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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: STUDY ON THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS

Final report by the Special Rapporteur, Mr. L. M. Singhvi*

CONTENTS

	Paragraph	Page
Introduction	1 - 8	1
Chapter		
I. SCOPE, SEMANTICS, METHODOLOGY AND MATERIALS .	9 - 19	4

* This document contains the introduction and Chapters I to IV inclusive. The following chapters and the annexes will appear in addenda to this report.

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		Paragraph	Page
Chapter (contd.)			
II.	THE PRINCIPLE OF THE INDEPENDENCE OF JUSTICE IN THE INTERNATIONAL PERSPECTIVE ...	20 - 44	8
III.	DENIAL OF JUSTICE AND STATE RESPONSIBILITY: A MODERN APPROACH	45 - 63	18
IV.	JUSTICE AND THE JUSTICE SYSTEM	64 - 73	29
V.	THE CONCEPT OF IMPARTIALITY AND INDEPENDENCE		
VI.	IN DEFENCE OF THE CONCEPT OF IMPARTIALITY AND INDEPENDENCE		
VII.	INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY		
VIII.	INDEPENDENCE AND IMPARTIALITY OF JURORS AND ASSESSORS		
IX.	INDEPENDENCE OF LAWYERS		
X.	TYPOLOGIES OF DEVIANCE FROM THE NORMS OF IMPARTIALITY AND INDEPENDENCE		
XI.	RECOMMENDATIONS		

Annexes

I. Replies to the questionnaire

II. Draft declaration on the independence of justice

III. Draft principles on the independence of the legal profession (Noto)

IV. Universal declaration on the independence of justice (Montréal)

INTRODUCTION

1. By its decision 1980/124 of 2 May 1980 the Economic and Social Council took note of Commission on Human Rights resolution 16 (XXXVI), adopted upon the recommendation contained in resolution 5 (XXXII) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities 1/, and authorized the Sub-Commission to entrust Mr. L. M. Singhvi with the preparation of a report, in the light of the comments made by the Sub-Commission at its thirty-second session 2/, on the independence and impartiality of judiciary, jurors and assessors and the independence of lawyers, to the end that there shall be no discrimination in the administration of justice and that human rights and fundamental freedoms may be maintained and safeguarded.

2. By its resolution 16 (XXXIII), the Sub-Commission requested the Secretary-General to invite Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council to transmit, on the basis of a questionnaire, to the Special Rapporteur, through the Secretary-General, any comments, views or material, including constitutional, legislative or administrative provisions and practice, and decisions of courts and tribunals, which may be relevant in the preparation of the report. In the same resolution, the Sub-Commission also requested the Special Rapporteur to give attention to ways and means whereby the judiciary and the legal professions can contribute to maintaining and safeguarding respect for human rights and fundamental freedoms.

3. At its thirty-third session, in 1980, the Sub-Commission noted with appreciation the preliminary report submitted by the Special Rapporteur (E/CN.4/Sub.2/L.731) and invited Governments, specialized agencies, regional intergovernmental organizations as well as non-governmental organizations to transmit to the Special Rapporteur, on the basis of a questionnaire prepared by him, views or

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1/ At its thirty-second session, the Sub-Commission had considered a preliminary study prepared by the Secretariat on measures hitherto taken and the conditions regarded as essential to ensure and secure the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers (E/CN.4/Sub.2/428).

2/ See E/CN.4/Sub.2/SR.839-SR.841 and SR.868-SR.869.

material which may be relevant in the preparation of his study. The Special Rapporteur submitted to the Sub-Commission progress reports in 1981 (E/CN.4/Sub.2/481 and Add.1), in 1982 (E/CN.4/Sub.2/1982/23) and in 1983 (E/CN.4/Sub.2/1983/16). By resolution 1984/11, the Sub-Commission, having considered the preliminary and progress reports submitted by the Special Rapporteur, requested him to submit his final report to the Sub-Commission at its thirty-eighth session, in 1985, and decided to consider it as a matter of priority, with a view to the elaboration of a draft body of principles.

4. By resolution 1983/38, the Sub-Commission, while considering the question of the new international economic order and the promotion of human rights, requested the Special Rapporteur to give consideration to the most appropriate means by which the international community could contribute to strengthening legal institutions, especially in developing countries, with a view to promoting full respect for human rights.

5. Following the initiative of the Sub-Commission and the presentation of the preliminary report by the Special Rapporteur, the question of the independence of the judiciary evoked world-wide interest and has been discussed and principles were formulated in various meetings, particularly those at Syracuse, Noto, Tokyo, Jerusalem and New Delhi 3/. These efforts at the non-governmental level finally led to the adoption of the Universal Declaration on the Independence of Justice at the World Conference on the Independence of the Judiciary, held at Montreal 4/.

6. In its resolution 16, entitled "Guidelines to ensure the independence of judges and to improve the selection and training of judges and prosecutors", the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges. The Special Rapporteur was closely associated with the finalization of the draft guidelines at the Interregional Preparatory Meeting at Varenna in September 1984. The Draft Guidelines finalized at Varenna 5/ will be submitted to the Seventh United Nations Congress on Prevention of Crime and Treatment of Offenders, to be held in August 1985.

1/ See the above-mentioned progress reports.

2/ See E/CN.4/Sub.2/1983/16, para. 5.

3/ See A/CONF.121/IPM/3.

7. It seems that there is a common thread in the principles formulated at all these meetings, in so far as the principle of impartiality in independence of judges is concerned. Moreover, the Special Rapporteur's comparative study of the subject with reference to different legal systems, five years of in-depth deliberations at international meetings of experts from different systems and draft documents prepared by international groups, and replies to the Special Rapporteur's questionnaire received from States, non-governmental organizations, professional bodies and individuals, establish remarkable world-wide unity of purpose and outlook on the subject of impartiality and independence of judicial legal institutions.

8. The constitutional landscape of the world provides a unique canvas for the study and comparative methodology throws welcome light on that canvas. It is noteworthy that though there are differences in the approach to the larger theme of equality in the administration of justice and the extent to which it can be achieved through judicial instrumentalities, there is a common level of cognition and basic conceptual and attitudinal consensus on the question of the impartiality and independence of the judiciary, jurors and assessors and the independence of lawyers. This is demonstrated theoretically by an analysis of the constitutional and legal provisions in different systems and is evidenced by samples of country profiles and constitutional and legal cross-sections 6/. It is verified more fully and specifically from the replies to the Special Rapporteur's questionnaire. It is true that institutional mechanisms and styles have evolved differently in different systems, and systems do not always do what they say. There is always a gap between formal verbal articulation on the one hand, and the actual "law in action" on the other. Legal and political cultures vary vastly. There are different operational priorities in different systems and at different times. There may often be in practice not only marginal but substantial and pervasive derogations from the principles of impartiality and independence of the judiciary, jurors and assessors and the independence of lawyers, but there is no legal system which denies or disclaims the basic postulates of what may generally and comprehensively be termed as "independence of justice". This broad unity of concept and outlook throughout the world is valuable for the task of standard setting and for strengthening legal systems for the prevention of discrimination and protection of human rights.

