

AUSTRALIAN FOREIGN AFFAIRS RECORD



FEBRUARY-MARCH 1986

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AUSTRALIAN JUDGE PROPOSES REFORM OF INTERNATIONAL COMMISSION OF

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Between 2-6 December, 1985 nearly a hundred judges, lawyers, government officials and academics meet in the Kenyatta Conference Centre, Nairobi, Kenya. The occasion was the first meeting outside Europe and North America of the International Commission of Jurists. (ICJ). This body, established nearly forty years ago comprises, by its statute, no more than forty jurists, elected by the Commission. The Commissioners include Judges of the International Court of Justice, the Secretary-General of the Commonwealth of Nations and distinguished lawyers and judges from all corners of the world. The ICJ is based in Geneva, Switzerland. It is funded by private donation, members' subscriptions and government subventions. The Australian Government has regularly supported the ICJ with an annual grant since 1973. The Australian Section of the ICJ comprises 400 persons, mostly judges and lawyers. The focus of attention of the ICJ is divided between investigation of reported violations of human rights and the Rule of Law and contribution to the growing international jurisprudence of human rights.

In 1984, Justice Michael Kirby, then Chairman of the Australian Law Reform Commission and Judge of the Federal Court,

was elected a Commissioner of the ICJ. He was the first Australian Commissioner for some time. In December, 1985 he attended the first meeting of the ICJ held since his election. Justice Kirby is now the President of the Court of Appeal of the Supreme Court of New South Wales. His attendance at the meeting in Nairobi was partly funded by a grant by the Australian Government to the Australian Section of the ICJ.

Focus on human rights in Africa

As might be expected from the venue of the meeting, the focus of attention of much of the discussion was upon the state of the Rule of Law and human rights abuses in Africa. Two of the ICJ Commissioners attending the Nairobi conference were African judges of the International Court of Justice (H.E. Judge T.O. Elias, former President of the ICJ and H.E. Judge Keba Mbaye, also President of the Supreme Court of Senegal). They used the occasion to direct attention to the African Charter of Human and Peoples' Rights ("The African Charter"). This instrument, designed to define human rights in a way specially suitable for the African continent and to establish intergovernmental machinery for investigating complaints of human rights abuses, was opened for signature in 1981. However, of the 26 ratifications required for it to come into force, only 15 have so far been deposited. Much of the attention of the participants in the Nairobi conference was directed at examining the possible reasons for the delay in the implementation of the African Charter. The meeting was opened by the President of Kenya (H.E. Daniel arap Moi). In the course of his address, President Moi announced that, subject to certain formalities, Kenya proposed to ratify the African Charter. Other African countries made similar

announcements during the conference although not sufficient to promise early implementation of the Charter.

The meeting of the African jurists was interwoven with the meeting of the ICJ Commissioners. The latter included a number of Commissioners from the Asian and Pacific region, notably Sir Moti Tikaram (Fiji), Mr. Fali Nariman (former Solicitor-General of India) and Dr. Tai-Young Lee (South Korea). What follows is an extract from the report of Justice Kirby to the Australian Section of the ICJ and a summary of the discussion document circulated in Nairobi by Justice Kirby, setting out certain criticisms of the ICJ organisation and proposals for the reform of the ICJ.

African Charter on Human and Peoples' Rights

The African Charter reflects an endeavour of African jurists to develop a regional convention, relevant to human rights, similar to earlier regional conventions developed and brought into operation by governments in Western Europe and Latin America. Judges Elias and Mbaye had each played an important part in the original development of the African Charter. They led discussion to ascertain the reasons for the delay in ratification. It emerged that the principal reasons included misunderstanding of particular provisions, administrative inefficiency and governmental attention to other problems. However, one area of controversy related to the notion of "peoples' rights". In the course of his interventions, Justice Kirby outlined reservations about this notion, as expressed by Western jurists. These reservations include (a) objections to the novelty of the notion of "peoples' rights"; (b) the possibility that "peoples' rights" might be misused as an instrument to

justify human rights abuses; (c) the non justiciable nature of most alleged "peoples' rights"; and (d) the unacceptable ambiguity of the notion. Justice Kirby also criticised particular aspects of the African Charter, especially in so far as it included "Zionism" in the catalogue of "isms" declared to be objectionable (with "colonialism", "imperialism" and "apartheid") and the unsatisfactory features of the mechanisms proposed for the investigation and redress of alleged human rights abuses. However, like other speakers, he expressed the view that the African Charter was a step in the right direction and should also be seen as a contribution to the effective fight against apartheid in South Africa. He expressed the view that one of the concerns of the white minority in South Africa was that the advent of ~~minority~~^{majority} rule would lead to the destruction of the respect for human rights, the independence of the judiciary and observance of the Rule of Law in South Africa. The concern by African governments and jurists about the respect for these features of civilised society was to be seen as a positive step in undermining the bases of apartheid grounded in the fear of the white minority about the consequences of majority rule.

