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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy

GE.04-10026 (E) 220304 250304

Summary

This report is the first to be submitted to the Commission on Human Rights by the Special Rapporteur on the independence of judges and lawyers, who was appointed on 14 August 2003. While it sets out the activities carried out by the previous and current Special Rapporteurs in 2003 and includes a substantial annex describing situations that have focused their attention in various countries (E/CN.4/2004/60/Add.1), its main purpose is to explain the Special Rapporteur's view of his mission and his working methods to the Commission.

To give an idea of the broad scope of his mandate and the issues and priorities involved, the Special Rapporteur has judged it appropriate to begin with a status report in order to identify all the topics and questions falling within his mandate that have already been considered by the Commission and, earlier, by the Sub-Commission.

As indicated in the introduction to the chapter entitled "Substantive topics and issues identified by the Special Rapporteur", which the Special Rapporteur suggests should be perused with particular attention, by helping the Commission to take stock of the work it has already done, his purpose is to present the substantive topics and issues that he will address in his future reports. He also intends to provide an opening for dialogue with all the actors concerned in order to advance the cause of justice and respect for human rights and pave the way for the strengthening of judicial institutions throughout the world.

CONTENTS

CONTENTS (*continued*)

CONTENTS (*continued*)

Introduction

1. The present report is the tenth annual report[1] submitted to the Commission on Human Rights since it established the mandate in its resolution 1994/41. The mandate which, in resolution 1995/36, adopted as its title "Special Rapporteur on the independence of judges and lawyers", was renewed for three years in resolution 2003/43.

2. On 14 August 2003, further to consultations of the Commission Bureau, the Chairperson of the Commission appointed Mr. Leandro Despouy (Argentina) as successor to Mr. Param Cumaraswamy (Malaysia) who had very ably worked as Special Rapporteur since 1994 and has developed very solid working methods and a stimulating approach to a wide range of substantive issues pertaining to the mandate, for which he deserves great appreciation.

3. Bearing in mind the short time that has elapsed since his appointment, in this first report, the Special Rapporteur aims at providing the Commission with the following: an overview of the activities carried out in 2003, his understanding of the mandate and his methodological and substantive approach to the issues pertaining to it.

I. TERMS OF REFERENCE AND METHODS OF WORK

A. Terms of reference

4. The Special Rapporteur noted that his mandate is derived from the Commission's concern at the frequency of attacks on judges, lawyers and court officials and its realization of the link existing between the safeguards for the judiciary and lawyers and the gravity and frequency of human rights violations. He further noted that the Commission developed the mandate as part of its activities aimed at the protection of all persons subjected to any form of detention or imprisonment. In an effort to reflect and build on the Commission's past work, the Special Rapporteur will thus address all cases, situations and issues pertaining to both civil and military justice, ordinary and special or exceptional jurisdictions, and certain forms of detention. He will do so keeping in mind the activities of other relevant Commission Special Rapporteurs, mechanisms and procedures and will work in close cooperation with them.

5. In addition, the Special Rapporteur noted that several of the resolutions adopted by the Commission during the last few years and at its fifty-ninth session are also pertinent to his mandate. He will take them into account when dealing with, in particular, issues of equal access to due process of law (resolutions 2003/44 on the rights of women in the United Nations system, 2003/49 on persons with disabilities, 2003/50 on minorities), human rights and terrorism (resolution 2003/68), human rights education for judges and lawyers (resolution 2003/70), impunity (resolution 2003/72) and the integrity of the judicial system (resolution 2003/39). He will further keep in mind two other important resolutions, those which invite all Special Rapporteurs to develop a gender perspective (2003/44) and also a child-rights perspective (2003/86).

6. Finally, the Special Rapporteur took note of the normative framework within which he is called upon to operate, and which his predecessor has both mentioned on various occasions as

well as tried to strengthen with the development and promotion of the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex) to promote and ensure accountability within the judiciary.

7. With the above in mind, the Special Rapporteur understands his mandate to include in particular the following tasks, which he considers of equal importance and closely interdependent:

(a) To identify, inquire into and record any breaches to the independence of the judiciary, lawyers and court officials as well as to identify and record any progress made in protecting and strengthening such independence, based, in particular, on the study of allegations and information regarding specific situations and issues brought to his attention;

(b) To analyse underlying matters of principle with a view to making recommendations aimed at securing and strengthening, as appropriate, the independence of the judiciary and of the legal profession, and at consolidating the corresponding normative tools;

(c) To promote consultative services or technical assistance aimed at strengthening the judiciary and the legal profession, and provide advice and guidance to interested member States;

(d) To foster, in general, activities aimed at furthering the independence of the judiciary and the legal profession.

B. Methods of work

8. The Special Rapporteur generally endorses the working methods described by his predecessor (see E/CN.4/1995/39, paras. 63-93) and in his additional reports. Based on this precedent, the Special Rapporteur will consider such elements, as appropriate, as outlined in the following paragraphs.

9. **Study of specific country situations**. This is based on allegations and issues brought to his attention and with in mind, whenever relevant, the work of the corresponding geographic Special Rapporteurs of the Commission and of the Human Rights Committee. Also, whenever relevant and possible, the Special Rapporteur will conduct on-site visits and trial observations, individually or jointly with other Special Rapporteurs or Commission mechanisms and procedures. These types of activities, which may prompt the issuance of press releases, are crucial insofar as they enable the Special Rapporteur to cross-check thoroughly and in a direct manner allegations regarding situations affecting either individuals or the institution of the judiciary or the legal profession as such. To ease the assessment of progress and setbacks emerging from the analysis of country cases and visits, the Special Rapporteur will present in detail the corresponding information in annexes to the main report while analysing the substantive issues and general or specific trends under the relevant sections of the main report.

