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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Working paper prepared by Mr. Guissé and Mr. Joinet

I. THE PROMOTION AND PROTECTION OF HUMAN RIGHTS THROUGH ANTI-IMPUNITY MEASURES

A. Introduction

1. By its decision 1991/110 of 29 August 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, after noting document E/CN.4/Sub.2/1992/WP.5 (distributed at its forty-third session) concerning the importance of measures to combat the increasingly widespread practice of impunity for perpetrators of serious violations of human rights, requested Mr. L. Hadji Guissé and Mr. Louis Joinet to draft a working paper expanding upon this question and to submit it for its consideration at its forty-fourth session. Such is the purpose of this document.

B. Sources

2. In addition to the many writings of jurists and important contributions by non-governmental organizations, 1/ reference should be made to the following documents and studies of the United Nations:

(a) Sub-Commission on Prevention of Discrimination and Protection of Minorities:

(i) Resolutions requesting that the massive and systematic practice of torture and enforced disappearances be recognized as a crime against humanity;

(ii) Report by Mr. Joinet on the role of amnesty laws in the safeguard and promotion of human rights (E/CN.4/Sub.2/1985/16);

(iii) Reports by Mr. S. Chernichenko and Mr. W. Treat on habeas corpus and the right to a fair trial (E/CN.4/Sub.2/1992/24 and Add. 1-3);

(b) Commission on Human Rights:

(i) Reports by Special Rapporteurs by country or by theme (torture and summary executions) and the reports by the Working Group on Enforced or Involuntary Disappearances; 2/

(ii) The draft declaration on the protection of all persons from enforced or involuntary disappearances, which provides for machinery to reduce the harmful effects of impunity;

(c) International Law Commission:

(i) Report on the Draft Code of Crimes Against the Peace and Security of Mankind;

(ii) Work concerning the establishment of an international criminal court;

(d) World Conference on Human Rights (1993), on the assumption that it might take initiatives relating to action to combat impunity.

C. Method of Work

3. In order to gain a year, this working paper might be considered in plenary at the present session so that a Rapporteur can be appointed this year to submit a preliminary report on the basis of which the Sub-Commission could, at its forty-fifth session, decide finally on guidelines for the study.

4. If that were not the case, discussion of the present document should be placed on the agenda of the next meeting (1993) of the Sessional Working Group on Detention for consideration in plenary by the Sub-Commission, also at its forty-fifth session.

D. Purpose of the study

5. The question of impunity has become a subject of major concern to policy-makers (armed conflicts, particularly of a non-international nature, negotiation of peace agreements, the process of democratization, organized international crime ...) and no longer to non-governmental organizations alone. The study might usefully be designed as a source of expert opinion and technical assistance, taking into consideration the legal aspects of the

question and, if need be, some of its political aspects. It would be intended for those who, in the exercise of their duties or in their capacity as activists, assume responsibilities in respect of anti-impunity measures.

6. It should further be decided whether the study should also propose:

(a) Normative measures (e.g. convention, protocol, principles on the lines of the Nürnberg Principles, etc.);

(b) Purely declaratory measures (e.g. resolution, declaration, guiding principles, etc.);

(c) The implementation of a special procedure (working group or Special Rapporteur).

7. In the normative sphere, the question of whether or not the new standards should be retroactive should be considered with care, especially when the principle of the non-retroactivity of criminal laws is in contradiction with that of imprescriptibility.

8. One of the objectives of the report might be to encourage States to adopt domestic legislation against impunity, without setting aside the question whether or not an international criminal court should be set up. However, considering how difficult it would be to give effect to such a proposal, it might be decided to submit this question to further study; but is it not already on the agenda of the International Law Commission?

E. The content of the report

9. The report could be centred around the following two ideas: analysis of the legal mechanisms and the practices that facilitate impunity; and organization of anti-impunity measures.

II. ANALYSIS OF THE LEGAL MECHANISMS AND THE PRACTICES THAT FACILITATE IMPUNITY

10. All legal systems contain laws which, under certain circumstances, provide for the possibility of having recourse to mechanisms that help to ensure impunity. The question consists in being able to assess, in each separate case, whether they are justified (pardon? oversight? ...) or whether they have been misused (self-pardon). The effect of the methods most frequently encountered are that the perpetrators of violations are not prosecuted, that their behaviour is insufficiently penalized or, lastly, that the sentences pronounced are not executed. We shall be examining in this connection:

(a) The role of amnesty;

(b) The role of measures of pardon (or "indulto");

(c) The role of prescription; 3/

(d) The role of the principle of the desirability of proceedings, with special reference to the practice of closing a file at the end of a preliminary police enquiry;

(e) The role of emergency courts which all too often help to ensure impunity: 4/

(i) By applying an unfairly protective entitlement (privileges, immunities, due obedience ...) in respect of certain categories of persons brought to them for trial (members of the police or armed forces, senior officials ...);

(ii) de facto under the influence of the "esprit de corps" which nearly always characterizes military courts when they are required to judge their peers;

(iii) By not complying with the requirements of the principle of the independence of the judiciary, the right to a fair trial and to effective remedy;

(f) The lack of an effective investigation, for want of resources or training but also as a matter of deliberate will;

(g) Neutralization of habeas corpus by submitting it to complex rules of procedure;

(h) The redefinition of facts, either in less severe terms in order to minimize the importance of certain behaviour, or in such a way that they do not come under criminal law;

(i) The role of non-execution of punishments.

