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CHRONICLE

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CRÓNICA

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EDITORIAL

THE INTERNATIONAL CRIMINAL COURT

A LONG GESTATION AND A DIFFICULT BIRTH

It has been a long time coming. In 1872 Gustave Moynier of the Red Cross in Geneva, horrified by violations of the law in the Franco-Prussian war, proposed the setting up of an international criminal court. In 1948 the UN General Assembly passed a resolution envisaging an international tribunal to try cases of genocide. In the end, it was the crimes in Yugoslavia and Rwanda in the 1990s that compelled states to act: having established ad hoc tribunals to deal with these, it was impossible to resist the case for a permanent court which could address extreme crimes wherever they occurred.

In recent years, tribunals like those for Yugoslavia and Rwanda were springing up like mushrooms. Unlike the opposition to the International Criminal Court (ICC) the setting up of such tribunals met with little resistance. So why set up a permanent court? Let us consider for a moment the nature of some of these tribunals.

The Lockerbie Court is an example of how complex efforts to bring abusers of human rights to trial have become. In that case two Libyans, charged with murdering the 270 people killed on Pan Am flight 103 in 1988, were tried in a Scottish court, temporarily situated in the Netherlands.

The criminal tribunals for the former Yugoslavia and Rwanda, which have also been laying the foundations of a truly international criminal law, took a different approach, not only from the Lockerbie court but also from one another. One is based in The Hague; the other has trial chambers in Tanzania and Rwanda and an appeal chamber in The Hague. International judges, amongst them our esteemed Deputy Secretary General, have been sent to Kosovo to provide objective justice within the national justice system and to be an integral part of it. In October of 2000 the UN Secretary General negotiated an agreement with the Sierra Leone government for an independent special court with jurisdiction over crimes against humanity. When properly functioning this special court will apply both international law and Sierra Leonean law. A mixed domestic-international criminal tribunal is being established in Cambodia to try former leaders of the Khmer Rouge. Some form of international tribunal is being considered for East Timor.

These varied tribunals differ not only in the way they strike a balance between international and domestic law but also how they are set up. The Yugoslavia and Rwanda tribunals are subsidiary organs of the UN security council; the Kosovo

court is part of the UN mission (civil presence) in Kosovo; the tribunals for Cambodia and Sierra Leone are to be established "by agreement" with the UN; the Lockerbie Court was the result of a compromise between governments approved by the UN Security Council.

This proliferation may have been a necessary phase in the development of mechanisms for enforcing international criminal law and the pressure for such tribunals may ease once the ICC is up and running early next year. There may indeed be good reasons for establishing different forms of tribunal - such as respect for the wishes of the state or states directly affected, goals of peace and reconciliation, world order and cost. However, it is likely that all these tribunals will be operating simultaneously for years to come, with the risk of conflicting interpretations of the law, confused applications of a mix of domestic and international rules of substantive and procedural criminal law, prejudice to the accused, and the use of funds that could have been channelled into the domestic legal systems of the countries concerned. It was mainly for these reasons that the case for a permanent court became irresistible.

On April 11, 2002, at a ceremony at UN headquarters in New York, the international criminal court was born. Enough states had ratified the Rome statute of the ICC to bring the total above the critical number of 60 needed to activate the treaty. The statute, the text of which was drawn up and first signed in 1998, subsequently came into force on July 1 2002. Acts of genocide, crimes against humanity and war crimes committed from then onwards can be investigated and prosecuted by the court. By 2003, the ICC will be up and running, with headquarters in The Hague.

It is tempting to view the ICC's birth as a triumph of law over force. In reality, the ICC comes into the world in terrible circumstances. Many major states refuse resolutely to become parties to the statute, and the ICC prosecutor, when appointed, will face a nightmare task in deciding which crimes to investigate. The hard part of the struggle for a system of international trials for extreme crimes lies ahead.