10. **Communications with and urgent appeals to Governments**. These are sent in response to allegations and situations brought to the Special Rapporteur's attention that could present a risk to the independence of the judiciary and/or lawyers or prosecutors. Such steps will either be individual or jointly with other Special Rapporteurs of the Commission or mechanisms

and procedures and may, as needed, give rise to the issuance of press releases. The Special Rapporteur understands that urgent appeals, communications and press releases are tools that should be used under appropriate circumstances, especially as he understands that they may be used as a preventive or dissuasive measure especially in situations such as: a post-conflict environment, or where newly proposed legislation could represent a risk for the independence of the judiciary, or whenever judges or lawyers are allegedly harassed, threatened or exposed to other risks in the exercise of their functions, or in connection to corruption within the judiciary. To that effect, the Special Rapporteur intends to act upon allegations that have been cross-checked with reliable sources. He wishes to clarify that, in his understanding, a "satisfactory answer" to a communication or an urgent appeal is one providing satisfactory guarantees that the independence of judges and lawyers is respected and goes beyond the mere explanation of the constitutional or legal framework of the State concerned. In this connection, the Special Rapporteur is concerned by some of the answers generally received from Governments between 1994 and 2003 (see section III below of this report) and is keen to develop a fluid and positive dialogue with Governments in connection with the allegations relayed to them. Such cooperation is a priority and is of great mutual interest.

11. **Consultations**. These are held with Governments (including possible in situ visits); the relevant mechanisms and procedures of the United Nations (other geographic and thematic special procedures mandate-holders, human rights treaty bodies and field operations of the Office of the United Nations High Commissioner for Human Rights and other departments, agencies and organizations of the United Nations system, including country teams); other intergovernmental organizations; non-governmental organizations; and relevant national institutions and organizations, including associations of judges and lawyers. Such consultations are crucial not only to promote a fruitful cooperation with Governments and professional associations of the States concerned but also to further a consistent and complementary approach of the subject matter by all United Nations and other players.

12. **Participation in international, regional and national meetings and events**. This depends on available resources and the Special Rapporteur's personal schedule. Such participation is useful both to allow the Special Rapporteur to present his work and recommendations and to exchange ideas and share experiences, thus enriching his approach in presenting his views to the Commission.

13. **Promotion of technical assistance**. The Special Rapporteur will support such assistance to strengthen the judiciary so as to prevent any breach of its independence or the development of corruption within it, and to ensure the importance of an integrated approach to support governments desirous to incorporate international human rights standards into national laws, policies and practices by building sustainable national capacities to implement these standards within the judiciary. To that end, he will endeavour to work with all responsible United Nations departments and agencies and is further committed to coordinating his work with other human rights rapporteurs and mechanisms and to strengthening cooperation with United Nations country teams and field offices.

14. **Fostering normative and promotional activities**. Like his predecessor, the Special Rapporteur attaches great importance to these activities and he will actively pursue them during his mandate.

II. ACTIVITIES CARRIED OUT BY THE SPECIAL RAPPORTEUR IN 2003

15. The following paragraphs summarize action taken by the former Special Rapporteur from 1 January to the end of his mandate in July 2003 and by the current Special Rapporteur through to the end of 2003.

16. **Consultations**. The former Special Rapporteur visited Geneva from 3 to 7 April 2003, where he presented his report to the Commission and met with representatives of the regional groups, held consultations with representatives of the Governments of Guatemala, Hungary, Iran, Malaysia, Mexico and Sri Lanka, held a briefing for interested NGOs and met individually with several others. The current Special Rapporteur visited Geneva from 2 to 5 November 2003 for briefings on substantive and administrative issues, took the opportunity to meet with representatives of the Governments of Hungary and the Russian Federation, held consultations with the Inter-Parliamentary Union which, especially through its Committee on the Human Rights of Parliamentarians, has developed relevant jurisprudence, and met with various NGOs, including the International Commission of Jurists, Amnesty International, the International Federation for Human Rights and the International Service for Human Rights. On 6 November 2003, he further held consultations in New York City with representatives of the Lawyers Committee for Human Rights and Human Rights Watch and NGOs involved in the protection of vulnerable groups.

17. **Missions/visits**. During the year 2003, no such visits were organized. As country visits are one of the essential elements of his mandate, the Special Rapporteur is currently evaluating outstanding mission requests made by his predecessor and standing invitations received to date for which he is grateful, to those respective Governments. He intends to conduct at least two in situ visits in 2004 and looks forward to a fruitful cooperation with the Governments of the States concerned.

18. (a) **Communications with and urgent appeals to governmental authorities**: Summaries to communications and appeals sent and responses received from Governments can be found in document E/CN.4/2004/60/Add.1;

(b) **Press releases**: Summaries can be found in document E/CN.4/2004/60/Add.1.

19. **Cooperation with intergovernmental and non-governmental organizations**. Under "consultations", above, the Special Rapporteur referred to contacts with various organizations. He is keen to continue and further promote close cooperation with the United Nations Centre for International Crime Prevention and other relevant United Nations agencies, departments and mechanisms.