11. Although correctly conducted and followed by a fair trial, the investigation may nevertheless result in impunity when the punishment is not enforced, wholly or in part, either through a purely arbitrary decision by the executive, or through the misapplication of measures designed to promote social reintegration (e.g., release on parole or suspended sentence with probation) or even through complicity with offenders who escape from custody.

III. THE ORGANIZATION OF ANTI-IMPUNITY MEASURES

12. It is proposed that such measures be organized in the following four ways:

(a) Establishment of specific standards. Should these be limited:

(i) Only to crimes against humanity (subject to their having normative force) or also to serious crimes (concept of serious and systematic infringements of human dignity), whether or not they are of a political nature; or

(ii) To certain particularly odious crimes (rape, crimes against vulnerable persons such as children, elderly persons, disabled persons, etc.), or even to serious crimes of an economic nature (appropriation of national wealth by leaders, drug trafficking, environmental damage)?

(b) The carrying out of effective investigations. The duty of States to carry out effective investigations into human rights violations is recalled in several international instruments (cf. in particular: Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions, adopted by the Economic and Social Council in its resolution 1989/65 of 14 May 1989, and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). The investigation may be conducted by permanent bodies (police investigation) or by temporary bodies (e.g., parliamentary or non-parliamentary ad hoc commission).

(i) The police investigation. It is a prerequisite for the effectiveness of investigations that justice be properly administered. This entails, in addition to sufficient and suitable resources:

a. That the independence of the judiciary should be ensured; 5/

b. That the police services should be competent (importance of training programmes), that they should work under the supervision of magistrates and that they should be safe from the temptations of corruption;

c. That there should be cooperation among all the public services concerned by the investigation;

d. That the safety of plaintiffs, witnesses, lawyers and indeed magistrates and investigators should be ensured against threats, pressure and other forms of blackmail.

(ii) Ad hoc commissions of inquiry. Such commissions (set up, for instance, in Argentina and Chile) do not necessarily take the form of parliamentary commissions. Unlike police investigations, which are concerned only with individual cases, their purpose is not so much to secure convictions (the conditions for exercise of the right to a fair trial not being fulfilled) as to reveal the mechanisms of a system that violates human rights, to identify the entities and governmental departments involved and, first and foremost, to ensure that evidence does not disappear. Only at a later stage does it fall to the courts to determine individual and official responsibilities. There is a need for vigilance, however, as such commissions may sometimes help to ensure some form of impunity (relative, it is true, but nevertheless real) if their work has the effect of taking the case out of the courts. It is therefore important for their work to be published, and indeed this should be the rule;

(c) Bringing the perpetrators to court. In this connection, the study should expand upon the following aspects:

(i) The difficulties encountered in bringing those responsible to trial:

a. What is to be done when judges, especially when they have cooperated with the former regime, are reluctant or show a lenience that makes them all but accessories to impunity? Should they be removed from office? In such cases, how can such a measure be made compatible with the principle of irremovability, which guarantees the independence of judges?

b. In order to get round this difficulty, should one opt for the establishment of a court which would have sole competence (national competence for attribution)? In such a case, how is one to avoid conferring on it the character of an emergency court? For example, by requiring that its operation should be fully governed by the rules of ordinary law?

(ii) Impunity, prescription and amnesty:

a. Should one go so far as to promote the imprescriptibility attached to crimes against humanity? Failing that, can a mechanism be devised which will significantly delay the starting-point for prescription (e.g. the draft declaration on the protection of all persons from enforced disappearances places such disappearances in the category of continuing offences, with prescription then beginning only from the time when, for instance, the disappeared person is found again or the presumed perpetrator is arrested)? This measure is de facto closely akin to imprescriptibility.

b. Should all amnesty measures be excluded or, on the basis of reconciliation (or simply of "conciliation"), could amnesty be accepted and, if so, at what time? When the perpetrator of the violations has been arrested? Tried? Convicted? When he is beginning to serve or is in the process of serving his sentence? When he has completed his sentence?

c. When amnesty has been approved by referendum (provided that the fairness of the vote is not challenged) or has been worked out during peace negotiations between the parties to a conflict, would any international anti-impunity provisions remain enforceable?