It is encouraging that, with the notable exceptions of the US and Turkey, most NATO states are parties. So are a few significant powers elsewhere, including Argentina, Nigeria and South Africa. But at that point the grounds for optimism start to look thin. The list of states that are not parties to the ICC statute is sobering. The militant opposition of the US - based on the fear that a rogue ICC prosecutor might charge US servicemen with war crimes - has been much publicised. What is less known is the determination of many other important states, including China and Russia, to avoid the hazards involved in accepting the statute.

Law without power is no law. International courts need the support of major powers if they are to operate effectively. The Yugoslav Tribunal in The Hague was virtually powerless for the first two years of its existence, because it wielded no power where it mattered - in former Yugoslavia. Only from late 1995 onwards, as the NATO-led peacekeeping force established itself in Bosnia, were there suitable conditions for the gathering of evidence and, eventually, the arrest of suspects. Only then could the court begin to function as intended.

There is wide agreement that the ICC's list of crimes (genocide, crimes against humanity and war crimes) is a sound basis for the court. These crimes are based on solid law, and also on precedent from the Nuremberg tribunal in 1945-6, right down to the ongoing Yugoslav and Rwanda tribunals. The decision made at the Rome conference in 1998 that the ICC will not initially include in its list of crimes either aggression or terrorism looks sensible, especially as both are notoriously hard to define.

The key problem is not what types of crime the ICC will tackle, but which particular crimes, in which countries. It is expressly barred from pursuing a case which is being genuinely investigated or prosecuted within the state concerned. It was on this basis that the British Foreign Secretary felt able to assure Parliament that no UK serviceman would be hauled before the ICC. On this basis also the French Government, originally opposed to the ICC, agreed to give it whole-hearted support.

Some claim the new international criminal court will limit the role of national courts. The reality is different: the emerging system of international criminal justice envisages a central role for national courts. International proceedings such as the Milosevic trial will be exceptional. The ICC's role will be "complementary" to national courts, which will continue to have primary responsibility for dealing with international crimes.

The war crimes trials at Nuremberg and Tokyo after the Second World War established the principle that no one is above the law and necessarily entitled to absolute immunity from criminal jurisdiction. Subsequently the United Nations adopted international conventions criminalising genocide, apartheid, hostage-taking, torture, terrorism and the targeting of civilians during armed conflict. These conventions apply principles of "universal jurisdiction" and require states to bring before NATIONAL courts those suspected of these criminal acts.

Under the strictly specified provisions by which the ICC prosecutor can inquire into crimes, the ICC is unlikely - unless specifically directed by the UN Security Council - to investigate crimes. The ICC is also unlikely to investigate crimes in states that are not parties to the Rome statute. The daily outrages in Israel and the occupied territories would probably not be pursued by the ICC, because Israel is not a party, and the UN Security Council is unlikely to refer the matter to the ICC.

Cases that are more likely to come under the ICC are from failed or failing states, which may be unable to claim that they are investigating and prosecuting their own nationals, and equally unable to stop the security council from referring the matter to the ICC. Even more important, they may be unable to prevent the arrest and detention of their own nationals by a foreign intervention or peacekeeping force.

There is a serious risk that the ICC may in the end tackle a small number of cases, mainly from third world states. If so, it would add to the damaging perception of the system as dominated by the white north, imposing standards on a reluctant south. Because of this, the UN Security

Council and the ICC will have a delicate task in deciding which cases to investigate and prosecute. The prosecutor, who is to be elected later this year, will hold the most important and politically sensitive post in the court. It will be hard to build up confidence in the court's impartiality while being unavoidably selective in investigations and even harder to secure the necessary minimum of cooperation from states that are not parties to the ICC.