6/ Jerome Hall, "Comparative Law as Basic Research", Hastings International and Comparative Law Review, Vol. 4, No. 1, p. 189

I. SCOPE, SEMANTICS, METHODOLOGY AND MATERIALS

9. The scope of the study is defined by Sub-Commission resolutions and discussions which provide the basic framework. The primary purpose of the study is (a) to analyse the principles of the impartiality and the independence of the judiciary, jurors and assessors and the independence of lawyers in conceptual, institutional and functional terms on a world wide basis in the context of human rights and fundamental freedoms; (and (b) to elucidate and elaborate the basic principles as standards of universal acceptability and applicability. Functional analyses and definitions of certain basic terms are attempted briefly in the relevant sections of the study. A few general clarifications may, however, be made at the threshold.

10. In his preliminary Report 7/, the Special Rapporteur raised the issue of the narrow and inclusive definition of the judiciary. In most systems, there are bodies of public officials who play an important role in the administration of justice, in resolving disputes and in protecting human rights. They may not strictly belong to the cadres of the judiciary in the conventional sense of the word. Similarly, there are persons other than those formally enrolled as lawyers, performing representational functions in specific disputes.

11. The institution of the judiciary is known and described by words such as courts, tribunals, conseil, judge, adjudicating authority, and judges are also called magistrates, ministers, justices and members of tribunals or named judicial bodies or authorities. There are many courts which are described as tribunals. Most tribunals are judicial courts and function as such. Tribunals are quite different from special courts, although in certain regular jurisdictions, tribunals are courts of special or specialized jurisdictions. Special courts are also courts. In many countries, tribunals such as Fiscal Tribunals, Revenue Boards, Customs and Excise Tribunals, Income Tax Tribunals and Contentious Administrative Tribunals perform traditional adjudicative functions. Generally, tribunals (with or without jurors or assessors) are judges of facts as well as of law. Members of judicial tribunals as well as members of many administrative tribunals are a part of the judiciary within the narrow sense of that term. Military tribunals perform judicial functions and are expected to adhere to the ethos of the judiciary.

12. Arbitrators and lay justices too belong to the fold of the judiciary although only for the particular purpose and duration unless there is a permanent cadre of empanelled arbitrators or lay justices or magistrates on a full-time basis. A special court, a military tribunal, a procurator (prokuratura), a Minister of Justice, a Law Reform Commissioner, a Ministerio

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7/ E/CN.4/Sub.2/L.731, para. 70.

publico, an Attorney General, a public prosecutor in certain countries, and an ombudsman also perform judicial or quasi-judicial functions. Their roles are undoubtedly crucial to the independence of justice but they are not always an integral part of the regular judicial organ of the State. They perform judicial functions, their functions have an impact on the independence of the judiciary and sometimes they are a part of the judiciary or drawn from it. If they are not independent and impartial in a functional sense the quality of the impartiality and the independence of the judiciary is inevitably impaired.

13. A minister of justice or a ministerio publico or an Attorney General or a public prosecutor is required to be independent in a different manner and a different context compared to a judge. The requisites and norms of impartiality and independence applicable to judges cannot be applied as such and in the same terms to these functionaries. Prosecutors are treated as a part of the judiciary in many countries, particularly in European and Latin American countries. In England, in the United States of America and in Commonwealth countries, prosecutors are members of the Bar. A distinction has to be made in certain contexts and these functionaries have to be treated as a class by themselves, without assimilating them fully to the regular, professional judiciary which, however, includes lay judges and assessors who function as judges in certain jurisdictions. A certain contextual differentiation has also to be made between judges performing judicial functions and authorities performing quasi-judicial functions. The latter are bound to accord fair hearing and have to be objective and just, but they cannot be called upon to function as full-fledged judges as they are not governed by the same conditions. The impartiality and the independence of such administrators and policymakers who are also entrusted with functions of an adjudicating nature are vital principles but they cannot be secured in the same way as in the case of judges and tribunals whose functions are primarily judicial and who belong by their appointment to the machinery of justice.

14. The Special Rapporteur agrees that administrative courts should be subject to judicial standards. To such administrators, however, principles of impartiality and independence should apply by analogy with suitable modifications and as far as practicable but not in a full normal sense. It is not a matter of roles but of functions, and functions often overlap. The principles of impartiality and independence apply to both judges and others, who, without being judges in the formal sense, perform judicial roles and functions. The terms and tenures of those who are not a part of the judiciary are necessarily different; so are their backgrounds and appointment procedures. Safeguards applicable to members of the judiciary cannot, therefore, be made applicable to them. They may nevertheless be called upon to discharge duties of a judicial and quasi-judicial nature in an impartial and independent manner. Of necessity, the primary focus of the study is the judiciary and the judges

in the conventional sense including those who, though they are not called judges, perform strictly judicial roles. With regard to those who also perform judicial or quasi-judicial roles but who are strictly a part of the judiciary, judicial standards and other safeguards apply as far as possible.

15. The definition of the judiciary includes not only the institution of the judiciary within each State at all levels, but also international judges, tribunals, arbitrators, jurors, assessors and experts 8/.

16. The term "assessors", however, has different meanings in different systems and has to be understood in the context of each legal system. It may mean an expert witness or a technical adviser, or a specialist or a full-fledged lay judge. The study deals with assessors in all these shades of meaning. The extent of the jurisdiction and powers of jurors differ in different systems but the term raises no semantic confusion. The term lawyer connotes not only primary functions of professional legal representation but also the functions of advising, assisting, drafting, conveyancing, counselling and academic teaching, writing and research.

17. The Special Rapporteur undertook, as part of the basic background of the study, a detailed in-depth study of the historical evolution of the institutions of the judiciary, jurors, assessors and the legal profession and of the perception of the principles of impartiality and independence in the context of those institutions in different systems. The conceptual and institutional evolution was studied both in the historical and comparative perspectives and at the national and international levels. The institutions were studied not in isolation but as parts of legal systems. The constitutional and legal texts were analysed with reference to the working of the system and the problems and controversies which had arisen around them. The Special Rapporteur also consulted, conferred and corresponded with many eminent judges, practising lawyers and academics to seek clarifications and to obtain materials.

18. On the basis of this background study, an elaborate synopsis consisting of 11 sections 9/ and a detailed questionnaire containing 61 questions were prepared by the Special Rapporteur. Both the synopsis and the questionnaire were placed before the Sub-Commission. The questionnaire, a copy of which is annexed, brought a rich harvest of responses 10/. The wealth of materials

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8/ See infra, Chap. II.

9/ See E/CN.4/Sub.2/1983/16, annex I.

10/ See E/CN.4/Sub.2/1982/23, para. 7, concerning the addressees.

contained in the responses to the questionnaire have proved to be a rich and reliable resource. Some of the country profiles included in the study are based substantially on these responses. The study does not purport to be exhaustive and, because of United Nations documentation regulations, it was not possible to reproduce all the responses received, only extracts of some of them, in order to illustrate the various aspects of the subject. The originals of the answers are available to the members of the Sub-Commission in the secretariat.

19. The Special Rapporteur has annotated and analysed these responses with the aid of available literature. Concepts, institutions and issues which have been discussed and delineated in the study have been subjected to considerable independent research by the Special Rapporteur. Norms having been culled, deviance was nevertheless difficult to describe and document. For the purpose of this study, the Special Rapporteur has preferred to describe the typologies of deviance, with a minimum of pointed references to specific episodes and instances in any country. Indeed the objective of such a study would be impaired if it were to lapse into any inquisition or accusation. On the other hand, it is well to remember that a typology as an analytical tool is authentic and serviceable only to the extent it represents a set of realistic generalizations based on the experience of live situations. This is what the Special Rapporteur has kept in mind, in describing deviance. The Special Rapporteur has used the background materials collected by him, the materials contained in the responses and the typological patterns of deviance in the conceptual matrix of this study to fashion a touchstone and a sieve for the principles on the independence of justice.