20. **Cooperation with the special rapporteurs and working groups of the Commission on Human Rights**. Close cooperation has existed throughout 2003 and will be pursued in the future with, especially, the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the question of torture, the Special Rapporteur on the right to freedom of opinion and expression, the Special Representative of the Secretary-General on the situation of human rights defenders, and also with the Chairman-Rapporteur of the Working Group on Arbitrary Detention. The former Special Rapporteur further attended in Geneva

from 23 to 27 June 2003 the tenth annual meeting of the special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme.

21. **Promotion of technical assistance**. During his visit to Geneva, in November 2003, the Special Rapporteur discussed issues of technical assistance with competent staff of OHCHR.

22. **Promotional activities**. The former Special Rapporteur delivered addresses at the Commonwealth Press Union Biennial Conference in Colombo, Sri Lanka (25-28 February), at the Universidad Iberoamericana in Mexico City, Mexico (17-19 March) and at the 13th Commonwealth Law Conference in Melbourne, Australia (13-17 April).

III. SUBSTANTIVE TOPICS AND ISSUES IDENTIFIED BY THE SPECIAL RAPPORTEUR

23. To gain a better understanding of the wide scope of his mandate and the issues and priorities involved, the Special Rapporteur drew up a status report on the work done by the Commission and the previous work done by the Sub-Commission with a bearing on his mandate, which enabled him to identify the substantive topics and issues on which those bodies have focused their attention. He considers that it is on this basis that he should organize his work, if only so that the Commission can benefit from well-established precedents. He has also set out in a box his observations inspired by a statistical review of the remarkable work achieved since the mandate was established in 1994.

24. In preparing this framework for his work, the Special Rapporteur bore in mind his exact terms of reference. He also took into account the 1993 Vienna Declaration and Programme of Action, which asserts in part I, paragraph 27, that every State should provide an effective framework of remedies to redress human rights violations and, for that purpose, requires an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments. As Mr. Singhvi stated in his report to the Sub-Commission (E/CN.4/Sub.12/1985/18): "The contemporary international order is premised on the intrinsic and ultimate indivisibility of freedom, justice and peace. It is clear that in the world in which we live, there can be no peace without justice, there can be no justice without freedom and there can be no freedom without human rights" (para. 74) and "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" (para. 44).

25. In the circumstances, the number of issues already addressed by the United Nations and referred to by the Special Rapporteur below is hardly surprising. These are complex subjects which are all closely interrelated, each with its own importance if the judicial system as a whole is to fulfil its basic mission of preventing or putting an end to all violations of human rights and fundamental freedoms or punishing the perpetrators of such violations in accordance with the law and ensuring reparation for the victims.

26. The Special Rapporteur will address the topics he has identified and endeavour in each report to highlight the key aspects. He further proposes that this list of topics serve as a frame of reference for contacts between himself and his various counterparts and sources of information.

Review of the Commission's work between 1994 and 2003

The following emerges from the reports considered by the Commission over the past 10 years.

The Special Rapporteur has presented detailed information on situations that he studied in 102 States and territories. He has been active in an additional 23 States (urgent appeals, communications or consultations with the Government), although without reporting on their situation. Thus he has closely monitored the situation in more than 60 per cent of the world's States and territories.

The reports record: (a) 253 urgent appeals to 68 States, issued separately or jointly with other special rapporteurs, and 270 communications to the Governments of 90 States; (b) replies, either systematic or on a case-by-case basis, from less than one third of the States concerned, and not always to the Special Rapporteur's satisfaction; (c) interviews with the representatives of some 30 States; (d) visits to 13 countries (one to three times per country) and requests, sometimes pressing and repeated, to visit a further 17 countries.

In nearly 10 years of work, the Special Rapporteur has: (a) drawn attention to judicial decisions or provisions in a dozen States that reflect a structural strengthening of the independence of the judiciary and the legal profession; (b) declared himself satisfied or encouraged by judicial decisions or other provisions in some 20 States that have enabled him to suspend his action in individual cases; (c) noted, in 44 States, an overall lack of independence of the judiciary and/or obstacles to the free exercise of the legal profession, or expressed concern in that regard; and lastly, (d) pleaded, in a large number of States, particularly those going through a period of transition to democracy, for emergency technical assistance to assist them in strengthening their institutions with a view to the effective administration of justice, in conformity with the criteria of independence and impartiality.

Over time, the list of States about which the Special Rapporteur has expressed concern has grown and diversified, and while certain States have been cited only once, others have been so insistently and repeatedly. The list includes both developed and developing States, advanced democracies and States in transition to democracy following an armed conflict or resulting from major political and/or economic changes. All regions of the world are represented, and although the Special Rapporteur has expressed particular concern as regards States in transition (particularly in Eastern and Central Europe and Asia), no region of the world can be credited with a good performance. In other words, the independence of judges and lawyers is at risk throughout the world, although to varying degrees and for reasons or in forms that are sometimes quite different.

The fact that the Special Rapporteur has repeatedly expressed concern with regard to certain States is an indication that the independence of the judiciary and the legal profession are at risk there, but this by no means proves that the situation is worse there than in States that are seldom or never cited. The frequent reference to certain States may stem from the fact that information is more easily available on them than on other States and that human rights NGOs, whether native to those countries or concerned with them, are active, organized and mobilized where the issue of the independence of judges and lawyers is concerned. In any case, it can be considered that the Commission's work has gradually become better known throughout the world, thereby encouraging the submission of information on an increasing number of States.

