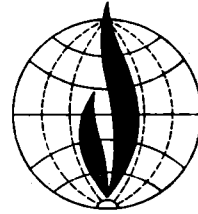


# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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# ARTICLES

## The Right of Humanitarian Intervention or the Right of Free Access to Victims?

Mario Bettati\*

The right of humanitarian intervention arises from a medical practice, that of the French doctors. This origin explains a great many things. Ever since the Biafra war, in 1968, they have tried to free themselves from the rules of recognized international law which often stood in the way and prevented them to reach victims of natural, industrial or political disasters and to bear witness to the causes of others' misfortune. Stemming from their confrontation with jurists, the concept of what the media now call right of humanitarian intervention was born.<sup>1</sup>

In the name of efficiency, we have tried to elaborate a legal tool which will enable to overcome, in good faith, the rampart of sovereignties without interfering with them. Humanitarian organizations had stumbled against this problem for twenty-five years. As they only wished to safeguard life in emergency situations, a new inter State law should make their task easier, thereby guaranteeing free access to victims. Historical circumstances and France's determination has given them partial satisfaction. Partial, only because, in the case where an ob-

jection is raised by regular or irregular forces, access to victims will require the use of public international force, in which case, world-wide consensus is more difficult to obtain. Controversies are rekindled and chances for success become rare.

### I A Principle of Free Access - with Limited Aims

The texts adopted at the United Nations on this subject are based on two major aspects of medical emergency, on the one hand, the alternative between intervention and non-intervention is a question of life and death and, on the other, the safeguard of life depends on the speed of such intervention.

#### (a) To Save Lives

Starting with Resolution 43/131<sup>2</sup>, the idea of protection from death dominates the preamble in the matter of humanitarian assistance to victims of natural disasters and emergency situations of the same

\* Mario Bettati is Dean and law Professor at the University of Paris II (Panthéon-Assas)  
1) See Mario Bettati and Bernard Kouchner, *Le Devoir d'Ingérence*, Denoël, Paris, 1987  
2) Resolution GA 43/131, 8 December 1988

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kind. This concern stems at the same time from the place held by survival in texts, and of the consistence of aid, the distribution of which they aim to ensure.

(i) *An Objective of Survival*

The safeguard of human life is at the heart of the concern. The expression appears three times. The General Assembly declares itself "deeply concerned about the sufferings of the victims of natural disasters and similar emergency situations, the loss in human lives, the destruction of property and the mass displacement of populations that results from them". It recognizes that "the international community makes an important contribution to the sustenance and protection of such victims, whose health and life may be seriously endangered" and it considers that "leaving victims of natural disasters and emergency situations of the same kind without humanitarian assistance, represents a menace to human lives and a menace to human dignity". Similar considerations appear in the preamble of Resolution 45/100<sup>3</sup>, and in two of the Resolutions of the Security Council which deplore heavy losses of human lives<sup>4</sup>.

(ii) *A Targeted Aid*

The preceding considerations give as a consequence the nature of the emergency assistance to be provided. It comes as no surprise to a doctor used to dealing with emergency operations. It requires nota-

bly the provision of "food, medicine, shelter and medical care"<sup>5</sup>. From the moment the application is ensured, the Security Council takes these needs into account and targets "food, medicine and materials and supplies for essential needs"<sup>6</sup>.

More firmly still, in December 1992, with respect to Somalia, it "strongly condemns all violations of international humanitarian law occurring in Somalia, including, in particular, the deliberate prevention of the delivery of food and medical supplies, essential for the survival of the civilian population".<sup>7</sup> The supplies are more or less specified. The outline texts define the large categories. Their application is ensured by humanitarian organizations after having been enabled by the Security Council in cases where these supplies are to be sent to a country under embargo, such as Iraq or Yugoslavia. Thus, the memorandum of agreement between Iraq and the United Nations, of 19 October 1992, mentions in paragraph 4 "food aid including the means to make available inside Iraq nutritional assistance, health and medical care, including support to public health systems and supply of health and medical equipment, assistance to purify water and sanitary installations including the supply of necessary equipment and spare parts to treat water and water-purifying stations, agricultural assistance, primary education and, in the three North regions, shelters and other measures of humanitarian assistance undertaken in conformity with the needs of civil populations affected throughout the country".

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3) Resolution GA 45/100, 14 December 1990

4) Resolution 733 (1992), 23 January 1992

5) Resolution 46/182, 19 December 1991, para 6

6) Resolution 706 (1991), 15 August 1991, para 2

7) Resolution 794 (1992), 3 December 1992, para 5

## (b) Rapid Intervention

Speed is, to start with, a criterion defining the conditions of forwarding such aid, its transport and distribution, taking into account the need to limit to the lowest common denominator, the obstacles and restraints which could hold up this aid. It is also decided by elements helping to foresee and to make a suitable evaluation of the needs, in order to reduce to a minimum the empiricism inherent to each operation.

### (i) Speed

Resolution 43/131 is very clear in this respect. The General Assembly states that it is "convinced that, in providing humanitarian assistance, in particular the supply of food, medicine or medical care, for which access to victims is essential, rapid relief will avoid a tragic increase in their number", and that "alongside the action of governments and intergovernmental organizations, the speed and efficiency of the assistance often depends on the help and aid of local and non-governmental organizations working with strictly humanitarian motives". At the same time, it desires "that the international community should respond *speedily* and effectively to appeals for emergency humanitarian assistance made in particular through the Secretary-General". The Security Council stresses this vital imperative with a terminology that leaves no room for misunderstanding, the words "urgency" and "high priority" ap-

pearing in the three key paragraphs of Resolution 746 on Somalia. In this Resolution, the Council calls upon the Secretary-General to continue his humanitarian efforts and to use all the resources at his disposal, including those of the relevant United Nations agencies, "to address urgently the critical needs of the affected populations in Somalia", and it "strongly supports the Secretary-General's decision urgently to dispatch a technical team to Somalia, accompanied by the co-ordinator", who is requested "to submit a report on the question as soon as possible".<sup>8</sup> It also requests, in the next paragraph, that "the technical team also develop a high priority plan to establish mechanisms to ensure the unimpeded delivery of humanitarian assistance". Further, it recalls the "urgent requests made by the factions in Somalia" and declares itself "deeply disturbed by the magnitude of human suffering and underlines that it is *urgent* that humanitarian aid be rapidly channelled throughout the country".<sup>9</sup> To this end, it requests the Secretary General to make full use of all available means and arrangements, "including the mounting of an *urgent* airlift operation, with a view to facilitating the efforts of the United Nations, its specialized agencies and humanitarian organizations in *accelerating* the provision of humanitarian assistance to the affected population in Somalia, threatened by mass starvation".<sup>10</sup> For Bosnia Herzegovina, it notes the "existence of urgent needs".<sup>11</sup> Practically, this requires the establishment of specific means, which,

8) Resolution 746 (1992), 17 March 1992, paras 4 and 6

9) Resolution 767 (1992), 27 July 1992, preamble. A nearly identical formula is included in the preamble of Resolution 775 (1992), 28 August 1992

10) Resolution 767 (1992), *op.cit.*, para 2

11) Resolution 752 (1992) of 15 May 1992, preamble and para 7

while awaiting the opening of airports to flights conveying international humanitarian aid, should consist of "parachuting emergency supplies".<sup>12</sup>

(ii) *Rationality*

But speed depends also on accelerating information mechanisms in the minutes, or hours, following a disaster. In this respect, the strengthening of the coordination of emergency humanitarian aid, the United Nations foresees that the agencies of the United Nations system should "intensify their efforts, building upon the existing capacities of relevant organizations and entities of the United Nations, for the systematic pooling, analysis and dissemination of early-warning information on natural disasters and other emergencies. In this context, the United Nations should make use, as appropriate, of the capacities of governments and inter-governmental and non-governmental organizations."<sup>13</sup> The nomination of a special representative of the Secretary General as Director of Humanitarian Action should respond to these concerns.<sup>14</sup> In practice, private or public operations of humanitarian aid have always been preceded by an evaluation mission intended to establish the facts of the situation in an objective manner. After the Gulf war, in 1991, several missions of this type were sent to Iraq. The one headed by Sadruddin Aga Khan is a good illustration of the method. At the opening of his 64-page report on humanitarian needs in the country, submitted to the United Nations Secretary-General<sup>15</sup> he states that

"we had wanted to observe the situation moderately, restrainedly and accurately". The systematizing of these missions will henceforth be ensured by the D.H.A.

## **II A Principle of Free Access which Is Largely Accepted in International Texts**

Free access to victims is, then, the most revolutionary part of these texts and, particularly, Resolution 43/131, which will inspire the following ones. The initial statement of the principle of free access to victims has been well received in western countries. It did not give rise to opposition although there was, at times, some concern on first analysis, on behalf of some developing countries. These anxieties did not withstand a more detailed analysis. Subsequent practice has allowed most of these objections to be overcome.

### **(a) The Confirmation of the Principles**

The principle, whose object does not really have the character of a menace to sovereignty has, since then, obtained the approval of the most diverse political and moral authorities.

#### *(i) Political Adhesion*

Conjunction of circumstances? On the same day of the Resolution's approval in New York, Mr Gloukov, Director of Humanitarian Affairs and of Human Rights of the Soviet Ministry of Foreign Affairs,

12) Resolution GA 47/131, 18 December 1992, para 8

13) Resolution 46/182, 19 December 1991, para 19

14) Resolution GA 45/100, op.cit., para 9

15) Security Council, Report S/22799, 17 July 1991

was received in Paris by the Secretary of State in charge of humanitarian action. The object of the meeting: the assistance that France could provide to the victims of the earthquake which had just destroyed part of Armenia. The USSR informed us – and this for the first time in its history – that it had opened its frontiers (without need for visas) to the rescuers coming from western countries. The United Nations Resolution came into force the day after its adoption. France, its voluntary associations, firemen, doctors, coordinated by the government, landed, during the first phase of the assistance, 514 men, including 57 doctors, 55 dogs (generally trained to find victims under the debris), 53 tons of supplies and, in a second phase, essentially equipment (48 aeroplanes transporting 200 tonnes, a train, a ship: the "Paimpolaise", a convoy of 17 trucks of the Post, Telephone and Telegraph company...).

Events took on a much faster pace: six months later, on 30 May 1989, Francois Mitterrand, while opening the Paris session of the CSCE, stated that "the obligation of non-intervention stops exactly where the risk of non assistance begins". In his speech of 14 July 1991, he recalled "France had taken the initiative of this new right, rather extraordinary in the history of the world, which is in a way the right of intervention within a country, when a part of its population is a victim of persecution". Six months later, speaking at the General Assembly of the United Nations, Mr Hans Dietrich Genscher expressed Germany's conviction, saying that "where human rights are trampled upon, the family of nations

cannot be confined to a role of spectator. It can, and should, interfere." In this same session, the Belgian Minister of Foreign Affairs considered that "the international community should help States to respect human rights, and to force them to do so, if necessary". On 6 December 1992, Roland Dumas, who had already expressed his thoughts on the subject on several occasions, stated on Europe 1: "The international community, entrusted with a new power, should set up a new rule and apply it: The right of intervention."

#### (ii) Ethical Support

The following year, Pope Jean Paul II, through the voice of the Cardinal Secretary of State, rallied to the "right / obligation of humanitarian intervention to stop the hand of the aggressor in Bosnia".<sup>16</sup> On 5 December 1992, the Pope reaffirmed this conviction, at the opening of the International Conference on Nutrition, organized in Rome by FAO and WHO, and said that "the conscience of humanity requires that humanitarian intervention be *obligatory* in situations that seriously endanger the survival of people and of entire ethnical groups. It is the obligatory duty of nations and of the international community."<sup>17</sup> "Obligatory", rarely has a declaration of support been as strong and determined. The date of this statement by the Pope is not immaterial. It took place some days before the deployment of 36'000 soldiers of the multinational force in Somalia. In spite of these concordant opinions, the idea gave rise to misgivings in some countries, anx-

16) "L'Osservatore Romano", 8 August 1992

17) Discussing this statement, *Le Figaro*, 7 December 1992, comments on page 5 that "the notion of humanitarian intervention has its roots in church doctrine".

ious for their sovereignty. A deeper reading of the text should reassure those with most misgivings.

### (b) The Principle's Consolidation

Three major reasons should appease the countries which had expressed objections to the principle.

#### (i) *An Obligation Erga Omnes*

The principle of free access is not applicable only to the countries of the victims. It aims also at all other governments, which must comply. In fact, Security Council Resolutions 43/131, 45/100 of the General Assembly, or Resolutions 799, 706 (for Iraq), 733, 746, 794 (for Somalia), 752, 758, 764, 770, 771, 798 (for Bosnia Herzegovina) recommend free access to victims, not as the desire of the aid givers to dominate the recipients, but as an essential condition to the good *deployment* of assistance to save victims. It is true, and statistics have proved it, that victims are more numerous in poor countries, and that most disasters take place in poor countries. Which explains the initial reticence of these countries to see themselves imposed with an obligation which appears to them as lacking reciprocity, being unilaterally imposed and without counterpart for other States. But this would mean ignoring that this obligation has a character *erga omnes* (for all) which imposes also upon other States not to hinder the transit or dispatch of humanitarian aid. Transit for neighbouring States.<sup>18</sup> This obligation applies also for the countries where the aid originates and limits their faculty to decree economic sanctions which would reduce or

prevent humanitarian aid reaching civil populations of the receiving country. This was the reason which led the Security Council to establish what I have called the "filter embargo", in its Resolutions 661, 666 (for Iraq), 757 and 760 (for ex Yugoslavia). This embargo forbids all exchanges with the exception of those concerning food or medical supplies.

#### (ii) *Its Harmlessness to Sovereignty*

Contrary to what has been stated, the principle of free access to victims is the more acceptable as it does not carry any ulterior motive of a colonial type. Two arguments are in favour of this. First, the UN Resolutions have introduced the subsidiary principle according to which the "major role" of the organization, setting into motion and implementation of humanitarian aid, is naturally recognized by the territorially competent state. And only if the latter is not able to undertake this task, that the international community will be allowed to intervene through the United Nations. Next, the *methods* for carrying out the principle exclude all long-term and extended presence in the territory in question. They frequently take the form of emergency or humanitarian corridors (see Resolution 45/100 of 14 December 1990). It is a matter of instituting a right of passage which will be harmless, geographically limited, medical and sanitary. The idea needs both a wide diplomatic acceptance and the least reduced humanitarian efficiency. To this end we thought it necessary to limit the idea in five ways: *limited in time* – the right of simple transit reduced to the necessary duration of assistance; *limited geographically* – it should keep to the roads of ac-

18) Resolution GA 43/131, *op.cit.*, para 6



cess; *limited in its objectives* – it has no function other than the supply of aid, medicaments, medico-surgical supplies, food, excluding any other form of assistance; *limited in its exercise* – it should be subjected to rules that need to be defined and which could be transposed from those coded under Article 19 of the Convention on the Right of the Sea of 1982, on the right of inoffensive passage in territorial seas; *deontologically limited* – to prevent confusion, dispersion and counter-performance in providing and distributing assistance and to respect the impartiality of all those distributing humanitarian aid (Resolution 43/131, preamble, paragraph 12). Indeed, this deontology is already widely established, in the first place, by the Geneva conventions of 1949 and by the protocols of 1977 as well as by the practice of the Red Cross and of the Red Crescent; secondly, by the International Court of Justice, according to which humanitarian assistance should be ensured without discrimination, it should be limited to the prevention and alleviation of human suffering, and to protect life and health and help respect the dignity of human beings.

These “emergency corridors” have been established during different recent humanitarian operations. Thus, for example, an inter agency mission of the United Nations, sent by the Secretary General and headed by the Director of the World Food Programme reached an agreement in June 1991, with the Government of Sudan, stating that an operation of provisioning of South Sudan populations in a precarious situation, would be un-

dertaken by water, by the Kosti-Malakal Nassir waterway over the White Nile and the River Sobat, recognized as a “humanitarian corridor”. The life line operation which had taken place previously was, also, a prefiguration of these corridors through which the European Community had conveyed aid in 1990 through the mediation of non governmental organizations. The “blue roads” of the United Nations were used as corridors to return to North Iraq in 1991<sup>19</sup>, to enable displaced Iraqis to voluntarily return in security. Other corridors were opened, in Yugoslavia towards Dubrovnik, Vukovar, Osijek, Sarajevo (Resolution 764 of the Security Council, 13 July 1992) where only the air relief corridors permitted its inhabitants to survive during the whole year 1992; in Somalia, between Mogadishu and Baydhaba (Resolution 767 of the Security Council, 27 July 1992)...

