ОРГАНИЗАЦИЯ ОБЪЕДИНЕННЫХ НАЦИЙ **E**

ЭКОНОМИЧЕСКИЙ И СОЦИАЛЬНЫЙ СОВЕТ

Distr.
GENERAL

E/CN.4/2003/65/Add.4
31 January 2003

RUSSIAN
Original: ENGLISH*

КОМИССИЯ ПО ПРАВАМ ЧЕЛОВЕКА
Пятьдесят девятая сессия
Пункт 11 предварительной повестки дня

ГРАЖДАНСКИЕ И ПОЛИТИЧЕСКИЕ ПРАВА, ВКЛЮЧАЯ ВОПРОСЫ

НЕЗАВИСИМОСТИ СУДЕЙ, ОТПРАВЛЕНИЯ ПРАВОСУДИЯ, БЕЗНАКАЗАННОСТИ

Доклад Специального докладчика по вопросу о независимости судей и адвокатов г-на Парама Кумарасвами, представленный в соответствии с резолюцией 2002/43 Комиссии по правам человека

Добавление

Доклад о поездке в Италию (5-8 ноября 2002 года)**

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GE.03-10649 (R) 170203 170203

Резюме

В настоящем докладе сообщается о дополнительной поездке в Италию, предпринятой с 5 по 8 ноября 2002 года Специальным докладчиком по вопросу о независимости судей и адвокатов.

Ранее Специальный докладчик совершил поездку в Италию с 11 по 14 марта 2002 года в целях установления фактов после получения информации о растущих трениях между судьями, включая обвинителей, и правительством. Эти трения вылились в общенациональные протесты, организованные судьями в начале их рабочего года в январе 2002 года. После этой поездки Специальный докладчик представил предварительный доклад (E/CN.4/2002/72/Add.3), содержащий его замечания и первоначальные рекомендации.

В своем предварительном докладе Специальный докладчик сделал следующие выводы:

a) он удостоверился в том, что у судей есть обоснованные причины полагать, что их независимость находится под угрозой;

b) ситуация усугубилась из-за сложности правовой системы и предусмотренных процедур судебного разбирательства и громких уголовных процессов в судах Милана, а также использования процедурных уловок для затягивания рассмотрения судебных дел. Положение осложнилось и тем, что, согласно сложившемуся мнению, в ход были пущены законодательные средства в целях принятия законов, которые затем применялись в отношении дел, уже находившихся на рассмотрении судов; и

c) эти события породили взаимное недоверие и подозрительность в отношениях между правительством и судьями.

В том же докладе Специальный докладчик рекомендовал следующее:

a) видные политические деятели, проходящие как обвиняемые в судах Милана, должны уважать принципы должного отправления правосудия и не прибегать к затягиванию судебного процесса; и

b) необходимо создать координационный комитет в составе представителей всех сфер отправления правосудия в целях рассмотрения вопроса о реформе системы юстиции на целостной и всесторонней основе.

Специальный докладчик указал в заключение, что он будет продолжать следить за событиями и представит последующий доклад пятьдесят девятой сессии Комиссии по правам человека.

В ходе нынешней поездки Специальный докладчик встретился с председателями Кассационного и Конституционного судов, председателем и некоторыми членами Высшего совета магистратуры, министром юстиции и его представителями и Национальной ассоциацией судей (НАС).

Специальный докладчик добивался личной встречи с премьер-министром г-ном Сильвио Берлускони, который в тот период являлся также министром иностранных дел. Однако по причинам, которые не были указаны, такая встреча не состоялась, и Специальный докладчик был лишен возможности выслушать премьер-министра, выступающего в качестве стороны в некоторых получивших широкую огласку судебных делах, о которых он упоминает в своем предварительном и в настоящем докладах.

В ходе встреч, проведенных Специальным докладчиком во время его поездки, им были затронуты следующие вопросы:

a) прогресс, достигнутый в деле реформы системы отправления правосудия, и напряженность в отношениях между правительством и судьями;

b) уголовные дела, возбужденные в отношении некоторых видных политических деятелей, закон об обоснованных подозрениях и его последствия;

c) неявка премьер-министра в качестве свидетеля для дачи показаний по двум судебным процессам; и

d) практика, в соответствии с которой судьи избираются в парламент и занимаются политикой.

Специальный докладчик приходит, в частности, к следующим выводам:

a) напряженность в отношениях между судьями и правительством сохраняется;

b) в результате этой сохраняющейся напряженности страдают столь необходимые реформы системы отправления правосудия;

c) этой напряженности во многом способствуют рассматривающиеся в судах дела, касающиеся премьер-министра и его помощника;

d) недостатки системы судопроизводства, которая остро нуждается в реформе и которой пользуется премьер-министр и его помощник в целях затягивания рассмотрения их дел;

e) существует мнение о том, что парламентские процедуры используются премьер-министром и его помощником в своих интересах и для своей выгоды в связи с рассматриваемыми в судах делами;

f) хотя судьи пользуются свободой слова, вероисповедания, ассоциаций и собраний в качестве профессиональных судей, они должны пользоваться этими правами таким образом, чтобы обеспечить уважение к своей должности и беспристрастности судебных органов;

g) трудно говорить о независимости и беспристрастности судьи, если он участвует в политической деятельности или является членом той или иной политической партии или же публично выражает свое мнение по политическим вопросам;

h) участие в парламентских выборах несовместимо с независимостью судей. Судьи, которые желают участвовать в выборах, должны слагать с себя полномочия судьи; и

i) коллективная забастовка судей ради достижения определенной цели несовместима с должностью судьи и может отрицательно сказаться на независимости судей.

