ASSOCIATION INTERNATIONALE DES JURISTES DEMOCRATES

INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

ASOCIACION INTERNACIONAL DE JURISTAS DEMOCRATAS

МЕЖДУНАРОДНАЯ АССОЦИАЦИЯ ЮРИСТОВ ДЕМОКРАТОВ

國際民主法律家協會

رابطة الحقوقيين الديموقراطيين العالمية

CHALLENGES for LAW and LAWYERS in the NEXT MILLENIUM: DEMOCRACY IN DOMESTIC & INTERNATIONAL LAW



FINAL REPORT OF THE XIVTH CONGRESS PROCEEDINGS

Office of the Secretary General, 17 Lawyers Chambers, Supreme Court, New Delhi, 11001 India
Tel. 91-11-38-2271 Fax: 91-11-647-3145

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FINAL REPORT OF THE XIVTH CONGRESS PROCEEDINGS

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Peninsula Technikon College (Pentech)
Cape Town, South Africa

Prof. Lennox S. Hinds, Editor in Chief
Rutgers University
New Brunswick, NJ
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Office of the Secretary General, 17 Lawyers Chambers, Supreme Court, New Delhi, 11001 India
Tel. 91-11-38-2271 Fax: 91-11-647-3145

In Memoriam

W. HAYWOOD BURNS
M. SHANARA GILBERT
FELICIA ROBERTS

ALL THESE WERE HONORED IN THEIR GENERATIONS,
AND WERE THE GLORY OF THEIR TIMES.
THERE BE, OF THEM THAT HAVE LEFT,
A NAME BEHIND THEM,
THAT THEIR PRAISES MIGHT BE REPORTED.
Matthew 44:7

SPECIAL APPRECIATION

THE REPRODUCTION AND INTERNATIONAL DISSEMINATION OF THIS IADL XIVTH CONGRESS REPORT OF THE PROCEEDINGS, DEDICATED TO THE MEMORIES OF OUR COLLEAGUES, WAS MADE POSSIBLE BY A GRANT FROM:

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NEW YORK, NY 10029

THE IADL WOULD ALSO LIKE TO EXPRESS PARTICULAR APPRECIATION FOR THE ASSISTANCE OF COLIN GREER, PRESIDENT OF THE FOUNDATION AND OF PROF. JOHN O. CALMORE OF ITS BOARD WHO ATTENDED THE IADL XIVTH CONGRESS, MOURNED OUR LOST COMRADES AND REJOICED IN THE NEW SOUTH AFRICA WITH US.

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DEDICATION

When I returned from Cape Town, South Africa after participation in the 50th Anniversary Congress of the International Association of Democratic Lawyers, I was both profoundly saddened and enormously hopeful. The Congress program had been enriched by presentations by lawyers and jurists from over 39 countries in addition to South Africa on the theme: Challenges for Law and Lawyers in the Next Millennium: Democracy in Domestic and International Law. Although I grieved for three lost comrades, I was heartened by the imagination, energy and creativity demonstrated by the Congress participants.

The new South Africa was chosen as the venue for this Congress, the 14th since the Association's establishment in Paris in 1946 after the war against fascism and Japanese imperialism and the first in Sub-Saharan Africa.[1]

The new South Africa, committed to a non-racial and non-sexist society, was chosen not only to pay homage to the second year of democratic government, but also to affirm the Association's commitment, as an international bar association, to enter the next millennium avoiding eurocentricism and first world dominance.

Members of IADL, both as individuals and as members of affiliate jurist's associations in Asia, Africa, the Americas, Europe and the Middle East, reaffirmed their commitment to the use of their legal skills

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[1]IADL Congresses have been convened in the following venues since the founding of the Association in 1946:

First Congress	Paris	1946
Second Congress	Brussels	1947
Third Congress	Prague	1948
Fourth Congress	Rome	1949
Fifth Congress	Berlin	1951
Sixth Congress	Brussels	1956
Seventh Congress	Sofia	1960
Eighth Congress	Budapest	1964
Ninth Congress	Helsinki	1970
Tenth Congress	Algiers	1975
Eleventh Congress	Malta	1980
Twelfth Congress	Athens	1985
Thirteenth Congress	Barcelona	1990
Fourteenth Congress	Cape Town	1996

to secure justice and respect for human rights in the southern hemispheres of the globe (sometimes called the "third world") no less vigorously, than in the north, (frequently designated "the first world"). We gathered together to reaffirm our commitments to social, political, and economic change throughout the world.

Among those attending the Congress was my long time colleague and friend, University Professor Haywood Burns, Former Dean of City University of New York School of Law, First National Director of The National Conference of Black Lawyers, tireless advocate, pioneering legal educator, and consummate lawyer, whose accomplishments in support of human rights in this country and throughout the world are legendary.

A few short hours after an inspiring address to the Congress by President and advocate extraordinary Nelson Mandela[2] on April 2, 1996, my friend Haywood and two other lawyers and academicians: Prof. M. Shanara Gilbert, a sister from the United States, and Felicia Roberts recently returned from exile to her homeland in South Africa, were senselessly cut down in the prime of their creativity and productivity in a motor vehicle accident.

2

In his address to the 14th IADL Congress, President Mandela reflected on South Africa's liberation struggle and the role of "progressive lawyers" throughout the world. (The complete text of his remarks are included in this volume). President Mandela observed that:

> "The ending of apartheid would not have been possible without the enormous support that our liberation struggle received from the role played by progressive lawyers throughout the world in highlighting the need for their governments to isolate the apartheid regime. They shall not be forgotten...Our transition to a truly democratic framework of government is an achievement of immense historical significance and one of which we are most proud as a nation."

President Mandela also spoke of the future. "International efforts to condemn apartheid and uphold freedom mark only the start of the much more extended tasks of democratizing society; entrenching a living culture of human rights; and improving well being. When freedom has given us the opportunity at last to address the basic requirements which ordinary people need to live, then that freedom will remain a promise and a reality."

The International Association of Democratic Lawyers dedicates this XIVth Congress Report of the Procedings to the memories of these three beloved activists and, particularly, to my dear friend and comrade Haywood Burns, not only because their lives as lawyers and citizens of the world were dedicated to social, political and economic change through the application of principles of law and justice, but because they are exemplary People's Advocates whose professional and personal gifts are dedicated to the human rights of the peoples of the world.

Haywood Burns, the founding National Director of the National Conference of Black Lawyers, was also one of the great Presidents of the National Lawyers Guild. Each of these organizations are national affiliates of IADL. He brought to every task he undertook, passion for justice, brilliant scholarship and humanity. Throughout his busy, productive life of public and private service he remained to the last, committed to social change and equity.

In addition to his active membership in both NCBL and the NLG, Haywood served on the Boards of Directors of every major US legal organization committed to the securing of economic and social justice: the Center for Constitutional Rights; the Emergency Center for Civil Liberties, the Puerto Rican Legal Defense Fund; the Asian American Lawyers Association, the Mexican American Legal Defense Fund, to name just a few of the activist legal organizations to which he gave his energies. Haywood, always conscious of the link between domestic and international human rights, had also worked with IADL for the past thirty years.

He was unflagging in his commitment to social change in the United States and throughout the world, frequently risking his personal safety and certainly his economic fortunes. His ferocious passion for justice infused all his works as a teacher, as a lawyer and as an advocate, never shirking any unpopular position, if it advanced justice. Haywood brought these experiences to the deliberations at the Congress before his tragic end.

I will always remember him smiling in the sun, rejoicing in his hard won and secure place on the South African soil as he listened to the new generation of activist lawyers speak about their visions for a more just and equitable world and the roles that lawyers like us could make.

Haywood served as a mentor to many young lawyers and law students and imbued many others with the sparks of activism, the burning

in their bellies to see that justice is done in every institution in which they participate; in the concern for human rights that informs every public and private statement they make. These are the values for which Haywood fought throughout his eventful and enormously productive life without fear or compromise. His legacy is like the legendary dragon's teeth which when sowed in the soil will yield an army of disciples who will march together on that hard but rewarding road to change. He was an inspiration to those who knew him and to those who benefitted from his struggles.

Prof. M. Shanara Gilbert who died with Haywood in that tragic accident, was a young woman rejoicing in her accomplishments which were bearing new fruits. She held an associate professorship at the City University of New York Law School at Queens College. She was the Director of the Defender Clinic, a criminal defense clinical education program for third law students. Included among her publications are "Racism and Retrenchment in Capital Sentencing: Judicial and Congressional haste toward the Ultimate Injustice", The NYU Review of Law and Social Change, and "An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases", Tulane Law Review, (1994).

In November 1991, Professor Gilbert had coordinated a workshop featuring presentations by South African and American judges and academics on legal issues presented by the democratization of the legal system in South Africa for a national conference in New York. During August, 1993, she served as a consultant to the Ford Foundation's South African Namibia office, for which she conducted an assessment of needs of law clinics and clinical education programs in seven South African Law Schools. At her untimely death she was writing a law review article on the nature of legal education in South Africa and the role of clinical education in expanding access to the bar for black South African students.

Her final years were spent in equal measure on the building of democratic legal institutions in South Africa and in challenging in her words. "The objectification of people of color and the poor (in the United States) as unwelcome, perpetual parasites on a nation bound up in the privilege of race and class status," suffering harms, "in the name of shrinking government and...private profit".

Just hours before her untimely death she presented the paper included in this volume in the Commission on the Administration of Justice on Equal Justice or Substantial Justice? The Crisis in the Provision

of Criminal Defense for the Indigent Accused in the United States.

She concluded her paper with what could be the rallying cry for all who support law in support of justice in every country in which they struggle.

> There is no time to lose while the nation's poor suffer the blows of callous, cruel application of laws and policies that violate basic human rights, the progressive legal community in United States strains under the political whims of the so-called republican revolution to find what endures of the principles of the nation's constitution and our own creativity to challenge the effect of the political tide. Meanwhile, we observe that here in South Africa, where freedom was finally, after so many long years of struggle and suffering, wrenched from the evil vise of apartheid, a conscientious and deliberate approach to the provision of counsel for the poor has emerged in response to the long-reigning illegitimacy and unavailability of the legal system to the masses of people. The United States has much to learn from the efforts of South Africans as they go through the process of accommodating the practical concerns of availability of lawyers and the tremendous legal needs of a large population. More so, the United States can learn from South Africa about human rights and its actual relationship to humanity; about making real for its people the words of an enduring constitution that truly requires and achieves equal justice for all under the law.

On behalf of IADL I urge you to honor this extraordinary man and these heroic women by renewed efforts to challenge the tidal waves of regressive policies. Join IADL in the search for democratic solutions in both domestic and international law in the next millennium.

Respectfully submitted,

Prof. Lennox S. Hinds
Rutgers University
New Brunswick, NJ

August 1996

ABOUT THE INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (IADL)

The IADL was founded on October 24, 1946 in Paris at an international gathering of lawyers who had fought and survived the war against fascism and had participated in the Nuremberg trials. It was organized to promote the exchange of ideas and skills among lawyers and jurists throughout the world dedicated to the principles of the United Nations Charter, the defense of peace and the establishment of a democratic world order.

Committed to the principle of equality among peoples, the rights of all peoples to self-determination, the elimination of imperialism and colonialism and the peaceful settlement of international disputes, the members of IADL who share these objectives include ever-increasing numbers of individual lawyers and regional and national lawyer and jurist associations in over ninety countries with different political, religious and philosophical orientations.

The IADL is a non-governmental organization (NGO) with consultative status to ECOSOC, UNESCO, and UNICEF and is represented at the United Nations in New York, Vienna and Geneva. It is a member of the Congress of Non-Governmental Organizations (CONGO) of the United Nations.

Since its founding fifty years ago, IADL has participated regularly in the UN Human Rights Commission and UN subcommissions concerned with disarmament, development, the rights of women and against apartheid and colonialism, among others. IADL has sponsored, organized and coordinated many international fact-finding missions, trial-observations and election-monitoring delegations of lawyers and jurists to such countries as Chile, Sudan, Guinea-Bissau, Zimbabwe (Rhodesia), Turkey, Northern Ireland, Haiti, El Salvador, Nicaragua, Korea, Israel, the occupied Palestinian territories, Japan, Vietnam, Namibia and South Africa. Reports of these delegations and observations have been distributed world-wide through IADL affiliates and United Nations-connected activities.

In 1988, IADL sponsored legal missions to observe the implementation of United Nations Security Resolution 435 [UNSR 435 (1978)] in Namibia's electoral transition to independence. In March and April of 1994 IADL organized International Legal Observer Missions to the elections in South Africa.

INFORMATION CONCERNING IADL ACTIVITIES, PUBLICATIONS AND MEMBERSHIP

Inquiries should be addressed to Secretary-General Jitendra Sharma, 17 Lawyers Chambers, Supreme Court, New Delhi, 11001 India, Tel. 91-11-38-2271, Fax: 91-11-647-3145.

CONSTITUTION
of the
INTERNATIONAL ASSOCIATION
OF
DEMOCRATIC LAWYERS[3]

(As amended at the 14th Congress at Cape Town, South Africa, April 1996)

ARTICLE 1: NAME

Those who adhere to this constitution constitute a voluntary association of democratic lawyers of all countries under the name of the International Association of Democratic Lawyers.

ARTICLE 2: AIMS

The aims of the Association are:

(a) To facilitate contact and exchanges of views between lawyers and lawyers' associations of all countries and to foster understanding and goodwill among them.

(b) To work together to achieve the aims set out in the Charter of the United Nations.

(c) To ensure common action by lawyers:

i) to encourage in the realm of law the study and practice of the principles of democracy making for the maintenance of peace and cooperation between nations.

ii) to restore, defend and develop democratic rights and liberties in legislation, and in practice.

iii) to promote the independence of all peoples and to oppose any restriction on this independence whether in law or in practice.

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[3]Available from the International Association of Democratic Lawyers, The Office of The Secretary-General, 17 Lawyers Chamber, Supreme Court of India, New Delhi 110001 India, Tel: 91-41-3382271 Fax: 91-11-6473145.

iv) to defend and promote human and peoples rights.

v) to promote preservation of ecology and healthy environment.

vi) to struggle for strict adherence to rule of law and independence of judiciary and legal profession.

vii) to defend peoples' rights to development and for creation of conditions of economic equality, enjoyment of fruits of scientific progress and natural resources.

ARTICLE 3: HEADQUARTERS

The headquarters of the Association shall be at such place as may be decided by the Bureau.

ARTICLE 4: MEMBERSHIP

(1) Membership of the Association is open to:

(a) Any national or international association of lawyers having aims and activities which are in accordance with the aims of the Association.

(b) Any person who accepts the aims of the Association and by profession or appointment exercises a judicial function or who devotes himself to the study, practice, or teaching of law.

(2) Applications for membership shall be made to the Bureau which can provisionally accept them. Such acceptances are subject to confirmation by decision of the Council.

ARTICLE 5: OFFICE BEARERS

(a) The Association shall have the following office bearers to be elected by the General Assembly:

President
Secretary General
Treasurer

(b) No person shall hold the same office for more than two

consecutive terms.

(c) The General Assembly may in recognition of the outstanding contribution of the individuals elect such an individual as President Emeritus.

(d) Rules may be framed by the Council to provide for the procedure for election of the office bearer. In the absence of rules, the Council shall be free to determine its procedure for the purpose.

ARTICLE 6: THE ORGANS

The Organs of the Association are:

i) the General Assembly
ii) the Council and
iii) the Bureau

ARTICLE 7: THE GENERAL ASSEMBLY

(a) The General Assembly is the supreme organ of the Association and is competent to take all decisions in the name of the Association including the amendments of the Constitution.

(b) The General Assembly shall be called once in four years.

(c) Member organizations shall be represented by their duly accredited delegates.

(d) Every member organization will have two votes which are divisible.

(e) Individual members of the Association may participate in the General Assembly without any right to vote.

ARTICLE 8: THE COUNCIL

(a) Between the meetings of the General Assembly all its powers except that of amendment of the Constitution, shall vest in the Council.

(b) The Council shall be comprised of all the members of the bureau,

all other office bearers and one representative of each member association duly appointed by it to the Council.

(c) The Council shall ordinarily be called once a year.

(d) All decisions of the council shall be taken by a majority of those present and voting.

ARTICLE 9: THE BUREAU

(a) The Bureau shall be the executive organ of the Association and be comprised of not more than eighteen members to be elected by the General Assembly out of which the President, Secretary General and the Treasurer shall be ex-officio and the rest shall be elected by the General Assembly ensuring balanced geographical and gender representation.

(b) the representatives of the Association accredited to international organizations and the editors of its publications shall be permanent invitees to the Bureau.

(c) The Bureau shall be responsible for directing the work of the Association in accordance with this Constitution and is to carry out the decisions of the General Assembly and the Council.

(d) The Bureau shall assign specific responsibilities to the members of the Bureau and may elect Vice-Presidents, Deputy Secretary Generals and Assistant Treasurers from among its members.

(e) The Bureau may constitute standing committees of special committees and working groups not necessarily of its members with specific responsibilities. All such committees shall report to the Bureau and work according to its directions.

(f) Any vacancy on the Bureau may be filled by the Bureau itself subject to ratification by the Council. The Bureau may invite representatives of any member association to attend and participate in its meeting(s).

ARTICLE 10: HONORARY ADVISORS

The General Assembly/Bureau may constitute a Board of Advisors and elect as Honorary Advisors eminent persons in the field of law for their contribution to the Association, a national association or to jurisprudence.

ARTICLE 11: FINANCE

(a) The funds of the Association shall be derived from:

(i) the annual subscriptions of member Associations and individual members.

(ii) grants; donations and contributions; sale of publications; savings and investments; and such other sources as may be authorized by the Bureau, not inconsistent with the objects of the Associations.

(b) All the funds of the Associations shall be kept in the bank accounts of and in the name of the Association.

(c) The bank accounts of the Association shall be operated by the Treasurer and/or such other person(s) who may be specifically authorized by the Bureau.

ARTICLE 12: AUDIT

(a) The accounts of the Association shall be audited every year by an Audit Committee.

(b) After every General Assembly, the Council shall elect an Audit Committee comprised of not less than three members.

(c) the Audit Committee shall continue to hold office until a new Audit Committee is elected after a General Assembly.

(d) Vacancies in the Audit Committee may be filled by the Bureau subject to its ratification at the next meeting of the Council.

(e) The Audit Committee may audit the accounts itself and if considered necessary, it may associate or authorize any other member(s) or professional auditor(s) for the purpose.

ARTICLE 13: EXPULSION

(a) Any member association or individual may be expelled from the membership of the Association by a resolution of the Council adopted by a two-third majority of the members present and voting if its activities are in conflict with those of the Association.

(b) Whenever a proposal for expulsion is received, the member concerned shall be given an opportunity to explain or of being heard before taking a decision.

(c) The Council shall state reasons for expulsion and its decision shall be effective immediately.

(d) Any member aggrieved may appeal to the General Assembly against the decision of the Council and the decision of the General Assembly shall be final.

ARTICLE 14(a): THE PRESIDENT

The President shall be the head of the Association and will represent it in all fora. He/She will preside over the meetings of the General Assembly, the Council and the Bureau. In the absence of the President, any of the Vice-Presidents or another member may be requested to preside at the meeting.

ARTICLE 14(b): THE SECRETARY GENERAL

The Secretary General shall be the chief executive of the Association. It shall be his/her responsibility to keep and maintain the records of the Association; periodically convene all meetings; in the absence of the President, to represent himself/herself to arrange for the representation of the Association; and to regularly submit reports to the various organs of the Association.

ARTICLE 15: AMENDMENTS

The Constitution may be amended by the General Assembly with a two-third majority of members present and voting.

ARTICLE 16: DISSOLUTION

The Association may be dissolved or merged with any other

organization having similar objects by a resolution of the General Assembly or the Council approved by a two-third majority of the members present and voting. In the event of dissolution the resolution will also indicate the manner of disposal of the assets of the Association.

OFFICERS OF THE INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS

Elected at the XIVth Congress, April, 1996

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APPRECIATION

The Bureau and Preparatory Committee of the International Association of Democratic Lawyers (IADL) wish to extend their profound appreciation to the Congress's hosts, The National Association of Democratic Lawyers of South Africa (NADEL), for the assistance of its Members, and, especially, General Secretary Vincent Saldanha, for their invaluable participation in the planning, preparation, and execution of this Congress. Special gratitude is also extended to Clive Newman Conferences, Excelsus and Making Music Productions for their assistance with Congress arrangements.

The following institutions and individuals are also gratefully acknowledged for their generous donations of resources, time and hospitality, particularly during the difficult days following the accident in which our three colleagues died.

Dr. Brian Figaji,Rector, Peninsula Technikon (Pentech)
Prof. Kader Asmal, Minister of Water Affairs and Forestry
Johnny de Lange, National Assembly, House of Parliament
Anne Else, Volunteer Congress Coordinator, United States
Dullah Omar, MP, Minister of Justice
Enver Daniels, Special Advisor to the Minister of Justice
Annetjie Marais and Staff of the Public Relations Office
of the Parliament Buildings
The Bellville Inn Staff and Management
Spier Wine Estate
Van Ryn's Cabinet Brandy
Viceroy Old Liqueur Brandy
Walton's Stationary Company
The Wembley Group of Companies
Law Student Volunteers from University of Cape Town Law School
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* Members of the 14th IADL Congress Preparatory Committee

⊠ Attendance

Attendance at the 14th Congress of the IADL was open to all lawyers and jurists, whether members or not, committed to the safeguarding of human rights and international cooperation and prepared to promote respect for the fundamental rights of the peoples of the world to national independence, self-determination, development, peace and the preservation of the global environment.

The IADL General Assembly meetings were held on April 4 and 5, 1996. Only affiliated members were authorized to vote or discuss matters on the General Assembly agenda under the terms of the IADL Constitution.

Participants, not members of any affiliate organization, were eligible for Observer status only at meetings of the IADL General Assembly.

⊠ Congress Languages

At Plenary Sessions the working Languages were English and French. At meetings of Commissions and Working Groups, the working language of the Congress was English. Simultaneous interpretations in French, Portuguese, Spanish, Arabic, and Japanese were also available from volunteers at many sessions.

⊠ Registration Fees

The registration fee for the Congress was $150 for attendees from North America, Europe, and Japan, $100 for all others.

⊠ Organization of the Proceedings of the 14th Congress

All discussions were conducted in a spirit of mutual good will, understanding and courtesy.

⊠ Plenary Sessions

The program of the Congress included plenary sessions to open and close the 14th Congress proceedings.

⊠ Commissions

Five commissions were established, their discussions are summarized in this Report. They were organized as follows:

Commission Chairs assisted by Co-Vice Chairs in each Commission were responsible for presiding over each session. They established and enforced the rules of procedure, established the order of speakers, set time-limits for presentations to accommodate those wishing to serve as Presenters; ensured that all speakers identified themselves by name and country; and ensured that the proceedings took place under the best possible physical conditions and in the spirit of democratic good will. They also took the responsibility for the convening of any working groups on special topics as requested and as possible.

The Rapporteurs provided working papers which established the framework for the discussion of the topics within the main theme; made summaries of presentations; prepared a report on each Commission; and provided a summary of the report to the plenary session on April 4. All participants who wished to present papers were free to submit written contributions on matters before the Commission included within the working paper. Presenters were responsible for providing one hundred copies of each complete paper of no more than 10 pages in English. Paper abstracts were provided to the appropriate Rapporteur, in advance, whenever possible.

Commission Chairs appointed Secretaries to assist the Rapporteurs in their duties and responsibilities to prepare summaries of presentations focusing on speakers' main ideas. Secretaries also obtained from presenters short written summaries of their remarks to be included in the Rapporteurs presentations at the plenary.

The Chair or Co-chairs of the Commissions introduced the reports of each Commission to be presented by the Rapporteurs at the plenary session on April 4.

The constitutionally required IADL General Assembly was held April 4-5, 1996 under the Rules of Procedure adopted in Athens at the General Assembly in 1986 and implemented in Barcelona at the 13th Congress. Each affiliated association was represented by no more than five votes to enable all opinions to be expressed democratically by each delegation.

INTRODUCTION TO THE CONGRESS PROCEEDINGS

After many months of preparation by Bureau members and representatives of the National Congress sponsor, National Association of Democratic Lawyers of South Africa (NADEL); the XIVth Congress of the International Association of Democratic Lawyers was convened in Capetown, South Africa March 31-April 5, 1996 under the patronage of President Nelson R. Mandela. More than 270 jurists from 39 countries from Africa[4], Europe[5], Asia[6], the Middle East[7] and the Americas[8] gathered to celebrate the fiftieth Anniversary of the Association and in observance of the second anniversary of a democratically selected government in South Africa.

Lawyers, jurists and law professors discussed the evolving role of law, both domestic and international, in addressing global problems and the issues that IADL members, committed to human rights, self determination and economic, political and social justice should address during the next fifty years.

By the end of the 20th century, fifty years after the founding of the IADL, profound changes in law and international expectations have changed the context in which IADL members practice their professions and political beliefs.

Since IADL's founding in 1946, the linkage between the violation of human rights of groups and individuals and threats to international peace and security, as defined by the United Nations Charter, has become both a political and a legal reality. Several factors have

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[4]Ethiopia, Sudan, Somalia, Eritria, Kenya, Ivory Coast, Senegal, Benin, Namibia, Mozambique, South Africa.

[5]United Kingdom, Belgium, France, Germany, Spain, Bulgaria, Yugoslavia, Russia.

[6]Japan, Korea, India, Pakistan.

[7]Morocco, Algeria, Tunisia, Libya, Egypt, Palestine, Israel, Argentina.

[8]Canada, US, Jamaica, Trinidad, Cuba, Brazil, Martinique.

contributed to this important development. The most influential of these are: the strengthening of the forces affirming the right to self-determination; the coming into force of the UN Charter (1945), the Universal Declaration of Human Rights (1948), the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1976), and the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948); the emergence into independence of many Afro-Asian States beginning with India and Pakistan in 1947 and the creation of several sovereign states out of the ex-Soviet Union and ex-Yugoslavia; the collapse of the doctrines and structures of communism in East Europe and most recently the end of apartheid in South Africa.

As a result of these profound changes, regional charters and conventions on human rights have been promulgated in virtually every region of the world, notably Europe, Africa and Latin America. The plethora of human rights crises in several parts of the world, in the post-cold war era; and the establishment of international mechanisms to monitor and remedy human rights violations including, most recently, the hotly debated creation of a war crimes tribunal sitting in the Hague have caused human rights activists and international lawyers to reexamine the precedents upon which they have relied.

All of these developments translate human rights abuses into threats to international peace and security. This ideological enhancement of the importance of the right to self-determination and of the observance of human rights at the national and communal level have resulted in a reinterpretation of the doctrine of "domestic jurisdiction" as formulated in Article 2, paragraph 7 of the UN Charter as a non-barrier to international action in support of those basic "rights."

The global evolution which resulted in legitimating United Nations intervention in situations of massive and institutionalized human rights abuses, began most significantly with UN action in the 1960's regarding South Africa's apartheid policies which divested all human rights from the black majority. As the proceedings of the Congress attest contemporary human rights struggles throughout the world ensure the need for legal activism to continue into the next century.

The papers in this report presented by a number of the Congress participants within the five commissions provide clear and convincing evidence of the continuing importance of the struggles by lawyers as activists and as professionals to protect and secure political, economic

and social rights within their societies and throughout the world. The deliberations within each commission provide a useful checklist of the contemporary issues affecting world peace and security and make clear the need for IADL to strengthen and extend its future capacity to serve as a legal arm in support of national struggles and international legality.

OPENING CONGRESS PLENARY SESSIONS
APRIL 1, 1996

At the invitation of the two year old Parliament chosen in the first democratic election in the history of South Africa, the opening session of the 14th Congress of the International Association of Democratic Lawyers (IADL) was convened in the stately Old Assembly Hall of the House of Parliament on the morning of April 1, where only a few short years before, the apartheid regime had passed the laws which denied the majority population their economic, political and social rights.

The very legal system which had been labeled by the international community as an instrument of criminal genocide and had caused the South African regime to be declared a pariah among the governments of the world had been ratified in these halls. This multiracial and multicultural gathering of more than 270 lawyers and jurists from Asia, Africa, Europe, the Middle East and the Americas, joined in observance of the Association's half century of uncompromising struggle against the abuse of law and legal process, was therefore made even more poignant by meeting in these elegant chambers where the racist regime against which IADL members had struggled had once gathered to codify these crimes against humanity.

Justice Shiraj Desai of the Supreme Court of South Africa and Professor Lennox S. Hinds of the United States presided over the first plenary session of the Congress at which welcoming statements were made by the Hon. Dullah Omar, Minister of Justice, founder of NADEL during the apartheid era; Joë Nordmann, President Emeritus of IADL; Prof. Kader Asmal*, Minister of Water Affairs and Forestry and long term member of IADL's Secretariat; John Platt Mills QC, Great Britain, a founding member of IADL; and Secretary General Amar Bentoumi*. To end the morning session, regional greetings were offered from IADL members representing respectively, the Middle East, Jamal Sourami, Palestine; North America, Adjoa Aiyetoro, Executive Director of the National Conference of Black Lawyers of the United States and Canada; Europe: Lidia Santos Arnau, Secretary General of the Catalonia Lawyer Association of Spain; Asia: Jitendra Sharma, General Secretary of the

Indian Lawyers Association; and Latin America; Beinusz Szmukler of Argentina and Board member of the American Association of Jurists.

Second Plenary Session, April 1, 1996

The afternoon plenary session was held in the auditorium of the Peninsula Technikon College (Pentech) where the balance of the program was convened over the next four days.

The Hon. Jose Ibrahimo Adubo, Minister of Justice, Mozambique and the Hon. Utoni Nujoma, Deputy Permanent Secretary, Ministry of Justice, Republic of Namibia and Justice Albie Sachs of the Constitutional Court of South Africa spoke on the challenges facing societies in Southern Africa and particularly lawyers, when they moved from participation in the liberation struggle to service as representatives of the new state power.

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*Presentation included in this volume.

Tuesday, April 2, 1996

The five Commissions began meeting in the morning. They continued until April 3. The scope of their inquiries, their presiding officers and the issues discussed are set forth below. Presentations identified by an asterisk * are included in this Report.

COMMISSION I
RIGHTS TO ECONOMIC AND SOCIAL DEVELOPMENT

Commission I was presided over by The Hon. Vijendi Jain, High Court Judge, Delhi, India, assisted by Vice Chairs Jeanne Mirer, Detroit, Mich, USA, and Beverly Franks, Cape Town, South Africa. The Rapporteur was Prof. Liliana Constante, of Argentina assisted by William Waterman, Jr., USA, who served as Secretary to the Rapporteur. The Commission considered diverse aspects of the right to development as a modality incorporated during recent years into the international law of human rights.

Professor Jose Peraza Chapeau(Cuba) gave introductory remarks. He described distortions affecting the interrelation of all rights including the fragmentary approach characteristic of most economic models causing damage to social policies by increasing the impoverishment, marginalization and exclusion of the great majority of affected populations. The standards of international law supporting the rights to economic and social development were considered, including among other international instruments, the Declaration of the United Nations on the Right to Development of 1986 and the African Charter of Human and Peoples Rights of 1991; particularly Article 22: "all peoples have the right to their economic, social and cultural development, in respect to their freedom and identity and to the equal use of the common heritage of mankind ... States, individually or in cooperation, have the duty to guarantee the exercise of the right to development." The discussion considered the rights of individuals as well as the collective people as the subjects that must benefit from the right of development as defined by the 1986 Declaration: "a human right inherent in all persons and peoples by virtue of which they are enabled to participate in economic, social, cultural and political development and through which all fundamental rights and liberties can be fully accomplished". The primary responsibility for the achievement of these rights is upon the States, but also may be asserted by the individual and collective people.

Mass violations of such rights including racism and racial discrimination, aggression, domination, or occupation of a country by another, the threat and the use of force, embargoes and blockades and other acts were discussed as contemporary obstacles to the achievements of these rights of development. One very recent example considered was the economic, commercial and financial blockade imposed by the United States against Cuba, condemned on four separate occasions by the UN General Assembly. This embargo, had however, been reinforced on March 12, 1996 when the United States' President signed the so-called "Cuba Liberty and Solidarity Act of 1996"[9].

Papers presented during this Commission were:

* Constante, Liaiana Beatriz, Argentina. "Market Economy, Dehumanization and Political Dominance: The Case of Argentina" (English Translation)

* Farinati, Alicia Noemi, Argentina. "Crisis del Modo del Modo de Desarrollo, Mundializaacion y Economia del Mercado. Y Que Democracia?" (English Translation)

* Mackinson, Gladys, Argentina. "The Right to Welfare."

* Masahiro Igarashi, Japan. "The Control of Multinational Corporations and Popular Participation in Economic Development".

* Natcheva, Snejana, Bulgaria. "Some Concerns About the Commercial Embargo."

* Pettifor, Ann and Angela Wood, UK. "A Fresh Start for Africa."

* Picard-Weyl, Monique, France. "Le Jungle de Liberalisme: Une Agression Contre les Principes du Droit International contemporain." (English Translation)

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[9]See also, paper by Attorney Arthur Heitzer concerning the U.S. Embargo of Cuba, presented in Commission IV International Crimes, included in this volume.

* Rajland, Beatriz, Argentina. "On the Rights of the Peoples."

* Robbins, Cynthia D., USA. "Redressing Economic Injury Through a Pro Bono Public Interest Law Practice."

* Sirotkin, Eric, USA. "Work in the Post-Market Economy - Securing Human Dignity in a Decreasing Job Market."

* Waterman, William Jr., USA. "Worker Ownership of Enterprise: A Vehicle for Egalitarian Development."

In addition, Kunibert Raffer's innovative paper, "What's Good for the US Must be Good for the World: Advocating Chapter 11 Insolvency"*, was distributed and discussed.

It was resolved by this Commission that IADL should devote more emphasis and resources to issues arising from the rights to development and the concept of sustainable development; and to the adverse effects on developing countries of the intellectual property provisions of GATT.

COMMISSION II
INTERNATIONAL REMEDIES FOR VIOLATIONS OF HUMAN RIGHTS & THE DUTY OF SOLIDARITY

Commission II sessions were presided over by Chair Attorney Doris Brin Walker, U.S.A. and Vice Chairs, Justice Siraj Desai of South Africa, Jamal Sourani of Palestine, and Prof. Medaad Rwelamira, South Africa. The Rapporteur was Michael Donen of South Africa.

The major issues considered were: Recovering from Colonialism - How Do Emerging Nations Repair Their Damages?; The Rights of Children, The Right of Refugees; The Rights of Political Prisoners, and Domestic Violence on Women. Also considered were the human rights of homosexuals and bisexuals. Resolutions were proposed in respect to violence on women*, the rights of children*, the rights of refugees* and finally, The rights of homosexuals and bisexuals.*

RECOVERING FROM COLONIALISM: HOW DO EMERGING NATIONS REPAIR THEIR DAMAGES?

Mr. Sourani of Palestine poignantly reminded the Commission that the Palestinian people remain afflicted with colonialism's worst

symptoms, including among others, lack of citizenship, institutional racism and the attendant danger the Palestinian people's conditions pose for peace in the region. He expressed concerns that the possibility of social and economic resolution of the problems of Palestine continues to be remote.

The search for remedies to heal the damages of colonialism is made even more difficult because of the reluctance of former colonial states to give up control of the economic and political systems of their former colonies as well as the vigor of colonial vestiges in the institutions of the society, especially the legal system.

Kwame Akuffo of the United Kingdom presented a paper entitled "Community Based Legal Education: Some Reflection on Clinical Legal Education and its Relevance and Possibilities in Development". He defined the prior colonial legal system as a "situation in transition," in which what went before must be adapted to the new directions of the society. He argued that a radical reformation of legal education, especially community-based clinical training, requiring students of law to learn by direct experience about the everyday problems of the masses of society and their interactions with the law would be helpful for those new directions. He pointed out how national liberation struggles had intended to replace colonial administrators with personnel from the majority peoples and their allies, but because the colonization process had limited the professional development of the indigenous peoples and their inclusion in the institutions of the colonial state after formal colonization was ended, colonial infrastructures continue in the new states legal, educational and military systems. Perhaps most important of all, colonial mind-sets continue, particularly among lawyers.

Justice Desai pointed out that the problem of colonial mind-set in South Africa was exacerbated by reactionary lawyers who exploited an intact legal system to defeat revolutionary democratic gains as well as by Judges remaining from the apartheid regime who dispensed justice according to the racist norms that had existed before.

It was suggested, however, that to lose a legal system altogether as has happened in Rwanda, is an even worse problem. It is better to have an infrastructure even if defective,and change it, than to have none. The legitimacy of a newly independent nation often depends on its being considered a "rule of law state". It is therefore desirable to retain the

existing legal structures while removing the unacceptable colonial vestiges including the examination of important changes like pluralistic access to all the institutions of the society. Another desirable change is to take justice to the most basic community levels when possible such as the use of community supported dispute resolution.

Pervading this discussion was the recognition that the economic systems in emerging countries require reconstruction and revitalization before any real meaning can be brought to traditional civil and political rights. In South Africa, as a nation emerging from colonialism, a delicate balance is being drawn between efforts toward consensus and reconciliation on the one hand and the rights of victims on the other. At the same time a Bill of Rights is enshrined in the new constitution as the Supreme Law of the nation. Simultaneously, a nationwide reconstruction and development program is being instituted to begin to eliminate the damages caused by imperialism. But colonial enslavement still exists in people's minds who must be educated to know their rights. Lawyers must be educated to abandon technicalities and to focus themselves on the true purpose of law to serve the people.

DOMESTIC VIOLENCE AND THE RIGHTS OF WOMEN[10]

In many countries, indigenous cultures have been used to mask important issues like the extent of domestic violence in the home. But, it was noted, the Third World was beginning to consider institutionalized programs to address domestic violence against women, while the First World, e.g. the UK and the US, were making cosmetic changes such as punishing women more leniently for killing their husbands, but were not making significant gains on the administrative and political levels. For example, state funding of programs to support rape victims and the granting of refugee status to women from countries where abuse is culturally sanctioned has been reduced and, in many western countries, eliminated.

A jurisprudential issue was considered as to whether concepts of liberal human rights developed by men respond to the needs of women or whether gender-specific legal rights are needed. The prevailing view of the Commission's participants was that domestic violence is not a

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[10]Also see, Report on the Special Meeting on Violence Against Women included in this volume.

function of economic oppression, but a social phenomenon arising from men's perception of their masculinity, their rights to domination and their fears of loss of control. It was suggested that personnel involved in the administration of justice and policing in particular should be inculcated with necessary sensitivities to the specific needs of women.

THE RIGHTS OF CHILDREN

Because of poverty in developing countries, many children are being placed for adoption and migration to developed countries. Children are often used and abused in the process. Though some countries have signed the Hague Convention on Children, the rules do not operate equitably in respect to countries as economically diverse as, for example, the US and Honduras. Although the content and theory of the Hague Convention is positive, its implementation does not properly deal with the reality that children are treated like chattels, often because of a false perception that it is better for them to be materially better off than to stay with their own, indigent families.

Professor Nelly Minyersky, of Argentina, presented two papers on the subject of the exploitation of children. In relation to adoption, her contentions were unanimously supported, that international adoption should only be allowed as a last resort and more particularly that children should be entitled to grow up in their natural milieu; that children should know their national origins and be able to trace them; and that they should be protected from illicit traffic in children.

THE RIGHTS OF REFUGEES

Patrick Twomey, of Nottingham University (UK), presented a paper entitled "Both Stranger and Fiction: Redefining the Refugee in International Law."* His central thesis is that analyzing refugee matters as defined in the 1951 Convention on Refugees fails to protect the interests of refugees. It merely provides a definition of refugees to the State, in the interests of the State, rather than in the interests of the refugee. The 1951 definition allows States to decide who falls within its definition. Subsequently, regional charters have expanded the definition based on local experience. However, major stumbling blocks are State perceptions of their own sovereignty and the tendency to narrow definitions based on local experience.

The suggested solution is to look at refugees from a human rights

perspective. States have obligations over and beyond the 1951 Convention both in respect to a person's individual rights and family rights. An array of human rights should vest in refugees against the State from which they happen to be fleeing. At the same time the States in which they seek asylum should be obliged not to become accomplices to violation of these rights and should have a duty to protect these rights.

THE RIGHTS OF POLITICAL PRISONERS

The discussion was confined to two issues. First an analysis of the Convention against Torture was presented by Daniel A. Straga, of Argentina: "A Critical View on the Convention Against Torture."* His principal contention is that the distinction drawn between torture and mistreatment is ill-conceived, inter alia,
because it permits State officials a large measure of abuse which does not carry with it the label and consequences of torture, although torture and mistreatment are identical concepts. This defect weakens the capacity of the law to protect people. Some participants in this discussion however thought that if every use of illegal force by the State against individuals was regarded as torture, the label would lose its odium and the convention its deterrent effect.

Violations of human rights in South Korea were also discussed.

HUMAN RIGHTS OF HOMOSEXUALS AND BISEXUALS

Finally, the group expressed concern for the grave denial of humanity to millions of human beings because of their homosexuality and other forms of sexual orientation.

COMMISSION III
INTERNATIONAL INTERDEPENDENCE

Hassan El Minto of Pakistan served as Chair assisted by Vice Chairs Nuri Albala of France and Asha Ramgobin of South Africa. Prof. Norio Tanaka of Japan was Rapporteur. Since the scope of the theme, "International interdependence" was broad, it was possible to discuss many issues from various points of view.

Professor Tanaka introduced the Commission theme by discussing two matters: The UN Security Council's activities in the post-cold war era and the problem of nuclear disarmament. His report was

based upon the work of the Japanese Lawyers Solidarity Association (JALISA) to which Prof. Tanaka belongs.

The UN Security Council's recent activities concerning the principles of non-use of force and the peaceful settlement of disputes were criticized, particularly the authorization of Member States to use force or take enforcement measures by means of resolutions adopted without critical opposition. In relation to disarmament problems, Prof. Tanaka pointed out the irrelevance of nuclear weapons in the current period and their potential for environmental harm and the urgent necessity to establish an absolute prohibition of nuclear weapons.

Mr. Tesfatsion Medhanie, from Bremen University, observed that the only way to prevent abuse of power by the United Nations, especially The Security Council and its arbitrary use of force in certain situations, is to restructure the United Nations and to expand the power of the General Assembly. At the same time, he proposed the necessity of examination of the criteria by which the United Nations can interfere in the domestic matters of Member States when atrocities such as genocide have been asserted.

Professor Paulette Pierson-Mathy, of Belgium University, commented that UN operations in Angola were another example of UN activities designed to achieve political gains rather than to foster peace. She suggested that the second UN mission to Angola, which resulted in a peace treaty was intended to provide UNITA a political victory rather than disarmament of armed forces.

Three Japanese lawyers, Mr. Morikawa, Mr. Yosizawa, and Mr. Kawauchi reported on the IADL fact finding mission to Japan concerned with the US military forces in Okinawa and Japan.

In September 1995, a twelve year school girl was raped in northern Okinawa by three U.S. military servicemen. The outrage against these crimes lead to protests by the Japanese people against the existence of the many large U.S. military bases established in Japan fifty years ago in the aftermath of the second world war and the military.

In February of 1996, the IADL Fact-Finding Mission lead by Prof. Lennox Hinds and two Japanese Lawyers conducted a Fact Finding Mission in Japan and Okinawa. An extensive report on the mission's

findings has been prepared.[11]

Three papers were presented on various aspects of nuclear weapons and testing. Prof. Bill Bowring of the UK gave a paper on "France, Polynesia and Nuclear Testing"*.

Jitendra Sharma, from India, made a presentation on "The Nuclear Non-Proliferation Treaty (NPT), The Comprehensive Test Ban Treaty and The Indian Position"* which explains the position of India on this issue as a non member of the NPT.

Mr. Kenji Urata, from Japan, reported on Constitutionalism and Nuclear Weapons, emphasizing the great significance of the peace principles of the Japanese constitution including the following principles: The renunciation of war, The prohibition against maintaining a war potential and the duty to assure the right to live in peace.

These peace principles could serve to establish the conditions for establishing a treaty for a nuclear free world. The Japanese Constitution and international law are mutually complementary because the Constitution's peace principles set forth the basic philosophy and the normative requirements of such a treaty.

Finally, Mr. Tesfatsion Medhanie from Bremen University, made a presentation on "Democratization, State-Building and Regional Integration in the case of Ethiopia, Eritrea and the Horn".

Mr. Medhanie discussed the war between Ethiopia and Eritrea . Although officially ended in May 1991, the relations between the EPLF(Eritrea Peoples' Liberation Front) ruling Eritrea and the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) ruling Ethiopia are still tense. They have concluded a draft agreement of national incorporation and integration in various areas and have taken steps to implement the agreement. But these agreements are not supported by the opposition forces in each country. These agreements have been criticized

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[11]Report of the IADL Fact Finding Mission into U.S. Military Bases in Japan is available in English and Japanese from JALISA, Japan Lawyers International Solidarity Association Ito Bldg. 2nd Fl. Yotsuya 1-2 Shinjuku-Ku, Tokyo, 160 Japan (Ph.) 81-3-3225-1020; (Fax) 81-3-3225-1025. [On September 19, 1996, 90% of the people of Okinawa voting in a non-binding referendum supported the closing of the U.S. bases on the islands.]

as steps taken by the two regimes to consolidate their hold on state power.

Unlike South Africa and Namibia, in these countries, no process of national reconciliation has been undertaken; no consensus based on principles of the Constitution has been forged, nor are these governments of national unity. In Eritrea the EPLF rules alone. Multi-party democracy has not been instituted which has lead to increasing instability in Eritrea. In the western and eastern lowlands some of the opposition forces are carrying on armed resistance.

The end of the Cold War notwithstanding, the policies of the United States and some other powers towards some regions is still based on strategic considerations rather than considerations of democratic and human rights. One of these regions is this oil rich part of the Middle East. For purpose of strategic calculations, Washington has always regarded the Red Sea region of the African Horn, especially Eritrea, as part of the Middle East.

The EPLF regime is now antagonizing Yemen by claiming that the Hanish islands belong to Eritrea and not to Yemen. Instead of requesting international tribunals or relying on available legal process, it has sent troops to occupy one of the islands. Fighting in which Eritreans and Yemenites have died has erupted.

EPLF's relation with the Sudan is also hostile. So long as there is no national reconciliation, so long as a government of national unity is not established, the internal situation in Eritrea will deteriorate further and armed struggle will continue. Eritrea's relations with its neighbors will remain tenuous. In fact, the tensions with Sudan and with Yemen may explode, destablizing even further the region as a whole.

In Ethiopia the political situation has also seriously degenerated since 1992. Several organizations have left the ruling coalition in which the EPRDF was dominant. The Oromo Liberation Front(OLF) and the Southern Ethiopian people's Democratic Coalition (SEPDC) are no longer part of the coalition and the regime has become more intolerant. Scores of teaching staff were dismissed from the University. Journalists and human rights activists have been harassed. Prominent activists in the opposition have been detained as reported by Amnesty International and other human rights organizations. Ethiopia has been restructured along ethnic lines. The country is now a federation of 14 ethnic based regions. The regime promulgated a new constitution which includes a provision on self-determination providing nationalities the right to self-determination

engendering an uneasy atmosphere in the country. Many Ethiopians oppose this article in the constitution and the policy of ethnicity because they fear it will cause the country to disintegrate.

In both Eritrea and Ethiopia there is a need for processes of national reconciliation and for national consensus on the basis of a constitution. From these processes, governments of national unity can be established.

The Commission ended with discussions of resolutions to be submitted at the final plenary on the situation in Okinawa*, nuclear disarmament* and the situation in Eritrea and Ethiopia.* Consensus was also reached that progressive jurists and other activists should be engaged not only in conflict resolution, but also in conflict prevention. Correcting situations early by democratic processes can contribute to preventing conflict. Progressive lawyers should also oppose the abuse of ethnicity as a basis for consolidation of power or for destablization and, finally, big powers should stop using young, small and weak nations like Eritrea to advance or to realize their strategic goals. Progressive lawyers should oppose such manipulation of the developing countries to further First World political ends.

COMMISSION IV
INTERNATIONAL CRIMES

Under the thoughtful, efficient, and good-humored chairmanship of John Platts Mills QC, (GB); Vice Chairs Advocate Pamela Gayle of Jamaica and Vincent Saldanha, Secretary General of NADEL, and Rapporteur Prof. Ann Fagan Ginger (US), the Commission worked cooperatively. It concluded by proposing a series of resolutions on those issues on which all agreed, for the purpose of empowering themselves to go forth from the XIVth Congress to do effective work on the critical question of international crimes.

The discussion of International Crimes was necessarily a discussion of how to reduce them through the exercise of the rule of law, and how to enforce the law in each state according to rules that do not violate norms agreed to throughout the world. The establishment of a permanent judicial body to try crimes against international law that no state is prepared to prosecute was also considered.

Participants in the Commission observed that in the last 50 years, primarily through the United Nations and its bodies, and through the work

of lawyers and activists and non-governmental organizations throughout the world there has been progress in codification of the rule of law, particularly criminal law and human rights law, starting with the UN Charter, Articles 55 and 56, the Nuremberg Principles and other international Covenants, Conventions, and Agreements.

The themes of this Commission included related subjects: the application of international norms of law to domestic and national rights, and international remedies against racist and other hate crimes.

The first paper by Attorney Arthur Heitzer of the United States*, discussed the US embargo against Cuba as a crime against humanity because it includes the deliberate attack on the Cuban health system, and "inhumane acts committed against [a] civilian population."

The second paper by John Platts Mills, QC of the United Kingdom, demonstrated that the death penalty is not applied with an even hand, bearing most heavily on racial groups and the poor, and that it has not been a deterrent against murder and crimes of violence. He suggested alternative punishments that could help rehabilitate offenders early in their careers, leading to an affirmation of the rejection of the death penalty.

The third paper, by Seiner Abshin Muse of the Somali Community Information Centre in London, described hideous crimes against humanity since the collapse of the Somali government in 1990 and called for an urgent investigation so that the perpetrators can be brought to justice.

Prof. Ann Fagan Ginger of the US, presented a paper on new tools, lawyers and NGOS's can use in their own states and cities against international crimes committed domestically*. This tool is the reporting process to the UN Committees on Human Rights, to eliminate racial discrimination, and against torture and other cruel, inhuman forms of degrading treatment or punishment. It was suggested that lawyers should work with their local bar associations to prepare accurate reports for submission to their national governments and directly to the UN bodies, which welcome and use such submissions in their continuing, periodic dialogues with each signatory country.

A number of speakers spoke about the effort to develop international norms and to use them at the international level as practiced at the Hague in an International Court of Justice. The

delay in the establishment of a permanent International Criminal Court to carry on the work now being done by ad hoc tribunals established as they become necessary to people charged with genocide, war crimes, crimes against peace and crimes against humanity was discussed. A paper by Prof. Budimir Kosutie of Yugoslavia* examined whether the Security Council exceeded the powers vested in it by the UN Charter Chapter VII when it established an ad hoc International Tribunal for the territory of the former Yugoslavia and whether such a tribunal could be independent, nonpolitical, even-handed and effective. He agreed with Prof. Zoran Stojanovic of Yugoslavia in his support of the establishment of an International Criminal Court. In his paper*, Prof. Stojanovic urged the establishment of a court because the ad hoc tribunal for the former republic of Yugoslavia did not show an even handed approach to all sides of the conflict.

Similar problems with the Security Council's ad hoc International Criminal Court for Rwanda were presented by attorney Charles Edward Mirega of Kenya and attorney John Philpot of Canada* who discussed the international criminal tribunal for Rwanda, which they characterized as justice betrayed, because of its inherent bias and its mandate limited in time to 1994 and its content limited to violations of international humanitarian law, which will prevent light from being shed on the issues that caused the Rwanda tragedy and prevent this tribunal from judging those responsible.

A paper, by Prof. Ginger of the US also proposed that the new International Criminal Court, being studied by the International Law Commission and the Ad Hoc Committee on the establishment of the International Criminal Court, should provide jury trials of defendants from countries that use jury trials* in order to strengthen the acceptance of the verdicts of the new court by defendants and by the people of the defendant's countries, who would be entitled to jury trials if they were tried in domestic courts.

These discussions led to a consideration of all of the types of work lawyers should undertake to affect the foreign policy of their governments toward countries engaging in human rights abuses, denial of the rights of women, lack of democracy, and nuclear proliferation and testing. The Commission concluded that lawyers should work as individuals, as members of the regional associations of traditional lawyers, through their IADL affiliate organizations, through local nongovernmental organizations, and as law professors, to publicize recognized problems concerning the enforcement of international

standards of criminal law and to insist on changes in the policies of their governments. John Platts Mills, QC, (UK) presented the final paper on reducing crime in our time by acknowledging that crime is a product of economic and social conditions that can be addressed by working on the causes of crime directly, and that lawyers, should undertake such work.

COMMISSION V
ADMINISTRATION OF JUSTICE

Jose Felipe Ledur, President, American Association of Jurists, of Brazil served as Chair. Hon. Celsa Pico Lorenzo, High Court of Catalonia, Spain assisted by Francois Bailly of Belgium, and Jusuf Ebrahim, Attorney of South Africa served as Vice Chairs. Attorney Deborah A. Jackson, National Conference of Black Lawyers of the United States and Canada served as Rapporteur. The Commission participants included members of the judiciary from Algeria, Argentina, Bulgaria, India and Catalonia (Spain) as well as attorneys and advocates from South Africa, Namibia, Mozambique, Brazil, Jamaica, Algeria, France, Catalonia, Palestine, the United States and the United Kingdom.

The Commission discussion focussed on impediments to the access to justice by the accused; the independence of the judiciary; the defense of lawyers and judges under political attack; and the criminalization of political expression as a method of political control. The following papers were presented to assist the work of the Commission:

- "Perceptual and Institutionalized Racism as an Impediment to Access to Justice by the Accused", by Adjoa A. Aiyetoro, Director, National Conference of Black Lawyers of the United States and Canada.

- "The Criminalization of Political Expression as a Method of Political Control", by Niloufer Bhagwat, Indian Association of Lawyers of India.

- "Equal Justice or Substantial Injustice: The Crisis in Provision of Criminal Defense for the Indigent Accused in the United States", by Professor M. Shanara Gilbert, City University of New York School of Law , National Conference of Black Lawyers of the United States and Canada.

- "Right to Access to Justice, to the Independence of the Judicial System, and the Defense of Lawyers and Judges Under Attacks," by Dr. Celsa Pico Lorenzo of Catalonia (Spain).

- "Intimidation of Defense Lawyers in Northern Ireland by Jane Winter", Director, British Irish Rights Watch of London. (Dedicated to the memories of Patrick Finucane, North Ireland; Griffith and Elizabeth Mscenge, South Africa; and Shanara Gilbert, United States).

Certain conclusions were reached by the discussants.

The right to have cases reviewed within a reasonable time is essential to the interests of justice. At the same time, the distinction between civil and criminal cases should be maintained.

In criminal cases, the right to a speedy trial is intended to protect the rights of the accused. Other factors that affect the criminal justice system are the allocation of resources, the role of the police and the acts classified as criminal. Alternative approaches such as mediation can do much to reduce the burden of cases in courts.

While the international community has focused on providing various types of technical support to developing countries in the areas of health, agriculture and some technology, not enough has been done in the area of effective access to justice. In the United States at this time, there is a growing tide of ideological conservatism which threatens the rights of the poor and particularly of people of colour. The atmosphere is one of oppression and intimidation. The delivery of legal services for the poor has been seriously damaged by drastic reductions in the funds provided to support programs for both civil and criminal matters, particularly in capital cases where the majority of those accused are indigent. Participants called for the establishment of Legal Aid programs for the poor in all countries.

In 1994 the United States set a dubious record. Over one million men and women are confined in prison, that is, in facilities housing persons sentenced to more than one year. Overall the US has close to 1.5 million incarcerated people. Race and class bias play a significant role. People of colour and black people specifically are disproportionately represented among those arrested, tried, convicted and sentenced to prison terms. Nationally, people of colour represent 52% of those incarcerated;

black people comprise 46%, although, nationally, blacks only make up about 15% of the population. Although the overwhelming majority of those in prison are men, the rate of incarceration of women is increasing. 1994 data compiled by the US Bureau of Justice Statistics indicate that the number of women prisoners grew 10.6% compared to 8.5% increase among men prisoners. A 1995 update found that the "proportion of black females in the US who are incarcerated was seven time higher than for white females in 1994."

The similarities of disparate treatment based on race and class in South Africa and the United Kingdom were also discussed. In South Africa, blacks had been sentenced to death at a rate at least 10 times higher than that for whites, before the abolition of the death penalty by the Constitutional Court. Growing fears of crime in communities throughout the world have been exploited and manipulated by politicians. Criminal justice policies in many countries tend to be viewed in a vacuum, ignoring the relationship between poverty and violence, powerlessness and its exploitation by the wealthy and politically powerful; and between racism and poverty and their impact upon public policies.

Growing interference in judicial decision making by political and executive forces threatens the independence of the judiciary in many countries, particularly the United States. For example, the US Congress has mandated federal guidelines to be used in sentencing which eliminates the discretion of judges. The connection between race and class in this area is particularly clear in drug cases. The federal guidelines require a 5-year mandatory sentence for the possession of 5 grams of crack cocaine, a crystallized form which is prevalent in poor communities, while only possession of 500 grams of powdered cocaine, prevalent in white affluent communities, also results in a 5-year mandatory sentence.

Legal safeguards for freedom of speech for all citizens and the right to form associations, essential to democracy were also discussed. At the same time certain types of political expression has been made criminal in some countries, such as utterances which foment prejudice, and stimulate violence in some multi-racial, multi-religious and multi-ethnic nations.

The Commission discussed the fact that fascism and genocide have been supported and perpetuated by law in societies that permit the dissemination of racist propaganda and distortions of nationalist ideologies. Nazi-Germany, Kampuchea and present-day Eastern Europe provide obvious examples of the extremes to which fascism and genocide

can be carried. It was also pointed out that in some racist societies, the same laws against incitement to race hatred are used to criminalize those who protest against racism.

Finally, the commission discussed restrictions on access to legal assistance for those detained under emergency laws in the United Kingdom and particularly the emergency laws applied more repressively in Northern Ireland. For example, persons arrested anywhere in the UK under the Prevention of Terrorism (Temporary Provisions) Act 1989 may have access to legal advice deferred for a period of up to 48 hours. In Northern Ireland, the initial deferral of access can be renewed for further periods of up to 48 hours. Additionally, solicitors are not allowed to remain with their clients during police interrogations.

Defense solicitors themselves have been regularly abused and threatened by the police in Northern Ireland. The British judiciary has failed to uphold the independence of defense lawyers as well as the right of suspects to receive prompt legal advice. Presenter Jane Winter, requested that the IADL support the call for a full independent inquiry into the murder of attorney Patrick Finucane in Northern Ireland. The Commission agreed that it was necessary to have some minimum standards accepted by the international community and proposed the development of an international declaration on the independence of the judiciary.

PRESIDENT MANDELA ADDRESSES THE CONGRESS

On April 2 at Noon a Special Plenary was convened. South African President Nelson Rolihlahla Mandela honored Congress participants with a powerful speech entitled "From Liberation Movements to State Power"*. He spoke to an overflowing plenary session presided over by Prof. Lennox S. Hinds. At the conclusion of his inspiring presentation, Secretary General Amar Bentoumi of Algiers, President Emeritus Joë Nordmann, (France) and founding member John Platt Mills QC of Great Britain, presented President Mandela with a plaque affirming his life membership in the Association followed by the presentation to the President of a special collage highlighting the many years of IADL anti-apartheid activities during the twenty seven years of Mr. Mandela's incarceration as a political prisoner. Finally Roland Weyl (France) presented Mr. Mandela with a specially bound copy of IADL publications.

TRAGEDY STRIKES[12]

On the evening after President Mandela spoke, tragedy struck the Congress when two prominent academics from the United States, Professors Haywood Burns and Shanara Gilbert and South African human rights activist Felicia Roberts of Mafeking, South Africa, to whom this publication is dedicated, were struck down in a random and senseless motor vehicle accident when a 40 ton truck collided with the passenger car in which they were driving early that evening on the way to visit a local family. Only 24 hours earlier Professor Shanara Gilbert had presented her very well received paper* in Commission V.

Wednesday, April 3, 1996

When the news of the deaths of these human rights activists was announced, the morning Congress program was suspended to permit delegates an informal opportunity to express their grief on behalf of themselves personally and on behalf of their delegations.

During the afternoon, Commission proceedings continued, followed by two special plenary sessions discussed below.

REPORT ON SPECIAL MEETING ON VIOLENCE AGAINST WOMEN

Prepared by
Magistrate Fatima Chenaif, Algeria

A special meeting dealing with women's issues took place on April 3 after the Commissions adjourned. This meeting took place informally and spontaneously with the participation of a significant number of women and men, encouraging an open and free debate on issues linked to the desperate situation of women in a number of countries including India, Algeria, Namibia, Argentina, Somalia, South Africa, France and the United States.

The discussion detailed various forms of violence that make women and young girls targets, including domestic and political violence, rape and murder performed in the name of principle and the distorted interpretations of some religions. There is an increasing use of violence

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[12]See Dedication p. 2.

against women as a form of terrorism throughout the world. The French author, Aragon, has written that the future of women is the future of humanity, and that a world without women has no future.

The International Women's Conference in Beijing in 1995 was the largest peaceable governmental meeting in the history of the world. It was the consensus of this meeting that violence against women and girl-children must be opposed and struggled against everywhere by women and men, regardless of the justification for the violence.

In the past, the IADL has taken a number of initiatives on political, social, and economic issues that affect women, including the Cambridge seminar in 1978, the Paris symposium in 1982, the Athens Congress of 1984, during which session dealt with the UN Decade on Women, and the Barcelona Conference of 1990.

The focus of the meeting at the XIVth Congress was steps to be undertaken to oppose violence against women and girls building on the Declaration and Platform for Action signed by governments in Beijing in 1995. The heads of state of most countries also made specific commitments in Beijing to establish new initiatives and agencies, to work to bring an end to terrorism against women and girl children including violence and discrimination. Governments must implement these commitments.

It was agreed that people in every society must commit themselves to the struggle against terrorism against women and intolerance that threatens to destroy humanity.

Concrete steps must be taken to include the subject of violence against women and girls and their overall development as one aspect of every IADL event because these problems are universal. They are linked to problems in each society of workers, of peace, of the administration of justice, of health, of education, of terrorism, of social welfare and culture. As the economies of nations decline, violence against women increases. Progressive jurists must increase their concern and actions to address these issues.

As one of the men at the special meeting pointed out, violence against women is a man's issue and a woman's issue. The IADL can gain much support from the women and concerned men of the world by embracing the Beijing Declaration and Platform for Action and by playing a leading role on this frontier as it has on so many others in the past.

RESOLUTIONS ADOPTED AT THE SPECIAL SESSION ON WOMEN

I. RESOLUTION ON VIOLENCE AGAINST WOMEN

Commission II had unanimously adopted resolutions, which was amended by the Special Meeting on Violence Against Women. Theseombined resolutions are:

I. Violence against women and girl children is on the increase throughout the world, as the economies of many countries decline. Violence against women is increasing in every class, and without distinction as to race, colour, language, religion, political or other opinion, national or social group.

II. Violence against women constitutes a violation of human rights.

III. No country or people can call itself free until violence against women is eliminated, and no society can survive that does not struggle against such violence.

IV. All States have a responsibility to condemn violence against women and to commit resources and enact measures to end such violence. After the measures are enacted, all States have a duty to see that these measures are enforced as a primary responsibility.

V. Lawyers have a new opportunity to hold their States to this duty because virtually all of the States with IADL affiliates signed the Beijing Declaration and made commitments in the Beijing Platform for Action. Many heads of States also made specific commitments in Beijing to establish agencies and methods to struggle to end violence against women and the girl children.

VI. All of the women and men in the IADL must commit themselves to hold their nation States accountable to carry out these basic human duties.

VII. The IADL and every affiliate of IADL, from this day forward, should include the subject of violence against women and girls as one part of every IADL event because this problem is universal, linked to problems of workers, of peace, of the administration of justice, of crime, of political equality, of health, of education, of terrorism, of social welfare and of culture--in fact, of the survival of the species.

THE CASE OF LOCKERBIE AND THE RULE OF LAW

On the evening of April 3, 1996, a special plenary on "The Case of Lockerbie and the Rule of Law" was convened at which Professors Lennox Hinds (US), Bill Bowring of Great Britain, Igor Blitchenko, Institute of International Law, Moscow, Russia and Dr. Abdelrazig El-Murtadi, Professor of Law, Libya University, Libya made presentations. The special resolution drafted at this session is included in this volume.

Thursday, April 4, 1996

On April 4, the Commissions concluded meeting followed by the presentation by each Rapporteur to the Plenary Session of Commission Reports and the discussion of resolutions.

MEMORIAL SERVICE

That evening a memorial celebration commemorating the lives of Haywood Burns, Shanara Gilbert, and Felicia Roberts was held. Wilhelm Joseph of the National Conference of Black Lawyers, U.S.A. and Jeanne Mirer of the National Lawyers Guild, U.S.A. coordinated the program which included: choral presentations by local groups, a welcoming speech by Wilhelm Joseph, who served as Master of Ceremonies; a candle Lighting for Haywood Burns and reading of a statement from his wife Jennifer Dohrn, lead by Adjoa Aiyetoro; a candle lighting for Shanara Gilbert and a Statement from her partner read by Beverly Franks, followed by a candle lighting for Felicia Roberts, and Statement from her brother Rommel Roberts.

Everyone joined in the singing of "Amazing Grace" following acknowledgments by Jeanne Mirer of messages of condolence sent from throughout the world.

Organizational tributes were presented from the National Association of Democratic Lawyers, (South Africa) by Sec. General Vincent Saldanha; the International Association of Democratic Lawyers, by Prof. Lennox S. Hinds; the National Lawyers Guild by Leora Mosston; and National Conference of Black Lawyers by Deborah Jackson.

Other Tributes were presented by Kader Asmal, Minister of Water and Forestry, South Africa, His Excellency David Pierce, U.S.Consul General to South Africa, His Excellency Franklin Sohn, South

Africa Ambassador to the U.S.; Justice Albie Sachs, Constitutional Court; and Hon. Dullah Omar, Minister of Justice. Choral Presentations closed the program.

GENERAL ASSEMBLY MEETINGS
April 4-5, 1996

The General Assembly of all representatives of affiliate organizations present met and considered a number of matters.

Secretary Amar Bentoumi reported on IADL activities since the 13th conference in Barcelona in 1990. The Financial Report was presented by acting Treasurers Bill Bowring and Susumu Nakata, Jitendra Sharma presented the proposals of the ad hoc constitution which were adopted by the General Assembly. Significant changes in the new constitution included the broadening of the aims of the Association to include the protection of human rights; the preservation of the environment; and the right of development. The International Secretariat was abolished. The number of Bureau members was reduced to 18 regional representatives selected to reflect gender and cultural diversity as well as potential for contribution to the IADL.

Under the newly adopted constitution, the Bureau consists of the President, Secretary General, Treasurer and 18 members elected by the Assembly plus IADL representatives to international bodies.

From its members, the Bureau is authorized to appoint Vice Presidents, a Deputy Secretary General and Deputy Treasurers. The identity and national origins of the newly elected and appointed IADL officers and bureau members are included in this report.

The General Assembly also established a special committee to study IADL publications which included Bill Bowring, Lennox Hinds, Claude Larzul, A. Maghrabi; S. Nidrul, Roland Weyl and designated representative of the AAJ to be identified.

Finally the General Assembly adopted the Declaration of the XIVth Assembly* and a series of resolutions.*

On April 5, 1996, the meeting of the General Assembly continued in which the future fifty years; of the Association was

discussed; and resolutions were adopted. At this Final Bureau Meeting convened after the newly elected members, the end of the Congress. A new slate of officers were also elected pursuant to the revised constitution.**

CONCLUSION

With complex emotions the XIVth IADL Congress concluded. The participants were at once exhilarated by the energy and intellectual excitement generated by activist lawyers from all over the world, meeting in a democratic South Africa for which most, if not all, of the delegates had struggled for many years; heartened by the collective intentions expressed to shape the IADL into a strategic force in the human and legal rights struggles of the next millennium, while at the same time, deeply grieving for lost comrades.

The loss will always be felt, not only by those of us who knew them personally, but because they were in the special ranks of those whose strategic contributions made profound differences in the lives of all whom they touched and every institution they served.

**The IADL Constitution as revised at the XIVth Congress is included in this volume.

OPENING PLENARY PRESENTATION
by
Amar Bentoumi, Secretary General of The International Association Of Democratic Lawyers[13]
1 April 1996

Dear Colleagues: Greetings To You All.

On behalf of myself and on behalf of the Bureau of the IADL, on behalf of all the continental, regional and National Associations Affiliated to the IADL, and of all the participants in this the 14th Congress of the International Association of Democratic Lawyers, I extend our extreme appreciation to the National Association of Democratic Lawyers (NADEL) of South Africa for their invitation to hold the Association's 14th Congress in your magnificent country and in the beautiful city of Cape Town; the final point of the African continent.

I extend warmest greetings to the founders of IADL who are with us today; IADL President Emeritus, Joë Nordman of France and John Platts-Mills of England.

In addition we must note the efforts of our colleagues Lennox Hinds and Vincent Saldanha to ensure the Congress' success along with the efforts of all the members of the IADL and NADEL Preparatory Committees; the extraordinary regard and respect that our association shares with the world community for President Mandela as the pre-eminent symbol of democracy and liberty informs our appreciation for his agreement to serve this Congress as patron and to grace us with his presence.

Despite a great variety of difficulties, it was with enthusiasm that IADL decided to observe its 50th Anniversary in South Africa, two years after its liberation from apartheid while it engages in the process of democratization and particularly in Cape Town which is in such proximity to those prisons, Robben Island and Pollsmoor, whose infamous reputations we all know.

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[13]Elected IADL President, 14th Congress.

The IADL was created in the wake of the Nuremberg trials by jurists who had fought against Nazism and all it represented: racism, the destruction of human rights and the oppression of peoples. It was, therefore, a logical step that the organization should become involved in the struggle of the people of South Africa who had been under white domination for three hundred years and especially in 1948, when the system of apartheid which was characterized by racial separation and discrimination was incorporated.

Thus, IADL denounced apartheid, a legal system designed to insure the domination by the white minority and to destroy all human rights including the right to citizenship of non-white people, in their native land. Some of the many IADL resolutions condemning this vicious system concerned:

1) The 1976 Repression of Communism Amendment Act to the Internal Security Law;
2) The Banning Orders;
3) The Pass Laws
4) The Group Areas Act which created Zones to which black people were exiled;
5) The Bantu Authorities Act which established the Bantustans.
6) The Internal Security Acts and other statutes perpetuating separation.

From the same arsenal of repressive legislation came the law against sabotage and the 1983 amendment to the constitution which institutionalized the exclusion of black people to the so-called homelands.

IADL never ceased its unqualified support for the South African peoples struggles against this discriminatory system; a struggle whose goals were best described by President Nelson Mandela on April 20, 1966 during the Rivonia trial, as a free and democratic society in which all can live in harmony and with equal opportunity and for which he was prepared to die.

IADL has consistently expressed its solidarity and demonstrated its support for the program of action, the boycotts and civil disobedience of 1949, the campaign of resistance against unjust laws in 1952 and support for the Freedom Charter adopted by the People's Congress in 1955.

IADL condemned the reign of terror, the Sharpeville Massacres (1960) which marked the start of the armed struggle, the infamous prosecutions for "sabotage" and " treason" of patriots including their leader, Nelson Mandela; that same reign of terror which included the unending detention of political prisoners denied due process under horrendous and inhumane conditions.

Most recently IADL decried the supplying of military equipment and condemned the recruitment of mercenaries by certain western nations and accused those states of aiding the survival of apartheid by providing the regime both military support and nuclear capacity.

IADL has made other modest contributions to the struggle of South African patriots by participating actively in the campaigns which resulted from the efforts of the special committee of the UN general assembly which caused the political system of apartheid to be studied and then branded as a crime against humanity, to the economic and political sanctions against the racist South Africa, and to the International Lawyers Campaign to Free Nelson Mandela and all other political prisoners.

IADL has the honour to count among its officers eminent South African jurists, noted for their opposition to apartheid like vice President Archibald Gumene and International Secretary Kader Asmal. In addition, IADL devoted numerous publications on the situation in South Africa as well as articles which appeared in the Revue of Contemporary Law in English and French which our colleague Roland Weyl has prepared for presentation to our South African friends.

Most recently, despite internal difficulties, IADL organized two observer delegations between March and May 1994 during the first non-racial South African elections. The first was organized in cooperation with NADEL by Lennox S. Hinds and Bill Bowring. The second, undertaken at the initiative of Jacques Bourgaux, by Paul Hilgers, under the auspices of the European Union election unit South Africa (Eunelsa).

Thus the relationship of IADL to the South African struggle is of long standing and intrinsic to the organization and integrated into the principal themes of the 14th Congress: Democracy in Domestic and International Law.

But what does human rights and democratic rights mean to countries in which poverty and illiteracy have increased? Can inequality be tolerated when 1/5 of the world's richest people dispose of 80% of the

planet's resources while 1/5 of the world's poorest people dispose of only 6%?

Many decades of exploitative development have created natural disasters in Africa , biological tragedies in the Arab-Muslim world, serious difficulties in Latin American including the industrialized nations, so that we have entered an epoch in which humanity benefits neither from the technical or financial resources of the planet.

The challenges being faced by all countries like South Africa, are those which result from the democratization of political and economic life and the prevention of local and internal conflicts, economic and social development. The balancing of the respect for human rights of all against the necessity to punish others for their crimes while indemnifying their victims, and the securing for all people the opportunity to live with dignity in a peaceful world in a safe environment.

Congress participants will address these problems, including International drugs and arms traffic and many others. These challenges need to be raised, but the main challenge remains a new world order dedicated to democracy and equity, and most particularly the democratization of the United Nations System.

The fundamental principals of the United Nations remain valuable to the people of the southern hemispheres and to all those excluded from seeking vindication and the resolution of their differences.

The rebirth of the UN and the United Nations system is a method for maintaining peace and for aiding the politics of development. The UN charter and most of its institutions and agencies have an irreplaceable potential for the vindication of human rights of people.

NGO's (Non-governmental Organizations) mission is not to work under the influence of the great powers and to become their partners. On the contrary, NGO's must comply with the charter which is so often set aside, and remind all member states of their responsibilities and that they must take necessary steps to democratize the organization by the promotion of the role of the General Assembly, the Economic and Social Council, and the International Court Justice. Other international institutions like the United Nations Conference on Trade and Development, the United Nations Programme for Development, The United Nations Organization for Industrial Development, the International Labour Office, which support development are also irreplaceable.

Such reforms must reinforce international democracy in each nation and strengthen the support for Africa, Asia, and Latin America in every sphere and international institution.

If the UN is only to be the tool of the great powers, it cannot achieve its mission as redefined by the Charter. If the UN truly becomes a communal house for all people and all individuals and an instrumentality of honest diplomacy, it will be an irreplaceable edifice for a new humanity. IADL must begin its plan for this global project and favour a universalism which is not simply the hegemony of western values which are essentially mercantile, but rather it must struggle for dialogue among all civilizations, all cultures and all nations. Thank you for your attention.

ADDRESS TO OPENING PLENARY, OLD ASSEMBLY BUILDING, CAPE TOWN 1 APRIL 1996

by

Prof. Kader Asmal, MP[14]

May I offer my warmest congratulations to IADL for arranging this Congress in South Africa. Over many years I have had the closest association with IADL and I think it is most appropriate, now that we have a democratic constitution and have achieved our freedom, that its members should assemble in the Parliamentary capital, indeed in Parliament itself, for this occasion.

It is a measure of the times in which we live that a Parliament that once legislated blacks into invisibility is now able to host the assembled talent of the world's progressive lawyers—and in the place that was once misused so notoriously for repression.

So let us savor the moment, but with a sense of relish that is both sweet and bitter.

Let us applaud the great sea change that made all this possible. Let us salute the lawyer-statesman President Nelson Mandela, for whose release from apartheid's bondage the IADL worked so tirelessly in years gone by. Let us recall the powerful, simple words of Nobel laureate-in-waiting, Wally Serote, uttered at the height of oppression in 1971, before Soweto burst over the land:

> "I do not know where I've been
> But, brother, I know I am coming.
> I do not know where I have been
> But, brother, I come like a storm over the veld."

Let us, then, also remember those, in South Africa and elsewhere, who worked, and fell, in the great cause of our liberation. Let us also remember those who managed to use the law, despite apartheid, to challenge repression while at the same time not giving legitimacy to an evil regime. Let us remember those who provided the inspiration, the

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finance and the expertise from beyond South Africa's borders in this great cause.

The South African struggle brought out what is most ennobling in the profession of law. May our presence here, at this particular place, ennoble the profession further.

With those words of personal welcome, I should like to make some observations about our craft, law, and matters that might be germane to your deliberations.

1. The Indivisibility of International Human Rights and Systems of Domestic Law.

The IADL structure is not accidental. With its international umbrella organization both nourishing and being nourished by affiliated local branches, it is the institutional embodiment of an important truth about international law. As Princeton University's Professor Richard Falk has pointed out, systems of international obligation only resonate in the real lives of people if domestic legal systems are responsive to these international norms. Under apartheid, South Africa's local lawlessness, internal repression, cross-border aggression and international pariah status were all of the same cloth. Conversely, in the new country, international law is explicitly part of the constitutional interpretation of domestic laws.

2. The Continuing Relevance of Sovereign Multilateral Institutions.

Multilateral institutions in which nation states co-operate remain an essential ingredient of social progress across the world. And yet, in domestic and international politics alike, an ideological assault continues on the idea of governance. The domestic political rhetoric that bashes "big government" finds a global echo in the assaults on international institutions (apart from transnational corporations, which continue to prosper) and in the wealthy countries' quid pro quo attitudes to the funding of organizations like the United Nations. In domestic and international politics alike, vast increases in the power of private self-interested institutions coincide with a political agenda that would strip the organs of governance of the tools they need to be effective. Yet the result of this strategy—unfettered private power—leads directly to warlordism rather than stability.

Even the most strident advocates of small government

tend to stop short of dismantling, for instance, the police force. Indeed, they tend to advocate its expansion as well as the expansion of defense spending. It is always noteworthy to me how the small government brigade end up as the big government brigade, when you add up the sum total of their plans.

3. The Continuing Relevance of International Nongovernmental Organizations.

International Organizations will not long remain a force for change, however, if they are effectively up for sale to the highest bidder. The risk that domestic political and regulatory institutions may be "captured" by powerful domestic interests has its echo internationally, where those with the purse-strings often expect to hold the whip hand. To avoid this, it is necessary to mobilize, as IADL has so effectively mobilized down the years, to speak truth against power and corruption—influences which, while always present, are capable of regulation and are sometimes vulnerable to reason. And it was reason that in the end mobilized the international community and vanquished apartheid.

> The power of IADL has always been the power of ideas; the power of advocacy to inform and convince; the power of simple decency. It is only through efforts such as yours that the integrity of international institutions will be kept safe from the blandishments of those who would suggest a dictatorship of money.
>
> IADL played a major role in the battle to ensure that apartheid was recognized for what it was: a crime against humanity. Because of the efforts of IADL and others, apartheid was repeatedly certified such a crime by the international community.

4. Apartheid and Civilization.

The claim that apartheid and civilization were of the same camp is grotesque, but it is not new. This claim was in fact always a central plank of apartheid's own international propaganda. "We are the bearers of the values that made the West great. We are Europe in Africa," said apartheid's Finance Minister, Dr. Diedrichs, in December 1967.

Eurocentric commentators—those uneasy in Africa, feeling themselves besieged by barbarity; people we might more aptly call Eurotic—seem to forget that there are problems of global power and powerlessness, of global wealth and dispossession, analogous to South African domestic politics of looting and oppression under apartheid. This is another aspect of the indivisibility of domestic politics and international affairs.

It is thus no accident that it was Cuban blood that was spilt in Angola in the struggle against apartheid. There is such a category as the wretched of the earth; and concerted political action among this group is not merely "based on eccentric notions of race solidarity," as some leading Eurotic parliamentarians would have it. Rather, it is the shrewd exercise of enlightened self-interest. As the US Congress cuts aid to South Africa, Cuban doctors are flocking to rural areas of the country, offering their life-saving skills for a pittance.

Foreign policy, no less than other government policy, flows from domestic institutions. Those who are best placed to influence a state's domestic policy are also best placed to influence its foreign policy. The lesson here is that if we genuinely enable the broad populace to reshape the central institutions of our domestic politics, the good effects of that transformation will spill also into our international involvements.

The countries of "the West" are not today immune from this general truth—that foreign policy is driven by strong domestic constituencies—nor were they immune from it during the apartheid years. Many lobbies impact on the policies of all governments, including Western governments. And not all lobbyists are civilized. Elements within Western countries that backed policies of collaboration and "constructive engagement" with apartheid represented only one voice of the West, and this voice did not automatically remain "civilized" by mere virtue of being Western. One cannot recall too often Ghandi's comment upon arrival in London to negotiate the future of India. Asked by a reporter what he thought of Western civilization, Ghandi replied: "It would be a good idea."

There are and always have been civilized strands to Western politics; but the struggle of civilization against the forces of violence and greed is everywhere, including in the West, a ceaseless one in which there can be real setbacks. The Western world's civilized best-self emerged at those times when its anti-apartheid constituencies gained the upper hand, when international opposition to, and sanctions against, apartheid

gathered momentum.

The "West" is no more a monolith than is South Africa; the "West" contains forces of barbarism as well as of civilization, as does South Africa, including the new South Africa. The democratic political process is exactly the means through which the balance of forces shifts between these poles (and others), at least in systems, unlike apartheid, where genuine politics is permitted. So there are no inherently "civilized" countries; only civilized and uncivilized politics.

5. The Continuing Role of Progressive Lawyers in the New South Africa.

Sadly one can often say of lawyers what F. Scott Fitzgerald said of his lunatic wife—that she was "tragically brilliant on all things except those of actual importance." South Africa has always had—and still does—its share of irrelevant legal pedants, imagining angels on the heads of needles while letting devils slink by. These were the fitting scriveners of apartheid, a system in which, as one scholar has recently put it, law degenerated to the pursuit of violence by other means. But there has always also been a vibrant practice of human rights legal idealism in South Africa; it is a tradition whose time has come. We must not squander this opportunity through lassitude or organizational disarray.

Our opponents remain fancily funded despite their bankruptcy of the imagination. In whole areas of South African lives, the challenge of generating progressive legal and policy solutions has become urgent since for the first time there is a government that want to implement these ideas. This profound change challenges progressive campaigners to rethink the scope of their activities; there is an enlarged playing field on which we now must keep our eyes on several balls at the same time.

6. The Need for a New Strategic Lens.

In facing these new challenges of governance, the progressive lawyer in South Africa must ensure that old orthodoxies do not blind us to new challenges. Do not misunderstand me. I do not mean to counsel those tatty forms of "pragmatism" that amount really to moral and political abdication. We must not be so revisionist that we abandon the central ethics of our longstanding world view. Rather, in the familiar radical tradition, we must identify points of contradiction in the armor of our opponents, and we must continually drive new wedges into the old and tired economic monolith of apartheid.

My favorite example is that of antitrust policy. Since when, we might ask, do socialists advocate competition? We know that the rhetoric of competition is often, for instance, misused as part of capitalist's assault on labor. But we must take a closer look. What, we might ask is the root cause of the risks that I have outlined above—the risk that powerful domestic constituencies may capture legal and regulatory institutions of the new democracy? The short answer is: concentrated economic power.

As a US President said earlier this century, if there are men in a country big enough to rule it, they will. If we will not tolerate a political despot, neither should we put up with an autocrat of trade. Nobody must be bigger than the national interest.

Yet South Africa's progressive legal institutions have been largely silent on such matters. We still too often view the world through a narrow and tired vision of what counts as human rights law. The valuable—indeed indispensable—energy that South Africa's progressive lawyers have expended on the Truth and Reconciliation Commission must continue unabated if we are to achieve the goal of taking the full measure of the crime of apartheid. Yet a sole focus on such traditional "human rights" issues is no longer enough. It is a narrow approach that underestimates the real scope of human rights activism under a government that wants to be responsive to a humane agenda. Issues such as property rights, land institution, water tariffs, electricity regulation are, in today's South Africa, human rights matters.

We cannot, as progressive lawyers, allow the warp and weft of governance to bypass us. This would allow our opponents to recapture governance by default. So I propose a challenge: the revival of the old cross-border collaboration that we put in place against apartheid; except that now it must take place on a whole range of issues where South Africa is looking to international models in order to solve local problems.

As I close, I leave you a thought. We must be fearless and even-handed in our pursuit of justice. We must not overlook the misdemeanors of our friends and allies, however just and honorable their cause. This must be rigorously observed—and indeed is being observed—in the pursuit of truth and reconciliation in South Africa. And it must be rigorously so in the pursuit of justice. Selective justice sullies the most respected cause. We can be progressive without closing our eyes to lapses close to home, however painful this might be. We must not indulge in what the French call the "treason of silence."

We must administer the appropriate discipline without fear or favor. The stability of our new-won democracy in South Africa depends on a deepening respect, among all people, for the law. Those who cynically break the law, or use it to crush opponents, are threatening the democratic national interest and the very fabric of society. With Edmund Burke, even if we must differ with him in other respects, we must recognize that:

> "People crushed by law have no hope but from power.
> If laws are their enemies, they will be enemies to laws."
>
> Law must offer a fulfilled life for all South Africans.
> It must never be abused again.
>
> With that, ladies and gentlemen, comrades, friends, colleague lawyers; I wish you all the best in your deliberations. Thank you.

FROM LIBERATION MOVEMENTS TO STATE POWER

by

President Nelson Mandela, South Africa

It is a particular honour to have been asked to share in this important Conference. We appreciate, in particular, the decision of the International Association of Democratic Lawyers to hold your deliberations on African soil. We are all the more moved that you have chosen to convene in South Africa.

Let me extend a very warm welcome to everyone gathered here, especially to our guests who have come from different parts of the globe. By being here, you help to strengthen our young democracy and to encourage Africa in her post-independence commitment to place a high premium on the protection of human rights and human dignity.

Long before law faculties emerged on the European continent; long before the Napoleonic Code replicated itself across Europe; long before the universities and the Inns of Court in the United Kingdom were established, law schools existed on African soil.

These centres of learning were not only among the foremost centres of culture of their day, but they also taught a system of law more humane than that which then existed in feudal Europe. In particular, they established the principle of linking law to social progress. The conception that law must serve all equally was an essential part of their contribution.

This African jurisprudential culture and heritage was, however, interrupted and largely destroyed with the advent of colonial invasion and exploitation. These processes, in turn, evoked resistance and, in time, the struggles for independence and liberation—which brings us to the topic of today's session: *From Liberation Movements to State Power.*

Ladies and gentlemen:

We are gathered this morning in the very region where colonial rule first implanted itself in South Africa. The resistance of those who lived here, though ultimately unsuccessful against a much more powerful enemy, initiated an unbroken tradition of resistance to the relentless progress of dispossession.

With the industrialisation of South Africa at the beginning of this

century, minority rule was consolidated in the establishment of a South African state whose racial laws codified and helped secure oppression, inequality and discrimination. It was against this background that the African National Congress was founded in 1912. Central to its aims was to reclaim the rights and the dignity of the oppressed.

But far from according these demands, the ruling minority refined the legal system of discrimination and oppression into an instrument of one of the most cruel forms of racial discrimination.

There is no need to recount here the horrors of Apartheid except to say that the task of addressing its legacy of socio-economic devastation is our central objective in the reconstruction and development of our society. It its extremity, it united our people in an unbreakable resolve to rid ourselves of it once and for all.

The ending of Apartheid would not have been possible without the enormous support that our liberation struggle received from the international community, and for this we shall be forever thankful. The role played by progressive lawyers throughout the world in highlighting the need for their governments to isolate the Apartheid regime shall not be forgotten.

What is important on this occasion is to recall that, in spite of the subordination of law to dehumanising and brutalising objectives, the oppressed majority kept alive the ideal of justice in law.

Today, as a result, the legal system is seen as crucial to the realisation of the ideals for which we struggled and which inspired the world's solidarity. Ultimately we elected as a nation to achieve our revolution through negotiation and to realise the goal of social transformation within a framework of law.

It is within this perspective that the establishment of the democratic state is unfolding.

What may be regarded as the greatest achievement in our country's political history was the holding of free and fair democratic elections in April 1994. For the first time in this country, a government based on the collective will of the majority of the people was voted into power, with a mandate to work for a better life for all South Africans.

The negotiations that paved the way for this founding act

embodied a central feature of our struggle, and one that has since marked the way in which we are building our new society. The Interim Constitution—like the Working Draft of the new Constitution we are soon to finalise—was not authored solely by politicians. Civil society had a major say in the matter.

This approach is reflected in the diversity of interests protected in the Working Draft Constitution, and has shaped many of its most significant aspects. I would like to highlight just some of these.

Firstly, promoting and entrenching a culture of human rights culture is amongst our priorities, especially given our experience of the denial of rights. Today we have a Bill of Rights which covers civil and political rights and freedoms as well as social and cultural needs, including developmental needs.

The right to development is of particular importance given the historical social neglect of the needs of the majority.

The Constitutional commitment to gender equality is a product of the close partnership between liberation movement and women's movement. A Commission on Gender Equality is amongst the measures we are taking to ensure that practical effect is given to the constitutional commitment.

Secondly, a central feature of the Constitution is the right to legal representation and to legal aid in criminal matters where the accused is unable to engage the services of a lawyer. This is one of the prerequisites of a constitutional state which is effectively based on the Rule of Law.

The wholesale lack of legal representation in the past tarnished the image of the courts in the eyes of the majority We are, therefore, paying particular attention to measures which will help the courts and the judicial process reclaim respect. We are also looking at viable forms of dispute resolution other than courts, which will be more accessible to ordinary people.

One of our concerns in this regard relates to the question of juvenile justice. The Apartheid system was brutal in its treatment of black juvenile offenders in particular. They were, in general, treated as adult offenders. No attempt was made to ensure that they had adequate places of secure safety. Today, we are engaged in serious debate on how to deal with juvenile delinquents in a manner that will afford them an opportunity

to reform and make a contribution to society; and how this is to be combined with the imperative of protecting society against those who are engaged in serious offences.

A third initiative to which we attach importance is the establishment of a set of constitutional supporting structures. The constitutional guarantees only become effective if the ordinary person is able to assert and protect those rights.

Because of their history, many South Africans shy away from the courts as avenues of redress. It was partly against this background that we established our Office of the Public Protector, the Human Rights Commission, and the Truth and Reconciliation Commission. Their task is to make good the promises of the Constitution in a people-friendly manner, and also to make people less dependent on politicians and government for the assertion and protection of their rights.

As regards the Truth and Reconciliation Commission, its principal aim is the promotion of national unity and reconciliation by facilitating reparation to victims of past gross human right violations and by granting amnesty where appropriate. We do know that reparation cannot make full amends: there can be no correlation between the pain and frustration of victims and their families and any remedial measures. We are nevertheless convinced that moral and material reparation are necessary for the achievement of national reconciliation, and that the starting point is full disclosure of the facts.

Chairperson;

Allow me to conclude with the following remarks.

Our transition to a truly democratic framework of government is an achievement of immense historical significance and one of which we are most proud as a nation.

However, it marks only the start of the much more extended tasks of democratising society; entrenching a living culture of human rights; and improving well-being. Freedom has given us the opportunity at last to address the basic needs of our people. But unless there is real change in the circumstance in which ordinary people live, then that freedom will remain a promise and many of the rights proclaimed in the constitution will remain formalities.

The themes that you will be discussing, and in particular the relation between constitutionalism, law and social justice, are central to our concerns. The topics are not abstract and academic. They revolve around the lives of ordinary people—not only here but across the world—in pursuit of freedom, justice and prosperity.

I am confident that you will address them with this in mind, and I wish you well in your deliberations. Thank you.

RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY OF THE XIVTH CONGRESS CAPE TOWN, SOUTH AFRICA

THE DECLARATION OF THE XIVTH IADL CONGRESS FIFTY YEARS AFTER ITS FOUNDING

1. The International Association of Democratic Lawyers was established in 1946 in the aftermath of World War II and the violation of human rights on a scale unprecedented in human history. Its founding objectives reflected the aspirations of progressive lawyers around the world on the eve of a new era in international relations represented by the United Nations system: the promotion of peace, fundamental rights and the principles of the UN Charter.

2. Political and economic developments in the last 50 years have radically transformed the international situation. Many of the objectives of the UN remain unrealized. For example, nuclear disarmament has not been achieved; on the contrary, existing nuclear powers have consolidated their dominant positions through ever more sophisticated and lethal weapons. The fall of the Berlin Wall and, with it, the collapse of the Soviet Union and its European satellites has given rise to worldwide capitalist hegemony. There is no longer any effective counter-balance to the recolonisation of the Southern hemispheres. This, together with the undemocratic role played by the World Bank, World Trade Organisation and IMF, ensures that states, particularly those in the South, are constrained to continue to serve northern capitals. For example, by imposing Labour market reforms inconsistent with decent standards, the polarisation between North and South has increased, and between rich and poor in all countries of the world. The ability of nation states to secure and enforce civil, political and socio-economic rights within their own boundaries is thereby restricted.

Consequently millions of people are overwhelmed by poverty and unemployment with no welfare protection and little prospect of satisfying and enforcing their basic human and socio-economic rights, disproportionately affecting women and children. This, in turn, has generated a huge upsurge in the number of political and economic refugees, against whom the developed countries are increasingly closing their frontiers.

This is accompanied by the existence of countless repressive regimes around the world in which peoples most basic rights are denied and which permit the commission of murder, torture and disappearance with impunity.

Against this backdrop, the UN has failed to live up to the aspirations of those founding the IADL and people throughout the world. It has become increasingly undemocratic, rendering it incapable of honouring its Charter obligations.

In this world context, a number of pressing tasks for IADL become clear:

a) Democratisation of the UN must remain a priority for the IADL, through reform of the Security Council and encouragement of the powers of the General Assembly. It must also tackle the separate questions arising from the shift of effective control of the global economy to institutions such as the IMF, WTO and World Bank.

b) One of the IMF's key instruments of economic control over poor countries of the South is through lending and debt. It is imperative that the IADL campaign for the cancellation of the backlog of unpayable debts of the poorest countries.

c) The IADL must offer legal support to national and international NGO's, Trade Unions and other progressive organisations whose objective and purposes coincide with those of IADL.

d) There must be formulated a new international jurisprudence upon which a fair and democratic world order can be built.

e) The IADL should campaign for the development of genuine democracies, involving people participating at all levels of decision-making, affecting their lives in each country.

f) The IADL must promote the development of domestic legal systems which resonate with concerns for justice, the including the establishment of community legal

services accessible to all who need them.

g) IADL's established role in monitoring political trials and providing resources to assist people in struggle where requested must continue.

h) An effective international IADL network to communicate amongst all members must be established.

i) Awareness of the IADL amongst dispossessed, disenfranchised and exploited people of the world must be increased.

j) Accountable and transparent procedures for the organization must be established.

k) Discussions to consider the amending of the IADL Constitution should be held within the next five years to reflect the principles of this Declaration.

RESOLUTIONS ON INTERNATIONAL ISSUES

ABOLITION OF NUCLEAR WEAPONS

We, Lawyers from the five continents gathering in the IADL 14th Congress in Capetown, South Africa,

Recalling that we are now in the 51st year since the two atomic-bombings on Hiroshima and Nagasaki;

Considering that the Non-Proliferation Treaty (NPT) has been extended for an indefinite period in 1995 under pressure of the Big Nuclear Powers;

Taking note that just after the extension of the NPT, the Governments of China and France have resumed nuclear tests several times, while the USA has never been reluctant to resume nuclear testing without explosion, and the other two Nuclear Powers are still clinging to this kind of mass-destructive weapons;

Realizing that it is now clear that the Non-Proliferation Treaty permits the Nuclear Powers to continue their monopoly of nuclear weapons, and

Noting that a Comprehensive Test Ban Treaty (CTBT) would be ineffective to stop the Nuclear Powers dominant positions over the world security, while they are citing a possible conclusion of a CTBT on a pretext to pass the extended NPT;

We express our ardent wishes for a peaceful world, free from nuclear arms,

We demand that a Treaty on Comprehensive and General Abolition of Nuclear Weapons be concluded immediately in order to shape our wishes for peace into a reality,

We sincerely hope that the International Court of Justice will declare the use of, and the threat of the use of nuclear weapons illegal by the impartial application of international law, giving consideration to the fact that the use of nuclear weapons should be at the same time a violation of legal and moral obligations of any States, and a heinous crime against the whole human community;

We urgently demand on behalf of Justice and Humanity, from South Africa now free of Apartheid, that each and every national government should conclude immediately a Treaty on Comprehensive and General Abolition of Nuclear Weapons.