II. THE PRINCIPLE OF THE INDEPENDENCE OF JUSTICE IN THE INTERNATIONAL PERSPECTIVE

20. The preamble of the Charter of the United Nations affirms the determination of the peoples of the world "to establish conditions under which justice can be maintained" and to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". It emphasizes the need to establish "conditions" which are necessary and conducive to justice in all its aspects. Human rights are an integral part of the conception of justice which permeates the Charter. The right to life and liberty, the right to a fair trial and the right to an impartial and independent system of justice are prerequisites for justice and human rights.

21. The Statute of the International Court of Justice specifically provides that the Court shall be composed of a body of independent judges elected from among persons of high moral character who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law.

22. Article 20 of the Statute requires every member of the Court before taking up his duties to make a solemn declaration in open court that he will exercise his powers impartially and conscientiously. Article 24 contemplates that a member of the Court should not take part in the decision of cases on account of any kind of incompatibility or other reasons of propriety and ethics. Article 31 deals with a conflict of interests, problems peculiar to international adjudication. It provides that judges of the nationality of each of the parties shall retain their right to sit in the case before the Court. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge.

23. The salaries of the members of the Court are fixed by the General Assembly and may not be decreased during the term of office (art. 32(5)). Article 18 provides that no member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions. The Court has power to frame rules for carrying out its functions and to lay down rules of procedure. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers without the right to vote.

24. Comparable provisions designed to secure the independence and impartiality of the judiciary are found with varying degrees of detail and particularity in a number of other international statutes. Article 6 of the European

Convention on Human Rights provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". It is provided that "judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Article 39(3) provides, as does Article 2 of the Statute of the International Court of Justice, that the candidates for a seat on the European Court of Human Rights "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence". The Court has power to draw up its own rules and to determine its own procedure. According to the Rules of the European Court, before taking up his duties, each elected judge shall take the following oath or make the following solemn declaration: "I swear" - or "I solemnly declare" - "that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations". Rule 4 provides that a judge may not exercise his functions while he is a member of a Government or while he holds a post or exercises a profession which is likely to affect confidence in his independence, and that in case of need, the Court shall decide the matter.

25. Article 8 of the American Convention on Human Rights provides that "Every person has the right to a hearing, with due guarantee and within a reasonable time, by a competent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature". According to article 52, the Inter-American Court of Human Rights shall consist of seven judges elected from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the State of which they are nationals or of the State that proposes them as candidates. According to article 71 the position of a judge of the Court is incompatible with any other activity that might affect his independence or impartiality. According to article 73, the General Assembly of the Organization of American States may, only at the request of the Court, as the case may be, determine sanctions to be applied against judges when there are justifiable grounds for such action.

26. The Universal Declaration of Human Rights embodies the broad principle of impartiality and independence, particularly in articles 7, 8 and 10. Article 7 declares the principle of equality before law and equal protection of law against any discrimination. Article 8 declares that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Article 9 declares that no one shall be subjected to arbitrary arrest, detention or exile. Article 10 expressly provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". (emphasis added).

27. The International Covenant on Civil and Political Rights addresses itself to the issue of remedies in specific terms in article 2(3) which provides:

> "Each State party to the present Covenant undertakes:
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> "(a) To ensure that any person whose rights or freedom as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> "(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> "(c) To ensure that the competent authorities shall enforce such remedies when granted".

28. Implicit in the injunctions embodied in article 6(1) of the Covenant that "no one shall be arbitrarily deprived of his life" and in article 9(1), that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law" is the principle of an impartial, independent and lawfully competent adjudication. Article 14 is an express guarantee of the principle of impartiality and independence and declares, inter alia, that "all persons shall be equal before the courts and tribunals", that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent independent and impartial tribunal established by law" and that everyone shall be entitled to certain guarantees in the criminal process. During the deliberations on the draft covenant, the importance of article 14 was emphasized since, "in the last analysis, the implementation of all the rights in the covenant depended upon the proper administration of justice". As the travaux préparatoires and the

deliberations of the Universal Declaration of Human Rights, and those of the Covenant show, there was little debate on details; the concepts of independence and impartiality were not analysed or elucidated. These broad concepts were taken to be axiomatic and did not engender any controversy. It appears that in article 14 of the International Covenant on Civil and Political Rights, the use of the word "competent" before "independent and impartial tribunal" in paragraph 1 was intended to clarify and ensure that all persons should be tried in courts where jurisdiction had been previously established by law 1/.

29. Article 7 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 16 of the Convention relating to the Status of Refugees entitled "Access to Courts", and article 16 of the Convention relating to the Status of Stateless Persons 2/, all stress the fundamental concept of equal justice under the law, equal access to and equal treatment before the tribunals and all other organs administering justice. It is self-evident that equal justice, equal access to tribunals and equal treatment before tribunals are relevant and meaningful only if there is an impartial and independent system of justice.

30. The interest and initiative of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in the subject of administration of justice dates back specifically to its fifteenth session in 1963 when it decided by resolution 1(XV) to undertake a study of Equality in the Administration of Justice, in accordance with article 10 of the Universal Declaration of Human Rights. Mr. Mohamed Ahmed Abu Rannat who was appointed as Special Rapporteur for the study submitted his final report to the Sub-Commission in 1970 3/. In his study, Mr Rannat analyzed the meaning of equality in the administration of justice, grounds on which discrimination operates in the administration of justice, and methods to combat discrimination in the administration of justice. He also observed in conclusion that in order to prevent

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1/ See E/CN.4/SR.107, SR.109, SR.110, SR. 153, SR.155; part II, 156, 199, 318, 323; E/CN.4/L.142, L.145; E/CN.4/170, 232 and Corr.1, 253, 279, 281, 283, 286, 353/Add.10, Add.11, 365, 414, 426, 694/Add.7; Official Records of the Economic and Social Council, Thirteenth Session Supplement No. 9, annex II A.

2/ See Human Rights - A Compilation of International Instruments, United Nations publications, Sales No. E.83.XIV.I.

3/ E/CN.4/Sub.2/296/Rev.I.

discrimination and to promote equality in the administration of justice, it was prerequisite to safeguard the impartiality and the independence of the judiciary. He also examined the role of the courts and the legal profession in combating discrimination and securing equality in the administration of justice. He suggested certain draft principles on equality in the administration of justice.

31. The General Assembly, in resolution 3144 (XXVIII), noted that comments received from Governments on Mr. Abu Rannat's study showed "the diversity of approach and the variety of issues faced by Governments in relation to the draft principles relating to equality in the administration of justice set out in resolution 3 (XXIII) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities". It called upon Member States to give due consideration, in formulating legislation and taking other measures affecting equality in the administration of justice, to the above-mentioned draft principles, "which may be regarded as setting valuable norms, with a view to arriving at an elaboration of an appropriate international declaration or instrument". There is in the General Assembly resolution the expectation and the promise of the international community eventually arriving at an elaborate international declaration or instrument. During the intervening 11 years after the General Assembly resolution, and more particularly during the last five years, international and comparative discussions and studies and an increasing awareness of the common principles of independence and impartiality in the administration of justice have paved the way for a renewed attempt for the adoption of an appropriate international declaration or convention on the limited theme of this study. The present Special Rapporteur submits that the time is now ripe for the world community to consider and adopt an appropriate international declaration or convention for there is today a substantial consensus and a shared common outlook on the subject of the impartiality and the independence of the judiciary, jurors and assessors and the independence of lawyers.