На основе своих замечаний и выводов Специальный докладчик выносит следующие рекомендации:

a) в связи с реформами системы отправления правосудия:

i) необходимо выявить и устранить основные причины, препятствующие проведению реформ системы отправления правосудия; следует как можно скорее закончить рассмотрение получивших широкую огласку судебных дел, затрагивающих премьер-министра и его помощника;

ii) при проведении реформ необходимо следовать целостному подходу;

iii) необходимо облечь доверием представителей всех профессий, имеющих отношение к отправлению правосудия, и предложить им войти в состав координационного комитета по проведению реформ, с тем чтобы избежать недоверия и подозрительности;

iv) НАС должен сотрудничать и играть активную роль в процессе реформ. Он должен следовать объективному подходу к этому процессу и избегать недоверия и подозрительности по поводу любого предложения, исходящего от правительства;

v) следует избегать узконаправленных или специальных реформ отдельных законов или процедур в интересах конкретных лиц и/или их дел, рассматриваемых в судах;

vi) если для проведения этих реформ требуются поправки к Конституции, все необходимые поправки должны быть определены, сведены воедино и представлены в парламент правительством;

vii) правительство, парламент и судебная власть должны преодолеть свои разногласия, уважать конституционную роль друг друга и уделить первоочередное внимание реформам;

viii) в ходе реформ следует внести изменения в статью 205 Уголовно-процессуального кодекса, с тем чтобы привести ее в соответствие с пунктом 1 статьи 14 Международного пакта о гражданских и политических правах и статьей 3 Конституции. В правовом государстве все граждане должны быть равны перед законом;

ix) необходимо без промедления решить вопрос, касающийся значительного числа ходатайств итальянских граждан, возвращаемых подавшим их лицам Европейским судом по правам человека на основании закона 89 от 24 марта 2001 года, с тем чтобы эти дела не направлялись вновь на рассмотрение в Европейский суд по правам человека;

b) в связи с находящимися в настоящее время на рассмотрении суда делами премьер-министра и его помощника:

i) премьер-министр и его помощник не должны использовать или подозреваться в использовании процедурных недостатков системы отправления правосудия в целях затягивания рассмотрения этих дел;

ii) они не должны использовать или подозреваться в использовании парламентских процедур для внесения изменений в законы и процедуры в целях помешать должному рассмотрению этих дел судами;

iii) премьер-министр должен рекомендовать своим сторонникам в парламенте отказаться от такого использования законодательного процесса, который можно истолковать как оказывающее благоприятное для него влияние на рассмотрение его дел в судах;

iv) премьер-министр должен уважать суд и являться в суд по вызову для дачи показаний. Ссылка на статью 205 Уголовно-процессуального кодекса создает ему дурную репутацию и может еще больше усугубить напряженность в отношениях между судьями и правительством;

c) в связи с судебными решениями:

i) хотя решения судов могут являться объектом внимания общественности и критических высказываний в сдержанных тонах, судьи не должны подвергаться личным нападкам за вынесенные ими решения, даже если такие решения явно ошибочны. Надлежащим местом для оспаривания ошибочных решений является апелляционный суд;

d) в связи с участием судей в политике:

i) судьям необходимо напомнить о принципе 8 Основных принципов независимости судебных органов, в соответствии с которым они всегда должны вести себя таким образом, чтобы обеспечить уважение к своей должности и сохранить беспристрастность и независимость судебных органов;

ii) с учетом этого принципа НАС следует серьезным образом рассмотреть вопрос о том, совместимо ли участие судей в политике и их членство в политических партиях с принципом 8 Основных принципов;

iii) заседающие судьи должны воздерживаться от публичных высказываний, будь то устных или письменных, по спорным политическим вопросам;

iv) судьи, которые желают участвовать в парламентских выборах, должны слагать с себя свои полномочия. В случае, если они захотят вновь вернуться к своей должности, они должны заново пройти процесс отбора и назначения;

v) НАС настоятельно рекомендуется рассмотреть вопрос о включении Бангалорских принципов поведения судей в Кодекс профессиональной этики судей; Бангалорские принципы содержатся в приложении к основному докладу Специального докладчика (E/CN.4/2003/65);

e) в связи с угрозами судей объявить забастовку или объявлением ими забастовки:

i) НАС следует серьезным образом рассмотреть вопрос о совместимости участия судей в коллективной забастовке с принципами независимости судебных органов.

Annex

REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS, DATO' PARAM CUMARASWAMY, SUBMITTED IN ACCORDANCE WITH COMMISSION ON HUMAN RIGHTS RESOLUTION 2002/43

Report on the mission to Italy (5 to 8 November 2002)

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Introduction

1. The present report concerns a follow-up mission to Italy undertaken from 5 to 8 November 2002 by the Special Rapporteur on the independence of judges and lawyers.

2. The Special Rapporteur undertook an earlier fact-finding mission to Italy from 11 to 14 March 2002 upon receiving information of growing tension between magistrates, including prosecutors,[1] and the Government. This tension resulted in nationwide protests organized by magistrates during the beginning of the legal year in January 2002 to express their concerns about the Government's attempts allegedly to undermine their independence. These protests were called by the National Association of Magistrates (NAM), of which 95 per cent of the magistrates of Italy are members. Following the mission the Special Rapporteur submitted a preliminary report (E/CN.4/2002/72/Add.3) which contained his observations and recommendations.