THE UNITED NATIONS

Considering that the UN Charter puts the international community under the banner of the free and peaceful consensus of peoples, of the equality of nations small and large, and of negotiated solutions of disputes.

That in the last period the UN mainly operates as an organ of police actions, dominated by the big powers, adding to conflicts both military and economic, by processes that are deemed technically acceptable but are not, in accordance with UN principles.

Although applauding the work of many UN bodies and agencies performing useful tasks, including but not limited to the UN Human Rights Committee against Torture, and the special Rapporteurs on Racism, all of which welcome and use the work of lawyers through NGO's, including IADL;

Therefore, IADL believes it necessary to reform that part of the Charter devoted to organization, in the interests of democracy and to conform to its own principles, including:

(a) Full sovereignty of the General Assembly and the transformation of the Security Council into a bureau of the Assembly, periodically elected by the Assembly

(b) The elimination of the privilege of "permanent members"

(c) The Placement of all UN organs and institutions, including the World Bank, IMF and WTO under the authority of the General Assembly,

(d) A decrease in the number of military and economic

interventions and an increase in the use of mediation and negotiation for resolving international disputes

GLOBAL ENVIRONMENTAL ISSUES

Lawyers from 5 continents gathering in the 14th General Assembly of the IADL, Recalling that global environment as a whole is a common source of livelihood and existence for all human beings now and forever;

Taking note that it is now in a critical situation;

Confirming that the preservation and improvement of the global environment is one of the most critical issues humanity faces;

Recommend as follows:

1. That each national government with the help and advice of concerned international organs should seek solutions to environmental disasters;

(a) To advance and develop its national policies on environmental preservation by:

i. Resolving thoroughly long lasting public environmental catastrophes such as the Minamata Diseases Case in Japan and respiration diseases caused by air pollution, coaldust, etc;

ii. Responding quickly to new forms of public nuisances, such as the disastrous effects of high technology, air-pollution caused by automobiles and disasters caused by toxic chemicals and industrial waste;

iii. Complying with the Convention on Biological Diversity;

iv. Making available necessary information on items i. to iii.

(b) To respond concretely to global environmental issues; nation states should:

i. Improve the UN Framework Convention on Climate Change and make a protocol to enforce

strict implementation of control measures;

ii. Advance and encourage the conclusion of international treaties according to each and every problem of global environment, especially on the matter of control of toxic substances and waste;

2. That each and every NGO body that is concerned with environmental preservation, should strengthen solidarity on both national and international levels;

a. To conduct inquires by international teams into environmental problems in specific regions, and to make policy proposals;

b. To establish an international organ on environmental issues, such as the NGO Congress on Environment in Asia and the Pacific established in Kyoto in 1994,

DEBT

Considering that the debt is the main obstacle to development, that the debt of poor nations stifles economies, and consequently their peoples' development; that a great part of the resources of these countries is devoted to the payment of interest on this debt;

Therefore, Lawyers from five continents call upon all democratic lawyers to lead a campaign to educate public opinion about the debt, calling for the abolition of the debts as the main precondition for the development of all peoples.

EMBARGOS AND BLOCKADES

Concerned with the problems raised by the increasing practices of economic extortion through embargo and blockade.

Lawyers from five continents denounce the practice of blockades as infringing upon tenets of international law.

Furthermore, blockades constitute military measures and pressures by one state upon others and are a form of aggression interfering with the free determination of affected peoples while

infringing upon the rights of all other nations to maintain relations of their choice.

Embargos also interfere with the right of each state to choose his own relations, especially when there are marked inequities in power. They become an illegal intervention when used to cause suffering and the abridgement of the rights of people to choose their self determination.

Embargos may be legal if decided by the United Nations, consistent with conditions and principles of the UN but, any embargos in the recent period, that endanger the basic nutritional needs of populations, violate the Geneva Convention.

Thus these standards of humanitarian protection, belong to the public international order, and should be jus cogens for the UN itself.

To be legal the goals of an embargo should be in accordance with those of the Charter itself. Recent embargo decisions taken formally under the Charter may be nevertheless advance sectarian national political goals and should be deemed illegal.

TERRORISM

Whereas terrorism as a practice, including such acts committed for religions purposes, is an abominable crime against humanity.

Whereas terrorism is destabilising states;

Whereas this scourge, by its mass destruction of wealth and national structures, leads to general poverty, delays economic development, and denies the rule of law;

Whereas religious fundamentalism and the terrorism which it generates systematically, as a mode of struggle, leads to barbarism and confusion and is an obstacle to cultural and social development;

Whereas religious fundamentalisms alleges a divine mission to oppose diversity of belief and the must basic values of humanity;

Whereas in its murdering madness it is aimed specially against women, children and intellectuals;

Therefore, lawyers from five continents condemn the destructive

impact of religious terrorism and denounce all crimes of terrorism anywhere and the States and organizations who create, finance, and support it, and give the use of terrorism their support and asylum.

Call upon all democratic lawyers, national and international organizations and public opinion to denounce and oppose terrorism as an ideology.

RESOLUTION TO ENCOURAGE LAWYERS TO USE NEW TOOLS AGAINST INTERNATIONAL CRIMES COMMITTED DOMESTICALLY

WHEREAS many lawyers have concentrated on defending people charged with crimes committed in their own countries;

AND WHEREAS many lawyers seek prosecution against police brutality, or when crimes are perpetuated by government officials openly or covertly;

AND WHEREAS other lawyers have concentrated on crimes committed in other countries against people residing in their countries, namely international crimes;

AND WHEREAS other lawyers have concentrated on filing civil lawsuits as a primary remedial tool for righting such wrongs;

AND WHEREAS other lawyers have sought criminal indictments against domestic governments,

THEREFORE BE IT RESOLVED that lawyers in each country establish a central clearinghouse to which lawyers will send brief digests of each of the cases handled which raise human rights issues under the one of the human rights treaties; and

BE IT FURTHER RESOLVED that lawyers at the completion of such cases send brief digests with citations to reported opinions (and case docket numbers where there is no reported opinion) at the central agency which would then issue an annual report containing these digests, plus digests of new human rights laws passed by the national legislative body and new regulations issued by the national executive.

BE IT FURTHER RESOLVED that the Annual Report be used to:

1) Prepare Issue Sheets when a specific country goes before one of the UN Rights committees.

2) Let other nations know about egregious problems on which the support of fellow lawyers abroad is needed.

3) Provide background material in briefs in other cases which other lawyers are handling.

4) Make more inclusive the biennial HUMAN RIGHTS AND PEACE LAW DOCKET which seeks to digest all important human rights cases in all the countries of the world, including those reported in traditional law reports, and those jury verdicts, dismissals and other outcomes not reported in official law reports, and as this process becomes widespread, these annual reports will attain the prominence of reports by other organizations and government, for example, the Amnesty International reports, The US State Department reports on human rights in various countries with their strengths and weaknesses. These reports should in time affect the reception given to the Amnesty and US State Department reports.

BE IT FURTHER RESOLVED that its lawyers responsibility is to convince their local and regional governments to adopt, as part of local substantive law; UN Charter Articles 55 and 56; substantive articles in the international Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights; the Conventions on the Elimination of all Forms of Racial Discrimination, the Elimination of all Forms of Discrimination Against Women, and the Convention on the Rights of the Child and further to encourage the establishment of government agencies to prepare the required reports at the local and regional level and to publicize the texts of these treaties, now part of local law, and, starting at the bottom, to educate the people on their content, and particularly to educate the top officials charged with their enforcement.

RESOLUTION ON TRAFFIC IN CHILDREN

Be it resolved that:

1. States which have not ratified the convention on the rights of the child should do so;
2. Traffic in children, whatever its purpose, should be treated as a serious crime;

3. Traffic with a view to prostitution, use of children in pornography, for work as slaves and organ transplants should be defined as a crime against humanity (and liability should be extended to those who traffic as well as to users);
4. People who have exploited children abroad for sexual purposes should be prosecuted in their country of residence;
5. The behavior of persons who profit from traffic in children should be treated as a crime, from which they must take personal responsibility.
6. That rules be incorporated into domestic law, taking into account new technologies which make possible the use of children in pornography;
7. That there should be an Optional Protocol to the New York Convention on the lines of the Convention against Torture, comprised of the following elements:

    a) Articles 4 to 9 of the Convention against Torture should provide a source of inspiration;
    b) The crimes in question should be clearly defined as crimes against humanity;
    c) A complaints procedure should be implemented similar to that set up under the first Protocol to the International Convention on Civil and Political Rights;
    d) A complaints procedure should be established before the Committee on Rights of the child.
    e) Control of State information should be reinforced and improved with all necessary publicity and discussion in the various countries;

INTERNATIONAL ADOPTION

Be it resolved that:

As a general policy of principle, States cannot avoid their responsibilities to provide appropriate conditions of life, health, food and education therefore, international, adoption for economic reasons is to be discouraged. Furthermore it is resolved that:

a) international adoption should only be considered as a last resort;

b) this principle should be guaranteed by clear and precise provisions;
c) the child's right to know his origin and the opportunity to reconstruct his history, which is the right to the child's identity, must be respected;
d) any adoption, based on the commission of an illegal act affecting the child or its parents must be null and void;
e) the rights to an individual and specific identity must be affirmed;
f) habitual residence or domicile should mean the place where this child was conceived, and/or born and/or has lived.

THE RIGHTS OF REFUGES

The IADL calls upon the member states of the European Union, in their formulation of a refugee policy, to respect both the spirit and the letter of their international human rights obligations.

HUMAN RIGHTS OF HOMOSEXUALS AND BISEXUALS

The IADL recognizes that homosexuals and bisexuals have the same human rights as other member of the human community and calls upon its members to take all possible steps to bring about their universal recognition; to bring an end to criminalization and to bring about an end to discrimination on the grounds of homosexuality and sexual orientation.

RESOLUTIONS ON THE INDEPENDENCE OF THE JUDICIARY

The General Assembly of the IADL:,

Considering the vital importance for democracy of the independence of judges, the guarantee of the rights of lawyers for the defense and of jurists, should be protected by legislation in each State; and

Welcomes, as essential, the United Nations draft of the Universal Declaration on the Independence and

Impartiality of the Judiciary and of these participating in it, but considers as an absolute and urgent need the adoption of a Convention to turn these principles into an obligation for each member State.

RESOLUTIONS ON AD HOC TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

WHEREAS Ad Hoc Tribunals are not a step toward a permanent international Criminal Court, but on the contrary the method of their establishment and operation (violating basic principles of international and criminal law) already has substantially discredited the possibility of an international criminal judiciary system;

AND WHEREAS the Tribunals' statutes and rules of procedure and evidence are also largely in contravention of a number of international documents;

NOW THEREFORE BE IT RESOLVED that the establishment of a permanent International Criminal Court is an ideal to strive for, despite the fact that the main obstacle to its establishment remains the lack of will and the opposition to it on the part of the great powers, especially the United States

MILITARY BASES

Considering that in all IADL Assemblies and Conference throughout the past 50 years the great powers have been denounced for the maintenance of a network of military bases all over the world; the danger they create for world peace, and the infringements caused by these bases on the security, sovereignty and rights of self-determination of the peoples in whose territories the bases are located; and considering that it is now evident that the pretext used to justify the maintenance of these bases about the risk of war between two large antagonistic economic systems no longer exists; and further considering

That these military bases exist only to maintain military dominance throughout the world to ensure maintenance of power by the great powers of the Nothern hemisphere.

Therefore, IADL urges the dismantling of all such military bases in foreign territories, including particularly, those of the US in Okinawa, Japan, in Guantanamo Bay in Cuba, and in South Korea;

More specifically dealing with Okinawa Bases

Considering the positions taken by the Japan Lawyers International Solidarity Association (JALISA), based on the Report prepared by the IADL Fact-Finding Mission led by Lennox Hinds in Okinawa in February 1996;

That the US Bases in Okinawa have directly supported US war efforts in the Korean War, the Vietnam War, and the Gulf War and therefore infringe upon the right of the people of Okinawa to live in peace, a right which has been internationally affirmed;

That these bases are forced upon the Okinawa people against their will, and serve as impediments to Okinawa's regional development;

That the existence of US Bases violate Article 9 of the Japanese Constitution, which stipulates the renunciation of war;

That the US Bases also violate international law, because they are nuclear attack bases whose mission accords with the United States' nuclear strategy;

That the US Japan Security Treaty, which "legalizes" these bases, runs counter to the UN Charter and the direction subsequently taken by the development of contemporary international law;
That the the governments, under the pretext of "redefining" this treaty, will expand and strengthen their mutual defense arrangement on a global level; therefore,

Lawyers from five continents support JALISA's struggle to urge both Japanese and US Governments to scale down and remove US military bases in Okinawa.

Calls upon lawyers throught out the world to support the struggles of the peoples of the Okinawa prefecture and Japan in their demand that the US military bases in Okinawa be scaled down and removed; to encourage world public opinion and work to have the Japanese and US Governments respond to these requests, and to link their efforts with the struggles seeking the downsizing and removal of US bases in Okinawa, thereby reinforcing the struggles to dissolve military alliances and eliminate military bases through out the world.

RESOLUTIONS ON REGIONAL ISSUES

Cuba

RESOLVED that the approval by the President of the US of the law described "in support of Cuba's freedom and democratic solidarity" is a new form of US aggression against the small nation of Cuba, and is an attempt by US to impose their will upon the international community;

Since lawmaking for other nation states is a heavy infringement on the principle of the sovereignty of states, the "Helms-Burton" law adopted on 12 March 1996 is a unilateral act violating the most basic rules of international relations.

Articles 1,2,33 and other of the UN Charter, Article 1 of the covenant of Civil and Political Rights and for Economic social and Cultural Rights 3,9,21 and 25 of the Charter of OAS, and the Agreement on Free Trade are violated and ignored. Therefore,

Lawyers from five continents call upon the community of sovereign states to repudiate the policies of the United States whose aim is to establish a new world order in which national sovereignty is subordinated to their will.

The General Assembly of the IADL calls upon all lawyers and peace loving people to protest the imposition of this unjust illegality.

MORE GENERALLY, Whereas the UN in 1973 adopted a Convention declaring that the South African policy of Apartheid constituted a crime against Humanity, and

Whereas the right to national sovereignty and self determination is guaranteed to all nations, and

Whereas the US economic blockade of Cuba constitutes prohibited use of force in violation of the Charters of the UN and of the Organization of American States, and

Whereas the current embargo legislation contravenes the right of other nations to trade with Cuba and to regulate their own chartered corporations, and

Whereas the 35 year economic blockade explicitly now includes a ban on the sale of life-saving medicine and food, directly or indirectly resulting in the deaths of many children, mothers, the elderly and others, and

Whereas this embargo or economic blockade was condemned by

the UN General Assembly in 1992,1993, 1994 and 1995, but it has recently been expanded and intensified;

The IADL condemns this illegal economic blockade, and calls upon its members and affiliates to sponsor discussion in each country on whether this blockade constitutes a crime against Humanity and how to compensate the people and economic entities who suffer as a result of it.

Puerto Rico, Panama, and the Maldive Islands

Lawyers from five continents gather in Capetown, South Africa to ask the UN committee for Decolonization to recommend to the General Assembly that they request from the International Court of Justice an opinion defining the legal status of Puerto Rico under international law;

Reaffirming the right of the Puerto Rican people to self determination and independence, in accordance with Resolution 154 (XV) of the UN General Assembly;

They also urge the Congress of the US to fulfill the commitments set forth in the "Torrigos-Carter" agreements on the Panama Channel by evacuating their military bases in Panama; and they further

Reaffirm the right of Argentina to the Maldive islands.

Antilles

Lawyers from five continents affirm solidarity with the national liberation struggle of the peoples of Martinique, Guadeloupe and French Guyana; and

Ask that they be included as registered territories on the UN List of non-autonomous territories that should be decolonized; and

Urge France to respect the inalienable right of the peoples of the Antilles to self determination in accordance with international law.

Palestine

Recalling the various resolutions of the IADL on the Palestine question and the militant support which it has given to the Palestinian people on their struggle under the leadership of the Palestine Liberation Organization for Self Determination and the achievement of their own state on the Palestinian territories with Jerusalem as its Capital; and

Recalling Security Council Resolutions 242 and 338 which declare the Palestinian and Arab territories as Occupied Territories and calls for the withdrawal of Israeli Forces from them; and

Observing with concern the ongoing Israeli Policy including the usurpation of land, creation of new settlements, enlargement of other settlements, building new quarters in Jerusalem, repression against the Palestinian people by blockade of Gaza and the West Bank, asks the Israeli Government to stop these measures at once; and

Believing that these policies endanger the peace process as a whole and will give rise to fundamentalism in Israel and in the occupied territories, and even in the whole region.

We therefore, urge the peace process be continued by implementing all that was agreed upon in the first stage of the negotiations at once, specially the redeployment of the Israeli forces from the city of Hebron, the opening of secure roads between Gaza and the West Bank, the transference of the entrances to and from Jordan and Egypt to the Palestinians, and to freeing all prisoners in Israel prisons.

The fulfillment of these terms, will enable the negotiations the second stage on the refugee problem and, the settlement of the status of Jerusalem and the frontiers. The settlement of these problems will pave the road for the establishment of the Palestinian state with Jerusalem as its capital.

We call for the commencement of negotiations on the Syrian track and the Lebanese track to reach an agreement for the evacuation of the Golan Heights, and southern Lebanon so that peace will prevail in the region for all states and for all peoples, and to that, terrorism will end for all parties everywhere.

We call on the United States and all other countries of the world to use their influence and relations with all parties to reach a just and durable peaceful settlement in the region.

We call upon the lawyers of the world to support these objectives and to use their influence in their respective countries.

IADL resolves to send to Gaza and the West Bank fact finding mission as soon as possible.

Somalia

In view of the gravity of the crimes against humanity with regards to Somalia, lawyers from five continents request all IADL members to recognize that the Somalia situation requiring urgent action; and

Resolve to contact the Commission on Human Rights, EC Commission, Governments and other international organizations about the genocides, mass murders, mass rapes and massive destructions of public and private properties in Somalia (especially in the capital of Mogadisho) since 1990; and further urge

IADL to organize and send joint commissions including representatives from IADL, the UN and EC to investigate these crimes in Somalia by establishing the facts, through interviews with survivors of mass killings, victims and relatives, from which a report should be prepared.

Resolution on the Lockerbie Affair
And Sanctions Against Libya

This XIV General Assembly of the International Association of Democratic Lawyers condemns the sanctions imposed on Libya pursuant to United Nations Security Council Resolutions 748(1992) and 883(1993).

We express our dismay and deep concern at the continued suffering and loss of life caused the Libyan people, and the loss and damage caused to the economies of Libya and its neighbors by the imposition of these unlawful sanctions.

At the same time, we condemn the criminal actions of the person or persons who planted a bomb on Pan American flight 103, and caused an explosion on 21 December 1988 which destroyed the aircraft with extensive loss of life in the air and on the ground. We express our profound condolences to the family and friends of those who were killed. Thos responsible must be brought to justice. We hold that present measures taken against Libya have the effect of obstructing the course of justice.

Furthermore, the international rule of law is threatened in at least three respects by the action of the Security Council and certain of its permanent members:

(1) The United States and United Kingdom have unlawfully and hypocritically applied and continue to apply pressure on Libya to give up two of its nationals for trial in Scotland despite the fact that such extradition is prohibited by Libyan law, despite the fact that Article 7 of the 1971 Montreal Convention requires Libya to prosecute the persons accused in the absence of an extradition treaty, and despite the fact that Libya has sought strenuously to comply with its obligations under international law.

(2) The United States and United Kingdom have abused their position on the Security Council by recuring decisions which pre-empt the deliberations of the International Court of Justice on the case brought by Libya under the Montreal Convention, and by imposing sanctions. In particular, they have procured a Security Council determination that there is a breach of or threat to international peace and security, as a condition precedent to mandatory Chapter VII action including the imposition of sanctions, when no such threat or breach exists.

(3) The United Kingdom has continued to insist that the accused persons stand trial in Scotland despite the fact that there is no credible evidence against them, and despite the fact that there can be no guarantee of a fair trial for them in the United Kingdom, given the many instances of miscarriage of justice and conviction and imprisonment of innocent persons there, particularly in cases of alleged terrorist activity. Furthermore, the United States and United Kingdom have effectively prejudged the issue by arranging for Security Council demands, in Resolution 731(1992), that Libya pay damages for its alleged involvement in the destruction of Flight 103.

We welcome Libya's compliance with its obligations under the Montreal Convention and with all the lawful requirements of Resolution 731, and congratulate Libya on offering to amend its legislation to permit the accused persons to stand trial before an independent tribunal, or before a Scottish judge under Scottish law, providing such trial takes place outside the United Kingdom, for example, at The Hague.

The IADL therefore resolves:

(1) To call on the Security Council forthwith to rescind its decisions imposing sanctions on Libya, and to give effect to full and appropriate compensation to Libya and other states adversely affected by these sanctions.

(2) To call on all democratic lawyers to publicise the truth of the Lockerbie affair, and to condemn the actions of the Security Council, the United States and United Kingdom.

(3) To promote the democratic reform of the United Nations, and in particular measures to ensure that the Security Council acts in accordance with the purposes of the Charter of the United Nations, and in accordance with the rule of law.

Sudan

Since the military coup d'etat by the National Islamic Front which took place in 1989, the situation in Sudan continues to deteriorate. Gross and persistent violations of human rights have led to a real humanitarian disaster.

The IADL has followed the development of the situation in Sudan for many years, and has already intervened with the authorities on fourteen occasions in relation to many specific cases.

The IADL condemns the grave human rights violations perpetrated by the Khartoum regime, especially the widespread resort to torture, arbitrary detention of suspected opponents, and, in particular, of lawyers, trade unionists, and political figures in "ghost houses", as well as the harassment of their families, and the persecution of women.

The IADL also condemns the total absence of the rule of law and the dissolution of the legitimate Sundanese Bar Association, and of professional and trade unions.

The IADL is gravely concerned about repeated interference with the independence of the judiciary, arrests and dismissals of judges, the destruction of the secular independent judiciary and its replacement by a judiciary controlled by fundamentalists who support the regime.

The IADL further expresses its deepest concern at the escalation of the war in the South and the attempt to turn it into a religious and "holy" war, leading to "ethnic cleansing", to the forcible enrollment in the

Islamic militia of children under fifteen in the North, and to many massacres and disappearances in the South, which have led to the death and displacement of thousands of civilians all over the country.
The IADL recalls the importance of the struggle for freedom, democracy and peace, and for the independence of the judiciary, the fight for hman rights in Sudan, and the rule of law.

The IADL calls for the restoration of a democratic, free and independent Sudan, and for its national unity in peace and dignity.

UN MEMBERSHIP FEES

Lawyers from five continents have been shocked to learn that the membership of 39 African States at the United Nations is endangered because of their failure to pay their fees.

Considering the economic difficulties of African countries and that the most developed nations, who draw the United Nations into expensive and questionable actions, still delay their own large payments;

Therefore IADL protests any measure which endangers the rights of the UN membership of small countries would infringe upon both the principle of equality between small and large nations and the universality of the United Nations.

Korea

Considering the situation imposed on the Korean people by half a century of partition of their land, and the challenge to the rights of the peoples to sovereignty and to international security and peace; and considering the existence of two different systems in North and South; and the agreement of 15 December 1991 about reconciliation, non-aggression, cooperation and exchanges between North and South;

Appreciating that favorable conditions are created for a process of reunification, possibly through a confederation, the IADL supports such a process and supports the demand of Korean lawyers that the Japanese authorities publish apologies, and provide reparations for the Korean "comfort women" to the Japanese soldiers.

Germany

Whereas thousands of public officers were dismissed in Federal Germany after investigations ordered by the authorities of the Republic in 1972 about their "loyalty".

Considering the decision of the General Assembly of 10 June 1987 that this practice violates rule 111 forbidding discrimination for political opinions and the similar position of the European Court of Human Rights of 26 September 1995;

Whereas, since the 5 October 1990, after the treaty of reunification, thousands of dismissals have occurred against peoples made guilty by having been in accordance with the legal, social and political principles of the former GDR, then an internationally recognized sovereign state, as numerous leaders of this former GDR are penally prosecuted as guilty of having used, before unification, the powers of their function, in conformity with the law of their state.

The General Assembly of IADL reaffirms that these acts already condemned by a former IADL Congress, are violations of Articles 3,12,35 § 2 of the Federal Constitution, of the Treaty of unification of the 3 October 1990, of Articles II § 2, 19, 21 § 1 and 2 and the Univeral Declaration of Human Rights and urges the German Federal Republic to put an end to this discriminations and to repair the damages created.

Sahara

Since the authorities of Morocco, during militiary actions in the western Sahara, have captured men and women, soldiers and civilians and jailed them in camps and prisons about whom for many years no news can be obtained about these people;

The General Assembly condemns this violation of international agreements and urges Morocco's authorities to respond to the families and international organizations requesting information on these disappeared persons.

INDIVIDUAL CASES

Veronique Akobe

Lawyers meeting in Capetown, South Africa call the attention of President Jacques Chirac to the situation of Veronique AKOBE, citizen of the Ivory Coast, domestic employee, jailed in Rennes (France) under a sentence of 20 years emprisonment for murder and violence against her employer and his son.

Considering that AKOBE like Sarah Balabagan recently sentenced in Abu Dhabi, claims the ignominy of rape and violence she suffered from her employers;

The General Assembly urge the Highest French Authorities to use their power of remission and pardon.

Mumia Abu Jamal

Lawyers meeting in Capetown, South Africa express their deep concern on the situation of Mumia Abu Jamal, African American writer and honorary Vice President of the National Lawyers Guild, sentenced to death for the murder of a policeman during a riot in Philadelphia, Pennsylvania;

Since during a hearing in 1995 for suspension of the execution, it became clear that Abu Jamal was sentenced for a murder committed with a gun which was not in his possession; that this fact was concealed by the prosecution from the defense and that he was selected for prosecution only because he was a writer engaging in political and anti-racist activities;

Therefore IADL seeks the reversal of his death sentence, and seeks the liberation of Abu Jamal and urges all lawyers to express this demand to President Clinton and to US embassies in each country.

MARKET ECONOMY, DEHUMANIZATION AND POLITICAL DOMINANCE: THE CASE OF ARGENTINA

by
Liliana Beatriz Costante, Argentina[15]

INTRODUCTION

I was taught that to know the law is nothing if you don't know the people for whom law was created. At the end of the millenium, I sincerely question myself about my involvement as a lawyer in a broken society. What are the main contributions a democratic lawyer can make in a world connected by the rules of free market politics? How can one be a part of the solution and not of the problem? These questions cast a shadow upon my spirit. As an exorcism against them, I wrote this summary of my ideas and, I share them with you.

Neo-liberalism refers to the view that unemployment and marginal are as merely undesirable consequences of progress and of the re-shaping of the State. I intend to prove that the psychological and social consequences resulting from the loss of employment that is a structural by-product of economic adjustment policies is a reality intended to achieve even more effective political dominance.

A DESCRIPTION OF THE PHENOMENON IN ARGENTINA

In the Argentine Republic, recent labor legislation has destroyed the social gains acquired in the past in favour of workers, by the reduction of the so-called "labour costs" of the companies. The indicator of labour demand fell 44% in January 1996 with respect to the available jobs in the same month in 1995, a year during which Argentina surpassed the 19% unemployment rate of its active population, which means over 3,000,000 jobless people projected they affect many more in the family nucleus.

Apart from the plight of non-recorded workers, so—called "workers in black," for which companies do not pay any social security contribution or other social service contribution, and who can be

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dismissed at any time without compensation since, under the law, these workers and the jobs they perform do not formally exist. Throughout the country, as of March 1996, there are more than three million people in this predicament.

The re-shaping of the State accompanied by the economic technocracy installs the State above its people, and at the expense of those who, it is presumed, at some indeterminate time in the future, may be able to enjoy the benefits of this transformation. Workers, who suffer these threats to their quality of life, must accept such conditions so as not to lose their jobs and their meager salaries. Under pressure to increase production, just having a job seems an achievement in an extremely competitive and cruel market in which there are few if any available jobs.

Thus, a perverse cycle is created: avoidance of risk that erodes personal self-esteem generates a weakening of resistance to these changes. This weakness permits these threats to workers rights continue and to become entrenched in society.

EXAMINING THE CONSEQUENCES

A human being is a unity of elements as is the labour environment. The conditions of the working environment, interact with individual's health and is transformed into potential risk factors. International norms to protect the rights of people, fall in the face of the national reality in which market economy rules, helplessness is perceived in the general environment and reproduces itself in the workplace, altering the modes of work, of salary, of benefits, the intensity of noise, of termperature, vibrations and the exposure to toxic substances, threatening workers' physical and emotional health.

One immediate physiological response is the acceleration of the cardiac rhythm, diminishing the capacity of workers to endure the requirements of their jobs. Thus, work and life itself become more risky and burdensome. In addition, vertebral and osteo-articular problems are caused by the postural requirements caused by speedups and demands for increased productivity.

Night-shift workers adopt a low-level pattern of sleep and as their work-load increases, passes from physiological fatigue; correctable by rest to chronic fatigue, very difficult to reverse. The social lives of such workers are affected and their chance for social interaction with family and friends is seriously damaged.

ALIENATION: DISEASES THAT SUIT THE SYSTEM

Characteristics of the *economic cycle of disease:* diminished working capacity leads to lack of production, leads to diseases affected by under feeding, bad housing conditions, little or no education.

The affects of an overload of work is not only manifest in an incapacity to fulfill production norms but is seen in psychological symptoms which cause states of chronic fatigue or nervous depression. The loss of physical strength (ASTHENIA from the Greek: a=deprived; sthenos: strength) and the loss of psychological strength (psicoasthenia) modifies character and is manifested by a passive attitude by the individual in the face of life and work changes. It is alienation, as understood in the etymological sense of "separation," from one's life.

CONCLUSIONS

The population between 18 and 60 years of age faced by employment, underemployment, temporary employment or unemployment, all causing unsafe and unhealthy environmental conditions as well as job insecurity is being affected by a weakening that paralyzes their capacity for action and interactions which translates into lack of expectations or hopes for change, social and personal. The affected persons find themselves minimized and stagnating in this minimization. Their assertive capacities are diluted. As a corollary of this depressed state, workers detach themselves from political life. In minimal democracies like Argentina, this lack of participation is not only used as a justification for the concentration of power in the Executive but also to legitimate political decisions that affect workers even more deeply. These decisions stimulate among the people, xenophobia, sexism and fundamentalism leading to repressive responses by the State causing even more drastic social control.

These workers, who have lost their places in society by objective conditions or employment whether permanent, precarious or no jobs are experiencing psychic violence against themselves as failures while assuming a state of alienation which prevents decision taking. By these so-called economic adjustment policies, public services become privatized; the successful grow even more successful. Structural adjustment policies of today have been adapted by capitalism to justify the intensification of the system of exploitation of workers by those in power. This is the condition I call "dehumanization."

At the end of the millenium, lawyers and jurists, like us, have become part of this phenomenon. Our great challenge is not only to describe it but to involve ourselves in the community to join theory and praxis in favour of humanity. If our societies speak and dominate on behalf of tecnocracy, those who still believe in the strength of the human spirit, those who still believe in solidarity, ought to involve themselves everywhere to repair the social fractures between workers and intellectuals. If not, our words will be just that: mere words. If not, we will be listening to ourselves while the population remains in isolation, desolation and hunger under the free rules of the free market imposed by "free" governments. I still believe that the only way to begin the restoration is to live and die struggling against any political power that sustains dehumanization. In this way, perhaps people will remain sacred for each other.

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GLOBALIZATION AND DEMOCRACY

by

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This paper discusses globalization as one of the chief economic phenomena at the end of the millennium. From the perspective of the craving which began in the eighties, of people throughout the world for democratic societies we analyze the possibility of "democracies" to exist as the crisis in the welfare state fails to respond to the ever-growing needs of the pauperized masses.

A primary assumption of this analysis is the fact that since ancient Greece, democracy has been characterized by exclusion. Democracy is an "unfinished" process by definition. During the eighteenth and nineteenth centuries, liberal political democracy has been the instrumentality which supported the conquest by the European and North American bourgeoisies of feudal monarchies and the rural masses (De Brie, 1994). Making a clean sweep of structures, it tried to install a community of free male property owners possessing natural and unalienable rights guaranteed by a State power created by law and citizens suffrage which for its part was in charge of individual inhabitants safety, by arbitrating conflicts in their interests.

Starting from this neo-liberal conception whose articulated ideals are freedom, equality, solidarity and justice for those deemed worthy of such rights, there have been numerous struggle waged by peoples excluded from democratic rights to achieve the political, social, cultural and economic rights which lend sense and dignity to the quality of life.

At this point, we shall consider the fundamental axes of democracy as it is practiced in the main centres of power at the end of this century. Democracy defines the rules of a society through the deliberate actions of the citizens. It is fragile and susceptible to constant interactions which must permanently be re-defined among its three major components: the individual, society and the political system.

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It neither has a perfect shape, nor a definite one. Its' contents are permanently unstable. M. Michel Foucault, in his lectures at the College de France, liked to reiterate: "Truth is not absolute, or stable or unequivocal, truth has a history." Nevertheless, at present, liberal democracy is given as the condition for the development of the modern State (Michel Camdesus, FMI, 1992).

Under this liberal perception, participation implies power, political power, according to Sartori. Political power is the characteristic element of the democratic regime, resolved in the individual freedoms that the citizens have asserted and seized from the absolutist State.

Such vindication goes further than the right to express one's own opinion, to gather and to associate in order to exert an influence on one's country's politics. It includes the right to elect and be elected. Such a state is democratic only if the political power and those who exercise it enjoy the consensus of the majority of the citizens: a provisional consensus which is renewed at regular intervals, expressed through plural elections by equal and secret vote that will guarantee free expression to the minorities.

In addition, separation of powers, submission to law and legitimacy seem to be pillars of Western democracy, inspired by faith in individual initiative and in the conception of the State as the mechanism which regulates conflicts.

In the frame of this development (Bobbio, 1993) popular representation must be considered leading to the gradual broadening of the right to vote, the increase in the political organs composed of elected representatives, extended to local authorities; offer the electorate real alternatives to solve problems and concrete possibilities of choosing among several of them. For these conditions to be realized, the electorate must enjoy guaranteed rights to freedom of expression of opinion, to meet, to associate, to speak and publish. These rights on which the liberal state was born and developed are not only a historical pre-condition of the democratic State. Certain freedoms are needed for the correct exercise of democratic power, thereby guaranteeing the existence and continuation of these freedoms.

Presently, however serious attacks are being launched against existing democracies, which must be solved if democracy is not to become a luxury available only to over-fed peoples but a vital possibility for all humankind.

In contemporary society, at the end of the century (Macpherson 1988) it is a complex market mechanism which holds the future of the possibilities of governments—and the lives of its people. Social-economic conditions are reflected in hard contradictions, including fiscal deficits and recession, growing inflation and unemployment and a regressive income-distribution, especially in under-developed countries; a world in which 83% of the GNP goes into the hands of 20% of the planet's population.

All the accumulated experience of the last century has taught that political democracy cannot develop if it is not accompanied by economic and social democracy and permanent correction of the inequalities engendered by the "laws of the market". If power is concentrated more and more in the limited centres of power that control the world's fluxes of economy and the available capital, then the possibility of democracy is subordinate to these objective conditions.

Therefore its legitimacy is doubtful. These Western models appear outdated as soon as their electoral victories have been proclaimed. Advanced industrial technology and a market-economy are not in themselves proofs of democracy. The increasing similarity and performance of unmet human needs, provides the middle-classes social control over the excluded or the underclass, in the words of John Kenneth Galbraith.

However, the messengers of neo-liberalism, the beneficiaries of globalization and the world market proclaim the end of inequalities by fiat and recommend shock-therapy, like the liquidation of the welfare state, as consumer goods multiply and modernization and the financial, technological and industrial power of the transnational elites increase. The "social costs" of the programmes of the Welfare State are decried as uneconomical and social safety nets are destroyed resulting in the progressive destruction of the economic security of workers around the world.

In the name of equity, the financial and industrial elite reject the involvement of the State in their business. Without any limits to contain it, businesses advertise their intent to ensure "everyone's prosperity and happiness." However, the results are a profound and growing inequality, unprecedented increases in unemployment, in some countries higher than that recorded during the crisis of the '30s, and ever increasing number of people excluded from the benefits of the societies.

The independence of these corporate interests from state regulation has led to corruption, which from being a rarity has spread over the globe. Allegations of embezzlement, extortion, and illegal fund-diversion are routine. Those principles that were the finest expression of democracy have been put aside: the will to protect the weak, and to guarantee individual rights most easily hurt by the economic machinery. Rules which once imposed procedures, fixed limits and conditions of the workplace protected the rights of workers and defined the functions of business have been rescinded. The "logic of productivity" relates profits to lay-offs. The capital crisis of the world economy after the decades 1955-1975 has modified the rights of labour; unemployment goes hand-in-hand with temporary and part-time employment, not only in Latin America but throughout the industrialized world and has diminished trade union activity and power.

The State at the end of this century is being forced to reduce its spending due to uncontrolled increases of national debts. Thus, the management-mode of government discourse is advanced to support cutbacks of efficiency, competence, modernity, excellence become strategies doomed to failure. It also exacerbates economic inequalities, causing social convulsions, e.g., Paris, December 1995. Meanwhile, the purchasing-power of the majority, is depressed resulting in less demand. Social justice, says Galbraith, is not only just, but it also fulfills a real economic function. The quality of life falls when jobs are lost, even by those who are paid the lowest. What were called "social gains" are swept away by the necessity of "balancing accounts." In a democracy the people must not only aspire to social promotion, but must also cast an eye on the less favoured.

Unemployment and salary cuts are not only socially unfair, but they also curb and paralyse the economic machinery. Even though companies may benefit by "labor flexibility," reductions of social norms and an increase in free trading.

This "atrophy of political imagination" (Castoriades, 1995) supports the desire of the elites to avoid controls. Globalization has proceeded faster as the chances of acting with impunity has increased (Chesnais, 1995). Some of the elements which have increased globalization, are deregulation, loss of controls by national financial banks, interest rates, which have affected the international capital markets directly and deeply.

The vulnerability of small enterprises has been revealed while

the impact of globalization on consumption has resulted in unemployment as the first consequence of this growth even in the best developed countries.

The depressing influence of these practices has spread internationally; perhaps the most important impact is the "crisis of the development model": the model of Western capitalist development which is supposed to be generalized to all countries. The development stages which should have been accomplished (Rostov, 1960) were accompanied in 1955-1975 by huge investments in the Third World countries, together with credits and several forms of aid. But this hasty ill-considered race towards the "First World" has failed for reasons discussed above. The model has suffered serious reversals: some countries have remained raw-material producers; in others, commercial capital has dried up; still others are unable to satisfy their enormous internal needs.

As a result, economic development begun during 1955-1975, has slowed and many countries face a time of progressive poverty, an ever-growing foreign debt and a halt to their development. These emergent societies cannot compete with the production of developed countries.

It is nearly ten years since the exploitation of energy, water supplies, and the pollution of the air, and abuse of non-renewable, or very difficult to renew, resources have become recognized as urgent global problems. The development model of the OECD countries is no longer fit for export (Chesnais, 1994). Such growth is incompatible with the chances for survival of the planet. The new technologies, production methods, consumption and transportation, fundamentally harm the world ecological system. The fundamentals of the development mode of monopoly capitalism—ownership, market, profits, natural resources, the distribution of work and incomes establish the social, political, and geographical consequences (Chesnais 1994).

Even if development in OECD countries could be stablized for a short and limited time, the beneficiaries would remain limited to a small group of rich countries.

Nothing prevents the design of a new model of development, based on life and consumption modes utterly different from the ones that historically have been followed. If the technicians were to decide that change is possible, what would the sociological and legal consequences be, bearing in mind that those models are tied to a very particular form of individualism? What if "the final end of every social transformation is the

happiness of the individual and not the realization of ineluctable economic laws"[17]? One of the key assumptions that must be rebutted is that social spending is an inefficient use of scarce resources.

Nothing must prevent us from believing that the model can be changed and that the people will undertake to stop the devastating advance of the "invisible hand" of market forces because we have not reached "the end of History".

CONCLUSION

Social spending, as public a policy for development and growth in the welfare state, has been dismantled while current economic practices of globalization and the search for popular democracy continue.

A few short years after the return to the rigid "laws" of the market, the drop in the quality of life has fallen so low that even first world governments must put new policies in place to reverse or mitigate the social and economic conditions. The socio-political blast suffered by France in 1995 was followed by several attempts at breaking the impasse in the Americas. Recently J. Wolfensohn, president of the World Bank, observed that attention to social problems will be the very center of his policy. As "almost half of the population of the hemisphere lives in poverty, Latin America is today the area of greatest inequality in the world".[18]

The Importance of Education: President Iglesiad discussed the deterioration of the educational system at the BID meeting in Buenos Aires, (March 25-27,1996), and the role which popular culture and technology has played in the process through out the nations of the Americas.

Industrial activity: The increase in the importation of goods is leading industrial activity downhill. For instance, in February 1996, Argentina dropped 6.64% below the same level in 1995, culminating in eight months of successive drops confirming the declining trend of the

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[17]Raymond Queneau, 1928, reprinted by Gallimard, Paris 1993: Traité des vertus Democratiques.

[18]Kliksberg, Clarion 10-3-96.

level of global activity[19]. To this end, the Catholic Church, of great influence in Latin America, has charged the authorities to seek a "more humane economy," stating in its Social Pastoral, that there must be a "greater incursion into the social problems than into strictly socio-economic" and that it is urgent to create flexibility and to humanize the system with a "more equitable distribution of riches," to those with less resources "who already have meagre incomes which do not even cover their basic needs."[20]

Deregulation in England which eliminated the ban on feeding bovines industrial food, infected with a pathology specific to bovines and pigs, is a clear example of contemporary problems arising from deregulation. The seriousness of this problem was known to the Prime Minister from scientists' reports although she refused to ban that type of feed.[21]

Even when a democracy appears robust and appears to have strong economic development, the empirical data, that is, reality, especially in Latin America, supports the idea that neither civilized society, nor democracy, nor capitalism, can survive long without social development.

When will governments admit that without social development there can be no satisfactory economy and real democracy?

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[19]La Nacion, (March 22, 1996).

[20]La Nacion, (March 19, 1996, pp. 1, 9).

[21]La Nacion, (March 22, 1996, p. 3).

THE RIGHT TO WELFARE

by

Dr. Gladys Mackinson, Argentina[22]

INTRODUCTION

If health is defined as the balanced state of ones bio-psycho-social development, the right to it should be considered a basic human and civil right. To understand the right to health in this integral sense means that the population should have access not only to medical diagnosis and treatment but also to adequate urban planning and maintenance, to the satisfaction of unsatisfied basic needs, to health information, education and justice. The comparative differences in the quality of the health services offered throughout the world correspond to the ideological, historical, financial and epidemiological diversities of various social and national groups. The role of lawyers should be to serve as the agents that defend the rights to health of all those in need, who are the ones that struggle hardest for their places in society.

THE RIGHT TO WELFARE

The right to health and welfare are not only elements of the right to development but also of the rights to human and civil rights.

The many differences between various health care services can be found in the network of historical, financial, epidemiological and ideological variables that make nations different.[23]

THE CRUELTY OF STATISTICS

The World Health Organisation reports that 140 million of the 440 million inhabitants of Latin America and the Caribbean have no

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[22]University of Buenos Aires, Argentina School of Law and Social Sciences, Institute of Legal and Social Research.

[23]Medina Lois Ernesto: "Derecho a la salud y los diferentes modos de la medicina." Commentary on the Chilean situation in *Problemas contemporáneos en bioética.* Lavados Manuel et. al. (Universidad Católica de Chile, 1990).

access to medical attention. Life expectancy at birth varies between 72 and 74 years old in the developed countries but does not surpass 55 years old in the underdeveloped world and is even less than 45 in many African countries. At the beginning of the eighties, UNICEF announced that 12 million out of 122 million children born in the eighties (i.e.: 1 out of 10) died before their first birthdays. According to these data from the World Health Organisation, in the poorest countries, approximately 200 out of 1000 children born alive die before their first birthday, another 100 die before their fifth birthday and it is estimated that only 5 of them will reach the age of forty.

Estimates from the decade of the eighties show that in developed countries, $244 is invested in health care per capita in the annual budget, in contrast to the $1.7 invested on the average in the poorest nations.

As long as health is not considered a fundamental right that includes the satisfaction of unsatisfied basic needs and conditions that allow for bio-psycho-social equilibrium, it cannot be said that the right to welfare has been enforced.[24]

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[24]Gonzáles Wood, Herán: "La calidad de vida en el mundo desarrollado" in *Bioética y derechos humanos.* Ed. UNAM, (Mécxico, 1992, p. 29 et seq). He quotes famine, ignorance, poverty and unhealthiness among others as conditions ehich lead to unhealthy populations.

The Case of Argentina

In Argentina, the contemporary view of health considers it as a whole and not just as the absence of sickness. This view is intimately connected conceptually to assumptions about the quality of life, understood as the maximum human services support possible[25].

Even if it is difficult to come to a consensus about the elements included in the "quality of life", it is by making reference to it that doctors and patients find a basis for asserting the dignity of death. It is time for lawyers to become involved in this discussion.[26] More than the difficulty of defining the quality of life, is the decision as to who should judge it: the patient, his family group, the doctor or the government?[27] Currently, there is serious disproportion in health conditions of the Argentine population concerning not only the quantity but also in the quality of the services that they receive: one large group underconsumes health services and a small one is overconsumpes.

This imbalance in domestic development is reflected in such data as the fact that a small social group enjoys a health consuming economy similar to that of the first world: they consume more medicine than they need (the problem of over prescription). They receive more diagnostic check-ups than are necessary (using the maximum amount of apparatus); and they go to the doctor more often than required.[28]

At the other end of the economic scale, large social groups suffer a process of exclusion as a consequence of the neoliberal economic plans of adjustment: social services reduce their coverage, public hospitals lose

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[25]Vidal, Marciano: *Bioética. Estudios de bioética racional.* Tecnos, 2° de. Madrid, 1994, p. 18. Informe Argentino sobre desarrollo humano. 1995. Honorable Senado de la Nacion. (Buenos Aires 1995, p. 130, 163).

[26]Nino, Luis: "Eutanasia. Morir con dignidad. Consecuencias juridico-penales." Ed. Universidad. (Buenos Aires, 1994).

[27]Bernard Lo: "Decisiones clínicas de limitación de tratamiento," quoted by Serani, A. y Lavados, M. in "Etica clínica." Ed. Universidad Católica de Chile. (Santiago de Chile, 1993).

[28]Similar observations can be made in connection to the access these same groups have to justice: more private counselling as well with lawyers, while the indigent accused have fewer legal interviews.

budgets and the people have to use their own resources to buy medicine. The public health services are so overcrowded that their capacity to provide professional attention is limited because they are obliged to cover the needs of an ever-growing sector of the population due to the growth of unemployment, while the unemployed are excluded all together from the social welfare state.

The distribution of health problems follows the curve of the levels of economic development in Argentina. As an example, the most frequent pathologies in the northwest of Argentina are related to malnutrition or deficiencies in sanitary facilities and in the water supplies. Some rivers are contaminated with entero-bacteria and organic matter. Those waters are very often used to irrigate food plants.[29]

Access to Justice and the Right to Welfare

Bates believes that social welfare becomes affected if the great majority of the people are mistaken about their rights and obligations and about how the legal system and its main agents should work.[30] Access to justice can be defined, in general terms, as equality of opportunities to have access to the institutions, organisms and government powers that generate, apply and interpret the law, rules and regulations with special impact on the economic and social welfare of the people

Consequently, in order to be able to enforce a real right to health, access to justice must be guaranteed. In any case, if we refer to the ideal role of lawyers, this activity is closely related to the defense of the right to health as a human right in the sense discussed above: as a legal condition with social efficacy.[31]

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[29]Idem, p. 132.

[30]Bates, Luis,: "Acceso a la justicia y las personas de escasos recursos" in *El poder judicial en la encrucijada.* Estudios acerca de la politica judicial in Chile. (Chile, 1993).

[31]Bidart Campos would say "with sociological effect." Bidart Campos, Germán: Tratado elemental de derecho constitucional argentino. Tomo IV. Socologia del derecho constitucional. (Buenos Aires, 1992).

THE ROLES OF LAWYERS IN GAINING ACCESS TO HEALTH SERVICES AND ENVIRONMENTS

A legal definition of the right to health is useful when analyzing the social conditions of patients and the overt or covert discrimination that they suffer because of temporary or chronic conditions.

At the end of this century, the manipulation of the mass media generates hedonistic pleasures that include the consideration of youth as a godlike state and the lack of nutrition, in certain social groups, as a means to achieve the beauty ideal presented in the media. At the same time, there is parallel post-mortem discrimination endured by the families of patients whose deaths have been caused by serious illnesses, such as cancer or AIDS, and the temporary loss of the civil rights of patients in hospitals.

The right to health implies the possibility of having access to diagnosis and preventive or corrective treatment. It also should mean adequate urban planning that enables the common use and enjoyment of public places by the handicapped and the elderly. This requires effective legal control.

The adequate planning for the security of basic needs, access to education, information and justice, the protection of maternity and the nursing period, among other measures of positive action, require the assertion of the law of those who are its agents exercising their roles as health agents.[32]

The consideration of health as a right depends on the specific society involved. The effectiveness of the law can be evaluated according to the adaptation of social behaviour to prescriptive rules. One of the variables is the control that social agents may exert on its fulfillment.

THE RIGHT TO HEALTH: BIOETHICS AND CIVIL ETHICS

In a bioethical discussion about maximum or minimum ethical positions, virtues or principles, there are currently many differences among those coming from diverse professional backgrounds, including

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[32]In the case of pandemics such as AIDS, the distance between the actual and the ideal role of lawyers is clearly seen.

lawyers entering this emerging scientific and legal area.[33]

The right to health,[34] is debated, among others, independently of the technology and the dehumanisation of medical practices. The human being must be considered as a whole and not as an ailing liver, kidney, foot or hand requiring protection and treatment. The importance of this distinction can be seen in the case of genocide where the criminal not only needs to be convinced of the dehumanisation of the victim, but, at the same time, he needs to convince others also. From a conceptual point of view, civil ethics can be understood as "the minimum common morals of a pluralistic and lay society."[35] This implies prophylactic legal protection, moving the law far away from its traditional definition as merely reactive.[36]

The holistic view of health leads directly to the protection of all women and men as human beings, because they are members belonging to a culture, without regard to their religious beliefs, political affiliations, gender, trade union activity, social position, age or race or ethnicity. These are the assumptions upo which all human rights theory rely. Any modification of this view justifies racist and xenophobic behaviour and practices.

The absolute importance of the dignity of the person and the impact of some medical practices upon the exercise of human rights have

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[33]Macintyre, Alastair: Tres versiones rivales de la ética. Rialp, Madrid, 1992. Potter, V.R.: Bioethics: The Science of Survival. Pers. Biol. and Med., N°14, 1970, p. 127/153; and Bioethics: Bridge to the Future. Prentice Hall, 1971.

[34]Kotow, Miguel H.: Introducción a la bioética. Editorial Universitaria. Santiago de Chile. 1995, p. 131. In opposition to this definition, Kotow believes that this right should not be referred to as the right to welfare or health but as the right to medical attention and health care. According to Kotow, this right has both medical and extra medical aspects (the right to medical attention and the rights to environmental protection, employment retraining, housing and urbanisation, etc.)

[35]Vidal, Marciano, supra, p. 21.

[36]Serrano Ruiz Calderón, José Miguel: Bioética, poder y derecho. Universidad Complutense (Madrid, 1993).

been proscribed by national and international legal regulations.[37]

CONCLUSION

As long as broad sectors of the population, in nations and world-wide, do not have access to justice, information, education and health, we, lawyers, must commit ourselves to using our powers to defend their rights.

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[37]American Declaration of Human Rights and Obligations; Universal Declaration of Human Rights; Convention for the Prevention and Sanction of the Crime of Genocide, International Agreement of Economic, Social and Cultural Rights; International Agreement of Civil and Political Rights; International Convention for the Elimination of all forms of Racial Discrimination; American Convention on Human Rights (Pacto de San Jose de Costa Rica; Convention on the Elimination of all forms of Discrimination against Women; Convention against Torture and other cruel, inhuman or degrading treatment or punishment; Convention about Children's Rights; to name just a few.

A FRESH START FOR AFRICA

by

Ann Pettifor and Angela Wood, England[38]

INTRODUCTION

This report sets out to highlight major issues arising from the indebtedness of the poorest countries of Africa, and calls for substantial debt relief for these countries so that Africa may be given a fresh start.

In outlining these issues we wish to make the following points. International debt differs from personal debt in some important respects. The first is this: in the case of personal debt, domestic law does not permit individuals and companies to descend into the abyss off debt. A line is drawn beneath those debts and the line is called bankruptcy. No such line is drawn in international law. Instead countries are allowed to spiral down into ever deeper indebtedness.

The wave of lending that took place in the 1970s occurred in response to a crisis in the international financial system. As Professor Thirlwall of the University of Kent has argued, *"the whole world community derived a benefit from the debt creation process in the sense that the world economy would have collapsed in the 1970s had international capital flows not taken place from the developed to the developing countries."*[39]

International debts, like personal debts, grow inexorably, thanks to what Keynes called *"the magic of compound interest."* But massive lending to poor countries took place at a time when international interest

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[38]Debt Crisis Network, DCN c/o Christian Aid, P.O. Box 100, London SE1 7RT, England. February 1996.

The Debt Crisis Network is a UK alliance of development and environment agencies, church-based organisations, and individuals working around issues of Third World Debt in respect to both project and policy work. It campaigns in Britain and internationally for the cancellation of up to 100% of the debt owed to western governments.

[39]In private correspondence with Bill Peters of DCN.

rates were low, or even negative, in real terms. It made very good sense to borrow at that time, and borrowing was actively encouraged by the World Bank, the International Monetary Fund (IMF) and major Western governments. However, through the 1980s these rates rose dramatically, to historically high levels—again as a result of forces that had little to do with developments in Africa. Today the poorest people of Africa are straddled with the burden.

Terms of trade have deteriorated because of factors beyond the control of poor countries, too. This means that to earn the same hard currency required for debt repayments, countries have to often increase export volumes dramatically, to maintain the same level of export earnings. The pressure to service debts forces countries to increase their exports, particularly of primary commodities. But the effect of many countries doing so, increases supplies and depresses their prices. Collectively debtor countries end up exporting more and receiving less—a form of forced unpaid labour at the national level.

The desperate poverty of the people of sub-Saharan Africa need not continue in the next century. But it seems certain that Africa's deprivation will remain entrenched unless wealthy creditors are prepared to write off the continent's mounting foreign debt. Africa needs a fresh start.

Ed Mayo, Chair
Debt Crisis Network

ACKNOWLEDGEMENTS

This report was produced with the generous help of David Woodward, an adviser to the Debt Crisis Network, and is based on work he has undertaken for the European Debt and Development Network (Brussels). His paper, *"Sub-Saharan Africa: the need for external resources,"* (1995 unpublished) was presented at a meeting of the Global Coalition on Africa in Maastricht, December, 1995.

Other sources include:

1. **World Bank Debtor Tables.** All figures for 1994 are projected. All figures are taken from the World Bank Debt Tables, 1994;

External finance for developing countries 1994/5. World Bank, Washington, D.C.

2. **IMF—World Economic Outlook**, October, 1995 and World Economic and Financial Surveys.

3. **IMF and World Bank 1995**, February, 1995: *"Multilateral debt of the Heavily Indebted Poor Countries."* Paper prepared jointly by the staffs of the IMF and World Bank, Washington, D.C.

4. **Secretariat for the Analysis of Swedish Development Assistance.**

5. **Overseas Development Administration**—press releases.

6. **Killick, T.,** 1995. *"Solving the multilateral debt problem: reconciling relief with acceptability."* Paper prepared for the Commonwealth Finance Ministers Meeting, Jamaica, 1995.

7. **Sabater, L.E.,** 1995. *"Multilateral debt of least developed countries."* United Nations Conference on Trade and Development.

8. **Sonko, K.N.M.** *"The African debt problem: a holistic perspective for resolution"*—Regis University, Denver and the United Nations Economic Commission for Africa, Addis Ababa, Ethiopia.

SUMMARY OF DEBT CRISIS NETWORKS (DCN) REPORT ON SUB-SAHARAN AFRICA'S (SSA) DEBT

- Poor African governments are transferring wealth to rich creditors. **Since 1984 the poorest countries have paid £96 billion to rich creditors in the North.** The IMF is a major beneficiary of this transfer of wealth. **In 1993 sub-Saharan African governments paid £196 million more to the IMF than they received from it.**

- The wealth transferred to creditors—£9 billion annually over the last three years—is substantially more than the £6 billion which UNICEF estimates is needed for health, nutrition, family planning and education.

•Uganda is at the centre of an AIDS epidemic. **Its government spends only £1.69 per person on health—but £19.00 per person on debt repayments to rich creditors.**

•**Debts are not being repaid.** 54% of the debts were not repaid in 1994. In 1989-91 38% of debts went unpaid. Total arrears now amount to £34 billion.

•**Africa is producing more but receiving less.** African nations achieved **a 50% increase in the volume of exports after 1985.** But these efforts have not led to increased revenues, because of falling prices for exports. As a result countries have had to limit imports. By 1992, **the volume of imports per head was 20% lower in real terms than their level in 1980.**

•If Africa's export prices had kept pace with the rise in import prices from 1980, by 1992 the region could have paid for all its imports from export earnings—without new financing, and the debt would have been 45% lower.

•**In a surreal money-go-round, aid is being diverted from development into debt repayment.**

•Over the period 1990-1993, **57% of gross bilateral loans and grants to Africa were, in effect, diverted to debt service payments—and often went straight back into the coffers of rich creditors.** Of this,

41% (£11 billion) went into servicing commercial creditor's debts;
14% (£3.5 billion) went into paying governments;
2% (£0.5 billion) was diverted to the IMF.

•Only **43% of bilateral financing stayed in the recipient countries.** In addition, it is estimated that **£4.5 billion of donor funds are channelled each year to the soft loan windows of the World Bank and IMF,** which are also largely used to finance debt service payments.

•The report concludes that **the unpayable burden of debt of the poorest countries of Africa must be comprehensively reduced; but stresses that Africa will continue to need aid** to fill the gap between the region's savings—limited by low

income—and the investment it needs to achieve sustainable economic and human development after the major losses caused by the collapse of export revenues and the drain of debt repayments over the last decade.

DEBT AND SAHARAN AFRICA

"For most of Africa the debt burden remains extremely high and the accumulation of arrears continues to raise overall debt burdens, which in much of Sub-Saharan African have reached levels that exceed 400 percent of export earnings. Few countries appear to have any realistic scope for servicing debt burdens of such a magnitude."

The IMF: World Economic Outlook, October, 1995

"Tackling the debt problem is one of the most effective forms of help that can be given to the poorest developing countries. Without it, countries will have no choice but to continue struggling year-in year-out to meet burgeoning debt payments. This consumes precious, scarce resources, which could otherwise be used to give economic growth."

Mrs. Angela Knight MP, British Economic Secretary, Her Majesty's Treasury, September 1995

THE BACKGROUND

THE POOR ARE FINANCING THE RICH

Since 1984, governments of the poorest countries in Africa[40] have transferred £96 ($149.76) billion to rich creditors in the North. This is more than 1.5 times the amount they owed in 1980. The more Africans pay, the more they seem to owe.[41]

Over this period Sub-Saharan governments repaid nearly £10 ($15.6) billion more than they received in the form of new loans from creditors, and a third of this net transfer was to the International Monetary

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[40]Throughout this Report, in referring to Africa, we are referring to the group of countries defined by the World Bank as "sub-Saharan Africa." This does not include South Africa.

[41]All figures quoted in this document are from the latest World Debt Tables for 1994/5. 1994 figures are projected.

Fund.

In 1993 African countries paid £196 ($306.76) million more to the IMF than they received from it.

Between 1990 and 1993 Africa transferred £9 ($14.04) billion annually to its creditors. This is substantially more than the ($9.36) billion which UNICEF estimates as the amount required to meet basic human needs such as health, adequate nutrition, education and family planning.

The World Health Organisation's (1995) Report states that *"recent childhood immunisation gains are now being eroded or even reversed by economic and social conditions."*[42]

In Uganda, which has appalling health statistics and an AIDS epidemic, the government spends a mere £1.69 ($2.64) per person on health care but spends £19 ($29.64) per person on debt repayments each year.[43]

THE DEBT BURDEN

Every many, woman and child in sub-Saharan Africa now owes £261 ($407.16) to rich creditors in the North. That is less than one week's wage for many people in Britain, but more than many Africans earn in a whole year.

The total burden of debt has risen to £135 ($210.6) billion—more than three-quarters of the region's yearly income and two and a half times its export earnings.[44] This makes Africa (relative to its capacity to earn foreign currency to repay its debts) ***the most indebted region in the world.***

Out of 45 countries in sub-Saharan Africa, 28 are defined by the

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[42]World Health Organisation: Annual Report 1995.

[43]From correspondence with Dr. Dorothy Logie, FRCGP, Medical Action for Global Security.

[44]See World Bank Debt Tables 1994-5, Vol. 1, Analysis and Summary Tables.

World Bank as severely indebted, 5 others are highly indebted, and a further 5 are classed as moderately indebted.

In 1994, more than half (54%—£7 ($11) billion) of the debt service due to Africa's creditors went unpaid compared with 38% in 1989-91. Total arrears now amount to £34 ($53) billion. This represents more than a quarter of the total debt.

In 1994, Africa paid £6.4 ($10) billion in debt service charges to its creditors in rich countries. This amounts to £15.40 ($24) per person in a region where average income is a mere £196 ($305) per person per hear.[45]

AFRICA IS PRODUCING MORE BUT RECEIVING LESS

In order to keep pace with debt repayments, governments have increased production of exports—***African nations achieved a 50% increase in the volume of exports after 1985***—and limited the purchase of imports. ***By 1992 imports per head had fallen 20% lower in real terms than their level in 1980.***

But these efforts have been frustrated by falling prices for exports.

If Africa's export prices had kept pace with the rise in import prices from 1980, by 1992 the region could have paid for all of its imports from its export earnings as well as part of its interest payments without any foreign aid or loans.[46]

This loss of purchasing power of exports due to price changes after 1980 amounted to around £9.5-10 ($14.5-15) billion in 1992 alone. That is roughly double the net transfer of resources (loans, aid minus debt servicing) to Africa in that year. The cumulative loss on Africa's trade between 1980 and 1992 is in the order of £45-50 ($70-75) billion.[47]

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[45]See African Development Indicators, 1994-5, page 34.

[46]Woodward, D., 1995, "*Sub-Saharan Africa: The Need For External Resources,*" EURODAD, Brussels. (Unpublished). All figures in this document exclude Nigeria.

[47]Woodward, as above.

If prices had remained unchanged the total outstanding debt would be 45% lower than it is today.[48]

If economic reforms are to help stimulate recovery, African countries must be able to purchase the imports necessary to increase production, income and exports. ***To restore imports per head to their 1980 level in real terms will require an additional £10 ($15.6) billion in aid and loans.***

THE SURREAL MONEY-GO-ROUND

The IMF argues that the poorest countries of Africa do not warrant substantial debt relief because grants from bilateral donors have risen to offset the negative net debt flows.

This is true. Grants have indeed risen from £3.6 ($5.6) billion in 1980 to £12.1 ($19.03) billion in 1993. Overall there have been positive flows of finance to SSA throughout the decade. This leads the IMF to argue that, in terms of liquidity, there is no case for debt relief.

But the IMF is, in effect, saying that there is no problem because aid donors such as the United States, Britain, Scandinavia and Japan provide funds to repay creditors. The creditors are, of course, the aid donors, the World Bank and the IMF.

Aid and grants are being used, not to help poor people, or for development, but to repay creditors.

The IMF assumes that these donor/creditor governments will continue to allow that aid to be used for debt repayments for the indefinite future.

The Secretariat for the Analysis of Swedish Development Assistance has analysed the way in which Zambia finances her debt.[49] This example illuminates the problem:

"To all intents and purposes Zambia's external debt is only

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[48]Woodward, as above.

[49]Quoted in Zambia report from the African Debt and Development Coalition, 1995.

serviced when the donor community provides the resources to do so. Therefore, since in aggregate the creditors whose debts are being serviced are almost exclusively the Paris Club (a club of OECD governments) plus the World Bank and the IMF (that is, the creditors are the donors), half of the gross flow from the donors to Zambia represent payments to themselves."

This was confirmed by the UK government in a press release in 1995:

> *"Britain has given Zambia a further £12.5 ($19.5) million of balance of payments support for its economic reform programme. The money will be used to reimburse Zambia for some of its debt service payments to international financial institutions to help ensure their continued support."*[50]

Britain actually provided £25 ($39) million to Zambia in 1994/95 to repay its multilateral creditors. And, according to the Financial Times, "£4.5 ($7) out of every £6.4 ($10) Zambia receives in aid, goes to repay debts."[51]

A large proportion of bilateral (country to country) aid simply bypasses Africa, going straight back into the coffers of rich creditors.

According to our analysis, well over half of gross bilateral loans and grants over the period 1990-1993—57% ($23.4 billion)—were effectively diverted to debt service payments. Of this

14% £3.5 ($5.46) billion was for payments to governments;
2% £0.5 ($0.78) billion was diverted to the IMF; and
41% £11 ($17.16) billion was consumed servicing commercial creditor's debts;

In effect, only 43% of bilateral financing stayed in the recipient countries.

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[50]ODA press release, 9th March, 1995.

[51]Financial Times, 18.9.95.

In addition, it is estimated that £4.5 ($7.02) billion of the funds of donor nations are used each year to finance the soft loan windows of the World Bank and the International Monetary Fund, and the Special Programme of Assistance. Much of this money is also used for debt servicing.

Foreign debt is not the only cause of Africa's ills, but is one which rich nations have considerable responsibility for, and can do something about.

THE CONSEQUENCES

The consequences of this crushing debt burden include: the *neglect of spending* on health, (including AIDS prevention), sanitation, education and water provision; *cutbacks in imports* and infrastructure *investment*—which harm productivity and contribute to declining national income; *the inability to change the structure of production from primary products to products with greater added value; capital flight* and *diminishing foreign direct investment.*

Above all, by being in debt, African governments remain in hock to their creditors. This means they are increasingly losing control over the conduct of their own economic policies and over their own affairs.

This removal of accountability and responsibility for economic policy from Africa's elites, compounds the democratic deficit in many African countries. In countries where democracy is slowly evolving, implementation of policies imposed by foreign creditors makes it almost impossible for politicians to win elections.

Already, responsibility for an increasing range of social and economic policy has been removed from one generation of African politicians. If this were allowed to continue through to the next generation, it would become increasingly difficult to nurture the mature political class needed to make democracy work in Africa.

THE WAY FORWARD: PUTTING AN END TO THE VICIOUS CIRCLE

"Both creditors and debtors find themselves in an almost vicious cycle in which the former must give to receive, and the latter must receive to

give. Giving and receiving become an end in themselves."[52]

Africa needs **comprehensive** debt reduction. Although there is a net flow of resources to the region, this is not sufficient even to enable African nations to pay their existing debts (as the build up of arrears indicates). (See Appendix D.) Debt reduction is also essential if the poorest countries of Africa are to reduce their dependence upon aid *in the longer term.*

Removing what the United Nations Secretary General, Boutros Boutros-Ghali, has described as *"the millstone of external debt"*[53] from the poorest countries of Africa is a necessary first step towards Africa's recovery. **Comprehensive debt relief, particularly from the multilateral institutions, is now a matter of urgency and would be a highly cost-effective form of external assistance.**

In terms of the debt burden of developing countries, Africa's debt is small—only 11% of the total—so reducing it would not create an unbearable financial burden on the global economy.

THE AIM OF DEBT RELIEF

The ***aim*** of debt relief must be to ensure that debt burdens are reduced to sustainable levels to allow economic recovery, **and not merely to reduce debt to levels which are currently being serviced.**

As Tony Killick has argued, *"to be credible, debt reduction needs to bring the debt overhang down to a sustainable threshold level. That is, the benefits do not increase linearly with incremental debt reduction but rather require a minimum `critical mass' to be effective."*[54] Debt burdens must be reduced to levels which allow these African nations to service them **using their own resources.**

This means reducing the burden below the level which is

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[52]Killick, T. 1995, "Solving the multilateral debt problem: reconciling relief with acceptability," paper prepared for the Commonwealth Finance Ministers Meeting, Jamaica, 1995.

[53]Boutros Ghali, B., 1993, United Nations.

[54]Killick, as above.

currently supported by the **diversion of aid flows.** Especially since these flows are on the decline, making the current debt-servicing level unsustainable.

BUT DEBT REDUCTION WILL NOT BE ENOUGH.....

Debt reduction will not be sufficient on its own, and concessional loans and grants will remain an important source of finance for Africa to assist the development process.

Debt reduction must not signal aid cuts to Africa; rather it should be used to free-up aid flows to assist the development and poverty reduction process.

If economic reforms are to help stimulate recovery, concessional loans and grants are needed to permit the importation of capital, raw materials and parts beyond those which can be financed by export revenues. This is essential to expand production and therefore income and employment.

Aid is also needed to fill the gap between the region's domestic savings which are limited by its low income, and the investment it needs for sustainable development; and to ease budget deficits and provide resources for essential spending on the social sectors and infrastructure. (See Appendix A)

WHAT MUST BE DONE?

THE PARIS CLUB

As a start, Paris Club bilateral creditors—country to country creditors with aid debts but also debt arising from export credits—must strengthen and broaden the implementation of the "Naples Terms" for debt reduction. These terms were intended by the G7 to achieve a two-thirds reduction in the stock of poor countries' debts owed to them. The results have so far been disappointing. The Naples Terms should be implemented to allow a larger number of countries to qualify for assistance and to include **all** debts owed to governments.

96% of the debts owed by the poorest governments to Britain are owed to the Export Credit Guarantee Department (ECGD), and covered by Paris Club negotiations. ECGD underwrites and insures UK exports to developing countries, and is situation within the Department of Trade

and Industry. The beneficiaries of this lending are often arms exporters. One third of ECGD funding for exports in the past 5 years has been in support of arms sales, according to a report from the World Development Movement.[55] In 1993/4 £2 ($3.1) billion of funding was provided to UK arms exporters. These lending policies fuel conflict and repression in developing countries. Nowhere is this clearer than in Nigeria, Britain's largest debtor.

"Naples Terms" for Paris Club debt reduction were agreed with much fanfare in 1994—but behind the secretive closed doors of the Paris Club, implementation has been profoundly disappointing. Uganda has only had its total debt reduced by 2%.[56]

Non-Paris Club creditors (e.g., the governments of Eastern Europe) should also move to offer debt reduction on a similar scale.

COMMERCIAL BANKS

Commercial bank creditors are major beneficiaries of aid diverted for debt servicing. They have also benefitted from tax breaks, must now write off any remaining loans owed to them by African countries, or offer them for repurchase at their true value—the current market rate which is in the order of 10 cents to the dollar.

THE INTERNATIONAL FINANCIAL INSTITUTIONS

Most importantly, the multilateral creditors, that is the IMF, the World Bank and associated institutions—but in particular the IMF, must take steps to ensure **comprehensive** debt reduction along the lines agreed by the G7 at Halifax in 1995. Their major shareholders should agree on a "Multilateral Debt Facility" to provide substantial debt reduction to the poorest countries. For the most indebted countries, debts to these institutions should be reduced by at least two-thirds.

Resources for such debt relief are available. These include the

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[55]"Goldrunners' Gold," World Development Movement, August, 1995.

[56]"The Naples Terms"—EURODAD, 1995.

IMF's Gold reserves of about £62.42 (40) billion;[57] World Bank reserves and net income (i.e., profits).

CONCLUSION

The debts of the poorest countries of Africa have become an unpayable burden to these countries, while the overhang of debt inhibits recovery, investment and growth.

Without the grip of foreign debt, it would not be possible for international institutions and rich nation governments to intervene in African economies and override local democratic decision-making. Such intervention denies choice to governments, and removes from their peoples any control they may have over their own destinies. At least one African government is developing new solutions. Eritrea's leaders, according to the Financial Times (22 December, 1995) are seeking to build a nation *"with sweat not debt.....determined to remain autonomous ...and avoid mistakes made by other African countries. The watchwords are improvisation and self-reliance."* **But to achieve self-reliance in the longer term these countries will need substantial debt reduction combined with financial support, if only to offset the effects of the debt crisis.**

Clearly creditors will want to attach conditions to debt reduction packages. We at the Debt Crisis Network will be stimulating debate on the development of a Compact of **Protocol** between Debtors and Creditors to ensure that resources diverted from debt repayment, are channelled into spending on human development in the debtor countries. We would hope that such a Protocol would promote economic, social and cultural rights, as well as human rights, in the poorest countries of Africa.

We would suggest that countries that have a better record in terms of democracy and human rights, and who devote less of their scarce resources to military expenditure, should be first in line for debt reduction.

Debt reduction on its own will not be a sufficient condition for Africa's recovery. Economies will have to undergo appropriate structural transformation, particularly if African countries are to move beyond their

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[57]See. D. Woodward "IMF Gold Sales for Debt Relief" published by the UK Debt Crisis Network, September, 1994.

dependence on exporting low value, and unprocessed primary products.

Above all, Africa will continue to need aid. While debt reduction will reduce the continent's dependence on such aid, **substantial, untied aid flows will still be needed.**

But without writing off sub-Saharan Africa's foreign debt, the continent's prospects for the 21st century are bleak indeed. The time is ripe to stop tinkering with the problem and to have the courage to take robust action. The people of sub-Saharan Africa deserve a fresh start.

APPENDIX A

DEBT, INVESTMENT AND DEVELOPMENT[58]

Investment is essential for sustainable economic development and the eradication of poverty; but Africa's external debt burden represents a formidable obstacle to investment by foreign companies, local entrepreneurs or the government.

The Secretariat for the Analysis of Swedish Development Assistance has noted that: *"without debt reduction, the debt overhang will be perpetuated, domestic and foreign investment discouraged, and capital flight invited."*

There has been a radical change in the nature of non-official flows of development finance to developing countries. Commercial bank lending has declined dramatically and there has been a massive increase in foreign direct investment (FDI), portfolio financing and bond issues. These accounted for **86%** of non-official net financial flows to all developing countries in 1993 (compared with 14% in 1980).

According to a joint paper prepared by the World Bank and the IMF in February, 1995: *"there is a risk that excessive debt burdens may deter foreign direct investment and other private flows to some of these [sub-Saharan African] countries."*

Africa's share in these flows of FDI, portfolio investment and bond issues has fallen from 20% in 1980 to 1% in 1993; the amount flowing into Africa is practically unchanged at £1 ($1.56) billion.

This goes part of the way to explaining why Africa has become so reliant on **official** flows of finance.

Foreign Direct Investment (FDI) is particularly important as it contributes directly to investment in the country's productive capacity, (and may allow the transfer of technology) as well as contributing to international financial flows. However, FDI in Africa has remained severely depressed, while it has boomed in other developing regions, largely because of the intractability of the region's debt crisis. In fact,

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[58]See D. Woodward "Sub-Saharan Africa: The Need For External Resources."

profit remittances on past investments are three times as much as new inflows, leading to an outward net flow of resources averaging £2 ($3.12) billion per year in 1990-1993.

Excessive debt acts as an impediment to domestic private investment as well as FDI, because of the fear of future taxation of profits to meet debt repayments, foreign exchange controls, high interest rates, and the general uncertainty and instability associated with the adjustment process—the "**debt overhang**" effect.

If this debt overhang is not addressed, the free-market reforms to African economies will not aid recovery. The effects of the debt overhang on the inflow of foreign investment and on domestic capital flight have so far inhibited economic recovery.

The debt crisis has also been a major factor depressing the savings which are needed to pay for domestic investment. Between 1985 and 1992 this gap widened substantially as savings fell, being filled by external resources (mainly aid).

However, the inadequacy of external resources and the drain resulting from debt servicing are reflected in the overall level of investment. Over the period 1980-92, levels of investment have remained far below the levels regarded as necessary for a reasonably rapid rate of long-term economic growth (30% of GNP), and the short-fall has increased substantially.

To increase investment to the 30% level would require additional resources of around £11-12 ($17-18) billion. It is not realistic to expect that more than a small proportion of these resources can be raised through domestic savings as long as income levels remain at their current level.

Debt service represents a drain on government budgets as well as on their balance of payments. The impact on these budgets has been particularly severe since 1985 when interest rates in the West were raised to meet the capital needs of the US, unified Germany and other rich countries.

The real value of Africa's interest payments—per capita—was roughly unchanged between 1980 and 1985, but nearly doubled between 1985 and 1990, and has fallen only marginally since.

In 1994, SSA paid £6.4 ($10) billion in debt service charges

to its creditors in rich countries. This amounts to £15.40 ($24) per person in a region where average income is a mere £196 ($305.76)[59] per person per year.

Between 1980 and 1984, despite declining incomes, African governments' revenues *increased* substantially—budget deficits declined and they were earning enough revenue to cover their interest payments and a small part of their investment spending.

After 1984, however, real revenue per capita declined continuously, falling below its 1980 level by 1987 and declining more sharply after 1991, reflecting weak economic performance and falling living standards.

Expenditure per head fell more slowly, and the overall budget deficit increased further. By 1991, government revenue had fallen so far that governments had insufficient revenue to pay any of the interest on their outstanding debts without borrowing. This shortfall has fallen still further since.

Government investment has thus been squeezed by falling revenues and rising interest payments. Despite increasing aid, government spending on investment fell continuously throughout the period, by about 20% overall in real per capita terms.

The ability of governments to finance health, sanitation and education services has also been severely constrained. Such spending is essential to long-term economic development, as well as to the well-being of African people.

Thus investment has been constrained by debt through its effects on international finance, savings and government resources. It is essential that investment recover to support future economic and human development. Even with debt reduction this will require substantial external resources.

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[59]World Bank: African Development Indicators 1994-5, page 34.

APPENDIX B

WHEN DOES DEBT BECOME UNPAYABLE?

The IMF and the World Bank regard a debt burden as being "unsustainable" when the net present value of the debt exceeds 200-220% of export earnings. Their own analysis of 33 African countries found that 28 had debt-export ratios on a net-present-value basis above this level, the average being 649%.[60]

Cash flow problems are measured using the debt service ration, defined as the ration of debt-service to the annual export earnings from goods and services plus workers' remittances.

Based on actual payments to creditors, Africa's actual debt-service-ratio rose from 9.8% in 1980 to a high of 19.8% in 1988. While it declined again to 15.2% in 1993, **scheduled debt-service ratios have remained high**, averaging 28% since 1989. The World Bank argues that countries with debt service ratios in excess of 15% are likely to face a liquidity constraint and will experience debt-service problems.

APPENDIX C

DEBT RELIEF SCHEMES

Despite a series of international initiatives ostensibly offering debt reduction to the poorest countries, the actual effect has been extremely limited and they have barely scratched the surface of the problem in Africa. Only 0.3% £374 ($583.44) million of Africa's total debt stock was reduced in 1993. And a negligible 0.08% £99 (154.44) million of the debt stock was reduced through debt conversion schemes, with virtually all of this benefiting Uganda only.

In terms of the repayment burden, debt reduction and debt conversions have accounted for only 2½% and 0.7% of the total debt service due respectively. With African nations unable t 2½% does not provide any significant help to these countries.

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[60]IMF and World Bank, February 1995, "Multilateral debt of the heavily indebted poor countries." Paper prepared jointly by the staffs of the IMF and the World Bank, Washington, D.C.

APPENDIX D

ARREARS

Despite the large flow of grant assistance to Africa, the growing burden of arrears gives an indication of the difficulties these countries are facing.

"Arrears are a key indicator of the intensity of the debt burden. Cases of countries unwilling, rather than unable, to pay debt service obligation are rare."

While actual debt service payments have apparently been reduced (from £9.7 ($15.32) billion in 1990 to £6.2 ($9.67) billion in 1994), this is not due to an easing of the debt burden; indebted countries have simply been unable to pay. Scheduled debt service levels have remained excessively high and arrears have been building up as Africa's ability to make repayments has declined.

In 1994, 54% £7 ($10.92) billion of the debt service due to Africa's creditors remained unpaid compared with 38% in 1989-91, and total arrears now amount to £34 ($53) billion. This represents more than a quarter of the total debt.

ARREARS, THE WORLD BANK AND THE IMF

The multilateral creditors (the World Bank, the IMF and the Regional Development Banks) are granted the privilege of "preferred creditor status." Countries are discouraged from going into arrears with these institutions by the threat that finance will be withdrawn by all official creditors until arrears are paid.

Given this status, and that these debts cannot be reduced or rescheduled, the burden of debt owed to the multilateral creditors is a critical problem for Africa. **40% of Africa's debt service payments go to the multilateral creditors who hold only 26% of the debt stock.**

Despite the penalties for non-payment, arrears are mounting to these `preferred creditors.'

Liberia, Somalia, Sudan and Zaire have arrears to the World Bank; Liberia, Somalia, Sudan, Zaire and Zambia have arrears to the IMF; and Guinea-Bissau, Liberia, Madagascar, Niger, Somalia, Sudan and Zaire have arrears to the African Development Bank.

PROFILES OF AFRICA'S SEVERELY INDEBTED LOW-INCOME COUNTRIES[61]

Burundi

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	166	455	907	1,063
% increase in debt over the period		174%	100%	17%
Multilateral debt	95	262	703	876
Bilateral debt	51	136	182	178
Commercial debt	5	23	1	0
Cumulative Arrears	0	8	0	13
Arrears as a % of debt service due			0	16%
Per capital debt (US dollar)	40.19	95.79	165.21	178.06
Per capital GNP (US dollar)	220	240	220	180

Sources: World Debt Tables, World Bank.

[61]Debt Crisis Network, c/o Christian Aid, P.O. Box 100, London, SE1 7RT, England, February 1996.

Economic profile (US$ million)	1985	1990	1993
Reserves	21.5	97.7	176.6
Current Account	-42.2	-66.2	-26.3
Exports	113.6	72.9	75
Imports	-149.7	-189	-172.8
Trade Balance	-36.1	-116.1	-97.9
Direct Investment	0.5	1.2	0.3
Balance of Payments	-8	-15.1	-16.3

Source: International Financial Statistics, IMF.

Social development	1986	1990
Military expenditure as % of GNP/GDP	3.5	2.2
Health expenditure as % of GNP/GDP	0.7	1.7
Education expenditure as % of GNP/GDP	2.8	3.5

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 102 deaths per 1000 live births.

Population with access to safe water, 1988-93: 57%

Adult literacy, 1992: 33%

Country grouping: severely indebted low-income country.

Main bilateral creditors: France, Japan, and Austria.

Burundi's levels of investment and aid have been hit by the country's political and ethnic problems. During 1993-94 the economy contracted by 16%, and external and internal debts climbed. Burundi, which had no arrears in 1990 and 1991, now has arrears of $13 million (1% of its debt). The debt amounts to $178 per person but income per person is only $180.

The country is heavily reliant on grants and concessional lending; 90% of its debt is contracted on concessional terms and 77% of the total debt is owed to the World Bank, IMF and the African Development Bank.

Exports decreased by 34% to $75m during the period 1985-1993. Imports, mainly food, machinery and transport equipment and other manufactures, rose by 15% to -$172.8m in 1993, leaving the trade deficit at -$97.9m. After positive net transfers (includes international aid receipts) and net rents, the current account deficit was -$26.3m in 1993.

On the capital account side, direct investment remained largely insignificant during the period, but international reserves jumped by over 720% to a large $176.6m in 1993. This meant that the balance of payments deficit could be kept fairly small at -$16.3m in 1993.

Main exports: coffee (75% of exports), tea, cotton fabrics

Coffee is the mainstay of the economy, providing almost 90% of the country's foreign currency earnings. After years of decline, coffee prices are now rising, this has cushioned the impact of the fall in coffee production caused by the political problems.

In 1993, agriculture contributed 56% to the GNP and employed 56% of the work force, while industry as a whole accounted for 16% of GNP and employed 15% of labour force.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Central African Republic

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	194.7	346.7	715.6	904.3
% increase in debt over the period		78.1%	106.5%	26.4%
Multilateral debt	76.8	160.3	492.3	568
Bilateral debt	44.9	142.0	162.6	236.4
Commercial debt	0	1.1	0	0
Cumulative Arrears	54.1	4.5	37.9	117
Arrears as a % of debt service due			38.4%	77.2%
Per capital debt (US dollar)	84	132	238	278
Per capital GNP (US dollar)	340	260	410	390

Sources: World Debt Tables, External Financing for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	47.3	111.3	107
Current Account	-48.6	-89.1	-57.4
Exports	131	150.5	123.5
Imports	-167.7	-241.6	-165.1
Trade Balance	-36.7	-91.1	-41.6
Direct Investment	2.4	-3.1	-8.7
Balance of Payments	-8	1.1	0.7

Source: International Financial Statistics, IMF.

Social development	1986	1990	1992
Military expenditure as % of GNP/GDP▲	1.7	1.8▲	2.0
Health expenditure as % of GNP/GDP▲	1.2	2.6▲	NA
Education expenditure as % of GNP/GDP	5.3	2.8	NA

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 102 per 1000 live births.

Adult literacy, 1991: 54%

Country grouping: Severely indebted low-income country.

Main bilateral creditors by 1992: France, Switzerland and Austria.

In 1994, 775 of the debt stock was contracted on concessional terms. But despite the low rates of interest on these debts the burden is unsustainable and the build up of arrears is accelerating. Arrears now amount to 13% of debt stock compared to 5% in 1990. 60% of the debt is owed to the multilateral creditors who do not provide debt relief. Slow progress in implementing structural reforms nearly led to the IMF suspending its loan package.

Main exports: diamonds, coffee, timber, cotton, tobacco, leather, rubber, gold, and wax.

Exports and imports remained almost unchanged during the period 1985-1993 and the trade balance and the current account stayed in deficit. Short- and long-term capital flows together with net official financing were positive, hence, the balance of payments account was balanced in 1993 at $0.7m.

The primary resources economy has been hit by higher import costs including price rises for food, medicines, and fuel. Agriculture and forestry are the mainstay of the economy contributing 35% of to GNP in 1993 and employing 66% of labour force. Mining contributed 20% of GNP and employed 3% of workforce. The trade deficit has been reduced through import cuts, but the long-term debt remains a severe burden.

Sources: Human Development Report 1995, UNDP.
Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Cote d'Ivoire

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	7,445	9,641	16,621	19,146
% increase in debt over the period		29.5%	72%	15%
Multilateral debt	589	1,871	3,019	3,061
Bilateral debt	706	1,449	4,402	5,117
Commercial debt	3,623	4,660	5,187	5,025
Cumulative Arrears	0	34	2,267	4,125
Arrears as a % of debt service due	NA	NA	49%	41%
Per capital debt (US dollar)	909	970	1,387	1,433
Per capital GNP (US dollar)	1,300	630	740	630

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	5.9	16.5	7.4
Current Account	63.7	-1209.6	-1229
Exports	2761	3027.9	2734.1
Imports	-1409.9	-1700.6	-1662.3
Trade Balance	1351.1	1327.4	1071.8
Direct Investment	29.2	31.6	30.4
Balance of Payments	84.2	-97.1	61.9

Source: International Financial Statistics, IMF.

Social development	1986	1990
Military expenditure as % of GNP/GDP▾	1.1%	1.7%▾
Health expenditure as % of GNP/GDP	5%	NA
Education expenditure as % of GNP/GDP	1.2%	0.8*

*1992 Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 92 deaths per 1000 live births.

Adult literacy, 1992: 37%

Life expectancy at birth, 1992: 51 years.

Principal government creditors: France, Germany, USA, Belgium and Japan.

The most significant threat to the economy is the debt burden which doubled with the devaluation of the CFA franc in 1994. Over 90% of the debt is contracted on concessional terms but the burden remains unsustainable in relation to exports. In 1994, a debt restructuring package under the Enhanced Toronto Terms was agreed with the Paris Club of Creditors which reduced the debt by $2.5bn. This move followed an agreement with the IMF over a 3-year credit package worth US$½ billion. The country has also been negotiating a Brady restructuring deal with its commercial creditors.

Throughout the period 1985 and 1993, exports have remained relatively constant, but imports have seen an increase. This has led to the worsening of the trade balance by about a third, although it was still in surplus in 1993. However, the current account balance has moved significantly into deficit (-$1229m). This means that both categories of net rent, interest, profits and dividends as well as net current transfers (which includes international aid receipts) together were negative by some $2200m.

On the capital account side, direct investment has remained positive and stable. The balance of payments is now in surplus ($61.9m). This means that the other net components of the capital account such as net long-term and short-term capital movements and net official financing (which includes reserves) were positive.

Principle exports: Cocoa, oil products, wood, and coffee.

In 1994 the economy experience a growth rate of 1.7% after six years of negative growth. Forecasters have predicted growth rates of 6% and 6.5% for 1995 and 1996. Although the real growth rate is diminished by the annual demographic growth rate which remains high at 3.8%. The lack of economic diversification is a problem. The economy is heavily dependent upon cocoa and coffee exports. Agriculture accounted for 40% of GNP in 1993 and 75% of export revenues.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Equatorial Guinea

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	75.6	132.3	241.1	268.0
% increase in debt over the period		75%	83%	11%
Multilateral debt	18.8	27.1	73.2	109.4
Bilateral debt	42.6	82.3	124.1	110.7
Commercial debt	0.0	0.0	0.0	0.0
Cumulative Arrears	5.6	4.7	48.1	88.7
Arrears as a % of debt service due			74%	84%
Per capital debt (US dollar)	222	357	574	595
Per capital GNP (US dollar)			300	360

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990
Reserves	0.5	1.8
Current Account	-20.6	-19
Exports	44.7	37.8
Imports	-56.5	-53.2
Trade Balance	-11.9	-15.4
Direct Investment	0	9.7
Balance of Payments	-1.7	-2.4

Source: International Financial Statistics, IMF.

Infant mortality rate, 1992: 177 per 1000 live births.

Life expectancy at birth: 48

Adult literacy, 1992: 75.3%

Country grouping: Severely indebted low-income country.

Main government creditors by 1992: Spain US$53.6m (45% of bilateral debt), France US$16.4m (14%), and Italy US$11.5m (10%)

Equatorial Guinea has not received much needed foreign aid since 1993 when international donors pulled out due to poor human rights abuses and election frauds. Arrears amount to a third of the debt stock. Over three-quarters of the debt is owed to official creditors (governments, the World Bank, the IMF and the African Development Bank), and half of it has been lent on concessional terms. The debt amounts to 432% and 181% of exports and national income respectively.

Exports of nonfuel primary products decreased between 1988-1990, to a small $37.8m. Imports also decreased but the trade balance remained in

deficit. The current account also remained in deficit. On the capital account side, direct investment shot up from zero to $9.7m in 1990 and reserves increased to a small $1.8m. Short- and long-term capital movements as well as net official financing were positive, leading to a small balance of payments deficit of -$2.4m in 1990.

Main exports: cocoa, coffee, and timber.

Agriculture, forestry and fishing, accounted for about 60% of BNP in 1993 and almost all exports. Industry and mining contributed another 4.5% and 0.5% to GNP respectively.

The country relies on the little aid it still receives. The government has had to adopt a crisis-budget stance, suspending most public works and social services programmes. The IMF approved a US$20.3m Enhanced Structural Adjustment Facility loan in February 1993 but had released only US$7.2m by the end of 1994. A lack of progress in the government's financial accountability was stalling the loan's disbursement.

Sources: Human Development Report 1995, UNDP.
Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Ethiopia

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	824	2,013	3,780	4,729
% increase in debt over the period		144%	88%	25%
Multilateral debt	419	673	1,245	1,866
Bilateral debt	299	974	2,029	2,227
Commercial debt	10	98	107	79
Cumulative Arrears	2	1	276	735
Arrears as a % of debt service due			45.9%	75.1%
Per capital debt (US dollar)	21.84	46.44	73.85	88.72
Per capital GNP (US dollar)	120	110	120	100

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	37.1	30.4	24.3
Current Account	38.7	19.2	-11.7
Exports	84.4	82.1	47.1
Imports	-171.7	-162	-148.4
Trade Balance	-87.3	-80	-101.3
Direct Investment	0	0	0
Balance of Payments	-29.5	-104.6	-107.2

Source: International Financial Statistics, IMF.

Social Development	1980	1985	1990	1993
Per capital military expenditure*	NA	6	16	3
Per capita health expenditure**	1.1	1.3	NA	NA
Per capital education expenditure**	3.0	4.0	NA	NA

*Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 119 deaths per 1000 live births.

Population with access to safe water, 1988-93: 25%

Rural population: 87%

Life expectancy at birth, 1992: 47.5 years.

Country grouping: Severely indebted low-income country.

Main bilateral creditors by 1992: Italy, USA, and Germany.

Ethiopia's debt burden amounts to 614% of export earnings and 116% of national income. Although nearly 80% of the debt is contracted on concessional terms, the burden is unsustainable. Arrears now amount to 15% of the total debt. Less than 3% ($140m) was rescheduled a trivial $9m was forgiven in 1993. Aid levels declined by 21% between 1992 and 1993. The debt amounts to $88 per person compared with an average income per person of a mere $100.

Exports declined during the period 1985 to 1993 by 42% to $47.1m in 1993. Imports also declined from a large -$171.7m in 1985 to -$148.4m in 1993, but the trade deficit grew to $101m. The improvement in the trade deficit, was a result of positive net rents and positive net current transfers (including international aid receipts).

On the capital account side, direct investment remained at zero and reserves declined in 1993. Negative net official financing led to a worsening of the balance of payments deficit in 1993.

Main exports: coffee, hides and skins, pulses and live animals.

Agriculture is the leading sector of the economy accounting for 42% of GNP, 77% of employment and 85% of exports in 1993. Improved world coffee prices in 1993-4 have led to a rise in export earnings.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables 1994-95, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Ghana

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	1,398	2,226	3,799	4,590
% increase in debt over the period		59.2%	70.7%	20.8%
Multilateral debt	384	1,228	2,583	3,125
Bilateral debt	279	603	678	787
Commercial debt	10	40	43	37
Cumulative Arrears	10	32	133	155
Arrears as a % of debt service due			2.2%	3.5%
Per capital debt (US dollar)	130	176	255	282
Per capital GNP (US dollar)	430	360	400	430

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1992
Reserves	263.4	302.6	607
Current Account	-134.2	-228.5	-337.8
Exports	632.4	890.6	986.4
Imports	-668.7	-1198.9	-1456.7
Trade Balance	-36.3	-308.3	-470
Direct Investment	5.6	14.8	22.5
Balance of Payments	63.4	8.8	-0.4

Source: International Financial Statistics, IMF.

Social Development	1980	1985	1990
Per capital military expenditure*	NA	3	2
Per capita health expenditure**	3.3	4.8	NA
Per capital education expenditure**	10.4	8.8	NA

*Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 81 deaths per 1000 live births.

Adult literacy, 1992: 60.7%

Population with access to safe water, 1988-93: 52%.

Country grouping: Severely indebted low-income country.

Main bilateral creditors by 1992: Japan, Germany, Netherlands, UK, France and Italy.

68% of Ghana's debt stock is owed to the multilateral creditors (IMF, the World Bank and the African Development Bank), with only 17% owed to rich governments. The total debt amounts to more than three-quarters of the nation's income and debt service payments amount to 22% of export earnings.

Exports of nonfuel primary commodities increased massively by 56% to $986m during the period 1985-1992. But this was off-set by imports, mainly of fuels, machinery and transport equipment and other manufactures, which also increased substantially by 118% to -$1456.7m in 1992. This meant that the trade deficit was quite large. After positive net rents and net current transfers (including international aid), the current account deficit came to -$338m in 1992.

Direct investment increased by 301% to $22.5m in 1992 and reserves shot up by 130% to a substantial $607m in 1992. This alleviated the current account deficit, leaving the balance of payments position neutral at -$0.4m in 1992.

Principal exports: Cocoa, Gold, Manganese, Diamonds, and timber.