32. Considering the question of torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment, the Sub-Commission in resolution 4 (XXVIII) expressed the view that certain issues deserved particular concern and listed among them "the necessity of impartial judicial investigation into alleged illegal practices against arrested and detained persons" and the "lack of ineffectiveness of judicial control over arrest and detention practices".

33. Several provisions and principles were included in the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 4/ to ensure the representational intervention of lawyers and

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4/ The Sub-Commission adopted the draft with few amendments. E/CN.4/1296, para. 109; see A/34/146 for more details on the Draft.

adjudicative superintendents and control of an independent and impartial judiciary to protect all persons, under arrest and detention, against torture and inhuman and degrading treatment, and in respect of other rights. Heavy reliance is placed in these principles on the inputs of the judiciary and the legal profession for the protection of the human rights of persons under detention and imprisonment. Principle 3 provides:

> "Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by or be under the effective control of a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, hereinafter referred to as a 'judicial or other authority'".

34. Principles 15 and 16 declare that a detained person shall be entitled: (a) to have legal assistance promptly; (b) to communicate, without the communications being delayed, censored or overheard, with a lawyer of his own choice; and (c) to ample opportunity for consultations with his counsel including personal interviews. Principle 28 embodies the right of a detained person or his counsel to challenge the lawfulness or necessity of his detention or to prove that he has been subjected to torture or other cruel, inhuman or degrading treatment.

35. In his Final Report to the Sub-Commission on Discriminatory Treatment in the Administration of Criminal Justice 5/, Mr. Justice Abu Sayeed Chowdhuri noted that "discrimination may be found in connection with the appointment of judges, juries or assessors, in that persons of a certain race or colour or other group may be excluded therefrom. According to Mr. Chowdhuri, in one African country all judges, magistrates and tribal commissioners are white. In another State, members of a particular minority group are excluded from juries on account of their race, there being a large element of unregulated discretion in the preparation of lists of possible jurors. In other countries also, the qualifications required of jurors are excessively vague and considerable discretion is permitted to the authorities who draw up the lists of names from which jurors may be chosen for particular cases. The Report also refers to the problem of discrimination in respect of lawyers and points out that in many countries, a prospective lawyer, in addition to possessing the academic qualifications, must meet a subjective standard of personal

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5/ E/CN.4/Sub.2/1982/7, 1982, paras. 70-72.

character which could be misapplied in a discriminatory fashion. Such standards include the following: "suitability", "fitness", "good reputation", "respectability", "a blameless citizen", etc. One can see the potential for excluding certain minority groups from the legal profession.

36. In this connection it has been pointed out in the Sub-Commission that the exclusion of persons of certain groups from the legal profession may result in inequality in the administration of justice, since access to the profession governs the whole judicial system in many countries. De facto discrimination also exists when members of a particular race, ethnic, religious, linguistic or other group are discriminated against in the area of access to the legal profession. The Special Rapporteur also referred to discriminatory attitudes of prosecuting authorities in some countries, who may be more energetic in bringing to court suspected criminals of a certain race or colour or those belonging to a certain group or class.

37. The Special Rapporteur recognized that judicial discretion was a possible source of discrimination in the administration of criminal justice. He noted, however, that differences in the treatment by judges or juries of similar situations were often nothing more than the inevitable results of the independence expected of judges. According to the Special Rapporteur, there are only a few cases of explicit de jure discrimination on the basis of race, colour or religion as in the case of South Africa or when votaries of particular views or beliefs are precluded from judicial office from giving evidence because they cannot in good conscience take the prescribed oath. De facto discrimination in action is more frequent and more complex. Obviously, these problems can be overcome only if the justice system is impartial and independent, if the legal system is free from the canker of discrimination both de jure and de facto, if States and individuals are conscious of their duties, rights and obligations, if there is an international accountability and a durable fabric of international solidarity, and if the social climate within the country and in the international community is protective of and conducive to independent, impartial and humanitarian justice.

38. Mrs. N. Questiaux' study of situations known as states of siege or emergency 6/ was a valuable contribution to an understanding of the implications of emergency régimes for human rights and the rule of law, particularly in the context of the widespread institutionalization of emergencies. The effect of emergency régimes, inter alia, is the subordination of judicial powers to the executive or military powers 7/ and the substitution of the principle of separation of powers by the principle of hierarchization of powers 8/. As Mrs.

6/ E/CN.4/Sub.2/1982/15, 1982.

7/ Ibid., para. 148.

8/ Ibid., para. 159.

Questiaux pointed out, there is a veritable transformation of the legal régime either due to the perpetuation of the state of emergency or because emergency provisions are normalized in the form of ordinary laws 9/. Not only are the rights of defence curtailed, legal procedures perverted and important remedies suspended, but there is also an erosion of the judicial power and function and its authority, and independence and integrity of the judiciary are impaired by ostensibly legal means and extra-legal methods, paving the way for "the degradation of a constitutional State" 10/. In this study an attempt has been made to study the phenomenon of situations known as states of siege or emergency with particular reference to the impartiality and independence of the judiciary, jurors and assessors and the independence of lawyers.

39. Madame E. I. Daes in the preface to her notable study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under article 29 of the Universal Declaration of Human Rights 11/ sums up the situation admirably when she says: "a judicial system which provides for independent judges reveals perhaps better than any other institution, the perfect equilibrium between the liberty of the individual and the power of the State" 12/. The principle of independence is particularly in contradiction to a wide range of procedures and remedies surveyed in the study 13/. Reference may be made, in this connection, to the election as an independent expert of a member of one of the committees of the United Nations with quasi-judicial functions or of other bodies or the United Nations system, who is under an obligation to exercise his functions and powers with independence, impartiality and objectivity 14/.

9/ E/CN.4/Sub.2/1982/15, para. 162, 1982.

10/ Ibid., p. 169. See in this connection, States of Emergency: Their Impact on Human Rights, International Commission of Jurists, 1983.

11/ E/CN.4/Sub.2/432/Rev.2, 1983.

12/ Ibid., p. IV.

13/ Ibid., chap. V, p. 148 et seq.

14/ Ibid., p. 55, para. 249.

40. In his 1984 report on Summary or Arbitrary Executions 15/, the Special Rapporteur, Mr. S. A. Wako underlined that "it is universally recognized that one of the best guarantees for the implementation of legal safeguards applicable to all fair trials is the existence of an independent judiciary ... (in) the constitution or basic laws of practically any country, whatever the basic principles underlying the constitutional system, there are provisions which are designed to ensure that the judiciary is free from political pressure and that the judge is competent and independent ... Some constitutions prohibit the establishment of any extraordinary commissions or tribunals of a temporary nature, outside the framework of the judiciary, to try any particular cases or persons ... A number of Governments state that their laws provide for systems to guarantee impartiality and independence of the court, such as appointment of judges by a commission independent from the executive. In order to guarantee the independent status of judges, special measures have been established for their appointment, disciplinary control and removal".

41. By resolution 1982/6, the Sub-Commission emphasized the importance of promoting full respect for human rights by accelerating the development process together with measures designed to strengthen respect for the rule of law and to improve knowledge and understanding of the legal system. It urged bilateral and multilateral development co-operation agencies to make available to States the necessary material resources and expertise required to contribute to the strengthening of the rule of law in the development process.

