

INTERNATIONAL COMMISSION OF JURISTS

MEETING, NAIROBI KENYA DECEMBER 1985

REPORT OF JUSTICE KIRBY

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MEETING OF THE COMMISSION

1. The International Commission of Jurists (ICJ) comprises by its Statute (attachment A) not more than 40 jurists elected by the Commission from jurists "who are dedicated [to the] aims and objectives" of the Commission. They tend to be senior judges, ministers, practising lawyers, government officials or academics, chosen from the different regions of the world.
2. Also by the Statute, the Commission is to meet once every three years, or more frequently if called into session. However, the last meeting of the Commission was held four years ago. The difficulty of arranging meetings is said to be one of finance.
3. A meeting of the Commission was convened to take place in Nairobi, Kenya from 2 - 6 December, 1985. With the support of an allocation of \$3,000 by the Australian Department of Foreign Affairs, to the Australian Section of ICJ, I attended this meeting. As no quorum was present, the meeting could not make decisions binding on the Commission. However, a useful exchange of views took place, including upon the future organisation of the ICJ itself, to which I contributed.

4. The Commissioners who were present at the meeting were:

H.E. Judge T. Elias (former President, International Court of Justice)

H.E. Judge Keba Mbaye (Judge of the International Court of Justice, President, Supreme Court of Senegal)

The Hon. Sir Moti Tikaram, KBE (Fiji Ombudsman)

Professor John Humphrey (Canadian law professor - former Director UN Human Rights Division)

Mr. Fali Nariman (former Solicitor General of India)

Dr. Tai-Young Lee (South Korea)

Mr. William Butler (USA) (Chairman ICJ Executive Committee)

Hon. Gustav Petren (former Swedish Ombudsman)

Professor J. Opsahl (Norwegian law professor)

Mr. J.R. Mawalla (Tanzanian lawyer)

Mr. Amos Wako (Kenyan lawyer)

5. There were also present representatives of National Sections of the ICJ, including a large number from Justice, the United Kingdom Section, and a representative of the Andean Commission of Jurists. There was no representative of the Australian Section, which includes about 400 Australian judges and lawyers.

AFRICAN JURISTS' MEETING

6. The meeting of the ICJ Commission coincided with the bringing together of judges, law ministers, professors and others from many countries of Africa. Indeed, this was the principal purpose of holding the meeting of the ICJ in

Africa, the first time it had been held outside Europe or North America. It was hoped by the Secretary General (Mr. Niall MacDermot, QC) that, by convening the meeting of the ICJ in Nairobi, attention would be placed upon the need for improvements in human rights and the Rule of Law throughout the African continent.

7. The interconnected meetings of the African jurists and of the ICJ were opened by the President of Kenya, H.E. Daniel arap Moi. The opening session was also addressed by Judges Elias and Mbaye.
8. The focus of the meeting of African jurists was the African Charter of Human and Peoples' Rights ("the African Charter"). This instrument is designed to provide a human rights convention applicable throughout the African continent. Such continental conventions have already been achieved in Western Europe and Latin America.
9. The African Charter, although opened for signature in 1981 has not yet come into force. To do so it requires signature by half of the fifty states of the African continent. So far, of the 26 ratifications required, only 15 have been deposited. It was this subject which was the principal focus of the discussion during the week in Nairobi. The object of Judges Elias and Mbaye (each of whom had played a part in the design of the Charter) was to discover the reasons for the hesitation on the part of African countries in signing the Charter.

10. That hesitation emerged from the discussion and included:
- * reservations or misunderstandings about particular provisions.
 - * sheer administrative inefficiency.
 - * governmental indifference or concentration on other issues.
 - * concern about the notion of "peoples' rights" and the fear that this might become an excuse for minority racial or tribal rights, which are a source of deep concern in Africa.
11. With considerable intellectual honesty and vigour, Judge Mbaye endeavoured to answer the various questions raised by the African jurists, occasionally stimulated by questions from the non-African Commissioners of the ICJ.
12. I indicated that there were a number of reservations held by me about the African Charter:
- * The most important was the reference to "peoples' rights". This issue was the subject of a meeting of jurists in Paris in January, 1985 convened by the Director-General of Unesco. That meeting was chaired by Judge Mbaye and I participated in it also. At that meeting the reservations about the notion of peoples' rights were explored. Those reservations include concern about (a) the novelty of the notion; (b) the possibility that it might be misused as an instrument for avoiding individual rights; (c) the concern that it refers to non justiciable rights, unsuitable for curial

enforcement; and (d) the ambiguity and obscurity of the notion.