A. Legal and institutional framework for ensuring or, conversely, hindering the independence of judges and lawyers

27. The United Nations has taken a structural approach to this subject. It is not only a matter of defending individuals engaged in a judicial or related activity; there is an institutional context to the issue: separation of powers, democracy and the rule of law. It was for this reason that Mr. Singhvi stated in 1985 that "The concepts of the impartiality and independence of the judiciary [that are the hallmarks of the legitimacy of the judicial function] postulate individual attributes as well as institutional condition … Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake."[2]

1. The rule of law and separation of powers: pillars of the independence of the judiciary

28. The rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency. These guarantees are embodied to varying degrees in the legal systems of the world's countries in the form of constitutional and legal texts and case law. They are also universal in scope since, as the previous Special Rapporteur put it in his 1995 report (E/CN.4/1995/39), "the requirements of independent and impartial justice[3] … are rooted in both natural and positive law" and, "at the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law" (para. 32); "the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore, an international custom in the sense of Article 38 (1) (b) of the Statute of the International Court of Justice" (para. 35). The Special Rapporteur considers, then, that their defence under all circumstances is an essential aspect of his mandate. It is, however, for national institutions to take the lead in ensuring that defence; international action, including that of the Special Rapporteur, can only play a supporting role.

29. The previous Special Rapporteur consolidated the notion that the rule of law presupposed judicial monitoring (or its equivalent) of the constitutionality or legality of executive decisions and administrative acts and laws. He stressed the fact that such monitoring should not be perceived as part of an institutional rivalry between the judicial, executive and legislative powers, but acts as a means of containing any authoritarian excesses and ensuring the supremacy of the law under all circumstances. The current Special Rapporteur shares his opinion that the desire to restrict or even suspend this judicial power would be tantamount to impairing the independence of justice, and his intention is to be attentive to any such excesses.

2. Role of the administration of justice in the defence and promotion of human rights

30. In any democratic society, judges are the guardians of rights and fundamental freedoms. Judges and courts undertake the judicial protection of human rights, ensure the right of appeal, combat impunity and ensure the right to reparation. These are expressed through:

(a) The various judicial procedures for the protection of individual or collective rights;

(b) Criminal judicial procedure, which guarantees the proper administration of justice in conformity with international standards for a fair and equitable trial and also the rights of those brought to trial, victims and eligible claimants;

(c) Prosecution, judgement and punishment of those responsible for human rights violations;

(d) Monitoring of the conformity with international human rights law of domestic standards and executive acts, generally by means of procedures for the revision or monitoring (direct or indirect, through action or as exceptions) of the constitutionality and legality of such standards and acts;

(e) Elaboration of a body of case law that incorporates international standards for the administration of justice and human rights and clarifies the scope and content of human rights and fundamental freedoms and the obligations of the authorities.

31. Where the role of justice in the defence and promotion of human rights is concerned, the Special Rapporteur welcomes the awarding of the Nobel Peace Prize for 2003 to the Iranian judge and lawyer Dr. Shirin Ebadi, who has distinguished herself by her unfailing commitment to respect for human rights and gender equality. Her remarkable work and the recognition she has received are an encouragement to all judges and lawyers throughout the world to defend human rights and the independence of justice.

3. Financial independence and liability of the judiciary

32. It is self-evident that, in order to be able to function efficiently and independently, the judiciary must have a sufficient operating budget and financial autonomy vis-à-vis the executive and legislative powers. If this is not the case, corruption and other similar practices, such as patronage, are liable to develop. This budgetary independence must be accompanied by an effective external audit. The Special Rapporteur intends to be attentive to these issues (see chapter III, section A.8, on corruption).

4. Structural and institutional impediments to the proper functioning and independence of the judiciary

33. The foregoing shows to what extent the identification and enumeration of the structural and institutional difficulties that can hinder the proper functioning and independence of the judiciary with a view to overcoming them is one of the most important aspects of the Special Rapporteur's work. Many poor and developing States and States emerging from a period of armed conflict or from a transition to democracy and democratic institutions are desirous of establishing an efficient judiciary and of ensuring the independence of judges and lawyers. Various reasons, however, including a general scarcity of financial resources, inadequate legislation concerning the judiciary, the lack of modern criminal code and code of criminal procedure, lack of individuals properly trained in the administration of justice or in administering

it in accordance with international human rights principles, and even inadequate equipment, may thwart the political will of these States. It is therefore important that international cooperation be undertaken, with their agreement and as soon as possible, to help them to achieve that aim.

5. Restrictions on the activities of the judiciary and the legal profession

34. Such restrictions may result from the implementation of emergency legislation following the proclamation of a state of emergency or from the implementation of ordinary legislation, most often in the name of national security. In view of its wide range and numerous consequences, this question is discussed as a special case in chapter III below.

6. Slow progress and delays in the execution of judicial tasks

35. This issue affects numerous States and may be the result of structural or functional problems or of political interference in the work of the judiciary. Given that delays in the administration of justice may result in a denial of justice or even in impunity, the issue merits attention in view of the restrictions it places on the action of judges and lawyers. The Special Rapporteur notes that certain States, when confronted with a particularly serious form of this problem for reasons of structure as much as circumstance, have established traditional-type courts, as in the case of the *gacaca* courts in Rwanda.

