of the Committee recommended a revision of the norms according to arts. 9 and 10 of the Covenant.

Further concern was expressed about reports on disappearances and torture. The delegation responded that such complaints were being dealt with by the courts and that the cases were being investigated.

It was noted that the formation of political parties was still restricted and the Communist and Socialist parties were refused licenses by the government, in contravention of the democratic spirit of the Covenant.

In conclusion, the members hoped that the return to democracy in Chile would bring about a greater respect for human rights and fundamental freedoms.

Democratic Yemen

Though the initial report of Democratic Yemen was on time, there appeared to be a lack of detail in a number of areas. Art. 35 of the Constitution of Democratic Yemen, regarding equality for all did not conform to art. 2 of the Covenant. Mr. Basaleh, head of the delegation accepted this, but said that in practice the equality existed. One member was concerned that the application of the death penalty for offences against public property was contrary to the Covenant (art. 6.2) even though art. 65 of the penal code of the State party was very clear in stating that the death sentence was an exceptional measure.

Freedom of political opinion had been omitted from the Constitution and neither the report nor the Constitution made it clear which rights could be amended during states of emergency. Full sexual equality was guaranteed, but the practice did not conform to the legislation. One member suggested that the main source of human rights problems was the restrictions which resulted from the one party system of government: the lack of freedom of expression was an example.

It was suggested that the Democratic Yemen might undertake a systematic review of its legislation to bring it into line

with its obligations under the Covenant. Mr. Basaleh promised more detail in the next report and thanked the Committee for the constructive dialogue.

Portugal

The Committee welcomed the changes in Portugal's legal system and political structure which had occurred since the submission of the initial report in 1981.

Changes to the Constitution included the abolition of the Council of the Revolution and any references to the "revolutionary process". Various provisions revealing the dominant concerns of the legislature were also adopted. These included:

- protection of human rights in general;
- promotion of economic, social and cultural rights;
- the enshrinement of the principle of universal suffrage, on a basis of equality, in direct, secret and periodic elections; and
- European integration.

The Committee raised a number of issues which required further information. Clarifications were made on the role of the Ombudsman whose task is to defend the fundamental rights of persons discriminated against for political reasons.

The Portuguese delegation said that the principle of self-determination enshrined in art. 1 of the Covenant was recognised in art. 7 of the Constitution and the process of decolonisation was carried out in accordance with it. However, this principle had not yet been applied to East Timor which was illegally occupied by Indonesia. Providing additional information on the status of Macao, it was clarified that the substantive democratic

rights of that population would be ensured when Portugal was relieved of its responsibilities for Macao after 1999.

Concerning the rights of minorities the delegation stated that measures for preventing discrimination against gypsies had been introduced as well as education for gypsy children. As to the preservation of the Mirandés dialect (currently spoken by about 15,000 persons) in the north-eastern region, the Ministry of Education had set up optional courses in elementary schools soon to be extended to secondary schools as a means of preserving the linguistic and cultural values of that minority.

In their final comments, the Committee agreed that the overall human rights situation in Portugal as reflected in its report was remarkable. Portugal's Constitution was the first one examined by the Committee which contained provisions stipulating that the protection of human rights should be a major factor in the formulation of foreign policy.

Union of Soviet Socialist Republics

The Committee considered the USSR's third periodic report which gave the Committee an opportunity to review the recent encouraging developments taking place.

The report was introduced by Mr. Yakovlev, Soviet Minister of Justice who presented a number of recent changes. These included constitutional amendments and electoral legislation reforms by which citizens could now select candidates whom they felt could protect their interests.

By decentralisation of state power, national State fora and autonomous bodies would have broad powers in economic management, the drawing up of an independent budget, and the man-

agement of natural resources.

Draft legislation on the rights of the republics in local self-management and the rights of national minorities was before the Supreme Court. Legislation concerning the right to enter and leave the country and on the role of the mass media had been submitted to the Supreme Soviet, and legislation on the right of association and freedom of conscience and religion had been prepared.

Important measures had also been taken in the field of judicial reform. Legislation on the status of the courts had been enacted with a view to guaranteeing the independence of the judiciary and a number of detailed amendments had been made to criminal law including art. 70 of the Criminal Code concerning counter-revolution and propaganda. The Supreme Court was also considering amendments to enable citizens to challenge individual illegal actions of officials.

Committee members noted that the report was an expression of the new spirit of co-operation in human rights and a number of questions were raised by the Committee.

The Constitutional Review Committee will monitor the conformity of legislative measures and normative acts with the Constitution.

Art. 1 of the Covenant would be taken into account in the elaboration of new legislation.

Death sentences have decreased by half since 1984. It was envisaged that future legislation would further limit the types of crimes punishable by the death penalty.

With regard to psychiatric abuse, 2,000 mental patients had been discharged since 1987. Under the 1988 regulations on the conditions and procedures for providing psychiatric care in

preventing abuses and errors in psychiatry, a person interned in a psychiatric hospital had the right to appeal to a court and criminal liability was introduced for detaining a healthy person in a psychiatric institution.

On the freedom of assembly and association, a law on the rights and responsibilities of trade unions was under preparation which would substantially extend their rights.

In their final comment, Committee members found the report submitted satisfactory and complete. However, it was noted that further improvement of human rights required a great amount of additional activities in various areas such as intra-national relations, the right to leave, religious freedom, right to privacy and freedom of expression. A hope was expressed for the eventual ratification by the Soviet Union of the Optional Protocol.

General comment

The Committee noted that the Covenant does not define the word "discrimination" or what constitutes discrimination. Drawing from definitions in arts. 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and of the Convention on the Elimination of All Forms of Discrimination against Women, it reached the view that "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all per-

sons, on an equal footing, of all the rights and freedoms.

The enjoyment of rights and freedoms on an equal footing does not however mean identical treatment in every instance.

The Committee expressed the wish to receive more information on discrimination which may be practised by public authorities, the community or by private persons and how legal provisions and administrative measures operate to decrease or eliminate such discrimination.

When legislation is adopted by a State party, it should not be discriminatory, in compliance with art. 26. The application of the principle is not limited to those rights which are provided for in the Covenant, but has a more general application under this article.

Statement of views under the Optional Protocol

The volume of cases decided has increased dramatically over the past three years. At its 28th session (July/August 1986) the Committee adopted four final views, whilst at the 37th session (October/November 1989) it made 17 final statements of views. The case-load of the Human Rights Committee under the Optional Protocol has increased at least as rapidly as the numbers of decisions reached by the Committee. In January 1986 there were 20 pending cases, whilst in October 1989, the number was 140. This growth rate is likely to continue as part of a trend resulting from an increased awareness of the procedures through the many new publications of the Centre for Human Rights and the current U.N. World Information Campaign for Human Rights. The urgent need for strengthening the Secretariat

servicing the Optional Protocol was underlined. (Only a small proportion of cases can be reported in this article).

The *Bhinder v Canada* case further elucidates the scope of articles 18 (freedom of religion) and 26 (non-discrimination) of the Covenant. In that case Mr. Bhinder, a Sikh by religion, had been dismissed from his employment as an electrician in the Toronto Coach Yard of the Canadian National Railroads, because he refused to wear a hard hat in a hard hat area, arguing that as a Sikh he could only wear a turban. The Committee found no violation of articles 18 or 26 of the Covenant, since the hard hat requirement was not discriminatory and was based on reasonable and objective considerations of safety.

F. Birindwa and E. Tshisekedi v Zaire No. 241 and 242/1987 arose out of the *Ngalula Mpandanyila et al v Zaire* case No. 138/1983. In the later case reported in the December 1986 issue of the ICJ Review (No. 37) the Committee found that the State party had violated Articles 9, 10, 12, 14, 19 and 25 with respect to eight former members of the parliament of Zaire including Mr. Birindwa and Mr. Tshisekedi. Instead of granting compensation or investigating their ill-treatment in accordance with the Committee's statement of views in case 138, the Zairan authorities imposed another term of banishment on Mr. Birindwa and Mr. Tshisekedi. They were however released on 27 June and 1 July 1987 respectively and decided to travel abroad.