3. In his preliminary report, the Special Rapporteur concluded the following:

- He was satisfied that there was reasonable cause for the magistrates to feel that their independence was threatened;

- Magistrates should not conduct themselves in a manner which could compromise their independence and impartiality;

- The cumbersome legal system and its procedures and the high-profile criminal cases before the Milan courts, and the manner in which the procedures were taken advantage of to delay the trials, had contributed to the situation. This was compounded by the perception that legislative process was used to enact legislation which was then used in cases already before the courts; and

- These developments led to a mutual suspicion and mistrust between the Government and the magistrates.

4. In the same report, the Special Rapporteur recommended as follows:

- The prominent politicians facing charges before the Milan courts should respect the principles of due process and should not be seen delaying the process; and

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[1] In Italy both judges and prosecutors are called "magistrates".

- That there be set up a coordinating committee of representatives of all segments of the administration of justice to address reform of the justice system in a holistic and comprehensive way.

5. The Special Rapporteur also concluded that he would continue to monitor developments and will submit a further report to the fifty-ninth session of the Commission on Human Rights.

6. At the fifty-eighth session of the Commission, the Special Rapporteur did not receive any formal response from the Government to his preliminary report. Since that session he continued receiving information of the tension between the magistrates and the Government.

7. On 29 April 2002 the Special Rapporteur sent a communication to the Government inquiring about the information he had received on a possible strike called by the NAM for 6 June 2002 in protest against proposed reforms of the Government for the administration of justice. In the same communication the Special Rapporteur enquired whether the Government had implemented the recommendations in paragraph 32 of the preliminary report and begun a dialogue with the NAM.

8. The Government responded in a communication dated 10 June 2002. In that communication the Government stated, inter alia, that with regard to the Special Rapporteur's recommendation under paragraph 32 of the preliminary report, the Government had launched consultations "on a semi-daily basis, with all the parties concerned, including both magistrates and lawyers - without any exception. Such consultations have so far proved to be smooth and effective and to have avoided any unnecessary radicalization of positions that could possibly arise from a more rigid and institutionalized framework".

9. On 2 August 2002 the Special Rapporteur sent a communication to the Government seeking response to the information he had received regarding a bill before the Senate to amend the law governing requests for transfer of a case to another court during a trial due to local situations that could affect the fairness of the trial. The bill was to amend article 45 of the Code of Criminal Procedure by addressing "legitimate suspicion" as basis for transferring a case to another court. This bill came to be known popularly as the "Cirami Bill" after the name of Senator Cirami, who initiated the bill in the Senate.

10. On 1 November 2002 the Government responded to the Special Rapporteur's communication of 2 August. In the communication the Government stated, inter alia, that the bill was passed by the Senate on 1 August 2002. It explained, inter alia, that the bill merely introduced "legitimate suspicion" as ground for a trial to be transferred if a party could show that he or she could not get a fair trial before that court due to local conditions. This law was already

in the pre-1989 Criminal Procedure Code. But when the Code was revised in 1989, in an oversight it was not included in the revised Code.

11. In the light of these developments, and to enable the Special Rapporteur to submit a further report to the fifty-ninth session of the Commission in accordance with paragraph 33 of his preliminary report, the Special Rapporteur sought the consent of the Government for a follow-up in situ mission in Rome from 5 to 8 November 2002. The Government readily agreed and invited the Special Rapporteur.

12. The Special Rapporteur once again thanks the Government, including its Permanent Mission in Geneva, for facilitating the mission and providing assistance and cooperation with cordiality.

I. THE FOLLOW-UP MISSION

13. During this mission the Special Rapporteur met the presidents of the Court of Cassation and Constitutional Court, the president and some members of the Higher Council of the Judiciary (CSM), the Minister of Justice and his representatives and the NAM.

14. The Special Rapporteur expressly sought a meeting with the Prime Minister, Mr. Silvio Berlusconi, who was then also the Foreign Minister. However, for reasons not given, such a meeting was not arranged and the Special Rapporteur was deprived of the opportunity of listening to the Prime Minister, who is a party in some high-profile cases referred to in his preliminary report and this report.

15. During the mission the Special Rapporteur in the course of his meetings raised the following issues:

(a) The extent of the progress made in the reform of the justice system and the tension between the Government and the magistrates;

(b) Criminal cases against prominent politicians, the legitimate-suspicion law and its implications;

(c) The failure of the Prime Minister to appear as a witness to give testimony in two trials; and

(d) The practice of magistrates of being elected to Parliament and otherwise involved in politics.

The extent of the progress made in the reforms of the justice system and the tension between the Government and the magistrates

16. In his preliminary report the Special Rapporteur observed that the cumbersome legal system and its procedures resulted in considerable delays in the judicial process. Every attempted reform affecting the administration of justice was perceived with suspicion and as a threat to the independence of magistrates. Judicial decisions, particularly in high-profile cases, were viewed as being partisan and leftist. He recommended the urgent need to address the reform of the justice system and called for the setting up of a coordinating committee of representatives composed of all actors in the administration of justice so as to avoid mistrust and suspicion.

17. The Minister of Justice stated that such a coordinating committee was not set up and could not be set up by Parliament. Generally, parliamentary committees would only be composed of parliamentarians.