Agriculture is the main sector of the economy, accounting for 37% of GNP in 1993 and employing around 45% of workforce, mainly smallholders. Ghana is the world's fourth-largest cocoa producer, which provides 40% of export earnings. Production of most minerals is currently static or declining. The few remaining gold mines, with the exception of Obuasi, are now scarcely economical.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables 1994-95, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Guinea

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	1,117	1,455	2,469	2,864
% increase in debt over the period		30%	70%	16%
Multilateral debt	165	288	730	1,183
Bilateral debt	716	831	1,457	1,448
Commercial debt	9	10	24	23
Cumulative Arrears	129	261	246	413
Arrears as a % of debt service due			36%	63%
Per capital debt (US dollar)	250.4	291.6	428.6	456.8
Per capital GNP (US dollar)			440	510

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Current Account	-221.5	-202.6	69.9
Exports	511.9	671.2	561.1
Imports	-510.6	-585.7	-582.6
Trade Balance	1.2	85.5	-21.6
Direct Investment	15.7	17.9	2.7
Balance of Payments	-5.1	52.1	-229.3

Source: International Financial Statistics, IMF.

Social development	1986	1990
Military expenditure as % of GNP/GDP▾	3.0	1.3▲
Health expenditure as % of GNP/GDP	1.0	2.0
Education expenditure as % of GNP/GDP	3.0	1.4

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 134 deaths per 1000 live births.

Population with access to safe water, 1988-93: 55%

Adult literacy, 1992: 33%

Rural population: 72% of total.

Country grouping: Severely indebted low-income country.

Main bilateral creditors by 1992: France, USA, Japan, and Italy.

Guinea's debt per person amounted to $457 in 1993, this is a substantial burden given that average income per person was only $510 in that year. Guinea has been making significant adjustment efforts and has started to implement its third structural adjustment programme. The group of bilateral donors who meet within the Paris Club agreed to reduce Guinea's debt under the 'Naples Terms' (the most generous terms offered by the Club) in January 1995. The debt servicing burden for 1994 and 1995 was to be reduced by 50%, $85m was cancelled and a further $85m was rescheduled.

Exports of nonfuel, primary products increased by some 10% during the period 1985-1993. Imports increased by 14%, leading to a trade deficit of -$21.6m in 1993. Positive net rents and net current transfers (which includes international aid receipts) led to a positive current account balance of $69.9m in 1993, a vast improvement on previous years.

Direct investment declined markedly from $15.7m in 1985 to $2.7m in 1993. Together, short- and long-term capital flows and net official financing (includes reserves) were negative, leaving the balance of payments with a substantial deficit of -$229.3m in 1993.

Main exports: Bauxite, alumina and diamonds.

Guinea does not belong to the West African Monetary Union (franc zone) and has not been affected by the CFA franc's devaluation. Although diamond exports are rising, the balance of payments situation is precarious, despite large volumes of concessionary assistance from the World Bank, IMF and foreign aid donors, including the former USSR. Revenues from bauxite and alumina are projected to decline.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Guinea-Bissau

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	134.1	307.8	605.5	691.7
% increase in debt over the period		129.5%	96.7%	14.2%
Multilateral debt	30.0	103.2	268.7	335.4
Bilateral debt	62.7	123.8	261.8	275.6
Commercial debt	2.1	0.0	0.0	0.0
Cumulative Arrears	5.6	28.9	58.3	152
Arrears as a % of debt service due			77.8%	90.5%
Per capital debt (US dollar)	165.55	345.85	617.86	665.09
Per capital GNP (US dollar)	140	180	190	220

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Current Account	-45.3	-31.4	-28.0
Exports	11.6	19.3	16
Imports	-59.5	-68.1	-53.9
Trade Balance	-47.9	-48.8	-37.9
Direct Investment	0	0	0
Balance of Payments	-9.6	-1.5	-16

Source: International Financial Statistics, IMF.**Infant mortality rate, 1992:** 140 deaths per 1000 live births.

Life expectancy at birth, 1992: 43.5 years.

Adult literacy, 1992: 51.7%

Population with access to safe water, 1988-93: 41%

Country grouping: Severely indebted low-income country.

Main bilateral creditors by 1992: Italy, Portugal, Netherlands and France.

Main exports: Cashew nuts, fish products, palm nuts, timber, groundnuts and cotton.

In January 1995, the government's economic reform efforts received the approval of the IMF. US$14.5m is to be provided for through the enhanced structural adjustment facility (ESAF), which lends on soft (concessional) terms. Following agreement on the structural adjustment programme (SAP) the Paris Club also agreed to a new arrangement under the Naples' Terms which allows up to 67% of the debt to be forgiven. Guinea-Bissau was denied a reduction in its debt stock because it has no track record with the IMF, or paying its debt service to the Paris Club.

However, its debt service was reduced considerably, providing immediate debt relief.

The SAP, which ends in 1997, means that tight monetary and credit policies will be pursued. The government has cut price subsidies for many basics, and the cost of fuel rose by 30%. Price rises are also expected to hit electricity, rent and public transport.

One in every five children die before they reach the age of five and 10% of the population is HIV positive.

Guinea-Bissau's exports of nonfuel primary commodities were a mere $16m in 1993. Imports, mainly food and other manufactures, were -$53.9m in 1993. This implied a trade deficit of -$37.9m. Foreign aid receipts and positive net rents improved the position to leave the current account at a deficit of -$28.9m in 1993, an improvement over the period 1985-1993. On the capital account side, direct investment remained at zero but net short- and long-term capital flows and net official financing were positive, reducing the balance of payments deficit to -$16m in 1993.

The agricultural sector (including fishing) accounted for 60% of GNP and over 75% of total export earnings, and employed 70% of the workforce in 1993.

Sources: African Development Indicators 1994/95, World Bank.
Trade and Development Report 1995, United Nations.
World Credit Tables 1994-95, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.
Human Development Report 1995, UNDP.

Kenya

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	3,394	4,111	7,126	6,994
% increase in debt over the period		21.1%	73.3%	-1.8%
Multilateral debt	884	1,842	3,015	3,023
Bilateral debt	572	947	1,155	1,395
Commercial debt	831	752	1,829	1,494
Cumulative Arrears	5	15	112	690
Arrears as a % of debt service due				29.2%
Per capital debt (US dollar)	205.0	205.6	305.2	275.57
Per capital GNP (US dollar)	450	300	380	270

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	338.2	231.8	61.2
Current Account	-112.9	-520.3	152.5
Exports	943.2	1010.5	1185.6
Imports	-1269.8	-2005.3	-1492.8
Trade Balance	-326.6	-994.9	-307.2
Direct Investment	12.7	57.1	1.5
Balance of Payments	39.6	66.9	272.1

Source: International Financial Statistics, IMF.

Social Development	1980	1985	1990	1993
Per capital military expenditure*	NA	5	6	7
Per capita health expenditure**	7.4	5.8	5.8	NA
Per capital education expenditure**	18.4	17.7	21.6	NA

*Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 69 deaths per 1000 live births.

Population with access to safe water, 1988-93: 49%

Rural population, 1992: 75%

Main bilateral creditors by 1992: Japan, USA, Netherlands, Canada, France and Denmark

In 1993, the debt per person ($276) amounted to more than average income per person $270. Aid flows have grown dramatically in the 1990's and have recently been linked to good governance. Donors have become increasingly concerned with these issues and have threatened to halt aid, as the Kenyan government slowed the pace of its economic reforms while clamping down on human rights. Current aid pledges are likely to be postponed until agreement is reached with the IMF, who blocked a $200 million enhanced structural adjustment facility loan in October 1995.

The value of Kenya's exports increased by 25% during the period 1985-1993 to a hefty $1185.6m in 1993. Imports also rose from an initially high level of -$1270m in 1985 to -$1493m in 1993, an increase of 18%. This left a trade deficit of -$307.2m in 1993. However, net rents and net current transfers (including international aid receipts) were positive yielding a current account surplus of $152.5m in 1993.

On the capital account side, both direct investment and international reserves decreased quite drastically, by 88% and 82%, respectively in 1993. However, the balance of payments was substantially positive at $272.1m in 1993, marking an increase of $87%. This implies that net official financing (which includes IMF balances) was substantially positive.

Main exports: tea, horticultural produce, coffee, petroleum products, fruit and vegetables, cement, and sisal.

The country is the world's fourth-largest exporter of horticultural produce and the agricultural sector contributed around 31% to GNP in 1993, employing 70% of the workforce.

Sources Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Liberia

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	686	1,244	1,849	1,926
Multilateral debt	202	551	755	709
Bilateral debt	229	417	491	472
Commercial debt	129	156	172	181
Cumulative Arrears	5	181	1,077	1,325
Arrears as a % of debt service due	0.73%	14.55%	58.25%	68.80 %
Per capital debt (US dollar)	364.89	565.45	780.17	812.66
Per capital GNP (US dollar)	620	460	NA	NA

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985
Reserves	3.8
Current Account	55.3
Exports	430.4
Imports	-263.8
Trade Balance	166.6
Direct Investment	-16.2
Balance of Payments	-108.7

Source: International Financial Statistics, IMF.

Social Development	1980	1985
Per capital military expenditure*	NA	22
Per capita health expenditure**	8.8	7.8
Per capital education expenditure**	20.2	23.3

*Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94, US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 126 deaths per 1000 live births.

Adult literacy, 1992: 35%

Population with access to safe water, 1988-93: 46%

Country grouping: Severely indebted low-income country.

Main bilateral creditors: USA, Germany, Japan

A large aid package was secured for Liberia late in 1995 to support the peace process that began earlier in the year. With all faction leaders backing the peace process hopes are high for lasting peace after 5 years of war. Prior to this, the IMF had withdrawn its loan facility in 1986 and the World Bank had ceased its lending in 1987. Arrears on its loans now amount to 69% of the total debt burden.

Due to the lack of figures for other years, little can be said about Liberia's development in the way of comparisons between years. Exports in 1985 were a strong $430.4m and consisted mainly of nonfuel primary products. Imports were much lower at -$263.8m, leading to a trade balance surplus of $166.6m. The current account also had a surplus of $55.3m. On the capital account side, direct investment was negative, meaning that $16.2m were invested abroad. Reserves were also low at $3.8m. This meant that the balance of payments was at a deficit of -$108.7m.

Principal exports: Iron ore, rubber, timber, coffee and diamonds.

The economy is severely disrupted with more than 150,000 people killed during the war and half the population displaced. Efforts are now being made to revive the rubber plantations (which provides 20% of the exports) and iron ore mines which have been the backbone of the economy. Agriculture is the economy's most important sector, contributing 35% to GNP in 1993 and employing 55% of the workforce. Mining accounts for two-thirds of exports, employs 15% of the workforce and contributing 20% GNP in 1993. While trade and business is starting to revive the entire economy needs rebuilding.

Sources: Human Development Report 1995, UNDP.
Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Madagascar

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	1,223	2,723	4,236	4,594
% increase in debt over the period		122.7%	55.6%	8.4%
Multilateral debt	269	659	1,379	1,558
Bilateral debt	386	1,483	2,268	2,214
Commercial debt	140	123	52	46
Cumulative Arrears	20	101	538	1,534
Arrears as a % of debt service due			39.4%	84.5%
Per capital debt (US dollar)	140.42	272.57	326.98	360.88
Per capital GNP (US dollar)	460	300	240	240

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	40.7	228	71.2
Current Account	-184	-251	-136
Exports	291	319	328
Imports	-336	-566	-466
Trade Balance	-44	-248	-138
Direct Investment	0	22	21
Balance of Payments	10	-9	-52

Source: International Financial Statistics, IMF.

Infant mortality rate, 1992: 93 deaths per 1000 live births.

Maternal mortality rate, 1992: 570 per 100,000 live births.

Population with access to safe water, 1988-93: 23%

Daily calorie supply per capita, 1992: 2,135

Rural population, 1992: 75% of total.

Main bilateral creditors by 1992: France, Japan, Italy, Spain, and Germany.

Madagascar's debt per person totals $360, yet average income per person only amounts to $240. Debt represents nearly 950% of export earnings and 143% of national income. Grants have fallen by 37% from 1990 to $220m in 1993. $54m was forgiven in 1993 but this was insignificant and represented just over 1% of the debt burden.

Since 1994, the country has showed interest in signing agreements with the World Bank and the IMF, but these institutions have been adopting a

go-slow approach to aid for Madagascar. In 1995 a letter of intent was signed which should be a significant step towards this goal. An agreement was expected come sometime in September 1995.

Exports increased during the period 1985-1993 by some 13% to $328m. Imports, mainly of machinery, transport equipment and other manufactures increased by 39% during this period. This led to a trade deficit of -$138m by 1993. The current account recorded a deficit similar to the trade balance, name -$136m in 1993.

On the capital account side, direct investment increased to a health $21m by 1993 and reserves also rose to compensate for the current account deficit. This meant that the balance of payments was at a deficit of -$52m by 1993.

Main exports: coffee, vanilla, prawns, cloves, cotton cloth.

Madagascar's main crop is coffee. In 1994, high world coffee prices resulted in a doubling of the revenues earned in 1993. Agriculture contributed 41% to GNP in 1993 and employed about 75% of the working population. Industry contributed around 20% to GNP in the same year employing 9% of workforce.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Mali

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	732	1,468	2,472	2,650
% increase in debt over the period		100%	68%	7%
Multilateral debt	212	498	978	1,181
Bilateral debt	460	847	1,418	1,393
Commercial debt	11	7	2	2
Cumulative Arrears	76	102	76	345
Arrears as a % of debt service due	NA	NA	54.5%	81%
Per capital debt (US dollar)	111	199	292	287
Per capital GNP (US dollar)	250	150	200	300

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	24.3	206.8	321.5
Current Account	-128.9	-133.3	-102.6
Exports	176.1	337.9	343.6
Imports	-328.5	-432.4	-463.5
Trade Balance	-152.4	-94.5	-199.9
Direct Investment	2.9	-6.6	0
Balance of Payments	-18.4	1.1	22.7

Source: International Financial Statistics, IMF.

Social Development	1980	1985	1990	1993
Per capital military expenditure*	NA	6	NA	6
Per capita health expenditure**	1.7	1.2	1.5▾	NA
Per capital education expenditure**	8.4	6.2	6.4▾	NA

*Constant 1993 dollar **Constant 1987 dollar

▾Figures for 1988

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 159 deaths per 1000 live births.

Adult literacy, 1992: 27%

Country grouping: Severely indebted low-income country.

Major government creditors: France.

Mali has a heavy debt burden; its debt in relation to export earnings and GNP amounts to 620% and 100% respectively. Although 92% of the debt is owed on concessional terms Indicators show that the burden is unsustainable. As a consequence arrears are mounting. As a proportion of the total debt service due and in absolute terms, Mali is paying less and less debt service to its creditors. Only US$54 million (2% of the total debt burden) was rescheduled or forgiven in 1993.

The government remains committed to its tight financial policies with government spending due to fall by 5.4% in 1995. Government reforms have led to job losses and tight controls on spending. The economy grew 2.5% in real terms in 1994, after achieving only 0.8% growth in 1993. Inflation rose from 22% to 30% at the end of 1994 because of higher import prices following the devaluation of the CFA franc.

The value of exports of nonfuel primary commodities increased by 95% to $343.6m in 1993. Equally, the value of imports, mainly food, fuels and manufactured goods, increased by 42% to -$463.5m, leaving a trade deficit of -$119.9m. The current account deficit fell slightly to -$102.6m in 1993. On the capital side, direct investment moved from a low of $2.9m in 1985, to an outflow of
-$6.6m in 1990 and to zero by 1993. However, international reserves jumped by over 1220% to $321.5m in 1993, leading to a balance of payments surplus.

Agriculture contributed 44% to GNP in 1993 and accounts for virtually all export earnings. Cotton exports (in metric ton) have increased 217% since 1980.

Main exports: Cotton and cotton products, live animals, gold, groundnuts and cereals.

Sources: Human Development Report 1995, UNDP.
Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Mauritania

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	843	1,483	2,143	2,203
% increase in debt over the period		76%	45%	3%
Multilateral debt	187	382	726	814
Bilateral debt	462	866	1,075	1,191
Commercial debt	16	11	0	0
Cumulative Arrears	54	62	248	379
Arrears as a % of debt service due			29%	65%
Per capital debt (US dollar)	544	857	1,088	1,029
Per capital GNP (US dollar)	470	390	500	510

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Social development	1986	1990	1992
Military expenditure as % of GNP/GDP	4.9	4.1	3.1
Health expenditure as % of GNP/GDP	6.0	4.7	NA
Education expenditure as % of GNP/GDP▲	1.9	5.5▲	NA

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 101 deaths per 1000 live births.

Maternal mortality rate, 1990: 20 deaths in 100,000 live births.

Population with access to safe water, 1988-93: 66%

Access to basic health services, 1985-93: 45%

Adult literacy rate, 1992: 36.2%

Life expectancy, 1992: 51.5 years.

Country grouping: Severely indebted low-income country.

Principal government creditors, 1992: France, Austria, Germany and Denmark.

Arrears represent a large proportion of the debt burden—17% in 1993 and they are growing in relation to the debt service due. $229m was rescheduled or forgiven in 1993, representing 10% of the debt burden. But Mauritania's debt burden is still unsustainable according to the Indicators: the debt service ratio is 27.3% and the net present value of debt to exports amounts to 286%.

Bread riots broke out in the capital in 1995 with the introduction of a value added tax. This is not the first time civil disturbance has erupted over government policy. Two years earlier unrest followed the devaluation of the Ouguyia by 30% in accordance with IMF instructions. However, the IMF approves of the government's economic reforms and in 1995 it agreed a loans package worth about $63m under the Enhanced Structural Adjustment Facility. Aid of $235m was provided over 2 years by donors to supply the country's external finance needs.

In 1994, economic growth has helped considerably by improvements in agriculture production and it was hoped that a good harvest in 1995 would sustain the recovery.

Principal exports: Fish and fish products (typically 57-60% of value), and iron ore.

Agriculture and fishing contributed 45% to GNP in 1993 and employed 67% of the workforce. About 80% of the population are subsistence farmers and nomadic herders. Manufacturing contributed 7% to GNP in 1993 and employed 5% of the workforce.

Sources: The Africa Review 1996, Kogan Page and Walden Publishing.

Mozambique

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness		2,714	4,770	5,263
% increase in debt over the period			75.7%	10.3%
Multilateral debt		111	503	970
Bilateral debt		1,737	3,157	3,759
Commercial debt		137	167	24
Cumulative Arrears		247	1,266	1,549
Arrears as a % of debt service due			90.4%	81.2%
Per capital debt (US dollar)		196.80	303.62	311.05
Per capital GNP (US dollar)		140	80	80

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Social development	1986	1990	1992
Military expenditure as % of GNP/GDP▲	7.0	13.0▲	10.2
Health expenditure as % of GNP/GDP▲	1.8	4.4▲	NA
Education expenditure as % of GNP/GDP	NA	6.3	NA

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 148 deaths per 1000 live births.

Life expectancy, 1992: 46.4 years.

Underweight children under 5 years, 1990: 47%

Adult literacy, 1992: 37%

Rural population, 1992: 70% of total.

Main bilateral creditors: France, Italy, Portugal and Japan.
After years of civil war ended in 1992, Mozambique is now the world's poorest country. The average debt per person—$311—far outweighs annual earnings which amount to only US$80 per person. The country is heavily dependent upon aid; the international donor community provided US$1.45 billion in 1994.

Mozambique has one of the most unsustainable debt burdens which totals 1,416% and 419% of exports and national income respectively. Its arrears now amount to nearly 30% of the total debt burden. Government creditors are owed 60% of the debt. In 1993, $167 million was rescheduled and $27 million was forgiven—less than 4% of the debt. In 1995, the donor community provided US$780 million in loans and grants, and US$350 million in debt relief to help meet the countries external

financing needs.

Main exports: Prawns, cashew nuts, petroleum products, sugar, cotton, team, and timber.

In 1993 the industrial sector contributed 30% to GNP and employed 20% of the working population, but agriculture is still the mainstay of economy, employing up to 60% of the workforce and accounting for 40% of GNP. The continuing balance of trade deficit has been caused by falling export earnings and heavy reliance on food and oil imports. The deficit is likely to fall further for 1995 after severe weather badly affected the cashew crop and food crops.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Niger

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	863	1,208	1,820	1,704
% increase in debt over the period		40%	50.6%	-6.8%
Multilateral debt	159	351	701	802
Bilateral debt	112	389	505	603
Commercial debt	0	302	375	182
Cumulative Arrears	1	9	113	223
Arrears as a % of debt service due			40%	45%
Per capital debt (US dollar)	156	184	237	202
Per capital GNP (US dollar)	380	220	320	270

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	93.9	231	234.3
Current Account	-64	-83.7	-29
Exports	259.4	303.4	238.4
Imports	-345.6	-337.5	-244
Trade Balance	-86.2	-34.2	-5.7
Direct Investment	-9.2	0	0
Balance of Payments	26.6	-25.2	-9.4

Source: International Financial Statistics, IMF.

Social development	1986	1990	1992
Military expenditure as % of GNP/GDP▲	0.7	0.8▲	1.0
Health expenditure as % of GNP/GDP▲	0.8	3.4▲	NA
Education expenditure as % of GNP/GDP	4.0	1.8	NA

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 124 deaths per 1000 live births.

Life expectancy at birth, 1992: 46.5 years.

Adult literacy, 1992: 12.4%

Population with access to safe water, 1988-93: 59%

Country grouping: Severely indebted low-income country.

Principal government creditors: France, Japan, UK

Principal exports: Uranium concentrates, live animals, vegetables, hides and skins, cotton, animal products

47% and 35% of the debt stock is owed to multilateral and bilateral creditors respectively. Arrears are a growing problem and amounted to 13% of the debt stock in 1993. The debt burden is equivalent to 574.7% and 78.6% of exports and national income respectively. Only $15m, less than 1% of the debt stock was rescheduled in 1993. Grants to the country have declined by 12% since 1990 to $200m in 1993.

Exports increased between 1985 and 1990 but then declined to $238.4m in 1993. Imports also declined by 30% to -$244m. This meant that the trade balance position improved to be almost neutral (-$5.7m) in 1993. Net rents and net current transfers were negative, leaving the current account balance at -$29m.

On the capital account side, direct investment was negligible in 1990 and 1993, but reserves rose by 150% to $234.3m in 1993. This meant that the balance of payments position was almost balanced in 1993 at -$9.4m.

In 1993, subsistence farming and stock rearing contributed around 47% to GNP and employed 70% of the workforce. Industry and mining contributed 12% and 5% of the GNP respectively, and both sectors employed 5% of the workforce.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Nigeria

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	8,934	9,550	34,538	32,531
% increase in debt over the period		7%	262%	-6%
Multilateral debt	571	1,431	3,733	4,324
Bilateral debt	434	792	13,413	13,909
Commercial debt	3,731	4,921	6,105	321
Cumulative Arrears	0	242	2,393	6,784
Arrears as a % of debt service due			44%	64%
Per capital debt (US dollar)	125.56	234.97	359.02	310.14
Per capital GNP (US dollar)	1,180	950	350	310

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1990	1992
Reserves	1772	4455
Current Account	482	493
Exports	2535	-2692
Imports	-1121	-1747
Trade Balance	1414	945
Direct Investment	251	381
Balance of Payments	113	-28

Source: International Financial Statistics, IMF.

Social Development	1985	1990	1993
Per capital military expenditure*	4	3	2
Per capita health expenditure**	1.0	0.6▾	NA
Per capital education expenditure**	3.9	2.1▾	NA

▾1987 *Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 84 deaths per 1000 live births.

Life expectancy, 1992: 50.4 years.

Principal government creditors: Japan, Netherlands, Germany

Nigeria's debt amounts to 100% of its annual income. Nigeria's debt burden is particularly heavy because 94% of the debt must be repaid at market rates.

The economy has been adversely affected by the political situation which has led to the suspension of Nigeria from the Commonwealth for 2 years after the execution of 9 human rights activists. In 1994, growth was not as high as the 2.9% predicted by the government, the budget was in deficit, inflation amounted to 70%, the value of the Naira was falling and unemployment was rising. Fiscal and monetary policies were in chaos and the financial system was threatened with collapse.

Despite this, it attracts more foreign direct investment than any other African country; most of going into the oil sector. The government has taken measures in its 1995 budget to encourage greater investment. This has opened the way for talks with the IMF. After abandoning a reform programme in 1994, the government is again seeking an agreement with the IMF and the World Bank which would lead to new financing and debt relief.

Nigeria's exports were a staggering $2692m in 1992 due to its main export of oil. Imports jumped to -$1747m in 1992, growing by 56% since 1990. This still left a large trade surplus and (smaller) current account surplus.

Despite substantial direct investment and international reserves (from export earnings) in 1992, net short- and long-term capital flows and net official financing were all negative, and the balance of payments slipped into deficit.

Principal exports: mineral fuels and lubricants, and cocoa, rubber and coffee.

While oil is of principle importance in terms of exports, the agricultural sector contributed 37% to GNP in 1993 and employed 47% of the labour force.

Sources: Trade and Development Report 1995, United Nations
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing

Rwanda

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	189.8	366.7	736.2	910.1
% increase in debt over the period		93%	100%	24%
Multilateral debt	104.3	242.1	542.3	693.8
Bilateral debt	52.0	85.9	142.0	152.6
Commercial debt	0	0	0	0
Cumulative Arrears	0	0	13.2	49.7
Arrears as a % of debt service due			3%	79%
Per capital debt (US dollar)	36.78	61.53	105.93	121.15
Per capital GNP (US dollar)	250	270	220	200

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1992
Reserves	108.6	72.8	96.1
Current Account	-64.1	-108.8	-84.6
Exports	126.1	102.6	68.5
Imports	-219.3	-227.7	-240.4
Trade Balance	-93.2	-125	-171.9
Direct Investment	14.6	7.7	2.2
Balance of Payments	-3.6	30.3	18.2

Source: International Financial Statistics, IMF.

Social development	1986	1990	1992
Military expenditure as % of GNP/GDP▲	1.9	1.7▲	6.8
Health expenditure as % of GNP/GDP▲	0.6	1.9▲	NA
Education expenditure as % of GNP/GDP	3.2	4.2	NA

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 110 deaths per 1000 live births.

Life expectancy, 1992: 47.3 years.

Population with access to safe water, 1988-93: 66%

Literacy rate, 1992: 57%

Country grouping: Severely indebted low-income country.

Principal government creditors: France, Japan

Rwanda's internal troubles have meant that payments on debt have been stalled and arrears are accelerating. Most (76%) of the debt is owed to the World Bank, the African Development Bank and the IMF. Despite 92% of the debt being contracted on concessional terms, Indicators show that the burden is unsustainable (net present value of debt-exports amounts to 304%). The debt amounts to 766% of export earnings and 63% of national income.

Main exports: coffee, tea, tungsten and tin-ores.

Rwanda's exports (mainly primary products), dropped dramatically by 46% down to $68.5m in 1992. While its imports grew by almost 10% in value to $240.4m. This led to a large trade balance deficit of -$171.9m. Through positive net rents and current transfers (including international aid receipts), the current account deficit was reduced to -$84.6m in 1992.

On the capital account side, direct investment decreased substantially by 85% ($2.2m) in 1992. Reserves also declined to $96.1m in 1992. Net official financing and net short- and long-term capital flows brought the balance of payments into a surplus of $18.2m in 1992.

Sources: Human Development Report 1995, UNDP.
Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Sao Tome and Principe

(Information continued on next page)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	23.5	62.6	152.9	254.0
% increase in debt over the period		166.4%	144.2%	66.1%
Multilateral debt	10.6	21.5	76.3	144.9
Bilateral debt	12.6	34.8	59.2	80.8
Commercial debt	0	5.0	0	0
Cumulative Arrears	0	3.0	30.0	52.1
Arrears as a % of debt service due			72.5%	81.1%
Per capital debt (US dollar)	261.11	626	1,275	1,954
Per capital GNP (US dollar)	520	320	420	330

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

GDP growth, 1993: 1.5

Terms of trade, 1992: 75 (Index 1987 = 100)

Life expectancy at birth: 67 years.

Rural population, 1992: 56%

Annual population growth rate, 1992-2000: 2.1%

Access to safe water, 1985: 42%

Main bilateral creditors by 1992: Portugal US$14,4m (23.6%), France US$ 7,9m (12.9%), and Spain US$ 3,9m (6.4%)

Sao Tome and Principe has a staggering debt burden of $1954 per person in 1993, yet the average person only earned $330 in that year. Debt amounts to 2117% and 712% in relation to exports and national income respectively. In relation to the debt burden grants are very low at $27 million. 80% of the debt is lent on concessional terms but despite this debt Indicators show that the burden is unsustainable (net present value of debt to exports is 1,049% and the debt service ratio is 21.8%).

Main exports: Cocoa 85%-90%, coffee, copra, palm kernels.

The country's balance of payments is dependent on cocoa, which account for 85-90% of total exports. In 1994, 4,000 tons of cocoa were produced, worth around US$7 million, whilst imports amounted to US$24 million.

Sao Tome and Principe has been experiencing both external debt and cost of living rises and fall of living standards. A structural adjustment programme is being implemented under the guidance of the World Bank and the IMF. In December 1994, the currency was devalued losing half its value by the end of the year, in a country which imports US$5 million worth of food each year, leading to higher food prices. Fuel prices were also raised by 40%. In February 1995, the government held discussions with the World Bank and International Monetary Fund where further austerity measures were agreed.

Agriculture contributed 70% of GNP in 1993 and employed 82% of the workforce.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Sierra Leone

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	435	723	1,155	1,388
% increase in debt over the period		66%	60%	20%
Multilateral debt	62	225	290	346
Bilateral debt	150	184	328	413
Commercial debt	20	17	17	17
Cumulative Arrears	25	83	366	248
Arrears as a % of debt service due			82%	60%
Per capital debt (US dollar)	133.43	198.08	272.40	310.51
Per capital GNP (US dollar)	340	330	240	140

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990
Reserves	7.4	3.8
Current Account	2.8	-69.4
Exports	131.9	139.8
Imports	-141.2	-140.4
Trade Balance	-9.4	-0.6
Direct Investment	-31	32.4
Balance of Payments	-9.3	49.2

Source: International Financial Statistics, IMF.

Social Development	1980	1985	1990	1993
Per capital military expenditure*	NA	1.0	2.0	3.0
Per capita health expenditure**	NA	1.0	1.4	NA
Per capital education expenditure**	NA	2.7	1.9	NA

*Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 166 deaths per 1000 live births.

Population with access to safe water, 1988-93: 37%

Life expectancy at birth, 1992: 39 years.

Daily calorie supply per capita, 1992: 1,695.

Country grouping: Severely indebted low-income country.

Main creditors: Italy, USA, Japan, France and Austria

A debt reduction package was completed with the Paris Club in 1994, involving US$42 million, of which US$16 million was rescheduled. A commercial debt buy-back programme, worth US$411 million at face value, was financed through the International Development Agency's Debt Reduction Facility. j Although arrears have declined from their high of $425m (a third of the debt stock) in 1991 to $248m (18% of the debt burden) by 1993, debt payment is still a problem.

The country is persevering with its structural adjustment programme designed to foster private-sector led growth. However, foreign private investment is likely to remain low while uncertainty surrounding the war remains.

Exports and imports were in balance taking the trade balance to a neutral position. However, the current account was down from a surplus of $2.8m in 1985 to a deficit of almost -$70m in 1990. Net direct investment greatly increased to $32.4m in 1990, and, although reserves declined by 48%, the balance of payments could still be kept in surplus at $49.2m through short- and long-term capital flows and net official financing.

Principal exports: Rutile, bauxite, diamonds, and coffee.

GNP growth increased in 1993 to 1.5 reversing the decline of -8.0 in 1992. Agriculture contributed 40% to GNP in 1993 and employed 65% of the workforce. Mining is also an important sector, contributing 13% of GNP in 1993.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Somalia

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	660	1,639	2,370	2,501
% increase in debt over the period		148%	45%	6%
Multilateral debt	177	564	913	902
Bilateral debt	408	917	1,136	1,114
Commercial debt	0	0	0	0
Cumulative Arrears	22	188	929	1,349
Arrears as a % of debt service due			95%	100%
Per capital debt (US dollar)	114.78	244.99	303.45	292.86
Per capital GNP (US dollar)	110	120	120	NA

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990
Reserves	4.2	14.4
Current Account	-102.8	-156.7
Exports	90.6	67.7
Imports	-330.7	-346.3
Trade Balance	-240.2	-278.6
Direct Investment	-0.7	0
Balance of Payments	15.5	-0.8

Source: International Financial Statistics, IMF.

Social development	1986	1990
Military expenditure as % of GNP/GDP	4.4	3.0
Health expenditure as % of GNP/GDP▲	0.2	0.9▲
Education expenditure as % of GNP/GDP	6.0	0.4

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 122 deaths per 1000 live births.

Life expectancy at birth, 1992: 47 years.

Underweight children under 5 years, 1992: 39%

Daily calorie supply per capita, 1992: 1,505

Country grouping: Severely indebted low-income country.

Principal government creditors: Italy, USA, Japan, France

Arrears form a large part of Somalia's debt stock (54%) because, due to the war, it has not paid any of its debt service due in 1992 nor 1993. Most of the debt (44%) is owed to government creditors, with 30% owed to the World Bank, IMF and African Development Bank (multilateral creditors). 62% of the debts are contracted on soft (concessional) terms.

Somalia's main exports of nonfuel primary commodities were down by 25% during the period 1985 to 1989. Imports remained more or less constant at -$346m in 1989. This meant a trade balance deficit of -$279m. However, net rents and current transfers were able to reduce this by some $120m to -$157m.

On the capital account side, direct investment was zero in 1989 and reserves increased slightly to a modest $14.4m. Nevertheless, due to positive net inflows of short- and long-term capital flows and net official financing together, the balance of payments was virtually balanced in 1989.

Sources: Human Development Report 1995, UNDP.
Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Sudan

(Information continued on next two pages)

Debt Position (US$ million)	**1980**	**1985**	**1990**	**1993**
Overall indebtedness	5,163	9,127	15,303	16,560
% increase in debt over the period		77%	68%	8%
Multilateral debt	1,065	1,700	2,679	2,882
Bilateral debt	2,659	4,547	5,777	5,582
Commercial debt	623	1,328	2,147	1,945
Cumulative Arrears	570	2,509	9,950	12,119
Arrears as a % of debt service due			97%	97%
Per capital debt (US dollar)	269.61	416.19	609.19	607.48
Per capital GNP (US dollar)	450	310	400	NA

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1992
Reserves	16.9	41.2	6.5
Current Account	-39.2	-188.4	-101.1
Exports	110.8	71.5	71.1
Imports	-132	-288.8	-170.2
Trade Balance	-21.2	-217.3	-99.1
Direct Investment	0	0	0
Balance of Payments	-0.9	-59.9	7.7

Source: International Financial Statistics, IMF.

Social development	1986	1990	1992
Military expenditure as % of GNP/GDP▲	5.9	2.0▲	15.8
Health expenditure as % of GNP/GDP▲	0.2	0.5▲	NA
Education expenditure as % of GNP/GDP▲	4.0	4.8	NA

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992:

Life expectancy at birth, 1992: 53 years.

Adult literacy, 1992: 42.7%

Population with access to safe water, 1988-93: 48%

Country grouping: Severely indebted low-income country.

Principal government creditors: USA< France, UK, Japan and Italy.

In January 1995 Sudan, who owes $1.7 billion in arrears to the IMF, narrowly avoided expulsion from the Fund after resuming payments on its arrears. Sudanese officials met with the IMF for emergency talks which, it was hoped, would start to normalise relations between them. However, differences over the level of monthly repayments and economic policy conditions remain, and the Fund is once again threatening Sudan with expulsion.

Credit from government donors was cut off after taking a pro-Iraqi stance during the Gulf was and it has not since been restored. And few donors are willing to offer new credit without the IMF's approval.

The economy has been deteriorating rapidly as a lack of foreign exchange has led to spare parts and basic commodities becoming increasingly scarce. Sudan's exports declined by some 36% to a modest $71.1m in 1992, as a result of war and famine which swept the country during this period. Its imports of food, machinery and transport equipment and other manufactures peaked in 1990 at -$289m and then fell back to -$170m. This accounts for the trade deficit of some -$100m. On the capital account side, despite a fall in reserves to a low $6.5m and no direct investment, the balance of payments was in surplus, presumably as a result of net official financing.

The agricultural sector provided over 90% of the total export earnings and 29% of GNP in 1993.

Principal exports: Cotton and cotton products, gum arabic and sesame.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Tanzania

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	2,972	3,750	6,880	7,522
% increase in debt over the period		26%	83%	9%
Multilateral debt	709	1,038	1,997	2,390
Bilateral debt	1,579	1,751	3,936	3,976
Commercial debt	127	29	108	96
Cumulative Arrears	43	383	1,108	1,525
Arrears as a % of debt service due			58%	74%
Per capital debt (US dollar)	164.20	177.22	281.16	281.30
Per capital GNP (US dollar)	290	290	110	

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	19.9	49.8	423
Current Account	-375.1	-425.1	-408.5
Exports	328.5	407.8	462
Imports	-869.2	-1186.4	-1299.9
Trade Balance	-540.7	-778.6	-837.9
Direct Investment	0	0	20
Balance of Payments	-39.7	217	-18.6

Source: International Financial Statistics, IMF.

Social development	1986	1990	1992
Military expenditure as % of GNP/GDP▲	3.3	6.9▲	3.6
Health expenditure as % of GNP/GDP▲	1.2	3.2▲	NA
Education expenditure as % of GNP/GDP	1.7	5.8	NA

Sources: Human Development Reports, UNDP.

Infant mortality rate, 1992: 85 deaths per 1000 live births.

Population with access to safe water, 1988-93: 50%

Rural population, 1992: 78%

Life expectancy, 1992: 52.1 years.

Tanzania's debt stock amounts to $281 per person yet average income per person is only $110 (1989-1992). Over 50% of the debt is owed to government lenders. Although 65% of the loans were contracted on concessional terms Indicators (debt service amounts to 25% exports and the net present value of debt to exports is 453%) show that the burden is unsustainable.

In 1994, corruption, mismanagement and tax evasion led to a suspension of multilateral aid and aid from the Nordic countries, Tanzania's most important aid donors. They demanded the resignation of the Finance Minister as a condition for resuming financial assistance. In late 1995 the IMF said they were waiting for a new government to be named before negotiating a $200m structural adjustment facility.

Tanzania embarked on free market reforms in 1987 and after eight years of painful reforms, the total debt stock has increased by 28% and the country is still heavily reliant on aid. According to the Financial Times, almost 22% of their credit goes into servicing other loans and import of essential goods and services.

In line with other nonfuel primary product exports, Tanzania's exports increased in value by some 41%. However, its imports of machinery and transport equipment and other manufactures increased by 50% to a massive trade deficit of $837.9m. Positive transfers (including international aid receipts) and positive flows of rent, interest, profits and dividends did compensate for the trade deficit somewhat but the current account remained in deficit.

On the capital account side, a massive increase in international reserves by over 2000% as well as positive net positions of short-term and long-term capital inflows and in official financing allowed for a very modest balance of payments deficit of -$18.6m.

Principal exports: coffee, cotton, minerals, tea and petroleum.

Tanzania's external trade is in deficit due to low volume of several major export crops and to low world prices. Agriculture is the mainstay of economy contributing over 61% to GNP in 1993 and accounting for 80% of export earnings and employing 83% of workforce, in the same year industry contributed 9% to GNP and employed 5% of labour force.

Uganda

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	702	1,239	2,669	3,056
% increase in debt over the period		77%	115%	15%
Multilateral debt	171	804	1,568	2,073
Bilateral debt	218	213	684	780
Commercial debt	23	64	89	31
Cumulative Arrears	103	67	326	283
Arrears as a % of debt service due			47%	11%
Per capital debt (US dollar)	54,8	87.7	163.4	169.5
Per capital GNP (US dollar)		170	180	190

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Social Development	1980	1985	1990	1993
Per capital military expenditure*	NA	2	4	3
Per capita health expenditure**	NA	0.8	NA	NA
Per capital education expenditure**	NA	3.1	NA	NA

*Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 115 deaths per 1000 live births.

Life expectancy at birth, 1992: 44.9 years.

Adult literacy rate, 1992: 58.6%

Population with access to safe water, 1988-93: 31%

Country grouping: Severely indebted low-income country.

Major bilateral creditors by 1992: Italy, UK, USA, and France.

A 3-year Enhanced Structural Adjustment programme began in September 1994 providing about &S$175 million in loans. Over two-thirds of the debt burden is owed to multilateral institutions such as the IMF and World Bank. Although nearly 70% has been lent on concessional terms, Uganda's debt is still highly unsustainable. The debt servicing ratio (the ratio of debt service payments to exports), has risen from 53% in 1992 to 121% in 1993, and is expected to have climbed even higher during 1994/95, mainly as a result of the increase in the value of dollar-denominated loans.

Early in 1995, Uganda negotiated a deal with the Paris Club of donors, by which only 22.6% of total Ugandan debt to the Paris Club and a mere 2.5% of the total debt burden was written off. Its effect on overall indebtedness was marginal. Uganda today spends less than $2 dollars per head annually on health but $30 per year per person on debt repayments.

In late 1995 the Dutch government gave Uganda US$30m to service its current multilateral debt of US$3.2bn, the Dutch Charge d'Affaires in Kampala said $20m would be released in 1995 and the rest in 1996.

Main exports: coffee and cotton.

Agriculture contributed 66% to GNP in 1993, earned 95% of all export earnings, and employed about 80% of the labour force. Coffee exports are the principal cash crop and in 1994 export receipts amounted to US$274 million, more than double the US$109 million earned in 1993. The heavy debt burden remains a strain on the economy and the government is implementing extensive trade reforms.

Sources: Human Development Report 1995, UNDP.
Trade and Development Report 1995, United Nations.
World Credit Tables 1994-95, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Zaire

(Information continued on next page)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	4,770	6,171	10,270	11,280
% increase in debt over the period		29.4%	66.4%	9.8%
Multilateral debt	695	1,410	2,450	2,665
Bilateral debt	2,287	3,467	6,189	5,722
Commercial debt	553	544	524	511
Cumulative Arrears	67	314	1,314	4,251
Arrears as a % of debt service due			70.8%	97%
Per capital debt (US dollar)	176.60	194.85	274.67	275.12
Per capital GNP (US dollar)	310	240		

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Infant mortality rate, 1992: 93 deaths per 1000 live births.

Adult literacy, 1992: 74%

Life expectancy, 1992: 52 years.

Population with access to safe water, 1988-93: 39%

Rural population, 1992: 71%

Daily calorie supply per capita, 1992: 2060

Main bilateral creditors by 1992: USA< France, Italy, Germany, Belgium and Japan.

Zaire has a huge debt burden of $11,3bn, which amounts to $275 per person (income per person totaled only about $242 per person between 1985-89). Arrears amount to 38% of the debt burden. Nearly three-quarters of the debt is owed to official creditors (governments, World Bank, IMF and African Development Bank).

In 1990 the country began to fall behind on debt payments to the IMF and in June 1994, when arrears had reached about US$314 million; the IMF suspended Zaire's membership on the basis of its arrears. But in September 1995 the IMF granted Zaire US$101m over a twelve-month period.

Earnings from diamond and gold exports in 1994 came to US$296 million although the Prime Minister estimated that the real figure covering diamond exports should have been in the region of US$700 million; fraud is believed to account for a loss to the state in excess of US$300 million a year.

The GNP at just over US$8 billion is matched by the country's international debts. The narrow export base, concentrated mainly on minerals with some agricultural cash crops, has made Zaire's balance of trade very susceptible to the vagaries of world commodity markets. Under-investment and regular strikes have further weakened the mining industry.

Main exports: Copper, diamonds, cobalt, crude petroleum and coffee.

Agriculture contributed 38% of GNP in 1993, with mining contributing 9% to GNP.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.
Financial Times

Zimbabwe

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	786	2,415	3,246	4,168
% increase in debt over the period		207.2%	34.4%	28.4%
Multilateral debt	3	533	644	1,589
Bilateral debt	44	428	870	1,002
Commercial debt	3	353	377	364
Cumulative Arrears	0	0	0	2
Arrears as a % of debt service due				
Per capital debt (US dollar)	112.12	290.26	332.92	391.73
Per capital GNP (US dollar)	760	620	700	540

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990	1993
Reserves	62.7	116.53	168.9
Current Account	-58.7	24	-69.2
Exports	259.1	451.6	383.8
Imports	-213.1	-344.4	-414.4
Trade Balance	46	107.2	-30.6
Direct Investment	0.6	-3.3	-2.5
Balance of Payments	24.3	-59.3	-25.1

Source: International Financial Statistics, IMF.

Social Development	1980	1985	1990	1993
Per capital military expenditure*	NA	32	28	21
Per capita health expenditure**	11.7	15.1	NA	NA
Per capital education expenditure**	33.6	48.9	NA	NA

*Constant 1993 dollar **Constant 1987 dollar

Sources: African Development Indicators 1994/95 - The World Bank
World Military Expenditures and Arms Transfers 1993-94,
US Arms Control and Disarmament Agency

Infant mortality rate, 1992: 67 deaths per 1000 live births.

Underweight children under 5 years, 1990: 14%

Adult literacy, 1992: 83%

Country grouping: Low-income country, moderately indebted.

Major bilateral creditors by 1992: Germany, UK and France.

By September 1994 economic recovery appeared to be faltering and by early 1995 economic output had fallen to 1992 levels. The Structural Adjustment Programme introduced at the beginning of the 1990s has contributed little to growth which has been about 2-3%. Despite poor economic conditions during 1994, Zimbabwe pressed ahead with economic reforms. Structural adjustment has not eased Zimbabwe's aid requirements which are increasing and are greater than they were in the 1980s.

Zimbabwe's fast growing population is expected to exert pressure on both land and resources of all kinds in the 1990s.

Main exports: semi-processed goods, tobacco, gold, food and crude materials.

Exports have increased by 51% over the period studied. During this time, however, its imports, mainly in the areas of machinery and transport equipment, other manufactures and fuels, have increased by some 95% which has swung the trade balance into deficit. The current account deficit has not worsened significantly. On the capital account side, direct investment became negative, as more investment flowed outwards than inwards. Similarly the balance of payments worsened and became negative (-$25m).

Agriculture sector contributed 22% to GNP in 1993 accounting for an important part of export earnings, in the same year manufacturing industry as a whole contributed 30% to GNP.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

Zambia

(Information continued on next two pages)

Debt Position (US$ million)	1980	1985	1990	1993
Overall indebtedness	3,261	4,576	7,242	6,788
% increase in debt over the period		40.3%	58.3%	-6.26%
Multilateral debt	844	1,524	2,367	2,534
Bilateral debt	1,105	1,802	2,957	2,577
Commercial debt	163	70	72	86
Cumulative Arrears	39	705	2,284	2,073
Arrears as a % of debt service due			81.8%	42.3%
Per capital debt (US dollar)	577.17	685.03	930.85	795.78
Per capital GNP (US dollar)	650	330	470	370

Sources: World Debt Tables, External Finance for Developing Countries, World Bank.

Economic profile (US$ million)	1985	1990
Reserves	63.8	116.3
Current Account	-398	-597
Exports	797	-1254
Imports	-571	-1511
Trade Balance	226	-257
Direct Investment	52	203
Balance of Payments	-145	322

Source: International Financial Statistics, IMF.

Social Development	1980	1985	1990	1993
Per capital military expenditure*	NA	NA	10	6
Per capita health expenditure**	7.8	6.1	NA	NA
Per capital education expenditure**	14.7	12.9	NA	NA

*Constant 1993 dollar **Constant 1987 dollar

Infant mortality rate, 1992: 104 deaths per 1000 live births.

Population with access to safe water, 1988-93: 53%

Rural population, 1992: 58%

Country grouping: Severely indebted low-income country.

Major bilateral creditors by 1992: Germany, Japan, UK, USA, Italy and France.

The debt of US$6.8 billion amounts to 638% of Zambia's export of goods and services, and amounts to $796 per person, yet the average income was only $370. A third of export earnings went into servicing the debt. Arrears amount to $2,073m and 31% of the debt stock.

In late 1995 Zambia has cleared arrears of US$1.2bn owed to the IMF and regained access to IMF facilities, and opened the way for a Paris Club debt reduction deal early in 1996. In December the IMF approved a US$1.3bn package over a three-year period.

As an exporter of nonfuel primary commodities, Zambia's exports have increased by 54% between 1958 and 1990. However, its imports have increased dramatically by 165%. This has significantly worsened the trade balance from a comfortable surplus in 1985 to a deficit of -$257m. Equally, the current account position has worsened significantly to -$597m. This means that international aid and other transfers was not sufficient to compensate for net outflows of interest payments.

On the capital account side, direct investment shot up to a high $203m in 1990, an increase of 290%. This and the other capital account components had a very significantly positive effect turning a balance of payments deficit of -$145m in 1985 to a surplus position of $322m in 1990.

Main exports: copper, cobalt, zinc and lead.

Zambia is the world's fifth biggest producer of copper, and despite efforts to diversity the economy it remains vulnerable to world market conditions. Copper and cobalt combined account for 90% of total export earnings. Agriculture contributed 14% to GNP in 1993, and employed 65% of the workforce, largely on a subsistence basis.

Sources: Trade and Development Report 1995, United Nations.
World Credit Tables, EURODAD.
The Africa Review 1996, Kogan Page and Walden Publishing.

THE JUNGLE OF LIBERALISM: AGGRESSION AGAINST THE PRINCIPLES OF INTERNATIONAL LAW

by
Monique Picard-Weyl, France[62]

I. PRINCIPALS VIOLATED

- *The Principal of the sovereignty of all nations*, large and small; powerful and weak; developed and undeveloped; is protected from interference by the UN Charter.

- *Right of Nations to Self-Determination* (Article 1 of the Covenant on Economic, Social and Cultural Rights (1966) and Article 1 of the Covenant on Political Rights): These provisions have been violated by the interference of financial institutions in State Policy, as well as by the intervention of supra-national institutions, such as transnational corporations.

- *Right to life, right to employment under normal conditions of employment* (wages sufficient to sustain the lives of workers and their families; regulated hours of employment; *Right to health and social security, protection against unemployment, right to education, to leisure, etc.* Universal Declaration of Human Rights, Articles 3, 23, 24, 25, 26, 28 and in the Covenant on Economic, Social, and Cultural Rights, supra, Article 11 addressing the obligation for states to take measures to avoid famine, and Article 15, the right for everyone to benefit from all the possibilities of scientific and technical progress.

It is clear that these rights are being violated all over the world among signators to the Covenants and not only in under-developed countries.

II. DEFINING THE RIGHT TO DEVELOPMENT

The very existence of the peoples of under-developed countries is being threatened by the tendency to reduce the Right to Development

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[62]Droit Solidarite. This is a translated summary of the original paper which was prepared and delivered in French.

to the most fundamental and minimal human needs: food, potable water, housing, minimal education and health services, including family planning. All such rights are of concern to international organizations as urgent needs of the poor throughout the world, which must be satisfied for survival.

Are such minimal demands an unavoidable consequence of the current economic crisis? Should the world's financial crisis be used to justify abandonment of international norms in respect to the Economic, Social and Cultural Rights of the people of the world?

III. THE RIGHT TO DEVELOPMENT, THE RIGHT FOR ALL TO BENEFIT FROM SCIENTIFIC AND ECONOMIC PROGRESS

Although international covenants clearly state that these rights are for all, that each member of a society has the right to benefit from progress; and that these are not privileges available only to certain members of society in developed countries, these rights are not being respected anywhere among the nations of the world, including affluent developed countries.

How many Einsteins, Pasteurs or other scientists have been lost to the world? How many Mozarts, Shakespeares or other geniuses have been lost among the Boudoi of Ho Chi Minh Town; among the children of the Latin American streets, or among the children dying of hunger in Africa? What better example of the dangers of such social indifference to the economic rights of all people than the discovery of the malaria vaccination by Dr. Manuel Patorroyo from Columbia who has refused to sell his discovery to the drug multinationals to avoid depriving poor people of the benefit of this progress? Compare this with how much money the Abbott Chemical Company makes from its medicine to combat AIDS.

It is clear that the right of everyone to benefit from progress must be of concern to all the world as a condition for the survival of humanity. The 1994 PNUD denounces the crisis of underdevelopment and poverty in the world and makes clear the necessity to take measures to avoid the great dangers caused by this situation. Although the measures suggested are insufficient, they are better than none.

IV. THE RIGHT OF EVERYONE TO BENEFIT FROM PROGRESS IS AN ISSUE OF JUSTICE

The rights of development at the minimum level at which rich countries help poor countries, is based on a notion of charity. But such assistance should be a duty and a necessity for the well-being of all of humanity on the assumption that riches should be shared with and distributed to all. This redistribution of wealth can also be justified by the provision of reparations for damages caused to the economies of the under-developed nations by the powerful western nations that still rule the world. In fact, many of these damages have criminal origins. Such as, the genocide of Native Americans in the Americas or the human destruction in Africa caused by the slave trade. Such genocidal crimes are responsible for much of the world's under-development and justify the imposition of taxes on rich countries to provide technological transfers and abolish debts.

V. AN INTERNATIONAL PROBLEM: THE GENERAL ATTACK AGAINST NATIONALIZED ENTERPRISES AND PUBLIC INSTITUTIONS

Nationalization is a democratic concept, not a socialist one. It is clearly recognized by international law (Article 17 of the International Declaration of Human Rights, the 1966 Covenants (see above) Resolutions 1514 XV and 3281 XXIX). The defense of the concept of nationalization is essential. In addition, this democratic concept should be proposed on the international level so that there can be an internationalization of the wealth that has been confiscated by the few for the benefit of all humankind.

ON THE RIGHTS OF THE PEOPLES

By
Prof. Beatriz Rajland, Argentina[63]

INTRODUCTION

By 1960, the richest 20% of the world population had an income that was thirty times higher than that of the poorest 20%. By 1990, the gap had increased to sixty times while the concentration grows: the richest 5% receives income that is a hundred and fifty times higher than the poorest 5%. Such inequalities occur between countiues and inside the same country.

How can such dimensions of poverty, of exclusion, of deep social imbalances be explained, when one considers the immense quantities of goods available in the world and the technical means available to increase them? This can be understood only on the basis of the disproportionate concentration of riches, of production, of centralization of capital that make up the current process of globalization. Even for the intrenched great national powers these concentrations have become troublesome. They fear the social unrest that such inequities may provoke.

In Argentina, for example, the very same industrial union argues that they are not "the villains of the piece"; that they are not responsible for poverty and unemployment, but that these problems derive from the economic plans implemented by the government. As if they had nothing to do with the implementation of these plans!

The assertion that national economic growth will end the problem of poverty has proved a fiction. Growth does not necessarily mean sustainable human development. The lynchpins of the free market, so called "structural adjustment" policies, whose formulas have been implemented round the world have done nothing but doom great sections of the population to the deepest extremes of poverty and marginalization.

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The State, in its present form, is the only guarantor of the rules of the game, of freedom and competition of the market. The re-structuring of capital for the increase of a profit rate which was decreasing in the eighties has functionally restructured the State.

The market becomes the dispenser of resources, and citizens finds themselves transformed into individual users or customers, oriented towards the market, to post-profit calculation within a "winners-losers" rationale.

In Latin America, about 62% of the population lives in a state of poverty. One of the phenomena that has been observed since the eighties is that about half of those formerly regarded as poor or under the line of poverty have become extremely poor or indigent. That is, they do not even reach minimal levels of consumption by the most fundamental nutritional standards.

Today, unemployment and under-employment are problems which affect the whole of society and affect the daily life of individuals and their families. It is the expression of the essence of the capitalist system, shaping the world-economy. It is its best evidence. By the end of the century, in which, ironically these problems were supposed to have been eliminated or drastically reduced because of technological, biological and scientific improvements, there has been a cruel deepening of the problems.

Technology, instead of being at the service of humanity, appears to be challenging us. Automation eliminates jobs when it should be generating a better quality life and less alienation, by for example, reducing working hours.

Technological rationalism defines social relationships, not in the sense of the basic assertion of a human being as a social entity, but in the technocratic sense of humanity's subordination to the machine.

But, it is not technology itself, the fruit of human ingenuity, which is responsible for the lack of jobs or for underemployment. Unemployment is also high in countries which have not yet been fully automated.

Pandemic unemployment is a result of the economic crisis arising from the abrupt drop of the profit rate of capital, which began in

the 70's and in the globalization that followed which both centralized and concentrated capital.

The force of scientific-technological development and competition has led to expanded use of capital raw materials, and machinery and to the development of changed labour relationships. Even so unemployment and underemployment result in the search for a rise in the profit rate at the cost of salaries. Thus, it is not the machine but human relationships in the production process that determines it.

Alternative policies could reduce working hours, but not salaries in order to accommodate changes in the deployment of the work force. However, economic trends lead to adjustment policies. Pay is reduced and the social benefits gained through the struggles and resistance of the workers for many years are reduced.

From the point of view of the state, the crisis of the so- called "Welfare State" is taking shape in its populist forms in Latin America, and especially in Argentina. All that is left is nostalgia. Conditions have changed, the ruling class no longer needs commitments from the workers to obtain its profits and so it excludes them from political, economical and social decisionmaking.

In the name of "efficiency," especially (but not uniquely) in Argentina, a model has developed from the economic crisis which presents different modes of accumulation: the subject that defines one's integration to society (i.e. the worker, once protected by legislation); collective social rights have been divided into individual privileges which can be integrated or excluded by the needs of the market.

This disintegration of a collective body of workers into free individuals who sell their skills has, in Argentina, a defining significance, since it undoes specific rights that had been considered universal.

In addition, in the search for consensus, the despoiling of the workers is manipulated by demonstrating these policies as successful, producing limited effects that must be overcome. In fact, these effects are the rise of unemployment in Argentina up to 30% (including the underemployed), social marginalization and extreme poverty.

In conformity with similar approaches in the international community, the fight against poverty is never mentioned. Again, as in feudal times, the natural existence of the poor is accepted and the myth of free and equal individuals is perpetuated.

This discussion about the structure of dismantled social policies is not meant to suggest that none exist, but that they are programmed to become part and parcel of the accumulation model. Thus social policies exist, but they now guarantee the free market and structural adjustments. They translate into "individualization" strategies, which tend to diminish collective action; that is to say, regressive social policies. The results of these policies include a high percentage of the world's population living under the poverty line, illiteracy, the reappearance of diseases which were regarded as eliminated, unemployment, underemployment, growing homelessness, and children living in the streets, these inequalities increase daily throughout the world.

The result is anaemic democracy, based on a model of society that consecrates real inequalities, while the State serves as the agent of the reproduction of these inequalities.

SOME CONCLUSIONS

Where do the rights of the people to health, housing, food and welfare, arise? We regard then as inherent in social existence.

They are neither the product or object of social solidarity on the part of a State that calls itself "benefactor" nor are they the result of the neo-liberal collective interest into isolated individuals, that hides humanity as the primary subject of social relationships in which one historically takes part as a social being and not as a private person. The work force which has been expropriated by capital, is not private but is concrete. People are either peasants or workers; employees or bosses; employed or jobless or threatened; technicians, scientists or professionals.

These rights should not be evaluated in terms of who gives and who gets or who has the power to decide how by what means and how much to pay for them. Nonetheless, these are the ways that these realities are manipulated by the ruling class.

Another result of the loss of collective power by labor is a renewed strengthening of religious principles. Religion has traditionally accepted poverty as one of the evils which are intrinsic to the human condition; a sort of life trial for human beings struggling for their basic needs and survival. These views lead to resignation, not energy to fight for entitlements.

We reaffirm that the peoples' rights must be recognized and

guaranteed and their elimination not condoned by resignation. They cannot be the object of "gracious" concession because one cannot grant what humanity intrisically possesses, even though these rights have been historically expropriated.

Therefore the peoples must retrieve or recoup what was expropriated by those holding the real power in society. The reality of each State consists of current dominant social relationships. It is necessary for the people to play an active part in the vindication of their rights and their implementation in daily life. These efforts are not assignable.

ABOUT THE TASKS OF JURISTS

The International Convenant of Civil and Political Rights states in its 6th Article, that "the right to life is inherent to the human person", a comprehensive statement that also includes the assumption that extreme need endangers the right to life.

The right to food, housing, welfare, employment has been enshrined in several international instruments, as has the States' duty to undertake the necessary steps in order to ensure them. The right of the peoples has also been recognised. But that does not mean that they constitute juridical obligations; they generally remain at the level of praiseworthy recommendations with no concrete guarantees of fulfillment and without sanctions for failures of implementation.

These stipulations, elaborated over the years, are the fruit and expression of certain forces during various historical stages, encouraged by the struggle of the peoples. But they remain merely potentials.

It is imperative for democratic jurists to support the peoples' struggles for respect and guarantees of their rights, by lending their technical-legal skills and political solidarity, as they too are an integral part of the people.

REDRESSING ECONOMIC INJURY THROUGH A PRO BONO PUBLIC INTEREST LAW PRACTICE: A CASE STUDY OF THE COMPREHENSIVE REPRESENTATION APPROACHES DEVELOPED AFTER THE 1992 LOS ANGELES CIVIL UNREST

by
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I. Preface — Overview

Crisis demands creativity—so it was after the 1992 civil unrest in Los Angeles ("the civil unrest" or "unrest"). Prior to the unrest, the greater Los Angeles region was in a severe economic recession; members of poor families were laid off or fired and struggling to survive on reduced incomes and many small businesses were teetering on the brink of failure. A series of tense inter-racial incidents and events during the early 1990's exacerbated Los Angeles' history of racial stratification. Tensions peaked and then exploded. On April 29, 1992, an ordeal that had begun the previous spring with the video-taped police beating of motorist Rodney King ended with the provocative acquittal of the only four officers charged with this crime.[65]

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[65]Rodney King was an African-American motorist arrested during the early morning hours of March, 1991. The alleged underlying traffic violation was never prosecuted and resulted in several conflicting reports about what violations actually occurred. The case became a worldwide spectacle due to the global broadcast of amateur video footage documenting the stop, beating and arrest of Rodney King.

Four of the several police officers shown on the blurred video tape were charged and tried for crimes associated with the beating. The court granted a motion to change venue for the trial of the four officers from Los Angeles to a suburban community called Simi Valley—reputed to be more conservative, more homogeneously Caucasian, and home to many law enforcement officers. On Wednesday afternoon, April 29, 1992, the jury returned a verdict of acquittal for all four of the officers on trial. Initial responses ranged from a community-wide meeting for thousands of people at First African Methodist Episcopal Church to a spontaneous, riotous brawl among motorists at the intersection of Florence and Normandie Avenues in South Central Los Angeles. By midnight, fires and outbursts ignited all over the greater Los Angeles region. The next couple of

The unrest burned holes through the safety net of services intended to support low-income communities. Traditional legal practice techniques proved insufficient to respond to the complex array of problems which developed after the unrest. Alternative strategies and techniques described in this paper unfolded to respond to these unanticipated and overwhelming challenges. In retrospect, we can describe these alternative approaches as part of a doctrine of comprehensive legal practice which includes: community outreach and grassroots education, capacity building and media advocacy as critical counterparts to the traditional trilogy of administrative advocacy, litigation and legislative lobbying. This paper also discusses a technique we did not use—reliance on international human rights instruments before domestic tribunals—which could have enhanced the effectiveness of our multifaceted approach.

None of these approaches is categorical; they were all important elements of a synergistic and comprehensive program of representation that sought to secure redress for economic injury and hardships, which befell poor and disadvantaged members of the community. The sheer magnitude of the economic crisis, social tensions and political discord provided the incentive to develop creative legal representation strategies and constructive approaches to community economic development. Thus, even though this paper consolidates practical experiences and summarizes primary research gathered in response to a federal declared disaster, many lessons from this context may be applied to other challenges confronting low-income communities.

II. The Work of Public Counsel's Urban Recovery Legal Assistance (U.R.L.A.)

Three days of fire and destruction fueled the anger and strengthened the divide already forged by racism and bigotry among Latinos, Asians, African Americans and Caucasians. Everyone in Los Angeles was filled with fear, anxiety and anger. Even as the community was smoldering, Public Counsel's Executive Director began to recruit prospective volunteer attorneys and to identify the types of legal issues

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days, the entire community was under siege by local, national and internal media as the community burned, businesses were destroyed, thousands of people were incarcerated and the rule of law was thrust into analysis and review. President George Bush declared a federal emergency and called in the National Guard and other federal forces to assist in restoring order in Los Angeles.

that would emerge after the ashes had settled. At that time, nobody really knew what to expect or even precisely what types of expertise would be needed among the corps of staff and volunteers.

On May 18, 1992, within three weeks of the catastrophe, Public Counsel's Urban Recovery Legal Assistance ("U.R.L.A") opened its doors to provide free civil legal assistance to people affected by the unrest.[66] Nearly 2.5 years of constantly evolving practice and approaches were made possible due to generous support in the form of loaned office space, attorney co-directors on loan for several weeks from several private law firms, donated equipment and furniture and financial assistance from foundations and corporations. At all times, U.R.L.A. operated as a multi-cultural, multi-lingual law practice reflecting the communities most devastated by the civil unrest, with paid staff language capacity in English, Spanish and Korean and overall capacity through volunteers in four other languages (Mandarin, Cantonese, Vietnamese and Cambodian).

The mission of Public Counsel's Urban Recovery Legal Assistance was defined, broadly, to create a multi-cultural, multi-lingual law practice: (a) that could assist people with receiving emergency government benefits and assistance with the civil legal issues arising out of the unrest and (2) that could identify and implement strategies for volunteer attorneys to participate in transforming the greater Los Angeles community into an urban environment that would flourish and support productive lives for its residents. A third systems-reform component of the mission emerged during the first six months of practice: to improve

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[66]Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations. It is the largest *pro bono* law firm in the United States. Public Counsel is also the non-profit Southern California affiliate of the Lawyer's Committee for Civil Rights Under Law. Lawyer's Committees were created at the behest of President Kennedy in the early 1960's, to provide *pro bono* representation to low-income communities in need.

Public Counsel, under the Executive Directorship of Steve Nissen, employs a well-trained staff capable of managing the organization's work in each program area to leverage the time, talent and skill of attorneys from several varied types of practice, who are willing to undertake particular projects as volunteers, on a *pro bono* basis. Through careful staff coordination, these volunteers can handle matters ranging from transactions to litigation, often honing important skills such as interviewing and gathering facts from clients to other aspects of case work such as preparing witnesses, taking depositions, filing papers, negotiating agreements, drafting and litigating motions and preparing legislative and public information materials.

the emergency service delivery systems to prevent future victims of federally declared disasters and urban despair from the tragic flaws in implementation that confronted our clients.

U.R.L.A. became one of the largest and most comprehensive emergency *pro bono publico* efforts ever established. At its largest, the staff of 12 marshalled more than 700 attorney and community volunteers who contributed more than 13,000 hours in *pro bono* legal services and enabled the program to handle more than 2,000 separate client matters in a wide range of practice areas.[67] The areas of practice ranged from entitlement to disaster benefits from the Federal Emergency Management Agency ("FEMA"), the Small Business Administration ("SBA"), and various consumer, community development and insurance issues.

One of the hallmarks of Public Counsel's U.R.L.A. practice was the definition, description and enforcement of a then little-known type of assistance, called Mortgage and Rental Assistance, specifically available to victims of federally declared disasters suffering economic injury. Establishing a national governmental disaster response plan may not be a high legislative priority in contexts riddled with many other development challenges. From the experience in Los Angeles, however, it seems that perhaps it should be. All governments are called upon to provide disaster assistance when natural or human emergencies strike. Even when governments have a disaster preparedness strategy, the U.R.L.A. experience demonstrates that it may be inadequate to meet the needs of those with little disposable income. The segment of the community which operates with only limited resources is generally most vulnerable to additional challenges that result in the wake of unexpected crises. Thus, a comprehensive approach to representation became essential as a way to meet emergency needs for services and to begin to reconstruct the social fabric so that it could sustain longer term progress.

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[67]U.R.L.A. staff, directed by Cynthia Robbins, volunteer attorneys and law students handled such client matters as assisting victims with their initial Federal Emergency Management Agency and Small Business Administration applications. Additionally, they wrote appeals from denials of benefits, and advocated on behalf of clients. The legal issues involved government benefits, commercial and residential landlord/tenant, insurance, employment, housing, bankruptcy and creditor/debtor matters.

III. Federal Disaster Benefits to Redress Economic Injury

A. Description of Economic Injury within the Community[68]

During the three-day period of actual unrest, there was substantial personal injury, more than 50 people killed[69], 2,664 injured, of which 280 had to be hospitalized. Not only was the city divided and strife-torn, but the physical destruction caused by the worst civil and urban unrest in U.S. history also had dramatic economic consequences. More than 1,200 structures were destroyed or severely damaged within the City of Los Angeles as were hundreds of other structures in other parts of Los Angeles County. An estimated 9,000 businesses were affected and approximately 6,000 jobs were lost.[70] Dun & Bradstreet estimated that 40% of the business closures would be permanent.

B. Federal Emergency Management Agency

When President George Bush declared a state of emergency in Los Angeles on April 30, 1992, it triggered the application of the Robert T. Stafford Disaster Relief and Emergency Assistance Act("Stafford Act" or "the Act") and implementing regulations[71]. Until the unrest, the most commonly used disaster benefits were set forth in section 408(a) of the Act, providing Temporary Housing Assistance ("THA") when people's homes are destroyed or rendered uninhabitable by a federal disaster. Remarkably, despite the scope of damage to physical structures during the 1992 civil unrest, very few residential dwellings were destroyed or

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[68]Robbins, C., Benitez, H., Federal and State Disaster Emergency Response Following the Los Angeles Civil Unrest, 1994, Unpublished report by Public Counsel, (relied upon for much of the research data presented here) and p. 1, citing disparate reports of deaths.

[69]The Los Angeles Coroner reported 51 deaths and the American Red Cross reported that 59 deaths were caused by the civil unrest

[70]*Ibid.*, citing, Los Angeles Mayor's office reported that of the 1,200 destroyed or damaged structures 562 were categorized as "major rebuilds," 127 sustained limited damage and the rest had minor damage.

[71]42 U.S.C. Section 5121 *et seq.*

damaged.[72]

Our clients faced particular challenges as they applied for emergency benefits from the Federal Emergency Management Agency[73] ("FEMA"), under a United States federal statute called the Robert T. Stafford Emergency Relief and Disaster Assistance Act.[74]

Instead, the 1992 Civil Unrest resulted overwhelmingly in destruction of businesses and job sites; economic injury that did not affect housing structures. The incidence of economic injury triggered another housing benefit called Mortgage and Rental Assistance ("MRA") found in Section 408(b) of the Stafford Act ("408(b)").[75] The Statute in effect at the time defined Mortgage and Rental payments as:

> "assistance on a temporary basis in the form of mortgage or rental payments to or on behalf of individuals and families, who, as a result of financial hardship caused by a major disaster, have received written notice of dispossession of eviction...Such assistance shall be provided for the duration of the period of financial hardship but not to exceed 18 months."[76]

The 1992 civil unrest was only the second occasion that Mortgage and Rental Assistance had been authorized.[77] Definition of

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[72]The American Red Cross reported that 36 single family homes and 353 apartment units were also destroyed or severely damaged.

[73]See 5 U.S.C. App.1, Section 1701 *et seq.* The United States Federal Emergency Management Agency is charged with providing emergency assistance to communities which have suffered federally declared disasters. Upon declaration of a disaster or emergency, residents of the affected communities may seek disaster benefits.

[74]42 U.S.C. Section 5121 *et seq.*

[75]See 42 U.S.C. Section 5174(b).

[76]*Ibid.*

[77]The previous authorization of MRA had been on a much smaller scale after a freeze affecting orange groves in Fresno, California in 1990, two years earlier.

disaster-related economic injury proved to be difficult in light of the significant economic recession which had already gripped the greater Los Angeles region prior to the 1992 unrest. For a low-income community, whose sense of economic crisis predated any declaration of disaster, the challenge was to prove the causal connection between undeniable economic strife and the federally declared disaster that occurred between April 29 and May 2, 1992. Unlike physical damage, there was no equivalent to the ostensibly objective photographic and inspection report evidence generally used to document disaster-related damage. FEMA and other related agencies made clear that the Stafford Act could not be used to redress longer-term economic hardship. Thus, despite low-income applicants' particular vulnerability to additional economic injuries resulting from the unrest, we were challenged to specifically prove the distinct causal elements of their hardship which resulted from the disaster. The initial shock of the unrest provided a brief respite from threats of eviction and foreclosure. Not surprisingly, people who had higher incomes, and savings to tide them through were better able to weather the slow process that preceded determinations of entitlement to Mortgage and Rental Assistance or denials. Also ironically, since the benefit resulted in government issuance of checks to pay either the applicant's rent or mortgage, those with higher standards of living were entitled to receive a higher level of disaster assistance from the government.

C. Documentation Challenges with Mortgage and Rental Assistance ("MRA")

One of the prime MRA implementation challenges was meeting FEMA's complex documentation requirements. Applicants were required to prove pre-disaster primary resident and pre-disaster income. The problem was not that the clients could not come up with **any** documentation, but that FEMA required more documentation than they could produce, particularly in light of an emergency which had destroyed so much.[78]

The requirements for documentation became a substantial burden for the numerous low-income victims of the civil unrest disaster. For

[78]Among the types of documents FEMA required clients to provide for initial assistance were canceled checks or check stubs, income tax returns, State Board of Equalization quarterly tax statements, Seller's Permits, company financial statements, city tax registration certificates, invoices and receipts, signed affidavits from former employees or employers.

example, in many cases disaster victims renting converted garages and other inexpensive alternative housing did not have leases, paid their rent in cash, and likely paid utility bills in cash or merely contributed a portion. Thus, they had no canceled checks or receipts to prove payment of rent and residency. To complicate things further, landlords fearing punishment either from the Internal Revenue Service or other government agencies, refused to provide verification that applicants actually resided at particular locations. The same type of concerns surfaced when multiple families shared apartment units. In many cases, the names of additional apartment occupants did not appear on leases, and consequently, such applicants could not verify pre-disaster rental arrangements because they had no receipts, canceled checks, etc. When applicants could not secure verification from landlords to prove pre-disaster primary residence, they were not eligible for assistance.

Similarly, individuals who were paid on a cash basis were unable to meet FEMA's complex income verification requirement and, thus, unable to prove that they had a pre-disaster income.[79] They had no check stubs to prove their income and they could not prove regular deposits in a bank because they did not have bank accounts. Furthermore, employers feared verifying their employees' employment status because they feared retribution from other government agencies. FEMA's requirements were particularly onerous in light of the fact that the fires and destruction that characterized the disaster resulted in complete devastation and it was therefore hard to salvage any of the requisite documents from what little had existed prior.

IV. Administrative Advocacy and Community Outreach

The eruption in Los Angeles which gave rise to Public Counsel's urban recovery project, served as a strategic stimulus to the volunteer recruitment and community mobilization effort. Galvanized to make some contribution to advance the recovery and healing of the greater Los Angeles community, many of the volunteers came together motivated by a range of conflicting emotions, including obligation, social

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[79]One such URLA client, who had worked for able to several years at a liquor store, was paid on a cash basis. He was unable to provide check stubs to FEMA and had no other documentation to prove that he had a steady income. When FEMA contacted the employer, the employer denied that our client worked there. Maids and gardeners are examples of some other professions where employees are paid on a cash basis.

responsibility, guilt and anxiety. We employed a team-building approach to staff management which helped to shape our alternative approach to representation. Training tools, orientation programs and other devices also enabled us to effectively incorporate an ever-changing pool of staff, attorneys and volunteers into the work of U.R.L.A. Through regular staff meetings and other procedures we were able to both elicit insights and inspire participants to implement suggested innovative methods that improved the delivery of services during U.R.L.A.'s growth and evolution.

A. Proactive Community Outreach and Education

At the outset, we recognized the mandate for a proactive outreach strategy. Prospective clients were not making applications for disaster benefits; in many cases, they did not even know that such benefits were being offered. Instead, people entitled to receive federal disaster benefits were first attending to fundamental human needs, such as securing food, clothing and shelter. Consequently, we gathered and distilled information about government benefits program deadlines and eligibility requirements. Through outreach to a broad network of other non-governmental organizations, emergency relief service providers, churches and government social services agencies we collected information about the emergency assistance being offered. The activated network provided ongoing information about changing community needs, application deadlines, policies and practices.

In view of the fact that our target community was culturally diverse, multilingual and unaware of the benefits available, we developed clear, concise, simple, information sheets in the languages of our anticipated clientele. We initiated a broad outreach campaign and dispatched staff and volunteers to distribute multi-lingual information sheets at sites where people in need were congregated. There, we uncovered many latent legal issues during informal initial interviews with prospective clients who stood in emergency food, clothing and shelter lines. In many cases, this grass roots education tactic provided these disaster victims' first exposure to any information about the emergency government programs for which they might be eligible.

Our volunteer attorneys, law students and other members of the community played a critical role in reaching a broad cross-section of the affected community quickly, in languages that they could understand. We also conducted organizational training programs to ensure that staff at social services agencies understood the key elements of the disaster

programs. Some organizations requested training for groups of benefits applicants.

B. Intake and Office Visits to Build an Administrative Strategy

Once clients had been identified, we developed a system to permit facile integration of numerous volunteers into representation and assistance in the office and at community sites more convenient to the clients. We also carefully crafted our intake form to elicit the type of statistical information and data that would be helpful in our various alternative approaches to representation and assistance. For example, at the time of initial client interview we recorded their amenability to participate in media interviews. We also collected basic data about the types of emergency assistance they had sought, the length of time they awaited determinations by FEMA and other disaster-response agencies and the other legal issues on which they required assistance. This information allowed us to frame persuasive arguments for our community organizing, advocacy for reform or pitches to media outlets.

C. Administrative Review of Applications for Assistance

The Stafford Act sets forth an administrative process to submit initial applications, seek review, contest denials and request recertification for additional months of support. Notably, the Act expressly prohibited litigation to review individual applications and, in effect, did not provide any process for applicants contesting denials to have a hearing on the matter. Their only recourse was to submit letters requesting reconsideration of the decision.

U.R.L.A. assisted clients in developing the type of evidence that would support pending applications. In addition, our staff and volunteers assisted clients with appeals from denials and requests to be recertified to receive additional benefits. We also contacted elected officials and informed them about impact cases and patterns of practice during the administrative advocacy process.

U.R.L.A. assisted clients in wading through the morass of an application process and were successful with more than half of our cases. In addition, we were able to help people to better understand the menu of emergency benefits, and to become part of the client community seeking assistance instead of operating in isolation.

V. Media Advocacy

Early on we realized that the sensationalist U.S. media had projected a spot light on the slow disaster recovery process in Southern California. Long lines of people waiting at federal disaster application centers became the visual images associated with FEMA's burdensome application process and slow response. The focus of the media on Los Angeles triggered the classic governmental fear of adverse publicity. We also realized that we could attract public attention to FEMA's rigid adherence to bureaucratic policies adversely affecting our clients and cultivated relationships with journalists and framed the issues in a way to encourage coverage. Thus, we placed important stories in various media organs to advance policy reform.

A. Case Study of Media Advocacy

The case of Manuel Ramirez[80] ("MR") is a powerful and typical example of the role of media advocacy in bolstering our efforts to secure Mortgage and Rental Assistance for our clients. As mentioned above, during the first three months after the disaster, many people in the alternative economy were struggling to meet the proof requirements of FEMA. They had to demonstrate their pre-disaster income and identify their precise disaster-related economic injury.

Manuel Ramirez had immigrated from Central America to the Los Angeles area and begun a small clothing business in a "swap meet".[81] Prior to the unrest, the family had eked out a modest, but independent, existence from their business selling clothing and small trinkets. The Ramirez family lost both their entire inventory and any records in the fire. In addition, since the business was located in a community devastated by the fires from the unrest, their regular clientele was similarly injured and consequently unable to patronize any replacement business they might have tried to initiate. They relied upon their nine-year-old son to translate the initial FEMA application process and other important information.

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[80]Manuel Ramirez is a fictitious name of a client. Only minor factual changes have been made to safeguard his privacy interests.

[81]Swap meets are large warehouse structures which typically have a central entrance and then have several stalls of 9 x 9 feet available for rent to small business owners. With common utilities, security and other features, fledgling businesses are able to start-up their businesses without much capital for overhead.

The disaster uncovered the tenuous and sparse infrastructure holding together the micro-businesses of MR and so many others in low-income communities. Now these fledgling entrepreneurs were being asked to produce detailed records and other information that they had never kept. They were unable to generate any income and stood at risk of eviction from their small apartment. FEMA reviewed their application and continued to request additional information. After three months of waiting for the anticipated FEMA support, the landlord initiated eviction proceedings. An unlawful detainer had been secured and the marshall had served notice that they would be locked out within the next couple of days. It was a Friday at the end of the month and the landlord required payment by the first of the month.

The administrative FEMA process appeared to be insufficient to assist us, so we were left to hope that the alternative forum of the media would provide more expedient relief. The clients understood that we had exhausted all legal remedies that could offer relief in the short term. They agreed that we should pursue this media advocacy. A desperate message left with the City Desk editor at the Los Angeles Times cited the key facts of the case above.

The following Tuesday, a mere three days later, a large photo of our clients appeared on the front page of the Metro section with an article detailing their predicament, the slow processing at FEMA and the intransigence of the landlord. Within a few hours, each of the unmovable forces had found a way to address problems that had no solutions the Friday before. FEMA finally completed processing the Ramirez application and was able to issue a statement of assurance that the family would receive a check by the week's end. Then the landlord also agreed to accept FEMA's assurances as a basis to withdraw the lock out order with the marshall. Some people who read the article sent small donations of ten and fifteen dollars to the family.

B. <u>The Administrative Petition as a Media Advocacy Device</u>

The second example of media advocacy was very deliberately planned. We looked for a milestone accessible to the media and picked the date of the six-month anniversary of the unrest. By that time, we had a clear sense of the patterns of problems, the challenges and the flaws in the system. On October 27, 1992, legal and community advocates on behalf of disaster victims from Florida, Hawaii and California lodged a formal petition charging FEMA with failing to provide full, fair and equitable disaster relief. This was the first time that disaster victims from

three states united to express outrage and frustration at FEMA's failure to deliver disaster relief funds and programs.

Notably, there was no particular provision of the statute or regulation setting forth the conditions or process for filing an administrative petition, but our colleague advocates in northern California had used a similar mechanism for documenting systemic complaints following the Earthquake in the San Francisco Bay Area in 1989.[82] We organized a press conference advertised with photo opportunities and with various components attractive to segments of the media. Press packets included background information on U.R.L.A., the most compelling data illustrating the number of FEMA applications that had been denied[83] and client profiles summarizing key problems confronting FEMA applicants. At the press conference, advocates challenged regulations and the implementation of policies, clients graphically described their victimization by FEMA's inadequacies. We promised and delivered a strong visual image—a demonstration in front of the nearby FEMA office, for which various groups had prepared posters, banners and signs, captured by a photographer hired to shoot black and white prints which were later sent out over the wire along with a more descriptive press release.

On the day of the press conference, we advised FEMA officials by telephone that the administrative petition was being delivered. As a consequence of this orchestrated event, we garnered the attention of FEMA, of the Press and of the legislators we hoped would become advocates in the effort to eliminate some of the flaws and lack of clarity in the legislation and the regulations as they were structured. This event was covered by media organs around the world. Cable News Network, CNN, offered global television footage and several newspapers carried news of the administrative petition.

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[82]Our secondary but most significant concern was that the date we had selected, October 27, 1992, was only one week prior to the presidential elections in the United States. We believed that we had a chance then or never to secure media attention before being eclipsed by the impending presidential elections.

[83]Ten months after the civil unrest, the majority of applicants were denied, or had yet to receive any determination. Only 399 out of 1214 applicants were deemed eligible for Temporary Housing Assistance and 3054 out 6760 applicants were deemed eligible for Mortgage and Rental Assistance. See Federal Emergency Management Agency, Summary Update of FEMA Activities for DR-942 as of 2/25/93.

The petition demanded that FEMA respond within 10 days to address the immediate concerns about FEMA's performance in the different disasters. The Federal Emergency Management Agency did respond by requesting additional time to review the substance of our complaints—an apparent ruse, since the issues presented were the same ones that we had been raising with them in individual cases since the office's opening five months earlier. There were no surprises. What may have been somewhat surprising was that we had secured some of their own data from the reports of numbers of applications received, processed and denied. It was damning that they had rejected more than 65% of the applications for Mortgage and Rental Assistance. Most of those denials represented families on the brink of eviction or foreclosure who had waited for more than 3 months each to be told that they were not going to receive any assistance either because they were so poor that it was not clear that their economic hardship was specifically attributable to the disaster or because their entire micro-business inventory and scanty records had been destroyed and they were unable to prove their pre-disaster incomes. In either case, these were the members of the community least able to withstand a long delayed rejection of even nominal and brief economic assistance from FEMA.

In the intervening week, President George Bush lost the presidential election to Bill Clinton. Federal agency officials were no longer accountable and advocates received no response on November 20, 1992. We continued to interact with FEMA, and with the federal, state and local elected officials who represented our clients' communities. We were not in a position to keep FEMA accountable until the new administration came into office nearly three months later. FEMA did not respond directly to the administrative petition until May 1993, after a full-blown litigation strategy had been developed.

VI. Impact and Class Action Litigation and Negotiation

The number of individual clients with pending or denied applications for FEMA assistance grew to a sufficient number to mandate an overarching legal strategy like impact and class action litigation that addressed fundamental flaws in the service delivery system. Our community outreach, administrative and media advocacy enabled us to frame the issues that could be raised in a class action lawsuit and to identify the client cases that best reflected the systemic flaws. Our options for litigation were complicated by the fact that the Robert T. Stafford Act expressly prohibited litigation on denial of individual requests. We had to frame our litigation claims strategically to challenge

FEMA's policies and practices on grounds that they violated the constitution and administrative procedure.

Acting on a *pro bono* basis, the law firm of Proskauer, Rose, Goetz & Mendelsohn, along with several public interest organizations[84] and U.R.L.A. filed a class action lawsuit against FEMA on behalf of victims of the Los Angeles civil unrest and Hawaii's Hurricane Iniki.[85] The lawsuit challenged FEMA's practices that delayed or prevented apparently eligible clients from receiving the assistance envisioned by the Stafford Act[86] and regulations [87]governing FEMA programs. The complaint also contended that FEMA violated its own regulations by having appeals considered by the same person who denied the initial application. Furthermore, the complaint asserted that FEMA officials failed to establish and enforce comprehensive standards to ensure the agency's coordination of efficient and effective disaster relief to victims.[88]

On September 7, 1993, FEMA filed a memorandum in support of its motion to dismiss the lawsuit on the grounds that the plaintiff's statutory grounds for relief were not subject to judicial review. On October 4, 1993, the Honorable Judge Letts scheduled a hearing on the government's motion to dismiss the complaint. Instead of ruling on that date, after a hearing of less than 2 minutes on the record, the Judge asserted that the parties would benefit from further discussion outside of the courtroom, summoned counsel for both sides into chambers and

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[84]Legal Aid Society of Hawaii, Western Center on Law & Property, Legal Aid Foundation of Los Angeles, Asian Pacific American Legal Center, National Housing Law Project and National Economic Development Law Center filed on behalf of California and Hawaii disaster victims.

[85]Deborah Castro, *et al.* v. FEMA *et al.*, No. 93-3523-JSL (C.D.Cal. Filed June 16, 1994). In Florida, Legal Services of Greater Miami, Inc., also filed a lawsuit on behalf of victims of Hurricane Andrew. See Locket v. FEMA, No. 93-1035-CIV-ATKINS (Filed on May 27, 1993).

[86]See 42 U.S.C. 5121 *et seq.*

[87]See 44 C.F.R. 206, which governs federal disaster assistance for disasters declared after November 23, 1988.

[88]"FEMA: Riot Victims Sue Agency over Denial of Aid," *L.A. Times*, June 17, 1993 at B4.

encouraged settlement negotiations. As a result, counsel for the plaintiffs and FEMA embarked on a nine-month long settlement negotiation process which ultimately resulted in a non-binding settlement agreement. Ironically, the words on the page were far less significant than the changed policies which had already been implemented prior to the conclusion of negotiations. FEMA agreed, among other things, to meet annually with community advocates from across the country, to continue to implement certain new strategies to facilitate the distribution of disaster assistance, to review the applications of named plaintiffs who still had unresolved issues, to review the actual housing situation in Hawaii, and to provide food stamps to victims of Hurricane Iniki in Hawaii.

The key outcome of the litigation though, was manifest beyond the litigation, in the wake of the next major disaster to strike the Los Angeles community, the Northridge earthquake on January 17, 1994. As the costliest disaster in the history of the United States, the sheer scope and magnitude required efficient strategies for changing policies. Instead of waiting for crises to brew, FEMA invited advocates to sit down to prophylactically discuss issues requiring change. FEMA's improved management in response to subsequent disasters and the increased access to advocates to FEMA officials to recommend alternate policy and procedures.

VII. Community Capacity Building to Advance Policy Reform

Our community capacity building strategy was designed to enable us to advance a policy reform agenda to address the flaws in the statute by working together as allies across racial, cultural, ethnic and linguistic lines. Despite perceived differences, we shared a common agenda of trying to remedy the economic injuries caused by the civil unrest. Unlike owners of small businesses who created disaster response networks, unemployed persons and other individuals would have been left to their own devices, in the absence of our network of advocacy organizations who knew the problems attendant to assisting individuals with FEMA applications.

A. Capacity Building Implementation Strategies

We employed several strategies to advance our capacity building agenda and to effect policy reform. First, we developed relationships with elected officials, provided them with a targeted information strategy to ensure that they understood the types of issues and problems we had been

addressing with our clients, and created a consultative forum for joint interaction of these officials and grass roots members of the community.

Second, about six months into our work, U.R.L.A. advanced the community outreach program by establishing a coalition of organizations called Coalition of Urban Regrowth Efforts ("C.U.R.E."). This loosely configured coalition involved legal services programs, groups that had sprung up to address the crisis concerns of particular segments of the community such as the Korean American Grocer's Victim Association and the disaster intervention mental health providers of South Central. Additionally, organizations with long histories of working to meet the needs of particular constituencies, to address social tensions and the effects of racism such as the Southern Christian Leadership Conference of Greater Los Angeles and the Chinatown Services Center entered the coalition. We also invited elected officials representing the affected communities.

The initial purpose of the coalition was to establish a more efficient way of sharing ordinary information such as deadline extensions and subtle nuances in the implementation of regulations. Subsequently, it became a way to involve a broad cross section of the community and to report to them about policy issues and reforms that ought to be pursued. Additionally, the strategy of establishing a coalition advanced our objective of building capacity as the forum was used as a mechanism to impart basic community legal education.

By involving the legislators and their representatives in a monthly meeting of the CURE consultative forum, we undertook an important part of the legislative advocacy process. Our outreach program and organizational strategy enabled the elected officials to interact directly with their "grass roots" constituents, and more importantly, it enabled people at the "grass roots" level to hold their elected representatives accountable. Consequently, officials at all levels of government demonstrated an active interest in the meetings and participated seriously, perhaps because they knew that the civil unrest represented a dramatic signal of the chasm separating officials from the concerns of their constituencies.

Additionally, as a result of their participation in C.U.R.E., officials gathered and disseminated data that enabled them to advance persuasive arguments on behalf of their constituents and enabled advocates from all sectors to develop effective strategies and information packages for the media and other opinion leader participants in the

process.

Once we developed mass representation strategies, the meetings of the coalition also proved to be a helpful forum for discussing and refining legal strategies and identifying trends. In addition, we had the opportunity to jointly explore and employ basic organizing tactics.

B. The Impact of Community Capacity Building on Policy Reform Initiatives

First, the coalition played a pivotal role in reforging bonds and fostering long-lasting relationships among people and organizations that had previously been divided by racial, linguistic and cultural differences. Invariably, people brought information about resources they had learned through avenues that previously had been open to only one cultural group present at the table. By participating in C.U.R.E., each different interest group learned about new programs that provided access to capital, support for the economic development and recovery process such as information about special loan programs, employment opportunities, micro-business support, training and other special opportunities.

Second, before the U.R.L.A. disbanded, it coordinated the preparation of a document by the Coalition for Urban Regrowth Efforts called *Priorities and Proposals for Community Economic Development in Los Angeles*.[89] This document was the synthesis of several concluding months of CURE's work. The more than 45 organizations, individuals and elected officials who had participated during the two years of its work all had an opportunity to suggest the key proposals to promote economic development in Los Angeles. Through a series of discussions on the draft, CURE was able to gather additional supporting information about efforts in place to advance the proposals and which elected officials and community leaders had adopted these issues as priorities. The topics included in the final document are: Developing a Blueprint for a Friendly Business Environment; Increasing Access to Business Development Resources; Implementing Disaster Recovery Strategies; Developing Human Capital and Creating Jobs; and Housing Development.

Third, in addition to the opportunity to present and discuss

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[89]*The Coalition for Urban Regrowth Efforts (CURE) Priorities and Proposals for Community Economic Development in Los Angeles*, 1994, unpublished report edited by Cynthia Robbins, Public Counsel.

proposals with policy makers influencing life and economic and community development priorities within Los Angeles, CURE and the capacity building work enabled U.R.L.A. and other participating organizations to serve as resources in the long-range planning efforts to redefine the role and operations of FEMA.

With persistence, we were able to arrange a meeting with the Federal Transition Team assigned to look at the issues confronting FEMA and as advocates and educators, played a minor role in highlighting the key legal, administrative and policy issues to be considered in selecting new agency heads and policy goals for FEMA. While the key grievances were unaddressed for a while, we laid the groundwork for the filing of a class action lawsuit and for eventual settlement compromises.

Finally, the most compelling reform happened in the wake of the next major disaster, the Northridge earthquake that struck Southern California on January 17, 1994, discussed above. Our capacity building and policy reform agenda resulted in FEMA calling U.R.L.A. and other advocates to discuss policy recommendations and procedures.

VIII. International Human Rights Instruments as Support for Community Economic Development

The final comprehensive representation strategy to be discussed in this paper involves reliance on international human rights doctrine as authority for redressing economic injury to low-income people. We did not use this approach in Public Counsel's U.R.L.A. On review, however, international human rights covenants would have provided additional support for our challenges to FEMA's policy. U.S. advocates can enjoy a particular benefit from reliance on these international human rights documents since they contain affirmative mandates in contrast to the U.S. Constitutional protection, which tend to be prohibitions against violations. For example, the United Nations Charter[90] mandates that member nations such as the United States, "shall act in accordance with the following Principles..." (Emphasis added.) The mandates cited promote economic development and non-discrimination, "All Members pledge themselves to take joint and separate action in cooperation with the Organization for

[90]The United Nations Charter was ratified by the United States Senate by a vote of 89 to 2 and, as a ratified treaty, is part of the supreme law of the United States. (United Nations Charter, October 24, 1945.)

the achievement of the purposes set forth in Article 55."[91]

The Senate also ratified the International Covenant on Civil and Political Rights. This Covenant sets forth in Article 26 that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[92]

While unenforceable in the United States, the International Covenant on Economic, Social and Cultural Rights provides strong language in support of a more effective strategy of helping disaster victims to secure new employment and to remedy their economic injury.[93]

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[91]Article 55 mandates in part that, "the United Nations shall promote:

> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
> (b) ...; and
> (c) universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

[92]Also see Article 2 which provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other norms." (International Covenant on Economic, Social and Cultural Rights.)

[93]See also the following articles of the International Covenant on Economic, Social and Cultural Rights:

Article 2(1): Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

People who suffered no economic hardship prior to the unrest were not made to produce the same volume of paperwork to justify their entitlement to receive emergency assistance benefits. The documentation requirements could have been challenged on the basis that the limitation did not advance the general welfare of the state.

The reliance on international doctrines would have enabled a more frontal attack on the federal government's policies which failed to redress the economic injury of our low-income clients, discriminated on the basis of language by failing to provide translated documents in the major languages of the affected communities. We could have more forcefully argued disparate treatment by FEMA on the basis of their economic, language, apparent racial and property discrimination against low-income disaster victims.

IX. Conclusion

As we prepare for a new millennium, we must continue to

Article 2(2): The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present
Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

...

Article 4: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 6(1): The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 6(2): The steps to be taken by a State Party to the present covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

explore strategies that are innovative and far reaching. First we are advocates, then we are lawyers. The law and traditional legal practices which include litigation and legislative drafting continue to be important mainstays of our work on behalf of the economically deprived and disadvantaged. However, we must also be mindful of the opportunities to implement creative alternate approaches, such as media advocacy, community capacity building to advance policy reform and reliance on international human rights law before domestic tribunals as aspects of comprehensive representation of poor and disadvantaged members of the community seeking redress from economic injury and hardships. Our best strategies will be ones that recognize the prudence of developing proactive and holistic approaches to improving the economic standing of the clients we represent.