7. Impunity

36. This question has been of concern to the Commission for a very long time, and Commission resolution 2003/72 fully illustrates how topical and serious it is.

37. Manifestations of impunity violate the rights of victims to truth, justice and reparation. They may be the result of political interference in the work of the judiciary and restrictions on the exercise of defence, or of other circumstances (such as the structural incapacity of the judicial system to function properly or within a reasonable time). The Special Rapporteur is concerned by executive decrees or Parliamentary legislation that have the effect of permitting human rights offenders to evade any kind of prosecution and granting them amnesty; such texts constitute a major obstacle to the administration of justice and to any justice-based reconciliation process.

38. Impunity inevitably reflects a dysfunction within the State that goes well beyond the judicial system. This is borne out by the numerous decisions taken by the United Nations Human Rights Committee and the Inter-Parliamentary Union Committee on the Human Rights of Parliamentarians. It will therefore be important for the Commission to receive the results of the study requested from the Secretary-General of the United Nations on best practices to assist States in strengthening their capacity to combat impunity.

8. Judicial ethics and corruption within the judiciary

39. The Commission has frequently expressed concern over the frequency and the extent of the phenomenon of corruption within the judiciary throughout the world, which goes far beyond economic corruption in the form of embezzlement of funds allocated to the judiciary by Parliament or bribes (a practice that may in fact be encouraged by the low salaries of judges). It may also concern administration within the judiciary (lack of transparency, system of bribes) or take the form of biased participation in trials and judgements as a result of the politicization of

the judiciary, the party loyalties of judges or all types of judicial patronage. This is particularly serious in that judges and judicial officials are supposed to be a moral authority and a reliable and impartial institution to whom all of society can turn when its rights are violated.

40. Looking beyond the acts themselves, the fact that the public in some countries tends to view the judiciary as a corrupt authority is particularly serious: a lack of trust in justice is lethal for democracy and development and encourages the perpetuation of corruption. Here, the rules of judicial ethics take on major importance. As the case law of the European Court of Human Rights stresses,[4] judges must not only meet objective criteria of impartiality but must also be seen to be impartial; what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society. Thus one can see why it is so important to disseminate and implement the Bangalore Principles of Judicial Conduct, whose authors have taken care to base themselves on the two main legal traditions (customary law and civil law) and which the Commission noted at its fifty-ninth session.

9. "Cleaning up" the judiciary

41. In the transition periods that follow a domestic armed conflict or the collapse of a dictatorial, authoritarian or particularly corrupt regime, it is logical that judges involved in human rights violations and corruption who wish to retain their posts should be held to account. Even in such cases, the international standards for a fair trial and the Basic Principles on the Independence of the Judiciary must be strictly observed. Otherwise, such "cleaning up" may weaken the judiciary instead of strengthening it and undermine its independence. The Special Rapporteur will be attentive to such risks.

10. Training of judges, lawyers and assessors

42. The Commission has stressed the need for judges, lawyers and assessors throughout the world to receive, in addition to legal training, training in international and regional human rights standards (see resolution 2003/70), including the Basic Principles on the Independence of the Judiciary adopted by the United Nations. Such training should be strongly encouraged in order to inculcate the values of independence and impartiality and prevent corruption within the judiciary.

B. Other dysfunctions that may indicate an infringement of the independence and impartiality of judges and lawyers and the right to a fair trial

43. By way of illustration, the Special Rapporteur wishes, in the light of earlier work done by the Commission, to draw attention to other types of dysfunction that are cumulative and have particularly serious consequences, especially in the contexts of risk referred to previously.

1. Discriminatory practices in the judicial system, the legal profession and prosecutors' offices

44. Bearing in mind Commission resolutions 2003/44 and 2003/50, the Special Rapporteur will focus on discriminatory practices that affect women, persons belonging to national, ethnic,

religious or linguistic minorities or indigenous and autochthonous peoples by restricting their access to the legal profession or by pitting them against unequal conditions of employment, promotion, dismissal, etc.

2. Measures that may weaken guarantees of freedom to practise as a judge or lawyer or infringe their enjoyment

45. Violations of the independence and impartiality of magistrates may be the result not only of the dismissal of judges but also of the way in which they are appointed, promoted or transferred. In this regard, the Special Rapporteur notes the Human Rights Committee's general comment No. 13, which considers that the notion of a "competent, independent and impartial tribunal established by law" as set out in article 14, paragraph 1, of the Covenant raises several issues with regard to "the manner in which judges are appointed, the qualifications for appointments, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative". In many countries, judges are appointed on a provisional basis, and this insecurity of tenure makes them particularly vulnerable to threats to their independence.

46. Similarly, the freedom of association and expression of lawyers and solicitors is essential for the exercise of the profession and must be established and guaranteed by law. The Special Rapporteur therefore intends to draw attention to any attempt to suppress or restrict the independent operation of bar associations.

47. The Special Rapporteur intends to continue his predecessor's practice and respond, in consultation with the professional organizations in question, each time he learns that an initiative relating to the status of magistrates or the bar may lead to restrictions on their independence.