### *(iii) Its Legal Consolidation*

The analysis of texts and of their conditions of adoption reveals an ever growing acceptance of the international community to the principle of free access. In the first place, there has been an evolution of the terms employed by the members of the Security Council. Relatively timid in 1991, it is more assured in 1992, and even becomes obligatory by the end of the year. Thus, in its first texts, the Council prudently “insists” upon an immediate access, or “invites” States to ensure that aid will be distributed without hindrances; as of 1992, it employs unequivocal compelling formulae. It “re-

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19) “Blue Road N° 1” between Isikveren on the Turkish border and Zakho, “Blue Road N° 2” between Usumlu and Kanimasi and Kakho and/or Al Amadiyah, both established on 30 April 1991. See UNHCR review *Refugiés of June 1991*, pages 12-13

quests", "asks" or "requires urgently"<sup>20</sup> and even "demands" a free relief corridor, without hindrances.<sup>21</sup> The Council goes even further when it energetically condemns acts which hinder the transport of emergency food and medical aid and asserts that those committing, or ordering to commit, such acts, will be held individually responsible.<sup>22</sup> The evolution appears then in the United Nations votes. Resolution 688 received a majority vote, with four votes against (Cuba, India, Yemen and Zimbabwe), but Resolution 706 had only one vote against (Cuba) and one abstention (Yemen). Even more clearly, the voting of several other solutions adopted subsequently reveal the unanimity of the Council in Resolutions 746, 751, 764, Resolutions 775, et 794 on Somalia; whereas for Bosnia, where Muslim populations are in danger, this had the effect of rallying the last eventually hesitating Arab States, unanimity was also obtained for the adoption of Resolutions 758, 761, 764, 770, 771, 779 and 780. Among the unanimous members, the following countries may be noted, Morocco, India, Venezuela – Venezuela belonging to a Latin American group traditionally attached to the principle of non-intervention in domestic State affairs. If some discordant notes can still be heard among the members of the Council, this is less due to a reference of the principle of free access to victims than to its modes of application, which imply either the use of force to accompany the convoys, or the use of pecuniary or material sanctions against a sovereign State. Thus, Resolutions 776 and 781 on Bosnia raised

abstentions (China, India, Zimbabwe for the first only, China for the second one only). The use of force for humanitarian purposes must, therefore, be closely controlled.

### **III A Principle of Free Access with the Controlled Use of Force**

If obstacles hinder the distribution of humanitarian aid, does the principle of free access give grounds to the international community to resort to armed force?

#### **(a) Armed Protection of Humanitarian Convoys**

Access to victims is often dangerous due to the insecurity caused by the agitation between rival factions or to hostility proclaimed by local authorities against international aid. Armed protection of humanitarian convoys has been envisaged by the United Nations in specific circumstances.

##### *(i) Protection by the U.N. Forces*

The Security Council adopted Resolution 733 on 23 January 1992. In the text, as in that of Resolution 746, adopted on 17 March, in Resolution 751 of 24 April and, even in Resolution 767 of 27 July, it not only demands free forwarding and distribution of humanitarian assistance to the Somali people, but, for the first time, it insistently claims that security be ensured for the personnel sent to the place to provide this assistance. It deplores that

20) Resolution 733 (1992), op.cit., para 7, and Resolution 746 (1992), op.cit., para 4

21) Resolution 758, para 8, Resolution 770, para 3 (concerning access to internment camps in Bosnia Herzegovina), Resolution 771, para 4, Resolution 794 op.cit., paras 2 and 3

22) Resolution 794, op.cit., para 5

agents from humanitarian organizations met their death while fulfilling their duty. Its request not having been considered, it crossed a further step in humanitarian intervention when it decided, in Resolution 751, to entrust the undertaking and forwarding of humanitarian aid to a battalion of U.N. Forces, and in Resolution 775 of 28 August, the reinforced deployment of the U.N. Forces in Somalia (ONUSOM) to ensure the escort and protection of relief convoys (4'219 men).

*(ii) Further Protection by U.N. Forces*

This is a question of the deployment on the territory of a given State of armed guards who will supervise the forwarding and distribution of aid. There are approximately a hundred U.N. guards in Iraq, in pursuance of the agreement signed 23 May 1991 by the United Nations and Iraq. These guards are provided by the United Nations administration, partly taken from the security guards of the Palais des Nations and partly from national administrations of some member states. These U.N. Forces are not peace-keeping forces, nor buffer forces, nor policemen, in spite of some erroneous statements in the western press upon the arrival of the first U.N. guards in Dohouk, after the withdrawal of the Iraqi army on 19 May 1991. Their function is to observe, supervise and report. Simultaneously, they ensure the protection of United Nations personnel and equipment on Iraqi territory, but in no way guard the Kurds' security. They carry a personal weapon, which should be sufficient for this function. Their presence has the es-

sential purpose of being visible albeit symbolical.<sup>23</sup>

*(iii) Protection by a Designated Multinational Force*

After the Gulf War, Baghdad's power, isolated and no doubt weakened, kept its hold on the civil population, notably through severe repression against Kurd autonomy in the North, and the Shiite revolt in the South. Resolution 6898 condemns repression of the civil Iraqi population and demands that Iraq ends this forthwith, but it only calls upon member states to "participate" in the efforts of humanitarian assistance. Two days later, the United States and their French and British allies start the operation "provide comfort" in which their armed forces provided direct assistance to the displaced Kurd populations. This action, deployed on an implicit approval of the Security Council, was brief, and the task was quickly taken up by the United Nations following a memorandum of understanding between the United Nations and Iraq of 18 April 1991, and renewed in an amended form on 19 October 1992.

The security of the "Blue roads" in the North of Iraq, is ensured by allied military forces. During a meeting of Iraqi and allied generals, on 19 April, in Zakho, a military coordination centre was established, bringing together permanently the military representatives of both sides. Iraqi armed forces were invited to withdraw to a zone of 50 km by 30 km around Zakho and to limit their air activity within this zone. They agreed to this request.

In ex-Yugoslavia, the initial scenario

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23) See explanation given by Sadruddin Aga Khan to the U.S. Senate on 11 June 1991, *Congressional Record*, "Proceedings and Debate of the 102nd Congress, First Session", Vol. 137, N° 90, Washington, Wednesday, 12 June 1991

is different. The Security Council decided progressively, starting with Resolutions 752 of 15 May, 758 of 8 June, 761 of 29 June, 764 of 13 July, 769 of 7 August, 775 of 28 August, and 776 of 14 September 1992. In this last Resolution, it authorizes "the extension of the mandate of the UNPROFOR to ensure protection of convoys of liberated prisoners". It does not hesitate to resort to menaces in case of refusal to cooperate on behalf of all parties, stating, in Resolution 761 that it does not exclude "other measures to bring humanitarian aid to Sarajevo and its surroundings". In Resolution 807, adopted on 19 February 1993, the Security Council decided to ameliorate the equipment of the army of UNPROFOR to enable it to retort more effectively in situations of legitimate defence. After which, the Security Council organized the "neutralization" of Sarajevo airport, besieged city, by the immediate deployment of additional elements of the United Nations' force. "Neutralization" by the establishment (Resolution 764) between the airport and the city, of security corridors, under control of UNPROFOR' to ensure the forwarding of aid and the transfer of required personnel.

Similarly, the inefficacy of UNSOM obliged the Security Council to go further. Thus, Resolution 794 authorized the United States and their allies to deploy operation "Restore hope". Around thirty countries participated in this operation, not lacking in difficulties, and their replacement by the U.N. Forces made it necessary to endow the latter with sufficient legal and military means to enable them to undertake the task entrusted to them.

## (b) Financial Constraints and Humanitarian Aims

Nevertheless, the United Nations and its member States were not satisfied by the conditions under which aid was given by Iraqi authorities. This was the reason why, taking a further step in the "intervention", the Security Council decided in Resolution 706 of 15 August 1991 to ensure "the need for equitable distribution of humanitarian relief to all segments of the Iraqi civilian population through effective monitoring and transparency".

To this end, it decided that a part of the oil revenues that Iraq would be authorized to receive in exchange for its oil exports – authorized during six months – and limited to up to 1,6 billion dollars (amounts which must be paid in their entirety by the buyers into an escrow account established by the United Nations) would be administered by the Secretary-General exclusively to finance the purchase of foodstuffs, medicaments and materials and supplies for essential civilian needs. In view of Iraq's refusal to cooperate in the application of this Resolution, the United Nations Security Council, in Resolution 778 of 2 October 1992, started to put into effect the proposals that I had made in July 1991<sup>24</sup>, that is, "to transfer the Iraq Government funds" received by 6 August 1990 "into the escrow account of the United Nations", and to employ the balance of these funds to cover the cost of the Organization's activities with relation to the provision of humanitarian aid to Iraq.

In conclusion, we may observe that the irruption of the humanitarian spirit in the international legal scene calls for

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24) "Un droit d'ingérence?" (A Right of Intervention?), *Revue Générale de Droit International Public*, N° 3 - 1991, p. 665

the updating of positive law. The Law of The Hague or of Geneva, however meritorious and to which due respect must be paid, still present numerous gaps. In the law on armed conflicts, it ignores the victims of natural disasters and other emergency situations of the same kind, subject precisely dealt with by the Resolutions voted in 1988 and 1990 at the United Nations General Assembly. In addition, it subordinates aid to a preliminary agreement of the parties in conflict. This explains why, under its authority, humanitarian workers were absent in

Cambodia, in Burundi, in Timor. Thus, we must welcome the meeting of an international conference in Geneva in 1993, at the invitation of the Swiss Government. It should take all necessary measures so that humanitarian laws be better applied, less often violated, more largely implemented. In short, to grant it executory power: the principle of free access to victims, with no conditions, from the moment this is decided by the international community, in the sole interest of the victims.

# "Droit" or "Devoir d'Ingérence"<sup>1</sup> and the Right to Assistance: the Issues Involved\*

Yves Sandoz\*\*

Humanitarian issues have hardly ever before been given so much publicity by debates over what some people have described as the "droit" or "devoir d'ingérence",<sup>1</sup> which is then linked with the notion of the right to assistance. At the various levels at which the problem is perceived, the public at large, the media and legal experts have become involved in lively and even heated debates.

This is not a bad thing in itself; such strong feelings do not pass unnoticed by governments and may thus further the progress of humanitarian issues, as some important questions have indubitably been raised and, for many people, still remain unresolved.

On the other hand, it is regrettable that apart from some genuine questions,

much energy has been expended on the basis of misunderstandings.

At this stage we therefore consider it useful to clarify the issues, not because we claim to be able to resolve them all, but in order to lay the foundations for a straightforward debate. It is just as well that experts on humanitarian issues should participate in lively debates. It is regrettable that they should seek to engage in unproductive polemics.

In reality, the source of these "unproductive polemics" is threefold: jurists have been presented with an undefined concept,<sup>1</sup> whereas it is not possible to discuss a point of law properly without defining it; almost everything and the antithesis thereof has been said in the public debate that was started at the

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1) The following article is a revised and adapted version of an article which appeared in the *International Review of the Red Cross*, Nr. 228, May-June 1992, pp 215-227.

One of the proponents of the "droit d'ingérence", Professor Bettati, himself notes that "l'ingérence" does not denote a given juridical concept in "Un droit d'ingérence", *RGDIP*, 1991/3, pp. 639-670, ad p. 641. Furthermore there is, to our knowledge, no official English translation of the terms "droit d'ingérence" and "devoir d'ingérence" which accurately conveys their French connotation. Referring to recent English-language works on the subject, we noted that some authors use the literal translation of these concepts, i.e., "right to interfere/duty to interfere", others prefer to use "right to intervene/duty to intervene". As we consider that these terms do not render exactly the meaning of "droit/devoir d'ingérence" and are not interchangeable, we have chosen to leave these concepts in French in the present article, given that their meaning and scope are explained in the article.

See also *International Law and the Use of Force by States*, Ian Brownlie, Oxford University Press, 1968, pp. 338-342.

\* See Sandoz, Yves, "Usages corrects et abusifs de l'emblème de la croix rouge et du croissant rouge", in *Assisting the Victims of Armed Conflicts and Other Disasters*, ed. Frits Kalshoven, Nijhoff, pp. 117-125, ad pp. 118-119.

\*\* Yves Sandoz is a member of the ICRC Executive Board and Director of the Department for Principles, Law and Relations with the Movement.

same time; finally, this undefined concept has been applied to two entities which are not comparable, namely States and humanitarian organizations.

Let us endeavour simply to see what concepts are involved.

## 1 States' "*Droit d'Ingérence*"

Having already pointed out in another publication that the term "*droit d'ingérence*" contained a contradiction in itself, we do not intend to dwell on an analysis of the term but shall instead seek to identify the ideas expressed about it.

What is established beyond doubt is the right for States to open their eyes. A State may ask itself what is happening in other States. Even if the latter frequently still take offence, this right is unquestioned. Machinery to this effect has been set up by and for all States, in particular the Commission on Human Rights within the framework of the Economic and Social Council, or the possibility for any member State of the United Nations to draw the attention of the Security Council to any dispute or situation likely to endanger international peace or security.<sup>2</sup>

Other machinery destined to extend still further this right of inspection has been established by virtue of conventions binding on a large number of States, such as the Committee on Human Rights within the framework of the International Covenant on Civil and Political Rights and its Optional Protocol, of 1966; or the procedures relating to inspections on request provided for in Article IX (consultations, co-operation and fact-finding) of the Convention on Chemical Weapons which was

adopted on 13 January 1993; not to mention regional agreements.

International humanitarian law is not outdone in this connection. The responsibility assigned to all parties to the Geneva Conventions to ensure respect for those Conventions in all circumstances implies, at the very least, a right of inspection in all situations of armed conflict.

But is there a right to take action when this "right of inspection" reveals things that are unacceptable? Here again certain distinctions must be drawn. It is undeniable that States may act within the scope of their sovereignty and if they abstain from using force: apart from the obligations imposed on a State by international conventions or international custom, nothing prevents it from refusing to co-operate with a State whose government is behaving in a manner which it deems unacceptable.

Furthermore the procedures laid down in international conventions, and primarily in the Charter of the United Nations, permit sanctions in certain cases.

The difficult question is, therefore, whether, beyond the unquestionable sphere of their sovereignty and of their possible participation in international or regional machinery, States still have a right of ad hoc intervention involving the use of force in certain particularly serious cases.

Apart from the decisions taken by the Security Council, the system established by the Charter of the United Nations does not provide for the use of force on grounds other than legitimate self-defence. Since the latter is either individual or collective, it does permit the intervention of States which are not directly at-

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2) Cf. Art. 35, para. 1 of the Charter of the United Nations.

tacked, but it is clearly restricted to the cases in which "an armed attack" occurs against a member State.<sup>3</sup>

The historical concept of "humanitarian intervention",<sup>4</sup> which authorized armed intervention by a State on the territory of another State in order to terminate serious and extensive human rights violations, has no place in the system established by the UN. Legal doctrine today moreover rejects, in very general terms, the legitimacy of "humanitarian intervention" even in its restricted sense, viz. armed intervention in order to safeguard a State's own citizens in another State.

The obvious arguments which may be employed against such practices are as follows: to tolerate "humanitarian intervention" would be tantamount to creating great uncertainty in international relations, would risk damaging the whole security system established on the basis of the Charter of the United Nations and, finally, would involve patent risks of misuse, since human rights violations can provide a pretext for interventions with far less honourable intentions.

And yet... in the event of an obvious deficiency in the system established to serve the purposes of the United Nations, do States have no right to take action when acts are committed which are clearly contrary to these purposes? Can it be affirmed that States have a duty to watch people being massacred without

using all the means, even military, at their disposal to prevent such a massacre?