18. The minister also said that three main committees were set up to review the penal code, the civil code and the bankruptcy code. He added that there were 42 bills in Parliament proposing amendments to existing laws. One such bill was on the judicial order relating to the judiciary. Among the proposals in the bill are an examination process for magistrates, establishment of an institute for judicial training, a time frame to define length of service of judges, regulation of disciplinary action, and better definition of the duties of prosecutors and judges. The minister expressed that representatives from the legal profession, the academia and the magistracy were consulted. The CSM's views were also sought.

19. In the meetings with NAM and CSM the Special Rapporteur learned that while NAM was called for some consultations by the Ministry of Justice it was felt that they were inadequate. Some of the proposed reforms, particularly the separation of functions of judges and prosecutors, and matters related to magistrates' salaries over which the Ministry of Justice has recommendatory powers, were not acceptable to them. Generally, the amendments to the judicial order were seen with suspicion.

20. With regard to the proposed separation of the functions of judges and prosecutors, the Minister of Justice explained that there are 26 judicial districts in Italy and under the present practice a magistrate can change from judge to prosecutor or vice versa at any time. Under the proposed reform, there would be an examination before such a change can be made and the magistrate will also be required to change districts and has to remain in the district for a

minimum of three years. Prosecutors will remain under supervision of the CSM. Prosecutors will continue to be in charge of prosecutions.

21. Both the CSM and NAM are opposed to these proposed reforms. They view these proposed reforms as a move to "separate" their careers and not as a mere separation of functions. As such they fear that these reforms would impinge on their independence and impartiality. The prosecutors also fear that Parliament would set priorities over prosecutions. That was earlier proposed, but the Ministry of Justice said that it was not pursued.

22. Following these differences NAM called for a strike in June 2002 against some of the proposals. The President of Italy appealed to the magistrates for restraint and called for continued dialogue. However, as there was little positive response from the Ministry of Justice, the strike proceeded, though it did not bring the courts to a complete standstill. While the strike did not bring about positive changes on the proposals by the Ministry of Justice, however, the Special Rapporteur was told that it did help to further deteriorate the relationship between NAM and the Ministry of Justice. This was evident during discussions with the Minister of Justice and NAM.

23. The tension between the Government and the magistrates continues. The Prime Minister was recently reported to have said: "The Italian experience demonstrates that a certain type of justice has brought a political system to an end, eliminated a ruling class, and has taken from the people the ability to decide who should run the country" (*Washington Post*, 12 November 2002).

24. The Special Rapporteur was also told that there are about 50,000 civil appeals and 60,000 penal appeals pending before the Court of Cassation. He was told that, constitutionally, every accused or litigant has a right to appeal to the Court of Cassation from decisions of the lower courts whether on law or fact. There is no procedure to restrict these appeals on grounds of merit or points of law of public importance.

25. In view of the considerable delays in the disposal of cases before the courts, aggrieved litigants petitioned to the European Court of Human Rights (ECHR) in Strasbourg for Italy's violations of article 6 of the European Convention for not disposing these cases within a reasonable time. Eight to 10 years obviously is considered as inordinate delays. No fewer than 12,000 cases were filed before the ECHR for the same violation against Italy. The ECHR had over the years found Italy, in many cases, in violation of article 6 of the Convention.

26. In the light of the very large number of petitions to the ECHR, the Committee of Ministers of the Council of Europe have been monitoring the Government's efforts to reform the judicial process to reduce the delays and prevent such large numbers of petitions to the ECHR for

violation under article 6 of the Convention. In its press release of 10 July 2002, the Committee, while noting some legislative reforms relating to length of criminal proceedings, expressed, inter alia, regrets that statistics provided for the year 2000/01 by the Government on reforms "did not allow to conclude that there had been any significant progress in the efficiency of the criminal justice in Italy".

27. Following Law No. 89 of 24 March 2001, known as the "Pinto Act", the ECHR returned 11,171 petitions filed by Italian citizens aggrieved by delays in the justice system to the same Italian petitioners to exhaust the additional domestic avenue provided under the same law to deal with their claims for compensation for such delays. This law provided for a further forum within the jurisdiction for Italian citizens to have their petitions for undue delays in the judicial process to be dealt with before resorting to the ECHR.

28. During the mission the Special Rapporteur was told that, of the 11,171 petitions returned, only about 600 petitions have since been resolved by the Italian courts.

29. In an address to the CSM at its extraordinary session on 2 October 2001, the President of the Republic, who is also the chairman of CSM, referring to this law said:

> "Thus, this law gives us a certain amount of breathing room. However, we must hope that most of those actions for equitable redress of the harm resulting from the unreasonable duration of the trial be concluded quickly, especially through settlements, on the basis of the parameters used by the European Court to liquidate damages. If this does not happen, all those petitions will return to Strasbourg after a while, resulting in further judgements against Italy."
>
> […]
>
> "I am also well aware that this remedy cannot be considered conclusive if not realized in the form of a settlement, since the violation of the reasonable length of the trial is rooted in grave systemic and organizational dysfunctions."

30. The Attorney-General, during his meeting with the Special Rapporteur in the earlier mission in March 2002, described the situation as follows:

> "The guarantees in the penal proceedings are excessive leading to excessive number of controls and excessive length. There is a strong lawyer lobby that has an advantage in delaying trials. In civil cases, one of the parties can be interested in delaying to avoid paying damages. There is a need to change the rules in order to speed up the process. An

equilibrium has to be found between guarantees and efficiency. Latin culture leads to litigious society. All governments have tried to reduce the length of court cases, without success because no one wants to give up any of the guarantees. Modification of the procedures may lead to results. As to mediation, magistrates oppose leaving it in the hands of lawyers, as this would lead to privatization. Arbitration is costly and not fast because it may always be challenged in court. Lawyers do not discourage their clients to go to court. There are too many lawyers in Italy and they need income."