Mr. Tshisekedi returned and was arrested at a demonstration he organised on 17 January 1988.

The Committee stated as on previous occasions, that it is implicit in art. 4 para. 2 of the Optional Protocol that States parties have a duty to investigate in good faith all the allegations of viola-

tions of the Covenant. The authors alleged retaliatory measures by the Zairan authorities as a direct result of their prior communication to the Committee in No. 138/1983, by stating that documents of the Human Rights Committee are considered subversive by the authorities and that anyone holding them is subject to arrest. The Committee noted that the State party had not commented on these allegations and stressed that it would be incompatible with the Covenant and the Optional Protocol if States parties were to take exception to anyone placing a communication before the Committee. If such allegations were true it would disclose grave violations of a State party's obligations under the Covenant and the Optional Protocol.

The Committee found violations in the case of *F. Birindwa* of art. 12 para. 1 because of his internal banishment from mid-June 1986 to 1 July 1987; of art. 7 in the case of Mr. Tshisekedi because he was deprived of food and drink for four days after his arrest on 17 January 1988 and was subsequently kept interned under unacceptable sanitary conditions; of art. 9 para. 3 because he was not brought promptly before a judge following his arrest on 17 January 1988; of art. 10 para. 1 because he was not treated with humanity during his detention; of art. 12 para. 1 because he was deprived of his freedom of movement during periods of internal banishment; and of art. 17 para. 1 because he was subjected to unlawful attacks on his honour and reputation — the authorities having constantly referred to him in the press as being mentally disturbed.

The Committee was of the view that the State party is under an obligation to remedy the violations and to ensure that the authors can effectively challenge these violations before a court of law, to

grant appropriate compensation to Mr. Tshisekedi and Mr. Birindwa and to ensure that similar violations do not occur in the future.

Decisions on inadmissibility

The Committee declared 11 communications inadmissible. The most significant decision, perhaps, was taken in case No. 268/1987, *M.G.B and S.P v Trinidad and Tobago*, where the authors claimed to be victims of a violation by the Government of Trinidad and Tobago of arts. 2(3)(a) and (b) and 5 of the Covenant. The Committee noted, however, "that these are general undertakings by States and cannot be invoked, in isolation, by individuals under the Optional Protocol". In other words, the Committee has decided that the Covenant does not provide for an autonomous right to a remedy (art. 2 of the Covenant) unlike in the European and Inter-American systems.

The Committee also declared two Jamaican death row cases inadmissible for reasons other than non-exhaustion of

domestic remedies.

"It appears that the author claims bias of the court, in particular in respect of the adequacy or otherwise of the judge's instructions to the jury. In the light of the evidence that was put before the jury and which it was for the jury to accept or reject. While art. 14 of the Covenant guarantees the right to a fair trial, it is for the appellate courts of the States parties to the Covenant to evaluate facts and evidence in a particular case. Thus the review, by the Committee, of specific instructions to the jury by the judge in a trial by jury of generalised claims of bias is beyond the scope of application of article 14. In the circumstances, the Committee concluded that the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol".

Yet another important development worth noting is that Committee members seem to be moving away from the consensus principle. More and more individual opinions are being submitted, both with respect to final views and decisions on inadmissibility.

ARTICLES

Realization of Social and Economic Rights The Minimum Threshold Approach

by
Asbjørn Eide*

Some basic challenges to social and economic rights

The indivisibility and interdependence of civil and political rights on the one hand and economic, social and cultural rights on the other is a fundamental tenet of the United Nations approach to human rights. But while this doctrine has frequently been reaffirmed by the various human rights organs, it has not been reflected in practice whether at the national or international levels. Among the reasons for this discrepancy is the fact that both the precise content of a number of economic, social and cultural rights, as well as the specific obligations which they imply for States Parties to the International Covenant on Economic, Social and Cultural Rights, remain extremely vague. This vagueness, when contrasted with the degree of precision with which most civil and political rights

have been elaborated, has tended to encourage the relative neglect of economic and social rights.

An objection to economic rights *qua* human rights is that they are not legally enforceable. Thus, for example, it has been argued that "the implementation of these provisions (including article 11) is a political matter, not a matter of law, and hence not a matter of rights"¹. But it is highly questionable, at best, whether an enforceability test can appropriately be applied in order to ascertain whether a right can be deemed to be part of international human rights law. As van Hoof has argued, "one cannot simply 'transplant' conceptions and ideas derived from municipal systems into international law, because often these are not attuned to the realities of international relations"². In fact, as he notes, "it is the exception rather than the rule that norms of international law can be enforced

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This article is a revised version of Mr. Eide's report given to the Paris Seminar in December 1988 "Human Rights and the Disadvantaged" and draws heavily on his study for the United Nations Sub-Commission presented in 1987, on the Right to Food as a Human Right (Doc. E/CN.4/Sub.2/1987/23).

- 1) E. Vierdag: "The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights", *Netherlands Yearbook of International Law* VI. IX (1978) p. 103.
- 2) Fried van Hoof: *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*. In Alston and Tomasevski (ed): *The Right to Food* (Martinus Nijhof, Publishers, 1984) p. 100.

through courts of law"³. The mistake made is to confound the question whether a right has become a justiciable right, with the question whether the right exists under international law.

A number of economic rights have been shown to be enforceable in the context of domestic law provided only that their component parts are formulated in a sufficiently precise and detailed manner. Such is the case, for example, with some of the economic rights which have been proclaimed in the International Covenant on Economic, Social and Cultural Rights and then spelled out in greater detail within the framework of the system of international labour conventions and recommendations adopted by the International Labour Organization⁴.

It has also been argued that economic rights are of fundamentally different nature from civil and political rights in that the latter are 'negative' rights the implementation of which is cost-free while the former are 'positive' and costly⁵. 'Negative' means that they consist in freedom from the state, and 'positive' that they require action by the state, and therefore are costly. We cannot, however, make a neat distinction around the axis 'negative/positive' between civil and political rights on the one hand and economic, social and cultural on the other.

The economic, social and cultural rights are broadly recognized, but the corresponding obligations are not. They are largely formulated as broad obligations of result rather than specific obligations of conduct. This has its strengths and weaknesses. Its strength is that it al-

lows for flexibility, making it possible for states to comply with their obligations in ways which correspond to their particular situation. The weakness is that the obligations – and neglect of them – are very difficult to pinpoint.

It is sometimes claimed that it is too easily used as an excuse to justify the neglect or downplaying of civil and political rights. While there are inevitably problems in achieving an appropriate balance between the two sets of rights in a particular situation, and while there will always be some human rights violators who will seek to justify their actions by purporting to accord priority to one set of rights over the other, such difficulties or risks can never convincingly be used as a justification for dismissing economic rights *qua* human rights. If, in a situation of mass starvation which is avoidable by some form of concerted efforts, action is neglected under the argument that to take action would impose duties on individuals and therefore be contrary to their freedom, this would be an equally unacceptable excuse. One should avoid throwing out the baby with the bath water and thereby jeopardise the fundamental principle of the interdependence of the two sets of rights.

State responsibility for human rights can be examined at three levels: the obligation to respect, the obligation to protect, and the obligation to fulfil human rights.

The obligation to *respect* requires the state, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, in-

3) *Ibid*, p. 101.

4) See generally N. Valticos, *Droit international de travail*, Paris, Dalloz, 1983.

5) Marc Bossyut: "La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels", *Revue des droits de l'homme – Human Rights Journal*, vol. 8 No. 4, Paris, 1975.

cluding the freedom to use the material resources available to that individual in the way she or he finds best to satisfy the basic needs. In this context we should remember the indivisibility of human rights: the right to food cannot stand alone, but depends also on the respect for fundamental freedoms.

The obligation to *protect* requires from the state and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual – including the prevention of infringements of his material resources.

The obligation to *fulfil* requires the state to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.

