联合国 E

经济及社会理事会

Distr.
GENERAL

E/CN.4/2003/65/Add.4
31 January 2003
CHINESE
Original: ENGLISH*

人权委员会
第五十九届会议
临时议程项目 11

公民权利和政治权利，包括以下问题：

司法机构的独立性、司法、法不治罪

法官和律师独立性问题特别报告员
达图·帕拉姆·库马拉斯瓦米根据
人权委员会第 2002/43 号决议提交的报告

增　编

对意大利的访问报告
(2002 年 11 月 5 日至 8 日)**

* 本报告的内容提要以所有正式语文分发。报告本身载于内容提要附件中，仅以提交语文印发。

** 根据大会第 53/208B 号决议第 8 段，本文件迟交是为了尽量列入最新资料。

GE. 03-10646 (C)　270203　070303

内容提要

本报告述及法官和律师独立性问题特别报告员于 2002 年 11 月 5 日至 8 日对意大利进行的后续访问。

特别报告员此前在收到有关包括检察官在内的治安法官与政府间关系日益紧张的资料后，于 2002 年 3 月 11 日至 14 日对意大利进行了实况调查访问。这种紧张关系导致治安法官在 2002 年 1 月法律年度开始时在全国组织了抗议活动。特别报告员在访问后提交了一份初步报告(E/CN.4/2002/72/Add.3)，其中载有他的意见和初步建议。

特别报告员在初步报告中提出了以下结论：

(a) 他感到满意的是，没有合理的理由使治安法官认为他们的独立性受到了威胁；

(b) 运作不灵的法律制度及其程序以及米兰各法院审理的十分引人注目的案件，以及利用这些程序拖延审判的作法，都助长了这种局面。使这种局面更为复杂的是人们认为有人利用立法程序来颁布立法，然后将之使用在已提交法院审理的案件之中；

(c) 这些情况导致了政府和治安法官相互猜疑和不信任。

特别报告员在该报告中提出以下建议：

(a) 被米兰各法院指控的知名政界人士应尊重正当法律程序的原则，并不被视为正在拖延这种程序；

(b) 应设立一个所有司法部门代表协调委员会，以综合全面的方式处理改革司法制度的工作。

特别报告员在结束时说，他将继续监测事态发展，并将向人权委员会第五十九届会议再提交一份报告。

特别报告员在访问期间会见了最高上诉法院院长和宪法法院院长、高级司法委员会主席和若干成员、司法部长及其代表以及治安法官全国协会。

特别报告员曾明确表示希望会见当时兼任外交部长的总理西奥维尔·贝卢斯科尼先生。然而因未指明的原因未安排这次会见，因此特别报告员没有机会听取总理的意见，而总理是初步报告和本报告提及的若干十分引人注目的案件的当事方之一。

访问期间，特别报告员在会见时提出了以下问题：

(a) 司法制度改革的进展程度以及政府与治安法官间的紧张关系；

(b) 指控知名政界人士的刑事案件，正当怀疑法律及其影响；

(c) 总理未能以证人身份出庭在两次审判中作证；

(d) 选举治安法官为议会成员并参与政治的惯例。

特别报告员的结论包括：

(a) 治安法官与政府间的紧张关系继续存在；

(b) 这种持续紧张关系的受害者是亟须进行的司法改革；

(c) 法院受理的总理及其同案人的案件在很大程度上助长了这种紧张关系；

(d) 总理及其同案人利用亟须改革的司法程序中的弱点来拖延其案件的程序；

(e) 议会程序被视为正在法院审理的案件中为人所利用而有益和有利于总理及其同案人；

(f) 虽然治安法官享有言论、信仰、结社和集会自由，但作为全职的司法官员，他们依然必须以适当的方式行使这些权利，以便维护他们职位的尊严和司法公正；

(g) 如果治安法官被视为参与政治或被视为某一政党的成员或就政治问题公开表示意见，这位治安法官就难以被视为是独立和公正的；

(h) 竞选议会议席不符合司法独立。希望参加竞选的治安法官应辞去司法职务；

(i) 治安法官为争取某种要求而罢工，这种集体行动与司法职务不符，可能有损于司法独立。

特别报告员根据其意见和结论提出了以下建议：

(a) 关于司法改革：

(一) 必须查明和处理妨碍司法改革的根本原因；应尽快了结涉及总理及其同案人的十分引人注目的案件；

(二) 必须综合进行改革工作；

(三) 必须信任司法部门所有行动者的代表，并邀请他们参加协调委员会处理改革工作，以避免不信任和猜疑；

(四) 治安法官全国协会应在改革进程中提供合作并发挥积极作用。协会应对该进程采取客观态度，并避免对政府提出的每项提案都表示不信任和猜疑；

(五) 必须避免对某些被视为有利于某些个人和(或)他们在法院的案件的某些法律或程序进行特殊或专门的改革；

(六) 如果需要为这些改革修正宪法，所有必要的修正案都必须由政府确认和汇编并提交议会；

(七) 政府、议会和司法部门必须将它们的分歧搁置一边，尊重彼此由宪法规定的作用，并最优先重视改革；

(八) 在改革中，应修订《刑事程序法》第 205 条，使之符合《公民和政治权利国际公约》第十四条第一款以及《宪法》第三条。法治要求不应将任何人视为凌驾于法律之上；

(九) 应毫不延误地处理欧洲人权法院根据 2001 年 3 月 24 日第 89 号法律发回意大利请愿人的大量请愿书，避免这些案件再转回欧洲人权法院；

(b) 关于总理及其同案人目前在法院的案件：

(一) 总理及其同案人不应利用或被视为利用制度中的程序性弱点来拖延了结这些案件；

(二) 他们不应利用或被视为利用议会程序来修订法律和程序，从而妨碍法院审理这些案件的正当进程；

(三) 总理应劝告其在议会的支持者，不要使用任何会被视为可对法院审理的他的案件有直接有利影响的立法程序；

(四) 总理应尊重法院的多数意见，并在被传呼时出庭作证。援引《刑事程序法》第 205 条不利于他的形象，并将进一步加剧治安法官与政府间的紧张关系；

(c) 关于法院的判决：

- 虽然法院的判决可受到公众严格的审视和语言温和的批评，但不应因治安法官的判决而对他们进行个人攻击，即使判决明显有误也是如此。纠正错误判决的正确场所是上诉法院；

(d) 关于治安法官参与政治问题：

(一) 应提醒治安法官注意《联合国关于司法机关独立的基本原则》原则 8，按照该原则，治安法官应始终以适当的方式行事，维护其职务的尊严和司法机关的公正和独立；

(二) 根据这项原则，治安法官全国协会应认真考虑治安法官参与政治并加入政党的做法是否符合《基本原则》原则 8；

(三) 现任法官应避免就有争议的政治问题口头或以书面形式公开表示自己的观点；

(四) 希望竞选议会议席的治安法官应辞去其司法职务。如果他们希望回到司法机关工作，就应重新通过甄选和任命程序；

(五) 促请治安法官考虑将《班加罗尔司法行为原则》载入《治安法官道德守则》；《班加罗尔原则》已作为附件载入特别报告员的主要报告(E/CN.4/2003/65)；

(e) 关于治安法官威胁举行或举行罢工问题：

- 治安法官全国协会应认真考虑治安法官采取集体行动举行罢工是否符合司法独立原则的问题。

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)

CONTENTS

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

- 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.

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

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."
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> […]
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> "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.**