42. By resolution 1983/38, the Sub-Commission noted the report of the Secretary-General 16/ prepared in accordance with resolution 1982/6 and invited Governments to indicate whether they felt the need to receive technical assistance of one kind or another to facilitate their efforts to strengthen their legal institutions with a view to promoting full respect for human rights. The report of the Secretary-General prepared in pursuance of Sub-Committee resolution 1983/38 throws some light on the ways and means of strengthening legal institutions in different parts of the world by means of technical assistance 17/.

15/ E/CN.4/1984/29, paras. 47-58.

16/ E/CN.4/Sub.2/1983/23.

17/ E/CN.4/Sub.2/1984/21.

43. In the Seminar on the Experience of Different Countries in the Implementation of International Standards on Human Rights 18/ "participants expressed the view that the rule of law was a fundamental requirement for the enforcement of human rights standards at the domestic level, and that (...) enforcing the rule of law was in large part the role of the courts ... The view was expressed that an independent judiciary was crucial, and was the key to the process of enforceability".

44. As resolution 1983/38 of the Sub-Commission shows the principle of impartiality and independence of the judiciary, jurors and assessors and the independence of the legal profession is, ultimately, part of the social setting and legal culture and depends on the strength and efficacy of public opinion and of legal institutions. The strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice. To strengthen human rights in the legal system and to build up the strength of the legal system and to sustain the rule of law and eliminate any denial of justice should be a major strategy for updating the premises of the new world order.

18/ ST/HR/SER.A/15, 1983, para. 42.

III. DENIAL OF JUSTICE AND STATE RESPONSIBILITY: A MODERN APPROACH

45. Each legal and political philosophy, every system and scheme of government promises to do justice and right. By the same token, the denial of justice has always been regarded traditionally both in foro domestico 1/ and in international law as a legal wrong, a serious lapse and a disgrace. A close study of the denial of justice in traditional law affords a striking and instructive insight into the concept of impartiality and independence of the judiciary as well as the question of State responsibility for maintaining an impartial and independent system of justice.

46. Denial of justice in international law has been historically linked to the classical institution of private reprisals. The rationale of the legality of reprisals was necessarily the moral lapse resulting in a denial of justice. It may appear to us today to be somewhat anachronistic and archaic that private reprisals even by private individuals were recognized as a form of remedy in international law and it is true that it must have led to self-serving auto-interpretation on the part of those who felt aggrieved or annoyed. Resort to private reprisals later yielded to the doctrine of State responsibility for the denial of justice 2/.

1/ Chapter XVIII of Forum Judicum (also known under the nomenclature of Liber Judicorum, Codex Legum and Visigothic Code) laid down that if any one should file a complaint against another before a judge, and the latter should refuse to hear him, or deny him the use of his seal, or under different pretexts, should delay the trial of his cause, not permitting it to be heard through favour to a client or a friend, and the plaintiff could prove this by witnesses, the judge would give to him to whom he has refused a hearing, as compensation for his trouble, a sum equal to that which the plaintiff would have received from his adversary by due course of law. The Magna Carta, in 1215, provided in its chapter 40: "To no man will we sell, to no man will we deny or delay, right or justice". The right of access to tribunals for everyone was enacted in France by the Napoleonic Code, which made punishable the crime of "denial of justice" or the refusal of any judge to render a judicial decision "under the pretext of the silence, obscurity or insufficiency of the law".

2/ See da Legnano, Tractitus de Bello, de Represaliis et de Duello (1360), ch. CXXIII and CL.

Vattel went so far as to suggest that in international law, refusal of justice might justify reprisals 3/. Grotius, Bynkershoek, Wolff and Vattel, among others, accepted the principle of reprisals by States for denial of justice to their subjects.

47. In more modern times, the principle of reprisals was replaced by the international law of State responsibility for denial of justice. State responsibility for denial of justice arises when local remedies have been exhausted and if it is shown that there has clearly been a miscarriage of justice or violation of treaty obligations or duties of the State or if the machinery of justice in the State is inadequate, unreliable or ineffective. The concept of State responsibility today is much wider because international obligations and accountability have an unprecedented range and reach, because in the modern world, individuals are not merely objects but are also more explicitly subjects of international law, and because no State can claim to do as it pleases in the matter of denial of justice and human rights on the ground that its treatment of its own citizens is exclusively within its domestic jurisdiction.

48. It is remarkable that the responses of Member States and the League of Nations Committee of Experts for the Progressive Codification of International Law on Responsibility of States concurred substantially on what should be taken to constitute denial of justice. In 1926, Mr. Hammarskjold, Chairman of the Committee of Experts invited the attention of the Governments to the report of Mr. Guerrero (Rapporteur) and Mr. Wang Chung Hai in which it stated, inter alia:

> "If there is one general principle concerning which there can be no discussion, it is respect for the majesty of the law. As between self-respecting States, there can be no greater insult than to question the good faith of municipal magistrates in their administration of justice.
>
> (...)
>
> "Denial of justice is therefore a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although, in the circumstances, nationals of the State would be entitled to such access.

3/ Vattel, Le droit des gens, LIV. II, Ch. XVIII. para. 350. See also Alwyn V. Freeman, The International Responsibility of States for Denial of Justice, p. 95.

(...)

"A refusal of the competent judge to exercise jurisdiction also constitutes a denial of justice.

(...)

"We infer that a State (...) incurs international responsibility only if it has been guilty of a denial of justice".

49. It would be pertinent to point out that the request for information addressed to the Governments initially put the following four questions on the issue of State responsibility:

"Does the State become responsible in the following circumstances:

"1. Refusal to allow foreigners access to the tribunals to defend their rights?

"2. Decisions of the tribunals irreconcilable with the treaty obligations or the international duties of the State?

"3. Unconscionable delay on the part of the tribunals?

"4. Decisions of the tribunals which are prompted by ill-will against foreigners as such or as subjects of a particular State?" 4/

50. In its reply, Germany stated that "the doctrine of international law generally takes into account the internationally recognized principle of the independence of the judicature. Since, therefore, in the interest of an independent and impartial judicature, Governments should refrain from influencing in any way the course of justice, the international responsibility of Governments as a result of decisions of the courts must necessarily be very slight ... as to the exact nature of a "denial of justice" opinions again vary widely. Some take it to mean an actual refusal to do justice; others hold that it is an unconscionable delay in procedure which may amount to an absolute refusal of justice, while others say that it consists in any clear violation of the law to the detriment of foreigners as a whole or certain nationals in particular". The replies of Austria and Great Britain were instructive. Austria stated that States were obliged:

4/ League of Nations publications, Bases of Discussion, Vol. III, Responsibility of States, (C.75.M.69.1929.V); pp. 41-51.

(a) "to place at the disposal of foreigners a minimum judicial organization such as is normally possessed by every civilized state", and

(b) "to accord to them the right of access to the courts equal to the rights of the nationals".