The role of the state is therefore double-faced, like Janus. The state must respect human rights limitations and constraints on its scope of action, but it is also obliged to be active in its role as protector and provider. By necessity there is some tension between these two aspects of the role of the state; it is both an ideological and a practical question whether the main emphasis should be on the constraint side or the action side. The real question is how the obligations of the state can be made operative in a way that ensures the optimal balance between freedoms and satisfaction of needs. This is a problem which should be tackled pragmatically, taking into account the different contexts and possibilities in various parts of the world. Different levels of development and variations in social organization call for different responses to achieve the results called for by the human rights system.

Having explored the three levels of responsibility, we shall now examine another, related and important distinction: that between obligations of conduct and of result. For the purpose of the present study, this distinction will be understood as follows: an obligation of *conduct* (active or passive) points to a behaviour which the duty-holder should follow or abstain from. An obligation of *result* is less concerned with the choice of the line of action taken, but more concerned with the results which the duty-holder should achieve or avoid. State agents are obliged not to torture – that is an obligation of conduct. States and their agents should eliminate the occurrence of hunger – that is an obligation of result.

The relationship between these two classifications of obligations is complex. The obligation to respect the freedom of the individual is an obligation of conduct, but it does not necessarily follow that an obligation of result necessarily requires that the state actively fulfills the needs of individuals, by being a provider of material goods. It may well be that the state can avoid hunger better by being passive, by not interfering with the freedom of the individuals and with their control over their own resources. Whether this is so depends on the concrete circumstances, the context, and cannot be answered in the abstract.

It follows from the above that many human rights, even if they are legal rights under international law, still may be imperfect as rights for the individual in one or more respects. This is the basis on which some authors have levelled understandable objections to internationally recognized human rights. Many recognized human rights have still not been elaborated in ways which ensure justiciability, nor has the possibility of redress and of enforcement been se-

cured. These weaknesses, however, they share with most rights under international law. They still are rights, but their imperfection is a challenge to legal creativity.

Recourse procedures for such rights at the national level may exist in some places but not everywhere; recourse procedures for economic, social and cultural rights at the international level are almost non-existent.

The nature of obligations for economic and social rights

Fundamental to an understanding of state obligations for economic and social rights is that the individual is the subject of all development. This is stated in the following terms in the Declaration on the Right to Development, art. 2⁶.

"1. The human being is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being..."

Development essentially means realization of human rights in all their aspects. This is implicit in the Declaration on the Right to Development, art. 1: the

individual is by virtue of the right to development entitled to participate in, contribute to and enjoy economic, social, cultural and political development *in which all human rights and fundamental freedoms can be fully realized*⁷.

Hence, the individual is expected, whenever possible through own efforts and by use of own resources, to find ways to ensure the satisfaction of his or her own needs⁸. This can be done individually, but more often in association with others. Most activities of an economic nature require cooperation between many.

The proposition that *needs* in the first instance have to be met by own resources, also has to be qualified: the resources may be owned or controlled by an individual alone, or in association with others. The latter would include the shared right to use communal land, and the land rights held by indigenous peoples. Furthermore, the realization of economic, social and cultural rights of an individual will usually take place within the context of a household as the smallest economic unit, although aspects of female and male division of labour and control over the produce, as well as various forms of wider kinship arrangements may present alternative alliances.

State obligations must be seen in the light of the above. States must, at the primary level, *respect* the freedom of the individuals to take the necessary actions and use the necessary resources – alone or in association with others. It is in regard to the latter that *collective* or group rights become important: the resources belonging to a collectivity of persons,

6) Adopted by the General Assembly on December 4, 1986, res. 41/128.

7) Included is also the full realization of the rights of peoples to self-determination and their sovereignty over natural wealth and resources, art. 1 para. 2.

8) This is the position taken already in the very first draft on the right to food, presented on behalf of Latin American Lawyers by Panama already in 1945, see below at note 9.

such as indigenous populations, must be respected for them to be able to satisfy their needs by those resources. Similarly, the rights of peoples to exercise permanent sovereignty over their natural resources may be essential for them to be able, through their own collective efforts, to satisfy the needs of the members of that collectivity.

State obligations consist, at a secondary level, in the protection of the freedom of action and the use of resources as against other, more assertive or aggressive subjects (more powerful economic interests, protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products – to mention some examples from different fields). Significant components of the obligation to *protect* is spelled out in existing law, and more can be elaborated; nevertheless, the full scope of this obligation is not manageable for judicial review – and yet, it remains an essential part of the right to food.

At the tertiary level, the state has – as a last resource – the obligation to *fulfill* the expectations of all for the enjoyment of the right to food⁹. This may take two forms:

- assistance in order to provide *opportunities* for those who have not;
- *direct provisions* of food or resources which can be used for food (direct

food aid, or social security) when no other possibility exists, e.g. (1) when unemployment sets in (such as under recession); (2) for the disadvantaged, and the elderly; (3) during sudden situations of crisis or disaster (see further below); and (4) for those who are *marginalized* (e.g. due to structural transformations in the economy and production)¹⁰.

It has sometimes been argued that the economic and social rights differ from the civil and political in that the former require the use of resources by the state, while the obligation for states to ensure the enjoyment of civil and political rights do not require resources. This argument is tenable only in situations where the focus for economic and social rights is on the tertiary level (the obligation to fulfill), while civil and political rights are observed on the primary level (the obligations to respect). This scenario is however arbitrary. Some civil rights require state obligations at all levels – also the obligation to provide direct assistance, when there is a need for it¹¹. Economic and social rights can in many cases best be safeguarded through *non-interference by the state with the freedom and use of resources possessed by the individuals*.

In the light of the complexity of the issue, and the need for flexibility to respond to different situations, it now becomes understandable that the basic

9) Interestingly, this corresponds to the approach taken in the very first draft on the right to food, the one presented by Panama in 1945. See in particular the comment to article 14 in the Panama draft, A/148.

10) It will be seen that most of these situations were already envisaged in the Universal Declaration, art. 25 para. 1 *in fine*: ... and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

11) Reference can be made to the General Comment of the Human Rights Committee in regard to the right to life, art. 6 of the Covenant on Civil and Political Rights adopted on 27 July 1982, GAOR, Supplement No. 40, A/37/40, 1982, p. 93.

provisions (art. 2 and art. 11 of the Covenant on Economic, Social and Cultural Rights) were drafted more in the form of *obligations of result* rather than *obligation of conduct*. It is also understandable that these obligations, taken at their highest and most general level, cannot easily be made justiciable (manageable by third party judicial settlement). Nevertheless, the obligations exist and can in no way be neglected.

This was clearly stated in the Limburg principles¹²:

"6. The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

7. States parties must at all times act in good faith to fulfill the obligations they have accepted under the Covenant.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be

made justiciable immediately while other rights can become justiciable over time."

Poverty and the right to food

Non-access to food is in most cases related to poverty. This, however, is a statement of limited usefulness; what needs to be explored are the different manifestations of poverty and the underlying factors influencing it.

In the final account, poverty can be translated in terms of ability for *procuring* food, although other aspects of poverty will have to be taken into account.

Poverty is extensive in many Third World countries, particularly but not only in those defined as Least Developed Countries. This is poverty in the meaning of non-satisfaction of basic needs, including food. The factors underlying this poverty are partly exogenous, influenced by the structure of the international economic system as it has evolved over the last centuries¹³; they are partly endogenous, influenced by the internal distribution of resources and of unequal opportunities¹⁴.

State obligations are related to pro-

12) Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN/4/1987/17.

13) It is in the light of this fact that the Declaration on the Right to Development, art. 4 para 2, states: "... As a complement to the efforts of developing countries *effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.*"

14) To this point, the Declaration on the Right to Development is addressed (see the final sentence of art. 8 para. 1): "Appropriate economic and social reforms should be made with a view to eradicate all social injustice". The same theme is found in a great number of other international instruments: in the Covenant on Economic, Social and Cultural Rights art. 11 para 2; and in the Declaration of Principles of the World Conference on Agrarian Reform and Rural Development held in Rome in July 1978. (See e.g. principles IV and VII. The latter reads: ... "that *equitable distribution of land* and efficient use of land, water and other productive resources, with due regard for ecological balance and environmental protection, are indispensable for rural development, for the mobilization of human resources and for increased production *for the alleviation of poverty*". It would be beyond the scope of this study to include the wide range of international instruments dealing with redistribution and reform.)

curement at one or the other level; at the level of fulfillment it is an imperative for the State to procure for the needy.