This question could obviously give rise to a lengthy debate, which we cannot address properly in the space of a few lines. It should be noted, however, that in its Draft Code of Crimes against the Peace and Security of Mankind,<sup>5</sup> the United Nations Commission on International Law mentions both aggression, which is defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (Article 15, paragraph 2) and genocide (Article 19), "systematic or mass violations of human rights" or "war crimes" (Article 22).

Since unilateral State intervention is allowed solely for protecting national independence if offences such as those defined in Articles 19, 21 or 22 are committed, no other possibility is envisaged than to implement the international system based on the Charter. For reasons mentioned above no provision has been made, should this system prove deficient, for a temporary derogation in favour of general humanitarian interests. In this hypothesis, there would therefore be no option other than that of committing one offence against the peace and security of mankind in order to put a stop to another.

Admittedly, the priority objective re-

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3) Cf. Article 51 of the Charter. The notion of armed attack has, however, given rise to various interpretations and much debate; see in particular on this subject: Cassese, Antonio, "Commentaire de l'article 51" in: *La Charte des Nations Unies. Commentaire article par article*, under the direction of Jean-Pierre Cot and Alain Pellet, Economica/Bruylant, Paris/Brussels, 1985, pp. 772 ff.

4) This concept and its history have been recalled in, inter alia, No. 33 of the *Annales de droit international médical*, 1986, Commission médico-juridique, Monaco.

5) See Draft code of crimes against the peace and Security of mankind, document of the General Assembly of United Nations: A/CN.4/L.459/Add.1, 5 July 1991.



mains the strengthening of the system based on the Charter. But in the light of certain contemporary events, would not the existence of a "state of necessity", based no longer on defence of the national interest alone but on that of fundamental human rights, warrant a fresh debate when particularly shocking situations arise?<sup>6</sup>

## 2 States' "Devoir d'Ingérence"

In the "global village" which the world has now become, States can be thought to have not only a right to open their eyes but also a duty to do so. The Charter of the United Nations does in fact lay down certain principles governing action by the Organization "and its Members" in pursuit of the United Nations' objectives.<sup>7</sup> Moreover, the influx of aliens in a number of countries is compelling States to examine the situation in the countries where these persons come from since their *refoulement* or their admission as refugees depends on that situation.<sup>8</sup>

Finally, by introducing the obligation for all States party to the Geneva Conventions to "ensure respect for" these Conventions, international humanitarian

law establishes not only a right of inspection but also an obligation at the very least to remain vigilant.<sup>9</sup>

In short, it can be concluded from the ever-increasing interdependence of all States, the development of human rights and the emergence of a principle of solidarity that States today are no longer allowed a "right of indifference". At the same time it must be borne in mind that the measures they should take to ensure respect for international humanitarian law in accordance with their obligations under the Geneva Conventions, or on a different level to fulfil their duty of solidarity, still require careful consideration.

Nonetheless, it would clearly be excessive to infer from this that there consequently exists a *duty* to intervene by force outside of security systems as defined by the Charter of the United Nations. There is no need to enlarge on this since no duty to intervene can possibly exist where, as shown above, international law denies any right to intervene. Analysis of the obligation to "ensure respect for" international humanitarian law, which is contained in particular in the Geneva Conventions, leaves no doubt whatsoever about this point.<sup>10</sup>

If during an armed conflict the Secu-

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6) Even though the arguments against such a derogation generally appear to prevail, as may be seen in particular in the resolution adopted on this subject by the Institute of International Law at its session in Santiago de Compostela, September 13, 1989. See Resolution III (The protection of human rights and the principle of non-intervention in internal affairs of states), in particular Art. 5. *Annuaire de l'Institut de Droit international*, 1990, Paris, Pedone, pp. 338-345.

7) Cf. Article 2 of the Charter.

8) Cf. in particular Article 33 of the Convention relating to the Status of Refugees of 28 July 1951.

9) Cf. Article 1 common to all four Geneva Conventions, and Article 1 of their Additional Protocol I of 1977.

10) Cf. in particular Condorelli, Luigi and Boisson de Chazournes, Laurence, "Quelques remarques à propos de l'obligation des Etats de respecter et faire respecter le droit international humanitaire en toutes circonstances," in *Studies and Essays on International Humanitarian Law and Red Cross principles*, in honour of Jean Pictet, C. Swinarski, ed., ICRC/Martinus Nijhoff Publishers, Geneva, 1984, pp. 17-36.

ity Council deems that serious and large-scale violations of international humanitarian law in themselves constitute a sufficiently grave additional threat to peace to justify armed intervention, then the decision to undertake or authorize such an intervention can clearly be taken only on the basis of Chapter VII of the Charter, and on no account by virtue of Article 1 common to the Geneva Conventions.<sup>11</sup>

### 3 The Approach of the ICRC and of the Movement with Regard to "Ingérence" by one State in the Affairs of Another

(1) This question arises for the International Committee of the Red Cross, first and foremost, within the framework of its mandate, as acknowledged by the Movement's Statutes, "to work for the faithful application of international humanitarian law applicable in armed conflicts".<sup>12</sup>

To this end, the ICRC must determine whether international humanitarian law is applicable, and therefore whether there is an armed conflict. Hence "*l'ingérence*" is concerned here only if it takes the form of armed intervention. When this is the case, there is unquestionably a situation in which the Geneva Conventions are ap-

plicable and, if the States concerned are both parties thereto, Additional Protocol I as well.

It must be stressed that even on the basis of United Nations' Resolutions, the use of armed force to impose<sup>13</sup> the passage and delivery of relief supplies can on no account be justified by international humanitarian law since, as noted above, the obligation to "ensure respect for" this law rules out the use of force. The question, therefore, is not simply one of relief actions such as those provided for in Article 23 of the Fourth Geneva Convention or in Article 70 of Additional Protocol I, but of using force to terminate serious and large-scale breaches of international humanitarian law.

The ICRC consequently considers it important that this question should be clearly regarded as coming under *jus ad bellum*, and that all necessary conclusions should be drawn in terms of international humanitarian law (*jus in bello*).

The above-debated question of the legitimacy or lawfulness of "*l'ingérence*" accordingly does not concern the ICRC more than any other question of "*jus ad bellum*". The ICRC must even be extremely reticent about addressing such questions, as any pronouncement with regard to the parties' responsibility for the outbreak of conflict would obviously be detrimental to the active role it is re-

11) Under the heading "Co-operation", Article 89 of 1977 Additional Protocol I links up with the Charter system by stipulating that: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter".

12) Article 5, paragraph 2 c) of the Statutes of the International Red Cross and Red Crescent Movement.

13) A clear distinction must therefore be made, at least in theory, between such operations and those which, although involving armed escorts, are nevertheless carried out with the consent of the parties to a conflict, while recognizing that in some circumstances it may be difficult to know exactly who is competent to represent the various parties.

quired to play in the conflict in aid of all the conflict victims.<sup>14</sup>

In this respect it is expedient to recall an essential basis of international humanitarian law: the reason for armed intervention has no effect on the obligations resulting from the said law. This is true of any armed intervention, including those which are undertaken within the framework of a Security Council recommendation.

The theoretical possibility of relying on Article 103 of the Charter<sup>15</sup> to tolerate a derogation from treaties as universally recognized as the Geneva Conventions would warrant in-depth consideration at least. But it can be affirmed already that a decision of this nature would, in any event, have to be based at least on a conscious, reasoned decision on the part of those responsible for taking it.

The armed forces acting under the United Nations' flag or by virtue of Security Council resolutions would not have any interest – nor would any State claiming to interfere in the affairs of another State for humanitarian reasons – in using the juridical basis or the lofty humanitarian motivation of their mission to exempt themselves from applying certain provisions of international humanitarian law: firstly, they would deprive their intervention of all credibility by refusing to accept this “island of humanity” which even the worst aggressor is bound to accept; secondly, they would give the opposing combatants a pretext not to re-

spect humanitarian law either, to the detriment of the wounded and prisoners of war of their own armed forces.

(2) A second question arises not only for the ICRC but also for National Red Cross or Red Crescent Societies, with regard to armed action for humanitarian purposes: may these and other humanitarian organizations enter into association with armed forces in such a context? This is evidently a relevant question in view of events in the Kurd populated areas in Iraq at the end of the Gulf war and, even more recently, in the former Yugoslavia. For the ICRC the reply is in the negative for reasons connected with what has been said above. Irrespective of the justification for such action, it may well entail armed confrontation, and thus casualties and prisoners. If associated with or covered by one of the armed forces in the conflict, the ICRC would lose all credibility in its role as a neutral intermediary, and thus any chance of being able to perform this role. However, it is not always easy to draw a clear distinction between a use of force as a means of imposing constraints upon parties to a conflict, and the use – with prior consent – of armed escorts for humanitarian purposes. In view of this, and of the extreme complexity of situations such as those prevailing today in Somalia and the former Yugoslavia, theoretical discussion can have no more than relative validity. Whilst a clear differen-

14) A role also provided for in the Movement's Statutes: cf. in particular Article 5, paragraph 2 d).

15) Article 103 of the Charter states that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. Concerning the interpretation and application of this article, cf. Flory, Thiébaud, “Commentaire de l'article 103”, La Charte des Nations Unies: Commentaire article par article, op. cit. (in note 4), pp. 1381-1386.

tiation of roles is of fundamental importance, it is nonetheless indispensable in such situations that means of practical co-operation should be actively sought.

National Red Cross or Red Crescent Societies might, for their part, be able to cooperate with the medical services of their country's armed forces or even, subject to the consent of their national authorities, with the medical services of a third country.<sup>16</sup> But such co-operation can firstly be envisaged only for tasks reserved for medical personnel, as specified in the Geneva Conventions,<sup>17</sup> and secondly, it must take place under the responsibility of the medical services of the armed forces.<sup>18</sup>

Conversely, a National Society may not display the red cross or red crescent emblem when acting as a government proxy to convey food relief in a situation of armed conflict, nor may it on any account act as such within the framework of an operation implemented by force.<sup>19</sup>

This restriction imposed by the Conventions on the tasks of a National Society is mainly connected with the use of the red cross or red crescent emblems. Since the latter are first and foremost emblems identifying the armed forces' medical services with a view to affording them protection, it is only right that their use should be strictly delimited.<sup>20</sup>

But this restriction also derives from the Movement's Statutes, which are designed, *again rightly*, to create some order in the large International Red Cross family. To this end, the said Statutes stipulate that international assistance in situations of armed conflict or internal strife shall be co-ordinated by the ICRC.<sup>21</sup>

Finally, what is the situation if humanitarian organizations not connected with the International Red Cross wish to associate themselves with such action? Several reasons justifying the refusal by the components of the Red Cross and Red Crescent Movement, reasons connected with the ICRC's mandate, the red cross and red crescent emblem and the internal organization of the Movement, do not apply to intergovernmental organizations. Those organizations must decide, in accordance with their statutes and terms of reference, how far and in what way they may do so. This difference is moreover one of the main reasons why it is important for the ICRC to be distinctly separate from the United Nations coordination system, even though it must cooperate actively with the latter.<sup>22</sup>

On the other hand, the United Nations specialized agencies or subsidiary bodies would obviously not be able to cooperate under any circumstances in action outside the scope of the system laid down

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16) Cf. Articles 26 and 27 of the First Geneva Convention of 12 August 1949.

17) Cf. Article 24 of the First Convention.

18) Cf. Articles 26 and 27 of the First Convention.

19) This does not however exclude a priori any participation whatsoever by the National Society, which could play its traditional role as an auxiliary to the medical services of its country's armed forces, and could also do so in countries other than its own.

20) Cf. Article 44 of the First Convention.

21) Cf. Article 5, para. 4 b) of the Statutes of the International Red Cross and Red Crescent Movement.

22) Cf. on this subject particularly de Courten, Jean, and Maurice, Frédéric, "ICRC activities for refugees and displaced civilians", IRRC, No. 280, January-February 1991, pp. 9-21.

by the Charter. Lastly, it must be clear that when co-operating in armed interventions for humanitarian purposes undertaken on the basis of Security Council resolutions, they are then acting as humanitarian auxiliaries of armed forces, and not within the context of "relief actions which are humanitarian and impartial in character and conducted without any adverse distinction" as understood by international humanitarian law.<sup>23</sup>

As for non-governmental organizations, such co-operation on their part depends on the rules laid down in their statutes, but it is clear, in the light of what has been said above, that it could be envisaged only at the expense of their independence.

(3) The more fundamental question that arises with regard to armed action with the limited objective of enabling the passage of relief is that of the advisability of such operations within the current international system, which is based on the Charter of the United Nations.

In other words, between failure of humanitarian action as provided for by international humanitarian law (which is based on respect for the red cross or red crescent emblem and on acceptance by all the combatants of relief operations which are humanitarian and impartial in character) and armed intervention designed to gain temporary military control of the situation, is there a third option consisting of imposing relief by military means?

Or, to put it more concisely, between the specifically political and the specifically humanitarian approach, can a combined political and humanitarian approach be found?

No definitive reply can be given here to this serious question. But the failures or great difficulties encountered in pursuing this middle course, as well as the obvious danger inherent in the politicization of humanitarian action, raise a number of crucial questions for the international community.

At this stage our sole objective is to make this clear.

Apart from the debate on advisability, the ICRC, as we have seen above, has no option but to consider that any armed intervention, regardless of its reasons, entails application of international humanitarian law. The ICRC cannot therefore be associated with armed action for humanitarian purposes, but must analyse the new situation created by such action in order to envisage, together with all the parties involved, the role it is required to play to ensure respect for international humanitarian law and to cooperate actively in the implementation thereof.

#### **4 "Droit" or "Devoir d'Ingérence" of Humanitarian Organizations**

This question is completely different from the previous one in that it is based on an inescapable fact: humanitarian organizations do not have armed force or other means of coercion at their disposal.

In reality, the questions raised in public debate have essentially been as follows:

- do humanitarian organizations have an absolute duty to comply with the will of the governments of the States on whose territory they wish to operate?

23) According to the wording used in Article 70 of Additional Protocol I.

- are humanitarian organizations obliged to use the only "weapon" at their disposal, that of public denunciation, when they ascertain serious breaches of international humanitarian law or even of human rights or international law in general?

It is rather regrettable that for image and promotional reasons, a new and far-reaching discussion was ostensibly launched on the principles of the matter, whereas in reality it was merely a discussion of advisability.

Standpoints have in fact been attributed to the International Red Cross and Red Crescent Movement in general and to the ICRC in particular which were not theirs. Respect for the will of governments is certainly not one of the Movement's objectives. On the contrary, the history of international humanitarian law documents a progressive erosion of the preserve of national sovereignty in favour of humanitarian action. Particularly noteworthy in this respect are the insertion, in the Geneva Conventions of 1949, of an Article 3 common to all four Conventions which enables an impartial humanitarian body such as the ICRC to offer its services to each of the parties to a non-international armed conflict; the principle, laid down in Article 70 of 1977 Additional Protocol I, that relief operations for civilians lacking essential supplies must be undertaken not only in occupied territory but also in territory belonging to the parties to the conflict; or the recognition, in Article 16, paragraph 1 of Additional Protocol I, that "Under no circumstances shall any person be punished for carrying out medical activities compatible with

medical ethics, regardless of the person benefiting therefrom".

As for the Movement's work, it is prompted solely by the first of its fundamental principles, the principle of humanity, which enjoins it to endeavour to "prevent and alleviate human suffering wherever it may be found". Negotiating with a government or with dissident authorities is not an objective but a necessary means of attempting to achieve as effectively as possible, in time of armed conflict, the objective set by the principle of humanity. To boast that one has reached victims without the consent of the military authorities controlling a territory implies deliberately forgetting that 95 percent or more of humanitarian needs can be met only with the consent of such authorities. Thus without wishing to express an opinion on the advisability of such an approach, we must note that it is consequently improper to present it as the envisageable option of one alternative, the other option being negotiations with the military authorities. Let us, therefore, acknowledge that this point has given rise to an "unproductive polemic", which is in the process - at least so we hope - of being resolved.