Austria added, inter alia, that a State is also responsible "if the level of its judicial administration falls below that of the judicial administration of an ordinary civilized State (for instance, if there is manifest corruption)". The reply of Great Britain, with which India and New Zealand associated themselves, stated that "courts capable of administering justice effectively for the protection and enforcement of the rights of private persons constitute a necessary part of the machinery of a State". According to Great Britain, the State was responsible if it refused to give foreigners access to these courts for the protection and enforcement of their rights, if the decisions of the courts were inconsistent with the treaty obligations or the international duties of the State, if it was established that there had been unconscionable delay on the part of the courts, or if the courts of justice gave erroneous decisions which could be shown to be prompted by ill-will against foreigners as such, or as nationals of a particular country. Poland cited articles 77 and 78 of its Constitution (of March 17, 1921) which provided that "the judges shall be independent in the exercise of their functions and shall be answerable only to the law. (...) Decisions given cannot be modified either by the legislative or by the executive authorities". Poland, however, accepted the position that the State may be held responsible "if the State does not possess tribunals organized in such a way as to guarantee equitable judgements; or (...) when it is manifest that the decision constitutes a flagrant infringement of international law".

The Preparatory Committee found that the replies of the Governments on the four questions showed agreement and proceeded to formulate a further question: "In what other circumstances may a State incur responsibility on account of an unjust decision given by its tribunals?" To this question, the replies of Governments generally suggested that a State is responsible "in the case of a judgement so erroneous that no properly constituted court could honestly have arrived at such a decision", or in the case of "an erroneous judgement given by judges who have been bribed or subjected to pressure by their Government", or "in the event of gross defects in the procedures or (...) in the organization of the courts rendering them unworthy of a civilized State".

51. In a resolution of the Institute of International Law adopted at Lausanne in 1927 5/, the principle of State responsibility for denial of justice was formulated as follows:

5/ See 22 American Journal of International Law (1929), supp. pp.330 ff.

"V. The State is responsible on the score of denial of justice:

1. When the tribunals necessary to assure protection to foreigners do not exist or do not function.

2. When the tribunals are not accessible to foreigners.

3. When the tribunals do not offer the guarantees which are indispensable to the proper administration of justice.

"VI. The State is likewise responsible if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular State".

52. Article 9 of Harvard Law School Draft Convention on Responsibility of States 6/ formulated the principle of State responsibility for denial of justice in the following terms:

"A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice".

53. An interesting example is provided by the case of Robert Brown. In that case, the international arbitration tribunal affirmed that the claimant had acquired substantial rights of a character entitling him to an interest in real property or to damages for the deprivation of the rights stemming therefrom, concluded that the Government of the South African Republic had deprived him of those rights under such circumstances as to amount to a denial of justice within the settled principles of international law. The tribunal stated:

"... we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps, (legislative and judicial), taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place... All three branches of the government conspired to ruin his enterprise. The Executive department issued proclamations for which no warrant could be found in the constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to

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6/ Ibid., (1929), supp. pp. 133 ff.; 23 A.J.I.L. (1929) supp. p.173.

submission and brought into line with a determined policy of the executive to reach the desired result regardless of constitutional guaranties and inhibitions. And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself" 7/.

54. Clyde Eagleton concluded 8/ that a denial of justice "is a failure in the administration of domestic justice towards an alien". Referring to many opportunities for the perversion of justice during the actual course of the trial, the author says: "If the court is under the arbitrary control of other agencies of the government, it will obviously be unable to render justice. The judge may exceed his jurisdiction, or be guilty of fraudulent or collusive practice. The case must be conducted with regard to due process of law, but the process meant is that of the country in which the trial occurs" 9/. The author makes it clear that denial of justice may occur not only when the courts refuse or deny redress for an injustice sustained by a foreigner but also when the courts themselves perpetrate injustice. No doubt, the aggrieved person must first seek and exhaust local remedies, no doubt great respect is due to domestic courts and their variations of laws as well as practice and procedure, but it is also expected that the domestic judicial system must measure up to an international standard 10/.

7/ American and British Claims Arbitration Tribunal, under the agreement of August 18, 1910, Nielsen's Report, pp. 198-199. See Freeman, op.cit., p.101, and Clyde Eagleton, The Responsibility of States in International Law, N.Y. University Press (reprinted by Kraus Reprint Company, New York, 1970), 1928, p.117.

8/ Op. cit., note 35.

9/ Ibid., pp. 119-120.

10/ Ibid., pp.114-122. See also Moore, Digest, VI, pp. 259, 266, 269-270, 656, 748; Moore, Arbitrations, p.3140, 1216-1217, 3126, 3129, 2081 3051, 3138, 3123, 3317, 3251, 1634, 3160, et. al.; Hyde, International Law I, p.497, p.268, 219, 285.

55. Contemporary State practice and international law holds a State responsible for acts or omissions of all levels and branches of government, as such acts or omissions are attributable in international law to the State concerned 11/. The second Restatement of Foreign Relations Law of the United States of America specifies four categories of denial of justice: (i) irregular arrest and detention; (ii) denial of trial or other proceedings; (iii) unfair trial or other proceedings; and (iv) unjust determination 12/. These categories of denial of justice continue to be relevant and are obviously interwoven with the principle of impartiality and independence of justice, more so in the field of personal freedom and humanitarian justice.

56. Denial of justice may be regarded as an "internationally wrongful act" or "international delinquency" 13/ which implies the existence of an international obligation and the fault or the failure of a State in the matter of its observance. Such an act obviously includes an omission. An act or omission of any organ or branch of the State 14/ resulting in denial of

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11/ See Richard B. Lillich (ed.), International Law of State Responsibility for Injuries to Aliens, Univ. Press of Virginia (Charlottesville), 1983, See George T. Yates III, State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era (pp.213-280); and Gordon A. Christenson, "The Doctrine of Attribution in State Responsibility" (pp.321-360), ibid.

12/ Second Restatement (1965), paras. 179-182. See also Harvard Draft Convention on the International Responsibility of States for Injury to Aliens; 1961 (55), A.J.I.L. 545.

13/ See Dr. Béla Vitányi (University of Nijmegen), "International Responsibility of States for Their Administration of Justice", 1975 (XXII) Netherlands International Law Review, pp.131-163 for an objective and comprehensive treatment of the subject.

14/ See article 6 of the Draft (I.L.C.), Yearbook of the International Law Commission 1971, Vol. II. "For the purpose of determining whether the conduct of an organ of State is an act of the State in international law, the question whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the heirarchy of the State are irrelevant". Also see Professor Ago (Special Rapporteur) Yearbook of I.L.C., p. 246. See also Max-Planck-Institute, Liability of the State for Illegal Conduct of its Organs (National Reports and Comparative Studies), International Colloquium, Heidelberg, 1964, published by Carl Heymanns Verlag KG, Köln - Berlin, 1967, pp.899.

justice is attributable to the State and the State becomes responsible to another State whose subject has suffered such denial of justice, to that subject and to the international community. The form of liability or accountability, the forum, the redress and reparation, may be different in each case but it is possible to contend that legal responsibility does arise for a serious failure or denial of justice within any jurisdiction, whether the victim is a national or alien.

57. The doctrine of State responsibility for denial of justice gave rise to certain apprehensions which were not extravagant or unrealistic. The doctrine had its genesis in the régime of reprisals and could be a tool in the hands of powerful nations anxious to protect the vested interests of their nationals and to perpetuate the different forms of exploitation practised by them in the heyday of colonialism and economic imperialism.