WORKER OWNERSHIP OF ENTERPRISE: A VEHICLE FOR EGALITARIAN DEVELOPMENT

by
William Waterman, Jr., U.S.A.[94]

If we are talking about development and the right to development, we must deal with a number of fundamental questions. Two of these questions are what kind of development, and development for whom? Increasing the average per capita income is not beneficial development if the increases are concentrated in the wealthier classes. A third question is what is the institutional framework in which development is to be carried out? What legal institutions can be used or created to enable people to exercise their right to development? This paper concerns to some extent the second question, development for whom, and the third, the institutional framework, focusing on a particular kind of institution I believe can help.

PERILS OF THE CAPITALIST PATH

Capitalism over the last 200 years has given rise to various social and economic problems, including growing concentration of wealth in the owning classes, exploitation of workers, gross inequality of incomes, large scale unemployment, business cycles aggravating unemployment during slow periods and alternatively fostering inflation, and the need for ever-expanding markets and cheap raw materials and labor and consequent fostering of imperialism.

South Africa has until now followed the capitalist path, and, despite the end of formal apartheid, the arrival of political democracy and the election of a black majority government, I see no signs that this is about to change. But unless there is significant change in the South African economic system, I see no way that the promise of equality underlying the recent political changes can be realized.

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[94]Attorney at Law; member, National Lawyers Guild. This paper was copyrighted in 1996.

SOCIALISM AS A MODEL?

Socialism has sought to eliminate the social and economic problems caused by capitalism by vesting ownership of the means of production in the people, meaning generally public or state enterprise, and by arranging a more egalitarian distribution of personal income. But those economies regarded as socialist which existed until recently in Eastern Europe failed to provide a material standard of living as high as that provided even for ordinary people by the developed capitalist economies. Even the social benefits of developed socialist countries, e.g., free or low cost medical care and education, benefits for the aged and disabled, etc., were no better than those provided in the most advanced capitalist economies, particularly those of northwestern Europe.[95]

Now the socialist system has collapsed in most of the countries where it had existed, for reasons including, inter alia, internal economic weaknesses of the system itself:

1. Excessively rigid central planning, unable to satisfy consumer demand or even demand of industry for necessary materials, and conversely resulting in unusable surpluses of overproduced or undeliverable goods.

2. Lack of worker initiative to work harder or improve the quality of what they did.

3. Technological backwardness related to lack of incentive for those with novel technological ideas to develop them.

4. Lack of the competition between enterprises which tends to improve quality, lower costs, and thus bring about more efficiency.

5. Lack of accountability of management, and a lack of principles on which to base accountability. In capitalist economies, the sine qua non for continued operation of a commercial enterprise is the earning of a profit. But because in the Soviet Union and Eastern Europe there was too little appreciation of the importance of profit, managers were not subject to the discipline, profit considerations impose.

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[95]A notable exception was the right to employment; unemployment in most Eastern European socialist economies was negligible.

Largely because of the economic stagnation and the ultimate collapse of these systems, the reputation of socialism in the world has become badly tarnished. But might a society based on principles of economic justice be more successful if these problems were addressed directly?

REFORMULTING OUR IDEAS:WHAT STEPS CAN BE TAKEN TOWARDS ECONOMIC DEMOCRACY?

Why have any of us advocated socialism? Leave aside ideas of historical inevitability—why have we wanted socialism? I think it is because we are distressed, whether as victim or humane observers, at poverty in the midst of wealth, and at great discrepancies in power, with the weak being pushed around, used, exploited by the strong. It is because we have basically democratic sentiments, and recognize that genuine political democracy cannot be achieved without economic democracy.

In this time of ideological redefinition, we should focus on specific benefits we wish to bring about and explore practical ways to achieve them. I believe the goal should be economic democracy, by which I mean an economy providing more or less equal, or at least not grossly disparate levels, of income and wealth for everyone, and meaningful input of the people into the processes of production and the processes governing their work relations.

WORKER-OWNED SELF-MANAGED ENTERPRISES

I wish to focus on one institutional idea which may, among others, be helpful in moving toward economic democracy in South Africa and other countries, namely that of worker-owned self-managed enterprises. This idea has gathered considerable interest, has been tried successfully in many countries including Spain, the United State, Canada, Italy and China, to name a few, and could be adapted for use in South Africa either within the present legal-institutional framework or with the help of legislation similar to that adopted in other countries.

One could even envisage an entire economy based on such enterprises, which would be characterized by a different kind of people's

ownership than has previously been widely experienced.[96] Rather than a system consisting largely of state enterprises, we would see a wide variety of independent enterprises, each owned by its workers, functioning in a market economy. These enterprises would be operated for profit, and would presumably pay dividends out of their profits to or accumulate earnings for the benefit of their worker-owners in addition to the wages paid for their labor.

These worker-owned enterprises could take a variety of legal forms, including both cooperatives and limited liability companies of the type familiar in most countries. The share-holders or cooperators would be the employees of the enterprise. Ownership would be more or less equally divided. These companies would operate under some form of democratic management, e.g., by directors chosen democratically by the owners, i.e., the workers, and management chosen by the directors.

Compensation of workers could be adjusted in line with the value of their labor, increasing incentive to work harder and more efficiently. Workers would, in fact, be doubly motivated to better performance because not only could this lead to higher salaries, it would also tend to increase the profits of the enterprise, increasing the amounts available for distribution to them, in their capacity as shareholders or cooperators.

Several enterprises might be engaged in the same line of business, allowing for competition. Rather than operating under a system of central planning, these companies would operate independently in a more or less free market much as companies do under the present capitalist system.

Technological development would be spurred by the profit motive, and new enterprises could be set up under the form of worker ownership to develop new technological ideas. A culture of collective entrepreneurship would develop, contrasting with the individualistic notion of entrepreneurship now prevailing.

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[96]Several models for such an economy have been put forward. See Schweickart, David, Against Capitalism, Cambridge University Press, 1993, Westview Press, 1996; Roemer, John, A Future for Socialism, Harvard University Press, 1994; Ellerman, David, The Democratic Worker-Owned Firm, a New Model for East and West, Boston, Unwin Hyman, 1990.

In such an economy, there would be workers' ownership of the means of production, but not through the State. Ownership would rather be private, but widely and more or less evenly disbursed.

Such an economy would thus seemingly be free of the weaknesses of state socialism, discussed above. But obviously it could not be established overnight and in its pure form might be altogether unattainable.

One can, however, envisage a mixed economy in which worker-owned enterprises would be part of the picture together with private enterprises of the kind now common, both large and small, and possibly some state-owned enterprises. **The scenario I propose is one of creating a worker-owned self-managed sector in the economy and working steadily to increase its size and significance and thereby to spread the benefits as widely as possible throughout the economy and the society.**

In the balance of this paper, I will focus primarily on two models of worker-owned enterprise, the Mondragon system of cooperatives in Spain and the "ESOP" model developed in the United States, I will also make brief reference to recent experiences in Cuba. Finally I will suggest how these ideas might be applied in South Africa.

THE MONDRAGON COOPERATIVES IN SPAIN

Cooperatives have existed in many countries at least since the early 19th Century. The first cooperative is sometimes said to have been the one established by 28 workers in Rochdale, Lancashire, in 1844, although the true origins of the institution may be earlier. Typically they involve people joining together to accomplish a purpose, and in some way sharing the work and benefits of the activity. Agricultural and consumer cooperatives are probably familiar to most of us. A less common form is the industrial production cooperative.

Among the most successful industrial production cooperatives are those operating in and around the small city of Mondragon in the Basque region of Spain.[97] The Mondragon cooperatives, deriving from

[97]My description of the Mondragon cooperative complex is derived primarily from Whyte, William Foote and Kathleen King Whyte, Making Mondragon, Ithaca, N.Y., ILR Press, 1988, from information obtained at the conference of the

the work of Father Jose Maria Arizmendiarrieta, a Catholic parish priest who in 1941 took up his duties in Mondragon, which then had a population of about 9,000 and some local industry. Arizmendi, as he is frequently referred to in a shortened form of his name, was interested in social questions. Through his position as priest worker he catalyzed various activities beneficial to the town, which was in an impoverished condition due to the recently concluded Civil War and the effects of World War II then under way elsewhere in Europe. He stressed the dignity of labor, the need for cooperation and collective solidarity in the community, and, in a town with very limited educational opportunities for the working class, who made up the vast majority of the population, the value of education.

Arizmendi was regularly involved in discussion groups with people in the town focusing on social problems. As a product of discussions focusing on the conflict between capital and labor and the idea of self-managed worker-owned enterprise, the first Mondragon cooperative, Ulgor, was established in 1956, initially engaged in the manufacture of gas stoves and heaters and as a foundry, with 26 worker-owners. Ulgor's business expanded so rapidly that soon other worker-owned cooperatives were formed in Mondragon as suppliers to Ulgor and in other businesses.

In line with Arizmendi's belief that an individual's labor should be deemed inalienable, not to be bought and sold like an ordinary commodity, members of the Mondragon cooperatives in theory do not receive wages, but work for their share of the profits of the cooperative. As the profits are not determined until after the close of each year, each worker during the year receives an anticipio, or advance, against his or her share of profits. A worker joining a cooperative receives starting

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International Institute for Self-Management held in Spain in September 1995 and focused on Mondragon (including a visit to the complex), and from contact over a number of years with scholars interested in worker-ownership and self-management, whose contributions to my knowledge have been considerable but cannot now be specifically attributed, including among others Elizabeth Bowman (Connecticut College), Bob Stone (Long Island University), Len Krimerman (University of Connecticut), Michael Howard (University of Maine), David Schweickart (Loyola University, Chicago) and Sharryn Kasmir (Knox College). Other useful, if perhaps overly laudatory works on Mondragon include Morrison, Roy, We Build the Road as We Travel, Philadelphia, New Society Press, 1991, and Ormaechea, Jose Maria, The Mondragon Cooperative Experience, Mondragon, Mondragon Corporacion Cooperativa, 1993.

compensation at about the same as the wage for similar work in the private sector. Modest raises can be awarded for merit, and as the worker progresses to more responsible positions, the compensation goes up.

A mandatory ratio is maintained between the highest and lowest compensation paid. Initially the ratio was set at 3 to 1. However, because this ratio was far less than what prevailed in the world outside, senior executives of the cooperatives were tempted to leave. This has been a persistent problem causing continuing pressure to widen the differentials in pay. By the 1980's, the ratio had been raised to 4.5 to 1, and by the early 1990's to 6 to 1, with pressure mounting to raise it to as high as 10 to 1. (It might be noted that even a 10 to 1 ratio is much less than what prevails in the capitalist world.)

Members do not own shares in the cooperative. Each member does, however, have a stake in the cooperative's capital. New members, upon joining, are required to pay an entry fee equivalent to about one year's salary. This fee is credited on the cooperative's books to an Individual Capital Account in the name of the member. The entry fee is not generally a bar to anyone joining, as most may be borrowed from the cooperative and paid back over a number of years.

From the profits of the cooperative each year, 10% is allocated as required by Spanish law for eleemosynary purposes, and further amounts varying from year to year to the cooperative's reserve fund. The remaining profits are credited to the Individual Capital Accounts of the workers.

Funds from the Individual Capital Account are not paid to the worker until he or she retires or leaves the cooperative. Thus, each member's capital stake in the cooperative continues to grow as long as he or she remains a member. The Individual Capital Accounts of the members thus vary according to the pay scale at which each member has been classified and how long the individual has been a member of the cooperative.

But, although the ownership interest, as measured by the Individual Capital Account, varies from member to member, each member has an equal vote in the affairs of the cooperative. Ultimate governing power in each cooperative lies in its General Assembly, consisting of all its members. The General Assembly meets at least once a year, and members are required to attend and vote. The General Assembly elects a Governing Board, all of whom must be members of the

cooperative. The Governing Board, in turn, chooses the Manager, who serves for a four-year term but is subject to recall. Each cooperative also has an Audit Committee elected by the membership and a Management Council consisting of the Manager and all department heads.

An additional body of particular interest in each cooperative is the Social Council, consisting of delegates elected by the members in each department of the firm. The purpose of the Social Council is to facilitate communication within the cooperative, to advise management on such matters as job safety, compensation, hours and fringe benefits, and to question abuses by management. The Social Council is the nearest thing to a labor union in the Mondragon system, but with only advisory powers is not the true equivalent of a union.

The history of the Mondragon cooperatives has been one of spectacular business success.

By 1959, Arizmendi, perceiving that a reliable source of financing would be necessary to assure continued cooperative development, that cooperatives could not sell shares to outside investors, and that borrowing from ordinary commercial banks would not only be impossible or difficult, but would compromise the independence of cooperatives, established a small bank, the Caja Laboral Popular (People's Labor Bank) to serve the four cooperatives then in existence. The Caja, serving as the sole bank for the cooperatives and later developing extensive business consulting activities for them, grew with the cooperative complex and played a central role in its development.

By the early 1960's the first cooperative, Ulgor, had grown so rapidly that it was one of the 100 largest manufacturers in Spain. It had reached a size where conventional companies typically become more bureaucratic, with divisions under centralized management, leading to less flexibility and more worker alienation. Ulgor, however, adopted a policy that, when any line of business became substantial and efficient enough to stand on its own, that line of business and its workers would be spun off into a separate and independent cooperative.

This spinoff policy, subsequently followed generally by most of the Mondragon cooperatives, together with formation of new cooperatives and conversion of formerly private firms into cooperatives, has now progressed to the point where the complex now consists of some 140 cooperatives, employing about 27,000 people, making products sold all over the world ranging from refrigerators and other appliances to luxury

buses, auto parts for the major manufacturers (including such components as engine blocks and transmission housings), electronics, and a wide variety of high-tech items, including precision machine tools and robotics. In the non-manufacturing section, cooperative in the complex include firms in construction and agricultural products and the Eroski chain of supermarkets, now the fourth largest such chain in Spain.

The complex today consists not only of the cooperatives in manufacturing, retailing, construction, etc., but a series of "second level" cooperatives which exist to serve the other cooperatives and the complex generally. Among these are the bank (the Caja Laboral Popular), technical schools providing training at various levels up to that of advanced engineering, a school of business administration, and two research institutes.

Taken together the Mondragon complex had assets of about US$8,000,000,000 and sales of about US$3,500,000,000 as of the end of 1993,[98] and is the largest single element in the economy of the Basque region, the wealthiest region in Spain. The Caja is now approximately the 10th largest bank in Spain. These businesses remain entirely owned by their 27,000 workers.

CRITICISMS AND PROBLEMS OF MONDRAGON[99]

In the early years of the Mondragon cooperatives they were criticized by elements of the Spanish left as creating a petit-bourgeois mentality among their workers and diverting them from their proper role in the class struggle. Certain aspects of the behavior of the Mondragon cooperatives over the years might be seen as supporting this criticism.

First of all, strikes concerning labor disputes within the cooperatives are forbidden by the cooperative by-laws. An attempted

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[98]Mondragon Corporacion Cooperativa, Annual Report for 1993.

[99]Many of the criticisms of Mondragon set forth herein were obtained from Sharryn Kasmir, whose book The Myth of Mondragon: Politics and Working Class Life in a Small Basque Town, will be published by SUNY Press, Albany, later in 1996. More cursory, critical evaluations can be found in GEO Grassroots Economic Organizing Newsletter, Issue XX, January/February 1996. The GEO Newsletter, can be obtained from EDINA, P.O. Box 5065, New Haven, CT 06525, USA.

strike in one of the cooperatives in the early 1970's led to the ringleaders being permanently dismissed from their positions.

When strikes have occurred in nearby capitalist firms engaged in the same line of business as the cooperatives, one might expect Mondragon workers to engage in sympathy strikes to show class solidarity—this kind of strike is not forbidden by the cooperative by-laws. Mondragon workers have, however, never participated in such activity.

Labor unions are weak in Mondragon, even though there is substantial non-cooperative industry in the area. The fact that so much of the working class is made up of the non-unionized cooperative workers is blamed for this situation.

The Mondragon cooperatives have in recent years been undergoing many of the same processes, in the name of efficiency, as other businesses in the industrialized world, including elimination or routinization of jobs, just-in-time delivery schedules and speedups, resulting in stress on workers and radical downsizing of some cooperatives. There has been increasing use of temporary workers, who do not have or participate in the benefits of cooperative membership.[100] The work culture in the cooperatives is said to be not much different from that in conventional firms.

Complaints coming out of this situation might be taken up by a union, but there is no union. The Social Councils, charged with dealing with these matters under the cooperative system are said to be ineffective and in some cases non-functioning.

Contrasting with the earlier tendency to decentralize through spinoffs as the cooperatives grew, in recent years there has been increasing centralization of management. Whereas previously the cooperatives were essentially independent entities, though held together by common institutions such as the Caja Laboral Popular, which has had a substantial affect on formulation of policy over the years, and the other second level cooperatives, the cooperatives have now been organized into functional groups and since 1991 all strategic management for the entire

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[100]Mondragon cooperatives have since the early days been permitted to hire nonmembers up to 10% of their workforce, but only to meet temporary needs. Use of this provision has increased recently, and some cooperatives appear to have exceeded the 10% limit.

group has been centralized in a new entity, Mondragon Corporacion Cooperative ("MCC").

MCC and some of the cooperatives have recently established subsidiaries in other countries, including Morocco, which are not organized as cooperatives. A similar practice has been going on within Spain for some time—the Eroski supermarkets outside the Basque region are not cooperatively organized, but are rather subsidiaries of the Eroski cooperative in the Basque region. The profits of these subsidiaries (which where operating in countries like Morocco take advantage of the lower wages there) thus do not accrue to their own workers, but to the parent cooperatives and ultimately to the members of those cooperatives in the Basque region.

The Caja for many years has been lending to companies outside the complex, the reason given being that there has been insufficient loan demand from the cooperatives. But recently the MCC began **selling shares** (non-voting) to outside investors.[101] Why don't they borrow from the Caja? The reason seems to be that the Caja can make more money lending to non-cooperative firms. And the result is that the complex is voluntarily integrating itself both as borrower and lender with the capitalist world.

Finally, the Mondragon cooperatives have never been supportive of any movement for worker-owned, self-managed enterprises elsewhere. If the Caja is so awash in money that it must lend it outside the cooperative complex, certainly some of this could surely be used to support development of cooperatives outside the Basque region where the complex is instead establishing subsidiaries.

The question of unions and strikes in worker-owned enterprises is a serious one. Note that in state socialist systems strikes were also considered illegitimate. Yet it is clear that conflicts will arise between management and line workers regardless of who owns the enterprise. All social systems, and for this purpose we can regard an enterprise as a social system, have the potential for oppression and for tension between the rank-and-file and the elite. The oppressed need mechanisms to end their

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[101]Is this inconsistent with cooperative principles? Arizmendi seems to have thought so when he set up the Caja to provide ongoing financing. But some cooperatives in poor countries may need outside financing. This is discussed towards the end of the paper.

oppression and any social system needs mechanisms to give the rank and file control over the elite.

The Mondragon cooperatives have clearly not addressed these problems satisfactorily. This does mean, however, that the problems cannot be addressed. Because these problems will be present to some degree in any worker-owned enterprise, they will require continued serious attention.

The centralization and efforts to improve efficiency have taken place largely in response to Spain entering the European Community, making it necessary for the Mondragon cooperatives to compete against the world. They have lost the Spanish export subsidies and the protection of import duties.

Despite the elimination of jobs, no members of Mondragon cooperatives have been laid off. The cooperatives have had a no-layoff policy from the beginning: workers whose jobs are eliminated are retrained and transferred to other jobs and even to other cooperatives. In recessions, the decline in income has been shared proportionally by all members.

The failure of cooperative workers to engage in sympathy strikes and the failure of the cooperatives to support development of worker-owned self-managed enterprise elsewhere reflect a professed apolitical stance the Mondragon cooperatives have held since inception. They began operation, it must be remembered, during the Franco period, and have been strongly influenced throughout by moderate Catholic social thought. Moreover, a long history associates cooperatives with political neutrality, this being one of the "seven cooperative principles" of the Rochdale pioneers in 1844.

The failure to support worker-owned self-managed enterprise elsewhere may also reflect some degree of Basque ethnic sentiment within the Mondragon cooperatives. Cooperative work is said to be natural to Basques, a part of their culture, and there may be a feeling that this quality cannot be readily transferred outside.

Perhaps worker-owned enterprises and any movement to support them should adopt a stance identifying themselves more explicitly with the political interests of the working class. Active assistance on the part of Mondragon to other cooperatives and to the movement for worker-

owned self-managed enterprise would be welcome.[102]

The defects and problems shown by the Mondragon experience, however, should be no basis for condemning worker-owned enterprise in general. Rather these should be taken as object lessons enabling worker-owned self-managed enterprises to try to avoid similar problems elsewhere.

THE "ESOP" MODEL

The "ESOP" model of worker-ownership was developed i the United States, where there has been in existence for many years an active employee-ownership movement.

The individual usually regarded as the original promoter of this movement in the United States was an American lawyer, investment banker and amateur economist named Louis Kelso, who died in 1991. Kelso's intellectual underpinnings would appear, to a socialist, largely conservative to reactionary. He was thoroughly convinced (with one major qualification, to be addressed later) of the virtues of capitalism. He profoundly disliked socialism, believing it would lead to a regimented society inconsistent with optimum goals of individual freedom. He even condemned the efforts made over the last sixty or more years in advanced capitalist countries to effect more equitable distribution of income through Keynesian economics, welfare measures, minimum wage laws, laws increasing the power of labor unions, measures aimed at reducing unemployment, etc. His views are set forth in several books.[103]

Why should the views of such an individual be considered by anyone interested in development of egalitarian societies? Some have been intrigued with Kelso's ideas because despite his ideologically capitalist underpinnings, he expressed distress at the great disparity in

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[102]It is of interest in this context that the International Cooperative Alliance in 1966 dropped political neutrality as a principle of cooperativism and added as a principle "international cooperative collaboration."

[103]The Capitalist Manifesto (1958, co-authored with Mortimer Adler); The New Capitalists, (1960); Two-Factor Theory: The Economics of Reality (1967, co-authored with Patricia Hetter); and Democracy and Economic Power (1986, co-authored with Patricia Hetter Kelso).

wealth in capitalist societies and devised a system he claimed would greatly reduce the disparity and provide everyone with adequate income.

Kelso recognized, as do socialists, that true democracy requires both political and economic democracy.[104] He differed from socialists, however, in that rather than putting the means of production under some form of collective or state ownership, he wanted to put everything under private ownership, but to assure that private ownership would be widely disbursed. In fact, private ownership of capital would be universal. Rather than a socialist economy, he wished to establish a "democratic capitalist economy," a private-property, free-market economy in which each family would have enough income, whether earned through interest and dividends on its capital or through labor, to follow the lifestyle it chose.

When one considers Kelso's entire system and considers the great benefits he anticipates, it looks like the work of some kind of economic quack: it's just too good to be true.[105] It serves no purpose here to discuss his ideas in detail. Suffice it to say that he presents a grandiose scheme he claims will lead to unprecedented economic growth and make everyone affluent, a scheme based on a multiplicity of questionable economic ideas and baseless projections.

Yet within this body of apparently crackpot notions are some truths and useful ideas. Kelso recognized, as do Marxists and many non-

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[104]Democracy and Economic Power, p. 12.

[105]Thus Pravda was said about 25 years ago to have called his ideas the "wanderings of a madman," while American economists, somewhat more charitable, have either regarded him as more of a "crank," or have ignored him altogether. See, e.g., Sherrill, R.G., "Louis Kelso, Nut of Newton?" The Nation, vol. 210, pp. 234-37 (March 2, 1970); Sloan, A., "Idea Whose Time Has Come?" Forbes, vol. 128, pp. 75-78 (July 20, 1981).

The first serious scholarly examination of Kelso's ideas seems to have been undertaken by Robert H.A. Ashford, Professor of Law at Syracuse University. See Ashford, "The Binary Economics of Louis Kelso: The Promise of Universal Capitalism," Rutgers Law Journal, vol. 22, p. 3 (1990), and "Louis Kelso's Binary Economic Democracy," paper delivered at Fourth Annual International Conference of the Society for the Advancement of Socio-Economics, held jointly with the Society of Economic Anthropology, at the Graduate School of Management, University of California, Irvine, March 29, 1991. In these papers Ashford notes the lack of serious attention heretofore paid to Kelso's theories.

Marxists, a key flaw in free-market capitalist economies in their ability to produce more than the people can consume.[106] He wanted to prohibit anyone having too much wealth, reinforcing the principle that capital ownership should be universal.[107] Finally, the best known feature of his proposed system was widespread worker ownership of enterprises. This is the only one of Kelso's proposals to be put into practice, although in a very limited way thus far. But the idea has gained influence in the United States and in certain other countries, and is associated with Kelso's name.

THE EMPLOYEE-SHAREOWNERSHIP PLAN ("ESOP")

The employee-shareownership movement in the united States advocates, inter alia, issuance of shares in already existing enterprises to their workers. One of Kelso's proposals sets forth a method to achieve this goal, which has now been followed thousands of times in the United States, with variations from company to company, and is known generically as the employee shareownership plan of "ESOP." ESOP's have, in fact, been widely adopted in the United States, there being perhaps 10,000 of them in existence at the present time covering perhaps 11,000,000 workers.[108]

A typical ESOP might work as follows: a company issues and sells shares, perhaps for financing to increase capacity of otherwise make investment, or for other reasons. But rather than selling the shares at a public offering, which under present circumstances would tend to be bought up by wealthy individuals and institutions, the company offers them only to its employees. The shares are paid for at their fair value, which is usually the market price where the company's shares are publicly traded, or an appraised value for a private company. The purchase money, however, comes not out of the pockets of the employees, but by borrowing money to pay the purchase price from a bank or other lender.

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[106]E.g., Lenin's consideration of overproduction in Imperialism, the Highest State of Capitalism (1916); see also Hobson, Imperialism (1905).

[107]Kelso called this the "principle of limitation." See Two Factor Theory: The Economics of Reality and Democracy and Economic Power, passim.

[108]Estimate in Employee Ownership Report, vol. XIV, No. 3, May/June 1994, p. 1. The Employee Ownership Report is published by the National Center for Employee Ownership, 1201 Martin Luther King Jr. Way, Oakland, California 94612-1217, USA.

The loan is made either to the company or to the **ESOP trust** which is set up to hold the shares on behalf of the employees, secured by the assets of the company, and evidenced by a note issued by the company or issued by the trust and guaranteed by the company.

The loan is repaid out of that portion of the profits of the enterprise attributable to those shares issued for the employees; these funds are paid regularly by the company as dividends on the shares or as contributions to the ESOP trust, which in turn remits them to the bank. As shares are acquired by the trust, they are allocated pro tanto to the accounts of the individual employees. As soon as the loan is repaid to the bank in full, the trust may either distribute the shares to the individual employees or may retain them for their benefit, depending on the terms of the specific ESOP. When an employee retires or leaves the company, shares held for his or her account are bought back by the trust at the then market or appraised value and the shareholder is paid or credited accordingly.

PROBLEMS WITH ESOP'S

ESOP's in the United States are much more limited in effect than the statistics might superficially indicate. The plans are in effect only at a small minority of companies, and 11 million workers is a small percentage in a country with a population of 265 million.

Workers covered by ESOP's in the U.S. are not normally in control of their companies; the typical ESOP is said to own only a minority interest in the company. Those ESOP's holding larger proportions of their companies' shares tend to be in smaller companies, although in a few large companies, including United Air Lines and Avis Rent-aa-Car, workers now have majority ownership.

Under many plans the bulk of the employee shares have gone to management rather than rank and file employees. Moreover, ESOP's as adopted in the united States generally fail to give rank and file employees a true voice in managing the company. As the shares are legally held not in the name of the employees, but in the name of the ESOP trustees, the trustees vote the shares. Moreover, the trustees themselves are under many plans chosen by company management rather than by the workers. Workers typically do not have representation on the board of directors proportionate to their interest, even when the ESOP holds a majority of the shares.

In many companies ESOP's are regarded as simply another fringe benefit adopted, along with such things as medical insurance and pension plans, to improve employee feelings about the company, without fundamentally changing the relationship of production, and to help discourage union organizing. Moreover, some ESOP's have been used essentially as vehicles for large shareholders to dispose of unwanted shares at favorable prices, or to get rid of troubled enterprises altogether.[109]

Employee ownership in the United States following the ESOP mode, accordingly, shows no signs of becoming the predominant form of ownership of business enterprise, or even to achieve a significant proportion of such ownership, in the near future. The number of ESOP's, after many years of growth, recently appears to have declined somewhat.[110] Such employee ownership as exists is defective and except in a very few cases fails altogether to assure democratic governance of companies.

Despite the apparent flaws in the ESOP approach, however, U.S. companies with ESOP's seem to have done better in general than those without them in terms of growth, and where programs have been instituted to increase actual worker participation in management decisions, productivity has substantially improved.[111]Moreover, there are

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[109]See Sloan, A., "Idea Whose Time Has Come?" Forbes, vol. 128, pp. 75-78 (July 20, 1981); Burck, C. G., "There's More to ESOP Than Meets the Eye," Fortune, vol. 93, pp. 128-33 (March 1976); Hobbs, C. D., "Kelso's Revolution: Only a Pension?" Business and Society Review, no. 18, pp. 36-39 (Summer 1976).

[110]See Employee Ownership Report, May/June 1994, p. 1 and Jan./Feb. 1994, p.1, and May/June 1993, p. 1. The National Center for Employee Ownership estimates that employees hold only about 5.8% of their employers' shares as of the end of 1992, including holdings not only through ESOP's but also through other plans providing for employee ownership of shares. Employee Ownership Report, vol. XIV, no. 3, May/June 1995. p. 1.

[111]Rosen, Corey and Michael Quarrey, "How Well Is Employee Ownership Doing," Harvard Business Review, Sept./Oct. 1987; "New Research Shows More Positive Results from Employee Ownership," Employee Ownership Report, Nov./Dec. 1990.

democratic ESOP's, though they be few and far between.[112]

THE NEW COOPERATIVES IN CUBA[113]

In a most interesting development the Communist government of Cuba is taking significant steps towards worker ownership and self-management in the form of a massive conversion of a major portion of its economy, namely, its agricultural section, to a cooperative basis. The goal seems to be to make cooperatives the principal form of agricultural enterprise.

The program is part of a generalized effort to stimulate the economy by moving away from a system consisting almost entirely of centrally directed state enterprises and promoting more autonomy.

State farms of various types have been dominant for decades in Cuba's agricultural section (although there remain a large number of small private farms). Under the new model there will be three basic types of agricultural enterprise, namely (1) state farms, some of which will remain, (2) two new types of agricultural production cooperative, and (3) small private farms.

Under the plan two new types of agricultural cooperatives are being established:

1. The **"Basic Unit of Cooperative Production"** (or "UBPC" in Spanish abbreviation) is the form into which state farms are being converted. UBPC's do not own their land, which is essentially leased to them by the state, but do own the rest of their means of production, i.e., buildings, equipment, etc. Each worker in the UBPC is a member, with an equal vote at elections of officers and directors and at meetings.

2. The **Agricultural-Livestock Production Cooperatives**

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[112]In this connection Spanish law has provided since 1986 for a new type of share company, the Sociedad Anonima Laboral, in which employees **must** hold over 50% of the shares and thus have control of the company.

[113]This section on cooperatives in Cuba is based on information I obtained as part of a delegation of North American philosophers and social scientists at two university conferences in Cuba during June 1995 where these developments were discussed and on visits to two Cuban cooperatives with the delegation.

("CPA" in the Spanish abbreviation) appear to be made up largely of small formerly private farmers who have been brought together into production cooperatives. Unlike the UBPC's the CPA's own not only their buildings and equipment but their land as well.

At a UBPC I visited, the board includes five directors elected by the membership, others serving on the board by reason of offices they hold in the coop, including the president and an economist, and still others representing different segments of the work force on the farm, i.e., tractor drivers, planters and pickers, mechanics, etc.

The workers are compensated according to their jobs, some by piecework, others by the hour. If they exceed their quotas, they earn more. Each worker receives a regular payment described as a "down payment" (sounding like the anticipio at Mondragon) against his or her compensation for the year.

The UBPC's profits are by law divided at the end of the year into two equal segments, one for reinvestment and other needs of the coop, the other for distribution to the members proportionate to the salary they received during the year. At this UBPC it was reported that profits for the fiscal year about to end would be quite substantial, and that the workers there would be receiving compensation far in excess of that received by professional workers such as doctors and lawyers.

PROBLEMS FACED BY CUBAN COOPERATIVES.

A basic problem of Cuban cooperatives thus far is their limited independence, particularly in the sugar cane sector. Sugar cane coops can sell their product only to the State, affecting not only their independence but their income and financial condition. Because non-sugar cane coops can sell on the free market, they can often obtain more than the State's price and are thus generally in better financial shape. Reflecting this fact, one Cuban opined at a university conference I attended that "too much democracy" could not be allowed in sugar cooperatives, because if the members could choose freely, they would all switch to more profitable crops. But because sugar is so crucial as Cuba's principal export, this could never be permitted.

Another key difficulty is with the concept of ownership itself. It was noted as a problem by some Cuban colleagues that the state

enterprises still considered themselves the owners of the coops and that conversely members of the new cooperatives had difficulty conceiving of themselves as owners. Given Cuba's decades of nearly exclusive state ownership and the attitudes reflected by the conferee who feared "too much democracy," this is not surprising.

Some further observations are (1) that there seems to be very little cooperativization in Cuba outside of agriculture, and (2) that the process of cooperativization itself, like all significant developments in Cuba, is under very close state and Communist Party control.

Perhaps a paradox is in the making. The still powerful and legitimate government and Communist Party have chosen to promote decentralization and worker ownership and are seeking carefully to guide the process ahead, unlike the governments in Eastern Europe which simply collapsed when the time seemed ripe for such developments there, leaving their countries to the wolves of Western and nomenklatura capitalism. Could it be that the very support by this Party and government, long associated with centralized state ownership and even now shepherding the cooperative plan in a centralized, controlled manner, offers the best hope for successful transformation of a state-based economy into one of autonomous worker-owned enterprises, egalitarian and democratic, where collective initiative and entrepreneurship can thrive?

WHAT ROLE COULD WORKER-OWNED ENTERPRISES PLAY IN SOUTH AFRICA?

A policy of promoting worker-owned self-managed enterprises offers a number of advantages for a country in the situation of South Africa. First of all, it would provide a vehicle for egalitarian development. Properly designed worker-owned enterprises could be especially useful in the areas of business development in underprivileged communities. Worker ownership could likewise play a role in privatization, and conceivably even redistribution of ownership of larger business enterprises.

Secondly this is something the country could begin implementing immediately within the market economy and within the present legal system, with perhaps some statutory enactments and some creative work by South African lawyers in negotiating and drafting the necessary instruments.

DEVELOPMENT OF COMMUNITY-BASED BUSINESS ACTIVITY

South Africa faces the task of establishing greater economic equity between the roughly 75% of the population who have been disadvantaged and the privileged 25%. If this were carried out abruptly simply by expropriating and redistributing a large portion of the property of the privileged, this would cause considerable antagonism and insecurity among the privileged, provoke departure of many from South Africa, and cause general economic disruption. A better way to work towards equality would be to maximize economic growth and try to arrange it to benefit primarily the disadvantaged.

The most obvious immediate need of the disadvantaged is more income. As income of the disadvantaged increases, so should the economy grow if production is increased correspondingly.

One way to increase income among the disadvantaged will be to increase economic activity within their communities by promoting development of community-based business. An obvious initial focus for such businesses is in the area of housing construction and infrastructure development, for which there is a desperate need and which are primary targets of the government's Reconstruction and Development Program.

Cooperatives could be formed on the Mondragon model to engage in these fields. In South Africa, while the Co-Operatives Act of 1981 is largely oriented towards agricultural cooperatives, section 23 of the Act provides that a "trading co-operative" may be formed to carry out any object, which would appear at least superficially to include industrial production cooperatives. As basic development of communities proceeds, demand for additional goods and services will arise, such as furnishings and amenities for the new residences, for which additional cooperatives could be formed.

Appropriately structured companies incorporated under the Companies Act of 1973 could also play this role. The Companies Act, like most modern company statutes, appears to make abundantly possible democratic control of a company. The possibilities for company democracy, however, have seldom been realized in practice due to such factors as dominance by blocs of major shareholders and a long-standing hierarchical culture in the business world.

But where it is wished, these problems can be overcome. One

way is to adopt measures within a company assuring rough equality of shareholding among workers. Alternatively it should be noted that sec. 195(4)(b) of the Companies Act authorizes limitation in voting rights of multiple shareholders, so that each shareholder could be limited to one vote regardless of how many shares he or she owned.

Insofar as something like the American ESOP model were followed, it would have to be modified to assure democratic governance of companies. Under the usual ESOP model in the U.S., the shares are held not in the name of the workers but by trustees, who vote the shares. This is in part due to requirements of the U.S. Internal Revenue Code requiring that trustees hold the shares as a prerequisite to special ESOP tax benefits being accorded to the company issuing the shares.[114]

In a country where this consideration would be inapplicable, the trust might be eliminated in some cases, and the shares issued directly to the workers. In many circumstances, however, a trust will remain desirable, particularly if there is a bank loan to enable the workers to pay for the shares—the trust will constitute a single entity to which the loan can be made and a single funded source for repayment, providing greater security to the bank. Where a trust is used, however, it should be structured to allow the workers to vote the shares or to instruct the trustees how to vote them.

Financing will clearly be a problem. In this and other areas, to make a program of worker-owned self-managed enterprises a success it would be necessary to provide substantial government assistance. First of all, banks will be reluctant to lend to smaller and often new community-based businesses. However, they could be provided with incentives to do so. For example, in the United States in some cases banks are provided with a tax incentive to make ESOP loans, by a provision exempting from income tax 50% of the interest received on certain such loans.[115] Similar provisions could be adopted in South Africa applying to loans to worker-owned firms generally, whether cooperatives of share companies, and whether or not an ESOP mechanism was used. Other incentives could be provided, for example, government loan guarantees.

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[114]U.S. Internal Revenue Code sec. 401.

[115]U.S. Internal Revenue Code sec. 133.

A specialized bank to finance worker-owned self-managed enterprises, along the lines of the Caja Laboral Popular in Mondragon, or a number of such banks in different areas, could also play a useful role.

Note should also be taken of the recent practice in Mondragon of selling non-voting shares. While I am far from convinced that this is necessary in Mondragon, resort to outside capital may sometimes be necessary for worker-owned enterprises, particularly in poorer areas or countries. Indeed, in Cuba there is talk of seeking outside capital in connection with the development of the newly cooperativized agricultural enterprises.

How to structure the participation of outside capital in a way to preserve the independence and democratic character of worker-owned enterprises is a big question.

Mondragon cooperatives pay out only the anticipio to the workers; the balance of the workers' share of the profit goes into their individual capital accounts. Following this example would provide a substantial amount of self-financing, increase the financial strength of the enterprises, and at the same time accumulate wealth for their worker-owners.

One problem in seeking to apply the ESOP concept to smaller businesses may be cost—setting up an ESOP for a medium-sized company in the United States can cost in excess of US$25,000 (R100,000), when legal, accounting and appraisal fees and other costs are added up. In the United States, small or start-up enterprises are sometimes able to avoid most of the cost by proceeding in a less formal way: for example, because the amounts of money involved are relatively small, such a company might not need the sophisticated tax advice usually required; an appraiser's fee might be avoided altogether by using book value as the price of the shares. Perhaps a bank loan or a trust will not be needed. Finally, it should be possible to put together packages of instructions and forms for use in the small business context in South Africa and other countries to simplify the procedure so as not to take up an inordinate amount of attorneys' and other professionals' expensive time.

Another problem will be the widespread lack in the disadvantaged communities of knowledge of what is involved in running a business. For example, in Yugoslavia prior to its disintegration a form of worker self-management prevailed. It was noted by some that the

workers' management bodies in Yugoslav enterprises tended to vote maximum distributions of income to the workers retaining no reserves, causing the enterprises to deteriorate over time. This was ascribed to lack of business knowledge and consequent ignorance of the importance of retaining earnings for investment.[116]

This is only an example of the kind of problem that could be widespread; deficiencies of this kind will threaten any policy based on widespread promotion of community-based business; strong policies will be required to deal with this threat, including an on-going program of in-depth assistance to community-based business and a widespread program of business education. One would hope to see emergence of cadre trained in management, accounting, finance and marketing willing to employ these skills in a democratically managed business context.

PRIVATIZATION; REDISTRIBUTION OF OWNERSHIP OF LARGER ENTERPRISES

South Africa and many other countries both developed and less developed have been under pressure to privatize state-owned enterprises. Distributing shares of such enterprises on an egalitarian basis to their workers through cooperativization or something akin to an ESOP mechanism offers a democratic way to do this and could be called democratic privatization. Resistance, however, may be met with among the very forces pushing for privatization, among whom there seems to lurk the view that privatization is not privatization unless the assets are acquired by wealthy capital interests.

At least a partial redistribution of ownership of the many companies presently operating in South Africa to their workers might also be effected. But because such a process would have to be gradual, cooperativization would seem not to be an option, and here the theatre of action might be more like that in the United States where ESOP's have been adopted by many large companies. In South Africa, companies could be required to institute such programs; one would hope steps would

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[116]See, e.g., Mirkovic, Damir, "Sociological Reflections on Yugoslav Participatory Democracy and Social Ownership," East European Quarterly, vol. 21, pp. 319-32 (Sept. 1987); Miller, Robert F., "Theoretical and Ideological Issues of Reform" in "Socialist Systems: Some Yugoslav and Soviet Examples," Soviet Studies, vol. 41, pp. 430-48 (July 1989); Denitch, Bogdan, "Yugoslavia, The Limits of Reform," Dissent, Winter 1989, pp. 79-85.

be taken to assure that ESOP programs were free of the deficiencies which seem to be more the rule than the exception in the United States.[117]

The question arises how fast and how far could such a program go. Distribution of a majority of shares forthwith would constitute confiscation. Many companies and their present shareholders would be unwilling to engage in even a modest process. To deal with this, legislation could be helpful, including tax incentives. Concern of present shareholders that their interests would be diluted could, in part, be dealt with by proceeding in a graduated manner, limiting issuance of ESOP shares each year to a level, for example, proportionate to the expected growth of the company. This would lessen the immediate impact on present shareholders, but lengthen the period for achievement of maximum distribution.

AVOIDING ILLUSORY VICTORIES: THE ANALOGY OF LAND REFORM

In some counties where ill-conceived land reform programs have been adopted, land has been redistributed to those who work it, but the farmworkers, because they have not been able to afford tools and seed to work the land and because their poverty has mandated raising money by the quickest means possible, have ended up selling their land back to the landlords. These results could have been avoided by properly conceived programs providing technical and economic back-up to the beneficiaries, and by restrictions on alienation of their newly won property.

The ideas outlined here would in some ways be like a land

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[117]A South African ESOP program might be aimed at eventual ownership of a significant share of most major companies by their workers. Shares issued to employees could be spread more or less evenly among all employees. ESOP trusts could be democratically controlled by their beneficiaries insofar as consistent with sound management and carrying out trustees' fiduciary obligations, and subject to annual audit. The beneficiaries would have voting power at shareholders' meetings proportional to their beneficial share interests.

ESOP's should not be used by companies to undermine trade unions; the role of unions as adversary to management in bargaining for improved wages and other worker benefits should remain; the unions might further play a role in ESOP formation and administration, including negotiating ESOP terms and providing representatives to serve as ESOP trustees. Unions in the United States, previously lukewarm or hostile to employee
ownership, have more recently played a major role in establishing ESOP's.

reform program. The beneficiaries would not immediately be well-off. Perceived pressing economic needs might tempt many to part with newly-awarded property interests before the goals of the reform have been reached. Moreover, many of the beneficiaries would be quite unsophisticated in matters of personal finance. Without safeguards, the benefits gained by these reforms would slowly percolate back into the hands of the privileged.

Where a Mondragon-type cooperative is the legal form of the enterprise, the workers' interests will not be alienable, and this will offer a substantial measure of protection. If, however, a cooperative voted to sell its entire business to outsiders, with the cooperative to be liquidated and each cooperator to receive his or her share of the proceeds, there could be a problem.

If the enterprise were incorporated under the Companies Act, there would be shares, normally alienable. This, however, could be controlled by an agreement restricting sale of shares. Further restrictions could be imposed by statute.

Where the ESOP form is used, for privatization of for distribution of shares of an existing company to its employees, note that a basic component of an ESOP is the ESOP trust. The trust typically holds title to the shares until the ESOP loan is paid off, and sometimes longer. In the South African context, these trusts should contain provisions assuring retention of the shares and prohibiting alienation of beneficiaries' interests i ESOP trusts until the danger of unwise or forced alienation has passed. As it would be difficult to specify standards defining when this danger has passed, an arbitrary but ample period, for instance, ten, twenty or thirty years, may be in order.[118]

THE ROLE OF LAWYERS

Why have I made this long presentation concerning new ways of doing business to a group of lawyers? Because the role of lawyers in implementing programs like I have described will be crucial. Just a few examples might be mentioned.

These ideas could be implemented within the present legal

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[118]In any event, the trust would hold the shares until the underlying loan were paid in full.

system, but legislation may be necessary. Will amendments to the Co-Operatives Act and the Companies Act be necessary? Lawyers will need to study the matter, and if legislation is necessary, draft it and see that it is taken up in Parliament.

If there is to be democratic privatization of state enterprises and if companies are required or encouraged to issue shares to their employees, legislation will probably be required, preceded by a more detailed study of the American ESOP experience and how to improve it. If there are to be tax incentives, further study and drafting is necessary.

Is the law of trusts in South Africa, where Roman-Dutch law prevails, sufficiently developed to handle ESOP trusts?

Who will draft the instruments to establish the cooperatives and companies with a view to worker ownership and self-management? Where ESOP's are to be used, who will draft them?

There is plenty of work here, and the opportunity to be creative, to bring about something genuinely new in South Africa. Go to it, comrades!

THE CONTROL OF MULTINATIONAL CORPORATIONS AND POPULAR PARTICIPATION IN ECONOMIC DEVELOPMENT

by

Igarashi Masahiro, Japan[119]

In the 1960s and 1970s, developing countries had encouraged the adoption of the New International Economic Order (NIEO) at the United Nations as a way of maintaining the rights of self-determination of their people. General Assembly Resolutions 3201(S-VI)(*Declaration on the Establishment of a New International Economic Order*), 3202(S-VI)(*Programme of Action on the Establishment of a New International Economic Order*), and 3281 (XXIX)(*Charter of Economic Rights and Duties of States*), were, among the main results of their struggles. Until the early 1980s, developed countries while recognizing that, "the poorest developing countries require increased concessional aid" (Bonn Summit of 1978), approached "in a positive spirit the prospect of global negotiations in the framework of the United Nations and the formulation of a new International Development Strategy" (Venice Summit of 1980). Soon afterward, under leadership of Reagan, Thatcher and Nakasone, the first world powers, adopted a strategy that "the strengthening of democracy, human rights, and economic reconstruction and development [is] through market-oriented economies" (the free market). In fact, developed countries recognized the "desire for greater freedom and democracy in the East" as a strong ideological weapon in Asia. (Declaration on East-West Relations, Arch Summit of 1989).

Notwithstanding, developing countries, while claiming to respect sovereignty, rights to self-determination, principles of non-intervention, and reaffirming the right to development, have not been active for some time in support of the NIEO.

In fact attitudes of the United Nations have also changed. In 1992, it was determined that no consensus was currently possible on the draft code of conduct on the transnational corporations (TNCs), first considered in 1975. The Secretary-General, in a report to the

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[119]Kanasaua University, Kanasaua, Japanese Association of Lawyers in Solidarity, JALISA.

Commission on TNCs concerning an international TNC framework, summarized the settled issues, as including observance by the TNCs of local laws and their non-interference in the internal affairs of host countries; fair and equitable treatment of TNCs by host countries and minimum protection under the law, including laws governing nationalization and expropriation; and specialized standards on business and trade practices, consumer and environmental protection, working conditions and labour safety. It was noted, however, that the manner in which those principles were applied by governments and TNCs had changed, as governments were liberalizing restrictions on the entry of foreign investment.

Increased emphasis was being placed on a number of issues as a result of the changed economic climate in Eastern Europe and in many developing countries. Those issues included; privatization and competition; securities, banking and insurance supervision; transfer pricing; corrupt practices in international transactions; and environment and investment.

Along these lines, the United Nations increasingly recognized the role of TNCs from the early 1990s. In 1992 and 1993, for example, the United Nations recognized that TNCs continued to exert a major influence on the global economy in 1992. It further recognized that the role of TNCs in economic development continued to grow as direct foreign investment flowing into developing countries reached record levels. The newly opened economies of Central and Eastern Europe provided further scope for TNCs to make inroads in the world economy.

Since 1990, the United Nations has discussed issues affecting the private sector in development, entrepreneurship and private-sector development. In 1992, the UNCTAD Trade and Development Board established the Ad Hoc Working Group on Comparative Experiences with Privatization. It was ironic that the UNCTAD, which was originally established to promote the NIEO, had proposed "Privatization." In the same year, ECOSOC adopted Resolution 1992/36, without vote, on *Privatization and Foreign Investment in the Context of Economic Restructuring* and the General Assembly adopted Resolution 47/171, without vote, on *Privatization in the Context of Economic Restructuring, Economic Growth and Sustainable Development.* Furthermore, the General Assembly adopted Resolution 48/180, without vote, on *Entrepreneurship and Privatization for Economic Growth and Sustainable Development.* Recognizing the importance of the free market and private sector for the efficient functioning of economies in various

stages of development, the General Assembly also recognized the sovereign right of each State to decide on the development of its private and public sectors,

> taking into account the comparative advantages of each sector, bearing in mind the economic, social and cultural diversity in the world, and acknowledging that broad participation by individuals and major groups in decision-making is a fundamental prerequisite for the achievement of economic growth and sustainable development, with entrepreneurship as an important element of that goal, and note[d] that many countries continue to attach major importance to the privatization of enterprises, demonopolization and administrative deregulation in the context of their economic restructuring policies, as a means to increase efficiency, economic growth and sustainable development.

Reading these Resolutions, one would think they were Declarations intended to "Westernize" the world for the benefit of TNCs owned by developed countries. It is clear that developing countries are more dependent on TNCs than ever before, and are not making efforts to control them. It is crucial that developing countries must decide whether they should regulate activities of TNCs, including foreign investment. Efforts are needed to complete the code of conduct on TNCs, implementing the NIEO.

POPULAR PARTICIPATION AS A HUMAN RIGHT

Popular participation as an integral part of the international development process has long been accepted as an ideal and is increasingly incorporated into national development strategies. Indeed, in its earlier years, the United Nations recognized the importance of popular participation in the process of development. For example, the *Declaration on Social Progress and Development* adopted by the General Assembly in 1969 emphasized the importance of active participation of all elements of society in the preparation and execution of national plans of development. Similarly, the role of participation in fostering respect for human rights is emphasized in international human rights instruments. *The Universal Declaration of Human Rights* expressed the right to popular participation in government (Article 21), while Article 25 of the *International Covenant on Civil and Political Rights* also included this right. Some have said that this right should be interpreted as implying

more than simple majority rule through the electoral process. Rather it should be interpreted as a reflection of the "internal" aspect of self-determination and viewed as fundamental to both political democracy and economic development.

Thus economic growth is no longer an object in itself in the concept of development, the aim of which is defined as the continuous improvement of material and spiritual well-being of all the people, implying the full realization of human rights by the entire population. To this end, the importance of popular participation in the process and benefits of development is stressed. In 1985, a study by the Secretary-General of the UN on popular participation pointed out that the exercise by the people of their right to self-determination through democratic processes involving popular participation was essential, politically as well as economically, for the realization of development. The *Declaration on the Right to Development* adopted by the General Assembly in 1986 emphasized popular participation as a key to the right to development, though it did not provide this as a right of peoples. The *Declaration* noted,

> The Human person is the central subject of development and should be the active participant and beneficiary of the right to development....States have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom...[120]

The concept of sustainable development is another example of progress. As mentioned above, the *Rio Declaration* made this concept a key element. Agenda 21 provides that "One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making" (Chapter 23.2) and devotes a whole Section to "Strengthening the Role of Major Groups," which includes women, children, indigenous peoples, non-governmental organizations, local authorities, workers and trade unions, business and industry, technological community, and farmers.

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[120]Article 2(1) and 2(3).

Thus, the democratic international economic order must be founded on the respect for human rights, especially on the right of popular participation.

PERMANENT PEOPLE'S TRIBUNAL ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS[121]

Preliminary Prospectus

TIMING: Mid-1997 (around the time of the Group of 7 Economic Summit, usually June or July).

VENUE: United States in or near the same city as the G-7 Summit, which, according to the present rotation, will take place in the U.S.A. in 1997)

PANEL OF JURISTS: To be designated by the PPT Secretariat (suggestions are welcome and should be sent to the Convener of the Planning Committee at the address given below)

OBJECTIVES: 1) Provide a forum for those with direct experience of the impact of transnational corporations (TNC) on human rights. 2) Apply international human rights standards to transnational corporations (TNC). 3) Impose enforcement mechanisms on TNCs. 4) Accelerate the effort to shrink, dismantle, and otherwise control global corporations.

TESTIMONY: Witnesses will be chosen who have first hand experience with transnational corporations, who can present evidence of the impact on human rights by TNCs, and who can address authoritatively issues such as those given below (again, suggestions are welcome and should be sent to the Planning Committee Convener).

RATIONALE: The last half century, and especially the last 25 years, have witnessed a fundamental change in the global political economy with the growth of giant global corporations. The 15 largest have gross incomes greater than the gross domestic products of over 120 countries. General Motors is larger than the economy of Denmark. The 500 largest control 70 percent of world trade. (See accompanying table, *Nations vs.*

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[121] Revised March 1996.

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Corporations).

Yet there has been no corresponding evolution of national law and national juridical institutions, much less international law and international juridical institutions capable of exercising oversight and asserting control to protect those whose lives are most directly affected by the actions of these global giants or those whose rights under international law are violated or denied by them. On the contrary, transnational corporations have succeeded in consolidating their power while sharply diminishing the sovereignty of nation states through the most recent round of GATT negotiations. The World Trade Organization, for example, will further insulate global corporations from democratic or popular control.

One of the more pervasive myths of the late twentieth century is that these huge corporations are effectively controlled by the governments of countries in which they operate around the world. Dwarfing as they do most nation states, transnational corporations are all too often able to cause great harms and abuse the human rights of the people. Witness Union Carbide Corporation, by no means one of the largest TNCs. Its lawyers have effectively placed the corporation and its directors outside of the law despite its role as a perpetrator of the world's worst industrial disaster.

Thus, global corporations are effectively dominating people, their communities, and their habitats throughout the world. Transnational corporations have been making the rules and defining institutional arrangements that take away people's rights and their ability to govern ourselves.

Fortunately, people are stepping up their resistance to corporate rule. One dimension of this resistance is directed toward trying to create more effective international monitoring and regulatory mechanisms. Another is concerned with redefining the relationships between sovereign peoples and subordinate corporate entities which are legal fictions, limiting corporations' size and powers, and dismantling some of the most destructive.

ISSUES: Given these circumstances, the convening of a session of the Permanent People's Tribunal on transnational corporations and human rights is timely and urgent. Among the issues which the Tribunal might address are these:

- Extending the application of international human rights law directly

to non-state actors such as transnational corporations, the largest of which perform many of the functions of governments without being "constitutionalized."

- International criminal liability for TNCs which engage in large scale violations of fundamental human rights.

- Gaining more effective state authority over corporations headquartered or operating within its boundaries.

- Mandating legally enforceable agreements between corporations and communities in which health and safety, environmental, and other performance standards for corporation are determined by the people of concerned communities.

- Assessing European Community and other regional efforts to establish more effective mechanisms for defining what corporations may or may not do.

- Dismantling the world's largest corporations and creating alternative institutions of enterprise which are democratically controlled.

- Using the International Law Commission to develop judicial principles, new criteria for the application of existing principles, judicial institutions, the reformation of existing institutions; to address the problematique of TNCs in the late twentieth century world.

- Revitalizing the United Nations Commission on Transnational Corporations, analysis of why it has not been more effective.

In addition and in conjunction with examination of such issues as the foregoing, evidence of impacts of transnational corporations on human rights across a broad spectrum, including persons (especially women and minorities often subjected to discriminating treatment), communities, countries, the environment and future generations, will be presented to the Tribunal.

This is a very preliminary listing of issues that might be addressed by the Tribunal. Suggestions of other issues or for reformulation of the issues above are also welcome and should be sent to the Planning Committee Convener.

PROPOSED PLANNING COMMITTEE (in formation):

Upendra Baxi, Professor of Law, Delhi University, India

Clarence J. Dias, President, International Center for Law and Development, New York, NY

Barbara Dinham, The Pesticides Trust, London*

Xabier Gorostiaga, Rector, Universidad Centroamericana, Nicaragua*

Richard Grossman, Program on Corporations Law and Democracy, Provincetown, MA

Francois Houtart, Centre Tricontinental, Belgium

Leah Margulies, Former Legal Advisor, UNICEF and UN Center on Transnational Corporations, New York

Ward Morehouse, Council on International and Public Affairs and Program on Corporations Law and Democracy, New York (convener)

Krishna Ahooja Patel, Women's World Summit Foundation, Ahmedabad, India and Geneva*

Surendra J. Patel, Sardar Patel Institute, India (and former Director, Technology Division, UNCTAD, Geneva)

Francois Rigaux, President of the Permanent People's Tribunal, and Professor of International Law, Belgium*

Gianni Tognoni, Secretary General, Permanent People's Tribunal, Italy

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*Invited

Nations v. Corporations

1.	United States	$5,237,707,000,000
2.	Japan	$2,920,310,000,000
3.	Germany	$1,272,959,000,000
4.	France	$1,000,866,000,000
5.	Italy	$ 871,955,000,000
6.	United Kingdom	$ 834,166,000,000
7.	Canada	$ 500,337,000,000
8.	China	$ 393,006,000,000
9.	Brazil	$ 375,146,000,000
10.	Spain	$ 358,352,000,000
11.	India	$ 287,383,000,000
12.	Australia	$ 242,131,000,000
13.	Netherlands	$ 237,415,000,000
14.	Switzerland	$ 197,984,000,000
15.	Korea	$ 186,467,000,000
16.	Sweden	$ 184,230,000,000
17.	Mexico	$ 170,053,000,000
18.	Belgium	$ 162,026,000,000
19.	Austria	$ 131,899,000,000
20.	General Motors Corp.	$ 126,974,300,000
21.	Finland	$ 109,705,000,000
22.	Denmark	$ 105,263,000,000
23.	Ford Motor Co.	$ 96,932,600,000
24.	Norway	$ 92,087,000,000
25.	Saudi Arabia	$ 89,986,000,000
26.	Indonesia	$ 87,936,000,000
27.	Exxon Corp.	$ 86,656,000,000
28.	South Africa	$ 86,029,000,000
29.	Royal Dutch/Shell Grp.	$ 85,527,900,000
30.	Turkey	$ 74,731,000,000
31.	Argentina	$ 68,780,000,000
32.	Poland	$ 66,974,000,000
33.	Thailand	$ 64,437,000,000
34.	IBM Corp.	$ 63,438,000,000
35.	Toyota Motor Corp.	$ 60,443,600,000
36.	Hong Kong	$ 59,202,000,000
37.	Yugoslavia	$ 59,080,000,000

(Table continued on next page)

Nations v. Corporations

(continued)

38.	General Electric	$ 55,264,000,000
39.	Greece	$ 53,626,000,000
40.	Algeria	$ 53,116,000,000
41.	Mobil Corp.	$ 50,976,000,000
42.	Hitachi Ltd.	$ 50,894,000,000
43.	British Petroleum Co.	$ 49,484,400,000
44.	IRI	$ 49,484,400,000
45.	Venezuela	$ 47,164,000,000
46.	Israel	$ 44,131,000,000
47.	Portugal	$ 44,058,000,000
48.	Matsushita Electric	$ 43,086,000,000
49.	Philippines	$ 42,754,000,000
50.	Daimler-Benz AG	$ 40,616,000,000
51.	Pakistan	$ 40,134,000,000
52.	New Zealand	$ 39,437,000,000
53.	Phillip Morris Co.	$ 39,069,000,000
54.	Columbia	$ 38,607,000,000
55.	Malaysia	$ 37,005,000,000
56.	Fiat S.P.A.	$ 36,156,000,000
57.	Chrysler	$ 36,156,000,000
58.	Nissan Motor Corp.	$ 36,078,400,000
59.	Unilever NV	$ 35,284,400,000
60.	Du Pont	$ 35,209,000,000
61.	Samsung Group	$ 35,189,100,000
62.	Volkswagen AG	$ 34,746,400,000
63.	Kuwait	$ 33,082,000,000
64.	Siemens AG	$ 32,659,000,000
65.	Egypt	$ 32,501,000,000
66.	Texaco	$ 32,416,000,000
67.	Ireland	$ 30,054,000,000
68.	Toshiba Corp.	$ 29,443,800,000
69.	Chevron Corp.	$ 29,443,000,000
70.	Nestle SA	$ 29,364,800,000
71.	United Arab Emigrates	$ 28,449,000,000
72.	Nigeria	$ 28,314,000,000
73.	Singapore	$ 28,314,000,000
73.	Singapore	$ 28,058,000,000
74.	Renault	$ 27,456,900,000

Nations v. Corporations
(continued)

75.	ENI	$ 27,199,300,000
76.	Hungary	$ 27,078,000,000
77.	Phillips NV	$ 26,992,500,000
78.	Honda	$ 26,484,300,000
79.	BASF AG	$ 25,317,000,000
80.	NEC Corp.	$ 24,594,800,000
81.	Hoechst AG	$ 24,403,000,000
82.	Amoco Corp.	$ 24,214,000,000
83.	Peugeot SA	$ 24,090,500,000
84.	B.A.T. Industries	$ 23,528,900,000
85.	ELF Aquitane	$ 23,501,400,000
86.	Bayer AG	$ 23,021,200,000
87.	Peru	$ 23,009,000,000
88.	Chile	$ 22,910,000,000
89.	CGE	$ 22,575,000,000
90.	Morocco	$ 22,069,000,000
91.	Imperial Chemical	$ 21,689,000,000
92.	Proctor & Gamble Co.	$ 21,689,000,000
93.	Mitsubishi Electric Corp.	$ 21,213,300,000
94.	Asea Brown Boveri AB	$ 21,209,000,000
95.	Bulgaria	$ 20,860,000,000
96.	Nippon Steel	$ 20,767,000,000
97.	Boeing Corp.	$ 20,276,000,000
98.	Puerto Rico	$ 20,118,000,000
99.	Occidental Petroleum	$ 20,068,000,000
100.	Daewoo Corp.	$ 19,981,400,000

WORK IN THE POST-MARKET ECONOMY: SEEKING HUMAN DIGNITY AND FULL MPLOYMENT IN A DECREASING JOB MARKET

by
Eric Sirotkin, USA[122]

"The workers of the world must unite in struggle against the dehumanizing system of work—against the whole social process that kills the freedom and natural creativity of individuals."[123]

Work can be dangerous to your health. Whether through unsafe or unhealthy working conditions, or by numbing the human spirit and detaching us from our true self, family and communities. The dehumanizing dimension of work is victimizing workers daily across the globe. Too often the demand for economic justice has focused only on adding more jobs to the market economy and providing work at the highest possible wages. While securing a job has been necessary to move people out of poverty and raise their standard of living, we must be cognizant that we create work that is meaningful and enhancing to the quality of life and the self-esteem of the worker.

The recent corporate job slashings, politely called "downsizing," has led to an increasing pool of laid off workers in the industrial nations of the world. Add to this the impact of technology on the future of work itself, and one can see how the endlessly expanding global labor market system is dying and we have devised nothing to take its place. In the short term, and likely with the support of government, the corporations will continue to make the money, while the workers are forced into unemployment, drifting into increased health problems, frustration, apathy and even death.

We must come up with creative methods to provide meaningful work and full employment for people around the world, while actually

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[123]Joseph Jablonski, *Introduction*, Lefargue, Paul, The Right to Be Lazy (Charles H. Kerr Publishing Co.: Chicago 1989) p. 14.

increasing the leisure time necessary to devote to one' family and local community. As historian and long time IWW organizer Fred Thompson has described it:

> "We need 'time to stand and stare'...we need time to be ourselves alone and times of complete involvement with others..., time to create as part of a group, time to create doing our own thing, time to be passively amused, time to use our muscles and our senses in ways our work does not provide—and hopefully, more of us will demand time to plot with our fellows how to make a saner world."[124]

Our individual health, the health of the planet and our communities depend on this transformation.

Global Economic Reality

In 1883 Paul Lefargue wrote his historic book, *The Right to be Lazy.* While lamenting the working classes' "delusion for the love of work,...even to the exhaustion of the vital force of the individual and his progeny," he concluded that "the machine is the savior of humanity, the god who shall redeem man from sordidae artes and from working for hire, the god who shall give him leisure and liberty."[125] Despite his prognosis, the machine age did little to truly eliminate the toil, or at least the tedium, of work for most employees, but instead, in the endless quest for capital, has required the worker to work increasingly longer hours at faster speeds. This has led to a global economy fueled by massive consumerism and militarism that continually tries to hide the growing threats of mass unemployment, societal decay and depression.

We have now begun our move out of this machine era into the technology-driven information age and little is being done to avert an economic disaster. The impact of this new era has already left its imprint. However, rather than giving people more "leisure and liberty," it is moving us closer to decay and despair. Global unemployment is at its highest level since the Great Depression of the 1930's with, currently, more than 800 million people unemployed or underemployed in the

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[124]Id., at p. 113.

[125]Paul Lefargue, *The Right to be Lazy* (Charles H. Kerr Publishing Co.: Chicago 1989) pp. 21, 74.

world.[126] Faced with the prospect of further mass unemployment, we must take creative steps to restructure the way that we work.

Economist Jeremy Rifkin, in his poignant book, *The End of Work*, is at the center of this debate on the future of work. He warns that:

> "If the talent, energy and resourcefulness of hundreds of millions of men and women are not redirected to constructive ends, civilization will probably continue to disintegrate into a state of increasing destitution and lawlessness from which there may be no easy return. For this reason, finding an alternative to formal work in the marketplace is the critical task ahead for every nation on earth."[127]

This is the challenge for every nation on earth: to use this opportunity to restructure the way we work and the way we live our lives.

In the United States most major corporations are going through a process that they call "downsizing" or "re-engineering." Another name might be mass layoff. More than 2 million jobs are being eliminated annually in the United States.[128] Between 1981 and 1991 more than 1.8 million manufacturing jobs disappeared in the U.S., along with 3 million white collar jobs over the last ten years.[129] Such changes are also occurring in the public sector, as governments recognize that they cannot continue to spend at the current rate without additional sources of revenue. In the U.S. alone between 1979 and 1993, nearly half a million public sector jobs vanished.[130]

This trend is only likely to continue and Rifkin points out that "more

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[126]International Labor Organization, press release (Washington, D.C.: ILO March 6, 1994); International Labor Organization, *The World Employment Situation, Trends and Prospects* (Geneva, Switzerland: ILO 1994).

[127]Jeremy Rifkin, *The End of Work* (New York: Putnam 1995) p. 291.

[128]Id p. 3 citing "When Will the Layoffs End? `" *Fortune*, September 20, 1993, p. 40.

[129]Id, at pp. 8-9.

[130]New York Times News Service report in *Albuquerque Tribune*, 3/18/96.

than 75% of the labor force in most industrial nations engage in work that is little more than simple repetitive tasks. This translates in the U.S. to 90 million jobs in a labor force of 124 million "that are potentially vulnerable to replacement by machines."[131] *The Wall Street Journal* reports that corporate re-engineering could eliminate between 1 million and 2.5 million jobs a year for the foreseeable future.[132]

A mixed message is being put out by the government and the media about our economy. They tell us that there are better economic times ahead and that we are in a period of steady growth. However, workers at all levels see the reality differently. One survey by *The New York Times* found that two out of five workers fear layoff or forced cuts over the next two years.[133] Others fear they have to work more hours and harder to avoid being the ones chosen for layoff.

This adds more stress on the family and on the health of the worker. Human Resources managers are being trained in teaching "Downsizing Survivors" to cope with the aftershocks. In a recent article, executives from Texaco Trading and Transportation in Denver grappled "with all the painful feelings caused by its downsizing, almost two years ago—fear, depression mistrust and betrayal. These aren't outplaced workers experiencing these wrenching emotions, however. They're employees who survived the layoffs."[134] The anger about these layoffs, amidst the politician's talk of good times is a powder keg of danger, as more and more reports of workplace violence by former employees appear in the paper each month. Disgruntled employees are returning to the workplace with guns and taking it out on "the company."

And who is making the decisions on the layoffs? Often CEO's and Board members who own substantial shares of stock and the trend has been that, when the layoffs are announced, stock prices go up. For example, at Xerox Corporation, they announced layoffs of 10,000 workers and the stock shot up 7%. Apart from the apparent conflict of

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[131]Rifkin, supra at p. 5.

[132]Id. p. 7.

[133]Id. p. 13.

[134]Shari Caudron, "Teach Downsizing Survivors How to Survive" *Personnel Journal*, January 1996, p. 40.

interest, this demonstrates that the company cares more about pleasing its stockholders than about its employees.

The Clinton administration is attempting to push "retraining" in an effort to get people on board with the new jobs of the information age. However, there will not be enough of these jobs and often the skill level or education level gap is too great to transfer over. With sectors such as agriculture, manufacturing and service all automating their operations, Rifkin asks the question echoed by many, "Retraining for what?" We must re-examine the *way* we work and propose alternatives to the traditional market economy. Rifkin writes, "Holding on to an old and outmoded economic paradigm in a new, post-industrial, post-service era could prove disastrous for the global economy and for civilization in the twenty-first century."[135]

With nearly half the human beings on the planet still farming the land, Rifkin points out that this amounts to 2.4 billion people facing being uprooted due to the breakthroughts in the production of food through the use of indoor technology. He urges dramatic changes in the type of work offered to people in the Post-Market Economy. As he states:

> "The very notion that millions of workers displaced by re-engineering and automation of the agricultural, manufacturing and service sectors can be retrained to be scientists, engineers, technicians, executives, consultants, teachers, lawyers and the like, and then somehow find the appropriate number of job openings in this very narrow high tech sector, seems at best a pipe dream, and at worst a delusion."[136]

The types of jobs that are emerging are quite different from the past. While the U.S. government announced that over 1.2 million jobs had been created in the first half of 1993, they failed to report that nearly 60% of them were part time and mostly in the law-wage service area.[137] In addition, many jobs that are being created are poorly paid "contingent" or "temporary" jobs. This outsourcing to temporary agencies for labor is cutting the costs for companies and lowering the standard of living for

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[135]Rifkin, supra, p. 40.

[136]Id. at 288.

[137]Id. at 167.

employees who are forced to live without benefits, often health-care, and remain insecure in their jobs. As one auto worker temporary employee declared, "Working on the edge as a temporary employee doesn't give us much of a life. They think of us as throw away people."[138] Unfortunately, the downsizing of the labor market and the technological displacement of millions of workers is spreading this disposable feeling to all employees.

Technology is the market economy's dream come true. Machines that don't become sick, won't speak back or report wrongdoing and don't have personal problems that spill over into the workplace. Yet, they produce the same end result of the market economy: money. The March 25, 1996 issue of *Time Magazine*'s lead story was "Can Machines Think? They already do, say scientists. So what (if anything is special about the human mind?" The Japanese government has been working on a research project to develop computers that mimic the most subtle functions of the human brain. Ironically it is called the "Real World Program" and its intent is to make intelligent machines that can read text, understand complex speech, interpret facial gestures and anticipate behavior.[139] This new worker will be able to handle most jobs and will provide the free market economy a new and frightening prospect: workers who don't know right from wrong. Add this phenomena to the prospect of mass global unemployment and one cannot help but conclude that we need creative solutions to avert disaster and make the 21st Century one of meaningful work.

Avoiding the American Model

Too often the United States is seen by many nations as the model for economic development. The goal has been to seek the "American Standard of Living." However, the international media fails to report the down-side of this society. While many people have more consumer goods and live in larger dwellings than most of the world, America suffers from a demise of culture and a detached, and increasingly isolated, populace that has become indifferent to human suffering. This is too great of a price to pay and the more that the American model of the market economy is exported, the more our world becomes de-humanized. For the American model relies on an out-dated paradigm that will only lead to global stress, environmental degradation and violence.

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[138]Id. at 194.

[139]"Japan Plans Computer to Mimic Human Brain," *New York Times* August 8, 1992, C.1.

Has this alleged prosperity brought Americans more happiness and good health? Americans spend a higher portion of the money they earn, have huge consumer debts and spend more time shopping than anyone else in the world.[140] We have an expression in America call "Shop 'Til you drop," and it's not surprising that Americans spend 3-4 times more time shopping than their western counterparts.[141] In the United States, there are over 4 billion square feet of land area being used by shopping centers and more and more shoppers are ordering through mail-order catalogues and over the Internet. In fact, there are even television stations that do nothing but advertise products for 24 hours a day that you can call in and order. People actually sit in front of their screens for hours and watch products roll by. This "shopping culture" has become the dominant cultural characteristic under the American Model of economic "success."

It is true that the average yearly income of Americans is $22,000, sixty-five times the average income of half the world's population. However, this ignores the huge growing consumer debt borne by the population, the increasing ranks of those living under the poverty line, and this decimation of culture caused by consumerism. The United States is on the brink of economic disaster as more layoffs and job displacement will cause defaults on the multi-billion dollar consumer debt pool. In addition, the loss of such a standard of living will result in millions of displaced, depressed, angry and disillusioned employees.

Hand in hand with the American Standard of Living has come a serious problem of overwork and its related social effects. Unlike the promise of more leisure through automation, worktime in the United States has actually been increasing for the past 20 years.[142] The result has been that Americans spend less time sleeping/eating, spend less time with their communities and with their children. This results in more stress as the individual feels helpless and detached from the things that make us human. It is truly life out of balance. Juliet Schor writes, "Americans are literally working themselves to death—as jobs contribute to heart disease, hypertension, gastric problems, depression, exhaustion, and a variety of

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[140]Juliet B. Schor, *The Overworked American* (Harper/Collins 1992) p. 3.

[141]Schor, supra p. 107.

[142]Id. at p. 5.

other ailments."[143]

Along with the more obvious psycho-emotional consequences, the fears and apathy of the "shopping/television culture" has created people who no longer know how to relate personally with others. With the unifying and supportive factors of community all but gone, we face a society with an increasing suicide rate and rampant domestic violence. Under the American model, people in the United States have lost meaning and purpose to their lives. While they may have material goods, they become impoverished in every other way that makes us human. Having lost meaningful activities and connections with others outside the home, they appear to have lost hope, become indifferent to violence and the plight of others and become, in essence, spiritually dead.

In fact, this has led to a situation in which "child neglect has become endemic to our society."[144] Overworked and detached parents come home exhausted and have little time and energy to focus on their children. Instead of life-enriching activities and learning the bonds of family, the parents plug their children into the Television or video games and pass out on the sofa. Family activities become watching television programs about make-believe families who try to poke fun at each other or at their predicament. It is no surprise that fatigued and hopeless workers seek out these "passive activities," rather than get involved in their communities, let alone their own families. This is in part related to the issue of overwork, as the only other rich industrial country to watch more television than the U.S. is Japan, the only country with longer working hours.[145]

Even amidst this era of overwork, it is getting more and more difficult for Americans to keep up with the income necessary to maintain this standard of living. One survey found that 8 of 10 Americans now believe that they can only make it on two incomes. Wages are slipping and many people live from check to check. The majority of US workers saw their average wage week peak in 1973 and it has declined steadily

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[143]Id. p. 11.

[144]Sylvia A. Hewlett, *When the Bough Breaks: The Cost of Neglecting Our Children* (New York: Basic Books, 1991) p. 1.

[145]Schor, supra p. 161.

since and now stands at the mid-1960-s level.[146] Therefore they have to work longer hours, or hold second jobs, just to make ends meet. This increases the internal resentment, anger and fatigue of the worker.

Therefore, to confront this growing problem of mass unemployment, increasing work hours and displacement of workers, we must come up with a major shift in attitudes and work styles that will provide new meaning to the concept of work. The nature of full employment will have to be rethought in ways that create socially enhancing jobs, as opposed to market slaves and mechanical clones. In a chilling and poignant reminder of the work of the future, Warren Bennis, a professor of Business Administration, stated, "The factory of the future will have only two employees, a man and a dog. The man will be there to feed the dog. The dog will be there to keep the man from touching the equipment. We are creative beings of unlimited possibilities that deserve more from the advances of "civilization" than to be idle observers. To alter this emerging doom, we must create a new work paradigm.

The New Paradigm

Creating a new work paradigm, or model, will be a revolutionary transformation of the way we live as human beings. Such a paradigm will involve treating employees with human dignity by recognizing the interdependence of a healthy worker with the health of society as a whole. The long-term capitalist goal of money being the end of all labor will become outdated and replaced by a view that makes human dignity a priority.

New approaches and paradigms for understanding our world are sprouting up all around ut. In science, the mechanistic approach of Descartes, that viewed the world and its inhabitants in a mechanistic fashion, is being called into question by the quantum physicists who believe that we are all interconnected and present endless human potentiality. This wave of thinking has led to a systems approach in medicine, psychology and healing that looks at the whole person, rather than a single part. Call if "Wholistic" of "New Physics," but it is clearly a new way of looking at the way we live as human beings.

Scientists and others are now asking important questions about this mechanistic approach to the world, such as, ***"Is everything that 'works'***

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[146]Id. p. 80.

good for the system?" Biologist Rita Arditti teaches us that:

> "The task that seems of primary importance—for women and men—is to convert science from what it is today, a social institution with a conservative function and a defensive stand, into a liberating and healthy activity. Science needs a soul which shows respect and love for its subjects of study and would stress harmony and communication with the rest of the world."[147]

It is no different with today's workplace. The conservative approach of the market economy has gutted the planet, treated workers as expendable and worked in a "winner-take-all" manner. The concept of an ever-expanding market is contrary to the laws of nature and naive in this world of limited resources. Countries around the world must look past the market economy to forge an economy and workplace based on the principles interconnectedness found in the new paradigm.

The new work paradigm will define the goals of business differently, as well as altering the abusive power relationships so prevalent in today's workplace. Matthew Fox, drawing from the work of Scientist Gregory Bateson in *Steps to an Ecology of Mind*, writes:

> "...the work of the future will be friendly toward the environment and will accept the environment's friendliness toward us; it will be interdependent rather than competitive and bellicose toward other humans; it will not exaggerate individualism or jingoism, sectarianism or nationalism but will have a planetary worldview about it; it will not be about controlling the environment; it will not fall into the fallacy of an infinitely expanding mode of thinking about a finite reality, namely, the Earth and its gifts to us; it will not succumb to economic determinism; it will look for its values and its creativity beyond technology alone."[148]

In this new era, workers will be respected for who they are and the

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[147]Rita Arditti, "Feminism and Science," *Science and Liberation*, Rita Arditti, Pat Brennan and Steve Caviak, editors, (Boston: South End Press, 1979) pp. 366-67.

[148]Matthew Fox, *The Reinvention of Work*(Harper: San Francisco 1994) p. 75-76.

impact that their work has on society, as the whole is appreciated rather than independent parts. The definition of a successful business will be judged, not on how much money they can make for its stockholders, but on the health of its workforce and contribution of its product. Unlike a machine with distinct mechanistic parts running independent of outside factors, the new paradigm, or "green" era, treats the earth and its humans as a living organism interdependent and connected to everything else.

Walt Whitman, a 19th Century American poet, described this interconnectedness when he wrote:

> "I celebrate my self,
> and what I assume you shall assume.
> For every atom belonging to me
> as good belongs to you."[149]

Work in the 21st Century must come to recognize this principle. An ever increasing notion circulating in the management training field is that of treating your employees as you would your customer. It recognizes them as an important part of the business...as important as the consumers who buy the product. The hope is to create a new era with meaningful work that honors "the art of living, of working and putting each other to good work; the arts of healing, celebrating and forgiving. Instead of the dryness of machines, we will enjoy the wetness of nature. The oil within all things, the wet, green, creative juices within all things, will be honored again."[150] It is the mechanistic view of labor and the workplace that has caused us to create boring and meaningless work and claim success as a society. The new work paradigm will link success to our creation of a healthy world.

Meaningful Work

It has long been established that work "plays a crucial role in the individual's psychological identity and sense of order.[151] The "psychological comfort inherent in ordered relationships binds workers

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[149]Walt Whitman, "Song of Myself," *Leaves of Grass.*

[150]Fox, supra at 88.

[151]Special Task Force to Secretary of HEW, *Work in America* 825, 15 2-23 (1972).

to their jobs," and, when coupled with a shrinking job market, makes them vulnerable to merely putting up with affronts to human dignity inherent in their work environment or work schedule. As one court declared:

> "Every man's employment is of utmost importance to him. It occupies his time, his talents and his thoughts. It controls his economic destiny. It is the means by which he feeds his family and provides for their security. In days gone by, a man's occupation literally gave him his name. Even today, continuous secure employment contributes to a sense of identity for most people."[152]

This court recognized how important work is to the individual. When one first meets a person at a social gathering, the first question is often, "So...what do you *do*?" Our role in the market economy becomes our defining feature to others and, too often, determines our value to society. In essence, many workers are left to define their identities through meaningless and de-humanizing jobs. No wonder depression and malaise are sweeping the western world. We need to both change the unhealthy nature of work, as well as examine our unhealthy attitudes toward worklife.

A study by the Canadian Institute for Advance Research revealed some shocking data about the importance of healthy work to an individual's well-being. In examining the link between unemployment and healthcare, it found that "medical services" had very little effect on national health levels. Instead, it found that what influenced health most was whether a person was in a work situation where they felt in control of their lives. It found that one reason that the wealthy outlive the poor is that they are more in control of their lives. As one commentator wrote in his article "Why Bosses Live Longer," "Something is killing the great lower classes of the modern world, grinding them down before their time. The statistics show it's also killing the middle classes, who live longer than the poor but not as long as the rich."[153]

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[152]*Lowe v. Hotel & Restaurant Employee Union Local 705*, 389 Mich. 123, 142, 205 N.W.2d 167, 178 (1973).

[153]Jack Miller, "Why Bosses Live Longer" *Toronto Star* Dec. 8, 1990. Citing the "Nurturing Health: A Framework on the Determinants of Health (Toronto: Premier's Council on Health Strategy, 1991). p. 7.

While one cannot ignore the issues of malnutrition, living conditions and hunger, the common factor shared in such situations and work in the market economy is despair arising out of an inability to do anything about one's situation. This lack of control and feeling of helplessness or despair is rampant in today's workplaces and must be shifted to make work meaningful and healthy.

In the United States we work more hours with less job security than any of our "western counterparts." Most workers can be fired without resort to any court or agency for redress. In turn, we also suffer disproportionately in the amount of cancers, heart attacks and high blood pressure disorders. Dr. Larry Dossey points out that job dissatisfaction and the "joyless striving" that accompanies it, cause more heart attacks than the high profile issues of high cholesterol or fatty diets. In fact, more heart attacks in the United States occur between 8:00 a.m. and 9:00 a.m. on Monday morning than at any other time during the week.[154]

The United Nations International Labor Organization has called job stress "one of the most serious health issues of the twentieth century."[155] It found that stress is particularly high with blue-collar workers and women workers. Echoing the Canadian findings on workers' feelings of a lack of control, it urged employer's to give employees more control over their work worlds.

Despite this extensive data on the impact of meaningless disempowering work on the individual, employers remain trapped in the Master/Servant mentality that refuses to recognize the interest of the employee in a healthy worklife. Numerous studies show that workplace productivity is severely hampered by the manifestations of these stress disorders, but few employers see the need to change the way we are working.[156] As one company CEO wrote in response to advocates for a

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[154]Larry Dossey (address to Mystics and Scientists Conference, Winchester, England, April 3, 1993).

[155]"Job Stress Characterized as 'Global Phenomenon,'" *Oakland Tribune*, March 23, 1993, D-11.

[156]In the U.S., stress disorders and related diseases, such as ulcers, high blood pressure and heart attacks, cost the U.S. economy over $200 billion per year in absenteeism, compensation claims and medical expenses. Matthew Fox, *The Reinvention of Work* (Harper: San Francisco 1994) p. 14.

shorter work week, "My view of the world, our country and our country's need is diametrically opposite of yours. I cannot imagine a shorter work week. I can imagine a longer one both in school and at work if America is to be competitive in the first half of the next century."[157] Another survey showed that to be competitive three-quarters of the country's CEO's felt that they would have to "push their managers harder."[158] Pushing against the human nature of the workers without regard to the human and society consequences, thereby ignoring the interdependence of all things (i.e., healthy worker = healthy productivity = health planet), is an element of the market economy that must be abandoned.

Nations that have not been caught up in this mechanistic market mentality must evaluate the impact of meaningless and stressful work when deciding to follow the lead of the dissolving global labor based market economy. At risk is their culture and the institutionalization of despair. The market economy should not be the model. As one reporter once asked Mahatma Gandhi, "Mr. Gandhi, 'What do you think of western civilization?'" Gandhi replied, "I think it would be a good idea."

The Future Is Now

The work of the 21st Century must not speak only about "jobs" and more work, but must examine how to make work supportive, as opposed to destructive of life. Economist E.F. Schumacher recognized this failure to view work through the eyes of the worker when he wrote:

> "The question of what the work does to the worker is hardly ever asked, not to mention the question of whether the real task might not be to adapt the work to the needs of the worker rather than to demand that the worker adapt himself to the needs of work—which means of course primarily to the needs of the machine."[159]

Therefore, we must ask ***"What has the Market Economy left us and what are we leaving behind?"***

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[157]Juliet Schor, *The Overworked American* (Basic Books 1992) p. 152.

[158]Id.

[159]E.F. Schumacher, *Good Work* (London: Abacus, 1980) p.3.

Anthropologist Marshall Sahlins has pointed out that the market system handed down to human beings a sentence of "life at hard labor."[160] Juliet Schor looks at the damage to our perspectives in recognizing that "we may have forgotten the real worth of time." (p. 139). Author Studs Terkel, in his book, *Working*, graphically describes the power abused and stressful nature of the work in the 20th Century when he writes:

> "Work, by its very nature, is about violence—to the spirit as well as to the body. It is about ulcers as well as accidents, about shouting matches as well as fist-fights, about nervous breakdowns as well as kicking the dog around. It is, above all (or beneath all), about daily humiliations. To survive the day is triumph enough for the walking wounded among the great many of us."[161]

He describes the goal of meaningful work to be in finding life within work, "rather than a Monday through Friday sort of dying."[162]

An overlooked impact of working life in the 20th Century industrial market economy is what has been the negative side-effects on us as human beings of working under such a system Schumacher describes this as the "stunting of personality" because most forms of work, both manual and white collar jobs are "utterly uninteresting and meaningless."[163] The fact that we are humans of endless possibilities and potentiality is lost, as work becomes "Mechanical, artificial, divorced from nature, utilizing only the smallest part of [human] potential capabilities; it sentences the great majority of workers to spending their stimulus to self-perfection, [with] no chance of development, no element of Beauty, Truth or Goodness."[164]

The Japanese have a term that actually means "death by overwork" called *"koroshi."* One could say that our society as a whole is suffering from a form of *koroshi.* To provide more meaning to people's lives and

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[160]Marshal Sahlins, *Stone Age Economics* (New York: Aldine, 1972), p.4.

[161]Studs Terkel, *Working* (New York: Ballantine, 1985) pp. xiii.

[162]Id.

[163]Schumacher, supra at 27.

[164]Id.

work we must first push for a shorter workweek. This will create more jobs and help move us to fuller employment. Of course, this will have to be accomplished with only minimal losses in income, as so many people are at the breaking point currently. However, experiments with shorter hours have often resulted in increases in productivity.[165] Support for such a concept should be universal as any employee who gets a three day weekend can attest to the fact that they come back to work feeling recharged and ready to work.

Part-time work and job sharing should be accessible to more people with the right to the same benefits (health care, pension, holiday pay) as full-time employees, but on a pro-rated basis, to make it more attractive. Mandatory overtime should be prohibited and workers may be better off with higher salary's and comp time being available, in lieu of time and a half, to increase the leisure benefit to the workers who occasionally choose to work the overtime. In order to truly live in a healthy manner, and thus feel in control of one's own live, it will also be necessary to encourage more meaningful worker participation programs. Top down decision making is outdated and contributes to the feeling of helplessness on the part of workers. Thus, the structure of the workplace hierarchy must be challenged.

Work in socially responsible non-profits or Non-Governmental Organizations (NGO's) must be encouraged as they truly enhance the whole of society. Individuals can be given incentives to work in such organizations through tax incentives and availability of more leisure time. Rifkin calls for a new Social Contract in which we use the time of the unemployed and those working lighter schedules to create a "third force that flourishes independent of the marketplace and the public sector."[166] Currently there are over 1.4 million non-profit organizations in the United States that provide a service or advance a cause. He points out that this type of "work" is fundamentally different than market economy work as it is a reaching out to others without expectation of material gain. Such work can be more meaningful and fits well into the interconnected nature of all things in the new work paradigm. The way we work in the market economy, according to Rifkin, reflects the values of our society. He writes:

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[165]Rifkin, supra at 224-226.

[166]Rifkin, supra at 239.

> "The market vision, wedded to a materialist cornucopia, glorifies production principles and efficiency standards as the chief means of advancing happiness. As long as people's primary identification is with the market economy, the values of expanded production and unlimited consumption will continue to influence personal behavior. People will continue to think of themselves, first and foremost, as 'consumers' of goods and services."[167]

He contrasts this consumer driven work to the potential for work in the third sector which is motivated "by service to others and security is viewed in terms of strengthening personal relationships and a sense of grounding in the larger earth community."[168]

Current plans to require work for welfare benefits and jobs for the unemployed can be directed to the third sector, rather than to flipping burgers at McDonalds. Rifkin suggests tax incentives such as deductions for time spent working with non-profits and incentives to employers who lend their workers one day a month to the third sector. He calls for the elimination of corporation governmental subsidies to free up enough funds to set up a social wage program for several million of Americans working in the third sector. Realigning society to include a workplace that respects the interconnection between workers well-being and the health of society in general is necessary. This, along with the humanization of the workplace and increased third sector community based "work," will create a new work ethic and attitude.

A saner workweek does, in fact, lead to healthier and more open attitudes. In one British shoe factory that experienced a forced job-sharing plan to keep the factory open and avoid layoffs, one worker reported"

> "...friendships began: we were now able to go beyond political conversation, and we managed to talk about love, impotence, jealousy, family life...It was also at this time that we realized the full horror of working in the factory on Saturday afternoons or evenings. Before the blokes had put up with it, but now we were

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[167]Id. at p. 246.

[168]Id.

once again learning the meaning of the word living."[169]

Unfortunately, workers in the current labor market economy suffer from the "carousel syndrome." They go up and down on the merry-go-round of an inhumane worklife, but they can't get off. Once the changes are made, they act almost relieved. Like the British shoe factory worker, they are shocked that they put up with such "horrors" for so long.

It is not enough that workers change their attitudes, as management must overcome its own obstacles and habits to implement a more humane interconnected workplace. Many workplace myths are antiquated and must be abandoned. These include the notion that employment law is equated with "master/servant" principles, that company loyalty means not saying anything that rocks the boat, that conflict or disagreements are unacceptable, and that employees are to be seen and not heard. Richard McKnight, an organizational psychologist, described the people he has met in his work with businesses as follows:

> "For most workers, managers and executives I have worked with in the last 10 years, business organizations are seen as cold, impersonal machines that take raw material, capital and people in one end, perform some transformation, process or service, and produce money out the other end—or should....In the prevailing model, the ideal business posture is characterized by words such as "Competition," "aggression," and "winner." 'Our business is only about making money,' one executive said to me, 'and the only way we can do that in our industry is by keeping everybody uncertain and mean—inside the company and outside it.'"[170]

Work, as it now exists, ignores the whole person and focuses on the pursuit of money. It tolerates inhumane treatment and overwork in the name of profit. McKnight describes this reality and says, "People have needs in three areas: body, mind, and spirit. Yet most companies, if they acknowledge that people have needs at all, act as if there are only two requirements for producing good work: money and job security."[171]

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[169]Schor, supra at 150.

[170]Richard McKnight, "Spirituality in the Workplace," in *Transforming Work*, ed. John D. Adams (Alexandria, VA: Miles River Press, 1984) p. 140.

[171]Id. at 142.

The nature of our work helps to define our role in this world. In recognizing the interdependence and organic nature of all things, we must ask whether our work contributes to enlightening or deadening the world. In the words of Matthew Fox:

> "...where our work is service oriented—geared to relieving ignorance, physical pain, unemployment, sexism, neglect, emotional pain, boredom—we are trying to do something about the dark night. But work is also capable of creating the dark night—when, for example, our work contributes to the devastation of the planet, to the despair of the young, to hoarding when we ought to be sharing, to control and power games, instead of celebrating, to putting people down instead of lifting them up, to injustice instead of justice."[172]

As a progressive movement we must look to analyze the work provided by the market economy in this manner. In developing countries they must look long and hard at the casualties of the ever-expanding market economy theory. The degradation of the human dignity of workers has gone hand-in-hand with economic expansion. It is not about bread, but of bread and roses, too!

Numerous employment practices must be changed to restore human dignity to the workplace. In the United States, we have companies that provide different pension plans for their workers. An employee stuck in a degrading job may stay and feel miserable because they cannot leave their employer and continue to accrue pension benefits at a subsequent employer. A universal pension system is needed to overcome this problem. In addition, the United States lacks adequate vacation time to allow people a chance to have a life outside of work. Many employees work 50-52 weeks a year. A four-week mandate by statute is needed. A six-month paid maternity leave and paternity leave will help families recognize the importance of the family.

A shorter workweek, as discussed above, will provide people with a chance to enhance their education and serve their communities. Guy Dauncey, in *After the Crash: The Emergence of the Rainbow Economy* described this new period as the "Third Era" whose characteristics would include:

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[172]Matthew Fox, supra at 48.

> "Nurturing creativity, worker self-management, participation and teamwork, setting up profit-sharing and employee-shareholding schemes, promoting the role of women and meeting childcare needs, encouraging work-sharing and flexi-work patterns, supporting employees' own personal journeys of growth and self-empowerment, breaking down hierarchical organizational structures and authoritarian modes of management...pursuing environmental excellence, encouraging community involvement—there are some of the signs which mark a company's evolution into the Third Era."[173]

Truly, employees should be treated as good or better than the company's customers. This attitude must become institutionalized to begin to show respect for the worker.

We cannot ignore the impact of youth on our society, both present and past. Currently, we pay the price for their boredom and neglect in our schools and on our streets. They see the dissatisfaction of their parents with work and have little to look forward to when they join the ranks of the living dead at the local factory. We must make a stand today and begin to change the nature of work or they will not emerge from their level of despair and anger. Schumacher urges us to teach our youth to reject meaningless work and struggle to change the system, as he writes:

> "How do we prepare young people for the future world of work?...We should prepare them to be able to distinguish between good work and bad work and encourage them not to accept the latter. That is to say, they should be encouraged to reject meaningless, boring, stultifying, or nerve-racking work in which a person is made the servant of a machine or a system. They should be taught that work is the joy of life and is needed for our development, but that meaningless work is an abomination."[174]

We have allowed the corporations and the global economic system to dictate the nature of work in exchange for the illusion of jobs and the hopes of consumerism. We can no longer allow them to set the agenda.

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[173]Guy Dauncey, *After the Crash: The Emergence of the Rainbow Economy* (New York: The Bootstrap Press 1989) p. 140.

[174]Id. at 118-119.

We must set up a green view of the workplace that respects humans and understands the interconnected nature of all our actions. ??Geologian Thomas Berry, in his historic book, *The Dream of the Earth*, declares that it is time for us to hold corporations responsible for the type of world they have created. He writes:

> "For the past hundred years the great technical engineering schools, the research laboratories, and the massive corporations have dominated the North American continent, and even an extensive portion of the earth itself. In alliance with governments, the media, the universities, and with the general approval of religion, they have been the main instruments for producing acid rain; hazardous waste; chemical agriculture; the horrendous loss of topsoil, wetlands and forests; and a host of other evils the natural world has had to endure from human agency. The corporations should be judged by their own severe norms. ***What exactly have they produced? What kind of world have they given us after a century of control?***"[175]

In law, we say "res ipsa loquitor" ...meaning "it speaks for itself."

Our workplaces and our approach to the job-based market economy lacks vision. We must awaken the human spirit by calling for a new set of guiding principles to lead workplaces into the 21st Century. As Matthew Fox declared, "When the human species wakes up, it is capable of great things. It is the call to greatness that would emanate from this community like a beacon of hope. By unlocking our imaginations, new work would abound."[176]

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[175]Thomas Berry, *The Dream of the Earth* (San Francisco: Sierra Club, 1988), pp. 33-34.