The obligation to go public has also been the subject of an unproductive polemic. From the ICRC's greatly misrepresented attitude in the extreme situation prevailing during the Second World War<sup>24</sup> it has been concluded that a kind of rule of allegiance to governments or even of passive complicity requires the institution to be discreet about what it does. Now silence has never been set up as a principle by the ICRC. The question has always been considered from the angle

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24) Cf. in particular on this subject Favez, Jean-Claude, *Une mission impossible? Le CICR, les déportations et les camps de concentration nazis*, Editions Payot, Lausanne, 1988.

of efficiency in achieving the objective set by the principle of humanity.

It cannot, of course, be denied that some decisions are difficult, since the benefit of public denunciation must be assessed in terms of what is best for the victims, taking into account not only the very short-term risks but also the possible longer-term effect on the operation concerned and, finally, the overall consistency of the approach compared with other breaches. Furthermore, remaining silent is particularly debatable when humanitarian action reveals situations that are very serious in humanitarian terms and are unknown to governments and the public.<sup>25</sup>

This is true even though the problem of going public today has more to do with the need to shake the international community out of its indifference to situations that are tragic from a humanitarian view-point than with the need to reveal unknown violations.

We should accept therefore that the continuing necessity of a genuine debate on the advisability of certain approaches to what may have been called the humanitarian organizations' right or duty to intervene should take precedence over alleged differences of principle.

The dialogue between humanitarian organizations – whether governmental or non-governmental – involved in armed conflicts is necessary since a better knowledge of the tasks, priorities, meth-

ods and experience of each one can but improve the overall efficiency of humanitarian action. However, to be positive and constructive, such a debate must avoid public disparagement for reasons that are sometimes not without ambiguity.

## 5 Right to Assistance

Today, this more appropriate term appears to be gaining ground over the expressions "*droit d'ingérence*" or "*devoir d'ingérence*". However, the "right to assistance" is not clearly defined either. In reality, the latter term opens up a range of important and complex issues. The message we would like to put over in this connection is concerned primarily with the already existing basis for this debate. The 600 or so articles of the Geneva Conventions of 1949 and of their Additional Protocols of 1977, not to mention the other Conventions forming part of international humanitarian law, in fact simply give legal expression to a broad interpretation of the right to assistance. These texts are the result of more than one hundred years' often painful experience, of a slow process of growing public awareness and of laborious negotiations with governments.

In this article we shall not embark on an analysis of these provisions,<sup>26</sup> nor do we intend to claim that they are the "last word" in the field of international hu-

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25) Although we do not wish to re-open here a debate on the attitude of the ICRC towards the extermination of civilians, particularly Jews, during the Second World War, it should be noted that the ICRC, contrary to popular belief or frequent claims, did not possess any important information about this tragedy which was not also known to the Allied governments.

26) See below Torrelli, Maurice, "From humanitarian assistance to intervention on humanitarian grounds?", pp. 228-248, and Plattner, Denise, "Assistance to the civilian population: the development and present state of international humanitarian law", *International Review of the Red Cross*, No. 288, May-June 1992, pp. 228-248 and pp. 249-263 respectively.

manitarian law. On the contrary, it is essential that this body of law should benefit from the new experience gained during each armed conflict and should take weapons developments and new humanitarian problems into account. To this effect, the ICRC's intention was to submit numerous documents examining the implementation or development of international humanitarian law to governments at the 26th International Conference of the Red Cross and Red Crescent, which was scheduled to be held at the end of 1991 in Budapest but unfortunately had to be postponed.<sup>27</sup>

On the other hand, care must be taken at all costs to avoid initiating debates on

such a vast subject while "forgetting" this sound basis, at the risk of calling into question the remarkable humanitarian achievements it represents.

### **Final Remarks**

A concerted approach by the international community – States, humanitarian organizations and the general public – to the problems discussed in this article is necessary and important. May these few lines help to draw attention, in a constructive spirit, to the true issues involved.

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27) See in particular the following reports: "National Measures to implement the Geneva Conventions and their Additional Protocols in Peacetime" (C.I/4.1/1); "Protection of the Civilian Population against Famine in Situations of Armed Conflict" (C.I/4.2/2); "Protection of the Civilian Population and Persons hors de combat" (C.I/4.2/1); "Protection of Victims of Non-international Armed Conflicts from the Effects of Hostilities" (C.I/6.1/1); "Information concerning Work on International Humanitarian Law Applicable to War at Sea" (C.I/6.2/1); "Prohibitions or Restrictions on the Use of Certain Weapons and Methods in Armed Conflicts - Promotion of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons of 10 October 1980, together with its Three Protocols" (C.I/6.3.1/1); "Prohibitions or Restrictions on the Use of Certain Weapons and Methods in Armed Conflicts - Developments in Relation to Certain Conventional Weapons and New Weapons Technologies" (C.I/6.3/2/1). See also the report "Respect for International Humanitarian Law: ICRC Review of Five Years of Activity (1987-1991)", in *International Review of the Red Cross*, No. 286, January-February 1992, pp. 74-93.



# International Co-operation to Promote Democracy and Human Rights: Principles and Programmes

*Babacar Ndiaye\**

## Introduction

The last decade has witnessed a veritable world-wide movement in support of democratic forms of governance and the protection of fundamental human rights. This movement has found its echo in all parts of the world – from Africa, Asia and Latin America to Eastern Europe and the former republics of the Soviet Union. The ideals of democracy and the notion of inalienable human rights are, of course, not new. They have guided political movements for at least the last two hundred years. Their origins can be traced to the notions of “natural law” and “natural rights” – notions which were first championed during the Enlightenment era in 18th century Europe.<sup>1</sup> The ideals of democracy and the protection of fundamental human rights have also inspired the very constitution and makeup of governments, both in the West and in many developing countries. Yet, what is perhaps the most striking feature of the current global movement towards democracy, is the broad convergence in politi-

cal thought, and the wide acceptance of the ideals and merits of democracy. This, in turn, has been accompanied by a spirited defence of legal and social systems created for the protection of fundamental human rights.<sup>2</sup>

The causes behind this apparent convergence in political thought and ideals can be explained by seemingly divergent developments in the various regions of the world. In Eastern Europe and the former republics of the Soviet Union, the crisis of communism, both as a political and economic system – and its eventual collapse – would appear to have validated the values of democratic forms of governance, as well as the principles underlying the functioning of market economies. In Africa, the economic difficulties of the last decade, and the problems governments face in surmounting them, exposed the limits of the one-party State. The crisis also revealed the sharp limitations of economic systems that relied predominantly on State control and direction. In Asia, the democratic movement would appear to be a response to

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- 1) The ideas of natural law from which the notion of inalienable human rights were drawn were behind the two most famous declarations on human rights in the 18th Century – that of the United States Declaration of Independence of 1776, and the French Declaration of the Rights of Man and Citizen in 1791.
- 2) A major exception to the global democracy movement is the rise of fundamentalism in some countries of the Islamic world. The movement is noteworthy by its explicit rejection of Western-inspired ideals of governance and human rights, and by its desire to establish *Sharia* law as the basic law governing all social relations.

the growing prosperity of the region, with citizens now demanding, alongside the economic and social gains that they had achieved in the recent past, greater political rights and say in government. Although differing from the experience of other regions, the Asian experience would, nonetheless, seem to validate the limits to economic development and growth under non-democratic systems of governance.

While the fundamental motivation for democratic movements in the various regions of the world would thus appear to be internal tensions and crises, these movements have also been helped considerably by changes in the global environment, as well as by the still evolving changes in the principles governing international relations. The growing interdependence of nations and regions, and the increasing inter-linkages between them – in turn made possible by advances in telecommunication technology – is changing the world into a veritable “*global village*”. Important political and economic occurrences, anywhere on the globe, are now almost instantly communicated to the rest of the world. Consequently, cases of political repressions, or flagrant abuses of human rights, can no longer be shielded from scrutiny by world public opinion. Instead, they become global news-items broadcast on the radio, or beamed to television sets all over the world.

An important effect of the international community bearing daily witness to events throughout the globe is the emergence of a perceptible sense of a “*shared humanity*”. The new experience is increasingly leading to the belief that the

internal affairs of every people is, in some measure, the affair of all. This, in turn, has led to growing calls for the international community to intercede on behalf of people suffering from political persecution or severe economic duress.<sup>3</sup> To date, the international community has interceded only in cases of immense human sufferings, or in cases where there has been a flagrant disregard of basic human rights. Thus, famines, hunger, and widespread human suffering now routinely elicit strong responses of assistance from the international community, usually under the auspices of the United Nations. Furthermore, in the recent United Nations-sanctioned military intervention in Somalia, the moral imperative of providing humanitarian assistance has been expanded to include the provision of *military protection* of starving people.

In a similar fashion, the more forceful claim that the international community has an obligation to promote democracy and respect for human rights in member countries is gaining ground, although it has yet to be formally elaborated or codified. This is reflected in the many programmes that the United Nations has launched in all regions of the world, in support of the establishment of democratic forms of governance, as well as for the protection of human rights. In this regard, it is worth noting that the United Nations has recently sanctioned the right of the international community to intervene – admittedly under rather unique circumstances – to protect an ethnic or religious minority from persecution by its own government. This new departure would appear to be a weakening of the principle of non-interference in the inter-

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3) It is important to recall that not too far back, such involvement of the international community would have been considered in the internal affairs of sovereign states.

nal affairs of member States – a principle that had guided the affairs of the United Nations since its inception in 1945.

The apparent acceptance by the international community of certain “higher principles” that would tend to curtail the prerogatives of sovereign nations, together with the application of measures to enforce them raise a number of contentious and problematic issues. These need to be fully discussed and debated in all the appropriate international fora – for example, in the upcoming United Nations Conference on Human Rights (June 1993). A full and in-depth debate is required in order to ensure that the views and perceptions of all nations and peoples are adequately represented. This is essential if the enunciation of international principles – and, in time, their codification into international laws – is not to reflect simply the strictures of the more powerful countries, but does, indeed, represent the considered views of all nations. Efforts to arrive at an international consensus are thus essential if international principles governing the promotion of democracy and the protection of human rights are to become freely acceptable to all nations and peoples.

This paper seeks to address some of the questions and issues that emerge in connection with international efforts to support democracy and protect human rights in individual countries. The paper first takes up the question of whether there are indeed notions of human rights, democracy, and good governance that are acceptable to all societies and cultures (section II/Towards Universally Accepted Notions of Human Rights and Democracy?). In the light of the inescapable differences in cultures and value-systems – as well as the inevitable tendency to promote specific national interests in the course of all international co-operative

endeavours – the paper raises the issue of what broad principles/rules should govern the involvement of the international community in the efforts to protect human rights and promote democracy (section III/Some Basic Principles That Should Govern International Co-operation to Promote Democracy and Human Rights). In section IV/Areas of International Co-operation to Promote Democracy and Human Rights, the paper discusses the type of joint actions/programmes that members of the international community could take in support of democracy and human rights, on the assumption that internationally-accepted principles will indeed be forthcoming.

### **Towards Universally Accepted Notions of Human Rights and Democracy?**

The involvement of the international community in efforts to promote democracy and protect human rights in individual countries presumes the existence of a certain *consensus* among members of the community on the essential attributes of democracy, and on those rights that are to be considered as *basic* human rights. A closer examination of the issue would, however, indicate that while there may be agreement on the desirability of democratic systems, considerable differences still exist on the essential properties of democratic systems of governance. There may, moreover, be greater consensus on *non-democratic* systems of governance and on systems that fail to respect human rights than on what characteristics – in a positive sense – constitute a democracy. In other words, members of the international community may find it easier to agree that a particular system of governance is non-democratic (e.g., as

in the case of the *apartheid* system in South Africa), than to agree on the constitutive elements of a democratic society.<sup>4</sup>

In Western liberal thought, democracy is traditionally identified with two essential attributes: *popular sovereignty and individual liberty*. These imply that legitimate power rests solely with the people, and that the people have the right to choose or dismiss their government. Complementing this fundamental axiom of popular sovereignty is the inalienability of certain human and political rights, such as the right to free speech and political assembly. Contemporary discourse in the Western world on the notion of democracy is marked by debates on whether rights, other than the purely political, should also be included within the notion of democracy. Many would argue, for example, that the right to basic needs, such as a minimum supply of food and acceptable shelter, as well as the right to work, should be included in the notion of democracy. Many would argue, for example, that the right to basic needs, such as a minimum supply of food and acceptable shelter, as well as the right to work, should be included in the notion of democratic rights. By contrast, many in the developing countries, would argue not only for a *hierarchy of rights* (with basic material rights often being given higher

priority), but would also insist on the reconciliation of the "universal" attributes of democracy with the specific value-systems and cultures of a people.

In considering the historical evolution of democracy, it is also important to note how this notion has expanded progressively over the centuries. It is worthwhile to recall, for instance, that when proponents of natural rights argued passionately for the "rights of man" in the eighteenth and nineteenth centuries, they did not include the rights of women, nor did they refer to the rights of people of colour. Even in our own century, it is important to recall the total disregard shown by colonial powers for the democratic and human rights of the peoples that they had subjugated. We should note further that it is only in this century that the notion of "economic rights" as an integral component of democratic rights, has gained some ground.<sup>5</sup>

The question of which rights should be considered as *fundamental* human rights is also subject to similar debate. While many would argue that the rights enshrined in the United Nations' *Universal Declaration of Human Rights* constitute basic human rights, this declaration has yet to be widely accepted. Furthermore, due to cultural and religious reasons, many of the human rights enumerated in the UN Declaration may not be

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4) As will be argued more fully below, the absence of an un-ambiguous consensus on these critical issues-as well as the inevitable pursuit of national interests in all international endeavours - would imply the need for certain prudence and circumspection in calling for international involvement in support of democracy and human rights.

5) The expansion, over time, of the notion of democracy, and the considerable time it took to arrive at modern concepts of democracy, has important implications for the international promotion of democracy in societies with limited democratic traditions. In brief, it is that democratic institutions in such societies will necessarily take time to be established and, more importantly, to take root. Also, it is clear all the democratic and human rights that are now recognized in the western world as fundamental rights can not be expected to be accorded the same value and weight in "newly-democratizing" societies.

acceptable to certain societies. A case in point is the status of women. Yet, in many societies – and by extension in much of international development work – there is a strong movement to accord women the same rights as men. Clearly here, there is a conflict between what may, at first sight, appear to be a “universally” accepted human right, and the values of particular societies and cultures.<sup>6</sup>

International co-operation for the promotion of democracy and the protection of human rights will not only be affected by the absence of a clear consensus on such issues, but by those considerations nations must necessarily take into account in deciding on their involvement in such co-operative endeavours. In this regard, the involvement of the nation is, and will always be, subject to the *calculus of national interests*. While the international community has indeed taken numerous measures which were largely motivated by humanitarian concerns, its record in promoting democracy and protecting human rights has, however, not always been subject to such lofty concerns. Its involvement has, as a result, often been inconsistent.<sup>7</sup>

The absence of universally accepted notions of democracy and human rights, as well as the inevitable pursuit by countries of their own national interests, have many serious implications for international co-operation in the promotion of

democracy and good governance, as well in the protection of human rights. In the first place, it implies that the rules and principles that should govern international intervention should be formulated to take into account the divergence of views and interests among nations. And in the light of such differences – some of which could be quite far-reaching – a certain circumspection and prudence is required to ensure the emergency of a consensus among nations. Furthermore, as will be argued in some detail below, this also calls for certain agreements and understandings between the international community and those countries or people on whose behalf the international community may wish to intercede.

### **Some Basic Principles that Should Govern International Co-operation to Promote Democracy and Human Rights**

The absence of universally-accepted notions of democracy, as well as differing views on what rights constitute fundamental human rights, implies the necessity of a careful delimitation of the conditions under which the international community should be involved to promote democracy and human rights. It also calls for a careful consideration and prudent deliberations on the types of sanctions

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- 6) Similar questions can be raised with regards democracy and customary rules of governance. As will be discussed in some detail below, a people, for wether traditional, cultural or religious reasons, may whole-heartedly accept non-democratic forms of governance.
  - 7) In this regard it is worth noting that in regions or countries where the vital interests of powerful nations have been at stake, the absence of democracy or the flagrant abuse of human rights, has not always attracted much international condemnation or interest. Similarly, the international community has not always been forthcoming in its support of democratic transformations in regions or countries, which may not be of particular interest to the powerful members of the international community.

the international community should authorize in response to perceived violations of democratic principles or basic human rights.