58. An Indian author vehemently questioned the claim of the universality of a State's right of diplomatic protection in such cases 15/. He was also critical of two sets of rights for individuals, one qua individual and one qua alien, and of loading the law heavily in favour of aliens by the added weight of diplomatic interposition. His conclusion in effect was to secure the aliens and citizens alike against denial of justice through the instrumentality of a bill of rights or through universally accepted principles based on equality of States and free from the motive of perpetuating colonial and imperial exploitation. Mr. Guha Roy's thesis has a particular lesson for the new international legal order which should seek to protect the integrity, impartiality and independence of the justice system and to prevent any denial of justice as a part of human rights for one and all. It is noteworthy that the 1974 General Assembly resolution 3171 (XXVIII) 16/ and the 1974 Charter of Economic Rights and Duties of States proceed on the basis that the right of a State to nationalize the property of aliens is no longer questioned seriously and that where the question of compensation gives rise to controversy, it shall be settled under the domestic laws of the nationalizing State and by its tribunals. The substantive recognition of the rights of the developing States and the substitution of the intimidating rigours of the traditional law of diplomatic protection 17/ by internationalization of human rights accountability

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15/ See S. N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" 1961 (55) A.J.I.L. pp. 863-891.

16/ General Assembly resolution 3171 (XXVIII). See also 1974 (68) A.J.I.L. 381.

17/ See, however, Lillich, 'The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack", (1975)69, 359-65; See A. O. Adede, "A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law", 1976 (XIV) The Canadian Yearbook of International Law, pp.73-95.

in respect of the denial of justice should go a long way in allaying the apprehensions of the developing nations 18/.

59. The substantial transposition of State responsibility for denial of justice from the bilateral sphere to the multilateral forum of the international community has a profound significance for the development and observance of minimum community standards in the administration of justice postulated and implied in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and a host of other declarations and reports. Professor Jessup observed perceptively that as a consequence of the embodiment in international law of the duty to respect rights of man, the topic formerly known in international law as "the responsibility of States for injuries to aliens" might be transformed into "the responsibility of States for injuries to individuals" 19/. In this connection, the Inter-American Conference held in Mexico in 1945 also affirmed that "international protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man" 20/. According to F. V. Garcia-Amador 21/, the concept of "the international standard of justice" was generally accepted by traditional theory and practice as one of the basic criteria for determining the responsibility of the State for injury to aliens, but this criterion had frequently clashed with the principle of equality between nationals and aliens 22/.

18/ See C. F. Amersinghe, State Responsibility for Injuries to Aliens, Oxford, 1967. In this book the author confines himself primarily to injuries to aliens by the denial of access to courts, effect of special courts, absence of independent courts, and illegally constituted courts (pp. 97-99); the author, however, observes en passant that "the conception of the fundamental rights of man has increasingly influenced international life", (p.279), and roots of State responsibility "go deeper to the need for justice as a basic human aspiration" (p.285).

19/ Phillip C. Jessup, A Modern Law of Nations, New York, 1948, p.97 ff.

20/ Quoted in F. V. Garcia-Amador, "State Responsibility in the Light of the New Trends of International Law", 1955 (49), A.J.I.L. p.339 at p.343.

21/ Ibid., p. 344.

22/ Ibid., p. 344.

60. The infirmity of the traditional view was that stateless persons were deprived of diplomatic protection, serious difficulties arose in multi-nationality and dual nationality cases, and even the protection of nationals was subordinated to the will and interest of a State rather than to the "intrinsic" merit of the claim of denial of justice made by an individual who was the actual aggrieved party and a prospective beneficiary 23/.

61. To sum up, we have in the traditional theory and practice of State responsibility for denial of justice to aliens a suggestive framework which can be adapted, consolidated and restated in the light of fundamental freedoms and basic human rights. One can clearly see the present as a bridge between the past and the future. Five prerequisite elements of the traditional theory and practice which can contribute to universal justice and to universal principles of impartiality and independence of the judiciary may be described as follows:

(a) the existence of identifiable norms of civilized society in respect of an adequate, effective and reasonably expeditious machinery for the administration of justice;

(b) the independence, impartiality, objectivity, integrity, probity and honesty of judges and tribunals;

(c) an adherence to and respect for international law, treaty obligations and duties of the State;

(d) reasonably, easy and equal access to the justice system for nationals and aliens alike;

(e) responsibility of a State for any miscarriage or denial of justice in international law attributable to any branch or organ of the State.

62. Justice may be difficult to define a priori, but denial of justice is relatively easier to identify. There already exists a widely shared wealth of ideas on what denial of justice is, how it arises and what may be done to

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23/ According to H. Lauterpacht, International Law and Human Rights (New York, 1950), p.41, "intrinsically, there is nothing - save the traditional doctrine on the question of the subjects of international law - to prevent the tortious responsibility of the State from being combined, in the international sphere, with the responsibility of the organs directly liable for the act or omission in question".

prevent or remedy denial of justice. All roads may not have led to Rome in ancient or mediaeval times, except in a figurative or rhetorical sense, but none of the contemporary highways of constitutional systems bypass judicial independence and impartiality in their journey of justice which all of them claim to be their destination. When we speak of justice, we speak essentially of social, economic and political systems, structures, functions, philosophies and historical experiences. That is the stuff of which constitutions and laws are made and it is in the laws and constitutions of States that we find eloquent evidence and acknowledgement of the world-wide unity of purpose in the pursuit of the impartiality and independence of the judiciary.

63. Therein also lie the seeds of accountability to the international community for denial of justice within municipal limits and the foundation of a common international standard of justice which necessarily postulates a free, independent and impartial judicial system.

IV. JUSTICE AND THE JUSTICE SYSTEM

64. It is trite to say that the duty of the judiciary is to do justice. A judge must do right and justice as he sees it irrespective of the parties before him. And he must see, he must endeavour to see, law and justice in the right perspective. That approach is a matter of the conscience of the judge and that perspective is a matter of his training and the ethos he has imbibed. That approach and perspective is for the judge individually as well as for the judiciary, collectively and institutionally. The conscience of a judge must be clear and sensitive, he must have the capacity to overcome the "sub-conscious empire of his predilections". He must respect the letter and the spirit of the law and the role and the purpose of the law in the society in which he lives. A judge often legislates because in order to interpret he has to apply or evolve a norm. He gives meaning and content to law by exercising a judicial choice. His credo is that he will deny justice to no one. In so far as he can help it, that is. Because a judge is not a law unto himself, his function is to adjudicate in accordance with law and do justice so far as he can. It is not open to him to defy the discipline of law or to transgress legitimate limitations imposed upon him institutionally and functionally. Justice then is a part of his striving. Law is the reality which surrounds him, and legal justice is a part of the larger goals of justice in society which embraces and envelops law.

65. Goals of modern social organization, within States as well as internationally have much in common. These goals represent aspects of justice, freedom and peace for individuals, groups and nations. They find expression in contemporary legal diversities and pluralities of style and institutions. Through these diversities there runs a thread of unity in terms of shared values and common goals. The Charter of the United Nations and the basic documents of specialized agencies and world bodies, the work of the Economic and Social Council, and a number of bodies constituted by it or in consultative status with it bear eloquent testimony to these shared values and common goals.

66. The rule of law is the composite essence of freedom, justice and peace. Modern constitutionalism is an ideological synonym of rule of law. Without entering into the philosophical thicket of positivism, natural law, realism and other jurisprudential schools of thought, we can say without hesitation that modern law, particularly in the field of human rights, seeks to make those who are weak strong, and those who are strong, just. In other words, what the community regards as just and proper should be translated and reflected into enforceable law. Legality should have legitimacy and what is legitimate should be legal, lawful and legally enforceable. But the question always is what is legitimate and what is just and how are legitimacy and justice protected and enforced.

