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COMMISSION ON HUMAN RIGHTS

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Agenda item 10

Written statement submitted by the International Federation  
of Human Rights, a non-governmental organization in  
consultative status (category II)

The Secretary-General has received the following communication, which  
is circulated in accordance with Economic and Social Council  
resolution 1296 (XLIV).

[Original: Spanish]  
[2 August 1989]

EFFECTIVE METHODS OF VERIFYING THE IMPLEMENTATION OF THE PRINCIPLES  
RELATING TO THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY AND  
THE PROTECTION OF LAWYERS IN THE EXERCISE OF THEIR PROFESSION

I. STANDARDS FOR VERIFICATION

1. The International Federation of Human Rights (FIDH) considers that the fundamental standards for verifying whether a State is implementing the principles relating to the independence and impartiality of the judiciary are that the judgements rendered by the courts should be in conformity with the law, be objective and impartial and be handed down in accordance with the rules of logic, that trials and judgements should as a general rule be public and that judges and lawyers should be free from pressures, threats or persecution.

A. Conformity of the judgement with the law

2. At the fortieth session of the Sub-Commission, FIDH suggested (E/CN.4/Sub.2/1988/SR.24) that in article 2 of the draft declaration, in the phrase "de conformidad con su interpretación de los hechos y de la ley" ("in accordance with their assessment of the facts and their understanding of the law"), the word "ley" should be replaced by the word "derecho", because the decision should not only be in accordance with enactments in the strict sense but also with the law in general, and what is of particular concern to the international community, in conformity with the universally accepted fundamental rights which are binding on all States, whether they are set out in international conventions or declarations or are part of customary law.

3. This is the case because fundamental human rights form part of domestic law and are immediately applicable even without the mediation of a domestic law (self-executing), as contemporary international doctrine maintains, the jurisprudence of a number of countries states and the Constitutions of various States show. "... 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" (Final report by the Special Rapporteur, Mr. L.M. Singhvi, E/CN.4/Sub.2/1985/18, para. 47).

4. In applying a customary rule of international law, in the absence of any domestic law or rule, the Supreme Court of the United States has stated that international law is part of the law of the United States and should be declared and applied by the competent courts whenever they are presented with legal issues governed by it (Havana Packet, United States Supreme Court, 1900, 175 US 677). 1/

5. Even in the case of a conflict between a domestic legislative act and a fundamental human right, the national judge should regard the latter as a higher-ranking and hand down a judgement conforming to it. Jiménez de Aréchaga, in the article already quoted, says that the legislative act in conflict with a rule of international law is quite simply equivalent to any other infringement of international law giving rise to the international responsibility of the State. 1/

B. The judgement should be in keeping with the rules of logic

6. The judge applies the law to a specific case by means of a freely-expressed act of will, which is the judgement. However, the magistrate's free will in interpreting the law and the facts and relating the two must be subject to the laws of logic.

7. A judgement of the Supreme Court of the British Occupied Zone of 19 October 1948 stated that the party requesting review considered that the infringement of the material right against which the protest had been entered consisted in the fact that the judgement contained contradictory assertions; it must be granted that such an impairment of the laws of thinking was tantamount to an infringement of the material right. This was not only the case when the conclusions contained irreconcilable contradictions but also when contradictions of the laws of thinking existed between them and the specific evidence regarding the offence. The infringement of the laws of thinking was therefore an infringement of the material right.

8. Moreover, the Federal Court of Justice of the Federal Republic of Germany stated that the principle of the free assessment of the evidence did not mean that the judge was not bound in any way. He was subject to the laws of thinking and experience and was required to respect those laws in verifying the facts. Such laws were unwritten rules of the law. Failure to observe them implied an infringement of the law. Both decisions are quoted by Rupert Schreiber, who adds that this subjection is not restricted only to the assessment of the evidence but also includes the application of legal standards, in other words, all issues of the law and the application of the law. 2/

C. The judgement should be objective and impartial

9. If the judgement conforms to the law and to the rules of logic it may be assumed that it is impartial and objective. However, an additional and indispensable guarantee of the impartiality and objectivity of the administration of justice is that the judges themselves should demonstrate those qualities, in other words, that their activity in the courts should not be determined on political, ideological, religious or racial grounds, and that the composition of juries should not be based on those inherently discriminatory grounds either.

D. Judges and lawyers should be able to perform their duties in complete freedom, without being exposed to pressures, threats or persecution

10. The existence of pressures, threats or persecution on or against judges and/or lawyers is a sure sign that the independence and impartiality of the judiciary have ceased to exist.

E. The public nature of trials and judgements is another indispensable element for verifying the degree of independence and impartiality of the judiciary

11. The right to public trials and judgements, as set out in articles 10 and 11.1 of the Universal Declaration of Human Rights and article 14.1 of the International Covenant on Civil and Political Rights, ensures the monitoring by society of the independence and impartiality of the judiciary.

## II. VERIFICATION MACHINERY

12. The International Federation of Human Rights considers that a Special Rapporteur should be appointed to report periodically on the state of the implementation in practice of the principles concerning the independence and impartiality of the judiciary and the protection and security of judges and lawyers in the exercise of their duties, based on the guidelines set out above. In carrying out his mission he should be empowered to request and receive reports and complaints from States, from governmental and non-governmental international, regional and national organizations and from private persons, and to make surveys and studies, on the spot should he consider it necessary.

### Notes

1/ E. Jiménez de Aréchaga, "La Convención Interamericana de Derechos Humanos como Derecho Interno", Revista del Instituto Interamericano de Derechos Humanos, January/June 1988.

2/ Rupert Schreiber, Lógica del Derecho, Editorial Sur, Buenos Aires, 1967.

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