3. Pressures and threats in respect of magistrates and lawyers

48. Among the legal professions, judges and lawyers seem to incur the gravest risks. The Special Rapporteur endorses the views expressed by Mr. Singhvi in 1985 (E/CN.4/Sub.2/1985/18 and Add.1-6, para. 81): "The duties of a juror and an assessor and those of a lawyer are quite different but their independence equally implies freedom from interference by the executive or legislative or even by the judiciary as well as by others … Jurors and assessors, like judges, are required to be impartial as well as independent. A lawyer, however, is not expected to be impartial in the manner of a judge, juror or assessor, but he has to be free from external pressures and interference. His duty is to represent his clients and their cases and to defend their rights and legitimate interests, and in the performance of that duty, he has to be independent in order that litigants may have trust and confidence in lawyers representing them and lawyers as a class may have the capacity to withstand pressure and interference."

49. And yet the work of the Commission over a period of 10 years shows how frequently judges and lawyers are exposed to risks that may range from harassment, intimidation or threats to assault, including physical violence and murder, to arbitrary arrest and detention, to

restrictions on their freedom of movement, or to economic or other sanctions for measures they have taken in accordance with recognized professional obligations and standards and ethics. In the case of lawyers, it is not uncommon for such situations to result from the fact that Governments identify them with their clients' cause, particularly in politically sensitive cases. However, there can be no independence of judges and lawyers if those individuals can be exposed to such situations and if the State does not take steps to prevent and remedy them. Thus the Special Rapporteur intends to pay particular attention to such situations, which, as can be seen from a perusal of the annex to this report, constitute the majority of the national situations brought to his attention.

4. Violations of the principle of equal access to justice

50. Although the law embodies the principle of equality, practice in most countries reveals that certain groups of persons, for various reasons, do not have access to justice, or at least not on an equal footing with the rest of the population. In this regard, the Commission has particularly noted in its resolutions the special situations facing women (resolution 2003/44), persons with disabilities (2003/49) and ethnic, religious and linguistic minorities (2003/50), as well as persons in a situation of extreme poverty, persons infected with HIV or suffering from AIDS and indigenous and autochthonous peoples. The Special Rapporteur intends to give continuing and priority attention to such situations since, where human rights are concerned, the main challenge is not only to embody them in standards but above all to ensure their enjoyment by everyone.

5. Unsatisfactory administration of justice vis-à-vis young people and children in conflict with the law

51. Bearing in mind Commission resolution 2003/86, the Special Rapporteur means to strengthen his cooperation with the relevant organs and specialized agencies of the United Nations. He will pay special attention to respect for the principle that minors must be brought before special courts and benefit from certain rules granting them special protection in view of their age and their legal status in order to foster their development and social rehabilitation. In particular, he will take into account the decisions of the Committee on the Rights of the Child and the Human Rights Committee; the latter has established that minors must enjoy the same guarantees and protection as adults pursuant to article 14 of the International Covenant on Civil and Political Rights, and that all children have the right, without discrimination, to measures of protection consonant with their status as minors, whether on the part of their family, society or the State.

6. Punishment disproportionate to or in contradiction with international human rights principles

52. Among the cases that have caused the Commission concern in recent years are those of the capital punishment of disabled persons and punishment that is disproportionate to the acts that have incurred the sentence. It has requested States in which such situations have occurred to review their legislation and practices.

7. Differences of opinion between the judiciary and the bar associations

53. Insofar as such differences of opinion, particularly when they are ongoing, may have an adverse impact on the proper functioning of justice and independence, and of lawyers in particular, the previous Special Rapporteur recommended that internal mechanisms should be established to solve them, and he himself made efforts in that direction.

C. Special circumstances that may give rise to violations of the independence of judges and lawyers and the proper administration of justice

1. Justice, reasons of State and protection of national security

54. Many States have laws enabling them to bring individuals suspected of attacks on national security before national security courts, whose composition and procedures are often far from complying with the requirements of article 14 of the International Covenant on Civil and Political Rights. Generally speaking, such courts sit in camera as courts of first and last instance and hand down very heavy sentences. In some countries, they are empowered to function at any time, although the procedures they apply are similar to those of courts martial.

55. Many States also have laws permitting the executive to order the detention of persons suspected of conspiring or intending to conspire against national security and to keep them detained without charge or trial, sometimes in secret and even without access to any judicial remedy or to counsel, for renewable periods that are often open-ended. Insofar as such laws entirely or partially bypass the judicial system, it is self-evident that the Special Rapporteur will continue to work in close consultation with the Working Group on Arbitrary Detention.

2. Administration of justice in states of emergency

56. Almost all of the world's States have constitutional or legal provisions permitting them to proclaim a state of emergency in order to deal with a variety of emergency situations ranging from war or domestic conflicts or tensions to natural disasters. Although provision is made for this institution under the rule of law, which imposes specific conditions for its proclamation and special conditions to ensure respect for human rights, it very frequently leads to grave violations of such rights and to a serious undermining of the independence of the judiciary and the activity of lawyers.

57. These issues were a major concern of the Special Rapporteur during the years in which he was mandated to deal with the question of human rights and states of emergency as Special Rapporteur of the Sub-Commission. He refers more particularly to paragraph 9 ("Effects of a state of emergency on the judiciary") of the "Draft guidelines for the development of legislation on states of emergency."[5]

3. Practices followed in dealing with terrorism-related offences

58. The number of complaints of failure by Governments to respect internationally accepted judicial guarantees in the case of terrorism-related crimes is constantly on the increase. Similarly, the concerns of some Governments and human rights defenders about the

repercussions of counter-terrorism measures on respect for legality have also been increasing. Terrorism is one of the most repugnant phenomena in existence and should be steadfastly opposed. In this context, the Special Rapporteur cannot but emphasize the importance for his work of Commission resolution 2003/68, General Assembly resolution 57/219 and Security Council resolution 1456 (2003), all of which stress that measures to combat terrorism must comply with the obligations of international law and in particular international human rights, refugee and humanitarian law, as well as other related documents: the Human Rights Committee's general comment No. 29; the statement issued by the Committee against Torture on 22 November 2001; the statement by the Committee on the Elimination of Racial Discrimination; the joint statement issued by the special rapporteurs on 27 June 2003; the "Guidelines on human rights and the fight against terrorism" issued by the Committee of Ministers of the Council of Europe on 15 July 2002; and the report and resolution of 12 December 2001 of the Inter-American Commission on Human Rights on "Terrorism and Human Rights".