Criminal cases against prominent politicians, the legitimate-suspicion law and its implications

31. In paragraph 13 of his preliminary report, the Special Rapporteur referred to the three pending criminal cases before the Milan courts involving charges of corruption and false accounting of prominent politicians, namely the Prime Minister and another prominent member of the Parliament, Mr. Cesare Previti. One of these cases was before the Court of Cassation on application for transfer from the Milan courts. He expressed concerns over the manner in which procedural points were used to delay these cases including the use of legislative process to enact legislation to thwart the prosecution's case. One such piece of legislation was on rogatory letters, ratifying a bilateral agreement with Switzerland with retroactive effect. Another legislation decriminalized the offence of false accounting if the corporation concerned was a private company. Again with retroactive effect. The immediate beneficiaries of these laws were alleged to be the Prime Minister and his colleague, Mr. Previti.

32. The Special Rapporteur learnt that an investigating magistrate in Milan has referred the legislation to decriminalize the offence of false accounting in private corporations to the European Court of Justice in Luxembourg, on grounds that the law was inconsistent with European law.

33. At the time of the follow-up mission, these three cases were still pending before the Milan courts. However, with regard to the application before the Court of Cassation for transfer from the Milan courts to Brescia, the court delivered its decision. In its decision the court referred the issue of application for transfer of cases from one court to another on grounds of legitimate suspicion of lack of impartiality to the Constitutional Court. Before the Constitutional Court could decide on the reference, Senator Cirami moved a bill in the Senate to amend the Criminal Procedure Code to provide for transfer on such grounds.

34. The passage of this bill, the priority given to it, and the speed in which it went through the legislature raised considerable concerns. Moreover, Parliament jumped the gun before the

Constitutional Court decided on the reference from the Court of Cassation. After approval by the Senate, the bill was passed by the House of Deputies in early November 2002.

35. To a question as to why Parliament jumped the gun, the Minister of Justice responded that it was not uncommon. Parliament often stepped in to see that there was no vacuum in the law.
36. The CSM informed the Special Rapporteur that, when the inclusion of the law on legitimate suspicion was overlooked in the 1989 revision of the Criminal Procedure Code, it pointed out the oversight to the Government, but no action was taken until now.

37. What was also of concern is that this amendment would have retroactive effect and hence would apply to all current cases before the courts, including those of the Prime Minister and Mr. Previti. Only the Court of Cassation could decide whether a case could be transferred from one court to another on grounds of legitimate suspicion. When such an application is made, the trial would be suspended. This again would contribute to the delay in disposal of trials.

38. Under the legitimate-suspicion law, it is not merely the lack of impartiality of one or two judges that would constitute a legitimate suspicion. If the local conditions where the trial court is situated give rise to a legitimate suspicion that the trial may not be impartial, then the Court of Cassation could direct the transfer.

39. It was said that since 1989 only two cases were ordered to be transferred to other courts. In the last 40 years, only 12 cases were transferred. This law dates back to the Napoleonic Code but was by "oversight" excluded when the Criminal Procedure Code was revised in 1989.

40. A point often raised by the Government and repeated by the Minister of Justice was that this law was initiated not by the Government but Parliament.

41. As soon as the legitimate-suspicion bill was passed by both Houses of Parliament, fears were expressed and media reports alleged that the Prime Minister's lawyers had said that they would invoke the new law to have the trial of the Prime Minister on charges of bribery moved from Milan to Brescia. It was also alleged that that would almost certainly make the charges subject to the statute of limitation.

42. The Prime Minister was reported in the media to have denied using the legislative process for his own ends. He was reported to have argued that the legitimate-suspicion law has a public, rather than a private, benefit. "Honest people know that it is in the right of each citizen to have a judge who is not prejudiced against him" he was quoted to have said (*Washington Post*, 12 November 2002).

43. To a question as to whether the trial of the Prime Minister will have to start *de novo* if it is transferred from Milan to Brescia, whereby the statute of limitation could set in, the Minister of Justice and his aides were imprecise with their responses.

44. One of the prominent interlocutors described the position as follows: "The tension between the Government and the judiciary has resulted in all proposed laws, whether good or bad, being viewed with suspicion that they are made to solve the personal problems of the Prime Minister. As the legitimate-suspicion law affects criminal trials, the reaction of the judiciary when seen supported and defended by the opposition hurts the Government."

Failure on the part of the Prime Minister to appear as witness to give testimony in two trials

45. On 11 and 15 July 2002, the Prime Minister was called to testify as a witness in two criminal trials, one at a special sitting in Rome of a Palermo trial and another in Milan. In Rome he was to testify in the trial of a close friend, Marcello Dell' Utri, charged with aiding and abetting the Mafia. In Milan he was to testify on behalf of Vittorio Metta on bribery charges. On both occasions the Prime Minister claimed that he had other engagements.

46. During the course of the mission, the Special Rapporteur enquired as to the legal basis upon which the Prime Minister could refuse to attend court to testify when called upon. The Special Rapporteur was referred to article 205 of the Criminal Procedure Code, which provides for high-ranking State officials to call upon the court to come to the venue indicated by them to take their testimony so that the State obligations of these officials are not unduly interrupted. Generally, witnesses can be compelled to appear to testify. However, high-ranking officials cannot be so compelled.

