

# THE NEED FOR A NEW INTERNATIONAL - NATIONAL CRIMINAL JUSTICE ORDER

## LA NECESIDAD DE UN NUEVO ORDEN INTERNACIONAL-NACIONAL DE JUSTICIA PENAL

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### ABSTRACT

*For years the United Nations has stressed the need for a New International-National Criminal Justice Order closely linked to International-National Development so as to cope more effectively and humanely with the sociopolitical phenomenon of crime which affects more seriously the developing than the developed countries. The phenomenon can no longer be confined to some modalities of common crime since non-conventional crime is far more serious and produces more victims; even though it is seldom registered and sanctioned by the penal system. Besides, the major shortcomings affecting the functioning of the penal systems in the vast majority of countries are pointed out. It is also shown that, whatever their differences, both penal systems in capitalist and socialist countries have their roots in the XIXth Century and that in each of them power -economic in the former and political in the latter- plays a primary role.*

### RESUMEN

*Durante años Naciones Unidas ha subrayado la necesidad de un Nuevo Orden Internacional-Nacional de Justicia Penal estrechamente vinculado al Desarrollo Internacional-Nacional, como medio para enfrentar más eficaz y humanamente el fenómeno sociopolítico de la criminalidad, la cual afecta más gravemente a los países en desarrollo que a los desarrollados. El fenómeno no debe restringirse a ciertas modalidades del delito común, ya que las formas no-conventionales de delito son más serias y producen más víctimas, aunque son raramente registradas y sancionadas por el sistema penal. Se puntualizan las principales deficiencias que obstaculizan el funcionamiento de los sistemas de justicia penal en la mayoría de los países. Se señala que, cualesquiera sean sus diferencias, los sistemas penales de los países capitalistas y socialistas tienen ambos sus raíces en el siglo XIX y en cada uno de ellos el poder -económico en los primeros y político en los segundos- juega un rol primordial.*

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opment so as to cope more effectively and humanely with the sociopolitical phenomenon of crime which can no longer be confined to some modali-

ties of common crime. Contrary to what is sometimes said at the United Nations, crime affects more seriously the developing than the developed countries. Certainly the latter offer statistical data showing, in many cases, a constant growth of the most violent forms of crime, but in the developing countries, which rarely offer reliable statistics, crime resulting from the criminal abuse of political power is far more serious and produces more victims. The recent United Nations report **Summary and Arbitrary Executions** (doc.E/CN.4/1983) issued by the Commission on Human Rights, demonstrates that according to well verified data, conservatively estimated, the number of "missing persons" in the last fifteen years in developing countries is no less than two million. In quite a number of cases in the last five or six years the number far exceeds that of reported criminal homicide in the same country in the last thirty years. The analysis of other related documents shows that no less than sixty countries are involved in "missing persons" criminality. In some, persons summarily executed without due legal guarantees amount to several hundred per year. Quite often disappearances and executions are preceded by torture and cruel, inhuman or degrading treatment or punishment and other offences which, even if known, are seldom reported to the penal system, which is often an instrument of the existing dictatorial regime. By its resolutions 1983/24 the Economic and Social Council requested the Secretary-General to obtain information from Member States and other available sources on the actual practice of summary executions.

At present economic crime in which politicians, high officials and multinationals are frequently involved, particularly but not only in the approval and implementation of development plans, also leads to the perpetration of other crimes among them the persecution and dispossession of national minorities by military, paramilitary and even private armed forces. In this respect, the study of the documents on transnational corporations shows that the approach to the problems involved in their activities is too narrow. Particular mention should be made of **Transnational Corporations: Material for the formulation of a Code of Conduct** (E/C.10/18,1977) and **Studies on the effects of the operations and practices of transnational Corporations** (E/C.10/1983/13).

International terrorism in which government and organizations of many sorts are involved is spreading, partly due to the lack of international cooperation and partly to the inability of the penal systems to cope with the situation. Numerous reports have been produced, some of them far more interesting and valuable than most criminological literature.

The reports of the Ad Hoc Committee on the matter (A/34/37/1979) and more recently of the Secretary-General (A/36/425/1981) show that **terrorism is simply a modality of common crime**, that often national terrorism is supported internationally even by some governments and that **governmental terrorism, of which "missing persons" and summary executions are expressions**, often remains immune in spite of the efforts of the penal systems involved. In sum, **there is at present a terrorism from above and another from below and the main conclusion is that in either case the privileges of being a political offender are unjustified.**

The analysis of the **Draft Code of Offences against the Peace and Security of Mankind** (A/36/535, 1981) and of the First report on the Draft (A/CN.4/364,1983) proves that whatever the intricacies of international penal terminology created in the XIXth century, **the numerous crimes perpetrated are committed by individuals and not by the State**, the frequent reference to which is little more than a legal gambit to maintain the impunity of many serious offences among which aggression and new modalities of colonialism are evident.