Declarations of the Conference

Although the number of Commissioners of the ICJ attending fell two short of the quorum necessary to permit resolutions of the ICJ to be past in Kenya, it was agreed by the participants, ICJ Commissioners and African jurists, that they would resolve in the terms of two declarations which were unanimously agreed to by the Conference.

The first declaration, on South Africa, expressed concern at the intensification of government repression in South

Africa during the recent past. It declared apartheid to be a threat to international peace and security and called on member states of the United Nations Organisation to intensify their efforts, by including the appeal for the unconditional release of political prisoners. It also expressed the "earnest hope" that the Security Council would impose mandatory and effective sanctions against South Africa with a view to the termination of the system of apartheid and the provision, for all people in South Africa, of democratic rights, without discrimination.

The second declaration of the Conference, recited the "role which the entry into force of the African Charter can play in the struggle for the elimination of apartheid, racism and racial discrimination". It appealed to the African states which had not ratified the African Charter to do so and it established machinery to help clarify the provisions of the Charter and to provide legal assistance to this end.

Critique of ICJ

During that part of the meeting which was confined to ICJ Commissioners and representatives of the National Sections of the ICJ, Justice Kirby produced and spoke to a discussion document, criticising various aspects of the organisation of the ICJ. Amongst the criticisms which he listed were -

- * The failure to distribute the statute and other documents of the ICJ to Commissioners.
- * The failure adequately to consult Commissioners on key policy decisions.
- * The failure to maintain the membership of the ICJ with sufficient Commissioners from all regions of the world, sufficient women and

members of sufficient relevance to contemporary human rights problems.

- * The failure to organise meetings of the Commissioners every three years, as required by the statute.
- * The failure to address sufficient attention to Rule of Law developments in the Asian and Pacific region, particularly in the Philippines, and to ensure the credibility of the ICJ by equal attention to alleged human rights abuses in Islamic countries as well as Israel and in Eastern Europe.
- * The failure to accord an adequate role to National Sections of the ICJ and
- * The failure to distribute budgetary and other financial records to ICJ Commissioners.

As a result of the criticisms and discussion of Justice Kirby's document, it was agreed that a number of reforms would be introduced, particularly in the supply of information and the distribution of documentation. Justice Kirby stressed the importance, for the credibility of the ICJ as an international organisation, that it should operate in a transparent and manifestly impartial way. However, all Commissioners joined in praise of the Secretary-General of the ICJ (Mr. Niall MacDermot, QC) for the ICJ Report on Activities 1981-85 which was tabled at the Nairobi meeting. This report details numerous initiatives taken by the ICJ, particularly in Africa and Latin America. The initiatives were described as "remarkable" and "cost effective" having regard to the very small budget and voluntary nature of

the ICJ organisation. Justice Kirby expressed confidence that reforms of the ICJ would be achieved from within and would enhance the capacity of the organisation to act as a credible non-governmental guardian of human rights and the Rule of Law and a contributor to the development of international jurisprudence in these fields.

It was agreed by the Commissioners that the retiring Vice President of the ICJ (Professor John Humphrey, QC of Canada) should investigate the possibility of holding the next meeting of ICJ Commissioners in Canada in 1988.

On the initiative of the Australian High Commissioner (Mr. Geoffrey White), whilst in Kenya, Justice Kirby met numerous Judges, law officials and academics, including the new Chief Justice of Kenya (Chief Justice C.B. Madan) and the senior Judge of Appeal (Justice T. Miller) who is also the Chairman of the Kenyan Law Reform Commission.

On his return journey from Nairobi, Justice Kirby reported the meeting in Kenya to H.E. Mr. E.G. Whitlam, Australia's Permanent Representative at Unesco, a past President of the Australian Section of the ICJ. In Sydney, he reported to Mr. John Dowd, MP, current President of the Australian Section of the ICJ at a meeting of the Australian Section held in Sydney in January, 1986.

Attached photographs

1. Justice Kirby (centre) shown with Judge Keba Mbaye, Judge of the International Court of Justice and President of the Cour de Cassation, Senegal (President, ICJ) and H.E. Judge T. Elias, Judge of the International Court of Justice and former Chief Justice of Nigeria.
2. Justice Kirby (centre) shown with Chief Justice Madan on Justice Kirby's left and Justice Miller on his right.