47. The Special Rapporteur was told by one of the interlocutors that it was the first time that a high-ranking official such as the Prime Minister had declined to attend court to testify when called upon to do so.

48. To a question as to why the Prime Minister, who is the accused in some cases and a witness in a few, does not attend court and deal with these matters, the Minister of Justice stated that the Prime Minister embodied the office of a sovereign State. He added that, between the executive and the judiciary, the executive is on a higher plain than the judiciary because the former is elected. The Prime Minister was in the highest position. Though the Prime Minister is a witness like any other witness but it was the magistrate who should come to the Prime Minister. This statement startled the Special Rapporteur. He was referring to the Prime Minister attending court to testify as a witness.

49. Since the mission, the Special Rapporteur received information that the Prime Minister eventually appeared before the magistrate at a special sitting of the Palermo trial in Rome. However, he refused to answer questions on grounds that they would incriminate him in a trial where he is accused and faces charges.

50. During the mission the Special Rapporteur also raised the issue of the propriety of a lawyer, who is also a member of Parliament and the president of the justice commission in the House of Deputies, appearing as lead counsel for the Prime Minister in the criminal cases.

51. In response, the Minister of Justice said that, while articles 56 and 58 of the Constitution permitted everyone, including lawyers, to be elected to Parliament there is "no rule within the system stipulating that there is incompatibility between the office of the counsel for the defence and that of Deputy and member of parliamentary commission". In essence it is not prohibited in the code of ethics of lawyers nor in the standing regulations of Parliament.

The practice of magistrates being elected to Parliament and involved in politics

52. During the first mission, in March 2002, the Minister of Justice referred to a few magistrates who wrote opinion columns in newspapers on controversial political issues. He also stated that there were some magistrates sitting in Parliament as legislators.

53. Magistrates once appointed cannot be removed. They cannot be dismissed or suspended nor moved to other jurisdictions or functions save by decision of the CSM (article 106 of the Constitution).

54. However, there is no restriction on magistrates joining political parties, contesting elections on a party ticket and serving in Parliament. In that event they do not resign from their judicial positions. However, during the period when they are in active politics and serving in the legislature, they do not sit as magistrates. It is akin to being on leave of absence. They are, however, free to return to their judicial positions upon losing an election or the seat in Parliament.

55. This practice is quite common among European States. It stems from the individual freedom of association and right to be elected to Parliament. Articles 56 and 58 of the Constitution expressly provide that all voters above the age of 25 can be elected as deputies and those above 40 elected to the Senate.

56. Many magistrates relish this freedom and are opposed to any curtailment, particularly their right to associate in political parties.

II. POST-MISSION DEVELOPMENTS

57. Since the completion of his mission, the Special Rapporteur on 15 November 2002 expressed his preliminary observations in a press release which can be found on the web site of the Office of the United Nations High Commissioner for Human Rights. The Government responded in a communication dated 9 December 2002 to the points raised in the press release.

58. On 17 November an Appeals Court in Perugia convicted former Prime Minister Giulio Andreotti of ordering the murder in 1979 of a journalist; he was sentenced to 24 years' imprisonment. The Appeals Court overturned a decision of a lower court three years ago which had acquitted Mr. Andreotti of the murder charge.

59. This conviction and sentence caused an uproar within political circles and the media, all calling for reforms of the justice system. Mr. Andreotti was reported to have said, "The system is what it is and there are some negative aspects, but it can't be destroyed." Not just the justice system but the appeal court judges came under severe attacks from various quarters.

60. The presiding judge in the Perugia Appeals Court later revealed that he had received anonymous death threats and was placed under 24-hour police protection.

61. Mr. Andreotti's lawyers have appealed to the Court of Cassation against the conviction and sentence.

III. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

62. **The Special Rapporteur reiterates that the independence of the judiciary and the independence of prosecutors is not only well entrenched in the Italian Constitution but also in the culture and tradition of Italy.**

63. **What has plagued the administration of justice has been the cumbersome and lengthy procedures resulting in undue delays in the disposal of cases, both civil and criminal. Such procedures are a haven for litigants to avoid court judgements aided and abetted by an indifferent legal profession. The adage that justice delayed is justice denied aptly describes the end result of such a system, with concerned consumers of justice growing disenchanted.**

The large number of petitions filed in the ECHR in Strasbourg by aggrieved Italian citizens and the several judgements delivered against the State by that court testifies to this state of affairs.

64. **While these undue delays have been embedded in the justice system for many years and calls for reforms have been made loudly and clearly, it still did not lead to any tension between the Government and the magistrates until the early 1990s. Beginning in the 1990s Italian magistrates, under what came to be known as Clean Hands campaign, began investigating corrupt practices among public officials particularly among politicians, and successfully prosecuted several politicians.**

65. **Ever since, the tension between the Government and magistrates continued increasingly to the detriment of the due administration of justice. The developments led to mutual suspicion and mistrust between the Government and magistrates. Every reform affecting the administration of justice was perceived with suspicion and as a threat to the independence of magistrates. Judicial decisions, particularly against politicians and especially in the high-profile cases, were viewed as being partisan and leftist by the Government. Some magistrates were subjected to personal attacks for their decisions.**

66. **The tension became more aggravated with several charges of criminal offences, including charges of false accounting and corruption, filed against the Prime Minister and his close associate.**