Neglect of economic and social rights is a cause of violence and social conflicts. "The general and apparently well-founded belief is that in some countries, the extreme poverty of the masses – the result in part of less-equitable distribution of the resources of production – has been the fundamental cause of the terror that afflicted and continues to afflict those countries. ... The essence of the legal obligation incurred by any government in this area is to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education"¹⁵.

There are also significant pockets of poverty in the developed countries¹⁶. The Council of Europe recently organized a consultation, or exchange of views, on poverty in Europe. Some of the conclusions are of direct relevance to this study, the following excerpts are therefore included here:¹⁷

"... it must be remembered that poverty is not only a complex phenomenon, but also takes multiple forms. ... Many examples were given during the discussion: inadequate financial resources, illness, unemployment, under-employment, moonlighting, illiteracy, lack of education or vocational training, inadequate housing, cultural ostracism, marginalization, insecurity and lack of confidence in

the future. ...

Poverty leads to exclusion from a life compatible with dignity as a human being: it is a reality experienced at individual and family level, but it is rooted in the structure of society. ..." (paras 17 and 20).

The consultation further concluded that strategies for the poor had to "give them an opportunity to take charge of their own destiny. ... But another important point must also be remembered: poverty exists because of those who are not poor. ... The drive to eradicate poverty is very largely a matter for those who are not poor. ..." (paras 20 and 21).

"The problem of poverty in the Third World, which was discussed at length during the exchange of views, has to be stated in the same terms. There again, the root causes of poverty are both endogenous and exogenous, but it is absolutely obvious that no significant result will be achieved without a major change in attitude among the wealthy countries (para. 24).

In particular, it is important to grasp the part played by military expenditure in international relations as well as national policies. Working for peace means working for the development and welfare of poor countries and poor people. The consultation produced a clear appeal for "expenditure of death" to be turned into "expenditure on life": many of the problems which are said to be insoluble

15) Annual Report of the Inter-American Commission on Human Rights, 1979-80. OEA/Ser.L/V/II.50 pp. 151-152.

16) See, e.g. the document "Hunger in America", prepared by the Physician Task Force on Hunger in America, Harvard University School of Public Health, 1985.

17) Council of Europe: Exchange of views on poverty in Europe, 30 September-1 October 1986. Conclusions as presented by the Special Rapporteur, Mr. G. Sarpellon. EVP (86) 5.

owing to lack of resources (at international as well as national level) could be solved if military expenditure were transformed into funds for combating poverty." (paras. 24 and 25).

"Human rights, which the Council of Europe upholds, cannot be observed selectively. They are all of equal importance. Efforts must therefore be made to achieve respect for fundamental rights as a whole, whether social, cultural and economic or civil and political. ... The first right is the right to build one's own destiny, which means first and foremost giving people a genuine opportunity to free themselves from the restrictions imposed by their environment and take part in shaping their own lives." (para. 35).

The minimal threshold approach¹⁸

It is possible to operationalise a minimal threshold for human rights realization by means of country-specific thresholds measured by indicators measuring nutrition, infant mortality, disease frequency, life expectancy, income, unemployment and underemployment, etc., and indicators relating to adequate food consumption (prone to disease, premature death). The right to adequate food is the nearest we can come to a minimal threshold that can be generalised across cultures and societies.

State authorities have an *immediate obligation* to assure this minimum threshold for all subjects within their ju-

risdiction, if necessary in cooperation with donors of development assistance. The scope of violation of socio-economic rights would then refer to the percentage of the population not assured of this minimal threshold, in the first instance, and further involve the question of whether such failure of minimal threshold assurance is evenly or unevenly distributed by group, defined by ethnicity, race, occupation etc. The question of discrimination in the assurance of any basic needs provision is central to assessing socio-economic rights performance, whether provision is attained autonomously or with government help.

The application of ideal principles of distributive justice to achieve the full realization of all economic, social and cultural human rights is in today's economic world order an unrealistic aspiration firstly because of uncertainty regarding incentives to produce the surplus wealth that would have to be redistributed. Abrupt, overambitious attempts at large scale redistribution might produce disincentives to production and attendant dislocations to the point where the position of the least advantaged might in fact be lowered instead of raised towards the full-scale implementation of socio-economic rights.

Secondly, we are faced with the self interest of nations as they perceive it. Expenditures on arms and national priorities of narrow domestic economic aims remain serious obstacles to extensive, maximalist strategies of redistribution in years to come. Even if the waste of resources on arms could be limited, wealthier states will still tend to focus

18) This section is drawn from an article by Bård-Anders Andreassen, Tor Skålnes, Alan Smith and Hugo Stokke: "Human Rights Performance in Developing Countries: The Case for a Minimum Threshold Approach. In Andreassen & Eide: *Human Rights in Developing Countries*, Copenhagen: Akademisk Forlag, 1988, pp. 333-356.

first on alleviating the situation of their own least advantaged groups before devoting resources towards addressing the conditions of those of the Third World. In the near future, demands for unrealistic levels of redistribution will not produce the immediate action that human rights demand. A minimalist focus may better urge international redistributive effort at least by those states that already have passed well beyond a minimal level in their own countries.

A minimalist approach may be a necessary stage of any consistent, progressive achievement of the aims expressed by the Covenant on Economic, Social and Cultural Rights. What the Covenant actually requires is that states take "steps" toward "progressively" realizing the full satisfaction of all economic and social rights. This, in turn, raises the political and ideological issue of which "steps" and strategies actually do produce progress, thereby becoming immediately obligatory. This approach should divert observers from common impressions that almost any distributive outcomes can in the short run be portrayed as a part of some long-term strategy to build wealth for some future redistribution to the needy. Such "strategic" considerations, sometimes even presented as justification for policy decisions that in the short term run counter to the satisfaction of the most basic needs of large numbers in identifiable groups, would be ruled out by an approach that consistently aims at progressively higher levels of right satisfaction.

The minimal threshold approach holds that the establishment of a minimal level of needs satisfaction is an essential prerequisite of this progressive achievement of rights fulfillment. Long-run distributive justice to achieve full human rights standards requires imme-

diately justice for the most deprived groups or persons.

In the Western Europe welfare state basic socio-economic human rights are to a large extent guaranteed by the government. These are access to the resources to provide minimal food, health care, etc., to most of those who need it. The majority is generally assured of at least minimal well-being for themselves without direct government help, but most individuals whose self-provision fails to reach the minimal threshold receive government support. Thus both self-help groups and recipients of government aid achieve the same full assurance of minimal needs provision. This is possible because of the large numbers in the former category and the correspondingly small numbers in the latter, and furthermore due to the substantial resources available to governments for aid.

Most Third World countries are not so fortunate. Although many households achieve assurance of minimal well-being by autonomous activity or governmental provision, high percentages of various groups do not. Furthermore, the lack of assurance tends to fall disproportionately on certain deprived groups of which very low percentages of the group achieves minimal well-being levels while very high percentages of other social categories are assured minimal basic needs. For lack of a more precise and workable measure for socio-economic rights fulfillment, we may take the percentage of members of a given group – say, of "Hindu landless labourers" or "middle-holding farmers" – who seem to be assured of at least minimal well-being.

We cannot focus solely on the distributive features of actual and potential governmental help. We must also look realistically into the original inter-group

distribution of the capacity of the most deprived persons for autonomously providing their own well-being. The social, cultural, and political processes in the local communities contributing to the overall distribution of poverty among groups are as significant as the even or uneven distribution of the government's attempts at its alleviation.

Nor can we limit the process to merely analyzing inter-group inequality of results among the lower strata alone: we must consider issues of distributive justice over all strata in any Third World country under scrutiny, in order to identify the sources of national and international redistribution practically required for acting on immediate needs and long-term goals.

