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DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

FOREIGN AFFAIRS RECORD

International Commission of Jurists meets in Caracas, Venezuela
January 1989 - Discussion of the Independence of the Judiciary

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The International Commission of Jurists is one of the more successful NGOs accredited to the United Nations. Established more than 30 years ago, it has its central office in Geneva, Switzerland. The ICJ is supported by subventions from the Australian and other Governments. It has national sections in many countries including Australia. These generally comprise leading judges and lawyers. The activities of the ICJ and its national sections concentrate on safeguarding respect for the rule of law, the independence of the judiciary and of lawyers and the protection of human rights throughout the world. Under its statute, the Commission of the ICJ meets every three years. Between Commission meetings, the business of the ICJ is conducted by an Executive Committee. The latest meeting of the Commission took place in Caracas, Venezuela, between 16 and 20 January 1989. The last meeting of the Commission took place in Nairobi, Kenya in 1985.

Among the twenty Commissioners attending the Caracas meeting was Justice Michael Kirby (President of the NSW Court of Appeal). In the course of the meeting, Justice Kirby was elected to the Executive Committee of the ICJ. He is the

first Australian to hold office on the Executive. Also present in Caracas was Mr John Dowd MP (Attorney General of New South Wales). Mr Dowd is the long-time President of the Australian Section of the ICJ, in which office he succeeded Justice D L Mahoney and Mr E G Whitlam QC, the former Prime Minister.

The Caracas meeting of the ICJ Commissioners coincided with a conference in Caracas on the independence of judges and lawyers which was held under the auspices of the United Nations. The conference was opened on 16 January 1989 by the Venezuelan Minister for External Relations, Mr G N Carrillo. It was addressed by the President of the ICJ, Mr Andrés Aguilar, the Permanent Representative of Venezuela at the United Nations. During their visit to Caracas, Justice Kirby and Mr Dowd were entertained by the Australian Ambassador to Venezuela, Mr Anthony Dingle and Mrs Dingle.

The opening session of the Caracas conference included an address by Justice P N Bhagwati, former Chief Justice of India. Justice Bhagwati examined the pressures on, and obstacles to, the independence of the judiciary. He quoted Hindu scriptures to the effect that a judge "should be a guardian to the weak; a terror to the wicked; his heart should covet nothing; his mind should be intent on nothing but equity and truth". He analysed the provisions in the Indian Constitution concerning the appointment of Judges, together with the conventions which are followed in relation to their appointment. He urged that the power of appointment

should be vested in a Judicial Service Commission composed of judges, lawyers and law academics. Especially in developing countries, it was important to provide institutional protections against appointments based on political considerations alone.

Justice Bhagwati referred to recent cases where judges had been dismissed as "victims of executive wrath". He mentioned particularly Justice Mahomed Hussein of the Supreme Court of Bangladesh and Tun Salleh Abas, the former Lord President of Malaysia.

The conference was later addressed on the position of the Malaysian judiciary by Tun Salleh and also by Mr Param Kumaraswamy, past-president of the Bar Association of Malaysia. Tun Salleh outlined the importance of ensuring the integrity of any tribunal which is established to consider the removal from office of a judge. Mr Kumaraswamy explained the initiatives which had been taken by practising members of the legal profession both in Singapore and Malaysia to confront attacks on the independence of the judiciary and the legal profession coming principally from the Executive Government. He mentioned, in particular, the great sensitivity of governments to judicial vigilance in cases of alleged abuses of internal security laws. Mr Kumaraswamy described several cases in Singapore and Malaysia. He referred to the strong support which the independent Bar of Malaysia had given to the deposed Lord President and other Judges. He said that the Bar Council of Malaysia ends all

correspondence with the words "Return the Independence of our Judiciary". It had urged lawyers to do likewise in support of the removed judges and in opposition to the way in which they were removed from office. The Caracas conference later adopted unanimously a resolution proposed by Justice Kirby (see below) condemning the circumstances leading to the removal from office of the Lord President and other Judges of the Supreme Court of Malaysia.

The focus of attention in the first two days of the Caracas meeting was upon measures which had been adopted in a number of jurisdictions to secure compliance with the Basic Principles on the Independence of the Judiciary. These principles were adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, Italy in 1985. In December 1985, the General Assembly of the United Nations in resolution 40/146, welcomed the Basic Principles and invited Governments to respect them and to take them into account, within the framework of national legislation and practice. On the recommendation of the Committee on Crime Prevention and Control, the Economic and Social Council of the United Nations has invited member States to inform the Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of the Basic Principles. (Resolution 1986/10 of 21 May 1986). The Basic Principles, in turn, arise out of drafts earlier prepared under the auspices of the International Commission of Jurists. They were formulated at

meetings held in Sicily in 1982 and Montréal in 1983. One of the leading actors in the Montréal Conference was Justice Jules Deschênes, former Chief Justice of Quebec. Justice Deschênes addressed the Caracas meeting on the need for refinement and improvement in the Basic Principles. He urged greater elaboration of the twenty Principles in order to cover a greater range of topics considered important for safeguarding the independence of judges throughout the world.