(iii) Should legislation be promoted on the lines of "repentance acts"? These exonerate from penalties or enable attenuating circumstances to be allowed in the case of perpetrators of serious violations who cooperate in anti-impunity measures (or who have facilitated such measures under the previous regime), in particular by contributing to the taking of evidence (cemeteries, secret places of detention, etc.) or the arrest of the persons responsible?

(iv) The effects of due obedience. Should this be taken into consideration? In certain duly specified circumstances, can it be an exonerating factor or simply enable extenuating circumstances to be allowed?

(v) The preservation of evidence. Special attention should be paid here to probing more deeply the question of the security services' files and records: since they are illegal, should they be destroyed? If not, should they be opened to the public? Should guarantees be provided for those who might be seen to be in collusion with the previous regime?

(d) Measures other than jurisdictional acts (purge, exile, political asylum, extradition ...):

(i) Purges. This difficult question should be tackled with due regard to the following suggestions:

a. How can purges be compatible with the rule of law? Under what guarantees can they be implemented democratically?

b. Should distinctions be drawn according to whether or not persons have acted as direct participants in the process of human rights violation, that is to say:

i. As political decision-makers, civilian or military?

ii. merely as being responsible for passing on instructions and seeing to it that they are carried out?

iii. simply as subordinates carrying out orders?

c. If they have cooperated actively with the former regime, without however participating directly in the process of human rights violation, should the situation be regarded differently according to whether they have acted:

i. as public employees (which raises the question of whether or not they should remain in public service)?

ii. as civilians (informers, police spies ...)?

(ii) Exile, political asylum and extradition. What can be done to ensure that voluntary or enforced exile (often negotiated in the case of deposed heads of States in order to prevent justice from being made into a mockery, because of an intense desire to avenge the massacres committed) does not become a source of impunity? In this connection, the study should make proposals for the development of the principle of universal jurisdiction (obligation either to extradite or to bring to trial) already enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in the Convention against the use of mercenaries, and

adopted in the draft declaration on the protection of all persons from enforced or involuntary disappearances. It is to be noted that under article 1F of the Convention relating to the Status of Refugees, the status of political refugee may not apply to a person who has committed a crime against humanity.

(e) Reparation of the prejudice caused to victims 6/

(i) A first category concerns former opponents or dissidents against whom proceedings are still under way or who are serving a prison term, decided upon under the authority of the oppressive regime and according to its own laws. The study should analyse the advantages and disadvantages of the various solutions put forward:

a. immediate release of prisoners of conscience;

b. discontinuance of proceedings pending with regard to persons not imprisoned;

c. retrial (whether or not preceded, in some countries, with release on bail) with due regard to the rules of the right to a fair trial. In view of the very harsh and even inhuman conditions to which detainees are often exposed, the new legislation may sometimes provide, for instance, that one year of imprisonment will, as a compensatory measure, be equivalent to two or three years of imprisonment under the former regime; this is in the interests of fairness and to enable detainees to be released more speedily.

(ii) A second category concerns individual measures of reparation on behalf of victims and their families (compensation for material, corporal and even moral prejudice, free medical care, pensions, reinstatement in employment ...) or collective measures (public ceremonies for the purposes of rehabilitation, symbolic legislation, national days, memorials ...).

(iii) Another form of reparation may result from attempts to establish the liability of the State before the civil or administrative courts, according to the legal system.

* * *

14. In conclusion, the study could explore in greater depth, including at the philosophical and political levels, the question of impunity as a violation of the right to justice recognized by the Universal Declaration of Human Rights (arts. 7 and 8) and the International Covenant on Civil and Political Rights (arts. 2 and 14).

Notes

1/ See in particular document E/CN.4/Sub.2/1992/NGO/20 submitted jointly by 28 NGOs.

2/ Cf. In particular the letter of 30 June 1992 from its Chairman requesting Governments to forward to him any comments or observations they might wish to make on the question of impunity.

3/ These three points have already been studied thoroughly in the aforementioned report by Mr. L. Joinet entitled "Study on amnesty laws and their role in the safeguard and promotion of human rights" (E/CN.4/Sub.2/1985/16).

4/ Cf. Reports by Mr. L. Despouy, Special Rapporteur, entitled "Annual reports and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency" (E/CN.4/Sub.2/1987/19/Rev.1 and Add.1 and 2) - (E/CN.4/Sub.2/1988/18/Rev.1) - (E/CN.4/Sub.2/1989/30/Rev.2) - (E/CN.4/Sub.2/1991/28/Rev.1) - (E/CN.4/Sub.2/1992/23).

5/ Cf. The reports by Mr. L. Joinet on the independence of the judiciary and the protection of practising lawyers (E/CN.4/Sub.2/1991/30 and E/CN.4/Sub.2/1992/25).

6/ Cf. The reports by Mr. van Boven on this question (E/CN.4/Sub.2/1992/8 and E/CN.4/Sub.2/1991/7).