[176]Id. at 189.

WHAT'S GOOD FOR THE UNITED STATES MUST BE GOOD FOR THE WORLD: ADVOCATING AN INTERNATIONAL CHAPTER 9 INSOLVENCY

by
Kunibert Raffer[177]

"When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open, and avowed bankruptcy is always the measure which is both least dishonorable to the debtor, and least hurtful to the creditor."

Adam Smith, *Wealth of Nations,* 1776

"It is now well known that countries politically incapable of meeting their liabilities need some sort of bankruptcy procedure that ensures that all creditors share the losses."

The Financial Times, 30 July 1992

I.

The fiction that all sovereign debt can and will eventually be repaid long upheld by the North and multilateral institutions, where Northern votes enjoy clear majorities, is finally crumbling away, although *The Financial Times* might be a bit prematurely optimistic as well as too little aware of economic constraints.

Economically, the problem of foreign debt cannot be solved without a substantial reduction of debts. The important question is thus how, not whether the burden will be reduced. Undoubtedly, the solution should be fair, economically sound, likely to restore development prospects in the South, and it should abolish those market imperfections in international credit markets that have contributed to if not produced the present crisis. The solution must be based on economic exigencies and fairness—not on

[177]Initially presented at the Kreisky Forum Symposium, Vienna, September 1992, Chapter 9.

political *ad hoc* decisions and favouritism.

A method of achieving these goals is the internationalisation of insolvency procedures, or an "avowed bankruptcy" to use Adam Smith's words. This proposal was already made during the first years of the debt crisis, and has repeatedly been advocated during the 1980s, among others by Nobel Laureate Lawrence Klein, and by UNCTAD in 1986. The model propagated was the reorganisation of a business firm, or—in legal terms—Chapter 11 of Title 11 (Bankruptcy) of the United States Code.

While economically feasible, international reorganisation pursuant to Chapter 11 or similar laws in other countries do not address the important problem of sovereignty. The proposal has therefore been attacked with the technical argument that differences between firms and sovereign states render Chapter 11 (or similar laws of other countries) inapplicable. This technical subterfuge can be answered by proposing the internationalisation of Chapter 9 of Title 11, the U.S. insolvency law.

Chapter 9, a procedure not well known outside the US, solves a problem unique to insolvent public borrowers: intrusion into the debtor's governmental power from without. It regulates the insolvency of so-called *municipalities*, protecting the municipality's governmental powers. Designed and successfully applied within the U.S. for decades as a solution to the problems of official debtors, there is no reason why it should not be applied to sovereign debtors. Like all good insolvency laws it combines the need for a general framework with the flexibility necessary to deal fairly with individual debtors. Under its umbrella many proposals made so far can be accommodated, such as interest capping, securitisation, counterpart funds, buy-backs, debt-for-nature (or equity, charity) swaps, or the ECA's proposals incorporated in the *African Framework*.

The idea of an international Chapter 9, originally advocated in 1987, has been discussed and presented in more detail elsewhere.[178] This brief

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[178]Kunibert Raffer, "Applying Chapter 9 Insolvency to International Debts" An Economically Efficient Solution with a Human Face," *World Development*, 18/2 (February) 1990, pp. 301-312; and: "Internationalising US Chapter 9 Insolvency: Economic Problems in Need of Legal Conceptualisation," in: S.R. CHOWDHURY, E. DENTERS, P.J.I.M. de WAART (eds), *The Right to Development in International Law*, Kluwer/Martinus Nijhoff, Dordrecth, pp. 397-410, 1992.

presentation confines itself to sketching its essential element, referring interested readers to the cited publications.

II.

A municipality is defined by section 101 (34), 11, United States Code Annotated (USCA) as a "political subdivision or public agency or instrumentality of a State." A municipality filing a petition must:

-be insolvent or unable to meet its debts as they mature
-desire to effect a plan to adjust such debts
-have either obtained the agreement of the majority of each class of creditors affected, or have attempted to work out a plan without success, be unable to negotiate with creditors because this is impracticable, or reasonably believe that a creditor may attempt to gain preference (§109(c), 11, USCA).

A filed petition results in an automatic stay of enforcements of claims against the debtor. In a Chapter 9 proceeding U.S. laws protect not only governmental powers of the debtor, but also individuals affected by the plan as well as the interests of creditors.

The composition plan should be fair, equitable, and feasible. Furthermore, to be confirmed the plan also has to be in the best interest of creditors. Fairness is tested by whether creditors actually get what they can *reasonably* expect under the circumstances. In practice these amounts are similar to Chapter 11 cases. Approval of the plan is denied if the municipality has the means to honour all its obligations.

A municipality is not expected to stop providing basic social services essential to the health, safety and welfare of its inhabitants in order to pay its creditors. The US Supreme Court rejected the idea that a city has unlimited taxing power by stating that a city cannot be taken over and operated for the benefit of its creditors. Tax increases that would depress the standard of living of the municipality's population below the minimum guaranteed to private debtors are clearly illegal. Feasible tax increases have actually been much lower.

The problem of governmental power is solved by §904. The jurisdiction of the court depends on the debtor's volition and cannot be extended beyond it. The court may not interfere with the choices of a municipality as to what services and benefits it will provide to its inhabitants. A plan can only be confirmed by the court if it embodies a

fair and equitable bargain openly arrived at and devoid of overreaching, however subtle.

The openness and publicity of the bargaining process are of particular interest. People affected by the plan have the opportunity to voice their arguments, be they employees of the municipality or "special taxpayers"—i.e., special in the sense that they are expected to pay more. They have the right to be heard in all matters arising in a Chapter 9 case and to object to the confirmation of the plan. Representatives of the debtor's employees labour unions and employees' associations have the right to be heard on the economic soundness of a plan affecting their interests. Furthermore the court can permit *any* interested entity to intervene.

The plan's feasibility is defined by whether the debtor emerges from reorganisation with reasonable prospects of financial stability and economic viability, including sufficiency of capital structures. The viability of the reorganised debtor is the touchstone, which includes the ability to service debts agreed on in the plan.

III.

As the problem of governmental powers is solved by Chapter 9 it can easily be adapted to sovereign debts.

Because impartiality of national courts, whether in a creditor or a debtor country, cannot be guaranteed, a neutral court of arbitration must be established to allow absolutely fair and equitable international Chapter 9 proceedings, devoid of overreaching, however subtle. As is usual practice in international law, each side should nominate the same number of persons, who, in turn, elect one further member to achieve an uneven number. One of the arbitrators is elected as chairperson.

Like a court in a domestic Chapter 9 case, arbitrators would have the task of mediating between debtors and creditors, chairing and supporting negotiations by advice, providing adequate possibilities to be heard for those affected by the plan, and—if necessary—deciding what should be done. Agreements between debtor and creditors would need their confirmation, in analogy to §943. They would have to take particular care that a minimum of human dignity of the poor is safeguarded—in analogy to the protection enjoyed by a municipality's inhabitants.

Exactly like Chapter 9 cases, employees of the debtor would be

represented by trade unions or employees' associations. In contrast to "special taxpayers affected by the plan," the affected population would, of course, have to be represented by organisations speaking on their behalf. Grass-roots organisations of the poor, NGOs or international organisations such as UNICEF or the World Council of Churches could fulfill this task. The possibility of describing the expected impact on the poor publicly would certainly have mitigating effects. Publicity of negotiations, like public sessions of domestic courts, would help guarantee a fair and equitable bargain, openly arrived at.

It is important to stress that an international Chapter 9 would not at all need a new international organisation, nor a costly bureaucracy. Theoretically not even an international treaty establishing international insolvency proceedings ratified by all (or the most relevant) creditor nations would be needed as long as all (or the most relevant) creditors are determined to solve the problem. Practically, though, an international treaty would certainly be helpful.

Two spectacular cases of *de facto* composition after World War II prove the point that no such treaty is required: the London Agreement with Germany and the Indonesia solution of 1969. Both reduced the debts of these countries measured in present values roughly by half. Both were, by the way, politically motivated, similar to the recent cases of Poland and Egypt. Whatever the motives, though, these two cases prove that international insolvency works, even without the legal basis of international proceedings.

Both creditors and debtors employ qualified personnel to manage reschedulings or other debt related issues. In an international Chapter 9 these people would simply do what they have done so far, negotiating and arguing their points before the arbitrators instead of among themselves.

Creditors, debtors and organisations representing the population would have to argue, prove and document their points. Arbitrators would only have to decide if and when debtors and creditors cannot reach an agreement or if representing organisations show that an agreement is likely to put too heavy a burden on the poor.

The costs of the arbitrators, whose number should ideally be five or less, would have to be covered. A very small secretariat, giving them the necessary, minimal organisational support, would be needed. Since all the arguments and figures would have to be prepared and presented by the interested parties this support and hence its costs would be relatively low.

Such costs, though, have to be covered in any case of international arbitration.

The court of arbitrators would not become a permanent institution. Once the task of starting a workable composition plan is achieved, it can be dissolved. If further disagreements should develop later on the same persons (or, if necessary, other arbitrators) could reconvene again to solve any remaining issues.

The general framework of an international Chapter 9 could easily accommodate a wide range of proposals. Nevertheless it seems useful to list a few essential issues.

ASSESSMENT OF DEBTS

All claims have to be verified loan-by-loan at the beginning, as routinely done in any domestic insolvency. This would include verifying whether financial obligations had been incurred by people authorised to do so according to the debtors country's law at the time of signing. Only people authorised to sign on behalf of a firm can legally bind this firm and banks do check authorisations so as not to lose their money. All OECD governments have rules which must be followed closely to bind the country. This same general principle valid for legal entities in the North must be applied equally strictly in the South.

SOCIALISED DEBTS

Quite a few governments were forced by banks to assume retroactively, losses from private lending initially done without any government involvement. The reason for such actions is simple: private debtors can go bankrupt, official debtors are not allowed to do so by the North. This is one clear illustration that the lack of international insolvency is a market imperfection. It should also be noted that such increases in the debt burden of debtor countries based on rather unorthodox legal foundations have not met audible protest by International Financial Institutions (IFIs), although they made debt management much more difficult. These socialisations of private losses must be declared null and void.

SYMMETRICAL TREATMENT OF CREDITORS

An important distinction is made between commercial banks,

bilateral governmental loans, and IFIs. The Brady Initiative, e.g., only calls on commercial banks to take losses by reducing their claims, but not on IFIs. The understandable self-interest of any creditor apart, there exists no objective reason for preferential treatment of this class of creditors.

Multilateral lenders charge interests below the debtor's market rate. Even for normal IFI-lending which is called "development finance" as it is too tough to qualify as Official Development Assistance according to the DAC definition, this is a valid point for preferential treatment. This point is all the more valid for concessional flows.

There is, however, another difference between IFIs and banks. Commercial banks did lend aggressively but have usually not interfered with their clients' economic policy while multilaterals have strongly influenced the use of loans and exerted massive influence on their debtors' economies. In the case of the IMF, the Group of 24 criticised the proliferation of performance criteria extending quite often down to microeconomic variables such as prices for specific products. The IBRD has been proud of the detailed monitoring of its projects for decades. Only in the most recent past this pride has not been voiced quite as perceptibly.

Put briefly: IFIs take economic decisions but refuse to participate in the risks involved. They insist on full repayment, even if damages caused by their staffs occur, which have to be paid by the borrower. A new loan might be given to correct the damages done by the first, as, e.g., in Brazil's Polonoreste case, leaving the debtor with more debts and the IFI with more interest income. *Time* of 12 December 1988 reported that $240 million had been loaned, which finally caused considerable environmental damages. Bank officials admitted that they had erred—then lent $200 million more to control the damage done by the first loan. Brazil's IBRD debts increased by $440 million.

Or, to give one other example: the Republic of Trinidad and Tobago documented grave irregularities and deficiencies in the IMF's assessment of its economy, which created the impression of economic mismanagement. After the IMF became aware of these substantial errors, corrections were not published in spite of their importance to the country. According to a mimeographed document by the Ministry of Finance and the Economy of Trinidad and Tobago on the *Trinidad and Tobago Government's Relationship with the International Monetary Fund 1988* (dated January 1989), the country's own expert (K. Levitt) advised them

not to "pick a fight" with the IMF, because of the government's need for the IMF's "seal of approval" to reschedule their debts.

These examples must not be misunderstood as blaming these institutions for making mistakes. A certain amount of mistakes will, alas, unavoidably be made by any operating firm or institution. Rather, hese examples show another, more disturbingt point: in the case of the IFIs, decision making is not only delinked from financial responsibilities, their errors may even cause financial gains. This is a system absurdly at odds with the Western market system. At a time when riskless decision making by bureaucrats is abolished in the East, there is no reason why it should be preserved in the West. It is the most basic precondition for the functioning of the market mechanism that economic decisions must be accompanied by (co)responsibility: whoever takes economic decisions must also carry financial risks. If this link is severed—as it was in the Centrally Planned Economies of the former East—efficiency is severely disturbed. Bringing the market mechanism to multilateral institutions is therefore advisable. The striking contrast between free-market recommendations given by IFIs and their own protection from market forces must be abolished. Introducing the market mechanism would doubtlessly allow IFIs to benefit from its considerable benefits as much as their clients.

Naturally, it would be difficult, if not impossible, to determine the appropriate financial share of an IF in one single project or programme that went wrong. In the case of an insolvent country, though, there exists an easy and simple solution to link decisions and risks: like any other creditor IFIs should lose part of their claims. In countries where IFI involvement is high and which have oriented their policies according to IFI "advice" for some time, this solution is particularly justified and appropriate.

The IBRD argues that its own excellent rating as a borrower would suffer if not all their loans were repaid to the last cent. If that were true, all commercial banks would have unbelievably low ratings as a certain amount of lost loans is simply part of the costs of running a bank.

The fact that inverse transfers from debtor countries to IFIs have been observed, turning IFIs into net receivers rather than net funders, provides another strong argument for symmetric debt reduction.

In the case of Indonesia, Hermann J. Abs advocated convincingly and forcefully that all creditors must be treated equally. It is a matter of

fairness to debtors as well as to other creditors. Considering all circumstances multilateral institutions must not be treated more favourably than other creditors. Debt reduction must be uniform, the same percentage must be deducted from all debts.

CAPITAL FLIGHT

Measures against capital flight should be supported by both creditor and debtor countries. In analogy to domestic laws, the international Chapter 9 should provide the possibility of overruling banking secrecy to recover money obtained by criminal activities, e.g., embezzlement, in the first place.

ECONOMIC ADJUSTMENT

Economic reform in problem debtor countries is doubtlessly necessary, but the burden of adjusting should not be shifted entirely on them. Debt service payments have to be brought in line with the debtor's capacity to earn foreign exchange. Regarding creditor countries, a trade-off between more repayments and less protectionism or higher debt reduction and a higher level of protectionism is necessary.

Doubtlessly there exists a need for reform within debtor countries. These reforms, monitored by the council of arbitrators, should adjust the debtor to the real international environment, not to a textbook illusion of "free markets." Realistic strategies have to drop the IFIs' predilection for one-sided liberalisation by those countries that can be forced to do so. Import substitution on a substantial scale is necessary, while existing export possibilities should be used. Economic diversification must be part and parcel of this kind of adjustment. A policy mix between intervention and market forces is necessary.

Import substitution should be encouraged where economically viable to form the basis of future economic diversification. Monitoring by the arbitrators, agreed upon in the plan, could help to overcome the problem of petrifying protection. Protection should allow domestic industries to compete with imports, and should be reduced as domestic industries become more efficient. Military spending, which was so long the sacred cow of "structural adjustment," must not be safe from budgetary cuts.

PROTECTING THE POOR

Considerable knowledge how to target social expenditures on those

needing support exists. Redirecting expenditures in favour of basic services, using less expensive yet efficient drugs, employing basic health workers or "barefoot doctors" are possibilities. Good results can be achieved with limited financial resources. These resources, however, must be exempted from debt service.

ISSUES REGARDING COMMERCIAL BANKS

Contractual constraints for individual bargains between debtors and banks, such as *negative pledge* and *sharing clauses*, serve the same purpose as a Chapter 9 proceeding: to prevent unfair preferential treatment of one or some creditors.

With an international Chapter 9 these clauses would therefore no longer be necessary because all creditors would be treated fairly and equally. This solves the free rider problem—i.e., creditors not granting reductions gaining at the expense of those reducing their claims—which may result in a deadlock where all banks refuse debt reductions. Insolvency procedures covering all creditors can avoid this outcome. The free rider argument also strengthens the case for symmetrical treatment of all creditors.

Insufficient provisions against sovereign risks, widely quoted as a hindrance to debt reduction in the 1980s have ceased to be a problem. By now all banks have sufficiently provided against Third World risk to absorb relatively large debt reductions, i.e., to recognise in their books what has been reality for some years.

Nevertheless, a proposal made by Alfred Herrhausen in 1989 could be taken up if needed when international insolvency is introduced: banks can increase their provisions during a period of not more than five years, during which interest rates on already existing debts are substantially reduced (with exceptions such as trade financing). After this period claims are reduced at once or in stages.

Although not a necessary part of an international Chapter 9 the question of tax deductibility of loan loss reserves should be touched upon briefly. Economically, provisions are simply a means of bringing nominal values of claims in line with their real depreciated values. The theoretical alternative of actually writing claims down to their factual values is rather impractical, not least because debtors might be encouraged not to honour already written off obligations. As long as the amount of reserves is identical to the actual loss in value suffered by

loans, tax free provisioning simply serves as a means to bring official and taxable income in line with actual, economic income. Under these circumstances tax deductibility does not mean any costs to the budget, but taxing provisions means taxing illusory profits.

If provisions exceed actual losses, banks get an interest free loan, which would cause annual costs to the budget, equal to this difference times the appropriate tax rate, times the interest rate at which the government itself can borrow. As such a loan is extended until provisions are used or resolved, postponing a solution to the debt crisis costs taxpayers' money. It can be argued, however, that under the assumption of a sufficiently well functioning regulatory framework only no or negligibly small differences between provisions and reductions in values and thus costs to the budget are possible. The latter might be outweighed by greater stability, as loan loss reserves perform an important stabilising function in financial markets. Adopting the principle of tax deductibility prevalent on the Continent could therefore increase the stability of international financial markets.

IV.
CONCLUSION

An international Chapter 9 would have the advantage that banks would never again presume that sovereign debtors will always repay. If it had existed during the 1970s, enormous misallocations of funds could have been avoided and the debt burden would certainly be much smaller. Its existence might even have prevented the debt crisis.

Economic history, not least the history of present creditors, teaches us that debt reduction is economically unavoidable at last. It only remains to be asked how long it will take and how much human suffering decision makers are prepared to allow before debtor countries' obligations are finally brought in line with their capacity to pay.

BOTH STRANGER AND FICTION: REDEFINING THE REFUGEE IN INTERNATIONAL LAW[179]

by
Patrick Twomey, United Kingdom[180]

STATE SOVEREIGNTY

Acknowledging the difficulty determining precise numbers, UNHCR statistics of January 1995 estimate that there are 14.5 million people worldwide holding refugee status according to the terms of the 1951 Convention Relation to the Status of Refugees (hereafter the 1951 Convention). An additional 13 million people fall within the responsibility of the principle refugee organisations, comprising returnees (4m), internally displaced persons (5.4m) and so-called 'other persons of concern'(3.6m).[181]

In terms of human misery there is often little to distinguish those who fall within the protection of the legal definition and those that must wait in line for the humanitarian assistance of organisations with a broader mandate. Whether one is forced to move over a state frontier or within one's state may owe as much to the possibilities for escape as to the magnitude of the event giving rise to the need to move. Equally, without discriminating on the basis of its victims' political views, a drought may be every bit as life-threatening as a political regime that takes exception to one's opinions. The illogicality of such situations is an unavoidable by-product of a legal definition, the application of which requires determination of who is included within its protection, and as a corollary those that are to be excluded.

It has long been accepted that traditional designations of the individual's relationship with the state, as citizen, national, alien, and the

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[179] Work in progress. Not to be quoted without author's permission.

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[181] Statistics from UNHCR The State of the World's Refugees: In Search of Solutions (1996).

like, lie primarily within the domain of state sovereignty.[182] Difficulties arise where individuals are not identified with any state, as in the case of stateless persons, and where they have been failed by their state and as a result seek refuge in another, as in the case of refugees. Even in these latter scenarios the fraught issue of state sovereignty comes to the fore.

Central to the concept of state sovereignty is the idea of control[183] over, and protection of, the body politic, as well as the need to ensure cohesion between that body and its continued affiliation to the state. It lies with the state to decide how best this cohesion and affiliation is maintained. Historically this has meant a tendency towards preserving homogeneity and the *status quo* unless labour market needs or other exigencies dictated otherwise. Accordingly,immigration and citizenship policies have favoured those individuals with familial links to the state's nationals, those ethnically linked to the state's population or ideologically linked to the state's form of government. The refugee, however, does not necessarily possess any of these links. Firstly, unlike the citizenship-seeker, and in many cases the immigrant, the refugee seeks only the temporary solution of asylum. The request for refuge is prompted, not necessarily by any identification with the state concerned, but, because it provides an escape from his, or her, own state which poses a threat to their well-being. The plight of the refugee is straightforward; a stranger compelled to establish a particular legal identity in order to assert a claim against a state with which he or she has no relationship, and in the face of state sovereignty and all that springs from that doctrine. An additional difficulty in cases of mass movement is the extent to which such migration from a state represents a most fundamental threat to its integrity as a manifestation of its failure as a political entity.

Perhaps more than most individuals the refugee has a vested

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[182] "The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international
relations." Tunis and Morocco Nationality Cases PCIJ, Ser B, No. 4 (1923), 24.

[183] As regards territorial control state sovereignty has been compared with the concept of ownership. See Brownlie, **Principles of Public International Law**, 4th ed (1990) p. 108.

interest in the curtailment of state sovereignty[184] and the realisation of the view expressed by Boutros Boutros-Ghali that "the time for absolute and exclusive sovereignty has passed". A notable erosion of the doctrine was the 1991 UN Security Council Resolution 688 demanding that Iraq grant "immediate access" to international humanitarian organisations, on the grounds that the internal displacement of the Iraq's Kurdish population represented a threat to international peace and security. This paper explores the need, taking account of state sovereignty, to reassess the basis on which we approach refugee issues and, in particular, to move from a legalistic definitional approach to the refugee towards a more generalised human rights based one.

THE ORIGINS OF SANCTUARY AND REFUGE

The tradition of offering sanctuary to those fleeing unlawful violence or the reaches of lawful sanction dates from the earliest civilisation. Predating the evolution of the nation state the concept developed under religious[185] and secular orders[186] alike. The power struggle between secular and religious authorities resulted in conflict as regards the application of sanctuary and refuge, in particular where sanctuary was afforded by the church to those fleeing the civil authorities of the same state. As power increasingly came to rest with the civil authorities so too came the first steps towards introducing territorial limitations to the grant of asylum. After all the individual had, in theory at least, no reason to seek sanctuary from a state that existed to safeguard their interests. The transformation of asylum to having an exclusively external face and consequent limiting of those who qualified for such protection occurred alongside the rise of the nation state and evolving conceptions about the relationship between the individual and the state.[187]

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[184] See generally Henkin, "An Agenda for the Next Century: The Myth and Mantra of State Sovereignty," 35 **Va. J. Int'l L.** (1994) 115

[185] For example, the right of asylum was recognised by Canon law under the law of Shariah.

[186] Both the Greek city-states and Roman Empire recognised the concept of sanctuary from violence and oppression.

[187] Arboleda & Hoy, "The Convention Definition in the West:Disharmony of Interpretation and Application," 5(1) **IJRL** (1993) 66.

The modern formulation of the entitlement to asylum owes much to the teaching of Grotius[188] and the view that society would come to an end if the state could not exercise control over the right to emigrate and, later, de Vattel[189] who formulated three categories of refugee: those who refused to be subject to a new regime; innocent victims of persecution and political offenders. The latter category represented a long customary tradition of the political offender exception to extradition, stemming from the view that states should not intervene in the political affairs of another state by entertaining a request for extradition on such grounds.[190] Sanctuary of this type gained momentum and importance with the birth of revolutionary politics and the burgeoning number of individuals fleeing from regimes that they wished to overthrow by revolution.

The transformation of the nature of movement beyond state frontiers, in part due to greater ease of communications and travel, is reflected in the changes to the refugee phenomenon over the centuries. Nevertheless, some features remain constant. The individual's dependency on relations between the state of departure and the intended state of sanctuary, a frequently shared interest of states in curtailing the activities of certain individuals whether the republican activist or the marxist idealogue, the importance of ethnic, religious or ideological kinship between the individual seeking sanctuary and the receiving state. Nor is the relevance of economic factors a new phenomenon, as it proved to be an important motivation in the early protection of refugees. In the late 15th century Spanish Jews were welcomed by a Portuguese state that recognised the value of a commercially active community.[191] Similar motivation prompted the Marquis of Brandenburg, Frederic Wilhelm, to issue the Edict of Potsdam in 1685 which granted entry and residence to French Huguenots.

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[188] Grotius, *De iure elli ac pacis* (1625) liber II, 5, xxiv cited in Kircheimer, **Political Justice** (1961) at p. 356.

[189] **Le Droit des Gens ou Principes de la Loi Naturelle** (1758).

[190] Morgensten, "The Right of Asylum," XXVI **BYBIL** (1949) 327 at p. 329.

[191] Zolberg *et al*, **Escape From Violence: Conflict and the Refugee Crises in the Developing World** (1989).

The nature and profile of the refugee problem altered drastically in the twentieth century. The politically active individual covertly fleeing to a friendly state from a regime he, or she, sought to overthrow had not disappeared, but such an individual was now frequently one of thousands who fled the same regime, with any number of motivations and fears. Instead of simply assessing the threat that admission of a particular political activist posed to foreign relations[192] or to internal political order, states found themselves dealing with population movements on a hitherto unprecedented scale. Movements that burdened the infrastructure and threatened the very stability of the state.

> The position of the ordinary refugee is different in our day. He is not usually an individual who has made his mark by his ideas or deeds and evoked personalized hostile reaction from the government of his country of origin. He is just one of the hundreds of thousands or millions threatened by a policy directed against a social stratum or an ethnic group. While his escape has not as a rule been furthered by the regime he flees, the regime might not have severely hindered it. Having been reduced to a servile social status, the victimized group may be held for exploitation or extermination. But they may also be regarded as disturbing alien matter, or an unnecessary cost element to be shoved across the border rather than "liquidated" in a manner bringing disrepute amongst the liquidators. In this respect the modern refugee is less troublesome than the old-style rebel, who, a rather rare and interesting specimen, could attract considerable attention and gain influence on the policies of the host country; in the last political analysis only his demise could ensure the peace of mind of the actual and potential rivals at home.
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> As a mass phenomenon, the nonactive fugitive from

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[192] Though the explicit arguments of the US Attorney General in *INS v. Doherty* 112 S. Ct 719 (1992) that foreign policy considerations were valid reasons for denying asylum to an IRA member whose extradition was sought by the United Kingdom is
evidence that such considerations remain operative.

> group discrimination need not become a strategic liability to his home government. In exporting the undesirable or permitting them to spend their last resources on the permission to leave, the country of origin saddles the country of destination not only with individuals but also with burdensome problems. The roles, correspondingly, become reversed. The country of exit will not protest the admission of the rebel and define it as a hostile act. But when the new political refugees appear *en masse*, it is the country on which they are unloaded that will object their ejection, or the introduction of policies resulting in the exodus, as an unfriendly act by the country of origin and a threat to the safety and interests of the recipient.[193]

The scale of modern population movements and the multitude of routes taken to flee transformed the refugee from an inter-state to a truly international concern and required an international response. Two of the largest movement generating events, the break up of the Ottoman Empire and Russian revolution, led to the first High Commissioner for Refugees being established by the League of Nations in 1921. Initial attempts to focus on such movements were concerned with documentation, for example the Arrangement relating to the issue of identity certificates to Russian and Armenian refugees 12 May 1926[194]; and the Arrangement of 30 June 1928 regarding Assyrian, Assyro-Chaldean and assimilated refugees[195]. Following the initial focus on documentation 1933 saw the first attempt at defining the refugee concept in the 1933 (Nansen) Convention Relating to the International Status of Refugees[196] which governed Russian, Armenian and assimilated refugees as defined by the 1926 and 1928 Conventions; the Geneva Convention of 10 February 1938 (and Protocol of September 1939) dealing with Refugees from Germany and Austria. Despite the burgeoning number of refugee instruments, history bears testimony to the failure of this piece-meal refugee regime in the 1930-1945 period, which has been described as 'a depressing tale of

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[193] Kircheimer, **Political Justice** (1961) pp 354-355.

[194] 89 LNTS no 2004.

[195] 89 LNTS no 2006.

[196] 159 LNTS no 3663.

callousness and evasion'.[197]

THE 20TH CENTURY - PART II.

The inadequacy of earlier measures and the scale of the post war displacement lent urgency to the drafting of a generalised refugee convention. The preamble to the 1951 Convention Relating to the Status of Refugees commences with a reference to the affirmation of fundamental rights and freedoms in the UN Charter and the Universal Declaration of Human Rights (UDHR). The formulation of the right in Article 14(1) of the UDHR, "[E]veryone has the right to seek and to enjoy in other countries asylum from persecution," earned the derision of Lauterpacht, who described it as being "artificial to the point of flippancy."[198] By way of confirmation of this lack of substance, the 1967 UN Declaration on Territorial Asylum[199] provides, in Article 2(1), that "[T]he situation of persons (under Article 14 UDHR) is, without prejudice to the sovereignty of States and the purposes and principles of the United Nations, of concern to the international community."

In substance the right to "seek and enjoy" asylum may only be asserted against the state from which the refugee is fleeing. Attempts during the drafting of the Declaration to place an onus on the "receiving" state to admit, and protect, the refugee by granting the individual an actual right of *asylum* ultimately proved futile. The final version of Article 14 represents a decidedly weaker formulation than the original draft[200] which read:"[E]veryone has the right to seek and to be granted, in other countries, asylum from persecution." The drafting body of the Universal Declaration, the Commission on Human Rights, recommended the

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[197] Martin, "Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction," 26 **Cornell Int'l Law J.** (1993) 753 at p 755.

[198] "The Universal Declaration of Human Rights," 1948) 25 **BYIL** 374.

[199] GA Res. 2312, 22 UN GAOR Supp. (no 16)81, UN Doc. A?6716 (1967).

[200] Opposed by the United Kingdom, Australia and Saudi Arabia.

inclusion of a right of asylum in an international bill of rights[201] or in a separate Convention. Discussion during the drafting of the Draft Covenant on Civil and Political Rights in 1962 by the Third Committee of the GA saw some support for the inclusion of a right to asylum but ultimately states retreated from creating such a right.[202] "The difficulty of confining within the limits of a definition at the same time general and precise, the living reality, coupled with the legitimate anxieties of governments, has the result that in international decisions and agreements the categories of persons to whom they apply have generally been carefully restricted by reference to race, geography, and time."[203]

After the failed attempt to insert a concrete right within Article 14 UDHR, the 1951 Convention represented the first attempt to provide something approaching a general definition of the refugee, while at the same time expressly including those who received protection under earlier instruments.[204] Nevertheless, even in the light of a collective post-war guilt, certain limitations proved necessary to garner sufficient state support for the adoption of the new Convention. The resulting refugee definition was confined, both in terms of geography (states party to the Convention are permitted to narrow the scope of their obligations to "events occurring in Europe"), and time ("before 1 January 1951").[205]

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[201] Ultimately the International Covenant on Civil and Political Rights 1966 (GA Res. 2200 A (XXI) provided in Article 13 that: "[A]n alien in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or person especially designated by the competent authority".

[202] See Brownlie at p. 559.

[203] Vernant, **The Refugee in the Post War World** (1959) at 8-9 quoted in Fragomen, 'The Refugee: A Problem of Definition' 3(1) **Case Western Reserve J of Int Law** (1970) 45 at p. 46.

[204] Article 1(A)(1) of the 1951 Convention.

[205] Displaying a degree of innovative interpretation subsequently turned to the asylum claimants disadvantage Hungarian refugees fleeing from the Soviet invasion of 1956 were generally protected under the 1951 Convention; their flight being deemed to have resulted from events preceding 1951.

From its entry into force on 21 April 1954 the principle international legal definition of Refugee has been that of

> ...any person who...[A]s a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted on grounds of race, religion, nationality, membership of a particular social group, or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;or who, not having a nationality and being outside the country of his habitual residence as a result of such events,is unable or owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the tern "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.[206]

The cold war backdrop to the formulation of the definition set the scene for its subsequent implementation by states. Initial principle objections came from the Soviet bloc which feared, correctly as it transpired, that the definition would be used by Western powers as an ideological weapon to condemn Communist states. In particular, it was argued that the international refugee protection regime should be restricted to stateless persons and, harking back to an almost feudal conception of the individual, that protection should not be afforded to those that fled their own state for reasons of ideological disagreement.

Critical to the understanding of the definition finally adopted is that it is a combination of the subjective, in that the individual concerned must be in a state of fear, and objective, in that fear must be well-

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[206] The 1967 Protocol Relating to the Status of Refugees, U.S.T. 6260, TIAS No. 6577, 606 UNTS 267, provided for the removal of the "pre-1 January 1951" and "Europe" limitations.

founded.[207] The notion of "well-founded fear of persecution" was adopted from the constitution and statute of the UNHCR's forerunner, the International Refugee Organisation.[208] Furthermore, recognition that the qualifying criteria are met does not constitute an individual as a refugee, but rather is a formal declaration recognising that status. Finally, the focus on the individual in the definition means that this declaratory finding must be made on an individual basis. Ultimately this definition is a fiction that serves neither to offer succour on the basis of greatest need, artificially excluding those whose lives are threatened by natural disasters, internal wars and disorder etc., nor does it impose sufficient obligation on states to ensure that its spirit as well as letter are met. However, if the definition of the 1951 Convention was circumscribed to cater for states' fears of a blank cheque being written to cover future events of a magnitude or nature then unenvisaged, the UN provided some redress for this lacuna in 1959 when it authorised the UNHCR, "in respect of refugees who do not come within the competence of the United Nations, to use his good offices in the transmission of contributions designed to provide assistance to these refugees."[209]

In addition to state obligations relating to entry and treatment of refugees the most significant protection afforded by the 1951 Convention stems from the prohibition against non-refoulement.[210] But even this obligation is framed in a particularly cautious fashion so that it imposes a duty on states *vis a vis* the other state parties to the Convention, without conferring any right on the individual. Article 33 of the Convention provides that: "1. No contracting state shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

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[207] The Convention's drafting body, the *Ad Hoc* Committee on Refugees and Stateless Persons interpreted this to mean "that a person has either actually been a victim of persecution or can show good reason why he fears persecution," U.N. Doc. E/1618 (1951) at 39 quoted in Fragoman, "The Refugee: A Problem of Definition," 3(1) **Case Western Reserve J of Int'l L.** (1970) at p. 53.

[208] The IRO was charged with responsibility for post War refugees in Europe from 1946 to 1952.

[209] G. A. Res. 1388 (1959).

[210] Support for the principle of non-refoulement being part of customary international law is provided by both state practice and the UN General Assembly Declaration on Territorial Asylum 1967.

nationality, membership of a particular social group or political opinion. 2. "the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." This protection is afforded prior to any assessment by the state as to refugee status.[211] As with the refugee definition even this apparently forthright wording has had to weather the storm of states' powers of interpretation.

ATTEMPTS AT REFORM

The inadequacies of the existing Convention and a realisation that, despite earlier hopes, the refugee phenomenon was to be a permanent one, prompted the UN to draft a new Refugee Convention. The still-born result was the Draft Convention on Territorial Asylum 1977. While Article 2 of the Draft Convention did not propose any major amendments to the 1951 definition, it reflected post-colonial changes in the composition of the international community of states. The article provided that:

> "A person shall be eligible for the benefits of this Convention if he, owing to a well-founded fear of:
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> (a) Persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, including the struggle against colonialism and apartheid, or
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> (b) prosecution or punishment for acts directly relating to the persecution set forth in (a), is unable or unwilling to return to the country of his nationality, or, if he has no nationality, the country of his former habitual residence"

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[211] "The principle of *non-refoulement* is the cornerstone of the protection of refugees, and is applicable whether or not refugees are lawfully admitted into the receiving state, and whether refugees arrive individually or *en masse*" - Principle 12 of the Declaration of International Law on Mass Expulsion adopted at the 62nd ILA Conference, Seoul, August 1986.

In addition, it was proposed that "kinship, foreign occupation, alienation, domination, and all forms of racism" be added to the grounds of persecution, but this was counterbalanced by the explicit exclusion of applicants seeking asylum on "purely economic grounds." Other proposed amendments to the Draft Convention included the more restrictive "being faced with a definite possibility of persecution" replacing the test of owing to a well-founded fear of persecution" in a shift from the 1951 combined subjective/objective test to a more pronounced objective one. A further limitation agreed by the conference was the inclusion of an exception to the principle of non-refoulement in circumstances where the numbers seeking to enter a state pose "a serious problem to the security of a Contracting state."

In any event the conference failed to conclude the Draft Convention and the reluctance of developed states to undertake any greater obligations than those imposed by the 1951 Convention meant that no subsequent efforts have been made to adopt the Convention.[212] Despite the failure amongst the international community to find agreement on an expanded definition of the refugee there is a discernable trend by organisations such as the UNHCR and the Red Cross and Crescent organisations, fortified by General Assembly and ECOSOC resolutions and the UNHCR's own statute, to adopt a wider mandate as regards refugees beyond the 1951 Convention.

REGIONAL DEVELOPMENTS

Experience with human rights protections in general suggests that the best hope for the progressive development of the concept of refugee lies at the regional level. Article 1(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969[213] affords protection to those qualifying under the 1951 definition, but goes further in providing that the term refugee, "shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his

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[212] See generally Weis, "The Draft United Nations Convention on Territorial Asylum' 50 **BYIL** (1979) 151.

[213] OAU Doc. CM/267/Rev. 1; reprinted in **International Legal Materials 8** (1969): 1288-98; UN Doc UNHCR/131/69 (1969).

country of origin or nationality." The definition draws upon a collective African experience of refugee-generating phenomena and colonial experience in general. Furthermore, in terms of protection afforded to those who come within this designation, the OAU Convention goes further than the 1951 Convention in Article 2, which provides that "(1) Member States of the OAU shall use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality. (2) No person shall be subjected by a Member State to measures such as the rejection at the frontier, return or expulsion which would compel him to return to or to remain in a territory where his life, physical integrity or liberty would be threatened." Nevertheless, even with the expanded definition state sovereignty raised its head in the form of an omission to deal with internally displaced persons, so-called *de facto* refugees. Equally, state sensitivities manifest themselves in the preamble distinction drawn between the refugee who "seeks a peaceful and normal life and a person fleeing his country for the sole purpose of fomenting subversion from outside."

The Inter-American refugee regime has built upon an initial stance that reflected the universal approach in the Organisation of American States 1969 Convention on Human Rights.[214] Article 22(7) of the Convention states that "Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and the international conventions in the event he is being pursued for political offenses or related common crimes." In November 1984 ten central American states adopted the non-binding Cartegena Declaration on Refugees which expands upon the universal protection by affording protection to those forced to flee their home countries by "generalized violence," "internal conflicts," "massive violations of human rights" or for reasons "relating to serious breach of public peace."[215]

Developments at the European level have taken place along two

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[214] 9 ILM (1970) 673.

[215] See Arboleda, "The Cartegena Declaration of 1984 and its Similarities to the 1969 OAU Convention- A Comparative Perspective," **IJRL** Special Issue (1995) 87 and Gros Espiell *et al*, "Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America," 2(1) **IJRL** (1990) 83.

separate strands, with the markedly divergent motivations reflecting the objectives of the Council of Europe on the one hand and the European Union on the other. The Council of Europe's Resolution on Asylum to Persons in Danger of Persecution[216]was reaffirmed in the Declaration on Territorial Asylum 1977 which provided that "[i]n fulfilling their humanitarian duties, the Member States of the Council of Europe reaffirm their intention to maintain liberal attitudes with regard to persons seeking asylum in their territory."

More effectively, the Strasbourg organs have utilised the well developed jurisprudence of the European Convention on Human Rights to expand state responsibility in respect of individuals threatened with refoulement.[217] Applying across the board to illegal aliens, extraditees and asylum-seekers alike, the ECHR jurisprudence provides that; "[a]lthough extradition and the right of asylum are not, as such, among the matters governed by the Convention...the contracting States have nevertheless accepted to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent to which, and within the limits of, the obligations which they have assumed under the Convention."[218]

Despite a growing consciousness of state responsibility extending to the consequences of an individual's return, a proposal in 1988 by the Council of Europe's Parliamentary Assembly that a right of asylum be added by way of protocol to the ECHR has yet to be acted upon.

It is instructive that the most recent activity regarding refugees in Europe has been at the level of the primarily economic European Union rather than the human rights based Council of Europe. A steady growth in the number of asylum applications, approximately 5 million since the early 1980s, prompted moves towards harmonisation by the Member States of the EU, initially in the form of the Schengen and Dublin Conventions and subsequently under the Intergovernmental third pillar of

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[216] Res, (67)14.

[217] Einarsen, "The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum," 2 **IJRL**,(1990) 361.

[218] The Commission on Human Rights in *X v Austria and Yugoslavia*, [1964] **Y.B. ECHR** 462.

the treaty on European Union. The result has been a downward harmonisation, with traditional states of sanctuary such as Germany and France curtailing their admission of refugees. Free movement across the internal Borders of the EU was to be accompanied by fortification of the external walls. In the words of former UK Prime Minister, Margaret Thatcher she "did not join Europe to have free movement of terrorists, criminals, drugs, plant and animal diseases and rabies and illegal immigrants".[219]

The tendency to equate these issues is manifest in Article K of the Treaty on European Union by which Member States "shall regard as matters of common interest" such topics as asylum policy, the crossing of external borders and their control, immigration policy and policy in relation to third country nationals (with particular reference to conditions and control of entry, residence, family reunion and access to employment), drug addiction, international fraud and judicial customs and police co-operation. Cooperation on these matters is to be in "compliance" with the European Convention on Human Rights and the Geneva Convention Relating to the Status of Refugees.[220] While progress has been slow under this pillar evidence already exists of a trend towards the lowest common standard of protection being adopted as well as an abrogation of individual state responsibility for their international obligations.[221] To date concern has focused on procedural changes, prototypes of which are provided by the Schengen and Dublin Conventions. At the definitional level so far there has only been one pronouncement, prompted by the breakup of the Former Yugoslavia, in the form of a Resolution in December 1995 to the effect that "reference to a civil war or violent internal conflict and the dangers they present is not sufficient to justify recognition as a refugee."

STATE INTERPRETATION OF THE REFUGEE DEFINITION

The importance of the various definitions of refugee provided by

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[219] *Daily Mail*, 18 May 1989, quoted in Spencer, *1992 And All That: Civil Liberties In The Balance*, at p. 37.

[220] Article K.2(1) TEU.

[221] See for example, Amnesty International, **Europe: Harmonisation of Asylum Policy: Accelerated Procedures for "Manifestly Unfounded" Claims and the Safe Country Concept** (1992).

international and regional legal instruments is obvious. Nevertheless, so long as the ultimate decision as to whether an individual comes within any of these definitions lies with individual states[222] the true picture of refugee protection is to be found in the national practice and legislative action.[223] The preamble to the 1951 Convention recognises the risk of an "unduly heavy burden" being placed on some countries, as well as speaking of the "social and humanitarian nature of the problem of refugees" as a potential "cause of tension between states." "Mass influx of fugitives dislocates the labor market, overtaxes the facilities of the recipient countries" "welfare agencies, creates acute housing, health, school and retraining problems, kindles and exacerbates animosities between racial and religious groups; the menace of unemployment pressures bring about ambiguous, contradictory, and sometimes hostile attitudes of labor unions, which feel ill at ease with conflicting dicta of principle and group interest."[224] Accordingly, towards the end of the 20th century, compassion fatigue, recession and the shifting ideological goal-posts have increasingly come to the fore in states' response to refugees. The result of this tension presents a changing, and at times apparently contradictory, tableau. On the one hand the grounds of persecution which an applicant must establish have been extended, to the advantage of claimants, beyond a narrow construction of the text of Article 1(A)(2). Several states have, for example, interpreted the persecution on grounds of "race" as including persecution of minorities; likewise the deliberately vague concept of "social group" has been extended by some states to include women in situations where persecution is feared for failing to observe cultural practices in their country of origin, trade union officials, homosexuals etc. where the applicants do not come identifiable within any of the other grounds of persecution.

Nevertheless the principal trend has been in the opposite direction. While acknowledging the importance of the Convention

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[222] The UNHCR, by contrast to its predecessor the IRO, does not make decisions of eligibility.

[223] Under Article 35 of the 1951 Convention, nation-states are charged with executing their responsibilities in co-operation with the UNHCR and other agencies responsible for the application
of the Convention.

[224] Kircheimer, **Political Justice** (1961) at p. 355.

definition and their commitment to it, legalistic formalism[225] has come to provide the cloak under which the protection of the institution of asylum has been steadily undermined. Some states have incorporated the international definition into their national law but even then there remains much scope for divergent interpretation.[226] The undermining of refugee protection manifests itself in a variety of forms but share the common attributes of allowing states to, strictly speaking, meet their Convention obligations while at the same time contracting the limits of the Convention definition so as to render it almost illusory. This restrictive trend has been accompanied with a growth of secondary "refugee" classifications such as exceptional leave to remain, "B" or "temporary Protected Status" etc. which provide varying degrees or protection, thought not to the extent envisaged by the 1951 Convention. Increasingly these classifications have switched from being the means by which states went beyond their 1951 Convention obligations to one where individuals excluded by the narrowing of the refugee definition get at least some protection.

The most obvious limitation of state obligations is by way of declaration and reservation to the Convention and Protocol. This was evident in a reluctance by so-called front-line European states to ratify the 1967 Protocol. Hungary, Madagascar, Malta, Monaco and Turkey have, by declaration, retained the "in Europe" geographical qualification to their undertakings under the Convention, despite, in the case of Malta and Turkey, acceding to the 1967 Protocol.

The requirement that an asylum claimant be outside their country of nationality has led some states to prevent refugees entering their territory by so-called policies of "humane deterrence"[227] which seek to reduce the appeal of their jurisdiction to potential asylum seekers; the institution of safe havens such as those implemented in Kurdistan and the imposition of visa requirements for visitors from states deemed to be the

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[225] Or in some cases direct violence by state authorities or toleration and incitement of local resentment towards new influxes of people.

[226] See for example *Sale v Haitian Centers Council Inc*, 113 Sup. Ct. 2549 (1993) regarding the interpretation *refoulement* in the US Refugee Act 1980 which incorporates the 1951 Convention definition.

[227] Adelman, "Refuge or Asylum: A Philosophical Perspective," 1 **J. of Refugee Studies** (1988) 7 at p. 8.

source of "bogus" refugees, "white lists," the "safe country" concept, the imposition of penalties on carriers who transport improperly or undocumented aliens,[228] declaring airports to be international territory to interdiction at sea in response to Haitian and Cuban displacement during the 1980s and 1990s.[229]

This deterrence has also increasingly come to be treated purely as a policing matter with a trend towards criminalising the asylum seeker through greater emphasis on border policing, the use of prolonged detention prior to processing asylum claims and recently the practice of fingerprinting asylum seekers and their dependents[230]. After entry states have adopted strict measures in the fields of welfare and work rights for asylum seekers.[231] In combination the measures adopted appear, in the words of the UNHCR to betray "an unmistakable migration control pedigree."[232]

In the context of the actual asylum claim itself the asylum claimant also faces ever-increasing barriers predominately in the form of a shifting of the burden of proof on the asylum claimant. This is invariably justified by states raising the spectre of increased illegal economic migration and so-called "bogus" refugees. In the US, for example, a shift towards listing countries that are deemed safe stands in contrast with the pre-1980 position when the opposite line was taken. Prior to the incorporation of the 1951 Convention definition by the 1980

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[228] Another feature of the restrictive trends has been the "privatisation" of responsibility for refugees, from privately-run detention centres to employers and carriers being required by law, under risk of penalty, to check the status of individuals.

[229] *Sale v Haitian Centers Council Inc*, 113 Sup. Ct. 2549 (1993). The prohibition of refoulement "by any means whatsoever" was deemed by the Supreme Court only to be operable once claimants are within the jurisdiction of the state. Though the Court did observe that the US practice breached the *spirit* of the 1951 Convention.

[230] S. 3 of the United Kingdom Asylum and Immigration Appeals Act 1993.

[231] eg US Immigration and Naturalization Service Regulations, December 1994 and UK Asylum and Immigration Bill 1995.

[232] "Issues and Challenges in International Protection in Africa," **IJRL** (1995) at 70, Special Issue on Refugees and Displaced Persons in Africa.

Refugee Act the definition of refugee in US law was considerably narrower in terms of recognised grounds on which to base a claim for asylum[233] and even more problematically was fundamentally based on an assumption that persecution was predominantly the preserve of Communist bloc states.[234] Assumptions now made, in relation to particular countries being safe and the concept of "manifestly unfounded applications" have given rise to fast-track procedures where administrative efficiency and cost-cutting appear to take priority over ensuring that an individual is not returned to potential persecution. Further limitation of the definition has arisen with the increasingly technical approach to the notion of "persecution"[235] and the gradual emphasis on the objective rather than the subjective element of "fear."

THE HUMAN RIGHTS CONTEXT

Extension of the refugee definition would no doubt be

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[233] Ironically the narrowness of the US definition is attributable, in part at least, to the US policy of awarding immigrant status to successful asylum applicants, a practise that has continued after the 1980 Act, 8 U.S. 1159 (Supp. IV 1980).

[234] "Aliens who satisfy an Immigration and Naturalisation Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from a Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such a country or area on account of race, religion, or political opinion, and (III) are not nationals of countries or areas in which their application for conditional entry is made;
or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode." Immigration and Nationality Act 203(a)(7), 8 U.S.C. 1153(a)(7)(1979) originating from the Refugee Escape Act 1957 Pub. L. No. 85-316, 71 Stat. 639.

[235] See Adarkar, "Political Asylum and Political Freedom: Moving Towards A Just Definition of "persecution on Account of Political Opinion, "Under the Refugee Act," "42 **UCLA Law Review** (1994) 181 examining US jurisprudence to the effect that an applicant for asylum alleging persecution "on account of" political opinion under the 1980 Act must establish that the persecutor's ultimate motivation is that of persecution for holding objectional political opinions ignoring the fact that such persecution invariably comprises multiple motivations such as obtaining information or intimidating other opponents of a regime but at the same time being accurately described as persecution "on account of" political opinion.

advantageous, but if it is to be achieved then it will have to be infused with political realism. One such "realistic" definition is that offered by Fragomen to include

> any person, (I) who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular group, or political opinion, is outside his usual place of abode and is unable or, owing to such fear, unwilling to return there, or (II) who owing to natural calamity or military operations is outside his usual place of abode and is unable to return there."[236]

Nevertheless, as outlined above,the definitional approach suffers from the central difficulty of shifting parameters as a result of state interpretation which is governed by internal pressure, economic and social and motivations ranging from the humanitarian to the cynical. Its ultimate weakness is that it is only as strong as its most recent interpretation and in this respect it has been suggested that the focus on the alienage and persecution components of the current definition has led states to seek to "resolve what is in fact a procedural and institutional problem by a legalistic sleight of hand."[237]

More fundamentally the definitional approach is to a degree self-defeating. Echoing some of the debates regarding the extension of the notion of "rights" it is argued that to extend the definition, and consequently the numbers falling within it, would be to diminish the level of protection afforded. Far better, it is argued, to recognise the universality of the refugee situation and move away from identifying the refugee as an abnormal stranger.[238] By focusing on basic human rights such as the right to live in one"s home country free from threat, we can perhaps at one stroke conceptualise the predicament of the refugee, dissolving its "strangeness" and identify one more source of pressure to compel states to meet their international obligations.

The passage of time has illustrated the futility of searching for

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[236] Fragoman, *supra* at p. 68.

[237] Shacknove, "Who is a Refugee?" 95 Ethics (1985) 274.

[238] Warner, "We Are All Refugees," 4 **IJRL** (1992) 365 at 367.

any single solution to the problem of enforced population movement or a single paradigm within which to seek solutions. The modern refugee situation requires a multi-faceted approach drawing upon humanitarian principles, inter-state obligations and international human rights law. The latter it is suggested has until recently[239] been downplayed as a constructive route through which states can be brought to respect the spirit as well as the letter of their international refugee obligations. "In many ways the treaty is a 'clean hands' document, not a human rights instrument. It memorializes the purity of state parties, to ensure that they will escape the taint of any responsibility so direct and visible as that involved in sending someone back to a place where he or she might be persecuted. But in the process, it downplays responsibility for failure to act systematically to end persecution in situ, back in the home country."[240] Hathaway has consistently maintained that refugee law does not derive from human rights law[241] or even humanitarianism, but rather from state interests. Nevertheless, there is sufficient evidence of a convergence of the issues and useful lessons to be learnt in terms of the individual/state sovereignty tension. A human rights focus would also serve to identify the refugee as a whole person as opposed to one fact of their predicament and allow for the growing body of human rights jurisprudence[242] to be tapped and ultimately a move towards the concept of an international

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[239] In 1980 the UN Human Rights Commission adopted a resolution on human rights and mass exoduses and followed in 1981 by appointing a Special Rapporteur to study the problem (issued on 31 December 1981 as E/CN.4/1503).

[240] Martin, "Strategies for a Resistant World:Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction," 26 **Cornell Int"l L. J.** 753 at p. 759.

[241] Noting the unsuccessful French attempts at the drafting stage to highlight that aspect of refugee protection.

[242] Other instruments have begun to fill this lacuna. For example Article 3 of the UN Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment prohibits the refoulement of any person, irrespective of the 1951 qualifying criteria, to a state where there are "substantial grounds for believing that he would be in danger of being tortured." In making such an assessment states are obliged to consider "consistent matters of gross, flagrant or mass violations of human rights" in the state concerned.

supervisory and enforcement body.[243]

Approaching refugee issues from a human rights perspective is no panacea. It is merely a framework within which solutions may be offered. The possibilities range from intervention by other states to utilisation of the various international, and regional, human rights procedures as well as applying political and economic pressures to both the causes of refugee movement and improper state response.[244]

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[243] The degree of political will involved in such a move is not to be underestimated. In particular the position of the refugee is akin to the individual whose human rights are being breached by his or her own state. It is instructive, for example, that only eleven inter-state cases have been taken under the European Convention on Human Rights, and of these, only two applications, prompted by gross violations of human rights by Greece and Turkey respectively, can be described as being motivated purely by states" concern for the human rights of non-nationals in the jurisdiction of another state.

[244] In **The State of the World"s Refugees** the UNHCR identifies the political improvements in Malawi, Mozambique and Zambia, and resulting reduction of refugee flows, with the International community making financial assistance subject to movement towards democracy.

A CRITICAL VIEW OF THE CONVENTION AGAINST TORTURE

by
Daniel A. Stragá, Argentina

Introduction

In 1972 Human Rights organizations promoted an important international campaign to ban torture. In 1975 the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, thus beginning an irreversible world-wide process to root out torture, urging all State Parties to prosecute and punish any act of torture.

The U.N. immediately instituted the promulgation of a Convention towards such aims. Resolution 32/62 dated December 8, 1977 was the first step, while the U.N. Commission on Human Rights took charge of preparing the text.

The opprobrious practices of torture were prescribed in an international convention which the U.N. adopted the Convention Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature and acceptance by the General Assembly as Resolution 39/46.

Professor Carlos Villán Durán of Spain has identified the Convention Against Torture as a significant landmark in the history of Human Rights, but it must not be "considered the ending point of the international codification process concerning the right to physical and moral integrity."

In his judgement, the different criteria used to distinguish "torture" from "other cruel, inhuman or degrading treatment or punishment" deserve an in-depth review in order to reach greater respect for physical and spiritual integrity of the human being.

A great many dissonant voices have been heard on the subject leading to the need to analyze the adequate rectification of the international text and of the resultant national legislations.

The Convention against Torture

The term "torture' is defined by the Convention in Article 1.1 as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity..."

Article 16.1 states the prohibition of

> "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity..."

There are two constituent elements required by the concepts of "torture" and "mistreatment:"

1. Material: Pain or suffering intentionally inflicted to a human being is the corpus delicti.

2. Qualified Author: Such pain or suffering must be inflicted by a public official.

Some observers distinguish a third element, for such "pain or suffering must be inflicted with a specific aim or purpose." This author contends the concept as defined by the Convention is wide enough to contain any aspect of torture or mistreatment, whether aimed to coerce or based on mere revenge.

On the other hand, several national laws, such as the Argentine Criminal Code, contain descriptions of crimes similar to "mistreatment'

(e.g., vexation, illegal compulsion), the perpetrator of which must have the purpose of obtaining information or other results as a result of the process. The Convention adopts a solution that avoids defining the abhorrent act by considering the purpose sought by its perpentrator.

The Difference between Torture and Mistreatment

As discussed above, "torture" and "mistreatment" both require two elements, the specific acts and the intent of the perpentrator. The definition focusses on the acts, and particularly the severity of the pain or suffering inflicted. The Convention quantifies and qualifies pain and suffering, and defines them as "severe."

This distinctive criterion must be examined and redefined to eliminate the concept of "inhuman or degrading treatment or punishment." This conceptual difference was conceived under the influence of several legal precedents of international courts discussed below.

The European Commission on Human Rights distinguished "torture," "inhuman treatment" and "degrading treatment" in a leading case, GREECE, 1967/1969.

Inhuman treatment was defined, according to this case, as involving "at least one act able to cause, on purpose, severe mental or physical suffering not to be justified in the given situation." **Degrading treatment**, in contrast is just an act manifestly humiliating the victim in front of others, or leading the victim to act against his will or his conscience. Finally, **torture** was defined as an inhuman treatment aimed to obtain information or a confession, or as the infliction of a punishment, and was considered **an aggravated kind of inhuman treatment**.

It is understood that these arbitrary and unfortunate definitions tend to justify less violent ways than torture. However, if we analyze the concepts defined in Article 16.1 of the Convention, we must come to the conclusion that **every torture supposes an inhuman and degrading treatment and every inhuman treatment is degrading.**

These allegedly "less than torture" forms— can conceal a series of crimes not defined by some national political laws as torture, where they are openly or secretly tolerated. When criminal definitions of brutal treatment are defined as "severities", "vexations" and "illegal compulsion", "one cannot ignore the fact that we are alluding to torture,"

says Spanish author Maqueda Abreu.

In support of this thesis, Tomás y Valiente, a professor from the University of Granada in Spain, states that these crimes are "a sort of dissembling of torture." If they are species of torture their quality should not be minimized.

The standard of "severity" is ostensibly the difference between "torture" and "inhuman or degrading treatment or punishment" according to the Convention. Such a distinction is invidious. Foucault said that "torture is a ruled and calculated exercise of suffering." Under this standard a torturer can estimate the point to which he can make his victim suffer, so as not to exceed the "limit". He may subject the unfortunate person to a variety of sufferings, but he must not cross the torture "threshold", lest he be guilty of torture. If he remains within the bounds of illegal compulsion or vexation and is prosecuted, his punishment is the lighter penalty. If suffering is not too severe, he has committed only "inhuman or degrading treatment".

As Maqueda Abreu says, under the Convention's definition, the intensity of pain makes one kind of suffering severe constituting "torture," while other conduct may be defined as less severe and consequently considered only "mistreatment."

Is there any objective standard?

Some critics of the Convention have suggested that intensity of the real pain that a chosen torture device or method can objectively produce should be the standard of definition. For torture to exist, according to the Convention, the pain must exceed "the one that for personal or social reasons is normally expected."

All human beings are not alike, physically or psychologically. "We are not equal in front of the fact of pain, for some people suffer in the same situation where others do not" (Pain Surgery) Rene Leriche, Paris 1937). In fact, the advances of medical science may have caused our nervous systems become more sensitive. Contemporary people are less resistent to pain than our ancestors. In addition the sciences of psychology and sociology have established that different cultures and societies feel and react to pain differently.

An effort to define "normal" pain is as senseless as it is to claim that the idea of "severity" establishes the crime of torture. On the other

hand, under the European Commission on Human Rights definitions, "inhuman treatment" is defined as severe treatment.

Since the standard of the "intensity" of pain is meaningless other authors define the existence of torture as its "regularity" and "systematization". This distinction also is inadequate. What if the victim is subjected to only one act, such as the electric prod ("picana")? Is that just "inhuman treatment"? How many times must a person's head be plunged into a barrel of water ("mojarrita"), or suffocated with a plastic bag ("dry submarine") for these practices to be considered torture?

How many "sessions" of these kinds of treatment rises to the level of torture under these definitions?

The supposed difference between these crimes is meaningless. Unfortunately, much of this conduct can be considered as mistreatment under Article 16.1 rather than what it is: torture.

The effects of the torture, inhuman or degrading treatment should also be considered, that is to say, the consequences suffered by the tormented victim, whether physical or psychological.

The actual experiences collected by members of the Argentine Committee, COORDINATED AGAINST POLICE AND INSTITUTIONAL REPRESSION (CORREPI), shows the irrelevance of these distinctions between torture and mistreatment, and provides reasons to oppose the legal use of criminal definitions with light penalties in cases where the application of torture was evident.

Two cases that should be considered in relation to the definition of torture are those of "Morinigo" and "Bulacio." Both were arrested by the police, one in the Province of Buenos Aires and the other in Buenos Aires City. In both cases they were immersed in an environment of abuse and indignity, and then were locked up in police stations. Both of them received only one blow on their heads from the rubber and wooden batons Argentine policemen carry in the streets. Both of them died.

The Convention refers to pain and suffering implying multiple acts, so that one deliberate blow leading to instant death may not be considered torture. In the definition of the crime it also uses the expression "any act," in the singular. Therefore the reliance on the succession of repeated acts causing pain or suffering should not be necessary to define torture. One act causing death inflicts suffering as in

the case discussed above.

It is the contention of this paper that pain should not be measured or quantified. Just one act, an act of "medium intensity" that caused the death of the two human beings, Felix Morinigo and Walter Bulacio made them the victims of torture. In the first case, the courts are still discussing whether Comisario Miguel Angel Esposito's blow on one boy's head was the cause of death or congenital aneurism. In the second case, policeman Moya was convicted to serve 8 years in prison, the minimum penalty for homicide. The penalty for the actual crime committed, torture followed by the victim's death, is a life sentence.

Finally, the criterion of "severity" is inherently unreliable. When violations to human rights are considered significant acts in a given society, then individual acts can qualify as torture. On the other hand in societies in which the national policies condone public officials violating the integrity of citizens, victims need to prove a great deal to claim torture.

Such distinctions serve only one purpose, to permit tolerance of practices that are nothing other than torture, but are hidden under the guise of "inhuman or degrading treatment," allowing illegal and clandestine acts to be judged, if ever they are, according to less severe standards that permit torturers to wait for trial out of custody.

Conclusions

We consider the 1984 Convention distinctions between torture and mistreatment to be a mistake, for they are essentially identical concepts. All of them are abhorrent crimes that must be defined as torture. The international community should insist the face of these barbaric acts in unifying both concepts into only one criminal definition: There is no such thing as inhuman or degrading treatment. Such acts are torture, and must be consequently punished as torture by national courts of law.

The Convention definition is too weak to accomplish the objectives of protecting people from national lawlessness.

FRANCE, POLYNESIA, NUCLEAR TESTING, THE WORLD COURT: LAW AND THE PUBLIC CONSCIENCE

by
Bill Bowring, United Kingdom[245]

INTRODUCTION

As this paper was delivered, the advisory opinion of the International Court of Justice (ICJ), on two questions was expected. The first, posed by the World Health Organisation (WHO) on 14 May 1993, asks: "In view of the health and environmental effect, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"[246] The second came from the United Nations General Assembly, which, following stormy debate, on 15 December 1994 adopted a resolution[247] asking the ICJ urgently to consider the question: "Is the threat or use of nuclear weapons in any circumstances permitted under international law?". During the debate in the UN First Committee, Gerard Errera, giving France's explanation of vote, exploded: "It is a blatant violation of the UN Charter. It goes against the law. It goes against reason..."[248] France is keenly aware that an adverse ruling, particularly on the General Assembly's request, will at the least be embarrassing.

This is not least because of the fact that, on 5 September 1995, French nuclear testing resumed in French Polynesia, after the announcement by President Chirac in June 1995 that the three and a half year long moratorium declared by President Mitterand on 8 April 1992,

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[245]Haldane Society of Socialist Lawyers.

[246] See ICJ Communique No. 93/26 (1993), and WHA 46,40 Geneva, 14 May 1993

[247] UN General Assembly Resolution 49/75 of 14 December 1994, adopted by 78 votes to 43, with 38 abstentions and 25 States not voting (France, Russia, the US and UK voted against; China did not vote.)

[248] 18 November 1994. See Kate Dewes and Robert Green *The World Court Project. How a Citizen Network Can Influence the United Nations* (1995) Pacifica Review of La Trobe University

which had been observed by the other nuclear powers with the exception of China[249], was at an end. A global audience witnessed the spectacular efforts of Greenpeace to halt the tests, including the arrest of US Congressman Eni Faleomavagea (an American Samoan whose wife is Tahitian) along with the rest of the crew of the *Rainbow Warrior II.*

But less media attention was drawn to New Zealand's attempt on 21 August 1995 to request the ICJ for an "Examination of the Situation", which was dismissed by a 12-3 majority on 22 September 1995; or to the unprecedented number of states which have taken part in the ICJ proceedings. Indeed, some 43 states and the WHO provided written memorials by the Court's deadline of 20 September 1995, while 22 states and the WHO made oral submissions between 30 October and 15 November 1995[250]

International law provides a further dimension yet. In October 1995 the US, UK and France announced that they would, during the course of 1996, sign the 1985 *South Pacific Free Zone Treaty (*the *Rarotonga Treaty)* which has been in force since 11 December 1986[251]. On 29 January 1996 President Chirac announced that France will close the test site at Moruroa in French Polynesia, after concluding a final series of tests in spring 1996[252]

This paper therefore briefly examines the history of French involvement in Polynesia, before turning to the law on illegality or otherwise of possession or use of nuclear weapons, and the recent proceedings in the ICJ. It is not sufficiently widely known that the requests to the ICJ were the direct result of effective campaigning by a number of non-governmental organisations, in particular the World Court

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[249] See David S. Yost *France's Nuclear Dilemmas* (1996) 74 Foreign Affairs no. 1, p. 108.

[250] Some of the best oral submissions, by Australian Foreign Minister Gareth Evans, by Georges Abi-Saab for Egypt, by M. J. Zarif for Iran, and by Zimbabwean Foreign Minister Jonathan Wutawunshe, are collected together in *Inlap Times (Journal for International Law and Peace) Supplement 1,* December 1995

[251] See Yost op cit, p. 109.

[252] Alexander Cockburn and Ken Silverstein, *"US Nuclear Weapons: Explosive Issues,"* New Statesman & Society, 19 January 1996, p. 18.

Project. I am therefore especially anxious to highlight the role not only of public opinion, but of the new "international civil society" of pressure groups and non-governmental organisations.[253]

FRANCE IN THE SOUTH PACIFIC

As Diana Johnstone pointed out some years ago, "In the last analysis, France must retain nuclear weapons in order to continue its imperial role."[254] The converse is also true, since France's colonial presence in the South Pacific has been intimately connected with the maintenance of its nuclear ambitions. France lost many of its former colonies as a result of eighteenth-century wars, mostly against England. Serious empire-building did not start again, until, ironically, after France's bitter defeat in 1870 at the hands of the Prussians. Tunisia, Indo-China, the Congo, Nigeria and Madagascar, were all acquired in the next few decades. French Polynesia was acquired during a period of greater uncertainty. France invaded Algeria in 1830 as part of a public relations exercise, dealing with the Barbary Coast pirates; and Tahiti was unexpectedly occupied in 1842, according to one version, when the people of Paris demanded the expulsion from Tahiti of an English missionary named Pritchard because of his activities there.[255] Prior to that year, the island although not claimed by any European power had been effectively run for many years by English Protestant missionaries, who would not allow Catholics to settle. Prior to that, says one author, it was "...a society which, in a simple way, came near perfection..."[256] two French priests of the Picusian order who attempted to stay were bundled out in 1835 and then again in 1836. France treated this as a national insult, and Admiral Dupetit-Thouars, who was cruising with his squadron in the Pacific, was able, simply by training the guns of his flagship on Papeete, to persuade the indigenous Queen Pomare to seek French

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[253]See Dianne Otto, *"Nongovernmental organisations in the United Nations System: The Emerging Role of International Civil Society,"* (1996), 18 Human Rights Quarterly, pp. 107-141.

[254]Diana Johnstone, *"How the French Left Learned to Love the Bomb,"* (1984), 46 New Left Review, p. 5, at p. 36.

[255]Douglas Johnson, *"Atolls and Atom bombs: France's colonial designs,"* (1995), 45 History Today No. 12, p.8.

[256]David Howarth, *"Tahiti: A Paradise Lost,"* (Harvill Press, 1983), p. 225.

protection.[257]

French colonial control of Polynesia began on 29 June 1844,[258] and France annexed the territory on 29 June 1880. Most of France's early 20th century colonial empire has been lost, but French Polynesia remains one of the nine remnants, named *Departements et Territoires Outremer* (the so-called "Dom-Toms"). The "Doms", run like any other part of France, are Martinique, Guadeloupe and French Guiana in the Caribbean, and Reunion in the Indian Ocean; and the "Toms", which are semi-autonomous, responsible for their own taxes and social welfare, are New Caledonia, Wallis & Futuna, and French Polynesia in the Pacific. Mayotte in the Indian Ocean and St-Pierre-et-Miquelon off North America are known as "overseas collectivities". France pays lavishly to ensure continued support from the populations of these territories. In 1995 French taxpayers paid FFr 40 billion ($7.9 billion) for fewer than 2 million people.[259] This is FFr 20,000 per person each year, and ensures a standard of living similar to that of mainland France. In 1958 and 1959 all three French Pacific territories voted in referendums to stay in France.[260]

Self-government within France was granted on 29 June 1984. But according to Faa'a's Mayor and independence leader Oscar Temaru, this was a sham: "Our country was sold out to France. Under an apparent system of self-government, our leaders have become puppets of France."[261] His party, the Tavini Huiraatira No Te Ao Maohi Party (Polynesian Liberation Front), has 5 seats in the 41-seat Territorial

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[257]Alan Moorehead, *"The Fatal Impact: An Account of the Invasion of the South Pacific, 1767-1840,"* (Penguin, 1974), p. 121.

[258]Mel Kernahan, *"South Sea Fallout,"* (1995), 8 New Statesman & Society No. 374 p. 18.

[259]*"Dom-Tom, Tomtom: the French Empire,"* The Economist, 16 September 1995.

[260]*"A kept woman: France and the Pacific (most Tahitians accept nuclear testing on Moruroa in exchange for high paying jobs),"* The Economist, 15 July 1995.

[261]Quoted by Kernahan, op. cit.

Assembly in Papeete.[262] The president of the Assembly, Gaston Flosse, is an ally of President Chirac. During the 1990s, strikes and demonstrations have multiplied, with roadblocks erected in protest against tax increases, and pro-independence barricades at Tierui in protest against a garbage incinerator, another at Funaauia against a new hotel, and a third at Mataiva against phosphate mining. The latest tests have ignited a fresh wave of protest, and on 5 September 1995 violent demonstrations occurred in Papeete, the capital of Tahiti.

Until the Algerian War of Independence, the Sahara desert seemed the ideal place for nuclear experimentation. France's first nuclear bomb exploded on 10 February 1960 in the Sahara desert, witnessed by President de Gaulle, whose reaction on French radio was "Hurrah for France!"[263] But in 1959, construction of an airstrip started in the lagoon in the Faa'a district on Tahiti. Another airstrip was constructed at Hao atoll, and bomb test sites were chosen at Moruroa and Fangataufa atolls, 750 miles from Tahiti, (and, as the French point out, 4,285 miles from Sydney), with no permanent population. Of course, France was not alone in using the Pacific as a testing ground. As Australian Prime Minister Paul Keating pointed out in his speech of 24 October 1995,[264] the Americans tested in the Pacific from 1946 until 1962, and the British tested in Australia from 1952 until 1963.

Oscar Temaru is the successor to the Maohi leader Puovanaa a Oopa, who was arrested and exiled to France in 1959, and sent home to die in 1968 only after massive protest. But despite the protests, as many as 16,000 Tahitians were employed in the business of testing and experimentation at and after the time of the first explosion in 1968, although by 1988 the number had dropped to 2,000 out of a total labour force of 80,000. Since 1969, France has exploded at least 190 nuclear weapons in the South Pacific. Between 1966 and 1992 175 tests were detected including 44 atmospheric tests, 39 at Moruroa and 5 at

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[262]Susan Bell, *"Riots undermine France's future as a colonial power: Nuclear tests in the Pacific,"* The Times, 8 September 1995.

[263]Diana Johnstone, op. cit., p. 7.

[264]Paul Keating, *"A World Without Nuclear Weapons: Security Issues, Before and After the Transition,"* Speech delivered to the Parliament House on the 50th anniversary of the United Nations,
Canberra, Australia (1995) 62 Vital Speeches, No. 4, p. 98.

Fangataufa; and 131 underground tests, 123 at Moruroa and 8 at Fangataufa. The French government insists, like the conservative Jean-Claude Martinez, that "Nuclear testing on Moruroa has not killed a single mosquito". Atmospheric testing ended only in 1974, following legal action by New Zealand, outlined below. Nevertheless, Mel Kernahan reports numerous accidents and deaths; for example, in 1979 two people died and four were severely burned in an explosion in a plutonium experiment.[265]

However, France makes an enormous financial contribution to the Polynesian economy; £1.3 billion in 1994.[266] This is more than three quarters of French Polynesia's revenue, and there are enough Tahitians who enjoy, correspondingly, a much higher standard of living than many others in the Pacific to ensure the continuation of French rule to date. In 1989, for example,French Polynesia's trade deficit was $753 million.[267] The Tahitians who work on Moruroa, mainly as labourers or cooks, earn more than $40,000 a year.[268]

FRANCE AS A NUCLEAR POWER

I have already noted the close interdependence, in respect to Polynesia, of empire and the nuclear bomb. France and nuclear weapons have a relationship which is exemplary in understanding why the testing and possession of such weapons is of such vital importance, whatever the position in law. I have already referred to General de Gaulle's ecstatic response to France's first nuclear explosions in 1960. From 1960 to 1966, 17 tests were conducted in Algeria, including 4 atmospheric, and 13 underground.

During the 1960s, as Diana Johnstone points out, the whole French Left campaigned against the *force de frappe*. However, by 1969, Mitterand announced that it would soon be irreversible, and could not be

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[265]Mel Kernahan, op. cit.

[266]Susan Bell, op. cit.

[267]*"France reconquers the Pacific,"* The Economist, 19 May 1990.

[268]*"A kept woman: France and the Pacific (most Tahitians accept nuclear testing on Moruroa in exchange for high paying jobs),"* The Economist, 15 July 1995.

"drowned like puppies."[269] Nevertheless, the Common Programme for government, concluded by the Socialist and Communist Parties in June 1972 still promised "general, universal and controlled disarmament." But following Mitterand's election, there was a swift conversion to the bomb. In October 1981 Veronique Neiertz, head of international relations for the Socialist Party, explained that "since coming to power, the Socialists have access to information they didn't have when they were in opposition and which confirms the existence of an imbalance of forces to the detriment of the Western camp."[270] Part of Mitterand's policy was closer military co-operation with Germany. This entailed replacement of the land-based Pluton tactical missile, which would explode within the Federal Republic, with a longer range missile, armed with a neutron bomb, exploding in the GDR. In August 1981 the Defence Minister Charles Hernu observed the first test-firing of the new missile at Moruroa.[271]

France attracted universal condemnation for its state terrorism, when, in 1985 its agents blew up the Greenpeace ship *Rainbow Warrior* in Auckland harbour, causing the death of crew member Fernando Pereira. The ship was about to leave for Moruroa to protest French nuclear testing. Two French secret agents were sentenced to 10 years imprisonment by a New Zealand court, after admitting manslaughter and sabotage, but were able to return to France after only five years, and have since been promoted. In May 1990 New Zealand Prime Minister David Lange admitted that France had threatened to end imports of New Zealand butter and lamb unless New Zealand agreed to a deal over the bombers.[272]

The opinion of one analyst close to US foreign policy, a professor at the US Navy Postgraduate School, is that "what could truly undermine the French defense consensus...would be evidence of the irrelevance of nuclear deterrence capabilities in dealing with substantial conflicts.[273] Prof. Yost distinguishes "more operational" and "less operational" approaches among French policymakers and analysts. The

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[269]Diana Johnstone, op. cit., p. 7.

[270]Diana Johnstone, op. cit., p. 12.

[271]*Le Monde,* 28 June 1983, cited in Diana Johnstone op. cit., p. 29.

[272]*"France reconquers the Pacific,"* The Economist, 19 May 1990.

[273]Yost, op. cit., p. 115.

former emphasise "deterrence through robust and flexible military capabilities, including nuclear forces capable of being used, if necessary, with control and discretion". The latter "have more confidence in traditional French nuclear deterrence policies, which call for responding with massive strikes, and maintain a principled opposition to limited nuclear options." The former rely more heavily on conventional forces; but to recognise that these are prohibitively expensive, would lead France inexorably into alliances with the United States and others.

INTERNATIONAL LAW ON NUCLEAR WEAPONS

This is the point at which I want to return to the framework of international law concerning nuclear weapons. There are several distinct forms of international law relating to the possession, testing and use of nuclear weapons.[274]

First, there is the law relating to non-proliferation, and to the banning of testing. This takes the form of binding treaties. It also nowhere prohibits the possession of nuclear weapons by the "nuclear states" (see below). This fact is much relied upon by those very nuclear states in order to oppose the current applications to the ICJ. The *Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water,* the *"Limited Test Ban Treaty",* came into force on 5 August 1963, but has never been ratified by France. France only ratified in 1991 the *Treaty on the Non-Proliferation of Nuclear Weapons,* the NPT,[275] which came into force on 5 March 1970, and has been ratified by more than 180 states. Article IX(3) of the NPT defines "nuclear weapons states" as those states that have manufactured and exploded a nuclear device prior to 1 January 1967, i.e. US, USSR, UK, France, China, also the 5 Permanent Members of the Security Council. Of particular relevance is Article VI, which states: "Each of the parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament under

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[274]See also Francis A. Boyle, *"The Relevance of International Law to the "Paradox" of Nuclear Deterrence,"* (1986), 80 Northwestern University Law Review, p. 1407; Elliott L. Meyrowitz, *"The Laws of War and Nuclear Weapons,"* (1983), 9 Brooklyn Journal of International Law,p. 227; David M. Corwin, *"The Legality of Nuclear Arms under International Law,"* (1987), 5 Dickson Journal of International Law, p. 271.

[275]729 UNTS 161.

strict and effective international control."

France has now committed itself to support for a *Comprehensive Test Ban Treaty* (CTBT). According to Yost, French officials support this for two reasons: first, because they hope that the treaty will reduce the proliferation of nuclear weapons; and second, because they perceive ratification of the treaty politically unavoidable in the context of the end of the Cold War, the NPT extension conference, the CTBT negotiations, and the world-wide opposition to nuclear testing.[276]

Two nuclear-free zones have also been created. The *Treaty for the Prohibition of Nuclear Weapons in Latin America* (the *Treaty of Tlatelolco*)[277] was promulgated on 14 February 1967, and was joined by Argentina on 18 January 1994, together with Chile, and by Brazil on 30 May 1994. Its counterpart in the South Pacific is the *South Pacific Nuclear Free Zone Treaty,* the *Rarotonga Treaty,*[278] of 6 August 1985, which came into force on 11 December 1986. In October 1995, the US, Britain and France announced that they would sign the *Rarotonga Treaty.* There are also recent UN General Assembly resolutions seeking to establish nuclear-weapon-free zones in Africa[279] and South Asia.[280]

The second area is that of United Nations General Assembly resolutions.[281] These have been consistently opposed by the "nuclear states," and cannot be said to create binding international law. They are, however, indicative of the view of a majority of states in the United Nations system. On 15 December 1983 the UN General Assembly adopted Resolution 38/75 on the "Condemnation of Nuclear War." It "resolutely, unconditionally and for all time" condemned nuclear war "as

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[276]Yost, op. cit. p. 111.

[277]UNTS Vol. 634, p. 281.

[278](1986) 24 International Legal Materials.

[279]General Assembly resolution 49/138 of 19 December 1994.

[280]General Assembly resolution 49/72 of 15 December 1994.

[281]See, in relation to all these points, Nicholas Grief, *Legal Memorandum* in *The World Court Project on Nuclear Weapons and International Law,* (Aletheia Press, 2nd ed., 1993).

being contrary to human conscience and reason, as the most monstrous crime against peoples" and "as a violation of the foremost human right—the right to life." There has also been a series of resolutions, starting with Resolution 1653(XVI) of 24 November 1961, through 33/71B of 14 December 1978, 34/83G of 11 December 1979, 35/152D of 12 December 1986, 36/92I of 9 December 1981, 45/59B of 4 December 1990), and most recently, on 6 December 1991 Resolution 46/37D, all insisting that the "use of nuclear weapons would be a violation of the Charter of the UN and a crime against humanity... the use or threat of nuclear weapons should therefore be prohibited, pending nuclear disarmament."

Third, there is modern humanitarian law, which has its sources in both treaty and customary law. Adam Roberts points out that "a main preoccupation of the laws of war has always been placing limits on the scope and ferocity of war; hence the large number of rules restricting the use of indiscriminate weapons..."[282] The *Hague Conventions* of 1899 and 1907, which forbid weapons which would cause unnecessary suffering, contain, in their preamble, the "Martens Clause" (drawn up because of the difficulty which the negotiators at the Hague had in agreeing whether irregular forces in occupied territory might qualify for belligerent status)[283]which states: "... in cases not included in the Regulations... the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience." The *Geneva Conventions* of 1949 prohibit the inflicting of unnecessary suffering,[284] and require parties to armed conflict to distinguish between combatants and non-combatants, stressing that only combatants are legitimate military targets. In the 1986 case, Nicaragua v. United States,[285] the World Court insisted that the 1949

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[282]Adam Roberts, *"The Relevance of Laws of War in the Nuclear Age,"* in John Dewar, etc., (eds.), Nuclear Weapons, the Peace Movement and the Law (Macmillan, 1986), p. 26.

[283]Roberts, op. cit., p. 27.

[284]This principle is to be found in Article 23 of the *IV Hague Convention* of 1907, and Article 35(1) of the *Additional Protocol I.*

[285]*Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986) ICJ Reports, Para. 218.

Conventions reflected "elementary considerations of humanity." In 1977 *Additional Protocols* to the Geneva Conventions were promulgated, to reflect changes in the conduct of warfare since 1949. The British and US governments, which have signed but never ratified the Protocols, made an explicit reservation: "... that the new rules introduced by the Protocol are not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."[286] Protocol I codifies the rule, to be found in customary law, of proportionality, according to which weapons or military tactics which would cause excessive incidental civilian losses, as against concrete and direct military advantage, are forbidden. Article 51 paragraph 4 prohibits "indiscriminate attacks," which are defined to include: "... an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." The Protocol also prohibits reprisals against civilians and the use of methods or means of warfare which might be expected to cause widespread, long-term, and severe damage to the environment. In the 1949 *Corfu Channel* case (*Albania v. United Kingdom*),[287] the ICJ declared that the general humanitarian principles contained in the *Hague Regulations* and the *Geneva Conventions* apply also in time of peace; indeed, they are "even more exacting in peace than in war."

Some international legal scholars argue that *Protocol I* cannot be utilised in the attempt to show that the possession of nuclear weapons is unlawful. Richard Williamson,[288] for example, submits first that *Protocol I* does not, by its terms, make the possession of any class of weapons illegal. Second, it does not follow logically that possession presupposes use. Third, it is not the case that any use would bring about the prohibited levels of civilian casualties. Fourth, the line of reasoning that possession of nuclear weapons is illegal because their use would be illegal would apply with greater force to the possession of chemical weapons, whose

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[286]See Sol Picciotto, *"Nuclear Weapons, State Power and Legitimacy in International Law,"* in John Dewar, etc., (eds.), *Nuclear Weapons, the Peace Movement and the Law*,(Macmillan, 1986), p. 7.

[287](1949), ICJ Reports, p. 22.

[288]Richard L. Williamson, *"Law and the H-Bomb: Strengthening the Nonproliferation Regime to Impede Advanced Proliferation,"* (1995), 28 Cornell International Law Journal, p. 71.

use is already prohibited;[289] but, Williamson points out, a chemical weapons convention to make possession unlawful has only recently been concluded.[290] Fifth, the conduct and public views of most of the major powers are not consistent with the claim that *Protocol I* is violated by a nation merely possession nuclear weapons. Finally, he points out that Russia, the US and UK have not ratified *Protocol I*, though, as signatories, they would be obliged not to take steps to defeat the object and purpose of the Protocol.[291] The contrary view is taken by Elliott Meyrowitz: "in view of the relevance of the principles of humanity to the formulation of the laws of war, an express prohibition on the use of nuclear weapons seems almost unnecessary, at least on the level of legal analysis, because of the relative clarity and bearing of conventional and customary international law."[292]

Indeed, by reference to the instruments and principles of customary law referred to above, Professor Burns Weston has summarised the six core "humanitarian rules of armed conflict":[293]

> Rule 1: It is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation and suffering[294]
> Rule 2: It is prohibited to use weapons or tactics that cause

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[289]See, 1925 *Geneva Protocol (Protocol for the Prohibition of the Use in Was of Asphyxiating, Poisonous and Other Gases, and of Bacteriological Methods of Warfare)*, June 17 1925, 26 UNTS 571.

[290]*Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* 13 January 1993, (1993) 32 International Legal Materials, p. 800.

[291]It should be noted that when signing *Protocol I*, the US took the position that the protocol did not preclude the use of nuclear weapons.

[292]Elliott L. Meyrowitz, *"The Laws of War and Nuclear Weapons,"* (1983), 9 Brooklyn Journal of International Law, p. 47. See also, in the same collection, Richard Falk, *"Toward a Legal Regime for Nuclear Weapons,"* p. 107.

[293]Burns H. Weston, *"Nuclear Weapons Versus International Law: A Contextual Reassessment,"* (1983)" 28 McGill Law Journal, and reprinted in Miller and Feinrider (eds.) *"Nuclear Weapons and Law,"* (Greenwood Press, 1984) p. 133, at pp. 144-149.

[294]1907 Hague Regulations, Article 23; 1977 Geneva Protocol I Article 35(2).

indiscriminate harm as between combatants and non-combatant military and civilian personnel[295]

Rule 3: It is prohibited to use weapons or tactics that cause widespread, long-term and severe damage to the natural environment[296]

Rule 4: It is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or disrespectful of persons, institutions and resources otherwise protected by the laws of war[297]

Rule 5: It is prohibited to use weapons or tactics that violate the neutral jurisdiction of non-participating States[298]

Rule 6: It is prohibited to use asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, including bacteriological methods of warfare.[299]

Finally, Article 6 of the 1966 *International Covenant on Civil and Political Rights,* part of the so-called "International Bill of Rights," enshrines the inherent right to life of every human being, from which no derogation is permitted, even in times of war or national emergency.

In 1984 the United Nations Human Rights Committee, which supervises States' implementation of the Covenant, by scrutinising their periodical reports, published a General Comment[300] on Article 6, in which they gave their authoritative judgment that "the designing, testing, manufacture, possession and deployment of nuclear weapons are among

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[295]1977 Geneva Protocol Article 48, 1949 Geneva Convention IV, 1907 Hague Regulations Articles 25 and 27.

[296]1977 Geneva Protocol Article 35(3), 55(1); 1972 *Stockholm Declaration of the UN Conference on the Human Environment* principles 2 and 26.

[297]1977 Geneva Protocol Articles 20, 51, 53 and 55; 1954 *Hague Convention for the protection of Cultural Property in the Event of Armed Conflict* Article 4(4); Geneva Convention IV Article 33; Geneva Convention III Article 13.

[298]1907 Hague Convention V, Articles 1, 2, 3, 4, and 10.

[299]1925 *Geneva Gas Protocol,* 1899 *Hague Declaration IV Concerning Asphyxiating Gases'* 1907 Hague Regulations Article 23(a).

[300]U.N. General Assembly Official Records, 40th Session, Supp. No. 40 (Doc. A/40/40), Report of the Human Rights Committee, p. 162, Annex VI.

the greatest threats to the right to life which confront mankind today." It also forbids reprisals against civilians, and the use of methods or means of warfare which may be expected to cause widespread, long-term, and severe damage to the environment.

However, as an Australian Foreign Minister pointed out in his submissions to the ICJ, nuclear weapons are simply the most powerful weapons of mass destruction in the trilogy of biological, chemical and nuclear weapons. The 1972 *Biological Weapons Convention,*[301] which now has 131 States Parties and the 1922 *Chemical Weapons Convention* with 159 signatories and 40 ratifications, have prohibited states from acquiring, retaining, transferring or using such weapons. Surely, he argued, possession of nuclear weapons can be no more consistent with fundamental principles of humanity than the other two.

NEW ZEALAND AND THE RESUMPTION OF TESTING

On 20 December 1974 the International Court of Justice gave judgment in the *Nuclear Tests Case (New Zealand v. France)*. New Zealand had brought its complaint in 1973, asking the Court to adjudge and declare that the conduct by France of atmospheric nuclear tests in the South Pacific constituted a violation of New Zealand's rights under international law. But those proceedings effectively came to an end when France undertook not to conduct any further atmospheric tests.

On 21 August 1994 New Zealand filed a "Request for an Examination of the Situation," in accordance with paragraph 63 of the 1974 judgment. This stated that "...once the Court has found that a State entered into a commitment concerning its future conduct it is not the Court's function to contemplate if it will comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute." New Zealand argued that France's June 1995 announcement that it would conduct a final series of eight nuclear weapons tests entitled it to invoke paragraph 63, triggering a re-opening of the case.

Australia and five other States applied for permission to intervene in the proceedings. Australia proposed to argue that the current French nuclear tests in the Pacific were a violation by France of *erga*

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[301] 1015 UNTS p. 163.

omnes (binding on all States) obligations relating to the protection of the marine environment.[302] Of course, it is Australia's position that the testing of nuclear weapons is *per se* illegal under customary international law.

On 22 September 1995, by a majority of 12-3, the Court dismissed the request.[303] The Court's reasoning started from the fact that New Zealand's 1973 Application asked the Court to adjudge and declare that the conduct by France of *atmospheric* nuclear tests in the South Pacific region constituted a violation of New Zealand's rights under international law. The Court concluded that the subject-matter of the 1974 judgment concerned exclusively atmospheric tests and not any other form of testing; and the basis for the judgment was France's undertaking not to conduct any further atmospheric nuclear tests, so that the Court was prevented from considering questions relating to underground tests. But the Court also stated that its Order was without prejudice to the obligations of States in general to protect the natural environment (obligations to which France has re-affirmed its commitment).

It has, indeed, been argued that Australia and New Zealand both have the right to commence proceedings against France in the ICJ, using treaties on the Law of the Sea ratified by all three states, along with an Optional Protocol by which they acceded to the compulsory jurisdiction of the ICJ for disputes arising out of the 1958 Conventions on the Law of the Sea. The 1958 *Convention on Fishing and Conservation of the Living Resources of the High Seas* provides in Article 1(2) that "all States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas." France ratified this Convention on 30 October 1958. Similarly, the 1958 *Convention on the High Seas* provides in Article 25(1) that "every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organisation," while Article 25(2) provides that "all States shall co-operate with the competent international organisation in taking measures for the prevention of pollution of the seas or air space above resulting from any activities with

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[302]Gareth Evans, in INLAP Times, op. cit., p. 15.

[303]See Peter Bekker, *"Recent Developments in the World Court: ICJ Dismisses New Zealand's Request to Reopen Nuclear Tests Case,"* (1995), American Journal of International Law.

radioactive materials..."

There is considerable evidence of environmental impact. The hurricanes which swept Moruroa in 1980 and 1981 tore off chunks of asphalt covers and revealed radioactive waste including scrap metal, timber, tools and clothes, and some 20 kilograms of plutonium, which had been dumped on the reef to the north of Moruroa, and covered an area of 30,000 square metres.[304] In 1981, a mission led by the French geologist Haroun Tazieff warned about the geological stability of the atoll in the long-term if tests continued. In 1983, a New Zealand-Australia-Papua New Guinea mission found elevated levels of tritium, and sever fissuring of the atoll and subsidence of more than one metre in parts. In 1987, Commander Jacques Clouseau found short-term radionuclides such as Caesium 134 and Iodine 131 in Moruroa lagoon, indicating that leakage was already occurring. In 1990, a Greenpeace team working outside the 12 mile military exclusion zone found artificial radioactivity in plankton, and in 1991 an International Atomic Energy Agency mission invited by France to counter the Greenpeace findings itself found elevated levels of plutonium in samples taken 12 miles from the atoll. These were never explained by France.[305]

THE WORLD COURT PROJECT, AND THE REQUESTS FOR ADVISORY OPINIONS

The first foundation for the request for an advisory opinion was the formation, in the US in 1982, of the *Lawyers Committee on Nuclear Policy.* In 1987 this organisation, together with the *Association of Soviet Lawyers* organised an International Conference on Nuclear Weapons and International Law. From this conference emerged the *International Association of Lawyers Against Nuclear Arms* (IALANA). In 1989 the World Congress of IALANA adopted a Declaration appealing to UN members to "take immediate steps towards obtaining a resolution by the General Assembly under Article 96 of the UN Charter, requesting the ICJ to render an advisory opinion on the illegality of the use of nuclear weapons." The following year, IALANA was joined by the International Peace Bureau (IPB) and International Physicians for the Prevention of

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[304]According to Swedish scientist Bengt Danielsson, who remained on Tahiti after the Kon Tiki voyage. See Kernahan, op. cit.

[305]All this information is to be found at the Greenpeace World Wide Web resource: http://www.greenpeace.org.

Nuclear War (IPPNW) in setting up the World Court Project; this was launched in May 1992. Important preliminary work was done by the World Court Project (UK), founded in October 1991. One of its members, Keith Mothersson, proposed invoking the "Martens Clause" (discussed above), in the unprecedented form of individual "Declarations of Public Conscience." By the date of the World Court proceedings, some 3.3 million individual declarations had been collected and were received by the Registrar of the Court.

The physicians also played a very important role. They recognised the importance of the World Health Organisation (WHO), which is a specialised United Nations agency under the auspices of the Economic and Social Council, and whose main objective is "the attainment by all peoples of the highest possible level of health." In 1984, the WHO had published a Report on *Effects of Nuclear War on Health and Health Services.*[306] This concluded that "no health service in any area of the world would be capable of dealing adequately with the hundreds of thousands of people seriously injured by blast, heat, or radiation from even a single 1-megaton bomb." The Committee of Experts which prepared the Report found that "it is difficult to comprehend the catastrophic consequences and human suffering that would result from the effects of nuclear explosions..." The Committee concluded that the only approach to prevent nuclear explosions and their consequences was the prevention of nuclear war. However, it was not thought at that time that the WHO could itself take steps to reduce the prospects of the use of nuclear weapons.

In May 1993, IPPNW achieved the support of 22 States in co-sponsoring a resolution for the Annual Assembly of the WHO, requesting an advisory opinion from the WHO. The resolution was passed on 14 May 1993, by 73 votes to 40, with 10 abstentions. Martin Strahan has argued that there are grave doubts as to the WHO's competence to request an advisory opinion, and that those seeking such an opinion should instead focus on the General Assembly.[307] That is precisely what happened next. Zimbabwe worked within the Non-Aligned Movement, which organises 111 of the UN's 185 member states, for a resolution to

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[306]Report of the International Committee of Experts in Medical Science and Public Health to Implement Resolution WHA34.38, (1st Ed., 1984).