In identifying most deprived groups, we consider not only the more conventional definitions related to group identity (ethnic-cultural, radical, regional, gender etc.) but also groups defined by assets held or controlled (e.g., "landless labourers" or "small-holding sharecroppers"). Independently of other sorts of shared groups interest or identity, poor people commonly share economic limitations (often occupation/income-related) distinctive to their economic category. Such economic limitations may make them steadily poorer, and, regardless of effort or ability, unable to achieve improvement. Those groups are also more vulnerable than other groups to periodic general difficulties such as economic recession or bad crop conditions.

Distribution by sectors

A key distinction in distributive analyses of economic and social rights in poor countries is that between rural and urban sectors. Uneven minimal threshold

assurance among groups within each sector must be assessed, and analysis must go from intra-sector to inter-sector unevenness or the possible existence of a sectoral bias in development. Some commentators have pointed to a systematic pattern of urban bias in national development, even in world development (cf. Michael Lipton, 1977).

Autonomous groups studies aiming to pinpoint different causal paths towards the attainment of a minimal threshold require a clarification as to which particular goods and services can be provided by which particular mode of provision, in general state, market, or autonomous groups interaction. Related to this are differences in the scope over which provision occurs, suggesting a centralization/decentralization continuum reaching from national public provision or self-reliance. By combining mode with scope of provision we arrive at often overlapping segments of a continuum:

- 1) state only;
- 2) state intervention in markets (predominant, partial);
- 3) free market exchange:
 - a) national market (fully monetarized);
 - b) local market or barter trade (partly non-monetary); and
- 4) ground-level self provisions.

Depending on what is to be provided, mode and scope differ among various human rights-related goods and services such as food, education, housing, clothing, health services, employment, transport, etc., yielding different combinations of mode(s) and scope(s). The combination of various modes and scopes of provision for all given right can be referred to as the structure of provision of that right in a given area.

The obligation to respect the right of other states to shared resources

The protection, preservation and enhancement of the natural environment for all peoples today, as well as for future generations, is the common responsibility of all states. Each state is obliged to ensure that activities within their jurisdiction or control do not damage the common human environment. There is a particular responsibility for states sharing common natural resources such as rivers, lakes, or drainage basins, not to abuse their rights in such a way as to cause significant harm to the rights of the other states.

The World Commission on Environment and Development, established pursuant to a resolution by the General Assembly in 1983 and which presented its report in April 1987¹⁹, has given substantial attention to the need for institutional and legal change in this area. Beyond calling for a strengthening and extension of existing international conventions and agreements in this field it also calls for the adoption, by the General Assembly, for a Universal Declaration and a Convention on Environmental Protection and Sustainable Development.

"The Charter should prescribe new norms for state and interstate behaviour needed to maintain livelihoods and life on our shared planet, including basic norms for prior notification, consultation, and assessment of activities likely to have an impact on

neighbouring states or global commons".

A similar concern is expressed in a different way in the Universal Declaration art. 28: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized".

In accordance with the International Covenant on Economic, Social and Cultural Rights art. 2, the States parties have undertaken to take steps, individually and through international assistance and cooperation, especially economic and technical, to achieve progressively the full realization of the rights contained in the Covenant.

In art. 11 para. 1 this is apparently modified somewhat:

"The States parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent".

In art. 11 para. 2, dealing with the fundamental right to be free from hunger, states again oblige themselves to take the steps, individually and through international collaboration, needed to achieve the aims set forth in that paragraph. They also undertake to ensure an equitable distribution of world food supplies in relation to need. In doing so, they shall take into account the problems of both food-importing and food-exporting countries.

19) *Our common future. The World Commission on Environment and Development*. Oxford University Press 1987.

Problems of implementation at the international level

The main body concerned is the new Committee on Economic, Social and Cultural Rights which has been established by the Economic and Social Council and which started its activity in 1987.

The tasks of this Committee are vast, since it is expected to deal with all the economic, social and cultural rights; it faces many difficulties in the years to come:

(i) *The vagueness of the obligations flowing from economic and social rights.* The rights are composite with a wide range of obligations specific to different situations and problems; to monitor the compliance with these obligations requires a comprehensive framework which has not, so far, been developed.

(ii) *The unsatisfactory guidance to States parties on how to report.* States reporting on their realization of these rights have not and cannot be given precise guidance unless their obligations are clarified.

(iii) *The non-involvement of non-governmental organizations in monitoring economic, social and cultural rights.* An essential aspect of the evolution of supervision and monitoring in regard to civil and political rights has been the involvement of non-governmental organizations. They have been given access to the Sub-Commission and the Commission; they have provided information to members of the Human Rights Committee, and they have been active in making proposals for the normative and institu-

tional development in regard to many human rights.

There are, so far, very few organizations which address themselves explicitly to economic, social and cultural rights. The main exception is that of trade unions and employers' organizations in relation to ILO. Some NGOs have also played a significant role in the negotiations and lobbying around such instruments as the International Code of Conduct on Marketing of Mothers' Milk Substitutes (WHO), the Convention on International Food Trade (FAO), and the Convention on Plant Genetic Resources (FAO). However, in some specialized agencies the attention to NGOs' views seem lower than in the human rights organs.

(iv) *The inadequate cooperation with the specialized agencies.* In drafting the Covenant, it was envisaged that the specialized agencies were to play a major role in the promotion of economic, social and cultural rights²⁰, and that ECOSOC was to establish a close link with them in this regard²¹.

This has only to a very limited extent happened; primarily because (with the exception of ILO) the agencies do not approach their tasks from the perspective of *rights and obligations*.

(v) *The limited time and capacity available to the Committee.* Under the periodic reporting system as it now functions, there will be nine year intervals between the reports from a given country dealing with articles 10 to 12 (thus including the right to food). This can hardly be expected to have a significant influence on the way in which states

20) This is reflected in the Covenant, art. 16 (2) (b).

21) See the Covenant articles 18, 20 and in particular art. 22.

comply with their obligations. In addition, the members of the Committee have to deal with very different rights (work, food, social security, health, education, family rights) which require very different kinds of expertise; without proper secretariat services it will be difficult to handle this broad array of issues.

Recommendations

States should

- draw up a framework for the realization of economic and social rights at the national level, built on local needs and opportunities, on lines suggested in this study;
- take care to identify within such frameworks the needs of groups which have the greatest difficulties in their access to basic needs and set specific goals to ensure sustainable satisfaction of such needs;
- ensure popular participation in periodically assessing and analyzing local needs and opportunities, and facilitate input by the least privileged groups in society into the action plans that should follow from such assessment and analysis;
- specifically indicate the areas in which international assistance is required and spell out details of the assistance needed;
- for States parties to the Covenant, provide in their reports details of the national plans and of progress made and obstacles encountered in the implementation of them;

National non-governmental organizations, universities and research institutions dealing with development and human rights issues should

- participate in the elaboration and implementation of the national plans for the realization of social and economic rights; and
- disseminate information about international human rights standards and stimulate local and national debate in particular contexts on the implementation of these rights.

The specialized agencies should

- examine their mandates for their relevance and relationship to the economic and social rights; they might consider the establishment of inter-divisional working groups or task forces for this purpose;
- pay closer attention to the work of the human rights organs and be prepared to cooperate with them to develop and to operationalize the frameworks for promoting these rights;
- explore the possibility to develop for such cooperation special mechanisms for interagency cooperation in this field under the Administrative Committee on Coordination or existing coordinating mechanisms.

International non-governmental organizations should

- support the efforts to realize the economic and social rights world-wide, through information, awareness-formation and action as appropriate;
- base their efforts on the rights rather than on policy statements which are often vague and contentious; and
- develop or strengthen their cooperation, on the basis of the right to food, with the specialized agencies, the Economic and Social Council and the Committee on Economic, Social and Cultural Rights.

Judges and Lawyers in the USSR Changing Perceptions

by
Fali S. Nariman*

In June 1988, the International Bar Association (IBA) hosted a conference in Moscow along with the Association of Soviet Lawyers – over 300 lawyers of the USSR mingled freely, and spoke unrestrainedly, with lawyers from other parts of the world. There were three main sessions devoted to three different themes – Inheritance Laws, East/West Arbitration, and Peace and Human Rights.