59. The Special Rapporteur recalls that his predecessor had expressed concern regarding the use in some countries of "faceless" judges and "secret" witnesses; these practices have led to serious irregularities in trials and are in contradiction with the provisions of article 14 of the International Covenant on Civil and Political Rights. He was also extremely concerned that persons suspected of participation in terrorist activities, including minors, could be detained and treated without regard for the standards contained in the applicable international instruments and excluded from justice. Lastly, he had expressed unease about the adoption of certain acts or decrees that, in the name of counter-terrorism and security, did not comply with the standards set out in international law and could, if implemented, constitute a major hindrance to the independence of the judiciary and the exercise of the rights of defence.

4. Bringing civilians before military courts

60. Using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism poses a serious problem. This regrettably common practice runs counter to all international and regional standards and established case law. The Human Rights Committee has time and again asserted that military courts may only hear cases involving military personnel charged with crimes or offences relating to military matters. The Inter-American Court of Human Rights has established a wealth of case law in this regard and has also considered that bringing civilians before military courts is a violation of due process and the principle of the "lawful judge". The European Court of Human Rights has also asserted this principle: although military courts are not competent to try civilians in the European system, it has had to pronounce on the action of national security courts composed of civilian and military judges. The African Commission on Human and Peoples' Rights has held that the trial of civilians by military courts is contrary to articles 6 and 7 of the African Charter and the Basic Principles on the Independence of the Judiciary.

5. "Revolutionary" justice

61. By their nature, so-called "revolutionary courts" clearly fall outside internationally recognized criteria for the administration of justice, and their composition and procedures,

generally summary, are far from ensuring the guarantees of a fair trial, particularly the principles of independence and impartiality. Such practices must remain among the Commission's concerns.

6. Honour killings, dowry murders and the killing of widows

62. The question of "honour killings", including dowry murders and the killing of widows, was addressed by the previous Special Rapporteur in consultation with the Special Rapporteur on extrajudicial, summary or arbitrary executions. Most of these killings, which derive from age-old traditions, go unpunished, and when perpetrators are brought to trial the courts frequently consider the upholding of family honour and tradition to constitute extenuating circumstances. The Criminal Code may even provide for less severe punishment for honour crimes. Bearing in mind Commission resolution 2003/44, the Special Rapporteur believes that while consideration should be given to ways of ensuring respect for certain traditional values, this should not imply any abandonment of efforts to ensure the rights of women in accordance with the principles of the Convention on the Elimination of All Forms of Discrimination against Women and other human rights instruments.

D. Issues relating to the International Criminal Court

63. The Special Rapporteur intends to follow developments concerning the International Criminal Court closely and to support efforts to strengthen the Statute and procedures of this important institution. His predecessor criticized the refusal of certain States to ratify the Rome Statute and their efforts to conclude bilateral agreements with member States, pursuant to article 98 of the Court's Statute, in order to ensure that the Court would not prosecute anyone subject to the jurisdiction of the former States who was present in the latter. With reference to article 16 of the Rome Statute, which undoubtedly opens the way to potential political interference from Security Council members in the work of the Prosecutor, he expressed his concern[6] that in practice it left "the Security Council a large role by authorizing it to delay investigations or prosecutions for a year or more. The political role of the Security Council in triggering the Court's investigation and prosecution powers, may, depending on how this role is played, substantially undermine the judicial independence of the Court by precluding judicial review of situations politically sensitive to one or other of permanent members of the Council, who, of course, wield the power of veto. … It can only be hoped that the Security Council will exercise its authority wisely and in the interests of the international community as a whole".

E. Freedom of expression and judicial authority

64. In his 1995 report (E/CN.4/1995/39, para. 61), the previous Special Rapporteur stated: "In this era of rapidly developing communications technologies, it has become difficult at times to balance the equally important freedom of expression (and the corresponding right to information) on the one hand with the requirements of fair trial (featuring an independent and impartial judiciary) on the other hand." Over and above the constraints of judicial ethics in this sphere, and without losing sight of the need to protect judges and lawyers "against pressures which would implant or effect bias, or even cause the appearance of such bias, to the detriment of the rule of law in a specific case or in general", there is a need to "be extremely careful not to restrict unnecessarily the freedom of expression. The question must be examined [and] a fine balance between these two competing, equally important, rights must be sought".

65. The Special Rapporteur wishes at this point to draw attention to the important case law established on 3 November 2003 by the International Tribunal for Rwanda which, in finding the founders and managers of a radio and television station and the former director of a journal guilty of being the direct perpetrators of the 1994 genocide, established that incitement to ethnic violence through the media is equivalent to actually committing the crime itself.