[307]Martin Strahan, *"Nuclear Weapons, the World Health Organisation, and the International Court of Justice; Should an Advisory Opinion Bring Them Together?"* (1995), 2 Tulsa Journal of International and Comparative Law, p. 395.

the 1993 UN General Assembly disarmament session. Peggy Mason, Canada's Disarmament Ambassador, said "Hysteria is not too strong a word to describe the nuclear weapons states' point of view around here." France, the UK and US reacted predictably, and sent missions to NAM capitals threatening trade and aid sanctions if the resolution was not withdrawn. On 19 November 1993 this pressure succeeded, and Indonesia, which held the Chair of the NAM withdrew the resolution which was done in the UN First Committee on 9 November 1994. On 18 November, Morocco's resolution that no action be taken was defeated by 67 votes to 45, with 15 abstentions and 57 states not voting; and the World Court Project's resolution was adopted by 77 votes to 33, with 21 abstentions and 53 not voting. China did not vote, Ukraine abstained as did Canada and Norway, breaking NATO solidarity. New Zealand/Aotearoa voted in favour, despite intense US pressure.[308]

THE HEARINGS AT THE WORLD COURT

State submissions before the ICJ were predictable.[309] France insisted on nuclear deterrence as "the keystone of its security;" claimed no difference between nuclear and conventional weapons, and argued that when use of armed force is legal, there is no prohibition on the use of nuclear weapons. The United Kingdom claimed that to call deterrence into question would be "profoundly destabilising," and that recourse to nuclear weapons might be necessary in self-defence to prevent "subjection to conquest which may be of the most brutal and enslaving character." With the US, the UK claimed that nuclear deterrence had preserved the peace" for 50 years, and that since the nuclear states had built up their huge arsenals and relied on them for security, there could not be said to be any international consensus for illegality.

Australia, on the other hand, argued that not just the threat or use, but every aspect including testing and even possession of nuclear weapons was inherently illegal. Foreign Minister Gareth Evans urged the

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[308]A gripping account of the debates and manoeuvres is to be found in Kate Dewes and Robert Green, *"The World Court Project: How a Citizen Network Can Influence the United Nations,"* (December 1995), Pacific Review of La Trobe University, Melbourne.

[309]For a good summary of the arguments, see Kate Dewes and Rob Green, *"Nuclear Weapons on Trial: An Assessment of the World Court Cases on the Legal Status of the Threat or Use of Nuclear Weapons,"* (1996, obtainable from WCP).

Court to declare that the nuclear states have a legal obligation under the NPT to abolish nuclear weapons within a reasonable timeframe. Nevertheless, Australia also asked the Court not to consider the questions posed, because to render an opinion might be counterproductive to nuclear disarmament. However, Costa Rica, Egypt, Indonesia, Iran, Malaysia, Marshall Islands, Mexico, Philippines, Qatar, San Marino, Solomon Islands, and Zimbabwe all made impressive contributions, against nuclear weapons. But in the end, as John Pilger argues, the achievement of the World Court Project's "principled audacity" can best be measured by the panic among the nuclear powers.[310]

CONCLUSION

In Spring, 1996, at the time of the presentation of this paper, the decision of the ICJ has yet to be issued. The judges will first have to decide the question of admissibility, which should not pose too many problems, at least in the case of the General Assembly. As Geoffrey Watson points out, the ICJ has never declined to render an advisory opinion simply because a case raised political as well as legal issues.[311] He adds that, if the Court does consider the merits, light will be shed on a problem that has divided scholars and states for 50 years. "How much influence such a decision might have on any state's nuclear policy is a different question altogether."

But assuming an advisory opinion which declares that the threat of nuclear weapons is unlawful, it is highly unlikely that the nuclear powers, which happen also to be the Permanent members of the Security Council, will forthwith decommission their nuclear arsenals and wind up all their test and research facilities. Nor does the promised Comprehensive Test Ban Treaty prefigure abandonment of nuclear weapons. Indeed, the US has embarked on a series of "subcritical" nuclear weapons tests under the Nevada Desert, keeping open the research establishments at Los Alamos, Livermore and Sandia. The world's only

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[310]John Pilger, *"A principled audacity,"* (17 November 1995), New Statesman & Society, p. 16.

[311]Geoffrey R. Watson, *"The ICJ and the Lawfulness of the Use of Nuclear Weapons,"* (1995), American Journal of International Law.

active test site will be that outside Law Vegas, used by the UK and US.[312] The tests are part of a larger programme, the Stockpile Stewardship and Management Programme, costing $3 billion a year, and designed to provide the full functional equivalent of underground testing.

The requests are, I would suggest, far more important for what they tell us about the role of the new international civil society. As Dianne Otto concludes,[313] "the quiet revolution spawning the emergence of international civil society has burst onto the international agenda with the end of the cold war and the recent UN world conferences." The World Court Project is an outstanding example of this "quiet revolution."

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[312]See Alexander Cockburn and Ken Silverstein, *"US Nuclear Weapons: Explosive Issues,"* (19 January 1996), New Statesman & Society, p. 18.

[313]Dianne Otto, *"Nongovernmental Organisations in the United Nations System: The Emerging Role of International Civil Society,"* (1996), 18 Human Rights Quarterly, pp. 107-141.

THE NUCLEAR NON-PROLIFERATION TREATY, THE COMPREHENSIVE TEST BAN TREATY AND THE INDIAN POSITION

by
Jitendra Sharma, India[314]

While the Commission for Disarmament of the United Nations continues its deliberations at Geneva, misgivings have been expressed about the Indian position on the Nuclear Non-Proliferation (NPT) and the Comprehensive Test Ban Treaty (CTBT). It is necessary to put the Indian position, which has the full support of the Indian people, in its correct perspective. Briefly stated the position is discussed here.

1. India was one of the first countries to advocate a complete ban on the manufacture of nuclear weapons and all other categories of weapons of mass destruction.

2. India advocated an International Convention banning tests, manufacture and use of nuclear weapons as early as in 1947 and 1948 in the immediate aftermath of nuclear bombs being dropped on Hiroshima and Nagasaki.

3. Pandit Jawaharlal Nehru, the architect of India's foreign policy, during his visits to the USA, China and the then Soviet Union as well as to other nuclear weapons powers between 1949 and 1960 advocated their giving up nuclear arms and nuclear testing.

4. India's continuous campaign against the spread of nuclear weapons, both vertical and horizontal proliferation of nuclear weapons, ultimately resulted in the United Nations adopting the Partial Test Ban Treaty originated and sponsored by India between 1959 and 1961.

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[314]General Secretary, Indian Association of Lawyers, Mr. Sharma was elected at the 14th Congress to serve as Secretary-General,International Association of Democratic Lawyers.

5. The Partial Test Ban Treaty prohibited the conducting of nuclear tests on the surface of the earth and above ground and in Inner and Outer space.

6. The most important proof of India's commitment to non-proliferation is the fact that the USA had actively encouraged and directly asked India between 1964 and 1966 to become a nuclear weapons state. The US desired India to become a nuclear weapons state to counter China's emergence as a nuclear weapons power from 1964 onwards. The US assessment was that, since India's nuclear power and other programmes had evolved in close cooperation with the US, India becoming a nuclear weapons power would provide the US with a strong nuclear powered ally in countering the emerging strategic challenges from China. However, Pandit Nehru firmly opposed India becoming a nuclear weapon power, emphasising his deep commitment to non-proliferation and opposition to nuclear weapons and other weapons of mass destruction.

7. After the adoption of the Partial Test Ban Treaty, India has been an assiduous advocate of general disarmament in the sphere of conventional weapons and complete elimination of nuclear weapons and stoppage of nuclear weapons tests over the last 35 years since 1961.

8. India was an active participant in the discussions leading up to the finalisation of the Nuclear Non-Proliferation Treaty. India also remained a participant in the discussions related to the elimination of chemical and biological weapons.

9. Most importantly India was the first country to advocate a Comprehensive Test Ban Treaty.

10. India did not sign the Non-Proliferation Treaty because it only concentrated on preventing horizontal non-proliferation. This treaty does not stipulate any obligation on the part of the five nuclear weapons powers: the USA, Russia, China, France and the UK, to destroy their nuclear arsenal, not to undertake any

nuclear tests or to subject their nuclear activities related to weapons to any international monitoring or inspection.

11. It is in this context that Indian policies clearly differentiate between India's commitment to the cause of non-proliferation and India's willingness to be part of a discriminatory and unjust regime stipulated by the Nuclear Non-Proliferation Treaty.

12. The Nuclear Non-Proliferation Treaty was extended without modification or amendment for an indefinite period on 10th/11th May, 1995 when it came up for reconsideration after the stipulated period of 25 years. The NPT has been retained for an indefinite period with all its discriminatory features. India's determination therefore not to be a party to such an agreement has increased even more.

13. India's current attitude towards the CTBT being discussed at the Commission for Disarmament of the United Nations at Geneva is structured in the above context.

14. India's assessment was that the inequities of the NPT could be circumvented and neutralised by the international community, negotiating and putting in place a Comprehensive Test Ban Treaty, which would have the following elements:

- The treaty would be an effective instrument aimed at general and complete disarmament including the complete elimination of nuclear weapons and complete ban on nuclear tests.

- India hoped that this treaty would be non-discriminatory and the obligations stipulated in it would be equally applicable to all countries, big and small, regardless of their nuclear weapons status and their power and influence.

- India has also been of the view that the

Comprehensive Test Ban Treaty apart from banning of nuclear tests by all countries would also include the objectives of complete elimination of all nuclear weapons within a defined time-frame. India also desired the CTBT to cap existing lethal nuclear technologies and the possession of the fissile material. The treaty, according to India, should also ban the acquisition of fissile material for weapons purposes. The treaty should also ensure fair and equal monitoring of fissile materials, stockpiles and the activities of all the nuclear facilities in all countries with a view to ensuring that nuclear activities by all countries are geared only for peaceful purposes.

- These objectives were inherent in the proposals for nuclear disarmament which the then Indian Prime Minister Mr. Rajiv Gandhi had put forward at the special UN General Assembly session on disarmament held towards the end of 1988. India's objectives regarding these matters were articulated by Rajiv Gandhi suggesting the time-frame that by the year 2010 all nuclear weapons capacities should be dismantled and eliminated and that the comprehensive test ban should be completely operational by then.

- It is this approach and these principles which governed Indian policy when negotiating the International Chemical Weapons Convention which came into force in the early 90s. We had hoped that the non-discriminatory frame work of chemical weapons convention would also apply to the proposed CTBT.

- The US and other nuclear weapons powers had given general indications that they would be willing to negotiate a treaty with these terms of reference. That is why India co-sponsored a resolution jointly with the US for the bringing about of the CTBT at the UN General Assembly session between September and december, 1993. But the US and other western nuclear powers were indulging in a

tactical strategum when they told India that they would be willing to put in place a non-discriminatory CTBT, linked with the overall problem of global disarmament and that they would also agree on a definite time-frame for the elimination of nuclear weapons and nuclear tests.

These powers had hoped that, in the context of the assurances detailed above, India would not oppose the indefinite unmodified extension of the NPT in 1995. We have remained opposed to the extension of the NPT because of our commitment to genuine and non-discriminatory non-proliferation.

The US and other western nuclear powers changed their tune from the summer of 1995 about the CTBT after the NPT was extended. They started suggesting a CTBT modelled very much on the basis of the discriminatory frame work of the Nuclear Non-Proliferation Treaty. The working draft which they had prepared during 1995 and which is under discussion at the Commission for Disarmament in Geneva retains the special status of nuclear weapons powers who continue to have freedom of option to conduct nuclear tests as long as they do not have radioactive fallout. The CTBT, as proposed by them, does not commit them to stopping any further nuclear tests, does not commit them to the elimination of their nuclear weapons and does not commit them to open nuclear facilities and nuclear materials to complete international inspection and monitoring. The draft also does not commit them to fulfill the obligations of the Comprehensive Test Ban and complete elimination of nuclear weapons within a definite time-frame. The draft delinks the question of nuclear non-proliferation from the overarching issue of complete and general nuclear and conventional disarmament.

The proposed CTBT draft ensures the special status of nuclear weapons states compared to the rest of the international community, with nuclear weapons states not undertaking any specific time-bound obligations.

The United States, the leading advocate of the present draft, has even indicated that it will pull back from the already limited obligations proposed in the CTBT if any of its vital interests require the US to conduct more nuclear tests and enhance its nuclear arsenal.

The proposed draft is not only opposed by India but a number of other countries. India, China and Iran are the most prominent amongst

those who oppose the present draft being considered at the "CD" in Geneva. While re-affirming its firm commitment to the cause of non-proliferation and Comprehensive Test Ban arrangements, India has articulated her policy on these issues as follows;

(i) The CTBT should be non-discriminatory with all countries assuming equal obligations.

(ii) The CTBT should be considered a vital interim step leading to complete elimination of nuclear weapons, nuclear tests and general and complete disarmament. It is illogical to delink the CTBT from overall genuine disarmament objectives.

(iii) All nuclear weapons states should agree to do away with their nuclear arsenal within a definite time-frame by the year 2000 or 2010.

(iv) They must undertake not to hold nuclear weapons tests and subject all their nuclear facilities to international monitoring and inspection. If nuclear weapons states accept these obligations, India along with other countries should also comply with these obligations.

(v) The existing fissile material, nuclear technology capacities should be used only for peaceful purposes under transparent conditions, and under international inspection on a non-discriminatory basis.

It is to be noted that, even after the Non-Proliferation Treaty was indefinitely extended, China and France continued to hold nuclear tests. China has indicated that it will continue holding tests till it reaches advanced technological levels equivalent to those achieved by Russia, France and the US. France has used the same logic to conduct its nuclear tests in the southern pacific area in the second half of 1995 and early 1996.

Nuclear weapons states have reached a stage of technological advancement where they can miniaturise nuclear tests and conduct them in laboratories with a very small quantity of fissile material without any radio-active fallout. They wish to continue to retain the option to conduct such tests, which contradicts Indian policy that such experiments should not be held and, if nuclear weapons states do not give a time bound

commitment to destroy their nuclear arsenal, the CTBT will not only be a discriminatory treaty but it would be an irrelevant and worthless agreement as far as the objectives of disarmament are concerned. The validity of the Indian approach is manifested in the fact that a large number of countries have proposed more than thirteen to fourteen hundred amendments to the working draft of the CTBT under discussion in Geneva.

Western nuclear powers, despite opposition from China and India, are likely to push through the adoption of the CTBT and according to their inclinations operate it by the end of 1996.

One feature of the CTBT which is different from the Nuclear Non-Proliferation Treaty is that once the CTBT as proposed by the US is adopted, even countries not adhering to this CTBT will be subject to punitive, political, economic and even possible military sanctions. This is unlike the NPT where, if you were not a party to the treaty, you were not subject to obligations of NPT, nor were you subject to punitive action by the powerful signatories to the NPT>

India, therefore, finds itself in a critical position. We are a nuclear weapons capable country. Our self-declared commitment to non-proliferation has restrained us from converting ourselves into a nuclear weapons state. But, if the CTBT comes into existence without including stipulations responsive to our logical concerns, Indian nuclear technological development would be subjected to negative pressures and unilateral external limitations.

India's attempt at present is to do its utmost in collaboration with like-minded countries to make the CTBT a just regime which will ultimately result in meeting the overall objectives of genuine nuclear and conventional disarmament.

THE U.S. EMBARGO AGAINST CUBA: A CRIME AGAINST HUMANITY?

by
Arthur Heitzer, J.D., U.S.A.[315]

INTRODUCTION

The 35-year-old U.S. economic embargo against Cuba has recently taken on broader forms, in a legislative attempt by the United States to impose an embargo on world trade involving Cuba and other nations. To the extent the recent Helms-Burton law and its predecessor impede the opportunity of third countries and their companies to trade with Cuba, it is widely viewed as a violation of international law principles, including the NAFTA and GATT agreements.[316] Sovereign nations have a recognized right to economic self-determination and to follow their own social systems, and the U.S. embargo in its worldwide if not in its unilateral aspects is designed to deny those rights to Cuba. No

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[316]A review of recent U.S. law review articles indicates a near consensus that even the Cuban Democracy Act of 1992, 22 U.S.A. §§6001-6010 (Supp. V. 1988), commonly known as "the Torricelli bill," violated international law by attempting to apply U.S. trade restrictions extraterritorially to foreign incorporated subsidiaries with significant U.S. influence ("control"). Most also recognized the U.S. embargo policy as being outmoded and counter-productive to long-term U.S. trade interests. See: Shari-Ellen Bourque, "The Illegality of the Cuban Embargo in the Current International System," Boston University International Law Journal, Spring 1995 13 n1, pp. 191-228; Jason S. Bell, "Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act," University of Miami Inter-American Law Review, Fall 1993 25 n1, pp. 77-129; Julia P. Herd, "The Cuban Democracy Act: Another Extraterritorial Act That Won't Work," Brooklyn Journal of International Law, March 1994 20 n2, pp. 397-442; Richard D. Porotsky, "Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-five year Old Embargo Against Cuba," Vanderbilt Journal of Transnational Law, Oct. 1995 28 n4, pp. 901-958. But see: John W. Smagular, "Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate," North Carolina Journal of International Law and Commercial Regulation, Fall 1995 21 n1 pp. 65-109.

serious argument can be made on the grounds that Cuba is a threat to international peace, neither is it such a violator of human rights as to justify such extraordinary measures.[317]

Given the fact that this embargo explicitly includes food and medicine, and a consolidation of major multi-national pharmaceutical companies is rapidly underway, can a reasonable argument be made that the embargo also reaches the level of being a crime against humanity? This paper will attempt to outline such an argument and suggest its strengths and weaknesses, as well as questions to be addressed in further exploration of this topic.

I. SOURCES OF RIGHTS/INTERNATIONAL PROHIBITIONS OF CONDUCT

A crime against humanity is essentially the same as a war crime, except it is a crime taken against civilian population, even when there is no state of war. Despite a history of unusual and adverse actions by the U.S. against Cuba since the 1959 revolution (including documented repeated attempts at assassination of the Cuban head of state, reported biological warfare against the island's food supply, etc.), there is clearly no state of war between Cuba and the United States. Indeed, the United States recognizes its obligation under the Neutrality Act to prevent war-

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[317]The criteria to define the level of a country's "human rights" is not universally accepted, and the level of human rights protection in Cuba is a widely discussed topic far beyond the scope of this paper,e.g., its accomplishments in delivering free and universal health care to its entire population, as well as a high level of education, are well known and rival that of developed countries with the wealth of the United States. As a revolutionary country recognizing the leading role of a reconstituted Communist Party, it is subject to criticism by those who champion pluralism, dissent, and opposition parties as a hallmark of democracy. Even in this area, however, the U.S. government's human rights reports concede that cases of political "disappearances," assassinations, and similar crimes are not present, although these have been major factors in other countries in Latin American and elsewhere which have not been the subject of any similar embargo and frequently received U.S. support. See, e.g., the U.S. State Dept. Country Report on Human Rights Practices—Cuba. In fact, toleration of dissent is not a hallmark of Cuban exile communities in the United States such as "Little Miami," where death threats, actual assassinations, sabotage, and economic ruination all have been used to suppress dissent, as documented in a special report from America's Watch.

like attacks on Cuba, regardless of its actual policy of enforcement.[318]

The Nuremburg Principles, as enacted in the London Charter, prohibit, in addition to "war crimes",

> (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;...
>
> (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[319]

Nuremburg's "Crimes Against Peace": Despite a history of aggression including invasion, attempted assassination, and sabotage against Cuba by U.S. intelligence agents, covert operations, and unimpeded private groups and citizens, this author does not mean to suggest that these acts establish that the current U.S. embargo policy constitutes the planning or waging of a war as defined in subsection (a), above.

However, the embargo may still constitute prohibited "force" in violation of the United Nations Charter, Article 2.4 which states: "all

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[318]News reports including *The Miami Herald* of 1/25/96 document open FBI statements that such acts violate U.S. prohibitions against terrorism. However, the same article documents a policy of non-prosecution even when men in boats have been intercepted headed to Cuba with weapons, ammunition, explosives and plans for attack on Cuba. The stated rationale is that convictions have been difficult or impossible to obtain in the past.

[319]Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, 59 Stat. 1544, 1547-1548.

Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." According to the International Court of Justice, economic coercion may constitute the use of "force" in violation of the charter, even when that force does not amount to actual combat.[320]

A standard U.S. text on international law cites each of the following as constituting "force": banning the importation of goods from another nation, restricting imports in order to achieve a political objective, similarly banning or restricting vital exports, encouraging other nations to boycott the products exported from a country, restricting business operations, and suspending travel to another country.[321] The form of the coercion is not as important as the reason for its use: economic coercion to achieve trading leverage with another country may be acceptable, whereas the same action to alter the internal political process within a sovereign nation would probably would not be.[322]

The origin of the U.S. economic blockage fully supports the construction that it is an application of "force." In 1961, the U.S. State and Treasury Departments exchanged memos in response to the State Department consideration of a "complete economic blockage of Cuba by the United States enforced if necessary by naval and military forces." The Treasury Department response stated that the full exercise of the president's authority under the Trading With The Enemy Act could "accomplish a significant proportion of all of the effects which might be desired." This is what was then adopted.[323]

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[320]Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, at 94 (Judgment of June 27, 1986), reprinted in 25 International Legal Materials 1023, at 1063.

[321]William R. Slomanson, Fundamental Perspectives on International Law , at 427-430. (St. Paul, MN. USA, 1990).

[322]Id.

[323]Memorandum, "Cuba-Total Blockage," May 16, 1961, Office of the Secretary to the Treasury, Department of the Treasury, as quoted in Morris H. Morley, Imperial State and Revolution: The United States and Cuba, 1952-1986, 188 (1987). See also, Michael Krinsky, "U.S. Embargo of Cuba: An Overview," New York Law Journal, 2/20/96, as well as Krinsky's book with David Golove, United States Economic Measures Against Cuba: Proceedings in the United

Nuremburg's "Crimes Against Humanity": For purpose of this paper, we will assume that none of the four crimes initially listed in subsection (c) above, apply to the instant case, at least as a matter of general policy. There have been isolated instances of murder and attempted murder in the past, and there is an apparently continuing condonation of small scale armed attacks from U.S. soil which reasonably can be expected to result in loss of life, but it is doubtful that they are sufficiently pervasive by themselves to establish a Crime Against Humanity. The focus of this paper, therefore, is on the more general language proscribing "other inhumane acts committed against any civilian population."

"Murder" vs. "Persecution" Crimes": According to the United Nations war crimes commission,[324]there are two types of crimes against humanity: crimes of the "murder-type"; and "persecutions," which must have been committed on political, racial or religious grounds. While a compelling argument can be made that the U.S. embargo policy "persecutes" the Cuban population because of their political direction and their obvious refusal to revolt against communism and the Cuban revolution, it is unclear whether the requirement at Nuremburg that this be in connection with another independently established "crime" within its jurisdiction is of general applicability. This question should be explored further, and is beyond the scope of the present paper.

Analogies to other provisions and codes of conduct established in international law may be helpful in determining what constitutes "other inhumane acts committed against a civilian population."

The Geneva Conventions: As stated in the Forward to the Geneva Convention index:[325]

Even in war and in regard to the enemy, certain rules of

Nations and International Law Issues, (Aletheia Press, Northampton, Mass., 1993).

[324]"History of the United Nations War Crimes Commission in the Development of the Laws of War," 1948, reprinted in M. Cherif Bassiouni, Crimes Against Humanity And International Criminal Law, p. 565 Boston, (1992).

[325]"Index of the Geneva Conventions for the Protection of War Victims of 12 August 1949," by Jiri Toman, Henry Dunant Institute, Geneva, 1973.

> conduct must be observed; the principal expression of these rules is in the four Geneva Conventions of 12 August 1949, now signed on behalf of practically all countries.
>
> The Geneva Conventions are founded on the idea of respect for the individual and his dignity as such. Persons not directly taking part in hostilities and those put out of action through sickness, wounds, captivity or any other cause must be respected and protected against the effects of war; those who suffer must be aided and cared for without discrimination.

Specifically, Conventions III and IV include provisions for the supply of medical treatment and medical supplies to prisoners of war and to afford "protection of civilian persons in time of war."

Convention III requires humane treatment of prisoners of war, most specifically in Articles 13-14, 15 (maintenance of prisoners), 20 (food), and 30 (hygiene and medical attention). Particularly, Article 13 indicates that "any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the present Convention," Op. cit., Vol. 3, p. 139. Article 15 not only requires providing for adequate quarters, food, and medical attention without charge, but also requires intellectual, educational and recreational pursuits.

Article 23 of Convention IV provides that each responsible party "shall allow the free passage of all consignments of medical and hospital stores (even for civilians of a military adversary)." Free passage is also required "of all consignments of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases."[326]

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[326]This obligation is conditional, if there is reason to believe these supplies will not meet their destination or may accrue "a definite advantage...to the military efforts or economy of the enemy...." The power allowing such transit is also allowed to require that "distribution to the persons benefitted" be supervised by the "the Protecting Powers." Given the fact that Cuba is a sovereign nation, attempts to require such supervision would likely contravene other principles of international law, but would likely be asserted as a legal defense in response to

While this article is narrowly designed, intended to be applied to a blockage imposed upon the population of a military adversary, "medical consignments intended to be used for the treatment of wounded and sick of the armed forces" are also entitled to free passage under Article 38 of the second convention if sent by sea.[327]

Article 55 of Convention IV refers to conduct towards an occupied population rather than a continuing adversary, and the occupier's obligations are considerably greater: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores, and other articles if the resources of the occupied territory are inadequate." The commentary specifically refers to "the absence of food and medical supplies in unhygienic conditions [which may] encourage the spreading of epidemics," as the basis for the scope of this provision, which it also indicates is "not confined to civilians" but may include members of the armed forces detained in an occupied territory. Op. cit., p. 310.

Article 56 of the fourth convention: "Hygiene and Public Health," requires the occupier to ensure and maintain "to the fullest extent of the means available to it,...the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to...the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties." According to the commentary, the duties include "the distribution of medicines," and specifically the obligation "to import the necessary medical supplies, such as medicaments, vaccines and sera, when the resources of the occupied territory are inadequate." Op. cit., p. 314.

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any Crime Against Humanity charges brought against the U.S. economic blockade.

[327]Geneva Conventions of 12 August 1949 Commentary, Jean Pictet, General Editor, Vol. 4, p. 180. The commentary observes that "the expression `consignments of medical and hospital stores' covers consignments of any pharmaceutical products used in either preventive or therapeutic medicine, as well as consignments of medical, dental or surgical instruments or equipment." Id. Examples of essential foodstuffs for minors under 15, etc., include "milk, flour, sugar, fats and salt." Id.

Article 59, "Collective relief," requires an occupying power to agree to and facilitate "by all the means at its disposal' relief efforts by other states or impartial humanitarian organizations "if the whole or part of the population of an occupied territory is inadequately supplied...." Again, because the convention is written to apply to a situation of ongoing military conflict, ample provisions to prevent diversion or misuse of the humanitarian shipments may be a condition of allowing them, such as by allowing the state granting free passage the opportunity to inspect to make sure that munitions are not present. A "protecting power" other than the occupying power, may guarantee that the shipments reach the population for which they are intended.

Article 108 of Convention IV and Article 72 of Convention III require the free passage of relief shipments including medical supplies, clothing and particular foodstuffs to internees, and to prisoners of war, respectively. Both provisions indicate that "such shipments shall in no way free the Detaining Power from the obligations imposed upon it" by other provisions of the conventions. Op. cit., Vol. 4, pp. 452-453; Vol. 3, pp. 350-351.

While some may argue that the claim that the U.S. embargo policy constitutes a "crime against humanity" could be criticized as demeaning the seriousness of the concept by attempting to apply it to different circumstances,, the concept of crimes against humanity has been broadened to include the crime of *apartheid*, including any measures designed to divide the population along racial lines and particularly the "deliberate imposition on a racial group or groups of living conditions calculated to cause it or their physical destruction in whole or in part...."[328] Also, the 1994 Commission I Recommendations of the London International Assembly on the Punishment of War Criminals (what crimes should be treated as "war crimes") indicated that these should especially include "(c) all crimes committed...for the extermination of a race, nation or political party (referred to in the United Nations' Declaration of 12/17/1942);" specifically including "(d) willful starvation of populations, excessive removal of foodstuffs or depriving persons of shelter, clothing

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[328]Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, adopted by the General Assembly in Resolution 3068 and entered into force on 18 July 1976, as reprinted in M. Cherif Bassiouni, Crimes Against Humanity and International Criminal Law, supra pp. 712-714.

and/or **other means of sustenance**."[329] [emphasis added]

II. THE U.S. JURIDICAL SOURCES OF THE EMBARGO AND ITS SCOPE

The Cuban Democracy Act of 1992 (CDA), or "the Torricelli bill," cited above, was followed by the Helms-Burton bill, known as the "Cuban Liberty and Democratic Solidarity Act of 1996," (Helms-Burton) passed by the Congress and signed by President Clinton with much fanfare in March 1996. Both these bills seek to strangle the Cuban revolution by enforcing an international embargo, also known as an economic blockade, against Cuba under its present leadership and policies. The CDA followed 30 years of administrative regulations against free interchange and trade with Cuba including barring U.S. persons from importing Cuban origin goods either directly from Cuba or indirectly from third parties; exporting goods to Cuba; transferring any goods, funds or credit to a Cuban national; paying for hotels or other necessities of travel to Cuba; or providing services to Cuba or Cuban nationals. Some of these provisions were not consistently enforced during the history of the Castro regime, as seen by the lifting of the travel ban under President Carter.

In addition, extraterritorial measures have been enacted, which were strengthened by the CDA. Such provisions include banning any ship from docking in a U.S. port for 180 days after it has traded in a Cuban port, attempting to prohibit foreign subsidiaries of U.S. corporations from trading with Cuba, and prohibiting third-country imports which incorporated even trace amounts of Cuban origin products, and prohibiting third-country exports to Cuba with more than de minimus amounts of U.S. origin goods or technology. The CDA for the first time codified into U.S. statues the embargo against Cuba, and it explicitly attempted to reassert the U.S. embargo policy over foreign incorporated subsidiaries which were subject to "control" of a U.S. parent corporation, either by significant stock ownership or otherwise. As indicated above, the general consensus among legal commentators, including those of the U.S., is that such an attempt at extraterritoriality was both unjustified and a violation of international law.

In addition, the CDA specifically encourages the president to

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[329]Bassiouni, idem, pp. 563-564.

persuade "the governments of countries that conduct trade with Cuba to restrict their trade and credit relations with Cuba..." and allows the president to deny eligibility for foreign aid assistance to such countries.[330] Originally, the Torricelli bill ***mandated*** the president to enter into talks with countries trading with Cuba to be followed by automatic sanctions against countries which failed to stop their trade.[331]

The CDA proscribes U.S. foreign subsidiaries from trading in food or medicine with Cuba. An amendment which would have "allowed U.S. companies to sell food to the Cuban government for humanitarian purposes" was defeated, as well as another amendment to allow sale of medicine and medical equipment.[332] Instead, Rep. Torricelli substituted an amendment to allow such medical sales "only if the U.S. government could verify, through on-site inspections, that the supplies would not be re-exported or misused for purposes of torture." This amendment set impossible conditions on the sale of medical equipment since it was universally recognized that such on-site inspections by the U.S. within Cuba would not be tolerated.[333]

The Helms-Burton bill as recently enacted, makes no secret of its intent to undermine and supplant the current Cuban government, prescribing a specific formula for the restitution of democracy, the acceptance of a transitional government, and the lifting of the embargo. These include abolition of the Committees to Defend the Revolution, acceptance of a market economy, and establishment of a government which excludes current Cuban leaders by name. Its test refers to "humanitarian" concerns, but only in the context of ideological attacks on the nature of the current regime or conditions for emergency aid for an acceptable transitional government. Among other things, it indicates that any wave of refugees fleeing Cuba (largely as a result of the economic crisis which it seeks to exacerbate) will be deemed an "act of aggression" by Cuba against the U.S.

Helms-Burton explicitly seeks to widen the extraterritorial reach

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[330]22 U.S.C.A. § 6003(a) & (b)(1)(A) (West Supp. 1993).

[331]See Bell, Jason S., idem, supra,n.2, at p. 99 & n. 164.

[332]Bell, Op. cit., at 123-124 & n.n. 315-316.

[333]Id.

of the U.S. embargo. While prior measures affected U.S. directors of foreign subsidiary corporations, the recently enacted measure mandates the exclusion of foreign nationals from the U.S. if they are officers or major stockholders in foreign companies which trade with Cuba (at least to the extent that they allegedly benefit from previously expropriated property). Helms-Burton incorporated wholesale into U.S. statutes the pre-existing administrative regulations against trade and travel to Cuba. It mandated active U.S. involvement to deny Cuba aid or credits from the IMF and similar institutions, as well as any aid or normal trade from third countries for whom the U.S. provides aid or with whom the U.S. has normal relations, particularly related to the unfinished nuclear facility near Cienfuegos. In its most controversial provision, it allows, subject only to the presidential power to suspend the right to sue, a retroactive cause of action for *current* U.S. citizens who had significant property holdings in Cuba that were long since expropriated.

Significantly, Congress considered but overwhelmingly rejected on September 21, 1995, an amendment that would allow the sale of food and medical supplies.[334]

The scope of the U.S.-orchestrated economic blockade of Cuba also includes active efforts to dissuade foreign companies and corporations from trade with Cuba. This includes informal means of persuading the U.S. parent corporation to regulate its foreign subsidiary, blacklisting a subsidiary from further trading privileges with any domestic U.S. firm, and claiming jurisdiction over American directors of foreign based subsidiaries.[335]

Richard Garfield, of the Columbia University School of Nursing in New York, reported that the U.S. government used "Mafia-type pressure tactics," to dissuade foreign sales of components for making soap and detergent to Cuba, resulting in an outbreak of childhood esophageal

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[334]New York Times, 9/22/1995.

[335]See Herd, Julia P. cited supra in n.2, at pp. 426-427 & n.n. 126-128.

burns.[336] Other documanted examples have been catalogued.[337]

The Clinton administration has taken action to enforce the embargo on trade with Cuba by U.S. pharmaceutical companies. E.g., the Treasury Department announced on October 24, 1995, that it had assessed a fine of $127,500 against Merck & Co., the largest U.S.-based drug company, for doing business with Cuba. The U.S. Treasury statement also said that since Merck had cooperated in disclosing its activities including travel and laboratory testing, it therefore, was not required to pay the maximum penalties of $1 million.[338]

III. THE ACTUAL EFFECTS OF THE EMBARGO ON THE HEALTH AND WELL-BEING OF CIVILIAN NON-COMBATANTS: THE POPULATION OF CUBA

It is beyond question that the U.S. economic blockade has either directly or indirectly harmed the health of the people in Cuba, resulting in substantially increased risks as well as death.

A number of individual cases have been reported in which the embargo has directly led to the deaths of patients from otherwise curable diseases. Prior to the passage of the Torricelli bill, about 90% of Cuba's trade with U.S. subsidiaries was in food and medicine, which was then embargoed.[339] In particular, Richard Garfield reports the impact of the embargo on curative medications, made only by U.S. drug companies or other subsidiaries, and for which there is no substitute, e.g., the only curative medicine for a certain kind of pediatric leukemia is the drug Elspar. Garfield documents the unsuccessful efforts by treating physicians to obtain this through licensing and other procedures, resulting

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[336]As interviewed in the video, "Cuba Calls: We Must Answer," 1995, issued by the Cuba Information Project, 198 Broadway, Room 800, New York, NY 10038.

[337]See generally, Mary Murray, Cruel and Unusual Punishment, Ocean Press, Melbourne, (1993).

[338]United Press International Report, 10/24/95.

[339]American Public Health Association, "The Politics of Suffering: The Impact of the U.S. Embargo on the Health of the Cuban People, "Report of a Fact-Finding Trip to Cuba, June 6-11, 1993, APHA, 1015 Fifteenth Street N.W., Washington, DC 20005, at p. 26.

in the death of one or more children who otherwise could have been cured.[340]

As documented in videos available for distribution in the U.S., the embargo includes other medications, such as a monoclonal antibody which a Cuban health official indicated was only produced in the U.S. and was prevented from being sold to Cuba. In addition, Cuba's principal supplier of heart pacemakers received instructions not to sell their products to Cuba, according to another Cuban health official interviewed in the video "Soy Cubano."

Others have reported the inability of asthma sufferers to receive bronchodilators, diabetics to receive insulin, and a severe shortage of antibiotics.

As indicated above, Garfield has also documented the great increase of esophageal burns, as a direct result of Cuban efforts to make their own soap substitutes from lye and caustic acid, which have been then mistakenly consumed by children.

In support of an October 4, 1994 petition filed with the Organization of American States (OAS), the Center for Human Rights Legal Action in Washington, D.C., filed information regarding individual victims. Among the specific cases cited, is the instance of a minor child whose heart operation in November 1994 for abnormalities was delayed while in critical condition and close to death until the medication Isuprel could be obtained only from Spain. The OAS petition also lists the experiences of a number of doctors, including a surgeon who reports he is unable to perform timely surgeries due to lack of necessary medicine, increasing risks of death; the immunology and pulmonary chief at William Soler Pediatric Hospital in Havana who reports being unable to treat frequent and unavoidable asthma attacks and suffocation episodes causing the children to suffer further anxiety which exacerbates their asthma; and a cancer specialist at the same hospital who reports having to choose to administer less than adequate doses of cancer medication because of the need to share it among several patients. The lack of antibiotics is also cited, increasing the risk of infections. A physician at the National Endocrinology Institute of Havana reports the shortage of

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[340]Garfield is interviewed about this issue in both the videos, "Cuba Calls," and more generally in "Soy Cubano," Global Exchange, 2017 Mission Street, Suite 303, San Francisco, CA 94110; (415)255-7296.

thyroid hormone putting newborn infants with congenital hypothyroidism at risk of suffering permanent mental retardation because the hormone treatment must be given within days of birth.

Reports also indicate that the shortages and actual inability to purchase medications have had generalized consequences on the health of the Cuban people. According to Richard Garfield, this includes a doubling in the deaths from tuberculosis, a tripling in the number of deaths due to diarrhea in the last four years, a tripling of deaths due to influenza, and a near doubling in the number of maternal deaths last year.[341]

Some of these shortages are the direct result of medication affected by the embargo for which there are no substitutes, and which although may from time to time arrive in Cuba as charity, subject to licensing or informal networks are hardly available on a reliable basis. Others are the result of the severe economic strain of the Cuban economy generally, including transportation, and the fact that the embargo has added increased costs to the purchase of medicine as well as other goods, e.g., in 1991, Cuba's Ministry of Health reported that Cuba spent $6 million for medical care and sea freight alone for products that would cost only $1-2 million if obtained from nearer markets.[342] According to the same report, even before the CDA and Helms-Burton, the blockade seriously impeded the widely hailed Cuban health system:

> Almost all computerized equipment involves electronic components patented in the United States. This requires suppliers from other countries to solicit licenses from the United States government, requests routinely denied when the equipment is being sold to Cuba. When such equipment is actually obtained, we've experienced long delays in delivery like in the case of Nuclear Magnetic Resonance equipment (used to diagnose pathologies which escape traditional x-ray). When replacement parts are needed, licenses must

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[341]As reported in his interview in the video "Soy Cubano," supra.

[342]As cited in Mary Murray, Cruel and Unusual Punishment: The U.S. Blockage against Cuba, supra. at p. 30 & n.27. Published in association with the Cuba Information Project in New York, and also distributed in London and Harare, Zimbabwe.

again be south from the United States. All of this impedes delivery of services to patients.[343]

According to the Report of the American Public Health Association of the U.S., much of the most important scientific literature is produced in the U.S. and access is difficult in Cuba. Even Spanish language medical textbooks which Cuba formerly purchased from a company in Spain came under the embargo when the U.S. firm, McGraw-Hill, bought out the company in 1991.[344] For more than ten years, Cuba bought 80% of its physical therapy equipment from a Dutch firm, which, in 1991, suddenly terminated sales of replacement parts because it could not obtain U.S. authorization for the sales. The embargo is also preventing Cuba from purchasing or replacing parts for operating tables from Canada, ultrasound and nuclear magnetic resonance equipment from Siemens-AG of Germany, laboratory equipment from Sweden, ultrasound equipment from Toshiba Corporation of Japan, x-ray replacement parts from France, among other essential medical equipment.[345]

Some medications have been available, but only from more costly and very limited market replacements, e.g., the largest producer of insulin is the Lilly Corporation in the U.S. Cuba must now buy from a single company in Europe, at a much greater cost.[346] For just 24 major drugs alone, Cuban officials estimate that almost $1 million more per year in product cost must be paid because they must be obtained from distant and limited markets.[347]

As indicated above, the "humanitarian exception" contained in the CDA exists on paper but not in practice. In partial response to the OAS petition discussed above, the chairman of the OAS Inter-American Commission on Human Rights on February 17, 1995, reported that the Commission wrote to the U.S. government requesting:

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[343]Op. cit., p. 31.

[344]"Politics of Suffering," supra, at pp. 26-29.

[345]Id.

[346]Id.

[347]Id.

> ...that the United States of America faithfully observe the traditional exemption from an embargo under customary international law of medicine, medical supplies and basic food items, and for humanitarian reasons. The Commission also stated that it is aware that the Cuban Democracy Act contains provisions for such exemptions, however, the Inter-American Commission on Human Rights has been informed that the bureaucratic and other requirements which have to be met in relation to those exemptions render them virtually unattainable.[348]

Humanitarian organizations in the U.S. and elsewhere donate medicines and related equipment to Cuba. Some attempt to follow the licensing procedure and solicit charitable donations for that purpose. Others bundle packages and carry them with them on visits to Cuba. Some churches are active in this effort. One organization in particular, Pastors for Peace (PFP), sponsored by the Interrligious Foundation for Community Organization (IFCO) has donated more than 1,000 tons of humanitarian aid to Cuba, without attempting to pursue the U.S. licensing procedure. During its six "Friendshipments" through January of 1996, PFP frequently "encountered resistance from the U.S. government, but in every case we delivered our aid to Cuba."[349] In 1993, 12 PFP supporters staged a 23 day hunger strike in Laredo, Texas, following the seizure of a donated school bus for a Baptist church in Havana, which U.S. Border authorities initially refused to let pass into Mexico. The authorities ultimately relented. On February 17, 1996, after a second attempt at border crossings from the U.S. with medical computers destined to be distributed by Cuba's churches to the INFOMED system in Cuba sponsored by the U.N. and Pan-American Health Association, five PFP activists began a liquid-only hunger strike on Ash Wednesday (February 21, 1996). The U.S. government seized 400 of these computers, empaneled a grand jury and subpoenaed records on PFP's "Friendshipments" to Cuba in 1994 and 1995. On March 7 the U.S. seized additional computer components, crutches, and other medical supplies which were being stored by PFP. Among the seized computers

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[348]Letter from OAS Inter-American Commission on Human Rights Chairman Alvaro Tirado Mejia to Ms.Wallie Mason, Center for Human Rights, 2/17/95, attached to the article.

[349]From Pastors for Peace Open Letter, 2/8/96.

were at least 23 donated by Canadians, who posted a bond for safe passage through the U.S. en route to Cuba.

PFP asserts that these obsolete computers from North America are essential to linking Cuba's health facilities together, so that insufficient supplies of medicine can be rationally utilized when and where needed, as well as to help overcome the blockade of current medical literature. As of March 29, 1996, the fasters in their 37th day of drinking only fluids (lemon juice sweetened by maple syrup), moved their protest to the White House.

IV. ARE THE ELEMENTS FOR A "CRIME AGAINST HUMANITY MET" BY THE U.S. EMBARGO AGAINST CUBA?

Assuming that the attempt by the U.S. to impose its unilateral policy of implacable economic hostility towards Cuba violates international law, both because of the inherent violation of Cuba's sovereignty by the letter and spirit of the explicit congressional enactments, as well as by extraterritoriality, it can be reasonably argued that the effects of the embargo raise it to the level of a crime against humanity. Clearly, if outlawing "persecution" of a populace for political reasons was an independent cause of action, the argument would be much easier. It is self-evident that U.S. policy not only seeks to destroy the Cuban people's right to self-determination, but intends to persecute the Cuban populace for their choice of political direction, it results in the sacrifice of the Cuban people's health and that of their children. Whether these facts constitute an independent crime against humanity based on a 35-year plan of comprehensive political persecution by the most powerful country in the world against a very small and poor neighbor should be explored.

Another issue to be explored is whether the overt attack by the embargo on the Cuban health system rises to being an "other inhumane act committed against any civilian population?[350]

It is the view of this author that the extent and impact of the economic blockade on food and medicine have been sufficiently documented thereby establishing the proofs that these inhumane acts are

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[350]Given the series of votes in Congress resulting in the faction to exempt food and medicine from the embargo, this attack certainly must be seen as being conscious and deliberate.

mounted against a "population," as opposed to isolated instances victimizing only isolated individuals.

The remaining question is whether the deliberate attempts to destroy the health system of a country and the health of its population for political leverage are "inhumane acts" rising to the level of murder, extermination, enslavement, or deportation. Based on the resulting increase in deaths, as well as the other severe and precedented deprivations suffered by the Cuban population in significant part due to the economic blockade. The more persuasive argument appears to be that the "crimes" are so longstanding and notorious that they do arise to this level, e.g., in 1992, 1993, 1994, and 1995, the United Nations General Assembly in increasing and near unanimous votes condemned the U.S. embargo policy against Cuba. The U.S. continuation and intensification of this policy, in the light of such universal repudiation and the exposure of the deleterious impact of the embargo on the health of the Cuban population, supports the argument that the embargo is a violation of international law rather than a random or incidental result.

Further, by simple analogy to the Geneva Accords for civilians (and military populations) in detention, during occupation, or under blockades, indicates that a policy designed to harm the health of non-combatants cannot be justified under international law and that essential goods must be allowed through such blockades.

In its defense, the U.S. may respond that because it allowed a "humanitarian exception" if Cuba would only compromise its sovereignty and allow U.S. on-site inspectors to monitor its distribution of medicines, it cannot be accused of such a violation. Such an argument may in the Geneva Accords, which were written for application during a shooting war. Given the record discussed above, this so-called "exception" should be viewed essentially as window dressing, never intended by the bill's sponsors to allow medicines through to Cuba on a commercial basis. As for humanitarian donations, the record of the U.S. government on this is sporadic at best, but more importantly, neither the health of individuals, nor that of a populace, can be dependent upon charitable donations. People die awaiting donors in another country to decide whether and when to donate life-saving medicines.

The strongest argument in support of declaring the blockade a crime against humanity reaches concerns the deprivation of medications for which there are no alternatives. Assuming that the reports of medical practitioners are fully documented, the denial of life-saving medicine to

Cuban patients when it is clear that no substitutes are available, is as serious as denying life-saving food or medicine to POWs or populations of occupied territories. A careful examination of the actual impact of the extraterritorial reach of both CDA and of Helms-Burton upon the international pharmaceutical industry should be undertaken, since it is widely recognized that a major consolidation of international pharmaceutical companies is under way. Therefore, few if any international drug companies are free of significant U.S. holdings or influence. The extent to which they meet the "control" standards of the CDA, or may be subjected to sanctions under the recently enacted provisions, requires research and documentation. Such intellectual untakings, however, are purely academic for a Cuban child who may die without effective treatment while efforts to deter the illegal effects of the embargo by litigation or other sanctions.

Another consequence of the embargo which should be examined is the degree to which the shortage of medical equipment and medicine is a result of the increases in costs arising from the blockade, rather than an explicit ban on the sale of a particular medicine, e.g., if Cuba has to pay 30-40% more for its medicines, and if it is unable to afford the expenses, causing some deaths because the cost prevents the purchase of substitutes, theoretically available around the world at higher costs or of lower quality, or both. There are those who argue that if the overall problems of the Cuban economy are the cause of medical shortages, rather than the blockade of specific medications, an argument that may be made in the review of the pending OAS petition discussed above.

While the decision to prevent the administration of life-saving medicine to a patient may be tantamount to executing them, are more generalized processes resulting in the same deaths any less a crime? Does the fact that there may be dual causation for the deprivation of a cash-starved economy and additional costs being imposed upon it by the blockade make a difference? It is the contention of this author where the only available medication is explicitly barred from being available by the affects of the blockade, culpability, is clear.

This issue should be discussed widely, especially in the U.S. and among its allies. Serious deprivations of human rights are undoubtedly taking place, unknown to most of the U.S. populace. Those of us who are aware must help end this "crime of silence."

V. QUESTIONS FOR FURTHER EXPLORATION

Can the "persecution" of a populace on political grounds constitute an independent crime against humanity, if the circumstances are severe?

Assuming that the conduct of the U.S. in outlawing the sale of commercial medicine (and in obstructing the humanitarian donation of such medicine), would violate the Geneva Accords if applied to civilian or even POW populations detained by an occupying power at war, should it not be argued that such conduct against the civilian population of Cuba is equally illegal even if no state of war or occupation exist? Is it not the case that provisions requiring the free passage of medicine and food and other materials to an occupied or detained population during wartime, must clearly outlaw any similar interference with a civilian population where there is no state of war?

What is the impact of the increasing centralization of the major drug companies in the world, as applied to the specific provisions of current U.S. law regarding the degree of U.S. ownership and control subject to the formal embargo provisions? How do Helms-Burton's new provisions regarding use of once expropriated property affect commercial transactions in medicine and food?

To what degree does the embargo *directly* prevent the sale to Cuba of life-saving medicine, as opposed to *indirect* interference resulting from the increased cost to ship such medicines or by taxing the resources of an economy that is already severely strained? Does it make a difference whether the prohibition on the sale of medicines is direct or indirect, if the impact on the population is the same?

To what degree do these standards apply to the embargo on *food* and *basic nutrition*, as opposed to medicines?

What effect does the history of prior economic and biological warfare against Cuba, resulting in the country's need to spend substantial amounts of its resources to defend against ongoing illegal military raids which are not prosecuted by the U.S.

Should campaigns, similar to the Russell War Crimes Tribunals concerning U.S. actions in Vietnam, be mounted in western Europe, in the U.S., and elsewhere, to discuss and publicize these issues?

VI. RECOMMENDATIONS FOR ADDITIONAL READING

American Public Health Association, "The Politics of Suffering: The Impact of the U.S. Embargo on the Health of the Cuban People," Report of a Fact-finding Trip to Cuba June 6-11, 1993, 1015 Fifteenth Street, NW, Washington, DC 20005.

Center for Human Rights Legal Action, "Brief in Support of Petition Against the United States for Violations of the Human Rights of Cuban Citizens Whose Health and Well-being Have been Adversely Impacted by the U.S. Embargo on Food and Medicines," September 11, 1995, 1601 Connecticut Ave., N.W., #612, Washington, DC 20009.

Krinsky, Michael, United States Economic Measures Against Cuba: Proceedings in the United Nations and International Law Issues, edited and with commentary by Michael Krinsky and David Golove; introduction by Richard Falk, Aletheia Press, 1993, Northampton, Mass.

Murray, Mary, Cruel & Unusual Punishment: The U.S. Blockade Against Cuba, Ocean Press, Melbourne, Australia, 1993.

NEW TOOLS FOR LAWYERS TO USE IN THEIR OWN CITIES AND COUNTRIES AGAINST INTERNATIONAL CRIMES COMMITTED DOMESTICALLY

by
Ann Fagan Ginger, USA[351]

INTRODUCTION

Democratic lawyers working in their own countries against crimes committed in their countries by their governments or by paramilitary groups, organizations or individuals have tools we can utilize more effectively than most of us have done to date.

Since we are all realists, as well as people with high ideals, let me say that there is statistical evidence that 32 out of 36 countries have improved their laws as a result of these tools.[352] And, as a member of my city's Commission on Peace and Justice, I have personally used these tools in my city[353] to propose ordinances that were adopted by the City Council to help protect human rights in time of war.[354]

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[351]Executive Director, Meiklejohn Civil Liberties Institute, Box 673, Berkeley, CA 94701-0673, USA; telephone: (510)848-0599; fax: (510)848-6008; e-mail: wagley@igc.apc.org. Professor of Peace Law at San Francisco State University; Vice Chair, Berkeley City Commission on Peace and Justice; editor, HUMAN RIGHTS AND PEACE LAW DOCKET: 1945-1993 (Meiklejohn Institute, 5th ed. 1995).

[352]Cindy A. Cohn, *The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights*, 13 HUM RTS Q 295 (1991).

[353]Berkeley, California, USA. See "Socially-Responsible Cities Packet," Meiklejohn Civil Liberties Institute 1995, available from MCLI, Box 673, Berkeley, CA 94701-0673 USA for $20 plus postage.

[354]As the first chair of the Berkeley City Commission on Peace and Justice, I first convinced the Commission to act, then the Commission convinced the City Council to adopt the UN Charter human rights Articles 55 and 56 as an ordinance. Several cities in Brazil have taken similar steps. Then, at the start of the Gulf War, we used the Nuclear Free Zone initiative and the resolution making Berkeley a city of refuge to convince the City Council to adopt a resolution protecting the rights of Arab-Americans and those members of the military who became conscientiously opposed to participation in War. See Peace Law Packet on

The types of criminal conduct most amenable to this type of approach are crimes including an element of racism, sexism, xenophobia, homophobia, nationalism, or class status; hate crimes; crimes committed by police officers; torture and cruel or degrading treatment of prisoners and others in any form of detention; and denials of due process at any stage of the criminal law process.

In this era in most of our countries and regions, economic desperation is leading people to commit violent acts spurred by fundamentalist, fascist-minded organizations and political leaders. At the same time, 1995 saw the largest peaceful governmental meeting in the history of the world at the UN Conference on Women, empowering thousands of new people to work against international crimes in all regions. Both of these factors suggest that we follow the advice of Albert Einstein to "think anew" in this nuclear era. The decision of South Africa to establish a Truth and Reconciliation Commission represents such thinking anew.

Many of us have concentrated on defending people charged with crimes in our own countries, or seeking prosecution of those guilty of police brutality or other crimes committed by government officials, openly or covertly. Others of us have concentrated on crimes committed in other countries against people now residing in our countries, that is, cases that are obviously international. And many of us have concentrated on filing civil lawsuits as our primary tool for righting such wrongs,[355] or have sought criminal indictments by our domestic governments.

I will talk about new kinds of work we can do as lawyers, to help aggrieved people in our own cities and countries without going to a domestic court that may be unconcerned or even hostile. We can use these tools to win something, if not everything we seek, and these tools never result in our losing. I will only discuss criminal law here, although similar proposals are appropriate to enforce new civil rights and report on their enforcement.

This is not the same as saying that these tools will provide the

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Socially-Responsible Cities (Meiklejohn Institute 1995).

[355]In the United States, most notably and successfully in Filartiga v. Pena-Irala, 630 F2d 876 (2d Cir 1980), and see U.S. government amicus brief, 19 Int'l. Legal Materials (ILM) 585 (1980).

same wonderful feeling as when one wins a lawsuit and actually frees the innocent defendant or puts the villain in jail or collects money damages for a wrong done. But it is saying that these new/old tools can result in some redress of grievances for our clients and can lead to changes in official policies of some governmental bodies. These tools provide the basis for activists to organize movements and for concerned journalists to report on wrongs and actions to right them.

The reason for the long introduction is that most of us have dismissed these tools as not being an effective way to deal with a major violation of criminal law because they require us to rethink our role as lawyers and our opportunities to work in bodies not called courts; that hear our claims in hearings not called trials; and then take actions, not called judgements and sentences.

These tools may also require us to rethink our attitudes toward the United Nations Charter, international treaties and covenants, and our past experiences with UN Committees established to enforce these treaties. The reason to go through the rethinking process is that it may (and I think it will) result in our returning to an affirmative attitude toward UN law and some UN procedures that have proved effective in dealing with some aspects of criminal behavior in some countries in all regions of the world in the recent period.

NEW/OLD TOOLS FOR ENFORCING HUMAN RIGHTS

These tools are publicizing, reporting and monitoring the enforcement of human rights treaties after they are ratified by our governments. By ratifying the treaties, at minimum,[356] governments pledge 1) to publicize the text at all levels of government in all regions; 2) to report to UN bodies on violations and enforcement of each right under each treaty; 3) to submit to extensive discussion and dialogue with

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[356]Several governments have attached reservations, under-standings and/or declarations to their ratification documents, which limit to some degree, the use of the treaties in domestic courts as the sole basis for a cause of action. There is a body of legal writing on the permissible extent of reservations, i.e., can a state file so many reservations to basic articles in a treaty that the ratification must be considered a sham? For the U.S. and the ICCPR, see, "Symposium on the Ratification of the International Covenant on Civil and Political Rights," 42 DePaul L. Rev. 1169-1412 (1993).

the experts on human rights on these UN committees in hearings open to individuals, NGOs, and to the press; 4) and to monitor improvements and lapses at regular intervals.

Reporting is at the heart of the UN system of enforcing international law: civil, criminal, and administrative, after it has been enunciated in a treaty and states agree to ratify the treaty. Therefore, lawyers need to learn how to participate most effectively in the reporting process, even if their governments have attached reservations, understandings and declarations making it difficult to litigate on the basis of treaty rights,[357] and even if the ratifying states have not also ratified the Optional Protocols[358] that permit individuals to sue their states for failure to enforce their treaty obligations.

CRIMES ENUNCIATED IN MAJOR HUMAN RIGHTS TREATIES REQUIRING REPORTING

The International Covenant on Civil and Political Rights (hereafter ICCPR)[359] enunciates at least three crimes on which states shall report: torture,[360] propaganda for war,[361] and advocacy of national, racial or religious hatred that constitute incitement to discrimination, hostility or violence. The Convention on the Elimination of All Forms of Racial Discrimination[362] (hereafter CERD), enunciates several activities to be prohibited by states through legislation that may make them part of the state's domestic criminal code: a) racial discrimination by any person,

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[357]Id.

[358]E.g., Optional Protocol to the ICCPR, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) 59, U.N. Doc A/6316 (1967).

[359]999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[360]Art. 7.

[361]Art. 20.1.

[362]660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

group or organization,[363] racial segregation and apartheid,[364] dissemination of ideas based on racial superiority or hatred,[365] racial discrimination leading to bodily harm,[366] and acts of racial discrimination.[367]

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[368] (hereafter CAT), defines the act of torture,[369] and acts of cruel, inhuman or degrading treatment or punishment.[370] The International Covenant on Economic, Social and Cultural Rights[371] (hereafter ICESCR), in declaring the right to strike[372] may be taking the first step toward establishing the arrest of strikers as a crime. The Convention on the Elimination of All Forms of Discrimination Against Women,[373] (hereafter CEDAW), enunciates the crimes of trafficking in women and exploitation of prostitution of women.[374] In prohibiting dismissal for pregnancy, and making this subject to sanctions,[375] this treaty may be taking the first step toward establishing such dismissal as a criminal act.

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[363]Art. 2.

[364]Art. 3

[365]Art. 4.

[366]Art. 5.

[367]Art. 6.

[368]G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985), (entered into force June 26, 1987).

[369]Art. 4.

[370]Art. 16.

[371]993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[372]Art. 8.

[373]1249 U.N.T.S. 14 (entered into force Sept. 3, 1981).

[374]Art. 6.

[375]Art. 11.2.

The Convention on the Rights of the Child[376] requires states to prohibit the illicit transfer and non-return of children abroad,[377] to take all appropriate steps: to protect children from physical or mental violence;[378] to abolish traditional practices detrimental to the health of children,[379] and the abduction, sale, or trafficking in children;[380] to protect children against all other forms of exploitation,[381] and the torture of youth.[382]

CRIMINAL PROCEDURES ENUNCIATED IN MAJOR HUMAN RIGHTS TREATIES REQUIRING REPORTING

States ratifying the Civil and Political Covenant have agreed to enforce and to forbid many procedures and practices and to report to the UN Human Rights Committee on their enforcement/failure to enforce the rights enunciated in the ICCPR articles: to ensure treatment without distinction as to race, colour, sex,[383] language, religion, political or other opinion, national or social origin, property, birth or other status;[384] to oppose the death penalty;[385] torture;[386] forced labor;[387] illegal treatment

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[376]G.A. Res. 44/25, U.N. GAOR, 44th Sess. Supp. No. 49, at 165, U.N. Doc. A/44/736 (1989) (entered into force Sept. 2, 1990).

[377]Art. 11.

[378]Art. 19.

[379]Art. 24.3.

[380]Art. 35.

[381]Art. 36.

[382]Art. 37.

[383]And see CEDAW, Art. 2g.

[384]Art. 2.1; also in CERD, Art. 5.

[385]Art. 6.

[386]Art. 7.

[387]Art. 8.

during arrest or detention;[388] failure to treat prisoners with humanity;[389] fair trial,[390], appropriate treatment of juvenile offenders;[391] and no ex post facto charges,[392] or imprisonment for debt.[393]

The other five major human rights treaties requiring states to make reports to UN Committees contain due process protections for juveniles[394] and adults facing the criminal justice system, [395]and those involved in extraditable offenses.[396]

MEIKLEJOHN INSTITUTE'S PILOT PROJECT ON STATE COMPLIANCE THROUGH REPORTING PROCESS

Meiklejohn Institute initiated a pilot program in 1994 to encourage US compliance with all four steps in enforcement of the United States' first human rights treaty with a reporting

requirement,[397] ICCPR. The fact that we were lawyers made our work much more effective because many activist NGOs did not know about the treaties and at first were cautious about getting involved since they had

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[388]Art. 9.

[389]Art. 10.

[390]Art. 14. And see CAT, Arts. 12-15.

[391]Art. 14.4

[392]Art. 15.

[393]Art. 11.

[394]Convention on Rights of the Child, Arts. 3, 9, 37b, 40.

[395]See CERD Arts. 5(a), (b), and 6; CAT Arts. 6 ¶4, 11-16.

[396]CAT, Arts. 7 and 8.

[397]Although, the Genocide Convention was the first major human rights treaty ratified by the U.S., it does not have a reporting requirement.

never dealt with treaty law before.[398] Our explanations that the treaties were written in clear language (similar to our U.S. Bill of Rights) and that they are really now part of the supreme law of the land[399] was decisive in convincing many organizations.

(1) We convinced the Berkeley City Commission on Peace and Justice to send a motion to the Berkeley City Council to pass a resolution welcoming ratification of the ICCPR and encouraging the appropriate City Commissions (on the Status of Women, on Labor) to prepare reports on enforcement/violations of ICCPR articles in our city.

(2) We contacted many NGOs in our area and nationally, asking them to send us the facts about specific violations of specific articles of the ICCPR.

(3) We wrote an Issue Sheet for each such violation, including the facts on the specific incident or case; national statistics on the problem; and the actions/inactions of the appropriate federal, state or local agencies on the subject; concluding with a series of questions the UN Human Rights Committee experts could ask the U.S. Government officials at the sessions at which the Government made its report to the UN Committee.

(4) We sent the Issue Sheets to the U.S. Secretary of State for inclusion in the U.S. official report.[400] (5) We sent the Issue Sheets to the UN Committee for their use. (6) We sent a delegation to the UN meeting and called a briefing session near the UN Committee hearing, inviting NGOs and the media in New York. (7) We held a press conference for local press and for editors of NGO publications. (8) We held an informal cocktail party for the members of the Committee to talk about their process and what role they see for NGOs seeking to assist them in their work. (9) At the conclusion of the hearing, we issued our own brief report of the events for use by local NGOs, public radio stations, and our

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[398]This was less true of NGOs representing Native Americans, African-Americans and immigrants from many nations, which had often worked extensively for and under the human rights treaties.

[399]U.S. Constitution, Art. VI, ¶2.

[400]Our material was not included in the U.S. Report, but it appears to have been read by U.S. Government officials participating in the Committee hearings.

own membership.

(10) We have taken the further step of convincing the National Lawyers Guild in California to propose to the Bar Association of the State of California that it sponsor legislation to establish a state agency to begin collecting facts on compliance/violations in our state of all of the articles of all of the human rights treaties ratified by the U.S. requiring reports at the national and then at the local and state levels.[401]

The response to these steps was so positive that we are now engaged in duplicating the process on the next two treaties ratified by the U.S.: CAT and CERD.

RESULTS OF THE PILOT PROJECT ON POLICIES OF U.S. GOVERNMENT

I cannot honestly report that the preparation and filing of the United States' first report and the dialogue with the UN Human Rights Committee brought about massive instantaneous changes in government policies or practices on human rights at the national level, or that it has yet penetrated state and local governments in my country. Such changes in government policies occur seldom in any country and only as a result of mass movements combined with changes in the law, which we are now celebrating in the new South Africa.

But I can report some changes in official federal government policies as a result of the U.S. government experience with the UN Human Rights Committee. For the first time in history, the U.S. Government had to confess openly to an international body that it faces major problems in universal enforcement of civil and political rights to which it is committed, without distinction of any kind. Such admissions have, historically, been the first step toward changes in condemned policies.[402]

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[401]This resolution is reprinted, along with much other background material, in "Nonprofits Have a New Role in Ensuring Human Rights in the United States," by Ginger, Wagley, and Markfield, 30 Univ. of San Francisco Law Review 196 (1996).

[402]At the same time, the UN Special Rapporteur on Contemporary Forms of Racism met with the U.S. Council of Churches, which was holding its own hearings on racism in the U.S., and with many NGOs and government agencies

The head of the U.S. delegation to the UN Human Rights Committee was John Shattuck, Assistant Secretary of State for Democracy, Human Rights and Labor.[403] At a recent symposium[404] on the first U.S. Report,[405] Shattuck outlined several concrete steps the U.S. government is currently taking to implement the standards of the ICCPR. These steps include (a) creation of an interagency working group to help coordinate the implementation process; (b) continuous review of federal and state law toward conformity with the Covenant; (c) proposal of new implementing legislation where necessary to insure U.S. conformity with international human rights standards; (d) on-going public dialogue concerning the implementation of the treaties including programs of human rights education in schools and other forums; and (e) programs with judges, law enforcement officials and legislators to make the ICCPR a living document on the local level.

Shattuck articulated the U.S. commitment to compliance with the Covenant. "In joining the Covenant, we have reaffirmed our commitment that our domestic performance should be judged by the same standard we use in assessing the human rights performance of other countries. Through this process, we are committed to fully implement the Covenant in all aspects of our domestic law. This process of full implementation will strengthen and deepen our domestic constitutional commitment to civil and political rights." He also observed that obstacles remain to further progress in advancing civil and political rights—obstacles such as racism and gender discrimination, intolerance and economic distress in portions of the United States population.

Assistant Attorney General Deval Patrick addressed the same

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in order to make his report on conditions in the U.S. U.N. ESCOR, ¶ 108, U.N. Doc. E/CN.4/78/1995/Add.1 (1995).

[403]Needless to say, even this title is new with the Clinton Administration.

[404]Symposium facilitated by the Carter Center of Atlanta, Georgia.

[405]*First Report of the United States under the International Covenant on Civil and Political Rights, Core Document Forming Part of the Reports of States Parties*, U.N. Doc. HRI/CORE/1/Add.49 (1994) and *Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, U.N. Doc. ICCPR/C/81/Add.4 (1994).

NGO symposium, detailing some of the specific issues that the UN Human Rights Committee members found disturbing, and on which they made Final Comments requiring governmental action, including excessive use of the death penalty,[406] police brutality,[407] easy access to firearms,[408] and prison conditions.[409] Patrick acknowledged that, while the U.S. Constitution embodies **some** provisions of the ICCPR, our human rights record is far from perfect. This African-American Assistant Attorney General also experienced intentions to comply with the Race and Torture Conventions, and their requirements that the U.S. submit reports to the U.N. within one year of completion of ratification.[410] He conceded that the U.S. has much work to do in order to meet these reporting requirements. He expressed his hope that by continuing to file cases and bring issues to the courts, the Civil Rights Division of the U.S. Department of Justice could have an important effect on the implementation of the treaties in the U.S.

A MODEST PROPOSAL TO ALL IADL AFFILIATES

Based on our experiences in the United States, and what we have learned specifically from human rights lawyers in Australia and Japan, we are anxious to share ideas for further use of the publicizing/reporting/monitoring process. Our modest proposal is that lawyers in each country establish a central clearing house to which lawyers will send brief digests of each of the cases they handle raising human rights issues under one of the human rights treaties. As you close your file on the case, send this brief digest with citations to reported opinions (and case docket numbers where there is no reported opinion). Once a year the central agency can issue a report containing all of these

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[406]See final Comments of the Human Rights Committee, April 6, 1995, paragraph 16, 31.

[407]Id. at paragraph 17, 32.

[408]Id. at paragraph 17, 34.

[409]Id. at paragraphs 20, 34. Patrick also discussed criticisms by the UN Committee of poverty and denial of aboriginal rights to Native Americans, erosion of support for affirmative action, and the California anti-immigrant Proposition 187.

[410]U.S. reports were due Nov. 29, 1995. State Department officials have indicated that they may be filed in mid or late 1996.

digests, plus digests of new human rights laws passed by the national legislative body and new regulations issued by the national executive. The resulting annual report will be invaluable in

1. Preparing Issue Sheets when your country goes before one of the UN human rights committees;

2. Letting other nations know about egregious problems on which you want the support of fellow lawyers abroad;

3. Using this information as background material in briefs in other cases lawyers are handling;

4. Making more inclusive the biennial HUMAN RIGHTS AND PEACE LAW DOCKET,[411] which seeks to digest all important human rights cases in all of the countries of the world, including both those reported in traditional law reports, and those jury verdicts, dismissals, and other outcomes not reported in official law reports.

As this process becomes widespread, these annual reports will attain the prominence of reports by other organizations and governments, e.g., the Amnesty International reports, and the U.S. State Department reports on human rights in various countries, with their strengths and weaknesses. In time our reports should affect the reception given to the Amnesty and U.S. State Department reports.

Our second proposal is that lawyers work to convince their local and regional governments to adopt as part of local substantive law UN Charter Articles 55 and 56; substantive articles in the International Covenant on Civil and Political Rights, in the International Covenant on Economic, Social and Cultural Rights, in the Conventions on the Elimination of All Forms of Racial Discrimination, the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. Our next step will be to encourage the establishment

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[411]Published as a biennial looseleaf service by Meiklejohn Civil Liberties Institute, available at this Congress, $65 for individuals, $76 for libraries and institutions, or by mail from the Institute, Box 673, Berkeley, CA 94701-0673, USA with postage added.

of government agencies to prepare the required reports at the local and regional levels. This can lead to work to publicize the texts of these treaties, now part of local law, and to education on their content, starting at the bottom, with the people, and at the top, with the officials charged with their enforcement.

UNIVERSAL PROTECTION OF HUMAN RIGHTS AND THE INTERNATIONAL CRIMINAL COURT

by
Dr. Budimir Košutić, Yugoslavia[412]

I

The mass human suffering and tragedies caused by the events immediately before and during World War Two, reflect the close connections between aggressive, arbitrary behavior of national governments towards their citizens and aggression against other nations, and between respect for human rights and the maintenance of international peace and security. The experiences of World War Two were synthesized and expressed in a wide-spread conviction that effective international protection of human rights is one of the essential prerequisites of international peace and progress, which is reflected both in the Charter of the United Nations and in numerous international instruments. One of the basic purposes of the United Nations is "to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".[413]

It has long been understood that it is impossible to provide effective protection of human rights and fundamental freedoms unless a special system of international criminal law and appropriate international jurisdiction has been developed. Therefore, during World War Two and immediately upon its termination the Moscow Declaration, London Agreement and the Statute of the International Military Court were adopted. These acts made it possible for two International Courts, in Nuremberg and Tokyo, to hold trials during which international criminal law was applied in international jurisdictions for the very first time.

Although these trials were of great importance for the international community, they also revealed certain shortcomings. First of all, these Courts were established by the victorious powers and the juridical functions were carried out by the representatives of the major

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[412]Professor, Theory of Law, University of Belgrade, Yugoslavia. 1995.

[413]ART. 1, para. 3, of the UN Charter.

powers without the participation of the representatives of other States from the anti-fascist coalition. Only the war criminals of the defeated side were tried and not the perpetrators of the same or similar acts from the victorious side. Finally, the Courts were of a provisional character and the trials were based on legally established war crimes, while crimes against peace and humanity were dealt with only on the basis of the Statute of the International Military Court.[414]

II.

The shortcomings in the work of the Nuremberg and Tokyo Courts, as well as their positive results, are reflected in the fact that war criminals charged with the preparation, commencement and the conduct of war, were prosecuted by a court which prompted the international community to elaborate international criminal law and to establish a permanent international court to try war crimes. In addition to the United Nations and its organs and commissions, numerous professional organizations and associations, including, in particular, the International Criminal Law Association, have lent a helping hand to this exercise.

However, the United Nations efforts on international criminal law and on the establishment of a permanent International Criminal Court have not been successful. As a matter of fact, although numerous international conventions have been adopted providing for the criminal and legal protection of human rights and fundamental freedoms, no permanent international criminal court has ever been established, not even after its provisions by these Conventions.

These conventions include the Geneva Conventions adopted and ratified on International Humanitarian Law, two Additional Protocols to these Conventions, Convention of the Prevention and Punishment of the Crime of Genocide, Convention on the Suppression and Punishment of the Crime of Apartheid, Convention on the Elimination of all forms of Racial Discrimination and other instruments, adopted under the auspices of the International Red Cross. Although Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide recognizes the jurisdiction of an International Criminal Court to try persons accused of committing the crime of Genocide, such a Court has not yet been established. Neither has appropriate international jurisdiction been

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[414]Dr. Mitar Kukolj, "Establishment of the International War Crimes Tribunal for the Former Yugoslavia", published by the Institute for Criminology and Sociological Investigation. The Nikola Tesla Club, Belgrade, 1993, p. 7.

established as called for by Article 5 of the International Convention on the Suppression and Punishment of the Crime of Apartheid.

The United Nations has sought to codify violations of international peace and security and to draw up a Statute for an International Criminal Court. For that purpose, it set up a Special Committee in 1951. Almost 30 years later in 1980, the United Nations Commission on Human Rights and the International Association for Criminal Law drew up the Statute of an International Criminal Court, the fate of which was no better than that of its predecessors.

Fifteen Caribbean and Latin American countries supported the idea of establishing an International Criminal Court at the special session of the United Nations General Assembly devoted to narcotic drugs in 1989; but it was opposed by the United States, Great Britain and France. Nevertheless, the work on the establishment of a permanent International Criminal Court continued as the United Nations General Assembly requested the International Law Commission to continue to study this question.

In 1991, the International Law Commission submitted its Report on Crimes against Peace and Security to the Sixth Committee and proposed that an International Criminal Court be established. Although many States supported it, the proposal was not accepted. Those instrumental in rejecting it contended that such a Court would cost too much, that bureaucracy would mushroom and that its' work and contribution were unpredictable.

This failure did not stop the preparations for the establishment of an International Criminal Court. The International Association for Criminal Law prepared, as part of its activities, the Draft Statute of a permanent International Criminal Tribunal. The Draft was discussed at the International Institute for Criminological Studies in Syracuse, New York, on 6 December 1992. It is expected that this draft will also be considered in the United Nations Commission for International Law. This Commission was entrusted by the United Nations General Assembly with the task of preparing a code of crimes against international peace and security and a Draft Statute of an International Criminal Court.

Whether the work on the establishment of a permanent International Criminal Court will be continued after adoption of Security Council resolution 827 on the establishment of an Ad Hoc International Tribunal for the prosection of persons responsible for serious violations

of international humanitarian law in the territory of the former Yugoslavia remains to be seen. It is encouraging that at its 46th session from 2 May to 22 July 1994, the International Law Commission did issue a Draft Statute of an International Criminal Court.

However, its proposal to convene an International Conference to adopt an appropriate Convention on the establishment of this Court was rejected. With the exception of Russia, all permanent members of the Security Council and other countries which previously had been staunch advocates of the establishment of the Ad Hoc International Criminal Tribunal for the territory of the former Yugoslavia opposed this proposal.

III.

To date, all activities aimed at establishing an International Criminal Court have been characterized by the efforts to set up a permanent rather than an ad hoc International Criminal Court. There have been a number of reasons for such an approach by the United Nations and international professional associations. First of all, the international system is based on the existence of a plurality of equally sovereign States. In such a system, the assertion and exercise of criminal jurisdiction are important determinants of State dignity.[415] Accordingly, the principle of sovereign equality of States is brought into question if an International Criminal Court is established against the will of individual States as a superordinated court.

This explains the position of the participants in the preparation of the establishment of an International Criminal Court that such a Court could be established only as a permanent Court and by an International Convention. Such a position was also expressed by C. Bassiouni, the editor of the Draft Statute for a permanent International Criminal Tribunal. Mr. Bassiouni and the other members of the team who prepared the Draft on behalf of the International Criminal Law Association pointed out that a permanent court established upon firm and adopted rules could be objective, while the implementation of international law, by rules which have not yet fully defined may set bad precedents and cause unwanted consequences for the legal interests and relations among

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[415]See, The Memorandum of the Government of Brazil on the establishment of an International Criminal Tribunal of 31 March 1993; This position was reflected also in the Draft Statute of an International Criminal Court accepted by the International Law Commission in July 1994.

States.[416]

Despite the fact that it was generally accepted from the establishment of the United Nations until 1993 that it was necessary to establish a permanent International Criminal Court by an International Convention, the abandonment of this approach should be examined. Why establish an ad hoc International Criminal Tribunal by a resolution of the United Nations Security Council, when its authority to do so has been disputed. Many local and civil wars erupted after the trials in Nuremberg and Tokyo. In addition, there were foreign, military interventions in the underdeveloped and developing countries. At this time, more brutal wars than the civil war in the former Yugoslavia are being fought elsewhere in the world. And yet an International Tribunal has been established only for the territory of the former Yugoslavia for the violations of humanitarian law committed since 1991. Would it not have been more appropriate to complete the work on the establishment of a permanent International Criminal Court, competent to try international humanitarian law violations committed in all local and civil war and other conflicts in all parts of the world? As far as the Federal Republic of Yugoslavia is concerned, it has always supported the establishment of a permanent International Criminal Court.

The dilemma as to whether to establish a permanent or an ad hoc International Criminal Court was considered in the United States Congress. Both the House and Senate held hearings in preparation for the trial of Iraqi President Saddam Hussein and other Iraqi officials because of the aggression against Kuwait and the war crimes committed in Kuwait. Proposals were made to establish a permanent or an ad hoc International Court. The controversy was resolved with the establishment of neither of these two courts. What this venerable institution was guided by in taking such a decision is open to conjecture.

It is assumed, however, that professional advisors held that the

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[416]C. Bassiouni, Draft Statute International Tribunal, Eres, 1993; M. Kukolj, op.cit. p. 52, etc; The International Law Commission proposed at its meeting in Geneva the two ways for the establishment of the Court: by amending the Charter of the United Nations or by an international agreement. International agreement was accepted as the method for the establishment of the Court; Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May-22 July 1994; General Assembly, official records, forty-ninth session, supplement No. 10 (A/49/10). UN New York, 1994, p. 32, inter al.

Geneva Conventions on International Humanitarian Law would provide for the prosecution of humanitarian law violations against any party which is the aggressor. In other words, once a permanent or an ad hoc International Court is established, it will not be possible to try only the perpetrators of war crimes as determined by the American or Kuwaiti side. To avoid making a decision that would possibly expose the US to the scrutiny of such a tribunal, an elegant method has been found by the establishment of the Ad Hoc International Tribunal for the territory of the former Yugoslavia.

IV.

It cannot be disputed that persons responsible for serious violations of humanitarian law, genocide and crimes against humanity should be punished. It is further assumed that persons responsible for war crimes and other serious violations of humanitarian law will remain unpunished unless an International Court is established. Especially when war is espoused as the sole vehicle for the establishment of a purely national and religious State by those Yugoslav peoples who had not succeeded in establishing such States at the time when they were being established.[417]

After all, the war crimes committed in Vietnam, Algeria, Panama, Cambodia, Lebanon, Afghanistan and the former Soviet republics are eloquent proof that national governments and national courts are not to be trusted to prosecute their nationals who commit war crimes. There is therefore little doubt that the legality of the prosecution of the perpetrators of war crimes in the former Yugoslavia will be inadequate and its effectiveness suspect even if a Tribunal for the territory of the former of Yugoslavia, permanent or ad hoc, had been established by an International Convention.

For, judicial independence and impartiality are the essential prerequisite of an objective trial and the confidence of States and their

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[417]The former US Secretary of State, James Baker, said in an interview for "C-Span" on 6 March 1994 that Yugoslavia had not disintegrated peacefully, but by one-sided declarations of independence first by Slovenia and subsequently by Croatia. By these acts, these two countries usurped part of Yugoslav borders, which constituted an act of violence and a violation of the principles of the Final Act of the Helsinki Conference on Security and Cooperation in Europe. Mr. Baker reiterated this position in January 1995 in his statement before the House Committee for Foreign Relations.

citizens in an International Court are based on the assumption of their existence. Yet, these have failed to materialize.

When the International Tribunal was established by a Security Council resolution despite the reservations of some of its members as to the power of the Council to do so under the Charter[418] (China and some other members of the Security Council voted in favour under the condition that the establishment of the Tribunal for the Former Yugoslavia should not set a precedent for the establishment of a permanent International Criminal Court, i.e. ad hoc Courts for other countries and cases), the Tribunal had become a reality within the United Nations system.

The view that the Security Council has no power to establish an International Court, be it permanent or ad hoc should be examined. Article 29 of Chapter VII of the United Nations Charter was invoked by the Security Council as the legal basis for the establishment of the International War Crimes Tribunal for the former Yugoslavia. Under Art. 29 of the Charter, the Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions. An analysis of the powers vested in the Security Council under Articles 24-26 of the United Nations Charter and under Chapters VI, VII, VIII and XII reveal that the Security Council has no judicial power.

Moreover, in the event of a legal dispute between parties, the continuance of which is likely to endanger the maintenance of international peace and security, the Security Council will refer the parties to the International Court of Justice rather than settle the dispute itself since this authority is not included in its functions and powers (Art. 36, para 3, of the United Nations Charter).

On the other hand, the International Court of Justice cannot, by its nature, be a subsidiary organ of the Security Council.[419] The Security

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[418]Memorandum of the Government of Brazil, items 7,8,9 and 13; Similar reservations were made in the debate at the XLVI session of the International Legal Commission; ILC Report, p. 33 et al.

[419]This question was discussed at the 46th session of the International Legal Commission. Various opinions were expressed and the position prevailed that the permanent court should not be established either as a subsidiary organ of the General Assembly or of the Security Council; Report of the International Law

Council is primarily a political executive organ, governed by specific criteria which are completely different from the principles governing a court of law and its litigative function.

There is no doubt that UN legal experts knew that when the Security Council based its decision to establish the War Crimes Tribunal for the former Yugoslavia on Chapter VII of the Charter. However, even after a careful analysis of Art. 39, related to Articles 41 and 42 of the Charter, it is not possible to establish with certainty that the authors of the United Nations Charter ever considered that the Security Council should establish permanent or ad hoc criminal courts. For, upon determining that there exists a threat to the peace, breach of the peace or act of aggression, the Security Council is to make recommendations or decide what measures are to be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security. Articles 41 and 42 of the Charter of the United Nations and, in particular, the measures specified in these Articles (complete or partial interruption of economic relations and of rail, sea air, postal, telegraphic, radio, and other means of communication and the severance of diplomatic relations and/or military measures in accordance with Articles 43-50 do not lead to the conclusion that these measures provide for the establishment of an international court.

Of course, it is always possible to contend that the word "measure" is so indeterminate that it may be interpreted to imply the possibility of the establishment of an international tribunal. Yet, this is a very farfetched interpretation and supports the proposal to the Security Council that the Tribunal be established by an International Convention.

V.

Not only the resolution on the establishment of an ad hoc International Tribunal for the territory of the former Yugoslavia, but also the other measures undertaken by the Security Council under Chapter VII of the Charter of the United Nations require a scrupulous analysis to establish whether the Security Council has exceeded the powers vested in it by the United Nations Charter. Of course, it is always possible to contend that all decisions adopted unanimously or with the majority vote of the 15 members of the Security Council constitute international law

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Commission, p. 33, et seg.

and that the Charter of the United Nations is only an indicator of the possible content of international law.[420] Considering the economic, political, diplomatic and military measures taken by the Security Council against small member States as the alleged main threats to international peace and security, it appears that the Security Council does not consider itself duty-bound to abide by Chapter VII of the Charter of the United Nations with respect to the goals and principles of the Charter.

How else are we to explain the collective punishment of innocent peoples, whether Muslims (sanctions did not harm the President of Iraq, Saddam Hussein, but did hurt thousands of innocent women and children) or Orthodox Christians.[421] In any case, neither domestic nor international law can be equated with every law passed by Parliament, a government decree or a resolution adopted by the Security Council, even if it adopted in accordance with Chapter VII of the Charter of the United Nations. After the dreadful experiences with the Nazi and Stalinist regimes, legal theory and legal philosophy make a clear distinction between the existence and essence of law, explained brilliantly by the famous German law philosopher and criminal law expert A. Kaufmann: "Without the essence of law there is no law in the real sense" (Richtige Recht).

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[420]The most prominent representative of the United States school of legal realism, O.W. Holmes, stated that the United States law is what is said by nine old men, the judges of the Supreme Court of the United States. In this connection it is interesting to note that the Special Commission of the American Bar Association, Section for International Law and Practice,
pointed in its report to many deficiencies in the Statute of the International War Crimes Tribunal for the Former Yugoslavia; Report on the International Tribunal to Adjudicate War Crimes committed in the former Yugoslavia, American Bar Association, 1993, pp. 1-61.

[421]These biased practices of the Security Council are well explained by a statement made by Willy Claes in his capacity as President of the Council of Ministers of the European Community to the effect that the countries of South-East Europe belong culturally to the Byzantine Empire which fell apart, that they lack democratic tradition and the tradition of respect for minorities and that it would therefore be appropriate to restrict the expansion of the Community to the cultural circle of the countries of the West. The expansion of the Community should be confined to the Protestant and Catholic circle of European countries. ("Kathimerini", 16 October 1993, p. 9). Since Willy Claes was appointed NATO Secretary-General after this racist statement, the developments in the former Yugoslavia, in particular the media and other types of genocide against the Serb people need no further explanation.

The essence of international law is contained in the Preamble and Chapter I of the Charter of the United Nations. It therefore makes sense to determine that the Security Council resolutions punishing the entire Serb people for acts of aggression it has not committed and the resolution on the establishment of the ad hoc International Tribunal establish the existence but not the essence of international law.

The resolutions on the punishment of the entire Serb people and the resolution on the additional punishment of the Serb people in the Republic of Srpska and the Republic of Serbian Krajina brought immense suffering and devastation to the Serb people. The Security Council resolution on the establishment of the International Tribunal for the former Yugoslavia, can contribute to understanding of the Serb people as the victim of the events in the former Yugoslavia only if extraordinary legal scholars and people of high moral integrity and human dignity are represented in this Tribunal.

It is to be assumed that the Tribunal, composed of such judges and such a prosecutor, will neither be able nor wish to use double standards, which has, unfortunately, been the practice of the Security Council in respect to the Serb peoples.[422]

The legal profession must call for respect for international law and the human rights of the accused, irrespective of their nationality or religion. Nevertheless, we must not forget that the judges of the International Tribunal are only human beings and that the relations between the International Tribunal and the Security Council are very intimate indeed. The Security Council has established this Tribunal and will decide on the date of the termination of its work. For all these reasons, this author doubts that this Tribunal will be independent, non-partisan, even-handed and effective.

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[422]The Permanent Representative of Russia in the Security Council pointed to the double standards applied by the Security Council as it refused to condemn the war crimes committed by a unit of the Muslim military against 16 Serb soldiers and 4 nurses taken prisoner on Mt. Igman.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: JUSTICE BETRAYED

by
John Philpot, Canada[423]

On November 8, 1994, the Security Council of the United Nations adopted Resolution 955 creating an ad hoc international criminal tribunal to judge those accused of violations of international humanitarian law committed in Rwanda between January 1, 1994 and December 31, 1994. It is the assumption of this paper that this initiative by the Security Council is contrary to fundamental legal principles, for the reasons discussed in detail below.

In its form and structure, the Tribunal as constituted, does not respect the basic legal requirements of independence, impartiality, and international acceptance as required of a tribunal established under international law. Furthermore, its mandate, limited in time; limited in who can be indicted; and narrowly limited in jurisdiction to violations of international humanitarian law, will prevent the illumination of the real issues raised by the Rwandan conflict: namely that of armed military intervention in Rwanda from Uganda, the root cause of the conflict.

The likely result of its hearings and findings will be the reinforcement of a distorted biased view of the crisis in Rwanda, providing a justification for further genocide against the Hutu populations of the region by the Tutsi minority now in power. It will legitimate further interventionist policies in Africa and elsewhere to the detriment of established principles of international law and institutionalize the de facto impunity for the members and supporters of the present government of Rwanda who, it has been established, committed many serious crimes between October 1, 1990 and the present.[424] It will likely prevent the international community from learning about the causes of the terrible

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[424]Rwanda, Les Violations des droits de l'homme par le FPR/APR. Plaidoyer pour une enqute approfondie, S Desouter, F Reyntjen, Université d'Anvers, Institut de Politique de Gestion du Développement, Centre d'Etude de la Region des Grands Lacs d'Afrique Centrale, Working Paper, Anvers, June 1995.

events which took place in Rwanda from 1990 to the present.

INHERENT STRUCTURAL PROBLEMS[425]

Does the International Criminal Tribunal for Rwanda respect the basic standards required of an international criminal tribunal? Since the end of the second World War, the world community has invested considerable time and energy with the aim of creating an international criminal court to punish those responsible for serious human rights violations throughout the world. The world is appropriately concerned with the apparent ease and freedom from punishment of those who plan and organize wars, who massacre civilian populations, and who commit willful genocide or other serious human rights violations with impunity. Authors of wars of aggression and other major human rights violations should be held responsible for their actions. The elimination of impunity will be a useful deterrent for future crimes.

These fifty years of international legal thought and reflection on the creation of such a Court should be taken into consideration when the Rwandan issue is examined. Improvisation can only discredit any effort to create an international criminal tribunal. Unfortunately the Tribunal for Rwanda, hastily convened in a few short months, ignores all previous studies and does not satisfy minimal standards for such an important international court. It is rather an ad hoc appendage of the Security Council designed to play an enforcement role with little concern for truth, impartiality and fundamental justice as conceived by legal scholars throughout the world over the past fifty years.

An international criminal court should only be etablished by the agreement of an international community based on the legal equality of all nations. The United Nations is a body in which all member states of the General Assembly are equal. On the other hand, the Security Council

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[425]Many of our comments on the structure of the Rwandan Tribunal are drawn from studies by the American Association of Jurists on the International Criminal Tribunal for the former
Yugoslavia. The American Association of Jurists has already made public its criticisms of the International Criminal Tribunal for the former Yugoslavia. See: "Droits de l'Homme, Ne cre pas un tribunal de Nuremberg qui veut", Journal de Genve, June 14, 1993; and Alejandro Teitelbaum, Representative of the American Association of Jurists at the UN in Geneva. 49th Period of Sessions of the Human Rights Commission, February 1993, Theme 11. E/CN.4/1993/SR.44/Add.1 p. 12 ss.

with its five permanent members with veto power and its ten temporary members in no way provides legal equality for all member nations. It was the Security Council that created the Tribunal for Rwanda by Resolution 955, without any vote or discussion by the General Assembly.

In 1992, the Working Group of the International Law Commission completed its report on the international criminal court. This report recommended that it was essential to draw on the experience of the International Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights for the organization of an international criminal court. These Courts were all created by treaties binding on adhering states. The United Nations Charter created the International Court of Justice. Similarly, the regional courts: the Inter-American Court of Human Rights was created by chapter VII of the American Convention on Human Rights, while the European Court of Human Rights was created by Convention. The authority and credibility of these courts are based on the consensus of the states adhering to the conventions.

The General Assembly adopted a resolution on the question of the international criminal court. Its Resolution 46/54, paragraph 3 (1991) provides that it is the responsibility of the General Assembly to make any directives on this issue, derived from its authority based on Articles 10 and 13 of the United Nations Charter. It appears to this author that the Security Council is usurping power from the General Assembly when it assumes the role of establishing an international criminal court.

The Tribunal for Rwanda was created by the Security Council under Chapter VII of the Charter of the United Nations. Chapter VII deals with coercion by the Security Council when action is required to prevent aggression, or maintain peace. The Tribunal created under article 29 of the United Nations Charter is therefore an entity subsidiary to the Security Council pursuant to the exercise of its policing functions under Chapter VII of the Charter.

To our knowledge, no subsequent studies have suggested that an international criminal tribunal should play a role in Security Council coercive activities. It requires strenuous intellectual gymnastics to justify the creation of a court as an appendage to an international organ of policing and coercion. Thereby precluding, an international criminal court from meeting its requirements of neutrality and independence, the hallmark of any tribunal, and particularly an international tribunal seeking the respect and support of all nations.

An international criminal court should be permanent and not ad hoc. This is one way in which it differs from a Commission of Inquiry. But the mandate of the Tribunal for Rwanda is limited to judging only certain accused individuals during certain events in Rwanda and neighboring countries during the calendar year 1994. In its very essence, it is limited and ad hoc, resembling a commission of inquiry rather than a criminal court.

The Nuremberg experience after the Second World War is the source of a rich body of law concerned with the punishment of the authors of wars of aggression and of genocide. Because of the context and as a first experience, the Nuremberg was an ad hoc tribunal. In fact, Nuremberg has been criticized as a victor's tribunal where the losers in the war were judged for their crimes. The international community has sought to move on from Nuremberg, seeking to create an international criminal court permanent in nature in order to guaranty its independence and impartiality. It is inappropriate to return to the Nuremberg process which developed in a totally different context.

The Tribunal for Rwanda does not respect the basic criteria required of an international criminal court. It is not independent, not impartial and not permanent. Nor does it reflect any international consensus created by the General Assembly of the United Nations or by treaty based on the sovereign equality of all nations. It does not live up to the criteria of independence and impartiality set forth in Art. 14.1, International Covenant on Civil and Political Rights.

It is at best, an ad hoc victor's tribunal created by the Security Council of the United Nations at the request of the victorious party in the civil war, the new Government of Rwanda dominated by the Rwandese Patriotic Front (RPF).[426] This Court was etstablished under an instrument created for coercion according to the Charter of the United Nations. Democratic jurists, human rights activists and human rights organizations should be outraged by the violations of basic justice underlying the formation of this Tribunal. The very worthy enterprise, the creation of an international criminal court, deserves a more principled approach.

SUBSTANTIVE PROBLEMS

The Tribunal for Rwanda is also fraught with serious substantive

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[426]Paragraph 1 of Resolution 955 of the Security Council, November 8, 1994.

problems in its mandate. Its inherent bias, its mandate limited in time to 1994 and in content, violations of international humanitarian law, will prevent any light from being shed on the issues which caused the Rwandan tragedy and will prevent it from rendering judgement against those responsible.

The Tribunal's mandate is to judge individuals responsible for violations of international humanitarian law. It is limited to judging individuals for crimes committed on Rwandan soil and Rwandan citizens responsible for such violations committed in neighbor countries between January 1, 1994 and December 31, 1994. As we have seen, the Security Council adopted Resolution 955 at the request of the RPF Government of Rwanda, victors in the four-year war. The Resolution is based on the premise that there is overwhelming evidence of acts of genocide by the Hutu group against the Tutsi group in a concerted, planned, and methodical way and that there was no evidence of such planning by the Tutsi elements against the Hutus.[427] As will be discussed, these investigators and the Secretary General ignored the Gersony report accepted by the High Commissioner for Refugees that the victorious RPF had massacred at least thirty thousand persons, mostly Hutus, between June and September 1994.

The general wisdom is that this type of tribunal is necessary in the world-wide fight against crimes against humanity with impunity to prevent a recurrence of Rwanda type tragedies elsewhere in the world. Unfortunately, this Tribunal with its mandate limited to the narrow scope of humanitarian law, and with its factual premises and limited time scope will fail abysmally to prevent future catastrophes but, rather, can perpetuate and exacerbate the crisis in Rwanda, Burundi and the surrounding countries and lead to more tragedies in the future.

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[427]S/1194/1125 Letter by Boutros BOUTROS-GHALI, Oct. 4, 1994, in Annex, Preliminary Report of the Independent Commission of Experts in Accordance with Security Council Resolution 935(1994), par. 148.