International co-operation and involvement should, in the first instance, be guided by the recognition of the legitimacy of different national political, economic, and cultural systems. The international community can not thus insist that all countries have identical systems of political organizations or systems of governance, even if there would appear at present to be some convergence towards the ideals of democracy and the *protection of human rights*. In other words, there is a need to recognize the legitimacy of "*national political and cultural space*" in the determination of systems of governance, and in the recognition and respect of fundamental human rights.

It is clear that a notion such as that of a legitimate "national space" can come in conflict with the broader principle of "shared humanity". It could also be argued that the notion of "national space" is not much different from that of "national sovereignty", which the international community has, in some important respects, already begun to abridge. A way of reconciling these seemingly contradictory principles is by recognizing the higher legitimacy of the principle of "shared humanity" only under certain specific conditions. In other words, it is best done by recognizing that the international community does have that right, and the moral duty, to express its profound concern and even take measures when certain clearly defined conditions prevail. A few can be cited: a case of attempted genocide against a people, be they a religious or ethnic minority; and the occurrence of a humanitarian crisis of unacceptable proportions, either due

to the breakdown of law and order, or to criminal negligence on the part of a government. In these types of egregious violations of basic human rights, or unacceptable levels of human suffering, the involvement of the international community could be considered legitimate and clearly called for.

A *second principle* which should govern international involvement in support of democracy and human rights is when a people clearly expresses a desire to exercise its democratic and human rights; but is thwarted by its own repressive government. The rationale for intervention under such conditions is the coincidence of value-systems between internationally accepted democratic and human rights values (as enshrined, for example, in the United Nations Declaration of Human Rights), and the political and cultural values of a people. Involvement in such a case is called for because of the manifest disregard of the clearly enunciated wishes of a people. Under these types of conditions, the appropriate response of the international community would, in general, be punitive measures such as suspension of resource flows, or, in very serious cases, the imposition of economic and trade embargoes.

The international community will, however, need to observe strictly the observance of the above type of situation. It will need to accept the principle of *non-interference* if a people, either due to religious or cultural reasons, genuinely supports a particular system of government, even if such a system may seem to contravene generally accepted democratic principles and even if it would appear to fall short in its observance of human rights principles. In the contemporary context, this would, for example, mean accepting political systems based on

*Sharia law*, if it is proven that the large majority wish to have their political and social relations governed by such a religious system. But the right of the majority to establish such a political system does not, on the other hand, give it also the liberty to impose forcefully its beliefs or will on a minority that may, for religious or other reasons, not support it.

Finally, a *third principle* that should be applied is the principle of *non-selectivity*. The international community, if it is to use the principle of "shared humanity" to justify its involvement in the affairs of individual countries, will need to demonstrate its impartiality in the application of this principle. To date, there are clear cases of selectivity, not only in the actions that individual countries take in response to human rights abuses and violations of democratic principles, but even in the implementation of the resolutions of the United Nations. If the principle of shared humanity is indeed to become a universally-accepted principle and used to justify the involvement of the international community in the affairs of nations, it can only become so if it is applied in a non-discriminatory manner.

The impartial application of the above principles would call for the *strengthening* and *democratization* of the international organizations that would, on behalf of the international community, be involved in the promotion of democracy and in the protection of human rights. Since the end of the Second World War, the United Nations, and, in particular, its Security Council, have been the principal bodies that have sanctioned international interventions, both military and non-military, against States that have been perceived to have violated the principles of the United Nations. And, as noted earlier, with the end of the Cold War, the United Nations has increasingly been in-

involved in the promotion of democracy and human rights in its member countries. But despite this greater involvement, there is still considerable room for strengthening and reforming the institutions of the United Nations in order to enable them to shoulder their new responsibilities more efficiently and effectively.

### **Areas of International Co-operation to Promote Democracy and Human Rights**

International co-operation to promote democracy and human rights could perhaps be best discussed at two levels – national and international. International co-operation at the national level would consist of programmes and activities to support the evolution of national political systems of governance towards democratic forms, as well as programmes to support the protection of fundamental human rights. Such programmes, if they are to have legitimacy and sustainability, will however need to be complemented by reforms of the *international political and economic systems* to make these systems more democratic and responsive to the needs of humanity at large.

#### ***International Co-operation at the National Level***

International co-operation to promote democracy and human rights at the *national level* becomes unproblematic when there are tangible movements towards democratic forms of governance in the societies in question, and when such evolutions are accompanied by invitations from the government or from popular organizations for assistance from the international community. Under these condi-

tions, the international community should provide various forms of assistance in support of the transformation of political and economic systems. Indeed, in many of the poor and resource-starved developing countries, such support may be critical for the successful implementation of democratic reforms.

International co-operation in support of democracy and human rights becomes problematic, however, when such favourable domestic conditions do not prevail. In the case of the obvious suppression by a government of a people's expressed desire to exercise its democratic and human rights, the international community may sanction punitive measures. And in the more flagrant cases, direct international support may also be provided to opposition political groups.<sup>8</sup> In situations, on the other hand, where, due to religious or cultural reasons, a society generally accepts a system of rule that to outsiders may appear un-democratic and in violation of basic human rights, the international community can do very little. It can not presume to know what is better for a people than the people themselves, and thereby take measures to support domestic political or economic reforms.

In those instances, where there is a clear call by a government or a people for international assistance, the types of international programmes of co-operation to promote democracy and support for human rights can perhaps be classified into three groups:

- programmes and activities to "modernize" the State;
- programmes and activities to strengthen society; and
- programmes and activities to promote economic reform and growth in order to help ensure the sustainability of democratic reforms and processes.

*Modernizing the State.* The development of democratic systems of governance would require what some have called the "modernization of the state".<sup>9</sup> This concept refers to the importance of improving the workings of the administrative machinery of government so that they become more open and accessible, decisions and the use to which resources are put become more transparent, and that the powers of the State over citizens are properly delineated and clearly circumscribed. For these conditions to prevail, clear administrative and financial rules have to be promulgated, and civil service codes and regulations, which delineate the duties and rights of public servants, must be drawn up. What is as important is that an independent and honest judiciary – one to which citizens can have recourse – must be set up. Finally an energetic, vigilant, and independent media must be allowed to operate freely.

Programmes aimed at the modernization of the State could thus be an important area for international co-operation to promote democracy and human rights. The international community could take

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8) This was, for example, the case with the international assistance provided to liberation movements in Africa.

9) See the Report of the South Commission, *The Challenge to the South*, (London: Oxford University Press, 1990), pp. 116-118, for a good discussion of this topic.



various measures to strengthen the institutions of the State. It could provide training to bolster administrative and financial systems; it could help in drawing up administrative and civil codes; and it could also assist countries to set up independent and effective judiciary systems. Donors often shy away from providing such types of technical and financial assistance in support of institution building as the results of projects aimed at enhancing administrative capacity are often not very tangible; they may, moreover, take considerable time before their benefits become clear. Yet, activities aimed at the modernization of the State could, in the long-run, have as much positive impact, if not more, on the overall (democratic) development of a nation.

*Strengthening civil society.* An essential characteristic of democracy is the dispersal of both political and economic power among citizens. By contrast, totalitarian or repressive social systems are characterized by the very opposite – the concentration of political and economic power in the hands of a small minority, whether these be party members, an oligarchy, or State functionaries. An important area of international co-operation in support of democracy and human rights should thus consist of programmes and activities that seek to strengthen the myriad institutions of civil society. A strengthened civil society – one that is clearly differentiated from the institutions of the State – is essential if a society is to have a countervailing force to balance the powers of the State, and thereby guarantee the essential conditions for democracy.

International support to civil society can take a number of forms. It can include financial and technical support to grass-roots popular organizations. Other

types of support can take the form of financial and technical support to programmes that seek to increase the general "political literacy" of a population. In this regard, projects that provide education on democracy and human rights can be quite supportive of the evolution towards democratic forms of governance, as well as to the emergency of democratic institutions at the grass-roots level. Programmes to increase general literacy rates can also contribute to enabling a people to exercise more fully its fundamental democratic rights. Finally, international support should also be extended to independent national research and policy institutions. These could play an important role in seeking to adapt general democratic principles to the particular historical conditions of a society. They can also provide the population with independent political, social, and economic studies and assessments to enable the citizenry to make informed judgements and decisions.

*Promoting economic reform and growth.* Many would argue that the sustainability of the democratic process in developing countries is, and will be, dependent on the success that countries will enjoy in establishing market-based economies, as well as on the growth-tempo of their economies. On this argument, if democracy is to take root, pluralism in the political sphere – implying a dispersal of political power – must find its echo in the economic arena in the dispersal of economic power among a citizenry. As the concentration of economic power, be it in a State bureaucracy or in an oligarchy, has historically buttressed totalitarian or repressive political systems, the establishment of market economies, as well as the emergency of a strong and independent private sec-

tor, are considered essential conditions for the success of democratic transformations. In turn, competition and a more rational allocation of resources – and, through these, more rapid economic growth – are nurtured under democratic forms of governance.

Such a dispersal of economic power is expected to be safeguarded by the essential attributes of the market economy which include: some private ownership of the means of production; free competition among economic agents; the right to freely enter and exit any line of production or employment; the determination of prices, and the allocation of resources, through the free play of market forces. In turn, the minimum political and legal conditions that need to exist for the efficient functioning of a market economy are: a system of property rights that is transparent and non-discriminatory; an efficient legal system for the endorsement of contracts and legal undertakings; a framework that allows competition, entry and exit; and equality before the law for all economic agents.

Partly as a response to the economic difficulties that they faced in the decade of the 1980s, and partly in response to the democratization movement underway, many countries in Africa, Asia, and Latin America have sought to establish full-blown market economies. Indeed, the rush towards the creation of market economies resembles, in its intensity, the global democratic movement. In Africa, for example, the large majority of countries has initiated radical economic reforms which have involved the jettisoning of old economic systems that relied on State direction and control, in favour of the establishment of market economies. A complimentary effort to these reforms has been the support governments have given to the private sector; increas-

ingly, the private sector is viewed in many countries as a vital agent of rapid economic growth.

The results of the economic reform efforts in many countries, and in particular on the African Continent is to date, rather mixed. In a few countries, there are encouraging signs of economic recovery and growth; and a vigorous private sector, emboldened by the change in economic policies, is emerging. In other countries, it has become clear that the development of a dynamic sector – one capable of discharging its anticipated role – will require some time. As a consequence, the transition from State-directed economic systems to full blown market economies is expected to take a much longer time, particularly in the poorer countries of Africa. It has also been observed that a key determinant of success in reforming economies is the extent and scope of the *external support* that countries receive. Those countries that have succeeded in mobilizing considerable external resources in support of their reform efforts have managed to bring about significant structural transformations. By contrast, reform efforts have flagged in those countries, which have faced difficulties in obtaining the requisite external support.

However, beyond the economic reform efforts that must necessarily accompany the transition to democracy, the *sustainability of the democratic reform process* itself is ultimately dependent on the pace of economic growth achieved in these countries. Rapid economic growth is essential if the goods and services required to improve the material welfare of citizens are to be produced, and if reductions in the number of people living in absolute poverty are to be achieved. A rapidly growing economy is also essential if jobs are to be created, and a decent livelihood is to be provided for the

rapidly increasing labour force.<sup>10</sup> Without the resources and the jobs that a rapidly growing economy makes available, it is questionable that the democratization process will be sustained for long. For economic stagnation and decline – leading to a downward spiral in standards of living – will undoubtedly prove fertile ground for anti-democratic forces that may well succeed in overturning and stifling democratic institutions and processes.

Rapid economic growth is dependent on a number of factors. Among these, the most important are: a high level of savings and investment; a stable macroeconomic environment (characterized by low inflation, stable monetary growth, and sustainable fiscal and balance of payments situations); adequate external resource flows (through a combination of private and official capital flows); and appropriate State intervention, including adequate public investment to provide the requisite social and physical infrastructure for economic growth. The economic reform efforts of many developing countries have sought to create the conditions necessary for rapid economic growth. While a few have succeeded, many countries, particularly the very poor ones in Africa, have yet to achieve sustained economic recovery and growth. Their efforts have been impeded not only by the heavy legacy of the past, but by the exceptionally unfavourable external environment that they have faced in the last decade. These have included all-time low commodity prices, a high debt overhang, high interest rates, and severe reductions in external capital flows. Thus, in the absence of major in-

ternational efforts to improve the external economic environment that many developing countries face, it is unlikely that these countries will achieve high and sustained levels of economic growth.

In the light of the essential linkage between democracy and market economies, an important area for international co-operation in support of democracy and human rights must necessarily be greater support for the economic reforms that developing countries have launched. International co-operation should also be aimed at supporting the efforts of developing countries to achieve rapid rates of economic growth. Here again, international support can take many forms. But in the light of the severe external resource constraints that many – and in particular African – countries face, a priority area must necessarily be increasing *the external resource flows* to developing countries, and, in particular, to the poorer countries. An important additional step that the international community can take in this regard is implementing measures to *write-down substantially the external debt* of these countries, so as to release additional resources for investment.

As important as these two measures may be, the international community should, in addition, take a number of other complementary measures in support of the economic reform and growth efforts of developing countries. These include: providing technical and financial support for the development of private entrepreneurship; assistance to improve and simplify government tax systems and regulations; technical assistance to revise and develop appropriate commercial codes and property laws; and technical

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10) On the African Continent alone, the labour force is expected to increase by some 70 million in the 1990s.

support to strengthen regulatory bodies, and to simplify and streamline regulations that govern business activities.<sup>11</sup>

### ***International Co-operation at the Regional and Global Levels***

International co-operation to promote democracy and human rights in individual countries will need to be complemented by efforts to improve *global governance*, as well as by attempts to reform the international economic system, so as to make these systems more responsive to the needs of humanity at large in the developing world. Indeed, if political reforms at the national level, as well as efforts to reform economic systems are to succeed, they must find support and sustenance at the regional and international levels.

*Improving global governance.* Measures to improve global governance must necessarily focus on the role of the United Nations, and on ways and means of both making this institution more democratic and more effective.<sup>12</sup> For much of its existence, the United Nations has reflected the tensions and conflicts of the Cold War era, with the superpowers manoeuvring to use the institution to further their own political agendas. But with the end of the Cold War, and the seeming convergence of thinking on such matters as democracy and human rights, it is essential that the United Nations begin to play more fully its unique role in efforts to improve global governance. This will, however, require that the United Nations

be reformed and strengthened. One of the most important measures in this regard is the reform of the Security Council, so as to ensure that all regions and nations are fairly and adequately represented.

A revitalized and reformed United Nations can provide considerable support for the fledgling democratic movements in many countries, as well as to the efforts of these nations to reform their economic systems. Many of the international support programmes and activities discussed above could be channelled through the United Nations. As the United Nations is the only supra-national body that can legitimately play such a role in all regions of the world, its involvement could be more acceptable to sovereign States than that of other institutions or countries. In this regard, however, it should be noted that *regional institutions* can also play equally important roles. In Africa, for example, a strengthened Organization of African Unity (OAU) could have an important role in assisting member countries' efforts to reform their political systems. Similarly, the African Development Bank (ADE) has, and will, undoubtedly continue to play a major role in regional member countries' efforts to reform their economic systems, as well as in their efforts to achieve higher rates of economic growth.

*Reforming the global economic systems.* Major reforms in the global economic system will also be required if the economic reform efforts of developing countries are to succeed and, by exten-

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11) The other measures that the international community should take to improve the external economic environment that developing countries face are discussed in the following subsection.