I was to participate in the last session and deliver a keynote address. But the session on Peace and Human Rights began on a traumatic note – by being cancelled, at first; this was because of the refusal of a visa to one of the panelists, Prof. Dinstein of Israel. The decision to refuse him a visa was, however, reversed at the personal intervention of the Procurator General of the USSR (the highest ranking lawyer in the Soviet Union). The session was restored. The Procurator General (Mr. Alexander Sukharev) himself delivered the opening address, which Prof. Dinstein attended, and applauded. Then, during the session, the Professor from Tel Aviv was critical of some aspects of Soviet policy and Soviet law. The criticism was not only listened to – but appreciated. For me, this entire panorama of events was striking – “*Glasnost*” (I said to myself) is not just an evocative word, I have seen it in action.

Another more recent instance of ‘*Glasnost*’ in action was the decision of the Government of the Soviet Union to accept binding arbitration by the International Court of Justice at the Hague in respect of alleged violations of five important human rights documents to which the USSR is a signatory; agreements relating to genocide, trafficking in prostitution, political rights of women, racism, and torture. And then (even more recently) laws punishing anti-Soviet propaganda (in existence for decades) have been abolished.

I visited Moscow again – in May this year – under the banner of the International Commission of Jurists. We met with Soviet lawyers to understand the profound changes taking place in the Soviet Union, and discuss the contribution which the laws could make towards their fulfillment. Three different aspects of human rights were on the agenda: Right to Peace and Development, Reform of the Criminal Law, and the Independence of Judges and Lawyers.

On our visit we learnt a good deal about the changing perceptions about the role of judges and lawyers in the Soviet Union.

Before Perestroika, the independence of the judiciary was constantly violated. In the thirties, forties and fifties, many judges (one of the Soviet lawyers we

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met, Prof. Chaldeev Lev, said "most judges") put implicit faith in the political leadership of the country. The enemies of the country were the enemies of socialism, and the enemies of socialism were the enemies of the Court. The decisions they arrived at were not as a result of orders from above – they only appeared so because of the approach of the Justices, their attitudes reflecting the political thinking of the day: for instance, the hysterical reaction against alcoholism and profiteers led to excessively harsh sentences. Another factor which then operated to undermine the independence of judges was that the procurators (or public prosecutors) were entrusted with the task of not only coordinating all aspects of crime, but also supervising the activities of the Court and of judges. One of those who participated in the discussions said "As a judge I can say that both in criminal and civil cases, judges passed sentences and issued decisions independent of any pressures – but in those times many cases were determined not by the internal conviction of judges but by external factors – not a small sin of which I am also guilty".

But all this has been changing over the past three or four years. New laws have been introduced providing for new structures for the Court, and an independent status for the Judge. Judges are still elected but for longer terms of office, and serious consideration is being given to appointing them for life. Another safeguard for securing the independence of the judiciary is the continuing involvement of the public in all court cases; a unique institution known as Peoples Assemblies, which helps render court hearings more objective and obviates pressures on judges by officials of State. Such pressures are now also expressly made punishable by law. What we were witness-

ing in the Soviet Union (as Mr. Sukharev said) was "a legal revolution – a revolution in the law as we have not seen since 1917".

Before Perestroika everything was prohibited unless expressly permitted; now, gradually, the trend is reversed; everything is permitted except that which is expressly prohibited.

But old habits die hard. We were told in Moscow, that in a poll recently conducted about 43 per cent of the total number of judges admitted that they were convinced that the accused was guilty even before the trial began; the same poll revealed that almost all the judges also believed that to be truly independent they must have a universal set of principles to guide them. Fortunately these are now available.

It is because of the universality of aspirations of those administering justice (and those seeking it) that the sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan (Italy) in August-September 1985 adopted by consensus certain Basic Principles on the Independence of the Judiciary. These Basic Principles were endorsed without dissent by the General Assembly of the United Nations (by all governments including the USSR). By its resolution of 13 December 1985, the General Assembly invited all governments to respect these Basic Principles "and to take them into account within the framework of their national legislation and practice". (The text of the Basic Principles will be found on page 109 of CIJL Bulletin, No. 23 of April 1989).

With Perestroika, there are now more and more demands on the judiciary in the USSR. For though Perestroika means freedom, it also means problems – ethnic and racial problems. In Parliamentary

democracies, when issues are too hot to handle they dump them on the Courts.

It was refreshing to find a like attitude displayed by the Procurator General of the USSR; whilst we were in Moscow, he asked the Supreme Court of the Soviet Union to interpret the word "discreditation" on the new Article 11(1) (Criminal Liability for State Crimes). Twenty-six Judges of the Highest Court at a special sitting on 15 May 1988 held that "discreditation" (in a provision relating to punishment for discreditation) only included "a public and deliberate dissemination of information known to the offender to be untrue with an aim to disrupt the credibility of bodies and persons". The Court then clarified: "Giving any information about malfunctions in the work of those bodies and of persons, and criticising them in that respect does not constitute a *corpus delicti*". Freedom of expression, so long denied, was thus secured – through the judicial process!

In the Soviet Union, political questions are now increasingly left to courts to decide according to their interpretation of the Constitution and the laws. But more and more independent judges will be needed in the Soviet Union for Perestroika to succeed. And the Basic Principles endorsed by the U.N. will constitute a workable framework; they will furnish useful guidelines.

A word now about advocates, why they need to be independent. Is there a Universality in the role of lawyers operating under different legal systems? There is. Lawyers have a prominent role in protecting fundamental freedoms. Under all constitutions around the world, persons charged with criminal offences and persons arrested and detained are required to be informed promptly by the competent authorities of their right to be assisted or represented by a lawyer of their

choice. We were told in Moscow that this safeguard had been recommended to the Supreme Soviet for enactment into law, though at present the right to counsel is at the discretion of the prosecutor; in criminal cases, the advocate can only intervene after the charge is framed: under the new draft law he will be entitled to represent the client at the commencement of proceedings. It is now increasingly realised in all countries – including the USSR – that lawyers have a duty to advise and protect the rights of their clients; that lawyers in every country are part of the judicial system, and to effectively represent their clients, governments need to ensure that lawyers are able to perform their professional functions without improper interference or hindrance. In November 1988, members of the legal profession from Moscow and other parts of the country met in the capital and set up the Union of Soviet Lawyers. Its Vice-President told us that Article 5 of their Charter provided that an independent and strong Bar was at the basis of the rule of law; he also remarked that many officials considered this statement of principle as "excessively bold". There were also complaints that the Soviet Ministry of Justice was interfering in lawyers' efforts to organise an independent body of professionals; there were reports that officers of the Ministry of Internal Affairs (non-lawyers) were 'placed' in the Organising Committee of the Union of Soviet Lawyers. This was being resisted openly, and through the democratic processes – in public discussions and in the press: itself a healthy trend.

Pursuant to the general conclusions and recommendations adopted at the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the U.N. Crime Branch Sec-

retariat has formulated draft Basic Principles on the Role of Lawyers. Lawyers in the USSR (it was felt) would need basic principles. The Procurator General told us that lawyers would enjoy a much higher prestige under Perestroika than before. He told us on the opening day of one session that he had just returned from a meeting of the Supreme Soviet after making a proposal for a new law to adequately safeguard people who criticize officials, Government officers and even Party members. This law when enacted will impose new obligations on Soviet lawyers – the obligation to defend people who exercise their rights under new laws, with concomitant difficulties involved in undertaking these obligations – since it is bound to lead to friction between bureaucrats and citizens; and since citizens will be represented by lawyers, between bureaucrats and lawyers. How would you Soviet Lawyers (we asked) protect individual members of the profession who may be harassed or persecuted for defending citizens who criticize officials – especially when they are highly placed; how will you protect judges who uphold the pleas of such citizens against highly placed bureaucrats? The International Commission of Jurists (ICJ) could perhaps be of some use here. After discussing the Draft Principles on the Role of Lawyers in Venezuela in January this year all participants (members and national sections of the ICJ) decided on what was known as the Cara-

cas Plan of Action – one of the measures we resolved upon in implementation of the draft Principles was: “To place renewed emphasis on intervening by appropriate means to protect judges and lawyers who are harassed or persecuted as a result of carrying on their professional duties including situations where the institutional independence of the judiciary or the legal profession is threatened”.