The study of the discussions on the Draft of an International Agreement on Illicit Payments, at present common in high level transactions in developed and developing countries, as well as that of the reports of the Commission on Transnational Corporations, show the subtlety involved in those transactions in which corruption, prevarication, violation of human rights and other criminal offences are **obvious but impune**. The illicit production and traffic in drugs, as a rule well organized, is not decreasing partly due to the complicity of high civil and military officials who do not take into consideration that their country is party to the International Conventions on Narcotic Drugs. The reading of Drug abuse and measures to reduce illicit demand (E/CN.7/640, 1979) and the reports of the Division on Narcotic Drugs, the last concerning its 1982 session, shows that the answers provided by some governments contradict the facts reported against them and their accomplices and that **very little progress will be made in the abuse of drugs as long as the traffickers enjoy the protection of high and minor officials in a number of illegally producing countries.**

With respect to torture and other cruel, inhuman or degrading treatment or punishment, the Declaration against them adopted by the General Assembly in 1975 and the Code of Conduct of Law Enforcement Officers, 1979, have not prevented their use in many countries which, in the vast majority of cases, are parties to the 1966 Conventions on economic, social, cultural, civil and political rights. As for the

**Principles of Medical Ethics, its adoption in 1982** confirms that the Principles, which already existed as part of national provisions governing the medical profession, have been utterly ignored in some countries in the perpetration of torture and treatment and punishment of which the so-called "psychiatric treatment" is part. In fact, the analysis of the Report of the Working Group on a Draft Convention against torture and related Treatment (E/CN.4/63,1983) shows the magnitude of the questions involved, **one of them the urgent need for an international jurisdiction, not to be identified with the setting up of an international criminal justice court still advocated by the supporter of an obsolete international penal law.** In fact the suggestion was already made at the 1974 meeting of the Committee on Crime Prevention and Criminal Justice but it was opposed by delegations of developed and developing countries **on the grounds** that it affected State sovereignty.

Since 1950 the Division of Human Rights, following decisions of the corresponding Commission, has stressed the often criminal violation of human rights. **The last document** on the subject which also deals with the **independence and impartiality of the judiciary, jurors, assessors and lawyers** (E/CN.41. Sub.2/1983,11 and Add.1 and 16) **states that the protection as well as the necessary independence and impartiality are lacking in the majority of countries.** One of the reasons, not mentioned in the reports, is that out of 160 independent States **barely 20% are governed by really democratic regimes.**

Other questions such as that of refugees, at present increasing in many regions, scientific and technological development, industrial contamination, racism and **apartheid**, deprivation of the rights of people to self-determination, aggression often hidden under the pretext of assistance, the growth of negligent crime in many fields including traffic offences, espionage, the abuse of diplomatic status to commit a variety of offences and forced labour, contribute to the growing extent of crime in many countries which is seldom dealt with by the corresponding national penal system.

With respect to **conventional crime** the United Nations has tried with very limited success to determine its extent and trends all over the world. The obstacles are many but the most significant are **the lack of criminal statistics** in a good number of countries, that in some criminal statistics exist but for political reasons the governments, while claiming on every possible occasion a constant decrease of crime, refuse to produce them, and that in other cases the data provided are unreliable or incomplete. The request made in 1975 was complied with by only 40 per-cent of United Nations Members and referred

only to a few common criminal offences. This means that the world crime rates presented were more a technical exercise than an expression of the extent of common crime and still less of crime in the global sense of the term.

The functioning of the penal systems in the vast majority of countries is affected in different degrees by the following shortcomings: (a) the overall clear-up rate by the police is declining. In the 80s in some developed countries it did not go beyond 35 per-cent; (b) dragging criminal justice in most countries. In the developing countries between 40 and 80 per-cent of the prison population is awaiting trial for long periods; in the developed countries the percentage is between 20 and 50. Here and there the number of those awaiting is reduced more or less periodically by amnesty or releasing indicted persons after a certain period of time; (c) prison labour is seldom available to the majority of convicted prisoners and in most cases the remuneration is minimal; (d) penal institutions are generally overcrowded and the new ones are often built for a capacity of more than 500 prisoners; (e) in most countries the compensation of victims of crime still depends on the financial means of the offenders who generally have very little as the greater portion of them come from the lowest economic strata; and (f) even in developed countries the budgetary sum assigned to criminal justice is minimal when compared with the extent of crime, its cost and the increasing lack of security and protection it constitutes. One of the highest is the French, which in 1979 amounted to 3.33 percent of the national budget.