12) These issues are discussed in some detail in the statement of the Stockholm Initiative on Global Security and Governance, "Common Responsibility in the 1990s" (Stockholm: 1991).

sion, if the movement towards democratic systems of governance is to be sustained. Many developing countries, and in particular the poor ones, have highly open economies that are affected by developments in the global economy, and in particular by movements in the international prices of primary commodities. Such economies are also highly dependent on external capital flows – both official and private – to meet their investment and growth requirements. As noted earlier, the external economic environment that these countries have faced, in the decade of the 1980s as well as the early years of the 1990s, has been highly unfavourable. Therefore, for many countries, both the attempt at democratization and the efforts at economic reform are being undertaken at a particularly unfavourable period.

The international community should thus undertake a number of measures both in support of the reform efforts of these countries, as well in support of the development aspirations of the peoples of the developing world. In addition to increasing *external resource flows*, and taking effective measures to *reduce the debt* of the poor countries, some of the most important complementary measures that the international community should consider are:

- international agreements to stabilize commodity prices in the short and medium term, and to support, in the longer term, the diversification efforts of developing countries;
- reform of the international trading and monetary systems, with the aim of removing or reducing protectionist measures and tendencies in the North, and to increasing global liquidity to allow improved access by developing countries; and

- measures to improve the access to, and transfer of, modern technology from the industrialized countries to developing countries.

## Summary and Conclusions

In the course of the last decade, the world has witnessed a movement of global dimensions in support of democracy and the protection of human rights. This movement has, in part, been a response to the political, economic, and social crises faced by many countries, largely arising out of the failures of past State control and repressive social systems. The increased interdependence and linkages among people, made possible by advances in telecommunications technology, have also contributed to the strength of the global movement. By allowing the world to bear witness to events everywhere, the new technology has contributed to the emergence of a strong sense of "*shared humanity*" among the people of the world. Thus, the affairs of individual countries are increasingly becoming the affairs of all. One consequence has been the apparent acceptance of the moral responsibility of the international community to intercede in cases of immense human sufferings, or in cases where the human rights of a people are being egregiously violated. The argument that the international community, through the offices of the United Nations, should also be involved in the efforts of countries to transform their political systems, in line with generally accepted democratic norms, is also increasingly gaining ground.

But despite the seeming convergence of political thinking, and the increased involvement of the international community to support democracy and protect

human rights, there still exists the need to recognize the validity and legitimacy of different political systems and arrangements that reflect different traditions, cultures and value-systems. These may not, however, always accord with generally accepted democratic and human rights principles. The international community would thus need to recognize the right of a nation, or a people, to its own "national political and cultural space". It can not, therefore, insist that all countries have identical systems of governance.

In the light of the apparent conflict between the principle of "shared humanity", which can give legitimacy to the involvement of the international community in the affairs of sovereign States, and the principle of "national political and cultural space", it is essential to delineate clearly the conditions under which the first principle will be given precedence. Three principles which should guide such interventions have been proposed in the paper. First, it is argued that the international community has the right, as well as the moral duty, to express its concern and to take appropriate measures in cases where a people's expressed desire to exercise its democratic rights are being thwarted by a repressive government, it is argued that the international community should take measures in support of a people's expressed wishes. But in situations where a people, either due to religious or cultural reasons, supports a political system that may seem to contravene generally accepted democratic principles, the international community has to refrain from interference. And third, international involvement can only garner the requisite global legitimacy if the principle of non-selectivity is strictly followed to ensure that the measures that the international community may take are

considered and implemented impartially.

In situations where appropriate conditions for international co-operation to promote democracy and human rights exist, such co-operation at the national level could consist of programmes and activities that seek (i) to *modernize the State*, (ii) to *strengthen civil society*, and (iii) to promote *economic reform and growth*, to help ensure the sustainability of democratic reforms and processes.

Programmes and activities at the national level should, however, be complemented by co-operation at the international level both to improve *global governance* and to *improve the international economic system* to make them more responsive to the needs of all humanity. Improved global governance will require the reform and strengthening of the United Nations. The reform of the UN should attempt to ensure that all regions and nations are fairly and adequately represented; and the strengthening of this institution should aim at allowing it to carry its new post Cold-War responsibilities more efficiently and effectively.

The reform of the international economic system should, in turn, aim at improving the external economic environment for the developing countries so that their political and economic reform efforts are not thwarted by further adverse global economic developments. Some of the specific measures that the international community should take in this regard consist of: increasing resource flows to the poor countries and regions; substantial write-downs of the external debt of the poorer countries; stabilization of commodity prices; and reforms of the international trading and monetary systems to remove protectionist measures and to increase global liquidity so as to allow increased access to developing countries.

# Uruguay: Amnesty Law in Violation of Human Rights Convention

Robert Kogod Goldman \*

One very disquieting feature of the shift to democratically elected governments throughout Latin America, during the last decade, has been the practice of granting amnesty – or comparable legal measures – to State security forces for their gross human rights violations committed during the previous military reigns.

Amnesties, for example, have been granted in recent years in Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Suriname and Uruguay. In some cases, military regimes have promulgated self-amnesty before relinquishing control to civilian authorities. In others, the military has extracted a guaranteed amnesty from civilian leaders as the “price” to pay for restoring a civilian government. In several instances, furthermore, the new governments, under pressure from the military, have enacted amnesties, euphemistically, in the name of democracy or for the bringing about of national reconciliation or pacification.

The question of whether States, that are parties to human rights treaties, are obliged to prosecute human rights viola-

tors has been extensively studied and debated by international lawyers and human rights advocates in recent years. The Inter-American Commission on Human Rights was the first inter-governmental body to squarely address this contentious question. It recently found that Uruguay's 1986 amnesty law (*Ley de Caducidad*) violated basic provisions of the American Convention on Human Rights and of the American Declaration of the Rights and Duties of Man.<sup>1</sup>

## The Position of the Petitioners

### The Theory of Complaints

The Commission's action decided eight consolidated cases, with multiple victims, which were jointly filed by the Institute of Legal and Social Studies of Uruguay and Americas Watch shortly after the Uruguayan Parliament, under pressure from the military, passed the *Ley de Caducidad* on 22 December 1986. This law terminated the State's power to prosecute and punish military and police per-

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1) Report N° 29/92 (Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375) Uruguay, OEA/Ser.L/V/II.82, doc. 25, dated 2 Oct. 1992.

In Report N° 28/92 (Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311) OEA/Ser.L/V/II.82, also dated 2 Oct. 1992, the Commission found that Argentina's “Due Obedience” and “Final Stop” laws violated the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. While factually dissimilar from the Uruguayan cases, the Commission disposed of challenges to these Argentine measures applying essentially the same legal reasoning as in the Uruguayan cases.

sonnel responsible for human rights violations committed during the period of *de facto* military rule (June 1973 to March 1985). The application of this law resulted in the dismissal of 40 criminal cases in civilian courts, initiated by attorneys for victims of human rights abuses or their relatives against approximately 180 military personnel. Uruguay's Supreme Court upheld the law's constitutionality on 2 May 1988. The law won narrow approval by Uruguay's electorate in a national referendum on 16 April 1989.

All eight cases before the Commission involved violations by State agents of certain "preferred" human rights, *inter alia*, the right to life, the right to humane treatment and the implicit freedom from forced disappearance. The complaints were not based directly on violations of these rights – all of which had occurred before Uruguay ratified the American Convention – but rather on the effect of the amnesty law, which was enacted after Uruguay's ratification of that instrument.

Specifically, the petitioners' fundamental claim was that the *Ley de Caducidad* – by terminating judicial investigation of these past abuses and dismissing proceedings against their perpetrators – denied petitioners their rights to judicial recourse and remedies in violation of Articles 8.1 and 25 of the American Convention and in relation to Article 1.1 thereof.

### ***The Misapplication of Amnesty***

During three lengthy oral arguments before the Commission, petitioners freely conceded that every government has the prerogative to amnesty or pardon certain criminal offences or offenders under its domestic law. But petitioners claimed that when the effects of such a measure deprive victims of such offences of judicial protection guaranteed by an interna-

tional instrument to which that State is a party, then the matter could no longer be regarded as purely domestic in nature or beyond the scrutiny of competent international bodies. Petitioners also asserted that the *Ley de Caducidad* was a morally and legally perverse application of the concept of amnesty.

In this connection petitioners noted that, conceptually, amnesty abolishes or forgets the particular offence. It normally applies to crimes against the sovereignty of the nation, i.e., political offences. Petitioners argued that, properly viewed, this concept should not apply to the *Ley de Caducidad* and similar measures that forgive agents of the State who have grossly violated the human rights of citizens. The State's right to abolish or forget the crimes of those who have infringed its sovereignty, by rebellion or other means, flows from the role of the State as the victim. Thus, the State may find that its interests, such as *national reconciliation*, are best served by an amnesty. However, petitioners contended that the State should not have the prerogative to abolish or forget its own crimes or those of its agents committed against its citizens. If the right to abolish or forget such crimes exists, then it belongs only to the victims themselves.

### ***The American Convention's Superiority***

The petitioners also argued that even if the *Ley de Caducidad* could deny them judicial remedies, as a purely domestic legal matter, it could neither deprive petitioners of their remedies under the American Convention nor relieve Uruguay of its duty to fulfil its obligations thereunder. Petitioners contended that, by denying them access to local legal redress, Uruguay had rendered illusory its basic obligation to respect, ensure and



remedy violations of Convention-based rights and in effect had interposed its domestic law as a bar to compliance with the Convention.

Petitioners noted that, on the international level, it is well established that a State's international obligations are superior to any obligations it may have under its domestic law. Thus, a State cannot invoke its own contrary domestic law as an excuse for non-compliance with international law. With regard to international agreements, this principle is codified in Article 27 of the Vienna Convention on the Law of Treaties, which states in pertinent part: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty..."

Accordingly, notwithstanding its failure to give internal legal effect to a provision of the American Convention, Uruguay remained bound by that treaty and was responsible for its violation. This principle has been repeatedly invoked and affirmed in decisions of the Permanent Court of International Justice and of the International Court of Justice, as well as those of other international tribunals.<sup>2</sup>

Petitioners also cited another related and basic principle of international treaty law directly binding on Uruguay: the customary law doctrine of *pacta sunt servanda*, embodied in Article 26 of the Vienna Convention. It states: "Every international agreement in force is binding upon the parties to it and must be per-

formed by them in good faith." This principle implicitly reinforces the doctrine that a State's treaty obligations are unaffected by changes, whether by legislation or referendum, in its domestic law.

### **Governmental Succession to Treaty Obligations**

Similarly, petitioners pointed out that a change in government, by whatever means (since the identity of a State remains the same), does not alter the binding nature of the State's international legal obligations. Thus, the Sanguinetti and Lacalle administrations were internationally responsible for unredressed violations of the American Convention, attributable to the *de facto* military regime. The Inter-American Court of Human Rights applied this principle specifically to State-sponsored human rights violations in the Velásquez Rodríguez case: in a landmark decision on 29 July 1988 it found Honduras responsible for the disappearance of Manfredo Velásquez. The Court said in this regard:

According to the principle of continuity of the State in international law, responsibility exists both independently of changes in government over a period of time and continuously from the time of the act which creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political

2) For example, in its 1930 advisory opinion in the Greco-Bulgarian Communities case the Permanent Court of International Justice stated: "It is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty." The Permanent Court has also ruled that this same principle applies even when a state invokes its constitution "with a view to evading obligations incumbent upon it under international law or treaties in force".

point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred (para. 184).

### ***The State's Obligations***

During these oral arguments, the petitioners particularly emphasized the authoritative interpretation by the Inter-American Court of Convention Article 1.1 in the Velásquez case to support their claim that Uruguay was obliged to investigate and prosecute perpetrators of State-sponsored human rights violations.<sup>3</sup>

In its opinion, the Court declared that Article 1.1 "constitutes the generic basis of the protection of rights recognized by the Convention" (para.163). The Court indicated that the obligation to "respect" rights recognized in the Convention is founded on the notion that "the exercise of public authority has some limits which derive from the fact that human rights are inherent attributes of human dignity which are, therefore, superior to the State" (para. 165). It interpreted far more broadly the State's other obligation under Article 1.1 "to ensure the free and full exercise" of these rights. The Court stated that this "obligation implies the duty of the States parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights" (para. 166).

The Court stated that whenever a State organ, agent or public entity, violates a right protected by the Convention, the State is internationally responsible, not only for the violation of the infringed right, but also for a violation of its duty, under Article 1.1, to respect and to ensure that right. Significantly, the Court found that as a consequence of their dual obligations under Article 1.1, States "must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation of human rights" (para. 166). The Court also noted that compliance with Article 1.1 necessarily requires the government to investigate each and every violation of a protected right. Failure to investigate or an investigation not undertaken in "a serious manner" and "as a mere formality preordained to be ineffective," resulting in the violation going unpunished and the victim uncompensated, violates the duty "to ensure" the full and free exercise of the affected right (paras. 176 & 177).

Petitioners argued that since the *Ley de Caducidad* terminated criminal investigations, it clearly violated Article 1.1. They also contended, from a policy perspective, that the prosecution of perpetrators "ensures" the protection of human rights by preventing or deterring future violations by the actor(s) or others. Moreover, such prosecution symbolically represents a clear break with the legacy

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3) The states parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition.

of the past and helps restore public confidence in democratic institutions.

## **The Position of the Government of Uruguay**

### ***The Law's Contextual Setting***

The Uruguay government's basic arguments, some of which were oral, were summarized and explained in its written response to the Commission's preliminary report.<sup>4</sup>

The government criticized the Commission for having ignored the "democratic juridical-political" context, the "domestic legitimacy" and the "higher ethical ends" of the *Ley de Caducidad*. Specifically, it asserted that the amnesty question "should be viewed in the political context of reconciliation, as part of a legislative programme for national pacification that covered all actors involved in past human rights violations" (Commission Official Report, para. 22). It emphasized that the law was enacted with the requisite parliamentary majority and had been the subject of a national referendum expressing "the will of the Uruguayan people to close a painful chapter in their history in order to put an end, as is their sovereign right, to division among Uruguayans" (Official Report, para. 22). As such, the government continued, the law "is not subject to international condemnation". In addition, the government pointedly declared that it "cannot accept the Commission's finding that while the domestic legitimacy of the law is not

within the Commission's purview, the legal effects denounced by petitioners are".

### ***Lawful Restrictions***

The government contended that the *Ley de Caducidad* violated neither the American Convention nor any other international engagement, but was instead a legitimate exercise of the State's basic rights to grant clemency and to place lawful restrictions on rights. It argued that Convention Articles 8.1 and 25.1 must be interpreted in light of Convention Articles 30 and 32, which permit States to restrict the enjoyment and exercise of Convention-based rights "when such restrictions are the product of laws enacted for reasons of general interest or when those rights are limited by the rights of others, by the security of all and by the just demands of the general welfare in a democratic society" (Official Report, para. 23). Furthermore, the government contended that Convention Article 4.6, as well as Articles 6.4 and 14.6 of the International Covenant on Civil and Political Rights, granted Uruguay the requisite authority to enact the disputed law.

### ***Articles Disputed***

The government averred that the fair trial guarantees in Convention Article 8.1 refer to "the rights of the accused in a criminal proceeding and not to someone filing a criminal action" (Official Report, para. 24). While asserting that "private parties are not the owners of a criminal action", and that Uruguayan procedural law does

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4) Uruguay, which has accepted the jurisdiction of the Inter-American Court, had 90 days upon receipt of the Commission's report to submit these complaints to the Court but declined to do so.

not recognize an individual right to bring a criminal complaint independently of a case brought by the public prosecutor, the government conceded that private interests are allowed to "intervene" in "exceptional cases" (Official Report, para. 24). It claimed that such an individual right is "not protected by international human rights law".

The government asserted that it had not violated Article 25.1 of the Convention whose purpose, it argued, was intended to "redress the injured rights and, if not, secure reparation for the damage suffered" (Official Report, para. 25). It further stated that "since, in the cases being denounced, it is impossible to redress rights injured during the *de facto* regime, all that remains is the right to damages, which the [ley] has in no way impaired".