These draft Basic Principles are not only universal, it is the duty of bodies of lawyers around the world to see that they are implemented. This will help institutionalise the legal profession as a world-wide fraternity.

In his stirring address to us in Moscow, Mr. Sukharev said of Russian lawyers: “We have a long way to go. It is not going to be easy. But we hope to ultimately achieve our aim of development of a *rule-of-law-State*”. There, in three short sentences, he displayed the primary attributes of a lawyer of the 1990s, of a lawyer with an international outlook: first, the essential quality of humanity, second, the enlightened lawyer’s dedication as a man of the law to the Rule of Law.

Someone in the audience asked the Procurator General whether there were adequate guarantees that Perestroika would succeed. Sukharev’s answer was typical of current thinking in the USSR. “The train has pulled out of the station. There is no stopping it...”.

Freedom of Expression and Official Secrets: The Impact of the Official Secrets Act 1989 in the United Kingdom

by
*Norman S. Marsh**

Although freedom of expression is a life-giving principle in many spheres of human activity, such freedom when exercised by way of information, comment and criticism concerning what a government is doing or planning, or failing to do or plan, lies at the very heart of democratic government. It is frustrated when, under threat of criminal sanctions against disclosure, the government forbids disclosure of information about its affairs to the public. It is therefore not surprising that 'Justice', the British branch of the International Commission of Jurists, should have been moved publicly to express its concern at the threat to freedom of expression presented by the new Official Secrets Act of 1989.

But how is it possible, it may be asked, that there should be anxiety about that freedom in a land where its existence is widely reputed to be taken for granted and where foreign visitors have long been proudly taken to Hyde Park in London to hear orators of all persuasions illustrating freedom of expression in practice? The explanation would seem to lie in the distinction to be drawn between freedom of expression as just one illustration of the residual freedom left to the individual in Britain after specific limitations on his freedom of action have been accounted for (which is the

characteristic British approach to human rights in general) and the scope and importance of the laws which restrict freedom of expression. Inspired by the apparently limitless reach of the concept of residual freedom, it is easy to disregard the actual restraints on its exercise, to say nothing of the limitations which international law puts on restrictions on the human rights which it positively requires to be respected.

Thus, the International Covenant on Civil and Political Rights (ICCPR) in Article 19 (3) and the European Convention on Human Rights (ECHR) in Article 10 (2) prescribe the permissible restrictions on the general freedom of expression required by Article 19 (2) and Article 10 (1) respectively. Article 19 (3) provides:

"The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (*ordre public*), or of public health or morals".

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And in a similar but more elaborated manner article 10 (2) states:

"The exercise of these freedoms, (i.e. the right of freedom of expression including freedom to hold opinions and to receive and impart information and ideas) since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

What has worried 'Justice' has been its grave doubts as to whether the limitations on freedom of expression arising from the Official Secrets Act 1989 are in accord with the permissible restriction of that freedom which is provided for by Article 19(3) and by Article 10(2) respectively.

The Official Secrets Act 1989 aimed to replace and reform s.2 of the Official Secrets Act 1911. The latter was generally considered to be in need of reform because under threat of fine or imprisonment it prohibited disclosure without official authority of any information in the possession of the government. The category of information involved or its importance was in law irrelevant. The Home Secretary in presenting in Parliament the Bill which eventually became the Act of 1989 took special pride in the undoubted fact that the new legislation abolished criminal liability for revealing the wide range of government-held information covered by the Act of 1911 and dealt with the disclosure of information only in certain specified categories (i.e. defence;

security and intelligence; international relations; information obtained in confidence from other governments or international organisations; information useful to criminals; information obtained by, or about, the interception of communications under the Interception of Communications Act 1985 or by, or about, action taken under the Security Service Act 1989). His opponents argued that the very comprehensiveness of the criminal liability for disclosure of information under s.2 of the 1911 Act meant that in practice it was in any event only occasionally enforced; much more important was the character of the criminal liability in respect of disclosure of the categories of information covered by the new Act.

In particular, as 'Justice' pointed out in a press release issued while the Official Secrets Bill was before Parliament, information relating to security and intelligence and information obtained by, or about, interception of communications or by, or about, action of the Security Service, would if disclosed lead to criminal liability, even though no damage had been proved. Such an unqualified restriction on freedom of expression could not be "necessary" in the sense given to the word by the European Court of Human Rights at Strasbourg in the *Handyside* and *Sunday Times* cases, namely that any restriction must serve a legitimate aim, meet a pressing social need and, what is here most relevant, be proportionate to that need.

It is true that in respect of some other categories of information disclosure to amount to a criminal offence under the 1989 Act has to be proved to be "damaging". It was claimed that this would enable a defendant to show that in the case charged the disclosure was not damaging but positively in the public interest. 'Justice' however pointed out that the far

more likely situation would be one where it would be impossible to deny that some damage had been done in the sphere of the information concerned — for example, in international relations — but where there was on balance a greater public interest in the information being made public. A court is given no room under the Act to carry out such a balancing process, all amendments to introduce a defence of the disclosure being on balance "in the public interest" having been unsuccessful. In the result the threat of prosecution under the Act might constitute a restriction on freedom of expression which was in breach of the ICCPR and of the ECHR as not being "necessary" in the sense required by those international treaties, and more especially as not being "proportionate" for the purposes of the ECHR.

Although, apart from the governmental spokesman, there were very few members of Parliament who spoke in favour of the Official Secrets Bill and in spite of a number of amendments seeking to meet the criticism of 'Justice' and others, it became law on 11 May 1989 with no significant change from the form in which it had been originally presented. It remains to be seen how often British governments will judge it expedient to use it, and if they do have recourse to it and its provisions are challenged under the ECHR, how they will be regarded by the European Court of Human Rights.

An important addendum must be made. A criminal prosecution under the Official Secrets Act 1989 is not the only way in which freedom of expression can

be restricted in the United Kingdom. As the recent litigation about the book *Spy-catcher* demonstrates, a government may attempt to restrict the circulation of information about its affairs by bringing civil proceedings for breach of confidence against those who originally disclosed it in breach of an obligation of confidence, or against anyone who later came into possession of the information with knowledge of the earlier breach. What remains somewhat uncertain in English law is not the existence (which is clear) but the extent of the defence to an action of breach of confidence that the disclosure in question was in the public interest. As long as that uncertainty remains it also remains uncertain how far the action for breach of confidence may be out of harmony with the United Kingdom's obligations under the ICCPR and the ECHR.

It should also be said that the replacement of s.2 of the 1911 Official Secrets Act by the Official Secrets Act 1989 has not affected the provisions under a great variety of earlier Acts and in many governmental contexts which provide criminal sanctions against disclosure of specified kinds of information. Such provisions tend to be inserted almost automatically when a governmental project is given legislative form, and although many of them could be justified, it would be a healthy development if in the future whenever what is in effect a new restriction on freedom of expression was being considered, it was measured against the United Kingdom's obligations under the ICCPR and the ECHR.

"Death Row Phenomenon" Held Inhuman Treatment

by
Gino J. Naldi*

In *Soering v United Kingdom* (Case No.1/1989/161/217) the European Court of Human Rights further developed the jurisprudence of Article 3 of the European Convention on Human Rights when it held that the so-called "death row phenomenon" constituted inhuman or degrading treatment or punishment in contravention of Article 3¹. This judgment is also significant because the US Supreme Court has not yet ruled whether the "death row phenomenon" constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution.

The case concerned a national of the German Federal Republic, Jens Soering, who had been arrested in the United Kingdom on a cheque fraud charge and was wanted in the USA where he had been indicted on charges of capital murder following the gruesome killing of his girlfriend's parents in Virginia in 1985. The US authorities sought his extradition pursuant to existing treaties and in 1988 the British Home Secretary signed a warrant surrendering Soering to the USA. Soering appealed to the European Commission of Human Rights (App.No.14038/88) contending that the likely imposition of the death penalty would subject him to an inordinate delay between imposition and execution of sentence, the "death row phenomenon", and thus vio-

late his rights under the European Convention.