- * The second reservation related to the reference in the Charter to "zionism" as one of the catalogue of objectionable "isms" including colonialism, imperialism and apartheid.
- * Thirdly, reference was made to the defects in the mechanisms suggested for the investigation of allegations of human rights abuses.

13. Nonetheless, I indicated my view that the African Charter was a distinct step forward and for that reason deserved, on balance, to be supported. I also pointed out (a matter upon which Judge Mbaye strongly agreed) that the improvement in human rights and respect for the Rule of Law in Black Africa was to be seen as a contribution to the fight against apartheid in South Africa. There is no doubt that one of the concerns of the white minority in South Africa is that the advent of majority rule will lead to the destruction of respect for human rights, the independent judiciary and the Rule of Law, so far as it affects them. This point made by me was later reflected in the second resolution of the meeting.
14. In his opening speech, President Moi indicated that, subject to certain legal steps, Kenya proposed to ratify the African Charter. Other countries indicated that such ratification was on the way. The meeting agreed to set up, amongst the African jurists, committees, to be serviced by the ICJ Secretariat, to travel around Africa with a view to

stimulating ratification of the African Charter. It is contemplated that such committees may in due course form the basis of the machinery for the operation of the African Charter, once it comes into force.

ORGANISATION OF THE ICJ

15. Because I had certain reservations about the focus and organisation of the ICJ, I prepared a discussion document (attachment B). That document sets out a number of criticisms of the ICJ. The document provoked a day long discussion of the organisation amongst the Commissioners. Prompted by the discussion document, it was generally agreed amongst those present that the following reforms should be introduced:

- * the minutes of the Executive Committee should be distributed to all Commissioners.
- * the audited balance sheet should be distributed to all Commissioners.
- * Commissioners elected to the governing Executive Committee should lose their place upon absence from two meetings of the Committee. This will modify the appointment of Alternates who have effectively retained control of the Executive Committee in the administration.
- * the next meeting of the Commission is to take place in two years time in Canada and, to this end, Professor Humphrey is to endeavour to organise funding and like arrangements.
- * there is to be more consultation with Commissioners concerning the policy directions of the ICJ.

It will be obvious from annexure B that I expressed concern that the ICJ should not simply "borrow" the names of distinguished jurists in various countries and then exclude them from effective contribution to the policy making of the organisation. It was also agreed that a number of retiring Commissioners would be replaced by persons who are younger and more relevant to present concerns and that more information would be provided to Commissions concerning proposed nominations for election as ICJ Commissioners.

16. It is my belief that these reforms will increase the openness and responsiveness of the ICJ.

FUTURE ACTIVITIES & PRIORITIES

17. The Secretary General presented the meeting with a paper proposing future activities and priorities of the ICJ in 1986-88. This is annexure C. This paper was discussed by Commissioners and National Sections representatives who were present. Amongst suggestions made for variation in the program put forward by the Secretary General were the following (in summary).

ORGANISATIONAL FOCUS:

1. Greater use of National Sections in the development of policy by the ICJ.
2. Greater responsiveness of the administration and availability to representatives of the Sections.
3. Use of established Bar Associations as local Sections of the ICJ.
4. Closer liaison with Lawasia in relation to developments in the Asian and Pacific region.

5. Greater use of local Sections to lobby governments, particularly in relation to human rights issues.
6. Solicitation of materials to equip the ICJ, Geneva, to make more useful contributions to the Human Rights Committee of the United Nations.

POLICY ISSUES REQUIRING INCREASED ATTENTION:

7. Human rights and women.
8. Human rights and peace.
9. Human rights and the Eastern bloc - in order that the dialogue which has been established between the ICJ and USSR jurists does not remove critical examination of human rights by the ICJ in Socialist countries.
10. Human rights and intolerance to religious minorities.
11. Human rights and emergency laws.
12. Human rights and new technology.
13. The interaction of regional human rights instruments and the universal conventions established by the United Nations.