67. **It became even more tense when the Prime Minister and his associates, particularly Mr. Previti, were seen as taking advantage of the procedural weaknesses to delay due process in the courts. No doubt the Prime Minister and his associate are entitled to all the defences available to any other accused persons before the court. However, it is not proper for the Prime Minister, being the chief executive of the Government, to be seen as taking advantage of procedural weaknesses in the system of which all have been calling for reform, including the Council of Europe. It certainly delays the reforms.**

68. **Under the process of reforming the law and its procedures, some targeted specific laws and procedures were amended by Parliament in the last three years. The immediate beneficiaries of these amended laws were the Prime Minister and his associate, to thwart the prosecutions against them.**

69. **The contention that some of these amendments were proposed by individual senators or deputies and not the Government is no answer to the allegation that they were motivated to measure and tailor to the needs of the Prime Minister and his associate.**

70. **At a time when Parliament should as a matter of priority and urgency address reforms of the justice system generally in response to calls from all quarters, including the Council of Europe, to prevent delays in disposal of cases, considerable parliamentary time was devoted to reforms of such targeted laws. The legislation on rogatory letters, the decriminalization of the offence of false accounting in private companies and the latest legislation on legitimate suspicion are, obviously, matters not urgent for such needed reforms. They are no doubt urgent for the pending cases of the Prime Minister and his associate.**

71. **The fact that the lead counsel for the Prime Minister in his cases is also the chairman of the Justice Commission of the House of Deputies lends further credence to how the legislative process could be influenced and used for the personal advantage of these high-profile litigants. Principles of conflict of interest do not seem to have been considered or applied. The fact that there is no specific rule against such conduct is no answer. The conflict appears clear and apparent.**

72. **The casualty of this continued tension between the magistrates and the Government is the much-needed urgent reform of the system. The Special Rapporteur is convinced that the court cases of the Prime Minister and his associate are contributing substantially to this tension. Tension will ease once these cases are finally resolved. To date, not much progress has been made on the reforms.**

73. **The Special Rapporteur was told that constitutional restrictions often hindered procedural and substantial reforms. For example, even to provide for some restriction on appeals to the Court of Cassation, a constitutional amendment is said to be needed. He was told that the procedure to amend the Constitution was complicated.**

74. **The Special Rapporteur finds this contention difficult to accept. The procedure provided in article 138 of the Constitution does not appear very complicated. The referendum for such amendments is only needed if requested after the amendments by one-fifth of the members of either chamber of Parliament or 500,000 electors or by 5 regional councils.**

75. **In any event it must be remembered that the Constitution is not static. When the need arises, it should be amended to meet the needs of the changing political, social and economic situation. In any event a sound and effective justice system is a core value of any democratic State. If the Constitution is seen as a hindrance to provision of such a system, then there is obviously a case for amendment of the Constitution.**

76. **Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides procedural guarantees in civil and criminal cases. Article 14, paragraph 1, provides expressly, inter alia, that all persons shall be equal before the courts and tribunals. Article 3 of the Italian Constitution under the chapter on "fundamental principles" provides that all citizens possess an equal social status and equality before the law, without distinction as to sex, race, language, religion, political opinions and personal or social conditions.**

77. **Equality before the courts is an important general principle of the rule of law. Courts are therefore expected to treat all those who appear before them or are called upon to appear before them equally without any discrimination.**

78. **It is in this context of this very important principle of the rule of law that the Prime Minister's failure to appear to testify, when called upon to do so, before the courts in Palermo and Milan are called into question with some concern. He appears to have been the first person to have taken advantage of the provision in the Criminal Procedure Code providing high-ranking personalities the option to appear and give evidence in the ordinary court or call upon the court to receive their testimony at a venue of their choice.**

79. **The Special Rapporteur finds the provision in the Criminal Procedure Code untenable. It may be inconsistent with article 14, paragraph 1, of the ICCPR and article 3 of the Italian Constitution. The Special Rapporteur learned that the constitutionality of this provision in the Criminal Procedure Code has not yet been challenged before the Constitutional Court.**

80. **In this regard the contention of the Minister of Justice that the executive, being elected, therefore stands at a higher plain than the judiciary and therefore the courts should go to the Prime Minister as head of the executive instead of vice versa, strikes not only at the very core of the rule of law but also the doctrine of separation of powers and the equal status of the three organs of the State. Attention must also be drawn to the fact that in Italy, under its Constitution, the sovereign head of the State is the President, representing the unity of the nation. The Prime Minister is only the head of the Council of Ministers.**

81. **By refusing to attend the court sessions on two occasions, the Prime Minister showed not only disrespect for the majesty of the courts but was seen as being above the law.**

82. **Among the proposed reforms of the Ministry of Justice, a vexed proposal is the separation of functions of the prosecutors and judges. The Special Rapporteur reiterates that in principle he does find such separation of functions will impinge on their respective independence and impartiality. However, given the timing of this proposal, amidst the virulent attacks launched at some magistrates for their prosecutions and decisions, the Special Rapporteur well appreciates the concerns over the motive for such a proposal.**

83. **In this regard the latest attacks on the appeal court judges in Perugia who convicted and sentenced former Prime Minister, Mr. Andreotti, is another example of such virulent attacks levelled at magistrates for their decisions. Even if the conviction and sentence were manifestly wrong, the proper forum is the appellate court. It is improper to attack the judges personally. Such attacks undermine judicial independence which is pivotal for the rule of law in a democracy.**