Mr Kurt Neudek, the representative of the Secretary-General of the United Nations paid tribute to the contribution of the ICJ to the development of the UN Principles. He also acknowledged the work of the Centre for the Independence of Judges and Lawyers (CIJL) established in Geneva by the ICJ. The Director of the Centre, Mr Reed Brodie, outlined its work in providing an international focus to promote the idea of the independence of judges and lawyers throughout the world. He outlined the investigations conducted by CIJL during 1987-8, and its interventions in a number of cases, including the removal of judges in Malaysia; the assassination and intimidation of human rights lawyers in the Philippines; the gaoling of defence lawyers in Singapore; threats against a judge in Chile as a result of his investigations into allegations of torture; the arrest of defence lawyers in Fiji and the prosecution of a judge in Peru for granting a habeas corpus petition during a state of emergency. In matters of this kind, the CIJL calls abuses to world notice, mobilises local support for judicial

independence and provides intellectual and tangible support for the important idea of judicial independence.

During succeeding days, the Caracas conference turned to the consideration of the position of judges during states of emergency and violent changes of government. In a thoughtful paper, the Chief Justice of Zimbabwe (Justice E Dumbutshena) reflected on how judges should react to such changes. He referred to the changes which had occurred in Rhodesia following the Unilateral Declaration of Independence. Tangible proof of the quandary which faces judges in such circumstances was given by the presence at the Caracas meeting of Justice Sir Moti Tikaram of Fiji. Justice Dumbutshena's conclusion was that the overriding consideration for the judge, faced with such a change of régime, was whether he or she could do justice to all manner of people without fear or favour. "If one cannot", he concluded, "then the best thing to do is to resign or to retire conveniently". He acknowledged the difficulty of laying down general rules, given the possibility that some justice, even in a revolutionary situation, may be better than none.

The importance of an independent and responsible legal profession as a prerequisite to an independent judiciary was also stressed by numerous papers read to the conference. This discussion was led by another ICJ Commissioner, Mr Fali Nariman, former Solicitor-General of India. After a number

of papers on the position of judicial independence in Africa and the Caribbean, the meeting turned to and adopted the "Caracas Plan of Action". This urged governments to take all efforts to ensure the adoption of Basic Principles on the role of lawyers and to comply with the Basic Principles on the Independence of the Judiciary. Attention was also drawn to the draft Universal Declaration on the Independence of Justice which is to be considered by the United Nations Commission on Human Rights at its 45th Session in 1989. The ICJ was invited to conduct national studies on the extent of compliance with and departures from the Basic Principles. Various practical means by which the ICJ could assist, by educational and advisory services, in promoting the independence of the judiciary and of the legal profession were proposed.

The conference then turned to a discussion of the role of National Sections of the ICJ. The Australian Section was represented at this session by Mr John Dowd. Views were expressed concerning the desirability of improved contact between the national sections. The Secretary-General of the ICJ (Mr Niall MacDermot QC) reported on the thirty-two national sections of the ICJ and the thirty-two affiliated organisations. He mentioned the death of two leading figures in the ICJ during 1988, namely, Mr Sean MacBride, a former Secretary-General and founder of Amnesty International (Ireland) and Mr Paul Sieghart (of the British Section, Justice). Mr MacDermot recorded the leading part played by

the ICJ in the coming into force of the African Charter of Human and Peoples' Rights, the European Convention on Torture, the reform of Japanese mental health law (following a report on that topic) and the adoption of the Basic Principles on the Independence of the Judiciary. These were listed as the principal achievements of the ICJ since its last meeting.

Mention was made by Mr MacDermot of a number of international missions conducted by the ICJ to investigate derogations from the rule of law. These included the mission to Palau in Micronesia in which Mr William Butler, the Chairman of the Executive Committee (USA) and Justice Kirby (Australia) had taken part. As a result of this mission, an attempt to intimidate litigants from testing the constitutionality of legal changes in Palau was defeated and the constitutional processes of Palau were reinforced.

During one of his interventions in the opening session of the Caracas meeting, Justice Kirby outlined what he thought would be among the principal issues to be considered by the ICJ, and lawyers generally, during the next three years. They were:

- (1) The moves towards greater respect for the rule of law and human rights in the Soviet Union and the "Second World";
- (2) The domestic application of international human rights norms by judges and lawyers interpreting local statutes and developing domestic common law (see (1988) 62 ALJ

514); and

- (3) Attention to the human rights issues raised by the global AIDS epidemic.

The resolution on the Malaysian judiciary expressed "grave concern" on the part of the ICJ about the removal from office of the former Lord President (Tun Salleh Abas) and two other judges of the Supreme Court of Malaysia (Tan Sri Wan Suleiman and Datuk George Siah) as well as the suspension from office of those and other judges of that Court. The resolution singled out for particular mention the concern of the ICJ about the campaign of attacks on the judiciary by the Prime Minister of Malaysia; the inducement made to the Lord President to resign; the apparently biased constitution of the tribunal set up to enquire into the Lord President's removal; the inclusion in the tribunal, as its chairman, of the Judge who succeeded to the Lord President's office; the unprecedented action of that Judge in securing the removal and suspension of Supreme Court judges who had provided a stay to allow the constitutionality of the tribunal to be tested in the Malaysian Supreme Court; and the "unpersuasive" report of the tribunal following which the Lord President was removed. The Secretary-General of the ICJ was instructed to bring the concerns of the ICJ to the attention of authorities in Malaysia including the judiciary, the former judges, the Bar Association of Malaysia and beyond.

Mr MacDermot announced to the meeting that after

eighteen years as Secretary-General of the ICJ he intended to resign in 1989. His work as Secretary-General was applauded by the participants. General satisfaction was expressed concerning the range and value of the ICJ's work, despite its small budget. Speeches pointed out that Mr MacDermot, a former Minister in the United Kingdom government, had set a high standard of professionalism and expertise. This has gained for the ICJ an enviable reputation amongst United Nations non-governmental agencies; several prestigious international prizes and a network of national sections, of which the Australian section is one of the most active.