FACTUAL BACKGROUND[428]

The present crisis began following the military intervention in Rwanda from Ugandan soil by the joint efforts of the Rwandese Patriotic Army (RPA) and the Ugandan Army (National Resistance Army - NRA)[429] on October 1, 1990. The Tutsis were the former semi-aristocratic minority who had established domination over the Hutu majority in pre-colonial times. Many had left Rwanda with the Royal Family after independence from Belgium in 1959. The history of Rwanda has been punctuated by mutual killings, in particular in 1959, 1963, 1964, and 1973. Most Tutsi refugees have consistently refused to accept Hutu electoral preeminence in both Rwanda and Burundi. The 1963 and 1964 killings were triggered by a Tutsi militia invasion of Rwanda. The 1973 crisis followed massive killings of Hutus by the Tutsi-dominated army in Burundi. In 1991, according to the Census, the population of Rwanda was approximately 6,500,000 of whom 6,877,500 (91.7%) were Hutus, 615,000 (or 8.2% were Tutsis and 6,500 (.1%) were Twas.[430]

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[428]The basic sources for this brief historical review are:
(a) The paper by the International Centre for Peace and Reconciliation Initiative for Africa (ICPCRIA), Prof. Agola Auma-Osolo, March 25, 1995, The Rwanda Catastrophe: Its Actual Root-Cause and Remedies to Pre-Empt a Similar Situation in Rwanda. pp. 33-39.
(b) Chronologie des Principaux événements Précurseurs de la Tragédie Rwandaise d'avril 1994., Cercle Rwandais de Réflexion (CRR) Document N 0152, (Avril 1995.)
(c) Physionomie de la Guerre entre le FPR et le Rwanda, Quelques éléments explicatifs du conflit. Dr Joseph Kalinganire, Paix et Démocratie. N : 000 (mars 1993.)
(d) Rwanda, Les Violations des Droits de L'homme par le FPR/APR. Plaidoyer pour une Enqute Approfondie, S Desouter, F Reyntjens, Université d'Anvers, Institut de Politique de Gestion du Développement, Centre d'Etude de la Region des Grands Lacs d'Afrique Centrale, Working Paper, Anvers, (Juin 1995.)

[429]Auma-Osolo, supra. p. 25. The RPF is the virtual creation of President Museveni of Uganda. The RPF and the Ugandan resistance army mirror each other. Their joint efforts succeeded in the overthrow of President Milton Obote in 1985.

[430]Auma-Osolo, supra. p. 33. These figures are similar to those proposed by the 1978 census undertaken by the FNUAP (Fonds des Nations Unies pour les problems de population) which stated that 9.8% of the population was Tutsi compared to 89.8% Hutu.

The Bay of Pigs style invasion of Rwanda from Uganda in October 1990 by the joint efforts of the RPF and the Ugandan army created a dynamic in the country which led directly to the 1994 catastrophe. There began a large displacement of Hutu residents from northern Rwanda. The majority Hutu population developed an acute phobia[431] of the Tutsi population. The civil war lasted almost four years. There were significant losses on the part of both Hutu and Tutsi communities. In 1993, there was a series of killings of Hutu leaders in the area. The Hutu President of Burundi was assassinated in October 1993. In February 1994, two Hutu government leaders were murdered. A few days prior to April 6, 1994, RPF leaders from all over the world held a meeting in Bobo-Dioulasso, Burkina Faso during which the leaders urged that the first priority should be the elimination of Rwandan Hutu President Juvnal Habyarimana at all costs.

On April 6, 1994, President Habyarimana was assassinated with his Burundi counterpart, Cyprien Ntaryamira, while both were landing at the Kigali airport protected ostensibly by Belgian troops with the United Nations. There is no definitive proof who was responsible for these murders.[432] The Hutu population, deprived of its leaders, felt encircled and threatened with elimination. Rwanda was set on fire and there was a mutual bloodletting in which probably over one million people were killed.

LEGAL ISSUES

The tribunal has a mandate limited to judging persons responsible for serious violations of international humanitarian law committed on Rwandan territory or by Rwandan citizens in states neighboring Rwanda during the calendar year 1994.[433] This narrow perspective limited to international humanitarian law is totally

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[431]The term phobia or Tutsi phobia was coined by Auma-Osolo, supra.

[432]The RPF blames Hutu extremists for these murders. In Africa International, N 272 May 1994 Marie-Roger Biloa makes a persuasive argument holding Belgium, the United States and Uganda responsible. Africa International, "Rwanda/Dossier La conspiration" p. 14.

[433]Article one of the Schedule to Resolution 955 of the Security Council, November 8, 1994.

inadequate.[434] It cannot indict those responsible for planning and waging aggressive war. The temporal jurisdiction for the year 1994 is artificial and will further prevent the Tribunal Prosecutor from articulating the appropriate charges for the planning and organisation of the war and undertaking any proper inquiry with respect to the causes of the conflict. Furthermore, limiting the jurisdiction to crimes committed in Rwanda or by Rwandan citizens in neighboring countries excludes the Court's jurisdiction crimes committed by non-Rwandan individuals outside Rwanda. Because of the many exclusions, the Tribunal will be weakened in its theoretical role of preventing future conflicts of this type.

INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL LAW AND HUMAN RIGHTS LAW, NUREMBERG

The Tribunal for Rwanda can only deal with violations of international humanitarian law. International humanitarian law regulates the conduct of war. Individuals who break the rules such as killing civilians, trying to exterminate an entire ethnic group or using illegal weapons could therefore be held criminally liable for their violations of basic principles of international humanitarian law.

International humanitarian law serves to regulate hostilities in order to limit hardship. International humanitarian law has two branches: the law of Geneva and the law of the Hague. The law of Geneva humanitarian law has as its purpose the safeguard of military personnel who are out of combat and persons not taking part in the hostilities. The law of the Hague, the law of warfare, determines the rights and duties of the parties in the carrying out of wartime operations and restricts the choice of wartime methods.[435]

Neither school of humanitarian law envisages criminal liability for planning or waging wars of aggression, or wars of invasion nor do they review the causes of conflicts and assign responsibility. He who

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[434]The mandate of the Commission of Experts granted by the Security Council on July 1, 1994 (Resolution 935 (1994)) was limited to international humanitarian law. The Commission itself decided to limit itself to the period from April 6, 1994 to July 15, 1994.

[435]International Dimensions of Humanitarian Law, Henry Dunant Institute, Geneva, UNESCO, Paris, Martinius Hijhoff Publishers, Dordrecht/Boston/London, 1988.

makes war, who invades another is not per se violating humanitarian law.

International law, international human rights law and the legacy of Nuremberg are not so limited, so narrow. The violation of national sovereignty, the planning and waging of a war of aggression are among the greatest crimes and are established concepts universally recognized in international law. In the search for peace and truth, in the quest to understand the causes of war, a tribunal set up to judge participants in a war must first indict the aggressor, those who initiate the wars. The Tribunal for Rwanda cannot deal with this primary responsibility.

The modern Rwandan conflict began with the invasion of Rwanda from Uganda in the north by the foreign RPF/NRA (Ugandan) army on October 1, 1990. This well-planned and well-organized invasion was followed by the four-year war which ended with the military victory of the RPF in July 1994. Questions raised by this war include: the violation of Rwandan sovereignty and the planning and waging of the war by President Museveni of Uganda and by the leaders of the RPF, and the conduct of the war by the Rwandese Patriotic Army (RPA) and by the defenders of Rwanda.

In this conflict, there have been violations of basic principles of international law, of modern African treaties and charters and of international humanitarian law. An examination of these violations should shed significant light on the legal and factual issues. Most important are the responsibilities for causing the invasion and the terrible conflict which ensued. International humanitarian law is of little use because it is limited to analyzing the conduct of war. It chooses to put its head in the sand concerning the causes of the conflict.

The principle of sovereignty is enshrined in international law: a country must not intervene in the internal affairs of another country. Therefore, an army cannot invade a neighboring country. African law and African human rights law have created additional important duties concerning refugees and invasions from neighbor countries based on the particularities of modern African history. The Pact of Paris, the Briand Kellogg Peace Pact of 1928, stressed the gravity of genocide as a major war crime. And furthermore one of the gravest violations of the obligation not to conduct aggressive war occurs when a foreign country favors a people in a neighboring country and invades to rescue them. This concept is germane to the present conflict given Uganda's active promotion of Tutsi supremacy in Rwanda. In Briand Kellogg, this type of intervention was conceived as a major cause of genocide. The use of

force was therefore outlawed as a means of settling disputes except in exceptional cases of self defence.

Modern history and international relations have been marked by the repudiation of the invasion of one country by another. Initiating aggressive war is the most reviled conduct in international relations. The Charter of the United Nations prohibits the type of invasion that was undertaken from Uganda.[436] In 1960, the General Assembly of the United Nations when dealing with the granting of independence for colonized peoples resolved that all member countries must abstain from intervening in the internal affairs of a country and respect the sovereignty and territorial integrity of all peoples.[437]

Modern African leaders have been preoccupied with the problems of their national sovereignty and military intervention from neighboring countries. Treaties and human rights instruments reflect this preoccupation. With decolonization and displacement of minorities opposed to these changes, for example the large numbers of the Rwandan Tutsis who left Rwanda after independence, and with the frequently artificial nature of African borders, African leaders have been haunted with the problem of exiled armies, potential invasion and destabilization. These leaders went to great lengths to sign treaties creating positive obligations for African countries to prevent armies from using their territories as launching pads for wars of invasion of neighboring countries.

The Charter of the Organisation of African Unity signed on May 25, 1963 (Art. III) required members to respect the following principles:

1. the sovereign equality of all Member States;
2. non-interference in the internal affairs of states;
3. respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence;
4. peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;
5. unreserved condemnation, in all its form, of political

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[436]Article 1, paragraph 1.

[437]Declaration sur l'octroi de l'independance aux pays et aux peoples coloniaux. Resolution 1514(IX) de l'Assemble gnrale en date du 14 decembre 1960.

assassination as well as of subversive activities on the part of neighboring states of any other state;[438]

Rwanda and Uganda are members of the OAU and are bound by the OAU Charter.

The 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa (Art. III par. 2) requires signatory states "to undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by an activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio." Art. II par. 1 provides that refugees "shall also abstain from any subversive activity against any Member State of the OAU. This Convention was signed by Uganda and Rwanda on September 10, 1969.[439]

The African Charter on Human and Peoples' Rights[440] signed on June 27, 1981 creates the obligation for a signatory state to defend national sovereignty of other signatory states from invasion by subversive elements on its territory. Article 23 paragraph 1, reaffirms explicitly the principles implicitly affirmed by the Charter of the United Nations and the Charter of the OAU. Paragraph 2 requires that States ensure that an individual enjoying the right of asylum not engage in subversive activities against his country of origin. The State must also ensure that its territory not be used as bases for subversive activities or terrorist activities against the people of any other signatory state.

Both Uganda and Rwanda are bound by the African Charter. It is interesting to note that the title of this Charter, refers to "Human and

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[438]Charter of the Organisation of African Unity, Art. III. The OAU charter was signed in Addis Ababa on May 25, 1963. It entered into force on September 13, 1963.

[439]OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session (Addis Ababa, 10 September, 1969.) It entered into force on 20 June 1974.

[440]The African Charter on Human and Peoples' Rights was adopted by the 18th Assembly of the Heads of State and Government of the Organization of African Unity on June 27, 1981 at Nairobi, Kenya. It entered into force in October 1986.

Peoples' Rights." African human rights experts clearly understood the inextricable link between individual human rights and a peoples' collective rights and the risk to national groups by invasion. They were preoccupied by the problem and took steps under treaty to avoid such invasions.

The instruments in question, the Charter of the Organisation of African Unity, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and the African Charter on Human and Peoples' Rights were powerless in the face of the joint RPF—Ugandan resolve to take power by force in Rwanda. War was initiated from Uganda with active Ugandan military participation in flagrant violation of all principles of international law affecting these African nations.

The relationship between the right to self-determination and other human rights was an important issue at the United Nations World Conference on Human Rights held in Vienna on June 14-25, 1993. The Vienna Declaration and Program of Action resolved in its paragraph 2 that the denial of the right to self-determination is a violation of human rights[441]. Peoples have the right to take any legitimate action to defend themselves against forms of alien domination and foreign occupation. The Vienna declaration was particularly important because of its recognition of the universality of human rights. Human rights are not limited to individual civil and political rights nor to social and economic rights taken alone but include fully the right to self-determination, to national sovereignty and to freedom from foreign invasion.

We know that international law contemplates the crime of planning and undertaking wars of aggression as a legacy of Nuremberg. Many of the principles of international humanitarian law were strengthened as a result of Nuremberg but Nuremberg went much beyond simply punishing individuals for the manner in which war is conducted. Nuremberg went to the heart of the issue: the planning and waging of a war of aggression.

Before the UN had declared genocide a crime in 1948, the victorious powers had tried and punished the Nazi leaders in the Nuremberg trials. The Nuremberg trials became the basis of international law for the prevention of genocide and the search for peace. Fundamental

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[441]Vienna Declaration and Program of Action. World Confer-ence on Human Rights, Vienna, 14-25 June 1993. A/Conf. /23 12 July 1993.

was the declaration of the crime under international law of the crime of preparing and waging a war of aggression. Pursuant to General Assembly Resolution 177, it was adopted by the International Law Commission:[442]

a. Crimes against peace:
   (i.) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
   (ii.) Participation in a common plan or conspiracy for the accomplishment of any of the acts in (i).

The law is clear on this question. And is it not also clear that the most serious crime is the planning and implementation of aggressive war in violation of established principles in international law? Is it not all the more serious when such a war—the invasion of Rwanda from Uganda by joint Ugandan-RPF forces—is specifically forbidden by the major African legal instruments? The Tribunal for Rwanda cannot address these issues.

Even if the Tribunal satisfied the basic criteria necessary for an international criminal court: permanent, impartial, based on acceptance through the General Assembly, its limited mandate would prevent it from carrying out the important duties of a criminal court: namely, punishing those Ugandans and RPF leaders responsible for wars of aggression and violations of fundamental human rights.

CONCLUSION: WHAT THE TRIBUNAL WILL NOT DO

The Tribunal can not indict the leaders of the Rwandese Patriotic Front for planning the April 6 murder of Rwandan President Juvnal Habyarimana and President Cyprien Ntaryamira of Burundi nor for the elimination of ethnic Hutus during the four-year war nor for the continuing arbitrary murder of Hutus in Rwanda.[443] Nor will it or can it examine the possible indictment of Belgian, American or Ugandan Government officials for the April 6, 1994 murder of these two Hutu Presidents in spite of ample evidence that such crimes deserve serious investigation.[444]

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[442]Yearbook of the International Law Commission [1950], Vol. II. P. 374-378.

[443]Desouter, Reyntjens, supra.

[444]Biloa, supra.

The Independent Commission of Experts commissioned in accordance with Security Council Resolution 935 (1994) to make recommendations for the creation of the ad hoc Tribunal for Rwanda found that Tutsi elements had not perpetrated acts committed with intent to destroy the Hutu group within the meaning of the Genocide Convention of 1948[445] This conclusion ignored the Gersony Report prepared for the High Commissioner for Refugees (HCR) which accused the RPF of the summary killings of 30,000 people, mostly Hutus, in the four months between June and September 1994.[446] The Gersony Report, accepted by the HCR, has been supressed and ignored by the United Nations. It was therefore decided in advance that the Tribunal will deal only with acts undertaken by Hutu forces against Tutsi aggressors. That is not surprising since the Tribunal was set up at the request of the Tutsi RPF victors, now speaking as the new Government of Rwanda.

In this way, the Tribunal is organized to reject in advance the basic thesis that the Hutu reaction after the series of murders of Hutu leaders culminating in the April 6, 1994 murder of the Hutu Presidents of Rwanda and Burundi was one of self-defence. After almost four years of war with the Tutsi RPA invaders where the RPA army had infiltrated almost all Tutsi groupings, is it not feasible that the reaction and mutual bloodletting was one of extreme fear and of self-defence by the Hutu population?[447]

The Tribunal will not indict President Museveni for the deployment in Rwanda of seven NRA battalions in February 1993. The RPF/NRA soldiers launched heavy attacks in the Ruhengeri and Byumba regions killing more that 40,000 innocent civilians, including women and children and causing the exodus of approximately 1,000,000 refugees.[448] The Tribunal with its present mandate cannot judge non-Rwandan citizens

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[445]S/1194/1125 Letter by Boutros Boutros-Ghali, Oct. 1, 1994, in Annex, Preliminary report of the Independent Commission of Experts in accordance with Security Council Resolution 935 (1994), par. 148.

[446]"Des Milliers de Hutus Massacrés au Rwanda," Libération. October 1 and 2, 1994.

[447]This theory is proposed by Auma-Osolo, supra.

[448]UDC Newsletter, Vol. 3, No. 4. April 1993. The UDC is the Uganda Democratic Coalition.

for acts committed outside Rwanda. President Museveni was certainly not in Rwanda in February 1993. Furthermore, with its mandate limited to 1994, it cannot deal with events occurring, for example, in 1993. It will not accuse RPF/RPA elements for the crimes they committed during the war or after the war.[449] These failures to attribute responsibility for these events can only undermine any attempt at reconciliation and reconstruction of Rwanda.

CONCLUSION - PERSPECTIVES

At the time of the writing of this paper, (September/October 1995), the perspectives are extremely dark for the two million Hutu refugees waiting in camps in Zaire and elsewhere. They are afraid to return home and face massacres or loss of their land to new Tutsi masters. On August 28, Hutu Prime Minister Faustin Twagiramungu and three other Hutu ministers in the RPF government were removed from power eliminating any semblance of Hutu representation in the RPF administration.

Amnesty International expressed its concern for the members of the Rwandan Government, in particular Prime Minister Twagiramungu, who apparently criticized deliberate and arbitrary killings by elements of the RPA.[450] We can conceive of a new Palestinian-style problem where these people will be left in limbo for generations. The Security Council has suspended its embargo against delivery of arms to the RPF regime with the active support of the United States. President Museveni of Uganda has promised to intervene if the Hutus try to retake power militarily.[451]

Human rights activists, jurists and others must ask themselves

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[449]Desouter, Reyntjens, supra. and S/1194/1125 Letter by Boutros Boutros-Ghali, Oct. 1, 1994, in Annex, Preliminary report of the Independent Commission of Experts in accordance with Security Resolution 935 (1994).

[450]Amnesty International News Service: Internet. Rwanda: Human rights may be the main casualty of tensions in the Rwandese Government. Sender, Amnesty International@io.org.

[451]Resolution 1011. The embargo was suspended until September 1, 1996. See also "L'embargo sur les armes au Rwanda suspendu," La Presse, Montreal, August 27, 1995.

some serious questions. Is it not important to avoid the trap of accepting basic "truths" set forth by the dominant powers? Is it not a danger that Non-Governmental Organizations (NGOs) funded by national governments complacently accept government policies and, in doing so, act as propagandists without proper investigation. Human rights crusades are fraught with risks and can be easily manipulated. Human Rights Watch is now criticizing France for allegedly supplying arms to the Hutus exiled in Zaire although it never condemned the armed invasion of Rwanda in October 1990. To our knowledge, no northern based human rights organisation condemned the invasion of Rwanda from Uganda. Do these organisations take seriously the African human rights treaties which, as we have seen, not only recognize individual and collective rights but also create obligations on Governments to prevent armed invasions of home countries by refugees residing in neighboring countries? Do they take into consideration the principles of Vienna whereby all human rights are considered as an inseparable whole?

Most of these organisations portray the RPF and the Tutsi population as the victims and the Hutus as authors of mass murder. No questions are asked about the RPF invasion. Few human rights organisations question the unilateral actions of the Security Council in creating international criminal tribunals which violate basic legal principles. Human rights organisations seem to have forgotten the principles of Vienna and the principles of Nuremberg. They forget that the planning of war and the violation of national sovereignty are probably the most serious possible violations of human rights. By limiting human rights in war to the narrow scope of international humanitarian law, they are accepting the model set out by the dominant powers who control the Security Council.

I invite human rights organisations and activists, and lawyers' human rights organisations including the International Association of Jurists to undertake a serious reflection on these issues. It is our duty to help to resolve problems instead of compounding them. Human rights law must evolve and look for root causes. It must not ally itself blindly with the powerful and rich against the powerless and marginal peoples. It is no longer sufficient to tinker with crises which are ripe for explosions. The reinforcement of the principles of international law is a prerequisite for avoiding future Rwandan-style crises. We hope that the Tribunal for Rwanda in its present form will not sit. Indeed, Kenya has courageously decided not to cooperate with the Tribunal as it is now constituted because it doesn't deal with the cause of the crisis, namely the invasion of Rwanda from bases in Uganda and the killing of the former

Presidents of Rwanda and Burundi on April 6, 1994. President Daniel Arap Moi has stated that anyone entering Kenya to serve a summons would be arrested on the spot.[452]

Any solution to the Rwandan crisis must be political. If ever it sits, the present International Criminal Tribunal for Rwanda will only prosecute members of the losing side in the war, the Hutu majority of Rwanda. It will protect the Tutsi criminals, bolster their hold on power in Rwanda and institutionalize one-sided impunity for Tutsi criminals. No political solution based on truth, punishment and justice will be found.

If the international community has a role to play in the reconstruction of Rwanda, it must be neutral and support examination of crimes committed by both sides inn the conflict. Any mandate should not be limited to violations of international humanitarian law and must include an examination of the causes of the conflict including the invasion of Rwanda from Uganda in October 1990. An independent criminal tribunal with a mandate to judge and punish guilty individuals from both sides of the conflict would be a positive alternative to the present Security Council Tribunal.

[452]Reuters, October 9, 199, Nicholas Kotch; and the Montreal Gazette, October 6, 1995.

INTERNATIONAL CRIMINAL COURT: UTOPIA OR REALITY? THE TRIBUNAL FOR THE FORMER YUGOSLAVIA

by
Prof. Dr. Zoran Stojanović, Yugoslavia[453]

By Resolution 827, on 25 May 1993, the UN Security Council established an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed since 1 January 1991 in the territory of the former Yugoslavia. By the same resolution it adopted the Secretary-General's report containing the Tribunal's Statute.

"To do justice, to deter further crimes and to contribute to the restoration and maintenance of peace" are the proclaimed three purposes of the Tribunal (First annual report of the Tribunal, 1994). How difficult it is to deny their legitimacy, especially when the heinous crimes of genocide and war crimes are in question. However, to what degree do they really have any connection with the establishment of this Tribunal and with its actions so far? This body has neither the legal basis to dispense justice by punishing and deterring crimes nor does it, in fact, possess the basic attributes of a criminal court. The restoration and maintenance of peace[454] is a clear political objective, but it cannot be the purpose of punishment or the goal of a criminal court. Since, by the way in which it was founded and its objective, the Tribunal, as an auxiliary body of the Security Council, cannot be a criminal court, what then is its true role and function?

The New World Order obviously aspires to restrict and abolish the state sovereignty of a number of countries in order to absorb them into that Order, one increasingly becoming an "imperium americanum." This true objective is ever harder to conceal, even with lofty argumentation. Its objective is the neutralization and elimination of situations standing in the way of the desired domination over the world, i.e., all situations which offer resistance to it will be handled under distorted international law and by the manipulation of the UN, even while resolutely rejecting suggestions that international crimes can be justified wherever and by

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[453]Professor of Criminal Law, University of Novi Sad, Yugoslavia.

[454]Chapter VII of the UN Charter.

whomsoever they have been perpetrated, including those endemic global situations which stem from an absolutely unjust world economic order.

The sovereignty of nation states must be defended against the tendencies of superpowers to expose peoples to the domination of anonymous and irresponsible forces, which, in fact, reflect economic power, out of any democratic control.[455] It is in that light that the mechanism of the ad hoc Tribunal should be interpreted as a means for achieving and maintaining domination of small and weak states, i.e., against uncooperative and disobedient regimes. In this connection, there is ample reason to conclude that the Tribunal is a political instrument of the great powers aimed at disciplining the disobedient, an instrument for labelling as war criminals all those designated as such by the international establishment. A war criminal is a person marked by those who wield power in the New World Order.

Perhaps more so than in any other area, the basic premises of some criminological streams (critical criminology, labelling approach, conflict theory, etc. are seen as justified. Playing into the hands of those pursuing this aim is the fluid and imprecise concept of "war crime." For instance, under the relevant international documents, "other inhumane acts" also constitute war crimes, and the Tribunal has adopted this in its Statute without any specific clarification, while from the standpoint of the principles of unambiguous legality, this constitutes an unacceptable general clause in criminal law.

It is not by accident that the Tribunal's Statute extended criminal responsibility to the realm of objective responsibility, which is unacceptable from the aspect of criminal law, namely holding criminally responsible not only the direct perpetrator, his accomplices and issuers of orders, but also those political or military superiors "if he knew or had reason to know that the subordinate was about to commit such acts..."[456] This is patently incompatible with genocide which features a pronounced subjective component (genocidal intent).

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[455] *Bernardini*, 1993, p. 25.

[456] Art. 7 of the Statute which has adopted inadequately but not accidently a modified provision of Art. 86 of Protocol I to the Geneva Conventions.

Further, the extensive powers of the Tribunal's prosecutor which he has given himself[457] in respect to the principle of nolle prosequi, allows him not to prosecute and indict accomplices in even the gravest of crimes if the evidence that the accomplice can give is considered necessary to secure conviction of a suspect.

In addition, those who founded the Tribunal seem to wish to be seen as the conscience of mankind, to arrogate to themselves the right to adjudicate what is right and what is wrong. The discharge of this dual political function has been made possible by those who drafted the Tribunal Statute adopting parts of a number of international conventions (which provide for the obligation of States Parties to incriminate given acts under their criminal laws) even though it is generally understood in criminal law and its basic principles, primarily as concerns the absence of the lex certa postulate, that it is impossible to apply the provisions of international conventions, not least because they envisage no sanctions at all. "The direct application of criminal law conventions would, at the present moment be impossible or would violate the generally accepted standards of criminal justice."[458]

The documents which are supposed to be the basis for the operation of the Tribunal do not make possible the realization of the principles of legality, legal certainty and legal equality. For example, the entire area of the General Part of Criminal Law is wholly unregulated without which application of criminal law in any European country is inconceivable. Incidentally, the vague and insufficiently specific language of these conventions which makes them totally unsuitable for direct application in the area of criminal law is not the result of diplomatic nonchalance as some would have it, but rather is the result of the fact that such ambiguity is consciously promoted for definite reasons.[459]

General principles which have not been regulated by legal norms, i.e., international customary law, cannot be the basis for the application of criminal law which by virtue of its nature requires a high degree of clarity and precision. The deficiencies, in particular in the

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[457]Prosecutor's Regulation No. 1 of 1994, as amended 1995, Tribunal Basic Documents, 1995.

[458]*Gardocki*, 1989, p. 94.

[459]*Gardocki*, 1989, p. 94.

sphere of substantive criminal law, are acknowledged even by those who in principle unreservedly support the founding of this Tribunal.[460]

In fact, the inappropriateness of invoking the general principles of law recognized by all nations in addressing issues of criminal responsibility which the Tribunal itself will have to decide, as invoked by the Secretary-General in the rationale offered for the proposed Statute of the Tribunal, is manifested precisely by the example which he adduces in respect to minimum age[461] for it is well-known that the age of maturity varies across countries and that no general rules exist in that respect.

This also applies to other principles of the General Part of Criminal Law, including the affects of an error on a question of law or an error on a question of fact. It is well known that an error on a question of law excludes criminal responsibility in some countries, while others have adopted the principle originating in Roman law (ignorantia juris nocet). While we are on the issue of errors on a question of fact and/or law, they are mentioned in the Tribunal's Statute[462] as the sole grounds for appeal, which constitutes an impermissible restriction and violation of the International Covenant on Civil and Political Rights adopted on 19 Dec. 1966 (ICCPR). There are a number of other breaches of the ICCPR in the Tribunal Statutes which constitute violations of the basic principles and standards of criminal law of civilized countries. The Security Council is not a parliament nor are its resolutions laws which are the only acts by which courts may be founded.[463]

Extraordinary efforts were undertaken to provide a legal basis for the founding and work of the Tribunal. Equally surprising is the position of the UN Secretary-General who claimed that there were no obstacles to a country's extradition of its own citizens for it was not an extradition of indicted persons to the Tribunal but, merely, their surrender or transfer! What then is extradition but precisely the surrendering of persons to stand trial. The term "transfer" is used in international criminal law for a number of different situations: e.g., the transfer of a convicted alien to

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[460] *Dolenc*, 1994, p. 457-460.

[461] Report of the Secretary-General, S/25704.

[462] Art. 26.

[463] See in respect of violation of Art. 14. *Trautwein*, 1995, p. 88.

serve his sentence in the country of which he is a national. In his opinion rendered in connection with Chapter VII as the legal basis for the establishment of the Tribunal, the Secretary-General analogizes the criminal tribunal with an auxiliary working body, the Compensation Commission, to manage a compensation scheme funded by Iraqi oil revenues in the context of the Iraq-Kuwait conflict.[464]

The Tribunal was set up as an auxiliary body of the Security Council on the basis of the provisions of Chapter VII of the UN Charter, a proposal never put forward by anyone in the lengthy debates that have swirled around the question of the establishment of a permanent international court for decades.

Even those who accept this basis for the establishment of the Tribunal for the former Yugoslavia emphasize that it cannot form the legal basis for a permanent criminal tribunal.[465] The restoration and maintenance of peace is invoked as the sole and exclusive basis for its establishment. If the provisions of Chapter VII are interpreted in so extensive a manner, then the Security Council could, for instance, dissolve a country's parliament, replace the head of state and similar acts, if it deems that country to pose a threat to peace, rather than to establish a court.

It is inherent in the nature of such measures that they are introduced vis-a-vis one or more countries which pose a threat to international peace. These create the impression that the establishment of a Tribunal is directed against certain states or parties to a conflict, jeopardizing the authority of the Tribunal and calling its impartiality into question.[466]

Consistently pursued, the purpose and the goal behind the setting up of the Tribunal could lead to the prosecution of those who pose a threat to peace in the assessment of the Security Council and the Tribunal. Conversely, those who have committed war crimes and genocide but are

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[464]Letter of Secretary-General to Deputy Prime Minister of FR Yugoslavia from 23 April 1994.

[465]*Kolodkin*, 1994, p. 395.

[466]*Kolodkin*, 1994, p. 395.

not in the view of the Security Council perceived as a threat to peace, could get away without being prosecuted.

Cooperative politicians and military commanders would not be prosecuted, let alone convicted, and uncooperative ones will be prosecuted as war criminals and perpetrators of genocide. Had the international criminal tribunal been founded in accordance with the norms of international law under a treaty, and primarily with the consent of the parties involved, the legal situation in respect of its legal basis would have been substantially different and one of the basic objections to the Hague Tribunal would be withdrawn.

The first proposal for the establishment of a Tribunal for the former Yugoslavia was the 1993 CSCE one which was more acceptable in respect to three crucial elements: the application of domestic law, the manner of establishment of the Tribunal and the time and commencement of its operation, namely after the restoration of peace.

However, the Tribunal should be viewed in the light of the manner of its founding: not as a real court but as a special auxiliary body of the Security Council, taking into account the global policy of the Security Council (or to put it more correctly the policies of several countries, and above all the U.S.A.) which articulate the political will and the decisions of the Security Council.

However, the fact that this is a quasi-tribunal which is guided by political aims makes it deleterious to human rights and freedoms. Even if one's genuine objectives are the protection of human rights, they may not be pursued through violations of human rights. Not even the gravest crimes may justify a departure from the elementary requirements of the rule of law, and it is inadmissible to resort, under the guise of a criminal court, to brute force and not law.

Viewed through the prism of the customary standards of criminal justice, the Tribunal figures as a legal leviathan which has already substantially discredited the justified, though hardly feasible, idea of an international criminal judiciary system.

The Tribunal's Statute and Rules of Procedure and Evidence are also largely in contravention of a number of international documents which guarantee civil rights and freedoms, established in legal literature.

What is at issue is whether the UN and its organs are under the obligation to respect international conventions.[467]

However, a totally different image of the Tribunal has been projected in world public opinion. Journalists have also had a hand in this by their irresponsible coverage of the civil war in the former Yugoslavia and their selective attribution of guilt to just one side in the conflict.

Regrettably, international bodies and various governmental and non-governmental organizations have also been the sources of accounts of crimes committed mainly by one side. By various resolutions, fact-finding missions and reports (somehow the facts always remain elusive), and even pamphlets and propaganda campaigns, these various bodies have convinced the international public that atrocities beyond the inevitable terrors of an armed conflict were committed in the civil war in the former Yugoslavia, Bosnia and Herzegovina in particular.[468] The public has also been convinced that only one side was guilty of most of these evil-doings.

Apart from serving to legitimize the Tribunal and justifying all kinds of sanctions against the party so charged, the objective was also to conceal the war crimes of those who cooperated with the great powers and also to hide what had been done by some other protagonists of the drama in the former Yugoslavia. What is even more worrisome is the reasonable assumption that this is the global strategy of the big powers, the testing ground for which is Bosnia and Herzegovina, i.e., the former Yugoslavia.

One-sided justice reveals the unfairness of the international legal system. During both World War I and II the Allies committed the same crimes against the Germans for which they later tried them, with most of those crimes, barring rare exceptions, never having been disclosed to the public. Similarly in respect to Japan, the worst example is the dropping of the atomic bomb on two Japanese cities, countenanced by the international public. "Had Japan or Germany so bombed an Allied power, there is no doubt that its perpetrators from the decision-makers to the crews of the planes that dropped the bombs, would have been tried and

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[467]See *Reinisch*, 1994/95 for numerous violations of the ICCPR in the Tribunal's Statute and Rules of Procedure and Evidence.

[468]Which, generalizations, exaggerations and sensationalism aside, this author believes to be true.

convicted of war crimes."[469] In addition to countless instances of war crimes in regional wars waged in the recent past, Bassiouni also addresses the bombing in Iraq of civilian targets and facilities as well as those protected under international law by the Allied forces, predominantly the U.S.A. In that case, as in all others, he concludes political interests prevailed over those of justice.

Although the world community has hoped for a permanent international criminal court since World War I, the world's major powers have prevented its occurrence.[470] Bassiouni did not address The Tribunal for the former Yugoslavia perhaps because he was directly involved in the controversial work of the UN Commission of Experts, and as a candidate for the Tribunal prosecutor's position, he was prepared to express enthusiasm for rapid action on war crimes committed only by one side in the Yugoslav civil war. Although this is not a tribunal of the victors, it is the tribunal of the stronger.

Though the Tribunal lacked legitimacy from its very inception, it cannot be ignored or underestimated. The world's political and economic establishment stands behind it.[471] In fact, the Dutch professor of international law who has resigned as Registrar of the Tribunal, criticizing some of its specific moves, points to such a link. "The United States...was a clear leader in the matter of the Tribunal," and "the U.S. Security Council appointed a group charged with collecting information for possible indictments."[472]

The United States also supported the controversial work of the UN Commission of Experts under Bassiouni whose university (DePaul) compiled a computerized database. "The United States also submitted almost five hundred documents indicating probable crimes, although there was some controversy behind the scenes about the withholding of supposedly classified information; it seconded almost two dozen officials

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[469]*Bassiouni*, 1992, pp. 231-233.

[470]*Bassiouni*, idem, 1992, pp. 233-234.

[471]Those well-versed in the situation in the Tribunal point to the link between the Tribunal and the pursuit of US policy aims.

[472]*Frankfurter Rundschau*, 21 February, 1996.

to help with preparation of prosecutions and it lobbied other states to vote for and otherwise support this effort in international criminal justice."[473]

It was also the United States that took the lead in seeking to expand the existing Tribunal to address war crimes in Rwanda. Is the United States the conscience of mankind? Why does it so strongly support these two tribunals and so strongly oppose a permanent international court? The answer is simple. Some American social scientists and criminologists discuss two types of international crimes perpetrated by the American government against other countries: intervention in their domestic affairs and war crimes.[474]

> "What would be the response of our political leaders and citizens if foreigners assassinated the president; foreign agents tried to influence the outcome of an election; a foreign power supported with money and weapons one side in a domestic dispute? Obviously we would not tolerate these attempts by outsiders...Such acts would be interpreted as imperialistic acts of war. The irony, of course, is that we have and continue to perpetrate such acts on other countries as part of our foreign policy."[475]

When U.S. soldiers were killing Vietnamese civilians, including infants, women and senior citizens, no captains, colonels, majors, or generals were ever convicted. Only one lieutenant was convicted of war crimes at My Lai, but paroled after minimal time in incarceration. This history does no great credit to humanitarian law.[476]

But in a civil war like that in former Yugoslavia, politicians and commanders are criminally responsible for war crimes or genocide even if they only should have known of the violations. Those who "should have known" should not be determined by American politicians. The political forces behind the establishment of the Tribunal, as a political instrument, are, judging by appearances, not keen on justice and fairness.

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[473]*Forsythe*, 1994, pp. 411-412.

[474]*Simon-Eitzen*, 1982, p. 219.

[475]*Simon-Eitzen*, 1982, p. 219.

[476]*Forsythe*, 1994, p. 417.

The apparent intentions of those who support the Tribunal are revealed by their threats of sanctions (economic, political, and military).

While a permanent international court is still an unattainable goal, because of the great powers are unwilling to concede that their citizens might be prosecuted by such an institution, ad hoc courts for small nations, weaker countries and unruly regimes are becoming a reality. The existing Tribunal for former Yugoslavia is not related to the pursuit of noble ideas. These may be carried out by a permanent international court someday with the ideals of justice, universality, and deterrence.

In the absence of a valid legal basis upon which the Tribunal can dispense justice, the legitimacy of the Tribunal as a criminal court must be suspect. Some claim that its' legitimacy derives from the fact that since it is not likely that the perpetrators of crimes will be taken to court in the former republics of the Yugoslavia, in light of the gravity of the crimes committed, it is certainly better to prosecute them in some form. Even if that were so, the numerous legal deficiencies and violations of basic legal principles of this Tribunal remain.

It is also not likely that corrupt politicians will be brought to justice for arms traffic, massive environmental pollution or organized crime, practices usually referred to as the crimes of the powerful which have become a problem of international proportions. Nonetheless, there is no likelihood of ad hoc international tribunals being established to prosecute countries that fail to comply with their obligations from international conventions designed to punish such crimes.

The principle of the separation of legislative, judicial and executive powers has also not been observed in the establishment of this Tribunal. Namely, the Tribunal was founded by a political and executive body (with regard to the International Court of Justice the executive function of the Security Council is evident from Art. 94 of the UN Charter) The Tribunal took over the prerogatives of legislative authority (formally, in conformity with the Statute) and adopted the Rules of Procedure and Evidence which it has repeatedly amended. The Tribunal has thus combined what even totalitarian regimes seldom do: police, prosecution, court, criminal investigation, indictment, adjudication, deciding appeals and executing sentences, i.e., punishment.

An interesting comparison is that to the notorious Stalinist processes and the infamous Cheka police in the Soviet Union. A research

scholar has observed[477] that Solzenitzin was wrong in assuming that this was a unique historical example. He claims that the Hague Tribunal for the former Yugoslavia has the same powers, with the only change being that cynicism in the name of outdated progress, has been substituted by cynicism in the name of the rights of humanity. Although it may be an exaggeration to compare the Tribunal with the Stalinist period in which millions of people were liquidated, it is nevertheless true that all these functions have been combined in a single body in the Tribunal and that this cannot be justified in an international criminal court.

Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide provides for the jurisdiction of: (1) the court of the country in the territory of which the crime was committed, and (2) such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction. A number of authors have pointed out that Article 9 of the Statute is at variance with the Convention.[478] Namely, neither the resolution on the establishment of the Tribunal nor its Statute provide for the acceptance of jurisdiction, but simply orders the cooperation of the countries involved.

Criminal responsibility for genocide in the Tribunal's Statute has also not been brought into accord with the Convention, it has been extended to the sphere of objective responsibility, or at least negligence, which is incompatible with genocide.

Perhaps one should not expect much from domestic courts in respect to the just punishment of the perpetrators of war crimes. Still less is to be expected from the Tribunal in the Hague, as there is every indication that its true goal is not the punishment of war criminals. The solution to the problem is to prevent wars in the first place. However, in the case of the former Yugoslavia, the "international community" and some countries in particular contributed to the outbreak of civil war in Yugoslavia. Some by political acts, others by proceeding under deliberate misconceptions.

CONCLUSIONS

If, in pursuance of Chapter VII of the UN Charter when the U.S.A. and some other great powers pose threats to peace and their

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[477] *Trifkovich*, 1996.

[478] See *Trautwein*, 1995.

military interventions have resulted, inter alia, in war crimes, the Security Council takes steps against such countries or establishes an ad hoc Tribunal to prosecute their politicians and citizens for violating or threatening the world peace and covertly or overtly victimizing entire nations, then the Tribunal for the former Yugoslavia may be recognized as fully legitimate.

However, some sincerely believe that the Tribunal can do justice and achieve its aim to punishing all those guilty of the gravest violations of International Humanitarian Law committed in the territory of the former Yugoslavia. For the Tribunal to have a modicum of legitimacy the following are the minimum requirements.

First, even-handed treatment of all the sides in the conflict and the indictment of all those responsible, whoever the perpetrators or the victims may be is necessary.

The most serious shortcomings in the realm of law should be eliminated and the Tribunal's Statute and Rules of Procedure and Evidence amended to that effect, particularly the elimination of the Tribunal's unlimited freedom to change its'regulation frequently.

In this connection, compliance with and full respect of obligations stemming from relevant international documents must be ensured, a usual practice, at least in European criminal law (including ICCPR standards and guarantees). Instances of serious violations of these guarantees in the documents of the Tribunal have been pointed out in legal literature.[479]

Since this is an ad hoc and not permanent court, the relevance of the Penal Code of the former Yugoslavia should be considered since the Tribunal's Statute fails to provide guidance on a number of issues. For the Tribunal to be invested with legitimacy, it should also renounce the strategy of force and imposition of cooperation contrary to ordinary legal practice. Rather, it should seek joint solutions and demonstrate respect for the legal systems of individual countries. Needless to say, objective responsibility has no place in criminal law, nor does responsibility

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[479]See, e.g., *Reinisch*, 1994/95.

stemming from negligence when criminal offences falling within the purview of the Tribunal are considered.

Although the creators of the Tribunal must be aware of the elementary deficits of law and legitimacy, a few of which are discussed in this paper, the prospects that something will be done to correct them are small. But, even if the essential revisions and improvements were to be made, there can be no justification for the policy of setting up ad hoc international tribunals, although it may render the cooperation of countries with the Tribunal already in existence more acceptable. The hope remains that, after the restoration of durable peace in the territories of the former Yugoslavia, conditions will be created for the perpetrators of these grave criminal offences to be more efficiently prosecuted and tried by the national courts.

The establishment of a permanent international criminal tribunal should therefore remain an ideal to strive to, despite the fact that the main obstacle to its establishment is the lack of will and, opposition to it, on the part of the great powers.

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TRIAL BY JURY FOR DEFENDANTS FROM COMMON LAW STATES TO STRENGTHEN ACCEPTANCE OF THE INTERNATIONAL CRIMINAL COURT

by
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INTRODUCTION

The International Law Commission and the Ad Hoc Committee on the Establishment of an International Criminal Court have worked very hard over a long period of time[481] in drafting the statutes for the proposed court to ensure that every aspect of criminal trials is considered from the viewpoint of every type of judicial system in the world. The Ad Hoc Committee enunciated three goals:

[The proposed] legal system should be transparent and efficient and aimed at enhancing the credibility and, therefore, the acceptability of the court..."[482]

The Ad Hoc Committee has discussed at length the selection of the triers of fact, that is, the judges, in order to make the court acceptable to states and citizens of states with varying legal systems by proving that it will provide fair trials and verdicts. Without such acceptance by states and their citizens, the judgements of the new court will not be enforceable. The Committee has considered the expertise expected of judges, from what states and regions they should be selected in relation to the state of the defendant(s), and their lengths of term.

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[480] Author, Minimizing Racism in Jury Trials: The Trial of State of California v. Huey P. Newton (Nat'l Lawyers Guild 1968), Jury Selection in Civil and Criminal Trials (2 vols.)(LawPress 1984,1985). Executive Director, Meiklejohn Civil Liberties Institute, Berkeley, CA, USA.

[481] Report of the International Law Commission on the work of its 49th session (2 May-22 July 1994), GAOR Supp. 10 (A/49/10), pp. 22-194; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR 50th session,Supp. 22 (A/50/22)(1995), pp. 1-60.

[482] Ad Hoc Committee Report, P 38.

All of these questions assume that the best judges of the facts and the law in the new international criminal court will be lawyers, many of whom will also be judges in their own states.

This paper proposes that defendants from states that now provide jury trials in criminal cases be permitted to have jury trials in the new International Criminal Court. It does not suggest that non-jury states change to a jury system or that defendants from non-jury states be afforded jury trials in the new International Criminal Court.

Using today's technology in creative new ways, it is possible to select an international jury of peers of defendants from so-called jury states in cases brought before the proposed International Criminal Court, and it is possible to do this without the expenditure of inordinate amounts of money or time. It is therefore appropriate to discuss whether defendants in cases before the new Court should have the right to request a jury trial on charges of great importance to society as a whole: genocide, war crimes, crimes against humanity, and crimes against peace.

First let us consider whether this is a good idea and then let us discuss the difficult, but no longer insurmountable, technical problems.

ARGUMENTS IN FAVOR OF PERMITTING JURY TRIALS

Lawyers and scholars in jurisdictions in which jury trials in criminal courts are the customary practice are convinced that defendants' rights to decide to have a jury trial can have several important consequences for the administration of justice and affirmation of democratic principles in their jurisdictions.

1) This provision will improve the acceptance of an international court because states can truly tell their citizens that the rights they would have as defendants in national courts will also be available in the new International Court.

2) Every criminal trial is a morality play, with the state (through the prosecutor) writing the prologue, the prosecution and defense battling through three acts, and with the jury writing the epilogue/denouement. While one of the goals of each trial is conviction of the guilty/acquittal of the innocent, another goal is engaging the public in considering their own rights and responsibilities in relation to the crime being charged. From this viewpoint, calling on ordinary citizens to participate in the trial/play

engages their attention and the attention of the general public, who wonder how they would act if they were jurors.

3) The process of selecting the jury provides the media and the public with an opportunity to probe the underlying social issue in a case, e.g., racism or political repression. Media coverage of the questions asked during voir dire questioning of jurors leads to people asking each other these questions and thinking about their own underlying prejudices.

4) The examination and cross-examination of witnesses in a jury trial make it necessary for lawyers to move beyond the specific legal issues to appeal to the ordinary person's sense of fair play and justice.

This tends to lead to 5) greater popular respect for the jury's ultimate verdict.

6) The very process of compiling names for jury lists shows that the trials is part of community concern and that ordinary citizens have a role to play in judging their neighbors. This suggests that citizens have roles to play in preventing such crimes, in catching perpetrators, and that law is not a distant set of unknowable words with esoteric meanings but grows out of events involving citizens and violations can be judges by citizens.

7) Jury trials bring the law up close, so jury service will educate jurors about the international criminal law and the International Criminal Court, and they will spread the word among their own acquaintances and the media in their areas.

8) A jury verdict of guilt will be much more palatable in jury states since the defendants could not convince a jury of peers that there was reasonable doubt of their guilt.

EXAMPLES OF JURY TRIALS UNDER SIMILAR CHARGES

Since I am from the United States, my examples will be from my country. In the United States, several defendants have been prosecuted for crimes paralleling or related to the crimes that will be tried by the new international court. Lt. Oliver North was tried by a jury for his misconduct as a military officer while working with top officials in the Army and the executive branch to violate a law passed by the legislative branch forbidding U.S. aid to the Contras in Nicaragua. His trial by jury received extensive media coverage and caused the Government to submit

107 paragraphs of admissions of acts by Government officials in order to avoid having Government witnesses examined and cross-examined in front of jurors. They feared that jurors would be prejudiced against the Government by hearing Government witnesses testify in person over many days to misconduct by Government officials.[483] The jurors' unanimous vote to convict North kept the issue of governmental misconduct before the general public.[484]

One person in the U.S. has been tried for violating the Nuremberg Principles,[485] Lt. Calley, for his conducts in My Lai village in Vietnam in 1968. He was tried by a type of jury of his peers, i.e., by military men of his rank.[486] Although this was a military trial, the use of a board acting like a small jury enhanced the believability of the guilty verdict. Both people in the military and the general public accepted the verdict, and it could be argued that this was made easier because the verdict was not simply that of a single military law judge sitting alone, but was a verdict by fellow officers who faced the same kinds of orders and circumstances the defendant had faced.

Rejection of trial by jury on the part of guilty government officials is another factor suggesting the value of jury trials. In jury states, the people and the media will notice if indicted officials charged with war crimes, crimes against peace or crimes against humanity or with genocide, decide **not** to seek jury trials but to throw themselves on the mercy of the judge. In the U.S., the fact that several codefendants of Lt. Oliver North in the Contragate scandal pleaded guilty rather than face jury trials[487] was

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[483] These admissions are reproduced verbatim in 46 National Lawyers Guild Practitioner 65-96 (1989).

[484] United States v. Oliver North (DC DC Cr No 88-0080-020GAC), 656 F. Supp. 414 (DCDC 1987), 910 F.2d 843, 920 F.2d 940 (DC Cir), certiorari denied, 500 U.S. 941 (1991).

[485] As set forth in the Dept. of the U.S. Army, Field Manual FM2710, The Law of Land Warfare, sec. 498511 (1956).

[486] Calley v. Calloway, 9 Crim. Law. Rptr 3059 (instructions to court martial);382 F. Supp. 650 (MD Ga 1974);rev'd. 519 F.2d 184 (5th Cir 1975)

[487] United States v. Secord, PL-275a/20.5 and United States v. Hakkim, PL-275d/20.5, Human Rights and Peace Law Docket, Ginger, ed. (Meiklejohn Institute 1995).

important to the public. Armando Fernandez-Larios, captain in the Chileans secret police (DINA), pleaded guilty to murder in the assassination of Letelier.[488] Flowers, charged with white supremacist activity in Texas, also pleaded guilty in the type of case that might come before the International Criminal Court.[489]

Of course, every criminal jury trial does not end with a verdict that fulfills all three of the functions set by the Ad Hoc Committee. The most recent U.S. examples are the so-called Rodney King case[490] and the O.J. Simpson case[491]. But even these trials did cause massive public discussion of the underlying social issues in those cases: racism on the part of the police and prosecution in Los Angeles, and violence against women in marriage.

PANEL OF JUDGES NOT THE SAME AS PANEL OF JURORS

It is true that the Ad Hoc Committee is proposing a panel of judges to try each case, and the panel shall consist of judges from every region of the world. This is different from trial by a single judge, but it is not a trial by a jury. A jury consists of peers of the defendant, i.e., nonlawyer citizens selected after they swear to be bound by the rules requiring them to set aside their biases; to listen to the facts as presented

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[488] United States v. Armando Fernandez-Larios, PL-126/20.2 (DC DC 1987), Human Rights and Peace Law Docket (1995).

[489] PL-430/20.4 (ND TEX) Human Rights and Peace Law Docket (1995).

[490] The jury trial of four white Los Angeles police officers for unnecessarily assaulting and beating an African American motorist was moved from Los Angeles to a virtually all-white jurisdiction where the jurors acquitted all defendants of all charges, even after seeing a videotape proving the beating. This touched off seven days of revolt/riots in Los Angeles and throughout the U.S. PL-851/28.20, Human Rights and Peace Law Docket 1945-1993 p. 28.20 (Meiklejohn Inst. 1995).

[491] The African American defendant football star was charged with murder of his ex-wife and her male friend. The social issues raised by the trial were: wife-beating and police/prosecutorial bias against African Americans.

by the witnesses; to consider the law as presented by the judge and then to vote according to their consciences.

RECENT U.S. JURY TRIALS OF ACTIVIST DEFENDANTS RAISING SOCIAL ISSUES

Since the 1960s in the U.S., a series of jury trials have taught us many lessons about the value of selecting a jury and trying a case before a jury when the underlying issue in a case is of great social significance. The process of questioning jurors in cases of progressive defendants charged with crimes brought out the underlying issue in the case, which often was racism in society[492] or in the prosecutorial system,[493] or the fear of leaders of the military/industrial complex that the public would gain access to information about U.S. involvement, e.g., in Vietnam.[494]

The trials before the International Criminal Court will be the opposite of these trials in which IADL members defended progressive people who claimed their innocence. The defendants before the new court will presumably be reactionaries who were officials of governments or private corporations charged with crimes of racism and actions leading to aggressive war. So the job of the prosecution will be to uncover underlying fascistic tendencies in prospective jurors (who should be

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[492] One of the greatest shocks to people in the U.S. came when it took three months of questioning of 1,500 prospective jurors in a northern college town (New Haven, Connecticut) in order to select 12 jurors and 12 alternate jurors who could pass muster as not being infected with racism or who understood themselves well enough to know that they had racist tendencies that must be overcome in order to be fair jurors in the case of several Black Panthers, including Erica Huggins. Connecticut v. Huggins, et al. (New Haven Super Ct No. 15681 (1971).) The trial ended in acquittal.

[493] Shown in the arrests and trials of an African American Communist, in California v. Angela Davis, Santa Clara County, California Superior Court, case no. 52611 (1971); of African American Black Panthers, in Connecticut v. Huggins, op. cit. note 13; of California v. San Quentin Six, California v. Bingham, Marin County Superior Ct., No. 4094 (1974); of many African American prisoners involved in the prison revolt at Attica, New York, New York v. Attica Brothers,359 NYS 2d 699 (Sup Ct 1974).

[494] In the Pentagon Papers Case, United States v. Russo and Ellsberg, (CD California No. 9373-WMB (1972).)

rejected) and to uncover underlying democratic tendencies in prospective jurors (who should be saved from peremptory challenges by the defense). Prosecuting attorneys from jury trial states will use the same skills in presenting their charges and the facts to juries that they have used successfully in domestic cases. It will be their job to learn how to teach citizens about international crimes.

JURY SELECTION BY COMPUTER, TELECONFERENCING, AND TRADITIONAL METHODS IS FEASIBLE

Since it is now possible to send satellites to distant planets and to recover objects floating in space, and since it is now possible to use computers and imaging to ferret out biological secrets inside our bones, it is possible for lawyers to start using such modern technology to ferret out political secrets inside human minds and hearts. We can use e-mail questionnaires and teleconferencing to make the early strikes of names of prospective jurors who can not serve for various reasons, leading to the selection of a panel of prospective international jurors of peers of defendants to try a case in the International Criminal Court.

The process of selecting a jury in an international case could proceed very much like the process of selecting a jury today in a criminal case in jury states, multiplied exponentially.[495]

1. In order to ensure that the law of the new International Criminal Court is uniform in all trials, whether judge trials or jury trials, two judges should preside over the jury trials in the International Criminal Court. One judge would be from the panel of judges sitting in non-jury cases who would decide all issues of substantive law. The other judge from the panel of judges sitting in non-jury cases would be from a jury state and that judge would decide all issues of procedure unique to jury trials.

2. For a particular trial, the administrative officer of the court responsible for that trial would confer with the two trial court judges and counsel for the prosecution and the defense and then establish basic rules: how many jurors to receive the basic jury questionnaire and from what

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[495] Since my experience is with the jury system in the United States, I will be using U.S. examples, which are similar to but not identical with jury systems in other jury states.

states; dates for each side striking obviously biased or otherwise unqualified jurors (due to occupations indicating the likelihood of prejudice for or against defendants, health problems, unavailability due to work schedules or family problems, etc.); how many jurors to receive the questionnaires prepared by prosecution and defense as to this specific trial; date for receiving replies; number of jurors to be initially interviewed by video satellite; dates for prosecution and defense lawyers striking prospective jurors for cause; number of prospective jurors to be summoned to the trial for face-to-face questioning; number of peremptory challenges for each side; who is to conduct the voir dire jury questioning: primarily counsel for each side, or primarily the trial judge, etc.

3. Since the Ad Hoc Committee is considering the possibility of holding a trial in the state where the alleged act occurred to save money in transporting witnesses, jurors could be selected from that state and from neighboring states with jury systems to save some of the cost of transportation.

In the beginning, lists of potential jurors could be generated by random selection of a certain number of names from lists of jurors in every jury state participating in this process.

4. A Non-governmental Organization (NGO) could be assigned the task of preparing the international database of names, addresses, and other essential information from jury forms in participating states. They could conduct a random selection of so many names from the pool as the presiding judge ordered and send out e-mail questionnaires to them. The cover letter would explain that the trials would probably take place in a state other than the state of the prospective juror, the court could only pay a stipend (in the U.S., this is sometimes as low as $5/day throughout the trial), and daily attendance would be required over a lengthy period of time.

5. On receipt of the completed questionnaires by e-mail, the NGO could enter the data. They could strike the names of jurors whose answers pose obvious problems of conflict of interest, show overt prejudice for or against the defendant or prosecutions, or show inability to attend the trial, or showed blatant inability to understand the facts of issues, etc. All of their decisions on these matters would be made according to strict rules and would not require the NGO's to make judgements inappropriate to jury clerks in jury states.

This work would be parallel to the work of the Red Cross/Red Crescent for the UN on catastrophes. The United Nations Association, World Federalists, or Soroptimists might be willing to undertake this work, under the guidelines of the International Criminal Court.

6. The NGO could also randomly select 100 (or some other appropriate number) for preliminary voir dire by video satellite, as some children and other witnesses are occasionally questioned now when they cannot appear in court for some reason.

7. Finally 36 or 48[496] prospective jurors would be transported to the courtroom where they would be questioned as in any jury case concerning relevant issues: prejudice for or against the prosecution or the state from which prosecutors come or the state where the alleged acts occurred, prejudice for or against the defendant, for or against any witnesses expected to be called, for or against the UN, international law, peacekeeping, weapons, making money from selling munitions, particular ethnic groups, etc. The process of voir dire teaches jurors the laws of the International Criminal Court. In order to ask questions and get answers, attorneys must explain each crime over and over to each juror. Voir dire probes prejudgments: that government officials must be good and law abiding;that minority groups must be bad and stirring up trouble, etc.

LET US ENCOURAGE THE AD HOC COMMITTEE TO PROPOSE THIS INNOVATIVE IDEA

The commitment to trial by jury is as strong in jury states as the commitment to judge trials is in non-jury states. There is nothing to be lost by providing jury trials in the new International Criminal Court and much to be gained. It is now technically feasible to select a jury of peers for defendants from an international database of qualified jurors in jury states. The use of such juries will enhance the prestige of the new court in jury states and will have no negative impact on the prestige of the court in non-jury states.

Certainly the system of jury selection in the International Criminal Court would become more representative and democratic over time, as the NGO's and court personnel work with the computer and

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[496] The cost of transporting and paying per diem expenses to 36 or 48 jurors would be considerably less than almost any maneuver by the Blue Berets, let alone the military exercise of any member state.

videoconferencing components. This was certainly the experience in the United States. It was only in the 1930's that the U.S. Supreme Court ruled that African Americans could not be deliberately excluded from juries trying African American defendants.[497] By 1996, jurors in many states are selected from voter lists and also from lists of people with automobile licenses and people who pay property taxes.

[497] In the Scottsboro cases, Norris v. Alabama, 294 U.S. 587 (1935).

EQUAL JUSTICE OR SUBSTANTIAL INJUSTICE? THE CRISIS IN PROVISION OF CRIMINAL DEFENSE FOR THE INDIGENT ACCUSED IN THE UNITED STATES

by
Shanara Gilbert, U.S.A.[498]

In South Africa, we breath deeply of the sweet, warm morning air of freedom following the decades-long, cold and bitter night of apartheid's brutal repression and iniquitous racism. With new and enlightened leadership, South Africans are now engaged in raking the hard but thawing earth of their society, to uncover the smothered seedlings of justice and fairness, to fertilize them with ideas, considered thought and discussion, and to encourage their widespread growth by building and reforming institutions and systems for their people. The legal system, emerging from shadows of illegitimacy from its days as one of the cornerstones of the apartheid structure denying equal justice to black citizens, is a major area of reform and rebuilding, with justice and fairness now as cornerstone ideals.

The concept of "legal aid" for the poor is internationally recognized Governments throughout the world have developed systems that attempt to provide legal services to the poor.[499] The partnership of the organized bar and government in the development of legal aid systems has historic and venerable roots in many countries. The principle upon which this partnership has been based is that justice should not depend upon the amount of wealth held by an individual; that fundamental fairness requires that every person, regardless of race, ethnic origin or economic station, is entitled to the protection of the law; and that the

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[498]Before her tragic accidental death in Cape Town, South Africa immediately after presenting this paper, Shanara Gilbert was Associate Professor, City University of New York School of Law, and a member of the Board of Directors of the National Conference of Black Lawyers of the United States and Canada. [See the Dedication for more details of Prof. Gilbert's unstinting contributions to human and legal rights].

[499]See, *Legal Aid*, 5 Maryland Journal of Contemporary Legal Issues, Issue 2, (1994) (Symposium Issue on legal aid and legal services in selected countries).

potential loss of liberty or life triggers substantial rights to due process that can best be protected by the "guiding hand of counsel."[500]

My intent in this paper is to juxtapose the situation in South Africa and in the United States in respect to the provision of lawyers for the indigent accused, highlighting the particular situation in the United States. Many countries look to the U.S. as a model in many spheres including reform of the legal system and, in particular, the criminal justice system. While the U.S. promotes an image of democracy, fairness and justice, there is another reality for the poor and the powerless.

The current wave of ideological neo-conservatism in the U.S. nurtured during the past two decades threatens the survival, let alone the advancement, of the poor and particularly of people of color, who are disproportionately represented among the poor. Ideological conservatism in government and the courts has provided a permissive environment for racism and racist violence in American society. We have witnessed the rapid expansion of white supremacist organizations that openly espouse and commit murder of black people and immigrants, including the yet-unsolved bombings of many black churches in the south and the recent cold-blooded murders of an African-American couple walking the streets of a southern town.

Meanwhile, unsuccessful attempts to legislate against hate speech and racial violence are fought at every turn by conservative forces and justified as protected first amendment rights to freedom of speech. Police violence, through beatings, intimidation and murders of black, Latino, Asian, Native American and other poor people, go virtually unpunished, and are often justified as self-defense or the necessary suppression of people accused of "resisting" the power of the law. The objectification of people of color and the poor as unwelcome, perpetual parasites on a nation bound up in the privilege of race and class status allows great harm to be done to large numbers of people in the name of shrinking government and the enlargement of private profit.

Access to justice for the indigent accused in the United States must be viewed in the context of this wave of ideological conservatism that directly affects political decisions to decrease funding to lawyers for the poor. The idealism reflected in early Supreme Court decisions mandating the right to counsel and equal access to justice for the accused,

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[500] *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

regardless of wealth, is no longer evident amid vast funding cuts affecting the availability and quality of defense for these poor accused of crime. The relationship between racism and poverty in the enforcement of laws and imprisonment rates is shockingly obvious. But these clear facts of American life draw not sympathy, but justification from a government increasingly hostile towards the poor and people of color. In short, the United States is moving hastily backward in its commitment to individual rights and civil liberties and its commitment to equal justice, which many in the progressive community argue have never actually been secured. American law has historically and consistently participated in the maintenance of racial subordination and class privilege.[501] Any aid obtained from the Bill of Rights has depended upon aggressive and creative advocacy by progressive lawyers, supported by mass movements determined to have the law do what it says, rather than be simply interpreted by judges and legislators of privileged status in the isolation of their chambers.

Impediments to access to justice for those accused of crime are different in both the U.S. and South Africa, but show clear similarities in that racial discrimination and poverty have combined to deny justice. In South Africa, these impediments are the result of the traditions and attitudes in law and society developed under apartheid, difficult to remove, even as change takes place. In South Africa, in 1991, over 550,000 people appeared in the magistrates' courts (lower courts) without representation.[502] In 1988-89, over 129,000 people went to prison without benefit of legal representation.[503] The vast majority of sentenced

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[501]See A. Leon Higginbotham, Jr., IN THE MATTER OF COLOR: *Race & The American Legal Process: The Colonial Period* (Oxford Univ. Press, 1978); Haywood Burns, *Racism and American Law: A New Course in Legal History,* 1970 Toledo L. Rev. 903 (1970) (discussing the uses of the law to maintain racial subordination
of blacks, Asians, Native Americans and Latinos throughout the history of the United States).

[502]Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa,* 75 Boston Univ. L. Rev. 1, 19 (1995) (*citing* Desiree Hansson, *Selected Statistics on the South African Criminal Justice System, 1991(4)* S. Afr. J. Crim. Just. 344, 356).

[503]2 South African Human Rights and Labour Law Yearbook, 133 (1991).

prisoners, or 97 percent, are black.[504] Moreover, the legal system has advantaged whites and disadvantaged blacks, whether they are clients, students or professionals. Entrenched separateness and exclusionary practices have resulted in sharp disparities in resources in legal education between white and black universities; erected impediments for black law graduates in obtaining positions in firms for the service of their articled clerkships, leading to the resultant scarcity of black lawyers.[505] Whites have had a monopoly within the legal profession. Since the majority of those accused of crimes are black and poor, and, as in the U.S., their plight is of little concern to the privileged white community, relatively few white lawyers have been willing to serve as counsel for the poor. For its 32 million people, a great many of them poor, there are approximately 8700 practicing lawyers, about 1000 of whom were advocates eligible to try cases in the Supreme Court.[506] The system of the divided bar, where, until very recently, only advocates, rather than all attorneys were permitted to practice in the higher courts, greatly diminished the available number of lawyers to serve the indigent accused.[507] Through its Judicare system, the government provides a system of indigent defense, operated by the Legal Aid Board, under the auspices of the Ministry of Justice. Until recently, the Board had allocated its sparse resources through

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[504]Id. Even in a country where people of color comprise the majority of the population, there is overrepresentation in the prisons by Africans and people of mixed racial descent. African people and people of mixed racial descent comprise 80% of the population. Asians comprise 3.2% and white comprise 17.3%. Ogletree, *supra* n. 4 at 14 n.83.

[505]Of the total of 8700 lawyers, approximately .08%, or 700, are black. Ogletree, *supra* n. 4 at 16 and n. 100 (citing D.D. Mokgatle, *The Exclusion of Blacks from the South African Judicial System* , 3 S.Afr. J. Hum. Rts. 44, 45-46 (1987) and David McQuoid-Mason, *Legal Representation and the Courts, in* 1 South African Human Rights and Labour Law Yearbook, 1990, 208 (1990)).

[506]Ogletree, id. at 19.

[507]In 1995, Parliament passed legislation permitting attorneys of the side-bar to practice in the Supreme Court. This development will greatly enhance the availability of lawyers in felony cases.

provision of counsel only in the most extraordinary of cases involving the indigent accused.[508]

Although the right to counsel of choice has existed in South Africa, it is only through the new Constitution that there has evolved a right to counsel at state expense.[509] The Legal Aid Board and the people of South African now wrestle creatively with the challenge of providing counsel for the thousands of unrepresented accused in the criminal courts. Through litigation,[510] parliamentary debate, discussions initiated by the new Ministry of Justice and progressive legal organizations such as NADEL and the Black Lawyers Association among legal academics, members of the traditional bar associations, and government providers of

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[508]As of 1994, the Legal Aid Board had been in existence for 23 years. During that period, approximately 442,000 legal aid applications were granted. In the years between 1990-1994, the years of transition from apartheid to democracy, 239-809 applications were granted. In criminal cases, between 1990 and 1994, there was an increase of 415% in the granting of applications for legal aid. *Annual Report, Legal Aid Board. 1993-94.*

[509]The new South African Constitution provides that

> [e]very accused person shall have the right to a fair trial, which shall include the right...to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights.

S. AFR. CONST. ch. 3 § 25(3). See Ogletree, *supra* n. 5, for a thoughtful analysis of the possibilities and limitations afforded by the "substantial injustice" qualification.

[510]See, *e.g.*, *S v. Khanyile and Another,* 1988 (3) SA 795 (N.P.D.) and *S v. Rudman and Another, S v. Mthwana,* 1992 (1) SA 343 (A.D.) (While recognizing that counsel is indispensable to fairness to an accused, *Khanyile* adopted a qualified right to counsel, where special circumstances of the accused and the case required counsel to be appointed. The Court of Appeals in *Rudman* overruled *Khanyile* essentially on the grounds that, since no comprehensive right to counsel existed in statute or court decision, to hold that one exists would be impossible in light of social, political and economic factors in South Africa. For an excellent analysis of the reasoning and potential impact of these cases in South Africa, see Ogletree, *supra* n. 5.

legal assistance to the poor,[511] there has developed a sound basis for the ideal that the provision of counsel to the poor is indeed fundamental to fairness and justice.

The right to counsel, however, is an ideal, and the new Constitutional provision for the right "where substantial injustice would otherwise result" is a qualified one based on the economic and social realities existing in South Africa at the moment. Among these are the scarcity of lawyers, the high rate of arrest and prosecution for crime and the delicate economic balance that the government must strike in the allocation of new rights, including economic and social rights. Various pilot projects initiated to expand capacity for criminal defense include the Public Defender Office in Johannesburg and the contracting by the Legal Aid Board with university legal aid clinics staffed with one or two supervising attorneys and graduate law students (articled clerks) which serve the magistrates courts.[512] Other proposals, such as allowing limited practice for people with lesser university law degrees, and the recognition of paralegals are other methods of expanding access to justice for the poor. These creative proposals demonstrate an affirmative commitment on the part of legal aid providers, the legal community, the government and the public to ensure that, despite economic and social conditions, the most that can be done to attain the ideal of legal aid for all who are in need will be tried. The new South Africa is pregnant with possibility for equal justice in fact.

In stark contrast stands the United States.

In the United States, by its constitution and Bill of Rights, every person accused of a crime is guaranteed "the assistance of counsel in his [or her] defence."[513] Although this right has been enshrined in the Bill of Rights for over two hundred years, it was only in 1963 that the right was interpreted to require a lawyer for every person accused of any felony,

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[511]The Ministry of Justice, under the direction of Minister Dullah Omar, sponsored a Legal Forum held in Cape Town in April, 1994, at which several topics, including the right to counsel, were considered.

[512]The Attorneys Amendment Act 115 of 1993 permits service of articles by law graduates in law clinics and community service agencies.

[513]U.S. Const. amend. VI.

including those who could not afford to hire their own counsel.[514] The right was later extended to include any offense where the accused faced a loss of liberty.[515] The right to a lawyer was deemed fundamental;lawyers being "necessities not luxuries,"[516] for a variety of reasons that included the fact that the massive resources of the state in its prosecution were amassed against a single individual with no resources with which to mount a defense. The question of resources and the lack of parity between a defendant and the state provided the basic justification for requiring government, as a matter of fundamental fairness, to provide counsel, at public expense, for the indigent accused.

The continuing question in the U.S. is whether, despite the constitutional mandate requiring the provision of counsel to the accused, a defendant is still denied due process and fundamental fairness, where the government, exercising its political will, deprives the lawyer of resources for preparation, training, support and professional independence. Litigation on this question has produced an affirmative answer to the question in some instances, where clients have sued states for the failure to provide adequate resources to their lawyers,[517] or for forcing lawyers to carry crushing caseloads.[518] As both a political question and a policy question for progressive lawyers to address is our

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[514]Gideon v. Wainwright, 372 U.S. 335 (1963).

[515]Argersinger v. Hamlin. 407 U.W. 25 (1972).

[516]Gideon, supra 372 U.S. at 344.

[517]See, e.g., State ex rel. Stephan v. Smith, 747 P.2d 816 (Kansas 1987) (holding that the requirement that attorneys, paid only $30 per hour in criminal cases, to personally pay for expenses of representing clients was a taking of property without due process of law in violation of the 5th amendment of the U.S. Constitution); Arnold v. Kemp, 306 Ark. 294 (Ark. 1992); Wilson v. State, 574 So.2d 1338 (Miss. 1990) (same); State v. White, 537 So.2d 1376 (Fla. 1989) (overturning a fee cap of $3,500 in a capital case on the grounds that it violated the 6th amendment right to effective assistance of counsel).

[518]See, e.g., State v. Joe U. Smith, 681 P.2d 1374 (Ariz. 1984) (holding that excessive caseloads violated the constitutional right to effective assistance of counsel); Ligda v. Superior Court of Solano County, 85 Cal. Rptr. 744 (Cal. 1970) and Escambia County v. Behr, 384 So.2d 147 (Fla. 1980) (both Ligda and Behr granted caseload relief where constitutional violations were alleged).

interest in ensuring that the poor are well-represented. Although there are a variety of forms of indigent defense systems in the U.S.,[519] they are almost uniformly chronically underfunded.[520] "Nationwide, governments spend three times as much on prosecution services as they do on indigent defense. Federal grants to state and local law enforcement and prosecution agencies are 40 times more than those made to indigent defense programs."[521] Economic arguments justifying cutbacks in defense services contradict evidence that public defender offices, rather than contracted-for services, are more economical and ensure greater quality control in the delivery of defender services.[522] Contract systems encourage mediocrity in the representation of the criminally accused, through the incentive of financing disposition of high volumes of cases through guilty pleas. High volume disposition discourages challenging of evidence through investigation and research or through means of potentially lengthy trials. Quantity, not quality, is the express concern of elected officials, many of whom are former prosecutors and who show open disdain for criminal defendants and excessive support for law

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[519]Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 Law and Contemporary Problems (Duke Univ. School of Law) 31 (Winter, 1995) (Systems include public defender agencies funded at either federal, state, country or local level; government-administered assigned counsel systems utilizing a roster of attorneys; contract systems with private counsel of associations of lawyers and other models.)

[520]Richard Klein and Robert Spangenberg, *The Indigent Defense Crisis*, report prepared for the American Bar Association Section of Criminal Justice (August, 1993). Total justice spending by federal, state and local governments in fiscal year 1990 was $74 billion, or three percent of total spending. Of this amount, only 2.3% was spent on public defense, while 42.8% was spent on police, 33.6% on corrections, 12.5% on courts and 7.4% on prosecution. Id. at 1, citing *Justice Expenditure and Employment, 1990 (Bulletin), U.S. Department of Justice, Bureau of Justice Statistics, (September, 1992).*

[521]Mary Broderick, Bob Burke, Addie Hailstorks, *Gideon v. Wainwright Turns 30 on March 18, 1993: Right to Counsel An Empty Promise For Many Poor Defendants*, National Legal Aid and Defender Association, March 4, 1993 at 1.

[522]See Spangenberg and Beeman, *supra* n. 21, at 34-37. See generally, Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. Rev. L. & Soc. Change 581 (1987) (highlighting cost effectiveness of public defender systems compared with assigned counsel programs and other forms of indigent defense systems).

enforcement.[523] These elected officials irresponsibly wield their power, under the guise of protecting the taxpaying public, to enhance advantage for prosecution and law enforcement and the privilege they protect, while severely handicapping the defense.

The results of failure to fund is woefully inadequate service to the client became an inability to hire investigators and expert witnesses, caseloads that preclude adequate research of rapidly-changing law and case analysis[524], the difficulty in interviewing witnesses or preparation of social services referrals and demoralization of otherwise dedicated lawyers.[525] Important defenses or sentencing issues may be frequently overlooked in the haste and stress of representing too many people.[526]

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[523]For example, in New York City, Mayor Rudolph Giuliani, who was the former United States Attorney for the Southern District of New York, has been responsible for the elimination of quality legal aid for the poor, while openly defending police violence, through continuous praise for their "bravery." In Philadelphia, Pennsylvania, Mayor Ed Rendell, former District Attorney for the city, has been a fervent pro-police and anti-criminal defense advocate.

[524]One factor enhancing U.S. incarceration rates and challenging the work of criminal defense lawyers is the increasing federalization of state crimes. A crime prosecuted at the state level may be subject to federal charges that use the state conviction as evidence in support of the federal prosecution. Defendants thus face penalties in both state and federal courts, requiring defenders to be knowledgeable about very different law and procedure of both systems. See Leah Prewitt, *Out of the Frying Pan* , The Champion, March, 1996 at 12. The Champion is the magazine of the National Association of Criminal Defense Lawyers (NACDL).

[525]See Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 Law and Contemporary Problems 81, 85-89 (describing the exacting toll imposed by underfunded public defender programs upon lawyers and clients).

[526]See Joyce Purnick, "*Another Frill: Giving the Poor Good Lawyers*", New York Times March 11, 1996 at B-1. (Describing the experience of an accused, insisting upon his innocence, who was persuaded to enter a plea of guilty by a busy assigned lawyer. When he refused, he sought out the representation of the Neighborhood Defender Service of Harlem, a pilot defender program emphasizing early entry into cases and a team defense that includes investigators and social workers. Upon investigation, evidence was revealed that another person had committed the crime. The Neighborhood Defender Service of Harlem has been eliminated by the City of New York as

The confidence of clients in their lawyers is lost, if indeed it ever existed. Lawyers who are committed to doing thorough work required by criminal defense are disabled by underfunding of services, and are unsupported by public opinion that ignores the presumption of innocence and equates "justice" with revenge and punishment. The refusal of local, state and federal governments to adequately fund indigent defense, because of political convenience and sensationalist use of the issue of crime by an increasingly right-wing ideological movement, undermines and, even, contradicts, the spirit and intent of the Bill of Rights. To borrow from the language of the South African constitution, the undermining of the right to counsel, in its very provision to the poor, results in a "substantial injustice" to the poor accused of crime.

Criminal justice policy across the country reflects public frustration with crime, yet strongly suggests a more sinister objective that results in vastly disproportionate rates of imprisonment for black people and the poor. Politicians enact multiple compounds of prison sanctions in state and federal legislation year after year, supported by a public, uninformed about the complexities of the legislative process and ignorant of the impact of political rhetoric on that process. Mandatory minimum prison sentences, particularly for drug offenses, have caused a dramatic upswing in the billion-dollar construction of prisons and the filling of those prisons with the poor, especially the young, black poor.[527] Drug

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an alternative defense
service provider to the Legal Aid Society. The Legal Aid Society's budget has been cut by $13 million, and it was prohibited from bidding on a city's for-profit contract to private firms of lawyers, some of whom are laid-off staff lawyers from the Legal Aid Society, with little administrative track-record in providing comprehensive defense services. *See* Matthew Goldstein, *"3 Bidders Win Right to Obtain Defense Work"*, N.Y. Law Journal, February 8, 1996 at 1. The Legal Aid Society remains the largest criminal defense agency in New York City at severely reduced capacity. It was forced to defend its existence by asserting its ability to assume increased caseloads and dispose of cases more quickly with fewer staff. See, "The Legal Aid Society As the Primary Defender in New York City," Memorandum from the Board of Directors, October, 1995.

[527]See, e.g., State Senator Catherine M. Abate, *"Dollars and Cells: An Analysis of Governor Pataki's Sentencing Reforms and Proposals"*; January, 1996, at 1 (noting that in New York State alone, current mandatory imprisonment sentencing proposals would result in a cost in one year of $476 million, and that as a result of the 1995 Sentencing Reform Act construction

policy has emphasized punishment over treatment or education, and is a major cause of the escalating imprisonment rates. Severe racial disparity exists in the imposition of sentences for drug cases. Federal and state statutes outlawing cocaine provide for vastly more severe sentences for possession or sale of "crack" cocaine which is more prevalent in urban black neighborhoods than for powdered cocaine used more in suburban white neighborhoods. This suggests, as one federal judge found that "race rather than conduct [is] the determining factor" in the disparity of sentencing.[528]

One in every three black men between 18 and 29 years old is either in prison or under some control of the criminal justice system.[529] That is nearly one million young men, whose lives are circumscribed by either prison bars or the disenfranchisement from the political process that results from a criminal conviction, and for those, lucky enough to be on probation or parole, severely reduced options for employment. The rate of imprisonment of women, particularly black women has increased threefold in the last decade, resulting in the dissolution of families and the well-being of children, and destroying life options for the young women themselves. The U.S. prison population has reached over 1.5 million. In most states, the proportion of prisoners who are people of color is over 70 percent.

Those in political power, including governors of states and recently, the country's president, in apparent violation of the most

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costs for the state will rise to $2.5 billion by the year 2005. Further, if 1996 "tough on crime" sentencing legislation is superimposed on existing legislation, costs will escalate to $3.5 billion.

[528]United States v. Clary, 846 F. Supp. 768, 770 (E.D. Mo. 1994). See also, Minnesota v. Russell, 477 N.W.2d 866 (Minn. 1991) (challenge to state conviction for crack cocaine showed that African Americans constituted 96% of those charged with possession of "crack" cocaine, while white Americans comprised 80% of those charged with possession of powdered cocaine; statute providing for different penalties held to violate equal protection clause of the state's constitution). See also, Douglas C. McDonald and Kenneth E. Carlson, *"Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger under the Guidelines?"*, 6 Federal Sentencing Reporter 223 (January/February 1994).

[529]Marc Mauer, *Young Black Men and the Criminal Justice System*, The Sentencing Project, Washington, D.C., (1995).

constitution principle of the separation of powers encroach upon the domain of judicial decision-making through threats against judges who enforce constitutional rights in criminal cases that they be removed from the bench.[530] In New York, the governor removed the state's only African American chief prosecutor from a case when the prosecutor insisted on following legal process in the evaluation of a case involving his discretion to impose the death penalty, rather than reacting opportunistically to the public cries for vengeance.[531] These same neo-conservatives demand the elimination of laws that can protect the public against the excesses of police and their rights of privacy leading to greater police excess and abuses of power against people.[532] Especially in cases in which homicide victims are police officers or white citizens, the political and public frenzy surrounding the use of the death penalty in the United States is reminiscent of lynch-mobs of an earlier era that strung black men from trees in a circumvention of a judicial process.[533] Consider the notorious case of political activist Mumia Abu-Jamal in Pennsylvania, sentenced to death for the murder of a white policeman by a judge who is a member of the same police organization that lobbies for Jamal's execution. Consider also the three Latino men accused in New York City of the killing of a white policeman from whose case the black prosecutor was removed on the grounds of his express moral convictions against the death penalty.

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[530]United States District Court Judge Harold Baer, (Southern District of New York) came under attack in March, 1996 for his decision to suppress evidence in a drug prosecution on grounds of police misconduct in effectuating the arrest. In a game of political one-up-manship with conservative Republicans, President Clinton, through a spokesperson, suggested that he might ask the life-tenured judge to resign. See Alison Mitchell, *"Clinton Pressing Judge to Relent: President Wants a Reversal of Drug Evidence Ruling"*, New York Times, March 22, 1996 at A-1.

[531]Rachel L. Swarns, *"Governor Removes Bronx Prosecutor from Murder Case: Clash on Death Penalty: Asserts Rare Executive Power, Citing District Attorney's Objections to Statute"*, New York Times, March 22, 1996 at A-1.

[532]For example, in New York, the governor's proposed Police and Public Protection Act of 1996 would eliminate all legal bases for the suppression of evidence on grounds of police misconduct, except where an accused can affirmatively prove "bad faith" on the part of the police officer.

[533]See Bob Herbert, *"Playing to the Mob"*, New York Times, Op-Ed, March 22, 1996 at A-27.

The political rhetoric demanding vengeance and State sponsored murder has produced enormous growth of death row population in U.S. prisons. Over 3000, 40 percent of them black, await death by lethal injection, hanging, the gas chamber or firing squad. Their ranks are vastly over-represented, by as much as eleven to one by blacks convicted of killing whites.[534] Counsel for the poor facing the death penalty are few and far between.

Trial level representation is severely underfunded, with some states still providing a fee cap of $1,000 for a capital case which can require thousands of hours of legal work. Few states abide by national standards for the performance of counsel in death penalty cases,[535] and it has been frequently reported that inept, unprepared, or untrained lawyers handle capital cases.[536] This horror is compounded by the unwillingness of states to fund capital defense work. Efforts to curtail post-conviction access to the courts through limiting preparation time for appeals to one year or less are pending in Congress,[537] while the federally funded Capital Resource Centers, which provided support to pro bono lawyers in trials and appeals have been completely eliminated.

Without lawyers to assist them on post-conviction review, clients will be left without the ability to prove that evidence against them was wrongfully obtained or withheld. Restrictions in the courts and in legislation impede all efforts to make an adequate record for appeal to be done at the trial level. If lawyers are handicapped by lack of resources,

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[534]See McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting as a basis for finding a violation of equal protection of the laws an extensive study determining that prosecutorial discretion is exercised in vastly greater numbers in favor of the death penalty in cases where victims are white.)

[535]See American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1990).

[536]See generally, Welsh S. White, *"Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care,"* 1993 U. Ill. L. Rev. 322.

[537]The latest version of the attempt to restrict *habeas corpus* relief has been attached to HR 2703, an Anti-Terrorism bill currently pending in the United States Congress. A senate bill, S. 735, also sets at one year the limit for perfecting *habeas corpus* petitions, and severely restricts the ability of federal courts to overturn state convictions on constitutional grounds.

the likelihood of convictions of the innocent is much greater.[538] Moreover, important evidentiary and procedural questions may be overlooked by an untrained or uninspired lawyer. Appellate remedies would be foreclosed by the blunders of trial counsel. Of course, nearly everyone awaiting death in America's prisons is poor.

If the commission of crime were the only reason for these appalling conditions, and societal outrage were truly being vindicated by harsh policies, the only question would be whether such crime policies are simply too harsh in the circumstances. There is, however, a larger context for the treatment of the poor accused of crime. Government in the United States, predominantly conservative, white, wealthy and male, has turned a deaf ear and a blind eye to the impact of its policies upon the poor disproportionately black and brown, and its cruelty to children, their mothers, fathers and elderly grandparents. Severe budgetary cutbacks throughout the country, which claim to advance the goal of reducing governmental debt, have eroded support for public education, health care and disease research, housing and other essential life-sustaining services, while spending for military defense and corporate expansion continues unabated.

The poor have been blamed for government spending excesses, and it is the poor who are punished uncompromisingly. The indigent criminal defendant is deemed the most worthy of condemnation among these perceived to be blameworthy poor, by their supposed failures to observe laws and live within society's dictates. They are expected to accept massive unemployment, the disappearance of jobs, and the elimination of job training in skilled professions. In narrow-minded fashion, the American public, largely concerned with its fragile economic well-being and largely uninformed about the enormous public costs of these policies, supports tough measures.

Criminal justice policy in the U.S. tends to be analyzed in a vacuum, with a conscious and deliberate avoidance of the relationships between poverty and the development of an underground economy; between poverty and violence; between powerlessness and its exploitation by the wealthy and politically powerful; and between poverty and racism. A holistic approach, which examines these relationships, otherwise

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[538]For a vivid description of these circumstances, see Marty I. Rosenbaum, *"Inevitable Error: Wrongful New York State Homicide Convictions," 1965-1988,* 18 N.Y.U. Rev. of Law. and Soc. Change 807 (1990-91).

consciously avoided, would take into account the fact that black unemployment, particularly among youth, is markedly and proportionately high when compared to that of white youth. It would recognize that in many cities there is a 20-40 percent school drop-out rate among young African Americans and Latinos; that 50 percent of black children are born into poverty compared to 19 percent of white babies; and that there has been a 20 percent increase in poverty among black people.[539] The one in four young black men in the criminal justice system is precisely echoed in the one in four black children living in impoverished neighborhoods.[540] An examination intent on proposing remedies to crime would focus on alternatives to imprisonment; to prevention and education; to job training and development; to policies and approaches that strengthen families and communities. Instead, policies, justified by rhetoric that defines the poor as god-less without morals, and undeserving of public sympathy or assistance, result in cuts to social services on all levels.

While these sweeping unabated assaults on the well-being of the poor by government policies increase, the progressive movement for human rights and social justice fights valiantly but ineffectively to hold onto gains thought secured after decades of struggle. The movement for justice is on a continuous defensive in protection of progressive ideals and their implementation.

It should also be noted that legal representation of the poor in civil cases, has also detoriorated recently as a result of U.S. government actions. Litigation support centers in specialized areas such as immigration, public benefits and landlord-tenant law have been eliminated. Federal law also eliminated the availability of class actions, the most effective litigation method for legal service clients. In the past thirty years class actions advanced the legal entitlement of poor people to adequate housing, public benefits and rights to equal treatment under the law. In addition, both statutory attorneys fees for civil legal services offices, and challenges to welfare legislation have been completely prohibited. Most appallingly, clients are now required to waive confidentiality rights as a condition of their representation by legal

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[539]*Statement by Hon. Robert L. Carter, District Judge of the Southern District of New York, Recipient of the Federal Bar Council's Emory Buckner Medal*, November 22, 1995, at 9.

[540]Id.

services funded by the federal government. The implications of these political and policy issues for the defense of the indigent accused are equally severe—for these defendents come from the same class orgins and communities.

In America, the public spectacle of the O.J. Simpson trial cast considerable light on the significance of resources to the successful mounting of defenses in criminal cases. What ever one's view of the outcome of the trial, there is universal agreement that he had the maximum opportunity to fight the charges against him and to aggressively confront his accusers by the support of a highly paid and skilled defense legal team, and if it had been necessary skilled appellate counsel, investigators able to locate far-away witnesses and to finance their travel to court; expert assistance in forsensic evidence and constitutional law, and other relevant topics. Since the conclusion of the Simpson trial, public discussion has frequently centered on the question whether only the rich accused can obtain a competent defense and whether the poor, with their overworked and underpaid court-appointed counsel, are denied effective defenses in criminal prosecutions.

As important as this public dialogue in the United States on the disparity of resources between rich and poor in the provision of criminal defenses, these theoretical discussions have done little to advance the interests of the poor in their achievement of parity with those with means or with the government that prosecutes them. Budget allocations to law enforcement and prosecution have not been reduced because of fiscal reform. In fact, their funding has sharply increased.[541]

The protection of the rights of the criminally accused by lawyers is considered by the conservative right to be a frivolous expense. The constitutional rights of the poor accused are deemed secondary to the rights of others to live free of their presence in society. The conservative

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[541]In New York State, the disparity between state funding of prosecution and defense services is extreme. Between 1988/89 and 1995/96, the prosecution and defense have been funded at a ratio of 60 percent to 40 percent respectively. The newest proposed 27% budget cut for the defense with no cut for the prosecution enhances the disparity even more, to 67% for the prosecution and 33$ for the defense. *Public Defense Services in New York State: An Analysis of Funding for Public Defense Programs in the Governor's FY 1996/97 Executive Budget*, New York State Defenders Association (February, 1996).

ethic says that the war against crime suspends rather than requires due process. Nowhere in the public dialogue is heard support for the constitutional guarantees that the rights of the poor accused are like all other citizens.

It is against this backdrop of public policy toward the poor generally, and particularly in the criminal justice system of the United States that it can clearly be seen that there is no relief in sight for criminal defendants through the programs originally designed to ensure protection of their rights to due process and competent counsel. Government-funded indigent defense systems were established pursuant to the Gideon ruling which constitutionally required them. These systems were established on a foundation that required that complete defenses be provided criminal defendants by a dedicated staff of attorneys, investigators, social workers, paralegals and volunteer law students working at both trial and appellate levels on behalf of indigent.

Some public defender offices were able to withstand the pressures of oversized caseloads caused by escalating arrest and prosecution practices in urban areas, by the creation of partnerships with the private bar and assigned counsel systems that ensured that every accused had a lawyer, while the most serious cases and a limited number of mid-level felonies and misdemeanors would be represented by public defenders.[542]

By insistence on a caseload that each lawyer could competently carry and on a budget that allowed for reasonable payment for expert services, such as physicians, psychologists, ballistics and other forensic experts, each client could receive a thorough defense. By insistence on a full complement of investigators and a full-time social work division to develop alternative sentencing programs for clients, these offices were able to provide effective and holistic representation of clients.

Cases could be investigated; important defense evidence obtained; lawyers could analyze and challenge the prosecution's case, and through rigorous, on-going training, trial advocacy skills could be sharpened that would put the prosecution to its burden of proof, as

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[542]See Ogletree, *supra* n. 29 at 90-93 (describing the District of Columbia Public Defender Service as a model public defender program) and Purnick, *supra* n. 26, describing the Neighborhood Defender Office of Harlem in New York City.

required by an adversarial system of criminal justice. If convictions resulted, it would not be the result of an inadequate defense, but because the jury or judge would have been convinced beyond a reasonable doubt that a given defendant was guilty as accused.

Sentencing alternatives could enable eligible clients, although convicted, to remain out of prison, saving taxpayer monies and helping to prevent the overcrowding of prisons. Social services to the client could address the social needs that initially brought them into the criminal justice system in the beginning, and might, if available, keep them out of the system in the future. Aggressive sentencing advocacy in serious felonies can ensure that only the more appropriate sentences under law would be imposed in the individual circumstances of each case.

The survival of these strong defender offices are endangered by current policies.[543] Many of them have closed because of budget reductions. Caseloads have expanded beyond the capacity of lawyers to represent clients adequately. Investigation and support staffs have been cut. Vital social services to clients have been eliminated. Budget cuts have abrogated the ability of defense offices to challenge the conditions of their clients' confinement, such as double-celling, guard brutality, overcrowding and other conditions that were the cause of the Attica and other prison rebellions in the 1970's, and which drew the world's attention to America's human rights violations in its prison system.[544]

Meanwhile, increasing poverty and the cycle of violence and crime it generates, coupled with vengeful arrest, prosecution and punishment policies newly legislated, have escalated the prison population proportionately to among the highest in the world. Lawyers, once deemed

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[543]The State of Wisconsin Public Defender, widely respected as a comprehensive service provider, lost $22 million over two years. Early entry into cases has been prohibited by new legislation that also restricts the right to counsel in certain minor offenses. Juvenile representation and litigation are prohibited. Telephone conversation with Addie Hailstorks, Director, Defender Division, National Legal Aid and Defender Association, March 25, 1996.

[544]Prisoners' Legal Services of New York is one of the few agencies in the U.S. that exist for the purpose of challenging conditions of confinement. Public defender offices traditionally handle such matters as ancillary to representation of particular clients. PLS, which used in the past the class-action law suit effectively faces elimination under the New York governor's proposed budget.

essential to due process, are overworked, underpaid, have few health and retirement benefits to keep them motivated to remain in public defender careers or to work at the level of zeal that is required by ethical canons and the constitution.

While the nation's poor suffer the blows of callous, cruel application of laws and policies that violate basic human rights, the progressive legal community in the United States strains under the political whims of the so-called Republican Revolution to maintain whatever remains of the principles of the nation's constitution and challenges to the political tide.

Meanwhile, we observe that in South Africa, where after so many long years of struggle and suffering, freedom was finally wrenched from the evil vise of apartheid, a conscientious and deliberate approach to the provision of counsel for the poor has emerged to compensate for the illegitimacy of the law and the unavailability of legal proction the masses of the people.

The United States can learn much from the efforts of South Africans as they go through the process of accommodating the practical concerns of availability of lawyers and the tremendous legal needs of a large population. More so, the United States can learn from South Africa about human rights and its actual relationship to humanity; about making real for its people the words of an enduring constitution that truly requires the achievement of equal justice for all under the law.

THE ADMINISTRATION OF JUSTICE: THE CRIMINALISATION OF POLITICAL EXPRESSION AS A METHOD OF POLITICAL CONTROL

by
Ms. Niloufer Bhagwat, India[545]

1. DEMOCRACY AND THE FREEDOM OF SPEECH AND ASSOCIATION

1.1 A constitution based on the political concept of democracy, protects and safeguards the freedom of speech of every citizen and the right to form associations, considered a pre-requisite for the canvassing of alternative political opinions and policies, without which a democratic system, as we understand it, cannot function or survive.

1.2 Should freedom of speech, however, be invoked, when the political expressions/political propaganda and exhortations being uttered are "criminal" in nature or violative of constitutional and criminal laws regulating election campaigns; which directly or by implication, incite hatred, prejudice and violence, leaving death and destruction, refugees and trails of human blood and a divided society; in particular in nations which are multi-racial, multi-religious and multi-ethnic?

2. CAN DEMOCRACY SURVIVE THE USE OF POLITICAL EXPRESSION WHICH NEGATES THE VERY PRINCIPLES OF DEMOCRACY

2.1 Justice Jackson in Terminiello v. Chicago observed that

> Invocation of constitutional liberties as part of the strategy for over-throwing them presents a dilemma to a free people which may not be soluble by constitutional logic alone....This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all logical attempts to maintain order are impairments of the liberty of the citizen.

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[545]Indian Association of Lawyers.

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[546]

2.2 These words from a powerful dissenting judgement are relevant to the dilemma that many a nation has been confronting. Are political parties/associations which resort to the use of criminal propaganda in the universally accepted sense permissible in a democratic society? What restrictions, if any are to be imposed and enforced on such criminal political propaganda which assumes different forms/ characteristics, sometimes racial, sometimes religious, sometimes ethnic and tribal, and sometimes even in the form of a distorted ideology, with only one objective, political control over the minds of men and women.

3. RACIST IDEOLOGY AND ITS IMPLICATIONS FOR CIVILIZATION

3.1 The extermination of millions the world over, in the erstwhile colonies and racist regimes, was the consequence of the inculcation of racist ideas in substantial sections of the population and the governing elites.

The subjugation and mass extermination of people in various parts of Africa, Asia, Latin America, North America and Australia, were based on the theory that mankind allegedly comprises two unequal parts; the selected biologically elite (the superior race), and the rest of little value (the inferior races). The superior race possesses all the virtues, hence it must be preserved; the inferior races have all the vices, hence must be destroyed and are dispensable.

3.2 Political control in these continents, regions and countries was exercised through political expression, political institutions, the educational system, the legal system and a whole way of life, which lent sanctity to the theories of racism, colonialism and apartheid which are antagonistic to humanity and all norms of civilization.

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[546] Terminiello v. Chicago (1948) 337 US 1.