### ***The Ley's Intentions***

The government claimed that the *Ley de Caducidad* did not violate Article 1.1 as interpreted by the Court in the Velásquez case. Noting that the duty to investigate and the question of an amnesty law "must be analyzed as a whole", the government noted that the *ley's* intention was in furtherance of the common good because "investigating facts that occurred in the past could rekindle the animosity between persons and groups", thus obstructing reconciliation and the strengthening of democratic institutions. While acknowledging that the legal system should make available to interested parties the procedural means to establish the truth, the government, nonetheless, argued that, for those same reasons, the State may choose "not to make available to the interested party the means necessary for a formal and official inquiry into the facts in a court of law" (Official Report, para. 26).

## **The Commission's Opinion and Conclusions**

### ***Competence to Examine the Ley's Effects***

Before addressing the merits of the cases, the Commission first rejected Uruguay's claim that it was not empowered to decide whether the *Ley de Caducidad* was compatible with the American Convention. While admitting that it lacked jurisdiction to pass on the domestic legality or constitutionality of national laws, the Commission stated that "application of the Convention and examination of the legal effects of a legislative measure, either judicial or of any other nature, insofar as it has effects incompatible with the rights and guarantees embodied in the Convention... are within the Commission's competence" (Official Report, para. 31). The Commission affirmed that its competence arises from the Convention which, *inter alia*, vests it with jurisdiction respecting matters relating to the fulfilment of the commitments made by States parties to the Convention (Article 33) and to receive and take action on petitions pursuant to its authority under that instrument (Articles 41, 44 and 51). It also noted that contracting States are obliged by Convention Article 2 to adopt "such legislative or other measures as may be necessary to give effect to those rights and freedoms". Thus, it concluded, "a *fortiori*, a country cannot by internal legislation evade its international obligations" (Official Report, para. 32).

### ***Violation of Fair Trial Guarantees***

The Commission noted that by sanctioning and applying the *Ley de Caducidad*, Uruguay had not only, by design, dismissed all criminal proceedings against perpetrators of past human rights abuses,

but also, had not undertaken any official investigation to establish the truth about these past events. It pointedly cited its own "general position on the subject" as stated in its 1985-86 Annum Report:

One of the few matters that the Commission feels obliged to give its opinion in this regard is the need to investigate the human rights violation committed prior to the establishment of the democratic government. Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed, in order to prevent a repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the judiciary itself may undertake whatever investigations may be necessary (Official Report, para. 37).

The Commission also indicated that it had "to weigh the nature and gravity" of events to which the *ley* applied, such as forced disappearances and abduction of minors, stating that "the social imperative of their clarification and investigation cannot be equated with that of a mere common crime" (Official Report,

para. 38).

The Commission indicated that the *Ley de Caducidad* "had various effects and adversely affected any number of parties on legal interests. Specifically, the victims' next of kin or parties injured by human rights violations have been denied their right to legal redress, to an impartial and exhaustive judicial investigation that clarifies the facts, ascertains those responsible and imposes the corresponding criminal punishment" (Official Report, para. 39).

It then addressed the merits of the petitioners' essential claim that the disputed measure, as applied, violated their rights to a fair trial and judicial protection guaranteed in Convention Articles 8.1 and 25.1, respectively. Article 8.1 provides in pertinent part: "Every person has the right to a hearing with due guarantees [by a competent tribunal]... in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a cure, labour, fiscal or any other nature."

The Commission rejected Uruguay's contention that Article 8.1 only applies to the rights of criminal defendants. It concluded that Uruguay, by enacting and applying the *Ley de Caducidad* after it had ratified the Convention, had deliberately prevented petitioners from exercising rights "upheld" in Article 8.1 and, accordingly, had violated the Convention. For the same reasons, the Commission found that Uruguay had violated the petitioners' right to judicial protection stipulated in Article 25.1 of the Convention.<sup>5</sup>

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5) Article 25.1 states: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

## **A Violation of Obligation**

The Commission also concluded that the *Ley de Caducidad*, which prevented investigation of past human rights abuses, violated Uruguay's duty under Article 1.1 "to ensure" petitioners the free and full exercise of these Convention-based rights. Predictably, it found the Inter-American Court's authoritative interpretation of Article 1.1 in the Velásquez case to be controlling on the issue of investigation in these cases. The Commission cited with approval the following passages, among others, from Velásquez:

If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. As for the obligation to investigate, the Court notes that an investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government (Official Report, para. 50).

## **Commission's Recommendations to Uruguay**

Based on its conclusion that the *Ley de Caducidad* was incompatible with the American Convention, and violated Articles 1.1, 8.1 and 25.1, as well as Article XVIII of the American Declaration of the Rights and Duties of Man, the Commission recommended to the Uruguayan government that it pay just compensation to

the applicant victims or their rightful claimants for its violations of these rights. It also recommended that the government adopt "the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the *de facto* period" (Official Report, para. 54).

## **Conclusion**

It is sobering to note that amnesties granted to violators of human rights during the rule of previous military governments in Latin America have rarely deterred and, at times, have become a licence for these State agents to repeat the same crimes under the new governments. By conferring, and indeed, enshrining impunity, these laws have deeply divided civil society and compromised the very notion of the Rule of Law, rather than promoting genuine national reconciliation and consolidating democracy. In these circumstances, it is not surprising that changes from military to civilian government, in the hemisphere, have often translated into military tutelage instead of actual civilian control over the security forces.

Most of these transitions, particularly in the case of Uruguay, have also been accompanied by a policy of official "amnesia" that makes second-class citizens of those who, having suffered violations of their rights, find that democracy does not offer them any more legal recourse as plaintiffs than they had as victims or defendants under military rule. The new civilian government, by active omission and by refusing to acknowledge and redress past horrors, becomes a party to the continuity of official contempt for the fundamental rights of certain citizens. The full measure and enjoyment of citi-

zenship is thus reserved for others who, under military rule, inflicted pain, or who did not feel directly and painfully the loss of guaranteed rights. Too often the victims are left with only collective memories of suffering for which there has been no reparation.

In its reports on Uruguayan and Argentine amnesty measures, the Inter-

American Commission on Human Rights has clearly and authoritatively established the duty of States, parties to the American Convention, to investigate, identify and prosecute the perpetrators of State-sponsored human rights violations. The Commission's decisions are an important and clear repudiation of impunity.

# COMMENTARIES

## The International Meeting Concerning Impunity

More than 60 experts – jurists, legislators and victims – from around the world participated in the International Meeting Concerning Impunity for Perpetrators of Gross Human Rights Violations. Their objective was to propose guidelines that would eliminate injustice and build on the future but not neglect the past.

The meeting was organized by the International Commission of Jurists and the Commission Nationale Consultative des Droits de l'Homme of France under the auspices of the United Nations. It was held 2-5 November at the Palais des Nations in Geneva.

### Historical Precedents

The impunity of perpetrators of gross human rights violations has a moral, political and legal dimension. It also has serious practical consequences. Gross and repeated violations of human rights make any possibility of peaceful coexistence between human beings difficult and, thus, constitute an obstacle to the development of democracy.

History shows that when this category of violators benefits from impunity, it opens the door to the worst kind of conduct and, thus, to new crimes against humanity and new violations of human rights.

The main historical references, after the fall of Nazism, are the trials at Nu-

remberg and Tokyo, as well as other national trials of perpetrators of war crimes or crimes against humanity and of former collaborators following the liberation of countries occupied during the Second World War.

Political developments in recent years have been marked by the restoration of democracy in some countries such as Spain, Greece and Portugal. This democratization process has subsequently spread to a number of dictatorial regimes in Latin America and to South-East Asia. The fall of the Berlin Wall led to the initiation of the democratization process in the countries of Eastern Europe. More recently, certain countries in Africa have embarked on the same path.

In these situations one question always arises: What attitude should a country adopt towards the political officials of the previous regime and its repressive agents who committed serious violations of human rights?

The transition period which these countries are experiencing, each in its own manner, often makes it difficult for historians to stand back and make a scientific assessment of these sombre times. Attitudes are often ambiguous, between a spontaneous desire to forget, and the sense of memory which is necessary to a people and the education of future generations.

Ethical principles, however, can be identified concerning one basic question:



How should a democracy and a State based on the Rule of Law deal with totalitarianism and barbarianism without the risk of erring? For both ethical reasons and in the interest of equity towards victims, it is difficult to advocate impunity. It is legitimate, however, to reflect on the concepts of pardon, responsibility (including that of the State), punishment and the need for conciliation or national reconciliation and civil peace.

Impunity has become a matter of serious concern in many countries today, not only for those responsible for political decisions but also for non-governmental organizations and social and political associations, particularly those which represent the victims.

There is a great need for historical, ethical, political and legal analyses of the issue, coupled with an exchange of experience and information, so that a course can be struck between what is theoretically desirable and what is practical. The urgency of addressing the matter of impunity is often directly related to the need to hold peace negotiations to put an end to armed clashes or serious internal conflict.

In analyzing the consequences of impunity on society as a whole, the meeting sought to determine to what extent impunity constitutes an offence against basic justice and adversely affects the equality of individuals before the law. It also examined the extent to which impunity can nullify the essential dissuasive finality of the law and unintentionally be used as a "stimulus" for repeating criminal conduct.

### **Unmasking the Perpetrators**

Who should be considered a perpetrator of human rights violations? Distinctions

are sometimes made between those who directly participated in the violation of human rights and those who played only an indirect role, such as high-ranking political, civil or military officials, persons transmitting or supervising the execution of their instructions and persons carrying out such instructions. In addition, there is the responsibility of those who acted under cover of the so-called "due obedience" principle of carrying out orders given by superiors, those officials whose continuation in service poses a problem and their collaborators (agents, informers, etc.).

How can the former oppressors be unmasked, traced and their crimes proven? In some cases, public committees of inquiry have been set up. Is this the only method?

Bringing those responsible to trial may pose difficulties, particularly in courts where some judges may have facilitated *de facto* impunity. What happens in such cases to the principle of judicial tenure, which guarantees the independence of the judiciary? Should a court be set up that would be exclusively competent, and would it be possible to avoid attributing exceptional jurisdiction to it?

Legal standards need to be defined. *De facto* impunity results from the malfunctioning of the police or judicial systems. Impunity may also result from legislative or administrative measures made in the interest of national conciliation, such as an amnesty, either before any judgement, by following a popular referendum or bargaining between the parties in the dispute, or after judgement and sentence, without the sentence being served or after partial completion of the sentence.

Clemency, pardon or any other measures which imply waiving investigation or trial before a court need to be exam-

ined. Then, there are attenuating circumstances, in particular from the application of the "due obedience" principle.

Is it possible to envisage a mechanism to significantly delay the date from which the statute of limitations for penal responsibility and punishment takes effect where the existing political situation does not allow the independent functioning of the courts? Or where the situation is such that people who might voice accusations run the risk of serious threats to their life or liberty? Can human rights violations such as "forced disappearances" be considered continuing crimes or should they be considered crimes subject to a statute of limitation?

For some, the imprescriptible nature of crimes against humanity is the only factor to be retained and should be extended to other gross and systematic forms of human rights violations.

Another subject that requires analysis is that of special or exceptional jurisdictions, including military tribunals. Is it legitimate to attribute exclusive competence to specific courts for judging cases of human rights violations? This needs to be considered in relation to penal procedure and the retroactivity of penal law.

Special legislative provisions could be envisaged, such as "acts regarding repentants", which grant total or partial exoneration from punishment, or take into account attenuating circumstances for perpetrators of serious human rights violations who cooperate in the search for evidence and the arrest of those responsible.

Thought must also be given to other measures applied to the perpetrators, such as:

- Screening measures and the relative problems concerning guarantees.

- Forced or voluntary exile. The latter case raises the problem of political asylum in another country, and an application for extradition in the event that the perpetrator absconds.

Special attention must be given to the preservation or the destruction of the records and files of the former regime.

Not to be overlooked are the limitations imposed by international law, including the customs derived from human rights treaties regarding the ability of States to grant impunity to their agents and officials.

This list of topics, which is not exhaustive, can also include defining national standards, forming international mechanisms to combat the phenomenon of impunity and even establishing a universal jurisdiction along the lines of an international penal court.

It is useful to recall the debates in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and its decision to entrust two of its members – magistrates Louis Joinet (France) and El Hadji Guissé (Senegal) – with preparing a working document on this subject.

## **Compensating the Victims**

Any analysis of impunity must give special attention to the victims.

A first category is made up of former opposition members or dissidents. What status should be granted to those who participated in armed struggle and have either been sentenced or against whom criminal proceedings are under way, under the law in force during the previous regime?

Similarly, what is the fate of persons against whom proceedings are still pend-

ing, solely because of their opinions?

More generally, how can the victims be identified and persons who have disappeared be found? And how should the victims (and their families) of gross human rights violations be treated? These matters concern their rehabilitation, their right to the moral and material reparation of the prejudice suffered, medical and psychological care, and access to files and archives kept by the repressive services and intelligence services.

These problems have arisen in many countries, each of which has adopted various solutions. An exchange of experience will thus be enlightening.

Lessons can be drawn from situations which existed in the Far East and Europe after the Second World War, for example in Germany, Italy and France.

Since the 1970s Latin America has experienced dictatorships, as have Europe, Africa and Asia.

Likewise, it is useful to examine the present situation in countries where the armed forces refuse to be totally subordinate to the civil authorities and in countries of Eastern Europe which have recently recognized the extent of the human rights violations committed.

Equally instructive is the experience of States moving from dictatorships to democracies (for example, in the southern cone of Latin America) or which are in the process of ending internal armed conflict.

An analysis of these subjects requires a multi-disciplinary approach.

## Appeal

The expert participants who have gathered at the Palais des Nations in Geneva for the International Meeting Concerning Impunity, organized jointly by the

Commission Nationale Consultative des Droits de l'Homme of France and the International Commission of Jurists under the auspices of the United Nations, issue the following appeal:

- Extremely preoccupied by the particularly grave international crimes now being committed with impunity in various regions of the world such as war crimes or crimes against humanity or flagrant violations of human rights.
- Ascertaining that, since the Second World War, national jurisdictions are often ill-suited to prosecute and punish such crimes despite their exceptional gravity.
- Considering that this deficiency, which tends to make impunity a universal phenomenon, constitutes an outrage for the victims, a serious obstacle to the authority of the law as well as to the development of democracy and incites new violations.
- Recalling that in all circumstances truth is an obligation, that the future of a people cannot be built on ignorance or the negation of their history, as the people's knowledge of their history of suffering forms a part of the cultural heritage and as such must be preserved.
- Ascertaining that if the international legal standards repressing such crimes can still be perfected or supplemented, notably those concerning major violations of fundamental economic and social rights, they are already sufficiently established to open prosecution against the atrocious crimes now being committed.
- That consequently the prevalence of impunity results less from the absence of laws condemning it than from insufficient mechanisms to ensure that the laws are applied and respected.

- Emphasizing that absolute impunity is a denial of justice and a violation of international law.
- That impunity cannot question the principles of law, by justifying the barbarity in the name of the State or allegiance to the prevailing power.
- That the pre-eminence of human rights is the necessary base for all national reconciliation.
- That national solutions should not impede full respect for international commitments concerning a State's duty to prosecute and judge those responsible for the most serious violations.
- Estimating that restrictions on legal punishment, which might be authorized in exceptional circumstances in order to favour the return to peace or the transition to democracy, should be subordinated in any case under the following conditions:
  - The decisions should not be taken by the authors of the violations or their accomplices.
  - They should not violate the rights of the victims and their lawful beneficiaries which include the right to know the truth, the right to equitable compensation and, if appropriate, the right to full rehabilitation.
- Affirming that the international community has to take action in cases when a State fails to exercise its legal capacity.
- That, as a deterrent, international co-

operation should be fully practised by complying with treaties that all the states should ratify and apply, notably the Geneva Conventions and their Protocol I.

- That the most effective international action requires public awareness beginning with the political leaders and a clear choice in favour of appropriate international bodies, as for example an international penal body.

The expert participants at the International Meeting Concerning Impunity appeal to the States, to the non-governmental organizations and to the inter-governmental organizations:

1. That the Security Council initiative creating an impartial panel of experts responsible for investigating the violations of the Geneva Conventions, and all other violations of international humanitarian law, committed on the territory of ex-Yugoslavia (Resolution 780) reaches a conclusion without delay so that this experience can be a first step in establishing an international penal tribunal, which is more essential than ever.
2. That during the World Conference on Human Rights, meeting in Vienna in June 1993, a proposal is made to set up an international penal tribunal according to the most appropriate modalities, in order to finally break the cycle of impunity.