84. **Magistrates are, like other citizens, entitled to freedom of expression, belief, association and assembly in accordance with the Universal Declaration of Human Rights. However, being full-time judicial officers they must exercise such rights in such manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. These are expressly spelled out in principles 8 and 9 of the United Nations Basic Principles on the Independence of the Judiciary.**

85. **At a meeting of High Councils of Judges of the European States held in Warsaw and Slok in June 1997 on guarantees of the independence of the judiciary, the meeting adopted some conclusions and recommendations. Among them is that "a judge must be independent. He is only subjected to the law which he applies and interprets. That means that no pressure from the State, <u>from politics</u> or other forces must influence judicial decisions. A judge must not give in to such pressures" [emphasis added].**

86. **In the light of these provisos to the rights of magistrates to freedom of expression, association, assembly and belief, it is difficult for a magistrate to be seen as independent and impartial in the judicial process if he or she is seen as involved in politics or a member of a political party or expressing an opinion publicly on controversial political issues. Magistrates must not only be independent but must be seen to be so. The current practice of magistrates going into politics and seeking election to Parliament without resigning from the judicial office is a matter of concern. Equally of concern is sitting magistrates expressing opinions publicly on controversial political issues.**

87. **The Special Rapporteur has previously expressed the opinion that resorting to strikes may not be compatible with the office of magistrates, particularly sitting magistrates.**

Strike actions are generally attributed to industrial workers or employees. Magistrates are not industrial workers. They are not employees of the Government or any other authority. Under the Constitution they are insulated to protect their independence and impartiality from the Government. Hence they should not be seen resorting to a course of conduct which could be seen by the people as being that of employees. Their independence may be compromised.

88. **No doubt they have the right to form and join associations of judges to represent their interests, to promote their professional training and to protect their independence (Principle 9 of the United Nations Basic Principles on the Independence of the Judiciary). However, they should always, in this collective capacity, behave in such manner as to preserve the dignity of their judicial office and the impartiality and independence of the judiciary.**

B. Recommendations

89. **The Special Rapporteur makes the following recommendations arising from the above observations and conclusions:**

(a) With regard to judicial reforms:

(i) The underlying causes hindering judicial reforms must be identified and addressed; the high-profile cases involving the Prime Minister and his associate should be disposed as soon as possible;

(ii) Reforms must be addressed holistically;

(iii) Representatives of all actors in the administration of justice must be taken into confidence and invited into a coordinating committee to address the reforms so as to avoid mistrust and suspicion;

(iv) NAM should cooperate and play an active role in the reform process. It should take an objective approach to the process and avoid mistrust and suspicion at every proposal from the Government;

(v) Specific or ad hoc reform of certain laws or procedures seen to benefit particular individuals and/or their cases before the courts must be avoided;

(vi) If constitutional amendments are needed for these reforms, all the needed amendments should be identified, compiled and submitted to Parliament by the Government;

(vii) The Government, Parliament and the Judiciary must set aside their differences, respect each other's constitutional roles and must give the highest priority to the reforms;

(viii) Among the reforms, article 205 of the Criminal Procedure Code should be amended so as to make it consistent with article 14, paragraph 1, of the ICCPR and article 3 of the Constitution. The rule of law dictates that no one should be seen to be above the law; and

(ix) The large number of petitions returned to the Italian petitioners by the European Court of Human Rights (ECHR) under Law 89 of 24 March 21 should be disposed without delay to avoid these cases going back to the ECHR;

(b) With regard to the present court cases of the Prime Minister and his associate:

(i) The Prime Minister and his associate should not use or be seen as taking advantage of the procedural weaknesses in the system to delay the disposal of these cases;

(ii) They should not be seen using parliamentary processes to amend laws and procedures to thwart the due process of these cases before the courts;

(iii) The Prime Minister should advise his supporters in Parliament against any use of the legislative process which would be seen as having an immediate beneficial impact on his cases before the courts; and

(iv) The Prime Minister should respect the majesty of the court and attend court to testify when called upon to do so. Invoking article 205 of the Criminal Procedure Code puts him in a bad light and would further aggravate the tension between the magistrates and the Government;

(c) With regard to court judgements:

– **While judgements of the courts could be subjected to public scrutiny and criticisms in temperate language, magistrates should still not be personally attacked for their judgements even if the judgements are manifestly wrong. Proper forum for redress against wrong judgements is the appellate court;**

(d) With regard to magistrates' involvement in politics:

(i) Magistrates should be reminded of principle 8 of the United Nations Basic Principles on the Independence of the Judiciary in that they should always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary;

(ii) In the light of this principle NAM should seriously consider whether magistrates' involvement in politics and joining political parties is consistent with principle 8 of the Basic Principles;

(iii) Sitting magistrates should refrain from expressing themselves publicly, whether orally or in writing, on controversial political issues;

(iv) If magistrates wish to contest elections for a parliamentary seat, they should resign from their judicial office. If they wish to rejoin the judiciary they should go through *de novo* the selection and appointment process; and

(v) NAM is urged to consider incorporating the Bangalore Principles of Judicial Conduct into the Code of Ethics of Magistrates; the Bangalore Principles are annexed to the main report of the Special Rapporteur (E/CN.4/2003/65).

(e) With regard to magistrates' threatening or going on strike:

– **NAM should seriously consider the issue of compatibility for magistrates' collective action to go on strike with the principles of judicial independence.**