Undoubtedly in many countries reforms have been introduced to improve the situation although seldom after a careful evaluation of the whole structure of the penal system and its possibilities. In Europe the case of Spain after forty years of Francoism is an example. The use of non-custodial measures and the cooperation of the community have been increased and encouraged. In many cases the personnel deserve praise for their efforts to keep penal systems going as well as possible; but the general tendency to reduce expenses, accelerated by the present economic crisis, makes it more difficult. In any case in view of the growing crime victimization the rising cost of criminal justice is fully justified when compared to that assigned to defence.

One of the most significant features of our time is the progressive politization of the common offender, ever more aware of the existence of human rights and of the inequality of the penal systems far more able to deal with him than with non-common offenders in the vast majority of countries and still pretending that he should be rehabilitated or

reeducated.

The exposé made shows that in spite of some well oriented reforms and the greater use in many countries of non-institutional measures, the penal systems of our time belong structurally and functionally to an industrial society which has been replaced by the postindustrial one even in the developing countries. Certainly, they have some fundamental tenets in common but each has undergone great changes. Such is the case, among others, with the family. The pretence that in some developing countries tribal values and customs may be used in criminal justice matters is little more than a socio-political delusion. It may be argued that penal systems of the capitalist and so-called socialist countries differ and that one is better than the other. A close study shows that whatever their differences, both are structurally rooted in the XIXth Century and that in each of them different kinds of power, economic in the first and political in the second, play a primary role.

Since 1960 at the Second Congress of the Prevention of Crime and the Treatment of Offenders, the United Nations has been trying to impress on governments the necessity of carefully planning the penal systems in close connection with national development. The results have been modest mostly due to the interplay in the majority of countries of the different forms of abuse of power. The more tangible result is that criminal victimization is increasing and that the attempt to formulate new norms and guidelines in criminal justice have been reduced to some recommendations adopted at the last Congresses, of very limited practical value. Fortunately mostly due to the Secretariat's initiative, the main question of **Crime and the Abuse of Power: Offences and Offenders beyond the reach of the law?** was brought to the international arena and as a sequel that of victimization will be discussed at the 1985 Congress. An attempt has been made to determine which are the main issues involved in the formulation of a new international-national criminal justice order (NINCJO) in the context of development and a new international economic order (NIEO). The subject was again discussed at the beginning of 1983 and several conclusions on the relationship between development and the prevention of crime, greater responsiveness of criminal justice systems, unrestricted access to it and community participation were adopted.

From the exposé made it may be concluded that while the United Nations is doing its best in criminal policy matters, many governments while adopting its recommendations, seldom implement them. The most glaring case is the still limited effec-

**tiveness of the Standard Minimum Rules for the Treatment of Prisoners adopted in 1955.**

One of the main obstacles is the still prevailing conviction that by crime should be understood mostly, if not exclusively, **common crime**. A second is the belief that by improving material living conditions crime will be considerably reduced or suppressed. A third is that the abuse of political, economic or any other modality of power even if criminal should be dealt with in a different or privileged manner. In the meantime crime is flourishing and at the end of the XXth Century freedom, equality, dignity and security are far less protected than in the past.

Curiously enough while in other fields contemporary postindustrial society has produced enormous advances, criminal justice although often rejuvenated or improved, remains structurally and functionally what it was at the end of the XIXth Century and beginning of the XXth, i.e. almost exclusively centered around the offender. Correction, readaptation, reeducation and the like, greater repression and capital punishment are still advocated and carried out. **The so-called radical criminal policy and criminology have failed, mainly due to their unilateral ideological approach.** Curiously the XXth Century has not been able to produce a better political creed than those of capitalism or marxism and the failure explains the continuity of obsolete penal systems.

The fact is that fear of crime, whether or not conventional, is one of the main features of contemporary society and that feature will be accentuated in the near future if a new international-national criminal justice order is not set up. Needless to say, **the repeated attempts to bring the community into the penal system will produce some scattered results but as long as the fear of crime persists its cooperation will not yield the results expected.** The same applies to the loose concept of juvenile delinquency which does not correspond to the role of youth in postindustrial society and the way in which the process of criminalization is taking place in many countries.

The concepts of development and criminal justice need a redefinition which is often prevented at the national and international levels by partisan aims in which power of many sorts plays the primary role. At the present time the main task as far as criminal justice is concerned is **to determine what is the amount of crime that a given society can stand without being seriously handicapped in its freedom, equality, dignity and security.** Its determination means, besides what has already been pointed out, the formulation and setting up of an international-national criminal justice order **that the modernization or present penal systems cannot provide.**