67. Most definitions of justice are remarkably open, leaving each age or social group or nation or community to pour its own content into them or to adapt them to its own notions and conceptions 1/. These definitions not only provide working rules but also adumbrate ideas, ideals and institutions 2/. Quintessentially, law is the road to justice 3/, though sometimes it may appear in actual operation to impede justice. Definitions of law also define justice because the manifold functions of law are aimed at achieving or maximising justice. In functional terms, law seeks: (a) to maintain public order and social peace; (b) to settle disputes and resolve conflicts; and (c) to define, protect and reform certain relationships and their equations in society and to regulate them. The contours and often the content, of these functional activities are provided by the prevailing conceptions of justice.

68. The roots of justice and its varied conceptions lie in the soil of morality. In an ancient Hindu conception 4/, justice was Dharma, that which sustains. It was the flower of righteousness. For the ancient Greeks 5/, it was virtue; to Aristotle, justice consisted in treating equals equally and unequals unequally, a doctrine of distributive justice or what Dean Roscoe Pound called "consultative justice". According to the Institutes of Justinian, justice means "to give every man his due". Aquinas regarded that in order to do justice all men were to be treated equally and impartially. In the conception of natural law, the ethical foundation of justice was regarded as moral instinct common to all men, or as a divine dictate written on men's hearts. Justice thus was regarded as a social virtue.

1/ See Roscoe Pound, Jurisprudence, (West Publishing), 1959, in five volumes, particularly Vol. I, Part 2; Vol. II, Part 3 (chapter 13); Vol. III, Part 4 (chap. 14); Vol.IV, Part 6 (chap. 21).

2/ See Julius Stone, see also Hans Kelsen, What is Justice? Univ. of California, 1971, p.397. At the end of his essay, Kelsen says: "Justice to me is that social order under whose protection the search for truth can prosper", ibid., p.24.

3/ An outstanding contribution to the theme is by Roscoe Pound, Justice According to Law, Yale University Press, First edition 1951 p. 98.

4/ See generally Jayasural, Hindu Polity.

5/ See Plato, Republic, IV. 443 and Aristotle, Nichomeachean Ethics II. 4.3; V.I.3. See Allen, Aspects of Justice: see also J. R. Lucas, On Justice, Clarendon Press, Oxford, 1980.

69. La Rochefoucauld had said that love of justice is, in most men, merely the fear of suffering injustice, but it was ancient wisdom, universally acknowledged in all religious traditions, that you should not do unto others what you would consider disagreeable to yourself. John Stuart Mill wrote in his Utilitarianism that justice "is a name for certain classes of moral rules, which concern the essentials of human well-being more clearly, and are therefore a greater absolute obligation than any other rules for the guidance of life".

70. Lenin thought that there were certain simple fundamental rules of living together, that these were known to all ages and were something which, in the proper conditions, all rational persons of good will could agree upon. Citing Lenin, Eugene Kamenka adds that it is not easy to separate these so called basic requirements of social life from historically specific conceptions of social aims and social good and of particular social orders, with their fundamental constitutions, class and power structures, social and moral conceptions and taboos, protected by legal or customary sanctions with a degree of implied and actual force. There is thus an obvious meeting-ground between Marxist-Leninist philosophy and Western liberalism when ideology is understood in historical and functional terms and when law is considered a technique of social engineering for updating the blue prints of justice. Lang, a Pole, a distinguished Marxist jurist, questions the formal and procedural confines of certain schools of the jurisprudence of Western liberalism, (e.g. F. A. Hayek and John Rawl), but finds considerable common ground with what he calls egalitarian bourgeoisie theories of justice exemplified, for instance, by A. M. Honore and Brian Barry. According to Honore, "the principle of social justice resides in the idea that all men have equal claims to all advantages which are generally desired and which are in fact conducive to human perfection and human happiness". Radbruch defined justice as "the ideal relation among men" 6/. Barry examines the concept of justice as reciprocity, as requital, as fidelity, as mutual aid, and as an aspect of relationships between rich and poor nations and between one generation and another. He finds the principle of "quid pro quo reciprocity" limited and inadequate and propounds the complementary principle of altruistic co-operation. Lang's conclusion is that "the axiological assumptions and underpinning of such bourgeoisie egalitarian theories of justice are very close to the assumptions of the Marxist ideal of justice ..." Lang, however, points out that these bourgeoisie egalitarian theories rest purely on distributive concepts of justice and do not consider the fundamental problem of the control of the means of production by the working classes of society.

6/ Roscoe Pound, Justice According to Law. Yale Univ. Press, 1951 and second printing in 1952, p.19.

71. Divergent theories and definitions of justice, however, do not detract from the fact that all theories of justice and every system and ideology of government converge on the consensus that justice is the goal of the modern State. Equally, it is universally accepted that freedom, justice and peace are indivisible and the international community must endeavour to promote them. There are different approaches to justice and there is often a difference of perspective or emphasis of idiom. Social situations and economic structures are different in different countries and so are the responses of law. The source of law and the content of justice may vary and diverge from country to country. The concept of justice according to law seeks to harmonize the autonomy of each legal system, but as Professor Julius Stone says: "Positive law in the last resort must sustain criticism by other than its own standards if it is not to degenerate into the commands of naked power" 7/. In a vast majority of cases, judges, in different countries may come to the same conclusions but there are bound to be cases where laws and conceptions of justice would be divergent and judges would reach quite different conclusions.

72. Even within the same systems, laws change, conceptions of justice are metamorphosed and solutions of the past are found to be unacceptable or otiose. In certain matters, judges at different levels, indeed in the same court, find it difficult to agree. The point, however, is that every system is committed to do justice and right, every judge is under an oath to dispense justice and every system accepts the fundamental postulate of the impartiality and the independence of judges (including jurors and assessors where they exist) and the independence of lawyers. Again there are different structures of judicial administration. Each constitution has its own pattern of distribution of powers. Judges are differently recruited and promoted. But the central fact is that judges everywhere are declared to be independent and expected to be impartial. The present Special Rapporteur is of the view that no single pattern of judicial organization, powers and functions can or need be mandated in the world to secure the independence and the impartiality of the judiciary, jurors and assessors, and the independence of lawyers.

73. What is required is a universal acceptance of and adherence to the basic principles and minimum standards of impartiality and independence, the denial of which should be taken to be denial of justice and violation of basic human rights and fundamental freedoms. These universal principles

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7/ Stone, The Province of Jurisprudence, p. 234. Also see A. J. Kerr, Law and Justice, Grahamstown, South Africa, 1963.

and minimum standards should be based on a commonly acceptable consensual denomination, based on historical experience, and accommodating structural diversities and operational angularities of different systems, without making any concession to deviant or destructive subterfuges circumventing and obliterating the principle itself. In respect of the subtle but marginal variations and historical and ideological problems, each system has to be left, by and large, to its own devices to evaluate itself and to work out its own indigenous solutions. If there is no insistence on a particular make or model, we would find that a broad framework of consensus already exists on the principles of independence and impartiality of justice and therefore an international convention or a universal declaration is well within the realm of feasibility in the contemporary world. In the words of Dean Roscoe Pound, experience developed by reason and reason tested by experience have taught us how to go far toward achieving a practical goal of enabling men to live together in politically organized communities in civilized society with the guidance of a working idea 8/. The independence of justice is such a working idea and we have the experience of legal and social history tested by reason and purpose and that reason and purpose tested by experience to evolve a practical set of universal norms to preserve, protect, promote and reinforce the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers.

8/ Pound, Justice According to Law, op. cit., p.29.