The British Government contended that there was no breach of Article 3 as Soering ran little risk of being sentenced to death since the Attorney for Bedford County, Virginia, who requested the extradition had given assurances to the United Kingdom that its wish that the death penalty not be imposed would be brought to the attention of the trial judge. Furthermore, it argued that Soering could not rely on delays caused by his own voluntary actions in exhausting all available appeal procedures.

The European Commission, by six votes to five, rejected Soering's contention. The majority considered that while the average time between trial and execution in Virginia is six to eight years, death row inmates contributed to the delay by exercising their State and Federal rights of appeal, which the Commission found were designed to protect human life and to protect against the arbitrary imposition of the death penalty.

The European Court, however, came to a different conclusion. It noted that its assessment of what may constitute inhuman or degrading treatment or punishment may be relative and may depend on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and

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1) "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

method of its execution, its duration, its physical or mental effects, and even the sex, age and mental health of the victim.

The Court considered whether the death penalty violated Article 3. The Court noted that as originally drafted, the Convention did not seek to prohibit the death penalty. However, subsequent national practice meant that few High Contracting Parties now retained it and this was reflected in Protocol No. 6 which provides for the abolition of the death penalty but which the United Kingdom has not ratified notwithstanding its virtual abolition of the death penalty. Yet the very existence of this Protocol led the Court to the conclusion that Article 3 had not developed in such a manner that it could be interpreted as prohibiting the death penalty. Nevertheless, circumstances relating to the death penalty, such as the manner of execution, and the conditions of detention prior to carrying out the sentence could give rise to issues under Article 3.

In the present case the Court found that Soering's fears that he would be exposed to the "death row phenomenon" were real because the assurance given to the British Government by the US authorities (that "a representation will be made in the name of the United Kingdom that the death penalty should not be imposed") was not inviolable; Bedford County's Attorney had indicated that he would nevertheless seek the death penalty. The question therefore arose whether the risk of exposure to the "death row phenomenon" breached Article 3.

The Court found that the appeals system in the USA, providing considerable

procedural safeguards and clearly respecting the rule of law, nevertheless means that a prisoner suffers for many years the conditions in death row, living in mounting tension in the shadow of death. The fact that a condemned prisoner was subjected to the severe regime of death row in a high security prison for six to eight years, notwithstanding psychological and psychiatric services, compounded the problem. The Court did not find it necessary to take account of psychiatric evidence that the applicant dreaded extreme violence and homosexual abuse from other inmates which led to objective fears that he may seek to take his own life.

The Court was additionally influenced by Soering's age and mental condition. Soering was eighteen years old at the time of the murders in 1985 and in view of a number of international instruments prohibiting the imposition of the death penalty on minors, which have been signed by many of the States Parties to the European Convention, the Court expressed the opinion that a general principle now exists that the youth of a condemned person is a significant factor to be taken into account (cf. *Stanford v Kentucky*; *Wilkins v Missouri*, (1989) 109 S. Ct. 2969), where the US Supreme Court held that the imposition of the death penalty on minors does not constitute cruel and unusual punishment in violation of the Eighth Amendment). Another factor the Court found relevant was psychiatric evidence that Soering was mentally disturbed at the time of the crime².

The Court was also influenced by the fact that Soering's extradition was sought by the Federal Republic of Ger-

2) (Cf. *Penry v Lynaugh*, Director, Texas Dept. of Corrections, (1989) 109 S.Ct. 2934) where the US Supreme Court found that executing capital murderers who are mentally retarded does not in itself violate the Eighth Amendment. Retardation is therefore a mitigating factor to be taken into account.

many whose Constitution allows its nationals to be tried for offences committed in other countries but prohibits the death penalty. Soering could therefore be tried for his alleged crimes without being exposed to the "death row phenomenon".

Bearing all these factors in mind the Court came to the conclusion that Soering's extradition to the USA would expose him to a real risk of being subjected to treatment contrary to Article 3.

This judgment does not mean that the United Kingdom will become a haven for fugitives from justice. The Court's decision was influenced by the particular circumstances of the case: capital charges; the death row phenomenon; Soering's age and mental condition; and the request for extradition by the Federal Republic of Germany.

The eventual outcome was that the British government has decided to extradite Soering to the US after the American

authorities dropped the charges of capital murder. Since Soering would no longer be exposed to the "death row phenomenon", the Court's judgment was no longer applicable.

Mr. Soering filed a *habeas corpus* application requesting that he be released from prison and not extradited to the USA, in accordance with English law which provides that if a person who is committed in custody awaiting extradition is not surrendered within two months after such committal or *habeas corpus* hearings, the English High Court may order his release unless sufficient cause is shown to the contrary. The High Court rejected the application on 21 November 1989, even though two months had elapsed, since it found that there was 'sufficient cause' as much time had been spent bringing the case before the European Court.

BOOK REVIEW

Terrorism, Politics and Law

The Achille Lauro Affair

by Antonio Cassese

published by Polity Press, in association with Basil Blackwell Ltd,
108 Cowley Road, Oxford OX4 9JF, UK.

Professor Cassese has written a fascinating book about the hijacking of the Italian ship *Achille Lauro* in October 1985. It combines the virtues of a good detective story with those of a detailed analysis of the complex issues involved under international law. After a careful recital of the facts he examines in turn the international agreement to give the hi-jackers a safe conduct, the attitude of the American government and that of the Italian government and the Italian judiciary. He does not hesitate to pass praise or condemnation at each stage as the story unfolds.

His main criticism is of the United States which "by disregarding the funda-

mental principles of international law,... sailed into a sea of political and diplomatic troubles. Not only did it fail to achieve its purpose (the capture and trial of the hijackers), it also antagonized and deeply offended two allies, one a member of NATO" (viz. Italy and Egypt).

Italy meets with the author's praise for its more far-sighted policy. It wanted to achieve a peaceful end to the crisis, with military intervention only as a last resort. However, it too was at fault for its failure to carry out its international obligation to extradite the hijackers to the United States, or at least to grant the United States time to complete its extradition application.

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The Harassment and Persecution of Judges and Lawyers January 1988 to June 1989

A report of a CIJL study.

Published by the ICJ, Geneva 1989.

Available in English. Swiss Francs 12, plus postage.

The report, which will be published annually, lists 145 judges and lawyers who have been harassed, detained or killed in 31 countries between January 1988 and June 1989. It includes 35 lawyers who were killed, 37 detained, and 38 who have been attacked or threatened with violence. Another 13 were professionally sanctioned (disbarment, removal, banning, etc.).

South Africa and the Rule of Law

A report of an ICJ Mission to South Africa in February 1987 by Geoffrey Bindman, Jean-Marie Crettaz, Henry Downing and Guenter Witzsch.

Published by Pinter Publishers, London, 1988.

Available in English in paperback. 160 pp. Swiss Francs 25, plus postage.

The report gives a detailed and comprehensive account of the elaborate legislation with which, over the years, the South African government has undermined all human rights of the black and coloured population.

Will Namibia's Elections Be Free and Fair?

A report of a Mission to Namibia in August 1989, by Geoffrey Bindman.

Published by the ICJ, Geneva, 1989

Available in English. Swiss Francs 10, plus postage.

This report questions whether the Namibian election due to be held on 7 November 1989 will be free and fair. Complaints of intimidation have been brought to the authorities by, inter alia, the Legal Assistance Centre, and powerful evidence has been given that the South Africa-controlled police are still using illegal means to deter SWAPO voters. In a Supreme Court trial, which Mr. Bindman attended as an observer for the ICJ, the government challenged the Legal Assistance Centre's right to bring complaints before a court. Other violations are described in the report.

The Independence of the Judiciary and the Legal Profession in English-Speaking Africa

A report of two CIJL seminars in Lusaka (December 1986) and Banjul (April 1987).

Published by the ICJ, Geneva, 1988.

Available in English. Swiss Francs 20, plus postage.

The seminars were organised as part of a series of regional seminars to examine how norms to protect the independence of the legal profession and the judiciary are being developed at the international level and how such norms should be applied and adhered to in different regions, and make recommendations for their implementation.

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