# **BASIC TEXTS**

## **Cultural Rights: An Underdeveloped Category of Human Rights**

The eighth Interdisciplinary Colloquium on Human Rights, organized by the Interdisciplinary Centre for Ethics and Human Rights of the University of Fribourg in Switzerland, brought together researchers from various specialized institutions on 28-30 November, 1991. At the end of lively, open discussions required by the difficult nature of the subject, the participants reached the conclusions expressed in this summary.

Considering:

- That, while acknowledging work done and in progress, there is a time lag in the formal expression of cultural rights as human rights, which is paradoxical given the numbers of violations occurring each day.
- That these violations jeopardize respect for all the other human rights.
- That a good many people and communities are now losing their identity, reinforcing intolerant and discriminatory attitudes and increasing the risk of clashes of interests.
- That a definition of cultural rights is vital to a grasp of all the aspects of the discussion on minority rights, in the form of individuals' and communities' rights, and could be one of the missing keys to an understanding of the links between human rights and people's rights.
- That the democratization of culture understood as consisting both in its propagation to the people and the access of all to the varying processes of knowledge and action, culture is a condition of democracy and not just a consequence thereof.
- That the difficulty inherent in forming the concept of cultural rights and preparing a definition of them prejudices the direct and indirect respect of these rights.

They believe:

1. That cultural rights are rights to identity and that, while it is impossible to decide on a definition of culture prior to the rights which objectify it, it would be appropriate at least to:

- a) recognize culture as an area able to develop the potential of every human being and community.
  - b) recognize a cultural right as a human right of individuals to determine their identity.
2. That cultural rights have the following characteristics:
- a) cultural rights as human rights are to be understood as being both individuals' and communities' rights.
  - b) they make it possible to identify the subjects of human rights as individuals and as members of many communities.
3. That cultural identity is generated not in isolation but in relationships, and cannot therefore be regarded as a specific fixed item but as a permanent process of development.
4. That the right to cultural identity, a general form of all cultural rights, is indivisibly the right to be different and the right to be similar, the right to individuality and the right to belong to local or wider communities and to humankind, without frontiers being taken into account.
5. That the right to cultural identity includes the free determination and the expression of people's specific characteristics in the economic, political, social and cultural spheres.
6. That it is possible, if the cultural rights already defined in international instruments and the progress achieved in understanding cultural identity are considered, to agree on the following indicative list of cultural rights:

#### The right to cultural identity

- to free cultural choices, particularly of one's language or languages and convictions
- to cultural heritages

#### The right to free participation in cultural life

- to exercise freedom of conscience and of expression
- to exercise the freedom essential to research and creativity
- to communicate
- to intellectual property

#### The right to education

- to basic and general education
- to practical education and to vocational guidance and training

These rights are exercised with respect for human rights and fundamental freedoms, without frontiers being taken into account.

7. That cultural rights jeopardize the accepted division of human rights into two categories, insofar as:
  - a) they imply negative, as well as positive, obligations for all authorities.
  - b) those entitled to these rights are all members of society jointly.
  - c) it may be considered that, in addition to the specifically cultural rights listed above, all human rights need to be interpreted in their cultural dimension.
  - d) the cultural rights listed above do not exclude, but in contrast call, however unequally, for decisions in the civil, political, economic and social spheres.
8. That their exercise necessitates not just more specific legal instruments and the associated supervisory machinery but also new democratic resources, bringing about genuine cultural democracies
  - in which human beings and communities can genuinely take the initiative of developing these rights.
  - which foster trans-frontier co-operation in the cultural sphere, particularly at local and regional level.

*The United Nations General Assembly adopts the Declaration  
on the Protection of all Persons from Enforced Disappearance*

**Declaration on Enforced Disappearances:  
Adoption by UN General Assembly**

**How the Declaration Was Drafted**

In December 1992, at the end of a long process, the United Nations General Assembly adopted by consensus the "Declaration on the Protection of All Persons from Enforced Disappearance". The ICJ, working in conjunction with other NGOs, took an active part in drafting this Declaration. The first draft of the text dates back to 1988 and was prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Later in 1990, the ICJ convened a meeting of experts at the United Nations Office in Geneva, which was attended by various members of the Sub-Commission, amongst others. Helped by the work of this meeting, the Sub-Commission completed its version of the text in August 1990 and submitted it to the UN Commission on Human Rights for review and eventual approval. The Commission, in turn, established an open-ended Working Group, which met in November 1991, for two weeks, under the admirable guidance of Mrs. Béatrice Le Fraper-du-Hellen (France). Participating in the Working Group, were a number of member and non-member states of the UN Commission on Human Rights, as well as various NGOs, including the International Commission of Jurists.

This Working Group produced the final text of the Declaration, which was approved by consensus on 28 February 1992 by the Commission on Human Rights in plenary session, and adopted by the General Assembly in December 1992.

**Main Aspects of the Declaration**

Even though the terms of the Declaration are not as severe as the ICJ and other NGOs would have liked, given their awareness of the cruelty of this type of political repression, it may, nevertheless, be considered a good text. It is clearly a step forward in the standard-setting action of the United Nations and contains important elements for countering this phenomenon, which is still prevalent in certain regions of the world. The ICJ believes that the next logical step is to draft a Convention, which will provide an opportunity to introduce changes that were unable to be made in the Declaration, for the very reason that it was a Declaration and not a Convention.

Even though the term "crime against humanity" was unable to be included in the operative section of the Declaration, it does appear in the fourth paragraph of the preamble, which states: "...the systematic practice of such acts is of the nature of a crime against humanity." Also mentioned in the text are some of the standard



measures associated with crimes against humanity (the non-applicability of statutory limitations, the exclusion of amnesty, the broadening of jurisdiction to States other than that in which the acts were committed, and, the exclusion of political asylum or refuge).

Whereas the Declaration provides a realistic description of this perverse phenomenon, it does not go so far as to define it. However, it does make clear that an "enforced disappearance" only occurs when action is taken by government agents, or individuals acting on behalf of the government, or with its direct or indirect support, consent or acquiescence.

The act of enforced disappearance is classified as "an offence to human dignity", a denial of the purposes of the UN Charter, a "grave and flagrant violation of human rights" and a multiple violation of international law (Article 1). States must not permit enforced disappearances and must cooperate in their prevention. They must incorporate them as serious offences under internal criminal law, and establish the civil liability of their perpetrators and of the State (articles 2 to 5). A general observation which is applicable to the text as a whole is that the word "perpetrators" should have been followed by "and other participants", since according to the criminal law of many countries, co-perpetrators, accomplices and accessories to a crime must also be held responsible.

No order, whether civilian or military, may be invoked to justify an enforced disappearance, and any person receiving such an order shall have the "duty not to obey it". This represents an important step forward, since it rejects out of hand, the argument so frequently invoked by guilty parties of "due obedience to superior orders". No circumstances whatsoever, not even those of war or of a public emergency, may be invoked to justify enforced disappearances (articles 6 and 7). A person may not be expelled or extradited to another State where there are grounds to believe he would be the victim of enforced disappearance (Article 8).

Also recognized, is the right to a judicial remedy as a means of determining the whereabouts of a person, his state of health and the identity of the authority ordering his detention (Article 9). This article is innovative since in addition to recognizing the right of the local authorities to have access to all places holding persons deprived of their liberty, it also grants this right to any competent authority entitled "by any other international legal instruments to which a State is a party". Furthermore, persons deprived of liberty must be held in an officially recognized place of detention, and an official register of these persons must be maintained (Article 10).

Any person - whether family member or not - who has a legitimate interest, or knowledge, has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. In addition, the investigating authority is empowered to compel the attendance of witnesses. This will help to correct the kind of situation which occurred in Latin America, in which parliamentary investigative commissions did not dispose of this power (Article 13). Other paragraphs in the article seek to protect the person reporting the act, and the witnesses, against reprisal.

Unless he is extradited to another State, any perpetrator of an act of enforced disappearance in a particular State must be brought to justice in that State. This article was intended to enshrine the principle of "universal jurisdiction", but instead

is incomplete and confusing. It is only useful to those States whose national legislations already authorize them to exercise jurisdiction for offences committed in another State (for example, if the victim or the perpetrator are its nationals). It offers nothing new to the majority of States, whose legislations do not provide for such a solution. The ICJ had proposed in the Working Group that the first line of Article 14 contain the words "...of enforced disappearance, who is found to be within a particular State..." and later "...regardless of where the acts were committed". It is the opinion of the ICJ that these additions would have improved the text and would have provided for universal jurisdiction, which, in other words would mean that guilty parties could be prosecuted wherever they were found, even if the State in which they committed the act did not request their extradition. The task of improving Article 14 is one that can be taken up when a Convention is drafted.

Important progress has been made in Article 16 of the Declaration, which excludes military courts from investigating this type of case and from trying perpetrators and other participants in the crime. If the latter are military or police officers, they must be tried by the ordinary criminal courts (i.e., the civil courts). It is a recognized fact that when military courts try those within their own ranks for human rights violations, this often results in impunity.

Articles 17 and 18 include some of the standard measures associated with crimes against humanity and those in violation of international law, as mentioned previously. Thus, if internal legal remedies are not adequately effective, the statute of limitations relating to these acts may be suspended. Acts of enforced disappearance are specified as being "a continuing offence", which implies that their perpetration continues so long as the facts remain unclarified, with the practical consequence that the clock on the statute of limitations does not start ticking either. Likewise, and this is a key point, persons having committed acts of enforced disappearance may not benefit from amnesty laws or other similar measures, and although the right of pardon has been maintained, authorities must take into account the "extreme seriousness" of the act of enforced disappearance.

The victims of enforced disappearances and their families have the right to adequate compensation, whether from those responsible or from the State (articles 5 and 19).

Finally, States must prevent and suppress the "abduction of children" of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance (Article 20). The four paragraphs of this article are devoted to dealing with a terrible phenomenon, one which became common in the southern regions of Latin America, giving rise to such associations as the "Grandmothers of the Plaza de Mayo". States are obliged to undertake the search for, and identification of such children, and to return them to their families of origin. The provision concerning the possibility of cancelling "any adoption which originated in enforced disappearance" was the subject of much discussion, as was the one maintaining its validity, in the "best interests of the child" (words taken from the Convention of the Rights of the Child), if consent is given by the child's closest relatives. The act of abducting these children, as well as the falsification of their identity, constitute an extremely serious offence.

The full text of the Declaration appears below.

## DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

*The General Assembly,*

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations and other international instruments, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Bearing in mind* the obligation of States under the Charter of the United Nations, in particular, Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Deeply concerned* that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law,

*Considering* that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity,

*Recalling* Resolution 33/173 of 20 December 1978, by which the General Assembly expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrow caused by these disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances of persons,

*Recalling also* the protection afforded to victims of armed conflicts by the Geneva Conventions of 12 August 1949 and the Additional Protocols of 1977,

*Having regard in particular* to the relevant articles of the Universal Declaration of Human Rights<sup>1</sup> and the International Covenant on Civil and Political Rights<sup>2</sup> which protect the right to life, the right to liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law,

*Having regard further* to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>3</sup>, which provides that States parties shall take effective measures to prevent and punish acts of torture,

*Bearing in mind* the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the

1) Resolution 217 A (III)

2) See Resolution 2100 A (XXI), annex

3) Resolution 39/46, annex

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Standard Minimum Rules for the Treatment of Prisoners,

*Affirming* that, in order to prevent enforced disappearances, it is necessary to ensure strict compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, contained in its Resolution 43/173 of 9 December 1988, and with the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set forth in the annex to Economic and Social Council Resolution 1989/65 of 24 May 1989 and endorsed by the General Assembly in its Resolution 44/162 of 15 December 1989,

*Bearing in mind* that, while the acts which comprise enforced disappearance constitute a violation of the prohibitions found in the aforementioned international instruments, it is none the less important to devise an instrument which characterizes all acts of enforced disappearance of persons as very serious offenses setting forth standards designed to punish and prevent their commission,

1. *Proclaims* the present Declaration on the Protection of All Persons from Enforced Disappearance, as a body of principles for all States,
2. *Urges* that all efforts be made so that this Declaration becomes generally known and respected.

### Article 1

1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.
2. Such act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

### Article 2

1. No State shall practice, permit or tolerate enforced disappearances.
2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.

### **Article 3**

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

### **Article 4**

1. All acts of enforced disappearance shall be offences under the criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.
2. Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarify cases of enforced disappearance.

### **Article 5**

In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable at civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law.

### **Article 6**

1. No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.
2. Each State shall ensure that orders or instructions directing, authorizing or encouraging any enforced disappearance are prohibited.
3. Training of law enforcement officials shall emphasize the above provisions.

### **Article 7**

No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

### **Article 8**

1. No State shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where

applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

### Article 9

1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty, is required to prevent enforced disappearances under all circumstances, including those referred to in article 7.
2. In such proceedings, competent national authorities shall have access to all places holding persons deprived of their liberty and to each part thereof, as well as to any place in which there are grounds to believe that such persons may be found.
3. Any other competent authority entitled under law of the State or by any international legal instruments to which a State is a party may also have access to such places.

### Article 10

1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.
2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.
3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the paragraph above, to any judicial or other competent and independent national authority as well as to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.

### Article 11

All persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured.

## **Article 12**

1. Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.
2. Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

## **Article 13**

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.
2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.
3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.
4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.
5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or the investigation procedure is appropriately punished.
6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

## **Article 14**

Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to

bring all persons presumed responsible for an act of enforced disappearance, found to be within their jurisdiction or under their control, to justice.

#### **Article 15**

The fact that there are grounds to believe that a person has participated in acts of an extremely serious nature such as those referred to in article 4.1, regardless of the motives, shall be taken into account when the competent authorities of the State decide whether or not to grant asylum.

#### **Article 16**

1. Persons alleged to have committed any of the acts referred to in article 4.1 shall be suspended from any official duties during the investigation referred to in article 13.
2. They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.
3. No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations.
4. The persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.

#### **Article 17**

1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.
2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.
3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence.

#### **Article 18**

1. Persons who have, or are alleged to have, committed offences referred to in article 4.1 shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.
2. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account.



### **Article 19**

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.

### **Article 20**

1. States shall prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance, and shall devote their efforts to the search for, and identification of, such children and to the restitution of the children to their families of origin.
2. Considering the need to protect the best interests of children referred to in the preceding paragraph, there shall be an opportunity, in States which recognize a system of adoption, for a review of the adoption of such children and, in particular, for annulment of any adoption which originated in enforced disappearance. Such adoption should, however, continue to be in force if consent is given, at the time of the review mentioned above, by the child's closest relatives.
3. The abduction of children of parents subjected to enforced disappearance or of children born during their mother's enforced disappearance, and the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such.
4. For these purposes, States shall, where appropriate, conclude bilateral and multi-lateral agreements.

### **Article 21**

The provisions of the present Declaration are without prejudice to the provisions enunciated in the Universal Declaration of Human Rights or in any other international instrument, and shall not be construed as restricting or derogating from any of the provisions contained therein.

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## RECENT ICJ PUBLICATIONS

### Chile: A Time of Reckoning

*A CIJL/ICJ study on human rights and the judiciary  
Published by the ICJ, Geneva (1992). Available in English. 259 pp.  
25 Swiss francs, plus postage.*

This study focuses on Chile as a case study on how countries in transition are dealing with the legacy of oppression. The 1989 transition to democracy in Chile raised hopes that past injustice would be rectified. Several measures, however, taken by the former military government, the most significant of which was the passage of the 1978 Amnesty Decree, have made this task difficult. The study interviews lawyers, representatives of Chile's non-governmental human rights organizations, relatives of victims of human rights violations, political prisoners, members of the judiciary, parliamentarians, and government officials, and assesses Chile's efforts to confront its past.

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### Towards Universal Justice

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

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

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### CIJL Yearbook

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

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

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