AREAS OF THE WORLD: NEW FOCUS FOR THE ICJ:

14. More focus on developed countries and their concerns in human rights and the Rule of Law.
15. More attention to Central America.
16. More attention to Afghanistan.
17. More attention to the developing situation in the Philippines.
18. More attention to Eastern Europe.

RESOLUTIONS OF THE MEETING

18. Because there was no quorum of the ICJ Commissioners it was not possible to adopt resolutions which were resolutions of the ICJ. Furthermore, the focus of most of the week's attention being on African concerns, it was inappropriate for the non-African ICJ Commissioners to take more than a minor part in the discussion of matters of specific African concern. Nonetheless, it was agreed that the jurists present would make two resolutions. These were made by them in their personal capacity. They are not binding on the ICJ as such and are expressed accordingly -
19. The resolutions which were passed by the meeting dealt with:
- * Declaration No. 1 on South Africa.
 - * Declaration No. 2 on the African Charter on Human and Peoples' Rights.

These declarations are annexures D and E. It will be noted that in declaration no. 2 the point is made in the fifth preamble that the entry into force of the African Charter can play a part in the "struggle for the elimination of apartheid, racism and racial discrimination".

20. Before taking part in the debate upon the resolutions which were circulated, discussed and amended, I had the assistance and advice of the Australian High Commissioner to Kenya (Mr. Geoffrey White). Amongst the points made was that, however abhorrent and unacceptable may be apartheid, it was not to be taken as a "crime against humanity" as that expression has been used in United Nations instruments. This observation was contested by the African jurists and having been made and noted, was not pressed further.

EVALUATION

21. The meeting of the ICJ was overdue. Convening it in Nairobi had certain disadvantages, including, obviously, the discouragement to many of the Commissioners, who did not attend. Nevertheless, the presence of the ICJ Commissioners ensured the success of the African meeting and the attendance of a large number of African Ministers, government officials and other lawyers. In this sense, the ICJ played a useful role as a catalyst.
22. The other use of the meeting was to stimulate attention to the African Charter and to the problem of human rights protection and respect for the Rule of Law throughout Africa. The African jurists were candid in their denunciation of human rights abuses in African countries since independence. Many denunciations of African tyrannies were expressed. There was great sensitivity to the issue of minorities and tribalism, the point being made that at least one in every four Africans was a refugee from his place of birth. It seems likely that the meeting will stimulate fresh attention to the African Charter. The establishment of regular machinery for receiving complaints about and investigating abuses of human rights in Africa will be part of the ultimate mosaic of political, economic and other moves necessary for the reconciliation of the races in the African continent.
23. The attention of the ICJ Commissioners to constructive criticism of the organisation of the ICJ itself was also a useful aspect of the Nairobi meeting and justified, in my view, my attendance at it.

24. Advantage was taken of my presence in Nairobi for the High Commissioner to organise a dinner attended by the Chief Justice of Kenya and various other judges, law officials, academics and practitioners. A number of enquiries concerning developments in Australian law are being followed up.
25. Of the \$3,000 allocated by the Department of Foreign Affairs, \$2,862 was paid to Qantas Airways for the return economy air ticket. The balance was expended in hotel charges en route in Harare, Nyeri and Paris. Whilst in Paris I took the opportunity to report on the ICJ meeting to Mr. E.G. Whitlam, a past President of the Australian Section of the ICJ. Copy of this report will be sent to the Australian Department of Foreign Affairs, the Australian Section of the ICJ, H.E. Mr. Geoffrey White and H.E. Mr. E.G. Whitlam.

M.D. KIRBY

(AUSTRALIAN MEMBER, INTERNATIONAL COMMISSION OF JURISTS)

Attachments

15 January, 1986

- A = Statute of ICJ.
B = Discussion Document - Critique of ICJ.
C = Secretary General's Report.
D = Conference Declaration 1 on South Africa.
E = Conference Declaration 2 on African Charter.