4. THE NAZI PARTY: A CASE STUDY OF CRIMINALISATION OF POLITICAL PROPAGANDA RELEVANT TO A CONTEMPORARY UNDERSTANDING OF FASCIST PARTIES AND THEIR ORGANISATION

4.1 "A thousand years will pass and the guilt of Nazi Germany will not be erased" admitted Hans Frank, Governor General of Poland, before he was hanged at Nuremberg.

4.2 Fifty years have passed since the defeat of Nazi Germany, commemorated last year the world over. However, today, we are compelled once again to remember, as shadows of fascist organisations darken the horizon in some of our countries, and Hitler is extolled, that those who do not recall or learn the lessons of history are compelled to repeat its mistakes.

4.3 The criminalisation of political expression exceeded all norms of human decency in Nazi Germany. Truth was the first casualty of the massive Nazi propaganda machine, which invaded and infected every aspect of the lives of citizens, who otherwise considered themselves "decent" human beings, even while they were succumbing not in hundreds, not in thousands, but in millions to what has now been accepted in political terminology and in dictionaries as *"Goebbelsian" propaganda*; after the infamous Propaganda Minister of Nazi Germany who epitomised the criminal use of falsehood in politics and culture with the objective of political control.

4.4 On the evening of May 10, 1933 four and a half months after Hitler became Chancellor, thousands of students torched a huge pile of books by Jewish and so-called radical authors and scientists.

4.5 Goebbels, the infamous Propaganda Minister, was to repeatedly lie to the world, that the pogrom against the Jews which commenced on the evening of 9th November, 1938, known as the "week of the broken glass" was the consequence of so-called "spontaneous demonstrations" by Germans against the Jews, in retaliation for the shooting of the third Secretary of the German Embassy in Paris by a seventeen-year-old German Jewish refugee, Herchal Grynzan. For a week in Germany there was calculated destruction and burning of synagogues, Jewish homes and shops, and the murder of scores of Jews, who were either murdered or shot by the State Police and SS, who ran the Security Service on

"instructions." These massacres were the direct consequence of the effect on the institutions of the State, including the police and army of racist, criminal political propaganda, by the Nazi Party, which had been permitted to disseminate its hate massacres by the authorities, while the judiciary turned a blind eye during the Weimar Republic.

4.6 Inflammatory oratory were accompanied by acts of violence and terror against political opponents with a view that the Nazi Party "would attract adherents and give them a sense of power over the weak."[547]

By 1940 the year after World War II broke out, six million copies of Hitler's *Mein Kampf* in which he put forth his barbaric criminal order, based on the Racial theory, were sold in Germany.[548]

5. THE ACQUIESCENCE OF THE JUDICIARY TO CRIMINAL PROPAGANDA AND THE ABSENCE OF ALL NORMS OF LEGALITY IN THE THIRD REICH

5.1 The historian Franz L. Neumann has declared "that political justice is the blackest page in the life of the German Republic." The treason laws were ruthlessly applied to the supporters of the Republic; those like Adolf Hitler on the military or fascist right who tried to overthrow it, got off either free or with the lightest of sentences. Even assassins, if they were of the fascist right or military, were leniently treated by the Courts, or as often happened, helped to escape from the custody of the courts.

5.2 The legal system of the Third Reich was no legal system at all. Judges swore an oath of personal allegiance to Hitler and the Nazi Party. The report of Major Buch, a Nazi Party Judge on the crimes committed during the "week of broken glass" commencing 9th November, 1938 discloses the harsh realities of the Nazi Judicial system. Party members who simply murdered Jews "cannot be punished," Major Buch argued, since they had merely carried out orders. On that point he was quite blunt. "The public down to the last man," he wrote, "realises that political drives like those of November 9th were organised and directed by the

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[547]William L. Shirer, *The Rise and Fall of the Third Reich*, A History of Nazi Germany.

[548]Idem.

Party, whether this is admitted or not." Major Buch's report gives an authentic picture of Justice in the Third Reich. "In the following cases of killing Jews," one part reads, "proceedings were suspended or minor punishments were pronounced."

6. CORPORATE CAPITAL AND ITS SUPPORT TO THE NAZI PARTY AND ITS CRIMINAL IDEOLOGY

6.1 The Nuremberg investigators, in a 90-page report that remains one of the grimmest documents of the 20th Century, stressed again and again that the Nazional Sozialisticher Deutsche Arberts Partei (NSDAP) and German big business "forged a symbiotic relationship such as the world had never seen."

6.2 In an incisive article, entitled "Nazidom and German Corporate Capital" written to commemorate the defeat of fascism in Germany and its criminal ideology, Frederic F. Clairmont has exposed the role of Corporate Capital in assisting the strategy of criminal political control, the crimes against humanity, and the war of aggression initiated by the Nazi Party.[549]

6.3 ...There was not a solitary German Corporation that did not toil to buttress the national interests of Hitler's Third Reich. Such legendary names of corporate capitalism as the Deutsche Bank (which bankrolled the Reichswehr before it switched its affections to massively funding the NSDAP and the Wehrmacht), all of the banks and insurance companies, the Fredric Frick Konzem, Krupp and the tobacco giant Reemtsma, etc. In short, the German counterpart to the American Fortune 500. There were few recalcitrants....[550]

The site of the infamous concentration camp in Poland, the dreaded "Auschwitz," was selected by Carl Krauch, Chairman of the board of I.G. Farben, who was designated as the "Father of Auschwitz."

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[549]Frederic F. Clairmont, "Against the Common Enemy: Nazidom and German Corporate Capital," *Economic and Political Weekly*, Bombay, India, April 29, 1995.

[550]Idem.

Slave labour was essential to swell the profits of IG's shareholders and leaders of the Nazi Party were among those with financial interests in I.G. Farben. "Members of the Nazi Bureaucracy became leading shareholders sitting on its executive board.[551]" In the concentration camp know as IG Auschwitz, millions of slave labour from occupied territories were worked to death.

SS Chief Heinrich Himmler justified slave labour stating, "Whether nations live in prosperity or starve to death like cattle interests me only in so far as we need them as slaves to our `Kultur;' otherwise it is of no interest to me. Whether 10,000 Russian females fall down and die from exhaustion while digging an anti-tank ditch interests me only in so far as the anti-tank ditch for Germany is finished...."[552]

Although IG Farbenindustrie, alias IG Auschwitz, was responsible for torture, pillage, mass murder and every conceivable crime apart from the use of slave labour, the verdicts pronounced at the conclusion of the trial of 24 senior IG executives at Nuremberg were a travesty of justice and against all norms of criminal jurisprudence. Twelve of the 24 were given light sentences ranging from one-and-a-half years to eight years imprisonment. The "Father of Auschwitz," Carl Krauch received a six-year sentence. None served their terms, they were integrated back into the corporate world, though slavery and mass murder were among the main indictments in addition to four others.

"The sentences were light enough to please a chicken thief," declared Du Bois who was castigated as a Jew and a communist sympathiser for pursuing the investigations. That he was neither did not matter..."[553]

The cri de coeur of Franklin Roosevelt in May, 1943 that "all who share the guilt shall share the punishment"[554] was an unheard voice crying in the wilderness.

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[551]Idem.

[552]Idem.

[553]Idem.

[554]*New York Times,* March 24, 1943.

7. THE DISTORTIONS OF SOCIALIST IDEOLOGY AND ITS CRIMINALISATION IN THE "KILLING FIELDS" OF KAMPUCHEA

7.1 The distortion of socialist ideology and a "criminal" elimination campaign were also carried out by the Khmer Rouge political party headed by Pol Pot and Ieng Sary, as a consequence of which 3 million Kampucheans were exterminated; and the economic, social and cultural structures of the country completely destroyed. For 1,300 days a regime of terror operated during which young people and declassed elements were recruited into gangs of killers by indoctrination and a distorted ideology.

7.2 One of the first measures adopted to permit the mass extermination of people was the policy of forced displacement of the urban population into rural and mountain areas. The displaced people were to go to "liberated territory" without any belongings. The real reason for the displacement was that there could be serious opposition to the regime from Phnom Penh and other cities and towns which were educationally and culturally advanced as against the countryside.

7.3 Communes were forcibly established and inhumane hours of labour imposed extending up to 12-16 hours a day. Children above 10, the old and the sick worked as much as adults. Children were separated from their parents. There was forced separation of married couples. Others were either prohibited from marrying or there was forced co-habitation.

7.4 Everything that was conducive to the establishment of human relations was liquidated: the family, markets, means of communication, the mails, telephones, etc., all in the name of the Khmer people.

7.5 Buddhism which was both the religion and way of life and culture was not permitted to be practised; this prohibition was directed against the people and their traditions. 2,800 Buddhist pagodas were destroyed and 114 mosques were either degraded or demolished.

7.6 National minorities were either annihilated or subjected to forced assimilation. Pol Pot's directive was, "individuals must change their names by taking new ones akin to the Khmer race....The culture,

languages, ethnic, particulars, costumes, habits, religions of the former nationalities are to be drastically abolished.[555]

7.7 A legal system ceased to exist. Only two types of punishments existed; doubling or tripling the daily quota of work with reduced rations and beatings; or the alternative, the death penalty.[556]

7.8 The Pol Pot regime's continued representation of the Kampuchean people in the UN was supported for a prolonged period in spite of its criminalisation, by several nations, some of which claim to defend human rights.

7.9 The International Association of Democratic Lawyers among other international human rights advocates investigated and submitted a report indicting the Pol Pot regime for genocide.

8. THE CRIMINALISATION OF POLITICAL EXPRESSION THROUGH THE USE OF FUNDAMENTALIST RELIGIOUS EXHORTATION AND ETHNIC IDENTITY

8.1 In different regions and nations of the world, whether in Yugoslavia, Algeria, Afghanistan, Egypt or in South Asia, among others, extremist religious exhortations and ethnic identity have been used to seize political control or to weaken existing governments.

8.2 The lessons of the disintegration of the former Federal State of Yugoslavia, which has destroyed itself, with every religious/ethnic group committing atrocities on the other, referred to as *ethnic cleansing*, a brutal policy resorted to by all parties to the conflict whether Serbs, Croats or Bosnians in a tragic retreat to barbarism, reminiscent of incidents which occurred during Nazi Germany's occupation of Yugoslavia during the second World War. Outside powers interested in the disintegration of Yugoslavia made haste prematurely to recognize break away entities.

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[555]People's Republic of Kampuchea People's Revolutionary Tribunal Document No. 2402 page 4.

[556]Valentine Shubin, *Kampuchea: Destruction of Millions*, Genocide Progress Publishers, Moscow, 1985.

8.3 The once fiercely proud and independent people of Afghanistan have seen their country destroyed by a war waged ostensibly in the name of religion; which has now further deteriorated into faction infighting on the basis of ethnic groups of various compositions, each of which is supported by a neighbour in the region. Essential supplies are hard to obtain for the people, and the numbers of dead and maimed are increasing. Development is at a standstill. The Afghan nation is being systematically destroyed.

8.4 However, there is slow but steady improvement in the situation in Algeria after a traumatic experience with the Islamic Salvation Front. This is a positive development of benefit to the `Maghreb' region of North Africa.

8.5 The threat of disintegration of nation states, in particular of the developing countries, where existing discontent with social and economic disparities and unemployment can be easily diverted into a "hate" campaign and pogrom against any national minority, is a cause not only for considerable anxiety among adherents of the secular spirit, but calls for a strategy and programme to educate the vast masses of the people on religious and cultural issues, to prevent the distortion and misuse of religion. Secular clergy of all religions have a vital and responsible role to play in such educational programmes.

8.6 An economic and social agenda to combat unemployment and poverty which dehumanises the human spirit, particularly among the youth, leading to frustration and criminalisation by political parties/formations, cannot be over-emphasised as such campaigns can reinforce legal and judicial intervention.

9. THE MISUSE OF TRIBAL IDENTITY AS A METHOD OF POLITICAL CONTROL: CASE STUDY OF RWANDA

9.1 In Rwanda in April-June 1994, in less than three months, over half a million innocent people were massacred. In addition, over two million people, women, children (infants) and the aged, fled the country in a mass exodus to refugee camps on the Zairian border and in Tanzania.

9.2 It has been noted by experts that, unlike other multi-ethnic groups, the majority Hutus (85%) and the minority Tutsis (14%) in Rwanda had experienced considerable "bio-cultural assimilation. They

shared the same language, same religion, same dance, same music and culture...."

9.3 The conflict which has been presented as an ethnic conflict, an identification that experts on Africa deem, as "oversimplified," maintaining that while "tribalism" and "ethnicity" have their places, the tragedy in Rwanda was the result of "ruthless political struggles."

9.4 Distrust created and fostered between the two ethnic groups by colonial favouritism and exploitation, exploded into a civil war and a race for power in the early sixties. The minority Tutsis became a ruling aristocracy with colonial support, and thereafter the majority Hutus, who were given subservient status by colonial masters, were thereafter encouraged by them to challenge their inferior status.

9.5 The Tutsi guerrilla resulted, continued in the seventies, eighties and nineties, while extremist Hutus opposed power-sharing with the Tutsis. In 1992 a partial accord was signed between the government led by Hutus and the Tutsis for power-sharing, which proved to be abortive.

9.6 The tragedy in Rwanda was resulted, not so much from tribal tribal hatred, as from political ambition and a power struggle, which used both Hutu and Tutsi tribes, even though they shared the same language, religion and culture to fuel a campaign of hate with a view to seizing political power.

9.7 Today the new Vice President of Rwanda has stated, "We must build a country that belongs to Rwandans, not Hutu or Tutsi." This can only happen when tribalism in Africa is prevented from being used for political control.[557]

10. THE JUDICIAL RESPONSE IN INDIA TO DIVISIVE POLITICAL PROPAGANDA

10.1 In the aftermath of the assassination of Mahatma Gandhi, who led the anti-imperialist struggle of the Indian people, on January 30, 1948, by an adherent of a right-wing communal and fascist organisation, India's first Prime Minister, Pandit Jawaharlal Nehru had cautioned, that if the people of India could anticipate any threat to the political, social and

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[557]Professor K. Mathew, "Roots of the Tragedy," *Mainstream*, New Delhi, October 8, 1994.

economic agenda the country had adopted, it would be from formations committed to religious revivalism.

10.2 Pandit Nehru advised the highest law officers of the country, including the Attorney General, that it was mandatory to initiate criminal prosecutions against individuals promoting enmity between different groups.

10.3 While the Government, following the assassination, was constrained to ban the extremists' organisation for a period of time, Pandit Nehru's political response was to present a perspective of planned economic development for the entire people with emphasis on science and technology. A constant dialogue was maintained with the people from the village to the cities. What was emphasised was the country's, diverse yet common heritage.

10.4 This legacy of the Indian people left behind by Mahatma Gandhi and Jawaharlal Nehru was sorely tested when sectarian religious appeals commenced from the terrorists in the Punjab distorting the tenets of the religion of the Sikhs and by militants misusing Islam in Kashmir, an integral part of India, and terrorising the local minorities. The Kashmiri Pandits were forced to flee the region and the terrorists and militants were unable to influence the vast majority of people in these regions, in spite of financial assistance and logistic support from abroad and from neighbouring Pakistan, a theocratic state which discriminates against religious and ethnic minorities. In both cases, adherents of the same religion as the terrorists and militants were killed and harmed, as much as the local minorities, as the people in these regions resisted terrorism and theocratic appeals in the struggle for the hearts and minds of the people. The economy of these regions was disrupted. Terrorism has now faded away in the Punjab except for sporadic incidents, and in Kashmir the militants are now at the negotiating table as a prelude to elections in the valley.

10.5 Simultaneously India has also been combatting a political movement of religious revivalism, whose members and front organisations, from time to time, resort to the use of criminal political expression and intimidatory violence which has alarmed secular opinion in the country. The movement distorts Hinduism.

10.6 The Judicial response to criminal political exhortation by such organisations has been a consistent reaffirmation of the principle that Secularism is a basic structure of the Constitution of India (the basic

structures of the Indian constitution cannot be amended) and political campaigns during electioneering which resort to campaigns of hate against citizens of other religions and to religious appeals will result in disqualification of the candidate.

10.7 In S.R. Bommai V. Union of India (AID 1994 SC at 1918) a decision of the constitutional bench of the Supreme Court comprising nine judges in separate and concurring judgements, pronounced by Chief Justice A. M. Ahmadi and K. Ramaswamy J.

> In a secular democracy, like ours, mingling of religion with politics is unconstitutional, in other words a flagrant breach of constitutional features of secular democracy. It is, therefore, imperative that religion and caste should not be introduced into politics by any political party, association or an individual and it is imperative to prevent religious and caste pollution of politics....

P. B. Sawant J (for himself and on behalf of Kuldip Singh J.) held that

> The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State. This is also clear from sub-sec.(3) of S.123 of the Representation of the Peoples Act 1951 which prohibits an appeal by a candidate or his agent or by any other person with the consent of the candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of or appeal to religious symbols. Sub-section (3A) of the same section prohibits the promotion or attempt to promote feelings of enmity and hatred between different classes of the citizens of India on the grounds of religion, race, caste, community or language by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate. A breach of the provisions of the said sub-secs. (3) and (3A) are

deemed to be corrupt practices within the meaning of the said section.

B.P. Jeevan Reddy J. (by himself and on behalf of S.C. Agarwal J., S.R. Pandian J concurring) observed

> If any party of organisation seeks to fight the elections on the basis of a plank which has the proximate effect of eroding the secular philosophy of the Constitution would certainly be guilty of following an unconstitutional course of action....
>
> Under our Constitution, no party of organisation can simultaneously be a political and a religious party. It has to be either....
>
> "Constitution cannot be amended so as to remove secularism from the basic structure of the Constitution...."[558]

10.8 In the Ayodhya Reference case, the Supreme Court in a majority judgement delivered by J.S. Verma J, inter alia, held that

> The polity assured to the people of India by the Constitution is described in the preamble wherein the word *secular* was added by the 42nd Amendment. It highlights the fundamental rights guaranteed in Articles 25 to 28 that the State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion of their own choice. In brief, this is the concept of secularism as a basic feature of the Constitution of India and the way of life adopted by the people of India as their abiding faith and creed...."[559]
>
> The minority Judgement delivered by S. Bharucha J. pronounced

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[558]S. R. Bommai V. Union of India, AIR 1994 SC, at 1918.

[559]In re Ayodhya Reference, Dr. M. Ismail Faruqui and Ors vs. Union of India, "Judgements Today" 1994 Vol. 6 SC Page 632.

> That secularism is a part of the basic features of the Constitution was held in Kesavananda Bharati v. State of Kerala, 1973 (4) SCC 225. It was unanimously reaffirmed by the nine Judge bench of this Court in S.R. Bommai V. Union of India 1994 (3) SSC 1. Sawant J. analysed the preamble of the Constitution and various articles therein and held that these provisions, by implication, prohibited the establishment of the theocratic State, and the State was enjoined to accord equal treatment to all religions....

Extracts of the pronouncements of the Supreme Court of India in leading cases have been given above to enable lawyers and judges present at the 14th Congress to comprehend the Constitutional and legal issues which have been raised and decided in the context of political campaigns and relevant to the discussions.

10.9 The critical area where secular public opinion is of the view that the judicial response has not been adequate is related to criminal prosecutions for inflammatory speeches, which Pandit Nehru had emphasised as absolutely necessary to prevent the misuse of political propaganda. Sections 153A and 153B of the Indian Penal Code prohibit the promoting of enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. and committing acts prejudicial to maintenance of harmony...and the use of imputations, assertions, prejudicial to national integration." Few cases have been lodged in recent years, fewer have gone to trial and hardly any have ended in convictions.

10.10 A judicial view expressed in a judgement that "it is not desirable to reopen the old issue afresh" has resulted in a few political parties and formations taking advantage of the failure of the courts to enforce the criminal law (J.B. D'Souza v. State of Maharashtra, unreported judgement of the High Court at Bombay, upheld by a Division Bench of the Supreme Court).[560] The leniency has resulted in the discontinuance of the Justice Srikrishna Commission of Inquiry into serious criminal incidents by a Regional Government without the approval of the Union of India, a decision which has been challenged in the Bombay High Court.

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[560] J. B. D'Souza vs. State of Maharashtra (unreported judgement of the High court of Judicature at Bombay).

10.11 However, the Press Council under the Chairmanship of Justice R.S. Sarkaria (Retd) on 19.6.1995 has held that the daily newspaper *Samna* and the weekly *Marmik* (press publications) of the Shiv Sena Party constitute an offence against standards of journalistic ethics and professional responsibility and the report ought to have been purged "of its provocative and unethical tendency."[561]

11. THE MISUSE OF THE ELECTRONIC MEDIA

If the misuse of the political expression through speeches, the press and publications has caused incalculable harm, the misuse of the electronic media "radio and television" has even more serious and sinister implications. I recall several years ago one of the leaders of a fanatical separatist movement from the Punjab vehemently discussing in a BBC interview as to why the then Indian Prime Minister should not be physically eliminated. The fact that subsequently this did happen indicates the impact of criminal political propaganda, the use of which should be declared illegal by an International convention regulating the use of broadcasting channels broadcasting to other nations.

12. CONCLUSION

For the people of South Africa it has been a `Long Walk to Freedom.' We in India across the ocean have agonised over every step of this struggle. The IADL Congess enabled some of us to make this pilgrimage to pay our homage to the land where Mahatma Gandhi the apostle of `Ahimsa,' formulated his non-violent political path; and where the people of South Africa have now embarked on a voyage of reconciliation, development and social justice.

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[561]Press Council proceedings in respect of *Samna* and *Marmik* publications, order dated 19.6.1995 of Justice R.S.Sarkaria (Retd.)

PERCEPTUAL AND INSTITUTIONALIZED RACISM AS AN IMPEDIMENT TO ACCESS TO JUSTICE BY THE ACCUSED

by
Adjoa Artis Aiyetoro, USA[562]

I. INTRODUCTION

The United States leads the developed world in the use of incarceration and the death penalty as punishments. This leadership role is reserved for those of color, particularly those of African descent. For those of European extraction, the United States' use of incarceration mimics Western European countries. Heavy reliance on punitive sanctions does not, however, lead to safe, life-sustaining communities—as politicians promise when they urge voters to support them and their too-easy solutions to crime. Indeed, many policy makers are disingenuous since they know their crime data are false, but use the fear of crime like advertisers use the allure of sex to sell themselves to the public knowing that their sales pitch is a lie. Communities must become more active in demanding an end to the high reliance on incarceration and the death penalty. Their allocation of resources to prevention, treatment and alternative sanctions which are more cost-effective, in human and economic ways.

II. THE UNITED STATES LEADING THE ROLE IN SEVERE PUNISHMENTS

In 1994, the United States set a record: 1,053,738 men and women in prisons—the facilities housing persons convicted of felonies and serving more than a year. Overall, almost 1.5 million people were incarcerated in prisons in the United States where almost one-half million more are in jails, the facilities holding those convicted of misdemeanors and serving sentences of one year or less.[563]

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[563]United States Department of Justice, Bureau of Justice Statistics, Press Release, August 9, 1995.

Race and class bias play a significant role in these incarceration figures. People of color generally, and Black people specifically, are disproportionately represented among those arrested, tried, convicted, and sentenced to prison terms.[564] Approximately 1,471 Black people per 100,000 Black residents were incarcerated in federal and state prisons on December 31, 1993 compared to 207 Caucasians per 100,000 Caucasian residents.[565] A Sentencing Project study released in early 1996 indicated that one in three Black males between the ages of 19 and 26 were in the custody or under the control of the criminal punishment system. This was an increase from the one in four statistic revealed by the Sentencing Project barely five years before.

Nationally, people of color represent 52% of those incarcerated and Black people comprise 46%.[566] The Corrections Yearbook reveals there are a number of states that exceed this national average. For example, in Maryland, Black people comprise 76.2% of those incarcerated while they constitute only 25% of the population. In Louisiana, Black people comprise 74% of those incarcerated but only 31% of the population. Black people represent 58% of those incarcerated in Michigan although they are only 14% of the population. Likewise, in the state of New York, while Black people are only 10% of the population, they are 50.4% of those incarcerated.

The view generally held by people of color, that Caucasian people are punished less severely, if at all, has been supported by studies in a number of states including New York, Virginia, California and Michigan. A recent study in California indicated that all persons charged with the federal crime of possession of crack cocaine were Black: whereas, 122 Caucasians were charged with possession of crack cocaine

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[564]See generally, Georges-Abeyle, Daniel The Criminal Justice System and Minorities—A Review of the Literature, The Criminal Justice System and Blacks, Clark Boardman, New York (1984).

[565]Idem, fn2.

[566]Bureau of Justice Statistics. Correctional Populations in the United States, 1985. The charts released with the 1994 statistics merged all people of color under the category "Black."

on the state level.[567] This is significant since the punishment for crack cocaine possession is far more severe on the federal level, a minimum of 5 years incarceration if convicted, versus incarcerating a minimum of 1 year in many state systems.

The Federal Sentencing Guidelines also make a distinction in the sentences for crack and powder cocaine, a distinction that has important race and economic class connotations. A person can receive a 5 year minimum sentence if convicted of possession of 5 grams of crack cocaine, a distilled version of powder cocaine. The same person would have to possess 500 grams of powder cocaine to receive a similar sentence. The evidence compiled by the United States Sentencing Commission indicates that those convicted of crack cocaine are overwhelmingly Black, in some jurisdictions as high as 95%; whereas those convicted of powder cocaine possession are overwhelmingly Caucasian, as high as 80%

The view that Caucasians are punished less severely when the victim of a crime is a person of color is particularly clear in death penalty research.[568] These studies indicate that a Black person is far more likely (as much as 22% more) to get the death penalty for killing a Caucasian than a Caucasian is for the same crime. Likewise, a review of those given the death penalty reveals that the death penalty has rarely been imposed upon a Caucasian for murdering a person of color, particularly a Black person. Finally, these studies indicate that Black victims of violent crime are generally devalued in comparison to Caucasian victims. The Black victim is far less likely to have his or her death vindicated by the death penalty than a Caucasian victim.

Anecdotal evidence indicates that the overwhelming number of those incarcerated are poor. Unlike statistics of race of those incarcerated, there are virtually no available statistics of the economic class of those incarcerated. A national jail study conducted in 1983 indicated that the annual income of over 80% of those incarcerated in jails was less than

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[567]ACLU, Washington Office, "Talking Points on Disparity in Cocaine Sentencing and United States v. Armstrong," February 1996.

[568]Keil, Thomas J. and Gennare P. Vito, "Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes," Justice Quarterly, Vol. 7, 1; March 1990. See also, Coffey, James F., "McCleskey v. Kemp: Ignoring De Facto Discrimination in Capital Sentencing," New England Journal of Civil and Criminal Confinement, Vol. 14, 2; Summer 1989.

$5,500 during the year prior to incarceration, an income well below the U.S. poverty line.[569]

Although the overwhelming majority of those in prison are men, the rate of incarceration of women is increasing and has surpassed that of men.[570] Based on the 1994 data compiled by the Bureau of Justice Statistics, the number of women prisoners grew 10.6%, compared to an 8.5% increase among men prisoners. A 1995 update indicated that "the proportion of black females in the U.S. who are incarcerated was seven times higher than for white females in 1994."[571] The actual figures tell the story: In 1994 60 Caucasian women were incarcerated in state or federal prisons or local jails, per 100,000 Caucasian women residents compared to 435 Black women per 100,000 Black women residents.[572]

> "Between 1980 and 1993, the number of white and Black female inmates grew at a faster pace than the number of male inmates in either racial group. During this period the number of white males grew 163%, the number of black males grew 217%, the number of white females 337%, and the number of black females 343%."[573]

III. THE COST OF THIS HIGH RATE OF INCARCERATION

When the data indicating significant bias in the determination of who is punished and how in the United States, ARE compared with the

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[569]See, "Report to the Nation on Crime and Justice; Second Edition," Bureau of Justice Statistics, March 1988, p. 49. Although this does not provide statistics of the annual income of those in prison, this statistic supports the conclusion that the overwhelming majority of those in prison are poor, since jails are the feeder systems for state and federal prisons.

[570]Bureau of Justice Statistics, "Special Report; Women in Prison," March 1991, p. 7.

[571]Department of Justice, Bureau of Justice News Release, December 3, 1995.

[572]Idem

[573]Idem.

data on the cost of the punishment system, important facts are revealed about this society's priorities. The state and federal governments are spending millions of taxpayers' dollars to punish certain groups rather than to protect society. Prisons and the death penalty are very expensive forms of punishment.[574] A number of studies describe the high cost of the reliance on prisons as the primary punishment for crime.[575]

According to the Corrections Yearbook, state and federal agencies spent an average of $48.51 per prisoner per day in 1991. However, this figure does not include account construction and operation costs. Among thirty-nine agencies surveyed, the average cost per bed in medium security was $56,435. Total projected national operating and capital expenditure costs for FY '93 were $15.7 billion.

In addition, there are financial costs which have not been compiled. Informed sources indicate that the total costs of incarceration to society should include the costs to the state of caring for dependent families when the primary breadwinners are incarcerated.[576]

The reports from the FBI and other crime watching agencies indicate that although crime has been slowly decreasing since 1980, the very year when policy makers began to pass the laws that sent the prison population skyrocketing. Indeed, even violent crime, the type of crime feared by most and exploited by many policy makers, has been decreasing for all groups with the exception of violent crimescommitted by youth, which experienced a small increase in 1994. The increase in youth violent crimes was for all races, although the statistics indicate that like adults, youth of color, particularly Black youth, disproportionately receive the harshest penalties.

The costs to US society are far more than the financial drain on the taxpayer. Cases challenging prison conditions in the United States, an area of specialty that began in the late 1980's with Black Muslim prisoners who were denied respect for their religion's dietary and worship requirements, chronicle the horrendous conditions that exist in the United

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[574]For example, see Time to Build: The Realities of Prison Construction. Edna McConnell Clark Foundation, New York, (1984), pp. 15-19.

[575]Id.

[576]Id., p. 18.

States prisons.[577] Although some physical conditions have improved over the years, prison violence, denial of treatment for addictions as well as other health problems, and the unavailability of training and education programs continue to plague the United States' prisons and jails. Indeed, although studies indicate that education and family involvement are the most significant factors in reducing the likelihood that a person will return to prison, the United States Congress in 1995 eliminated the use of Pell grants for prisoners, that paid for prisoners' college education. Approximately 60% of those released from prison return.[578]

IV. REASONS FOR THE HIGH RELIANCE ON INCARCERATION AND THE DEATH PENALTY

Why would a government continue to throw away taxpayers' money to incarcerate so many people, particularly people of color and Black people? The answer lies in the history of racism in the United States and the pseudo-moralistic attitudes which cover this racism.

Judge Leon Higgenbotham, a noted African-American jurist and legal commentator wrote, *In the Matter of Color*, that chronicles the development of the criminal law in the United States in pre-colonial times. In his book Judge Higgenbotham describes how the laws in the New World were established concerning the protection of property and to punish violence against people, rape and assault, that were developed solely to punish African slaves exported to labor in the New World. Whites were either not punished for these crimes or were punished outside the scope of these laws, receiving far less harsh punishments.

The American Civil Liberties Union, building on Judge Higgenbotham's work, produced a video which traces the development of the death penalty in the United States. This video documents the racist nature of the death penalty, how it has always targeted those of color, particularly of African descent, from state condoned lynchings to the imposition of the death penalty by state and federal authorities.

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[577]See, ACLU National Prison Project Journal, Chronology of Prison Litigation.

[578]Beck, Allen J. "Recidivism of Prisoners Released in 1983," Bureau of Justice Statistics, April 1989.

Studies, during slavery and after the emancipation of Africans held as slaves, indicated that many African-Americans were subjected to punishment as a result of prejudiced witnesses and juries. Since the reconstruction period, the perception of African-Americans as criminals is the popular stereotypic characterization of them as debased, depraved and inherently criminal.[579] Indeed, Charshee McIntyre's conclusion concerning free African-Americans during slavery is still as true today: "the incarceration of disproportionate numbers of free African Americans in the nation's penitentiaries, and the negative consequence of being related to that lowly stratum, buttressed the national perceptions that all free African Americans were innately deviant and criminal."[580]

V. CONCERNED GROUPS MUST EDUCATE AND ORGANIZE

For many years, a number of groups in the United States have focused on the ineffectiveness of the criminal punishment system because of its over-reliance on incarceration. Still other groups have focused on the race and class bias in the application of the laws and have worked to end this racism. Others, such as the National Conference of Black Lawyers, the ACLU, The Sentencing Project, the National Urban Coalition and the National Lawyers' Guild have pushed for both an end to racism and the development of a punishment system that values human beings and spends public funds in a reasonable and effective manner that rehabilitates as well as punishes..

The National Conference of Black Lawyers administers a project of the National Criminal Justice Coalition, a coalition of organizations including those named above, organized to address these issues. The project was designed to put the brakes on the high rate of incarceration and the imposition of the death penalty by educating grassroots activists about the manipulated and unopportunistic promises of policy makers. The project chose to focus its educational efforts on activists who were still undecided about crime issues because it was assumed that activists would discuss issues and ideas to others as well as becoming informed themselves. It is the project's hypothesis that if activists are convinced that more prisons and the death penalty are not the answer to creating safe, life-sustaining communities, and in fact decrease the likelihood of

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[579]McIntyre, Charshee C. L., Criminalizing a Race: Free Blacks during Slavery, Kayoda Publications, Ltd., 1993.

[580]Id., p. 185

building such communities, they will persuade others and organize to demand that policy makers put more money into prevention and alternatives to incarceration.

The project was implemented for the first time in 1995. Four cities were chosen: Chicago, Dallas, Los Angeles and Washington, D.C. Washington, D.C. did not complete the seminar series and, therefore, no results were obtained from it. In the other three cities from anecdotal evidence, the results of pre- and post-seminar questionnaires as well as responses to the closeout hypothetical indicate that a number of the activists had modified their positions and were willing to support the use of alternatives to incarceration after participating in approximately sixteen hours of training.

The support for our conclusion that we were successful in modifying views of the relationship between the criminal punishment system and building safe and health communities was primarily anecdotal in Chicago. There was significant turnover in participants making it difficult to complete the pre- and post-seminar questionnaires and the hypothetical.

Three examples of the positive affects of the training include the following. A Black woman representing the Y.W.C.A. Sexual Assault program arrived late for the second day. During the midday session, a recently released Black man, who had been incarcerated for 17 years for the deaths of two white policemen who had beat him severely in a Maryland police station when he was 15 years old, discussed "The Reality of Punishment." In the discussion period, the woman indicated she was late because she was angry about the previous evening's session and, initially, had decided not to return. She thought that we misrepresented the seminar's purpose and were attempting to force people to be sympathetic to criminals. She indicated she was glad she returned, since after Terrence Johnson's presentation, she now understood how incarcerated people were victims of the system as well as the population she serviced.

Another Black woman who also worked with the Y.W.C.A. Sexual Assault program revealed that before she came to the seminar she had supported the death penalty although she was not sure it was really effective. After participating in the seminar and particularly afterviewing the ACLU film on the death penalty, Equal Justice, she indicated she was now wholeheartedly opposed to capital punishment. A Latina representing Southwest Women Working Together said that the seminar

made her more aware of the problems facing youth of color and led her to want to become more involved in defining "justice" with the community.

Anecdotal evidence, the hypothetical situation resolution and responses to the questionnaire support the conclusion that the seminar was also effective in Dallas. A review of the pre- and post-seminar questionnaires indicated that a participant who supported the death penalty for rape prior to the seminar after the seminar supported life without parole for this crime. A participant who, prior to the seminar, did not believe the death penalty decreased murders, afterward now also believed that the imposition of the death penalty increased murders. A participant who did not believe that involvement of youth in positive activities would decrease crime, left the seminar believing the opposite.

The response to the hypothetical suggested that even those participants whose questionnaires revealed no change in their position supporting the high use of incarceration and the death penalty, relied almost exclusively on alternatives to incarceration in responding to the hypothetical in which an innocent bystander was killed by a young Black man engaged in an argument with another Black youth, both of whom were high on cocaine. The discussion afterward suggested that people may be able to consider the use of alternatives when faced with a "real life" situation rather than when responding to the cold print of the questionnaire.

Questionnaire responses indicated that many participants in the seminar given in Los Angeles began the seminar with views similar to those of the organizers with the exception of several people who supported the death penalty. Their support, however, was at best moderate since during the pre-seminar questionnaire they chose life without parole to punish a drive-by killing. The responses to the hypothetical situation revealed that the seminar had been effective in focusing attention on the use of alternatives rather than traditional punishments. Even those persons who had favored reliance on incarceration and the death penalty utilized alternatives to incarceration when given the "real life" situation.

Finally, the persuasiveness of the media and misrepresentation of data surfaced in a discussion of legislation that is popularly called "Three strikes and you're out." Many of the participants, even those with views similar to those of the organizers, had supported this legislation because they thought it would get the "bad" people off the street and

create a safer community. After the discussion virtually all the participants agreed that such legislation could not create safe communities and indeed, resulted in increased costs to the taxpayers.

A March 1995 report on the three strikes legislation in California indicated that once again, punishment provisions that were ostensibly race-neutral were being disproportionately applied to Black defendants.

VI. CONCLUSION

Communities accept, support, and urge severe punishments for crime because they are under the mistaken belief that these severe punishments will make them safer. Policy makers have capitalized on people's fears and, in many instances, have fueled these fears, by suggesting that the way to address the problem of crime is to build more prisons and to institute more state-sanctioned murders. The reality is that there is no positive correlation between more severe sanctions and safer communities. The reality is that the imposition of severe punishments has been used primarily to continue racism within the United States to criminalize people of color, particularly Black people. The solution is to work to reverse this condition through educating people and helping them organize to establish race neutral, criminal punishment systems and safe, life-sustaining communities.

RIGHT TO ACCESS TO JUSTICE, TO THE INDEPENDENCE OF THE JUDICIAL SYSTEM, AND THE DEFENSE OF THE LAWYERS AND JUDGES UNDER ATTACK[581]

by
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INTRODUCTION

The Judicial Power which we are about to discuss is the old concept of justice, that is, a justice based on freedom, on peace, on democracy, on tolerance. A judicial power that wants to make the law effective without weakening other powers; and that feels strong enough to protect itself when disturbances challenge its exercise.

These powers rely on establishing a priority and respect for fundamental Human Rights and on considering them significant goals of justice. Judges, lawyers and members of the jury, from their different roles in the administration of justice, must share these particular aims.

It is important to establish "minimum standards," from different and specific national perspectives as it has evolved in the field of Human Rights.

Because of the different objective conditions existing in different nations, even among those on the same continent, and their distinct juridical concepts and systems, a unitary explanation cannot suffice. In this paper, we will discuss some useful legal cautions that are shared by a number of States.

In this discussion, we will also consider those aspects of experience in Continental Europe that has proved to be most positive. We will also discuss those negative aspects which can produce distorted results. While doing this, we emphasize, as Special Relator Singhvi has said in the United Nations Special Report on the Independence of Judicial Power, that it is not necessary to build a single model for organization, for

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[581]This original of this paper was in Spanish. This is a translation of its highlights.

[582]High Court of Barcelona. Associacio Catalana de Juristes Democrates.

powers and for judicial functions in order to guarantee the independence of the judiciary, juries, legal advisers and lawyers.

Jurisdictional protection of individuals and the collective rights of the citizens have constitutional status in most States that live under democratic principles. It is significant to note the increase in the use of judicial ways of solving conflicts in those States that previously suffered most from the lack of liberties.

In totalitarian situations, the lack of trust in the judicial system reduces the number of citizens that ask judges for protection. It's obvious that no authoritarian society makes the jurisdictional control of its conduct easy, whether administrative or through activities that aim to deprive its citizens of their fundamental civil or human rights, their rights to personal liberty, freedom of speech, inter alia. At the same time, vigilance cannot stop in democratic States, because legality is supposed to act as a limit to the established power.

A Judiciary independent of the other Powers of the State: legislative and executive—is needed. Not only for a correct application of international law in the field of Human Rights, which the executive branch is usually reluctant to accept, but also in the field of national legislation, where the law, as the very essence of democracy, is the instrument to protect everybody's liberties. The political nature of many of the domestic issues about which judges decide is clear. The most obvious example of this are the vicissitudes of administrative law, and its fundamental issue, the control of discretion. In two separate continents, Europe and the USA these issues are discussed. In the USA, Professor Edley has stated that not only politics lies in wait for any administrative decision but also that the evolution of the interventionist State has made the harmony between law and politics even more important.

However, the political impact, whether by action or omission, of judicial acts in other areas of law, such as the criminal, is most significant in old Europe. Thus, in many democratic States, problems arising from increased political corruption, with parallel irregular financing of political parties, is a relevant factor of distortion. In some States it has even given rise to amnesty for the political figures involved.

Edley, has also said that it is the failure of the normal processes of governance that creates the occasion and the need for judicial intervention. In keeping with this, Woehriling observes that reform of the jurisdictional control of the administration of justice has developed over

the last 20 years, which has become more intense because of constitutionalisation, and has reinforced the legitimacy of its interventions.

As Professor Garcia de Enterria says, citizens exercise basic liberty through appeals against administrative acts because they are affected by the law directly, not the whims of administrators. It is out of date to define adjudication as existing only to solve conflicts between private individuals. It is also unavoidable for judges to avoid being the targets of political attack because justice doesn't develop in a neutral context. In spite of all these problems, it is necessary to keep in mind the feasibility of values and principles, constitutionally proclaimed, that constitute the principles of legality.

It is necessary in every modern State, whatever its economic and social development, to show respect for the principle of judicial independence. This is the primary foundation upon which a democratic justice administration must operate, whatever weaknesses a specific juridical system might have. It is not enough to give lip service to this value. It is essential for an effective democracy.

It should be noted that international economic investors make note of the nature of the respect for judicial independence in a given society when they consider investment in foreign countries. It is also relevant to note that international justice has been called to judge recent events in Africa (Rwanda) and in Europe (former Yugoslavia).

The free exercise of the legal profession, autonomously organised, must also be encouraged. It has the task of advising and representing its clients before the courts. We understand that from a progressive point of view, its function must be based not only on bona fide principles but also on the spirit of justice as a public service. The exercise of the right of defense by lawyers, must be developed without any kind of impediment, including economic factors.

Finally, in respect to the administration of criminal justice, in some European states the institution of prosecution has been placed before magistrates. However, that fact doesn't assure independence, even though some progressive judicial groups argue that it does. The legal definition of judicial independence is very different in different legal systems. It ranges from the principle of opportunity to a defense to the principle of legality as a warrant of public interest protected by the law. The principle of opportunity to a defense can be established from the beginning of

judicial proceedings or not, depending on whether it is seen as related to the general interest.

Similar judicial systems have a tendency to put their guarantees at the same level. So, the membership of the Spanish, Italian and Portuguese associations of prosecutors to MEDEL (Magistrats Européens pour la Democratie et la Liberté) has made clear that "the autonomy of the prosecution is a fundamental element of the independence of judicial power". They reason that prosecution exercises its functions with full autonomy from political power, subject only to issues of justice and law. The Statute of public prosecution states that the liberties and guarantees defined there are to be applied to magistrates. In Italy the statute of the prosecution is identical to that of the judges. This is not the case in Spain or Portugal. In Portugal, the prosecution enjoys high guarantees of independence, because of their new role as keepers of the democratic legality given to them by the 1976 Constitution. This was made clear by the commencement of hundreds of legal prosecutions concerned with misused supranational subsidies for the development of the poorest regions.

Germany is quite different. R. Muhn has recently said that German public opinion is worried by the apparent inability of prosecutors to exercise criminal proceedings against influential economic and political individuals. He reasons that this results because the Bonn Fundamental Law doesn't say much about judicial order.

In Latin America, we note the conclusions adopted at the International Seminar on Judicial Independence about the status of judges in Latin America, held in Buenos Aires in March 1991. It was concluded by the participant judges that both judges and members of the prosecution should have the same statute of independence. A similar statement was made in Mexico in 1975 during the first Latin American Congress on Constitutional Law.

INDEPENDENCE OF JUDGES AND LAWYERS.

The two great conceptions of juridical organization (European-continental and Anglo-Saxon) have influenced justice in contemporary law in the field of justice outside of non-western countries in Asia and Africa. But all judicial systems have something in common: the judicial function consists of judgments according to the law. All systems define this function with characteristics such as independence, immutability and responsibility together with unconditional submission to the rule of Law.

There are no great doctrinal arguments when it comes to describing the main features of judicial function. Judges must be independent, not only from their colleagues superior and inferior and from executive and legislative powers but also from lobbies, in the broaedst sense.

Two factors affect these features: the subjective; ie. the judge's own view and the objective, known also as structural. If the structural view is to be adequate, it is important that the judicial system and the society in which it functions should encourage judicial independence.

Although the judge's personal attitude should consist of a suitable ethic it cannot, prevail over the juridical norm. Due to lack of time, we will not discuss the relationships between morals and justice made by Dworkin, Alexy, Hart, etc., but must consider Radbruch's thesis in discussing Nazi legislation in Germany. The Judge must put into effect legal norms except when there are deep contradictions between positive Law and Justice, especially when these contradictions go as far as to cause Law to destroy Justice.

This rupture is less likely to happen in a democratic society which respects human rights but it can occur in societies where democratic values are not protected or respected. We must not forget that the Retig report on crimes against human rights which proved that during the Chilean dictatorship, the Judiciary didn't oppose violations of human rights.

Judges must not be isolated, they must be aware of the realities in which they function. Being free from prejudice and being impartial is not enough. Judges must interpret legal norms, even if lapsed according to the reality of their time. Judges must know the legal modifications that are possible but must not become law-makers, substituting themselves for the will of the legislature.

The significant difference between those judges who traditionally make Law and those who apply Law are these. The first rely on precedents, even if it requires overuling what has been ordained. The second are strict interpreters of norms. But even they become law-makers, by interpreting norms according to social reality and zeitgeist. Both methods of proceeding are defensible in their contexts. This means that judges must act with respect for their legal and constitutional framework.

Different juridical traditions influence the election of judges. There is the bureaucratic modality that works through open competitions similar to the civil service competitive examinations. Another is the democratic modality which is similar to those elected to the legislature. There is also a modality in which the professional capabilities of those are designated through co-optation.

All of these judges, legitimate according to their respective legal systems, have in common the fact that they should be chosen on the basis of solid juridical training, independence and integrity. The extent of the influence of the executive power over the appointment of judges, and over their career afterwards, is based not only on the selection system or the balance of power mechanisms but also on the values of their society.

It must be said that despite the great number of promotions and transfers to the judiciary, some States in Europe (Spain, France, Italy and Portugal) have developed a mechanism to counterbalance the executive power with more or less effectiveness. In none of these countries—all of them in the Latin tradition—is the selection of judges made by co-optation or by election. They name judges through competitive examinations. Therefore, young law graduates have access to these examinations without any experience or previous knowledge, a significant difference compared to other systems.

All of these countries have created a government body on the highest level of Judicial Power (Consejo del Poder Judicial, Conseil Superieur de la Magistrature, Consiglio Superiore de la Magistratura, Conselho Superior da Magistratura). These government bodies are completely independent of the Legislature and Executive and are regarded as a self-regulated institution of judiciary. There are some important differences among these States concerning the nature of this body and its relationships with the other powers. Both Executive (France) and Legislative Power (Spain, Italy and Portugal) intervene in the selection of the integrating members of this body. For instance, in Italy and Portugal, the different political tendencies have a clear role through elections that consider distinct political feelings of various judiciary associations which integrate the members of judicial power. Such elective mechanisms were instituted in Spain after General Franco's death but were suppressed in 1985 with the blessing of the Constitutional Court. These bodies exercise as well full disciplinary powers over judges.

There are difficulties in considering a unitary concept of judicial responsibility as a counterpoint to the attribution of independence.

Putting aside moral responsibility which is only relevant to one's internal conscience, public opinion is an effective control of judicial activity. The quality of judicial work is an essential factor in enhancing the reputation of judicial power. Therefore, a solid education, along with continuous study is an important factor in judicial behaviour. Judicial culture must combine with metajuridical knowledge (sociology, psychology,science, economics, accounting, etc.) that allows an adequate evaluation of reports made by external experts in the trials. Judges must be prepared to be criticized for their decisions not only in specialized forums but also by public opinion. Their responsibility before public opinion, and to a lesser degree, before specialized forums when their decisions become public, can be influenced by media campaigns ruled by the interests of the media owners. In a highly developed world, the outbreak of show business in the world of justice has just begun, and its future is unclear.

We observe that in Western Europe, the criminal, civil and disciplinary responsibilities of the judge-civil servant differ markedly among States. For example, in the Anglo-Saxon systems, the possibility of dismissal is available by the application of the system of indictment and trial by legislative bodies (violations of "good behaviour"). This system is rarely used, because clear incapacity or notorious bad behaviour must be proved, while more minor errors are ignored. To consider these misdemeanours, different committees and commissions, of varied composition (judges, lawyers, plain citizens appointed by the legislative bodies) are set up, to monitor judicial action. The different judicial systems agree to the necessity of properly regulating these aspects of judicial action.

Most legal theorists agree that the exercise of the legal profession is incompatible with any activity that may result in a loss of independence (public posts, commercial activity, etc.) or a conflict of intent. But, as a matter of fact, in many States, this is not the case. Such a unitary vision is difficult, as it depends on diverse traditions from every country.

The lawyer contributes to the functioning of the overloaded judicial system. Legal assistance, to a person who has been just arrested, is a starting point. Therefore, a good legal education and professional competence are key criteria for a lawyer to assume the defense of an accused individual's fundamental rights and liberties. Regulations for access to the legal profession are different from one country to another, even in similar judicial systems. The usual way is through a training period that follows a university degree in Law. A theoretical education combined with practical experience are considered essential for the proper

and defence of the clients' rights. Another important factor that contributes to the independence of the legal profession is the existence of independent and self-sustaining private or public organisations of lawyers. Such organisations can play a significant role in assuring the security and independence of lawyers in politically unpopular and socially sensitive cases, such as the defense of citizens asserting their individual and collective human rights or unpopular causes in both totalitarian and democratic societies. Such organisations must preserve and monitor the professional behaviour of their members, in order to maintain the integrity of the legal profession.

SOME COMMON GLOBAL OBSTACLES TO THE INDEPENDENCE OF THE JUDICIARY AND TO ACCESS TO JUSTICE: MEASURES TO GUARANTEE INDEPENDENCE.

The right to have a cause examined in a reasonable time is a principle, the implementation of which has a profound impact on personal liberties, paticularly in criminal cases or efforts to gain judicial protection for civil and human rights. The right to speedy trials or hearings is frequently recognized formally by national Constitutions and, at the international level, by various Conventions on Human Rights, such as the 1950 European Conventions, the American Convention, the African Charter on human rights and rights of the peoples, and international treaties like the UN Universal Declaration on Human Rights, the International Convention on Civil and Political Rights and the Declaration of Principles for the Protection of Individuals under detention or imprisoned, adopted by the UN General Assembly in 1988.

One of the explanations for the delay typically experienced in countries which have a formal requirement that causes must be heard in a "reasonable time" is the gap between procedural legal requirements and the requirements of reality. This explanation is heard in many countries including those of the first world with high per capita incomes. Political events place great pressure on substantive and procedural law affecting the exercise of discretion by judicial bodies in response to public concerns or political objectives. Such pressures are seen in the administration of justice in the United States and the United Kingdom. In countries without such procedural safeguards the legislature and executive are reluctant to increase the role or discretion of the Judiciary to implement rights embodied in Constitutions. Most nations laud justice as a principle but fail to act to implement it as a reality.

The failure to provide generously for the Administration of Justice in terms of human and material resources, although not a direct attack on independence, has an indirect but powerful influence on it. Inadequate resources contribute to delay in the resolution of conflicts before the courts and thereby undermines public confidence in these institutions. This is a problem of not only the poorest countries, but endemic throughout Europe and The Americas. It is said that delayed justice is no justice, particularly since such delays affect primarily the poor and unpopular seeking justice whose only remedies may be before the courts. Wealthy people or corporations, frequently can employ alternative remedies such as arbitration and other available alternate but costly remedies for conflict resolution.

The practice of the legal profession is even more difficult in non-democratic States, where the State's policies and principles prevent citizens from exercising their rights, including the rights to defenses, representation by lawyers, as well as the absence of written procedural safeguards to the access to justice. The transformation to a democratic judicial system after tyrannical situations is not easy. Considering only Europe, the difficulties in totalitarian Germany, Italy or occupied France during and after World War II have been documented. Other countries instituted a system of liberties after a fallen dictatorship such as Spain, Greece, Portugal or in the former peoples republics of Bulgaria, Hungary, Romania, Czech. In these nations, judges have had to learn how to function in new social democratic systems which guarantee cetain political and civil rights.

Judicial independence is not only achieved by fiat. Several other factors are involved including the desire by the judiciary to implement mandated changes, such as continuing education and internal oversight. In this context, consider judicial institutions in southern Europe which oversee their own funding. In some States this "self-rule" by the judiciary is criticized by both members of the judiciary and by public opinion. Such criticisms include, "Lotizzacione," the use of patronage, when appointing new judges; political patronage, "cuotas"; division of the number of judicial positions among political groups according to the results of general elections, criticized as defects of "self-rule," according to Rep. Senese of Italy, former magistrate, now member of Parliament. What Senese says about Italy can be also said, about Spain. The role of the Consejo General del Poder Judicial in Spain has been praised because of its defences of values that are outside the political party system and are the foundations of judicial functioning, without the interference of sectarian and political interests inside.

In the USA according to the media there are profound political tensions between the executive power, the President, and the legislative power, the Congress, on appointments of justices to the Supreme Court.

Appointments to the judiciary should be made with absolute public awareness and transparency of the merits of the candidates. Discussing South America, Dromi says that when members of the Supremè Court are appointed who are neither friends of politicians or followers, it is a sign of independence of governments. Such appointments are always desirable. Total transparency of the merits of a candidate enable the public to play a significant role.

Tensions over the judiciary in continental Europe have been given little attention in the media. The effectiveness of institutions aimed at judicial independence in the countries with a bureaucratic magistracy have been hampered. Professor Guarnieri considers Italy, and to a lesser degree, Portugal, to have more independent institutional judicial frameworks than Spain and France. In Portugal, for example there have been at least two attempts to limit the powers of the Council, both of which have been prevented by the Constitutional Court. In Spain however, 1985 reform was unsuccessful. As Magistrate Orlando Afonso has observed, any debate on the composition and powers of the Portuguese Council leads, to the creation by the legislature of legal mechanisms that endanger the independence of the judiciary, even though they are widely praised as constitutional guarantees.

However, a general overview of democratic societies reveals the necessity to identify the perverse results of the reflexive exercise of freedom of information, because biased information in the mass media which can be manipulated by individuals with economic or political power can unduly influence public opinion. Public opinion can be manipulated, creating frequently a social environment that interferes with the objectives needed for equitable and fair judicial opinions. The system of justice has also been used by politicians by instituting prosecutions, denunciations. The final results are not as important in these cases as the access to and control of media reportage, including frequent attacks in the media on the judiciary when judges don't act in expected ways.

Without disparaging the healthy role of public opinion, members of a democratic society should be prepared to accept judicial resolutions on the merits, without political or partisan allegiance. No doubt some judicial decisions affect political life and are controversial. But intimidation campaigns, designed to attack or support certain judicial acts

as bold or "activist" when politically acceptable or as "pusillanimous" when it fails to advance a given political goal should be denounced. Appropriate judicial conduct should avoid that which the media encourages in many countries: excessive responsiveness to pressure, and even the stardom of some judges. Clearly, some members of the judiciary appear to make decisions thinking mainly of their projection in the media.

The texts of Constitutions in democratic States are supposed to guarantee their citizens full enjoyment of the rights enshrined within them. Judges are citizens as well. In some States their rights to associate and their freedom of speech are restricted by law. For example, they can't belong to political groups. In some other countries they can participate freely in political life. In fact, their own appointment may depend on their belonging to a specific political party. There is a general agreement that at least, judicial memberships in professional association aimed to increase judicial independence and the fair protection of citizens rights should be allowed. Concerning the freedom of speech, there are significant differences even among countries belonging to the same judicial tradition. Except when it affects professional matters, the freedom of speech of judges should be protected. Nevertheless, in order to maintain the appearance of unbiased opinion and the need to maintain an image of impartiality, judges freedom of speech may be modified.

Recently, in France and Spain there have been discussions about judges serving political functions as advisers or directors in ministries, as if they were senior civil servants or politicians close to the party in power. One of the elements of this discussion is whether these judges can still be independent when they return to judicial functions. To date, in France and in Spain as well, support for judges to get involved in political functions come from judicial associations (Syndicat de la Magistrature, Jueces para la Democracia). Concerning France, A. Garapon, states that judges are new political actors. He observes that Magistrates have moved from the high judicial hierarchy, formed of senior magistrates who wrote well-reasoned judicial resolutions which were reviewed in legal publications, to the highest ranks of civil service.

Another difficulty facing the judiciary is the subject of compensations for judges. Demands by judges for economic rises in their salaries are considered, in many States, inappropriate. The wages of the judiciary in each country, should be appropriate according to their own economic situation. In some countries where judges are selected from the legal profession, prosperous and capable lawyers are not ready to assume judicial responsibilities for economic reasons. On the other hand, a

practice denounced by Latin American judges in a Seminar held in Buenos Aires in 1991 must also be avoided. In those countries affected by constant inflationary processes, the wages of the judiciary had become nominal.

Finally, an example of a conflict of powers will be discussed that removes protections from the very citizens who have been favoured by a certain judicial resolution: that is the proposal by the executive branch to the legislature to adopt laws, post facto, sometimes with retroactive affects, to annul the effects of an unwanted judicial decision, through a change of standards.

Similarly, double standards should be repudiated by the judiciary. The most cursory examination of the results of criminal decisions by the judiciary makes clear that individuals belonging to the most disadvantaged groups are denied access to alternative penalties as well as being provided listless defences.

The protection of citizens' rights by the judiciary is non-existent if the most disadvantaged are deprived of the economic resources for their access to justice. In some countries public defenders are paid by the institutions of the State, in others, private defenders are paid from the State's budget. In still others, professional associations of lawyers provide free defenses. Access to justice of illegal immigrants is even more difficult. This is a growing problem in developed countries accepting economic immigration. Lawyers should struggle for principles, recognised in many countries, that nationals and foreigners should receive equal treatment, regardless of the legal status of their residences. The confidentiality of lawyer relations with their clients should also be protected.

Earlier in this discussion, the absolute necessity of judicial responsibility was cited including respect for equitable principles when imposing administrative sanctions or criminal punishments. To eliminate the appearance of arbitrariness, a judicial decision should carefully detail the undesired behaviours and the basis for the sentence. The basis of the decisions of a court or commission must be clear and provide an opportunity for appeal.

Whether budgetary autonomy would guarantee judicial independence is an open question. The distinctions between those

countries in which the executive, through the Ministry of Justice, manages the budget and those in which budgetary autonomy has been given to constitutional bodies outside of the executive should be made. In the former, budgetary autonomy is difficult to defend because of the traditional connections of the legislative and executive powers. In the latter, it is possible that an objective rationalization of the expenditures resources can be made.

The administration of justice should be seen as a public service, in which citizens are the beneficiaries of the operation of the judicial system.

CONCLUSION

Declarations, Conventions and International Agreements on human rights and civil liberties, in which the rights of citizens and their defense are emphasized, are undeniably very important.

Their ratification and respect by a given country are a clear barometer for measuring whether this country guarantees the full exercise of human rights—as a minimum standard. Similarly, if a state does not subscribe or ratify those Conventions, it provides proofs of non-democratic behaviour.

It should be considered a modest demand by its people that governments should include in their legislation, and in their practice, basic principles on lawyers functions and guidelines to achieve the independence of the judiciary.

It is not enough for the United Nations Human Rights Commission to recognize that the Special Reporter of the Independence of Magistracy and Lawyers wants to spread information related to the norms in effect concerning the impartiality and independence of lawyers and judges.

It is not enough that the UN General Assembly passed—in its 1985, 1989 and 1990 sessions — fundamental principles related to the independence of the judiciary, the procedure for the effective implementation of basic principles on the independence of judicial decision making and basic principles on the role of lawyers. The 1990 approval in Havana of the principles to be applied to the function of the public prosecutor is not enough either.

Taking as a reference, the slow but unstoppable evolution in the field of the defense of human rights, we think it is necessary to encourage similar efforts in support of the independence and impartiality of the judiciary and the rest of the personnel involved in the administration of justice. The Project of the Universal Declaration on Independence and Impartiality of Judges and Juries and for the independence of lawyers should be particularly noted. This project is not well known either by the public or by the legal profession, in academia or even among judges.

International efforts to reform the judiciary are fragmented and not widely publicized. Principles stated in the Delhi, Lagos, Rio de Janeiro and Bangkok Declarations have yet to be transformed into Positive law. There has been a little progress in the instruments promoted by the Center for the Independence of Judges and Lawyers or the International Federations of Lawyers and international associations of judges.

Recently, the "Magistrats Europeens pour la Democratie et les Libertés" (MEDEL) proposed to the bodies and the member countries of the Council of Europe to pass an additional Protocol to the European Agreement for the protection of human rights and fundamental liberties inspired by the guiding principles of the European Statute of Magistracy, as approved in Palermo on the 16th of January 1993. This Statute, submitted as well to the European Union Commission and Parliament, aims to accomplish the realization in Europe that individual guarantees will reach the highest level at the same time that each judicial system develops efficiently, consistent with a series of principles respected as basic rules and applied by the national legislations and practices. Judicial systems, based on a rule of law that protects and develops democracy and human rights, must be established. The starting point for such progress must be basic rules such as the principles on independence of the Magistracy, on the role of lawyers and on guiding principles applicable to the public prosecution, all of them elaborated in UN protocols.

Simultaneously the European Section of the International Magistrates Union has been working in the same direction by drafting another text on the Statute concerning European Judge. It seems that there will be a joint debate sponsored by the Trevés Academy of European Law and the French National School of Magistracy, on the 30th and 31st of May 1996.

It is understood that independence of the judiciary is an essential element for a democratic society. Judges and lawyers must be involved in

the defense of the Law to guarantee real access to justice for citizens. Therefore scattered efforts must be consolidated. Joint efforts are necessary. The diverse declarations on the independence of the judiciary and the protection of the rights of the defense, made by different groups and associations should be integrated. There should be a unified agreement subscribed and ratified by all democratic states, not only the European ones. This could be achieved on a continental level. Although it is widely known that what the UN General Assembly approves is not always implemented by the member countries, it is desirable that all these principles materialize in a coherent text that defines real independence for the judiciary, as well as the establishment of mechanisms to protect it when attacked, anywhere.

INTIMIDATION OF DEFENCE LAWYERS IN NORTHERN IRELAND

by
Jane Winter, England[583]

INTRODUCTION

British Irish Rights Watch is an independent, non-governmental organisation that monitors the human rights dimension of the conflict and the emergent peace process in Northern Ireland. Our services are available to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations.

For the past six years, we have been researching the factors that make it difficult and dangerous for defence lawyers to practice on behalf of those detained under emergency laws in Northern Ireland, all of which are still in place. We have also done what we can to support lawyers working in this complex environment. This paper examines the following issues:

- restrictions on access to legal advice for those detained under emergency laws;
- abuse of and threats against lawyers;
- the failure of the judiciary and other state appointees to uphold the independence of defence lawyers;
- state collusion with pro-state paramilitary groups;
- the murder of lawyer Patrick Finucane and its repercussions;
- the rules on the right to remain silent and their impact on the lawyer/client relationship.

RESTRICTIONS ON ACCESS TO LEGAL ADVICE FOR THOSE DETAINED UNDER EMERGENCY LAWS

1. Northern Ireland is part of the United Kingdom (UK), which is divided into three jurisdictions: England and Wales, Scotland, and Northern Ireland. People arrested under emergency laws in Northern

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Ireland have fewer rights of access to legal advice than people elsewhere in the UK.

2. People arrested anywhere in the UK under the Prevention of Terrorism (Temporary Provisions) Act of 1989 (PTA) may have their access to legal advice deferred for a period of up to 48 hours.[584] However, in England and Wales, where access is governed by the Police and Criminal Evidence Act 1984 (PACE), once a solicitor is allowed to see a client, access continues to be granted on request, and the solicitor is allowed to remain present during police interviews. In Northern Ireland, where the Northern Ireland (Emergency Provisions) Act 1991 (EPA) applies, the initial deferral of access for 48 hours can be renewed for further periods of up to 48 hours, and solicitors are never allowed to remain with their clients during police interrogations.

3. So far as practice is concerned, there is a marked contrast between the jurisdictions. In England and Wales, solicitors are very rarely denied access for as long as 48 hours; no recent statistics are available, but experienced practitioners report that access is usually granted within six hours of the arrest in Northern Ireland, deferral of access has been frequently used and has led to much litigation by way of judicial review. Between 1987 and 1991, access to lawyers was deferred in 58% of all PTA detentions, on average. This rate of deferral fell to 26% in 1992, 14% in 1993 and 15% in the first three quarters of 1994, apparently as a result of a number of successful legal challenges of deferrals. Since the paramilitary ceasefires of autumn 1994, during the period 1.10.1994 to 30.6.1995 (the latest date for which statistics are available) deferral of access to legal advice has dropped to 1% (4 out of 388 cases).[585]

4. In terms of the rate of deferral of access to legal advice, therefore, the situation currently equates between the two jurisdictions, although if conflict were to resume, past experience suggests that a similar differential to that pertaining prior to the paramilitary ceasefires would re-emerge. However, there remain two very important differences in practice between the jurisdictions.

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[584]England & Wales: s. 58 (8) Police and Criminal Evidence Act 1984, as modified by subsections (13)(d) and (e), Northern Ireland: S. 45 (8) Northern Ireland (Emergency Provisions) Act 1991.

[585]All figures computed from Northern Ireland (Emergency Provisions) Acts: Statistics, Northern Ireland Office, Table 12.

5. First, in England and Wales once access has been granted, solicitors remain present with their clients during police interviews, whereas in Northern Ireland solicitors are excluded from such interviews. Access to legal advice is regarded as an integral aspect of the criminal justice system under English law. In England and Wales no distinction is made between those suspected of terrorist offences and any other suspect when it comes to access to lawyers. It is generally agreed that access to legal advice is not only a crucial safeguard for the civil liberties of suspects, but is essential to the smooth running of the criminal justice system and the courts.

6. In Northern Ireland, the separate legal regime created by the EPA can have potentially very grave consequences for suspects if they are ultimately charged and tried in the Diplock Courts, which are unique to that jurisdiction. Single judges in these courts sit without a jury and act as triers of fact and law. In particular, the lower threshold for the admissibility of confession evidence that pertains in those courts and the developed jurisprudence on the drawing of inferences from silence under police questioning mean that a suspect is seriously disadvantaged by both the deferral of access to legal advice and by the absence of the solicitor during police interviews. These disadvantages were commented upon by the United Nations Human Rights Committee during its examination of the United Kingdom's periodic report on it observance of the International Covenant on Civil and Political Rights. In November 1991 Professor Peter Burns, a highly respected expert in international human rights law, observed:

> "Detainees in Northern Ireland could be held for 48 hours without charge, and then upon application for a further five days. Studies had shown that torture more frequently occurred during the first 48 hours of detention. During the first 48 hours, detainees could be denied access to counsel, which effectively constituted incommunicado detention. This met all the necessary conditions for abuse by the authorities to take place....The fact that no suspect was entitled to have his solicitor present during interrogation was also a cause for great concern. The arguments put forward to justify the refusal of the right to silence were all the less acceptable because the suspect was deprived of the assistance of a solicitor. To all intents and purposes, the United Kingdom was deliberately setting aside one of the basic protections guaranteed throughout the

civilized world. Even the extreme circumstances in Northern Ireland in no way justified such a denial of basic human rights."[586]

7. The second difference in practice between jurisdictions is that, in addition to the solicitor's presence throughout police interviews, all such interviews are tape-recorded in England, whereas in Northern Ireland they are not. Tape-recording provides a vital safeguard for suspects against coercive interrogation. In the absence of both the solicitor and tape-recording, the only record of the police interview becomes the notes taken by the police officers conducting the interview, there being no independent record of any kind.

8. Police behaviour in the holding centres (as the three designated police stations used to hold terrorist suspects are called, the most notorious being Castlereagh in Belfast) comes under only the most minimal scrutiny. Interrogations are relayed on a silent television monitor which is watched by a police officer, but British Irish Rights Watch is not aware of a single disciplinary or criminal charge brought against any police officer as a result of this surveillance, despite many allegations of ill-treatment made by detainees. In 1993 Sir Louis Blom-Cooper QC was appointed as Independent Commissioner for the Holding Centres, but he cannot observe more than a fraction of all interviews, and has himself called for the introduction of video- and audio-recording of police interviews, citing the widespread support for such measures from, among others, the Northern Ireland judiciary and the European Committee for the Prevention of Torture.

9. British Irish Rights Watch has received many complaints of physical and psychological ill-treatment occurring during police interviews at Castlereagh Holding Centre, and has submitted reports to the European Committee for the Prevention of Torture, the United Nations Human Rights Committee and the Committee against Torture concerning these complaints. In its most recent report on conditions of detention in Northern Ireland, the European Committee for the Prevention of Torture concluded:

> "110. In the light of all the information at its disposal, the CPT has been led to conclude that persons arrested in Northern Ireland under the P.T.A. run a significant

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[586]United Nations press release CAT/2955, 13.11.1991 (morning), p.5.

> risk of psychological forms of ill-treatment during their detention at the holding centres and that, on occasion, resort may be had by detective officers to forms of physical ill-treatment."[587]

10. In their comments on the United Kingdom's fourth periodic report to them, the Human Rights Committee said in November 1995:

> "It is the view of the Committee that the powers under the provisions permitting infringements of civil liberties, such as extended periods of detention without charge or access to legal advisors...are excessive. Note is taken of the government's own admission that conditions in Castlereagh detention centre in Northern Ireland are unacceptable and concern is therefore expressed at the government's admission that it has not decided definitively to close the facility."[588]

They went on to recommend "that the Castlereagh detention centre be closed as a matter of urgency."

11. In its final comment on the United Kingdom's second periodic report on its observance of the Convention against Torture and Cruel, Inhuman and Degrading Treatment, the United Nations Committee against Torture expressed concern about:

> "14. The failure to provide for counsel to be present during interrogation in Northern Ireland for terrorist related offenses."

The Committee recommended:

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[587]Report to the United Kingdom Government on the Visit to Northern Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 20 to 29 July 1993, adopted on 3 March 1994.

[588]CCPR/C/79/Add.55, 27 July 1995, at paragraph 11.

"(a) the abolition of the detention centres in Northern Ireland and the repeal of the emergency legislation;

....

"(e) the extension of taping interrogations to all cases and not merely those that do not involve terrorist related activities and in any event to permit lawyers to be present at interrogations in all cases."[589]

ABUSE AND THREATS AGAINST LAWYERS

12. Against this background, it will come as no surprise to human rights lawyers to learn that defence solicitors in Northern Ireland are regularly abused and threatened by police officers of the Royal Ulster Constabulary (RUC).

13. In a recent report to the United Nations Committee against Torture, British Irish Rights Watch reported on our independent analysis of instructions given by 183 clients to solicitors firm Madden & Finucane, Belfast, during the period February 1992 to August 1995. These instructions covered 56% of the total of 324 clients of that firm held under emergency laws during that period. These instructions included 1,573 instances of alleged abuse, most of them reflecting physical and psychological ill-treatment. However, 121 clients reported abuse uttered against their solicitors by RUC officers, accounting for 25% of all complaints. This abuse took the following forms:

Abuse Uttered against Solicitors by RUC Officers

(Table continues on next page)

	Clients	Instances
General abuse of solicitor	45	57
Solicitor will wrongly advise client to remain silent	39	44
Solicitor only interested in making money	45	50

[589]Conclusions and Recommendations of the Committee against Torture, United Nations, 17 November 1995.

Solicitor is incompetent/unprofessional	21	34
Solicitors are republicans	39	41
Solicitor does not care about client	21	28
Choice of solicitor queried	22	27
Reference to Patrick Finucane*	23	27
Asking/speculating about solicitor's advice	19	21
Solicitor will pass information to/from terrorists	13	15
Client must be a republican because of choice of solicitor	10	13
Solicitors have schooled clients	3	7
Solicitor will be prosecuted	4	5
Solicitor gives money to terrorists	4	4
Outcome of trial will be affected by choice of solicitor	4	7
Death threat against solicitor	7	7
Police know contents of client's interview with solicitor	4	5
Solicitors are responsible for terrorism	3	3
Derogatory reference to barrister	4	4

*The Belfast solicitor who co-founded Madden & Finucane, who was murdered by the Ulster Freedom Fighters with the alleged collusion of a British intelligence agent, Brian Nelson, in 1989.

Five clients also reported that the police refused to pass on their requests to see their solicitors.

14. The following three examples, all of which occurred since the ceasefires of 1994, are typical:

Case Example: 164, October 1994

...Told me brief sent message up that he'll see me in jail when I'm getting charged...Told me to go and ask for advice of solicitor because some for clients and some are for paramilitaries. Said your solicitor is up for his cheque so you ask him for advice for yourself. Make him earn his money...Slagging Pat Finucane. One said he was the underground movement. One said "Pat the Rat"...

Case Example: 168, February 1995

...They said did my brief not tell me to say anything, then they mentioned about solicitor in England under investigation. They said they were going to start it here with this other crowd...

Case Example: 175, June 1995

Went in "Putting in a fucking complaint against me, saying I assaulted you." Said black haired one, continued "I suppose that dirty fucking whore (female solicitor) told you to do that." "That fucking trollop" (re same solicitor)...They said "Madden & Finucane, they're making a fortune of you'se, every cunt makes money of you'se, even the cleaners."

THE FAILURE OF THE JUDICIARY AND OTHER STATE APPOINTEES TO UPHOLD THE INDEPENDENCE OF DEFENCE LAWYERS

15. As has already been mentioned, during the 1990s lawyers in Northern Ireland have brought a series of cases of judicial review concerning the deferral of access to their clients for 48 hour periods. As a result, the RUC have considerably modified their practice, and deferral is now unusual, whereas previously it was very common. However, this is not because the court cases were successful. On the contrary, the judiciary in Northern Ireland has consistently failed to uphold the right of suspects to receive prompt legal advice. In one case,[590] the Lord Chief

[590] In re McKenna and McKenna (1991) CA.

Justice accepted the RUC's contention that the solicitor concerned might be kidnapped by the IRA and forced to disclose information gleaned by him about the police case against his client, if he were allowed to consult with him. This fantasy was swallowed by the court, despite affidavits from the solicitor concerned and from his father, a leading defence lawyer in Northern Ireland for many years, attesting that they had never once been so much as asked for any such information, never mind been out under any kind of pressure to reveal it. The court also discounted a solemn undertaking given to the RUC by the solicitor not to disclose anything that passed between himself and his client to any third party.

16. Other state appointees have also been less than robust in defending defence lawyers against continual threats and abuse. Once mechanism in place as a supposed safeguard to counterbalance the draconian powers contained in the PTA and EPA has been the appointment of "independent" scrutineers, to report annually on their workings. One such appointee was Viscount Colville of Culross QC, who has been criticised for his role in Guatemala.[591] In his final report to the government on the EPA,[592] Lord Colville referred to evidence sent by British Irish Rights Watch to him of abuse of lawyers. He deplored any such activity on the part of police officers, but the only remedy he could envisage to put a stop to such behaviour was for us to report the names and dates of detention of clients making the allegations to the RUC. Quite apart from the undesirability of the RUC investigating such complaints against its own officers, such a course of action would have laid clients open to reprisals by the police. The more obvious remedy of allowing solicitors to be present during police interrogations did not appear to have occurred to Lord Colville.

17. Lord Colville's successor, John Rowe QC, has also failed to uphold lawyers' rights. Of the presence of solicitors during interviews, which he declined "with reluctance" to propose, Mr. Rowe has this to say:

> "130. ...Section 11 [of the EPA, which deals with the admissibility of confessions], and the courts' interpretation of it, permit lengthy and persistent

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[591] *Colville for the Defense: A Critique of the Reports of the UN Special Rapporteur for Guatemala, Americas Watch, New York, February 1986.*

[592] *Report on the Operation in 1992 of the Northern Ireland (Emergency Provisions) Act 1991*, 20 May 1993.

> questioning, probably more so than PACE (NI); to allow solicitors to be present at interviews would be contradictory. Putting it another way, the regime of the holding centres contemplates that kind of questioning; but solicitors, quite legitimately, by advising their clients not to answer, would impair that regime. It may seem that I am paying excessive attention to logic, in refusing to recommend a change. After all, I could simply recommend it, as being a safeguard which exists under any other Code. It may be a breach of Article 6 of the European Convention [on Human Rights]. I am not asserting that it is. But I think the whole concept of the holding centre is against the presence of solicitors at interview so long as holding centres last."[593]

It would appear that the only reason that Mr. Rowe did not recommend that solicitors should be present during police interviews of their clients was that it ran contrary to the whole logic of the Holding Centre regime, a logic which he apparently accepted, despite its incompatibility with international human rights norms.

18. Another state appointee is Sir Louis Blom-Cooper QC, who acts as the independent Commissioner for the Holding Centres. In a series of reports he has developed a theory, unsubstantiated by any independent research, that there are unacceptable delays on the part of solicitors in attending their clients when they are arrested under emergency laws. Despite the absence of complaints from clients on this score, he has proposed a special legal advice unit to be based at Castlereagh and supervised by the Northern Ireland Law Society, who oppose the whole idea. Detainees would then be offered immediate free advice by one of the unit staff, and would only be able to consult the solicitor of their choice if they paid for such advice out of their own pockets. The Commissioner is robust in his defence of criticism of his proposals from international human rights groups,[594] and impervious to the reproach that he is failing to uphold suspects' right to counsel of their own choosing,

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[593] *Review of the Northern Ireland (Emergency Provisions) Act 1991*, Cm. 2706, February 1995, Chapter 9.

[594] See, for instance, *Choice without Delay: Interrogation, Legal Advice and Human Rights in Northern Ireland*, Lawyers Committee for Human Rights, New York, September 1995.

and that he is indirectly lending his support to the RUC's view that some solicitors are over-identified with their clients' causes.

STATE COLLUSION WITH PRO-STATE PARAMILITARY GROUPS

19. There have been many allegations throughout the conflict of collusion between the UK security forces, both army and police, and loyalist paramilitaries. The overwhelmingly Protestant composition up of the security forces, and the fact that part-time members of those forces have on occasion been proved to have also belonged to loyalist paramilitary groups concurrently, have fuelled these allegations. However, they are not merely a matter of perception: collusion has been officially acknowledged. Far from taking rigorous measures to stem collusion, through, the UK government has appeared to condone it by a series of official cover-ups, the failure to publish reports on collusion, failure to prosecute known agents of collusion, and the use of public interest immunity certificates at trials and inquests to withhold information concerning collusion.

20. In 1989, John Stevens, a senior police officer, was asked to investigate allegations that members of the security forces had been passing details of suspected IRA members to loyalist paramilitaries. In May 1990 a summary of his report was published, which confirmed that this had happened. As a result, 59 people were charged or reported to the Director of Public Prosecutions, resulting in 44 prosecutions and 41 convictions. Although many of the documents leaked to the loyalists originated from police files, not a single police officer was charged. Stevens' full report was never published and it is not known whether his many recommendations were acted upon by the government. Allegations that security force documents continued to be passed to loyalists continued until the ceasefires. For example, on 14.5.1994 the *Andersonstown News* reported that an army intelligence file containing details of 200 inhabitants of West Belfast had been found by a member of the public near Divis Flats; several of those identified had been victims of recent loyalist violence.

21. Even more disturbingly, police officers continued to visit many individuals, included elected Sinn Féin politicians, to inform them that their security files had been leaked to loyalists and advising them to take precautions for their own safety. Despite these warnings, the Northern Ireland Office refused home security grants to some of those threatened,

and the RUC refused to allow them to have gun licences so that they could arm themselves for their own and their families' protection.

22. The most significant outcome of Stevens' inquiry was the prosecution of Brian Nelson, a double agent who was working for the government intelligence service and acting as the senior intelligence office of the Ulster Defence Association from 1987 to 1990. In January 1992 he stood trial on five charges of conspiracy to murder. Two charges of actual murder and 13 other charges against him were dropped shortly before the trial, which lasted only two days. He was convicted on all five conspiracy charges, plus a number of lesser charges, and sentenced to 10 years' imprisonment, a remarkably lenient sentence. After his conviction, he gave journalists his prison diary, which was featured in a *Panorama* programme transmitted by the BBC on 8.6.1992. In this diary, he allegedly admitted to involvement in a number of other murders, including that of Patrick Finucane, a Belfast solicitor, and to targeting another lawyer, Paddy McGrory. The transcript of the programme was referred to the Director of Public Prosecutions, who asked John Stevens to investigate these allegations. Stevens completed his enquiries in January 1995, and submitted his final report to the DPP of Northern Ireland on 24.1.1995. On 17.2.1995 the DPP issued a direction of no prosecution to the Chief Constable of the RUC. It is not known why he reached this decision, which seems extraordinary in the face of Brian Nelson's allegedly self-confessed part in the murders.

23. Brian Nelson was also alleged by a BBC *Inside Ulster* programme transmitted on 28.1.1993 to have been involved in assisting loyalists to obtain a shipment of arms from South Africa. The consignment arrived in Northern Ireland in January 1988, and allegedly consisted of 200 AK27 automatic rifles, 90 Browning 9mm pistols, 12 RPG7 rocket launchers, 30,000 rounds of ammunition, c. 500 fragmentation grenades and an unknown number of warheads. Relatives for Justice, an NGO representing the families of victims of contentious killings, claim that at least 102 sectarian murders have been carried out by loyalists using weapons from the South African consignments.[595] In 1994 Relatives for Justice sent a representative to give evidence to the Cameron Commission concerning these allegations, and it is understood that the South African Cabinet has agreed to authorise further enquiries.

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[595] *Collusion 1990-1994: Loyalist Paramilitary Murders in the North of Ireland*, Relatives for Justice, 1995.

THE MURDER OF PATRICK FINUCANE AND ITS REPERCUSSIONS

24. Lawyers have been constrained to take threats and abuse seriously since the murder of solicitor Patrick Finucane. He was murdered at the age of 39 by the loyalist Ulster Freedom Fighters on 12th February 1989 in the presence of his wife and children. He died less than four weeks after Douglas Hogg MP, Under Secretary of State for the Home Department, had alleged in parliament that

> "...there are in Northern Ireland a number of solicitors who are unduly sympathetic to the cause of the IRA."

25. As is explained above, the government agent Brian Nelson was apparently involved in setting up the solicitor's murder, but has so far escaped prosecution.

26. Patrick Finucane's family and business associates continue to suffer from unwarranted attacks upon his memory and reputation which adversely affect them. For example, during the debate on the renewal of the Prevention of Terrorism Act in the House of Commons on 24th May 1994, David Trimble, an Ulster Unionist MP, claimed:

> "Then there are the godfathers in Belfast, who are well known to journalists, to the police and to members of the public."[596]

He went on to name a number of people whom he alleged were IRA "godfathers," including, "...the IRA's Belfast intelligence officer, one of the Finucane brothers." As he was protected by parliamentary privilege, there was no recourse for the individuals he named in this highly defamatory context. However, the next day the *Belfast Telegraph*, a Unionist newspaper, reported his allegations under the headline "Man named as IRA chief." Under a sub-heading, "Who are the men?", the paper repeated a number of the names given by David Trimble and gave reasons why they might have been named by him. In this section they included the following:

> "Lawyer Patrick Finucane was shot dead by the UFF at his home in north Belfast in 1989."

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[596] *Hansard*, 24 May 1994, co. 292.

This reference to Patrick Finucane was entirely gratuitous. The newspaper was well aware that he had no paramilitary connections, although other members of his family had, and that a police officer giving evidence at his inquest had confirmed that, "...he was just another law-abiding citizen going about his professional duties in a professional manner." Both Patrick Finucane's widow and his former business partner, Peter Madden, complained to the newspaper, and to the Press Complaints Commission, Martin Finucane, one of the solicitor's brothers and a human rights activist, complained to the Special Rapporteur on Extra Judicial, Summary or Arbitrary Executions that both the MP and the newspaper had put his life in danger.

27. As has been seen above, police officers still make derogatory reference to Patrick Finucane, six years after his murder. It is high time that there was a full independent inquiry into his murder, in the interests of justice and of common decency. The following list of functionaries and non-governmental organisations has expressed concern about the murder of Patrick Finucane and the issue of intimidation of lawyers, including:

- the United Nations Special Rapporteur on Judges and Lawyers;
- Dr. Claire Palley, United Sub-Commission;
- Peter Burns, Rapporteur on the UK for the Committee Against Torture;
- the United Nations Human Rights Committee;
- the Standing Advisory Commission on Human Rights, which advises the UK government on human rights in Northern Ireland;
- Viscount Colville of Culross QC, who until recently acted as independent scrutineer of UK emergency laws;
- Amnesty International;
- the International Commission of Jurists;
- the Fédération Internationale des Droits de l'Homme;
- the Committee on the Administration of Justice;
- Liberty;
- British Irish Rights Watch;
- the Haldane Society;
- Norwegian Helsinki Committee;
- Human Rights Watch (formerly Helsinki Watch);
- the Lawyers Committee for Human Rights;
- the Human Rights Working Party of the Law Society of England and Wales; and
- the Association of the Bar of the City of New York.

The American State Department, in its recent report to the Senate on human rights in the UK, also raised the murder for the third consecutive year.

THE RULES ON THE RIGHT OF SILENCE AND THEIR IMPACT ON THE LAWYER/CLIENT RELATIONSHIP

28. Adverse inferences can be drawn against defendants in the Diplock courts if they exercise their right to remain silent under police interrogation or if they fail to testify in their own defence.[597]

29. For the first three years' operation of these rules, over half of all those detained under the emergency laws had to make the decision whether to remain silent under police questioning without the benefit of any legal advice.[598] In a recent decision of the European Court of Human Rights,[599] it was held that the situation where a detainee had to decide on whether to remain silent when the police had deferred his access to legal advice violated his right to a fair trial.

30. The rules on the right of silence in Northern Ireland have serious implications for the roles of judges and lawyers, and were introduced without any consultation with the judiciary or the legal professions.

31. Defence lawyers in Northern Ireland strongly object to the rules on the right of silence. Solicitors report that they create a number of dilemmas, especially where clients are very young, or of low intelligence, or are otherwise vulnerable. Problems can be particularly acute where access to a client has been deferred. In some instances, the client, intimidated by the police caution against remaining silent, will already have made damaging admissions. In others, the line of police questioning may suggest that they have no real grounds for suspicion or any hard evidence against the client. In other cases, the client may already have exercised the right to remain silent and will already be at risk of adverse inferences being drawn if the case comes to trial. In all these situations, it may well be in the client's best interests to advise silence, but solicitors

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[597]Criminal Evidence (Northern Ireland) Order 1988.

[598]See paragraph 3 above. In 1994, 15% of all PTA detainees were denied access to their lawyers during the first 48 hours of police questioning.

[599]John Murray v. UK Application no. 41/1994/488/570.

must also advise of the risks attached to doing so. Advising, for example, an eighteen-year-old who has never been arrested before and who is suggestible, anxious, and not very clever, as to whether to remain silent or not is close to impossible.

32. Where a solicitor does advise, or the client chooses, silence in the police station, lawyers and their clients face further dilemmas if the case comes to trial. The client is already at risk of adverse inferences being drawn against him or her. If counsel advises the client to testify, he or she risks being accused of mounting an "ambush" defence, i.e., coming up with a defence which has been concocted during the time spent awaiting trial. Equally, if counsel advises the client not to testify, the court may still draw adverse inferences. In either situation, counsel face difficulty in presenting the defence, since they will have to attempt to predict what inferences the court may draw.

33. Given the inequality of rights between the individual and the state, the right to remain silent in the face of police questioning and at trial are fundamental to the defence, especially in an adversarial system of justice such as there is in the UK. If defence lawyers cannot advise their clients to remain silent without putting them at risk of conviction, their ability to offer impartial advice, and hence their relationship with their clients, is seriously distorted.

CONCLUSION

Although defence lawyers in Northern Ireland face far fewer dangers than many of their colleagues around the world, their situation is unique amongst western democracies in that many of them have practised for years while going in fear of their lives, and there are, as has been described above, a plethora of legal and institutional practices and measures that militate against the independent exercise of their profession, free from improper pressures. It is very much to their credit that so many of them, with great personal courage, have continued to practice and to challenge the system of emergency laws which violates their clients' human rights.

REMARKS MADE DURING THE IADL CELEBRATION COMMEMORATING THE LIVES OF HAYWOOD BURNS SHANARA GILBERT AND FELICIA ROBERTS

Cape Town, South Africa
April 4, 1996

by
Dullah Omar, Minister of Justice, South Africa

Introduction by Wilhelm Joseph: *When the current government of South Africa triumphed over apartheid, they faced a hell of an obstacle, having to build a new society, build on justice and dismantle injustice. If you had to do that, and depend on someone, and you wanted someone to help you who was cool, calm, collected, intelligent, nice to be around, full of energy, and even good-looking — South Africa is blessed to have one of those people in its midst who carried on a struggle right here at home while others fought outside, and he persevered. I call on the current minister of justice, Dullah Omar. By the way, unless the statute of limitations has run, the minister of justice finds himself in a real contradiction. I was told he violated the laws of South Africa and snuck out of here to attend an IADL conference in Barcelona. So he should do an arrest of himself.*

Thank you very much, Comrade Wilhelm. Friends, ladies and gentlemen, comrades. I am grateful for the opportunity of sharing this day with you, sharing this event with you. I want to record our own solidarity with all of you, but in particular our condolences with the families.

I know that when this event, a tragic accident occurred, many of you, if not all of you attending this conference, were thrown—particularly those who lived and worked with the three comrades were devastated. It was difficult for you, it was difficult for all of us, because we considered ourselves to be very rational human beings. I would not be wrong if I say that perhaps all of us who had anything to do with this conference considered ourselves to be revolutionaries, a swear word to many. But because we consider ourselves to be revolutionaries, it is often thought that we are people without feelings, without emotions. That we are

concerned about material things, the world, and changing the world.

I remember a conversation I had with Haywood in his home, in his flat in New York, when my wife, Farida, and I and our family enjoyed a supper with him. And this is the very thing we spoke about. And in associating myself with the thought which has been expressed here this evening, I would like to share a thought with you, which arises out of that conversation.

I do so because sometimes we are afraid to cry. I was pleased to see Lennox cry. I am sorry to say that in a way, but it symbolized something, that we are human beings; we are human beings with feelings.

If I can also concentrate on Haywood for a while, Haywood and I asked ourselves: "What is a revolutionary?"

We asked ourselves that question because the concept and people who call themselves "revolutionaries" have been demonized in this world. Demonized by those who want to maintain systems based upon domination, maintain systems which continue the oppression and exploitation of human beings by other human beings.

And in our discussion, Haywood indicated that a revolutionary is a person who believes in the transformation of the world, who is committed to the transformation of the world. But more than that, a kind of transformation which will liberate humanity from the terrible conditions under which they live. To transform the world into one which will improve the human condition.

As I understood it and still understand it, a revolutionary is a person who seeks to ensure that the human condition is altered, so that we create a world which is fit for human beings to live in. The comrades who died were revolutionaries in that sense of the term.

What was important about the conference of the International Association of Democratic Lawyers was the fact that lawyers who share a common perspective and a common vision got together in order to make a contribution through law towards the achievement of the kind of objective that the revolutionaries stand for.

Haywood and Shanara stepped into the South African parliament, obviously for the first time in their lives, on Monday, for the opening of the Congress of the IADL. I was already in the assembly hall

when Shanara stepped in, in her own gentle fashion. Those of you who know Shanara will know that that's how she is, soft-spoken, treading softly, careful not to upset anybody, hurt anybody, gently performing what she had to perform. And she stepped into parliament in exactly the same way and found a seat somewhere.

Haywood strode into parliament, I almost wanted to say like a colossus. Because in terms of lawyering, he was a colossus. But as a freedom fighter, and as a revolutionary, for him that was a symbolic moment. Because wherever he was, he fought for the liberation of humanity.

In this instance, it was South Africa. And when he strode into that parliament, for him and for us, it was also an historic moment.

Thinking back, I think that when we walked into that parliament for the first time in May 1994, we did so very hesitantly, almost as if we did not belong. But not so Haywood. He strode into it, knowing that he belonged. And this speaks of another element in the character, in the personality, in the vision, in the work of the comrades who passed on. And that is their internationalism. In this instance, it was South Africa. But I am always amazed by the fact that our comrades in the National Lawyers Guild (NLG), and the National Conference of Black Lawyers (NCBL) have displayed such internationalism.

When I first made contact with the two organizations, which was not very long ago, because in as much as persons like Comrade Albie were in exile, there were many of us who were, I don't know if it's a correct term, we were in "in"-xile. There were some who could not come back. There were others who were not allowed to leave. And so for many years, I like many others, I don't claim any special status for that, did not possess that piece of paper which allows you to leave the country. So we were restricted to our country. Perhaps it was a good thing. Because we were able then to combine our struggles inside with our struggles outside.

I looked at their literature that they produced. It spoke of the participation of their members, not only in the struggle in South Africa, but in Palestine. They spoke of Vietnam. They spoke of the struggle of people fighting dictatorships in South America, Central America, other parts of Africa. They identified. They went to those countries. They came back to the United States and wrote about them.

Sometimes I feel a little ashamed that we South Africans, who have benefitted most from international solidarity, have not been able to display the same kind of internationalism to the extent that we should have, and should. We have been the beneficiaries of international solidarity.

My belief is that it is very important that as we go along we begin to repay our friends and our comrades. Not directly, because they did not do it for reward. But do it by displaying the same kind of solidarity in the struggle of people all over the world against oppression, against exploitation, and against domination.

I only hope that we will live up to that ideal. People like Haywood, Shanara, Felicia from our own country, helped to teach us that lesson. And indeed that kind of internationalism, universalism, a recognition of a common humanity, that we are all brothers and sisters in one world, that we need to care for each other, that there must be compassion with, there must be sharing, that human beings are not fated to make war with each other, to kill each other. That there is nothing in our destiny which says that countries must make war with each other. That there is something called human solidarity which can transcend national boundaries. That it is possible for us to build a world in which human beings of different colors, from different nations, different traditions, different religions, can live together as brothers and sisters, while respecting those things which are dear to people such are religion, culture, language.

A revolutionary is a person who will not only believe in those ideals and is committed to those ideals, but devotes her or his life towards the achievement of those ideals. The way I came to know Haywood and Shanara, they fitted that description. Felicia, a fellow South African, was also forced to leave our country and returned as an exile to participate in the rebuilding of our country and the upliftment of our people. Comrade Rommel spoke about it. And so you see the same quality coming in.

I think one of the great things about our liberation movement, and liberation movements in other parts of the world, is its commitment to create a new world in which human beings can live together in peace and harmony with each other. And the wonderful thing about belonging to organizations such as the NCBL, NLG, and the various other components of the International Association of Democratic Lawyers, lies in the fact that even though spread out wherever you are, in the small minority maybe wherever you are, you are upholding values and a vision,

which are very important for our world if we are going to get out of the morass of the period in which we live.

South Africa has had its first democratic elections. All of you shared in the celebration of that moment. All of you want to participate in the transformation of our country, and that is very exciting. But the struggle for freedom never proceeds along a straight line. There is no linear development from a position of un-freedom to a position of freedom. The struggle for freedom has its ups and downs. And if we examine the international scenario, we will see that there have been huge setbacks in the struggle for freedom from domination. Our world and our peoples are still dominated by forces which on their own they are unable to overthrow.

The greatness of internationalism is that it makes it possible for people, isolated in their countries though they may be, to know that they are part of a worldwide movement which seeks to bring about a change which will alter the human condition and make the world a beautiful place in which to live.

I want to pay tribute to the memory of Haywood, and Shanara, and to Felicia, by saying that they made a contribution to that struggle. The greatest tribute we can pay to their struggle and contribution is firstly to ensure that the world remembers. We must not assume that the world will remember; there is nothing automatic about it. The world can forget. Part of our task in changing the world is to ensure that history is written in a way which records the contribution of ordinary men and women who have fought to change the world. So part of our responsibility in tribute to them is to do precisely that. The second thing that we need to do as a tribute to their memories is to dedicate ourselves to the same objective. And thirdly, to commit ourselves to do those things in our own lives, in our own way wherever we are, in little ways, in big ways, but to know that there are many other people all over the world who are also doing those very little things which together will make a mighty ocean. That ocean will water the world and make the world a better place to live in.

Long live the memories of Haywood, Shanara and Felicia.

Thank you.