66. In view of the many issues involved, the Special Rapporteur intends to work in close cooperation with the Special Rapporteur on freedom of expression.

IV. CONCLUSIONS AND RECOMMENDATIONS

67. **It emerges from an analysis of nearly 10 years of its work that the Commission's approach to the question of the independence of judges and lawyers has been primarily structural - in other words, linked to the functioning of the judicial system as a whole. According to this approach, separation of powers, the rule of law and the principle of legality are inextricably linked in a democratic society.[7] This is not a matter of analysing the judiciary strictly from the standpoint of legislation but of looking into how it actually functions, since social, economic or cultural factors may hinder the genuine exercise of rights by certain groups that have enormous difficulty in obtaining access to justice, as is sometimes the case of disabled persons or persons in a situation of extreme poverty.**

68. **At the same time, the quality of the administration of justice has a direct impact on democracy and the development of States. This is one of the reasons why the Special Rapporteur believes it is so important that the States in question be provided with technical assistance for strengthening the judiciary, and he means to make himself available to them in order to reinforce the services furnished by the Office of the United Nations High Commissioner for Human Rights and other institutions. It is also for this reason that he hopes to be able to develop fruitful cooperation with various organizations and institutions that perform an important task in denouncing corruption, identifying and analysing its mechanisms and preventing it.**

69. **The number of allegations received (see E/CN.4/2004/60/Add.1) shows the extent to which the independence of the judiciary, the legal profession and their members continues to be threatened in many countries. The Special Rapporteur wishes to pay a tribute to all the judges, lawyers and assessors who, at great cost and personal risk, endeavour to uphold the rule of law and to render justice to all those who deal with the judicial system. Judges and lawyers are among the main defenders of human rights, and enjoyment of those rights by everyone is largely dependent on the proper administration of justice.**

70. **The Special Rapporteur is persuaded that the institutional weaknesses and functional problems affecting the work of judges and lawyers are a direct cause of violations of the right to a fair trial. He therefore hopes to be able to develop fruitful cooperation with Governments both with reference to issues brought to their attention in urgent appeals and communications and in the course of in situ visits, and would note that all of these interactions should be perceived as tools for encouraging positive developments. It goes without saying that he is committed to making a balanced assessment of**

government initiatives having an impact, either positive or negative, on the independence and functioning of the judiciary. The Special Rapporteur recommends the adoption of public policies which make provision for the allocation of adequate resources to the justice system.

71. **He welcomes the publication of the handbook *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (No. 9 in the Professional Training Series) and proposes that this work, which can be found on the web site of the High Commissioner's Office (www.unhchr.ch), should be made available, preferably in national languages, in all law faculties and professional associations of judges and lawyers. He makes the same recommendation with reference to the Bangalore Principles of Judicial Conduct. He further notes with satisfaction that the Basic Principles on the Independence of the Judiciary have become a common reference source for international human rights bodies and procedures, both universal and regional, as well as for the United Nations human rights treaty bodies, the Commission and the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights when the independence and impartiality of courts are assessed.**

72. **While he is convinced that the matters raised in this report merit equal attention from the Commission and are indivisible and interdependent, the Special Reporter considers that, like his predecessor, he will be obliged to place greater emphasis on some than on others, if only because, given their complexity, it will be physically impossible for him to present in preformatted reports of limited length all the facts and issues that arise. He nevertheless intends that certain topics, such as equal access to justice, should always find a place in the reports.**

73. **Where terrorism is concerned, he is persuaded that it cannot be efficiently combated in the long term by measures that violate the rule of law and international law. Such an approach is likely to encourage or even be taken as a justification for further terrorist attacks of increasing violence, while undermining the international legal system and the prevention and response capacity of States. The impact on the administration of ordinary justice and the enjoyment of human rights is incalculably far-reaching and serious.**

74. **National security must not be preserved at the cost of human rights and fundamental freedoms or undermine the right to be judged by an independent and impartial court established by law, a right to which there should be no exception.**

75. **The Special Rapporteur is of the opinion that in order to help combat impunity and uphold the right of victims to truth, justice and reparation, it might be useful to create an international database on what are known as justice and reconciliation processes so as to give the States concerned access not only to technical assistance but also to best practices and case law on which they can base themselves.**

76. **Lastly, the Special Rapporteur believes that it is important to continue to strengthen the International Criminal Court so that it can play its role to the full.**

Notes

[1] See E/CN.4/1995/39, E/CN.4/1996/37, E/CN.4/1997/32, E/CN.4/1998/39, E/CN.4/1999/60, E/CN.4/2000/61, E/CN.4/2001/65, E/CN.4/2002/72 and E/CN.4/2003/65, and relevant corrigenda and addenda.

[2] E/CN.4/Sub.2/1985/18 and Add.1-6, para. 75.

[3] This requirement is confirmed by the doctrine and case law of the international treaty bodies and by its evolution at the regional level; the decisions and opinions of the Inter-American Court of Human Rights are particularly valuable in this regard.

[4] See, inter alia, the judgement of 9 June 1998, *Incal v. Turkey*, No. 41/1997/825/1031, para. 65, and the judgement of 25 February 1997, *Findlay v. United Kingdom*, para. 73.

[5] See E/CN.4/Sub.2/1991/28/Rev.1.

[6] See E/CN.4/1999/60, paras. 39 and 40.

[7] This notion is confirmed by a decision of the Inter-American Court of Human Rights, which asserted that “In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.”