There is a legitimate concern that the ICC will be effective only if powerful states sign up. Despite having played a pivotal role in founding the tribunals for former Yugoslavia and Rwanda the US joined China, Libya, Israel, Qatar and Yemen in voting against the Rome statute. Although the Rome agreement took on many of the Americans' stated objectives, they still maintain that it poses an unacceptable risk that politically-motivated charges would be brought against US officials and military personnel, which might in turn curtail the deployment of US forces worldwide to protect global interests. Mindful that its troops carried out the My Lai Massacre in Vietnam and aware of allegations of human rights abuses by its troops in Cambodia perhaps they feel they have genuine concerns. American concerns would appear to be misplaced. The prospect of the court's prosecutor indicting an American soldier for a crime against humanity is minimal, thanks to the concessions, which were made to the US. The "complementarity" provisions ensure that the world criminal court will take jurisdiction over an alleged offender only where his or her own country is unable or unwilling to take disciplinary action. The power of the prosecutor, moreover, is supervised at every stage by the court's judges and overseen by the Security Council (where America holds a veto).

The only prospect of indicting an American - and it was the refusal to compromise on this point which caused the US to cast its negative vote - is in respect of the ICC's power to punish UN peacekeepers who commit war crimes, if they are not proceeded against by their own nations. This is not hypothetical: in Rwanda, two detachments of "blue helmets" from Ghana became complicit with the genocide, handing over the Tutsi officials they were guarding to Inter-

hamwe death-squads. If American soldiers were ever to behave like this - and in the unlikely event that they were not subjected to US military discipline for such appalling behaviour - an ICC investigation might be called for.

The reality is that the US has shown no recent reluctance to prosecute soldier-criminals. It has even set up an inquiry into allegations that its marines committed war crimes as long ago as 1950, in the South Korean hamlet of No Gun Ri.

The US opposition to the ICC is difficult to justify in law and in logic. However, it would be wrong to imagine that it is confined to the present Administration. It was President Clinton who refused to sign the treaty setting up the ICC in 1998. Indeed this is a worldview that certainly can be traced back to Theodore Roosevelt, and, arguably, to George Washington's warning that the country should avoid "foreign entanglements". This strain in political thinking was largely dormant for 40 years because of the cold war. It has become dominant again now. The problem has been magnified because America has become more isolationist following the atrocity of September 11.

Nuremberg created the international law precedent for punishing war crimes and crimes against humanity, irrespective of the national sovereignty protecting their perpetrators. The Nuremberg legacy, supplemented by that great triptych of post-war human rights treaties (the Universal Declaration, the Genocide Convention and the Geneva Conventions) envisaged (specifically, in the Genocide Convention) that an international criminal court would in due course try the authors of the gravest crimes against humanity. The attacks of September 11 must qualify amongst the "gravest crimes".

The ICC was brought to birth helped by a large contribution from the vast well of US expertise in international law. It is to be hoped that the US will rejoin a movement to which it has in the past given so much in terms of idealism and practical support.

The fledgling court has many problems to resolve. Some are problems growing out of the usual inadequacies of UN majority rule: how will it ensure the best lawyers are chosen, how will it be financed, how will it recruit its investigating force? The US has a proud tradition as a nation committed by its constitution and traditions to democracy, universal rights, the UN and the "international community". Post war events demonstrated that American leadership can be inspirational and President Truman showed the US to be a champion of international law and order. It can be so again.

It is intended that 18 judges will be appointed to the ICC. It seems likely that they may be less busy than the prosecutor. At least three will be full time from the start, but the others could initially be part time. There may be periods when they have little to do but sit in The Hague and study. This is not a criticism of the court. Its greatest success may well be in getting States to take their obligations to implement international law seriously, and to investigate violations properly within their own legal systems, so that their nationals never see the dock in The Hague. Like the nuclear deterrent, the ICC may have a function even if it is not used.

Willie McCarney, Editor

## CRIMINAL PROCEEDINGS, PROBATION AND RESTORATIVE JUSTICE

### MENDOZA - ARGENTINA

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#### I. Introduction

A fundamental change has been brought about in the judicial treatment of delinquent conduct on the basis of the modification of Juvenile Justice Procedure in June 2000 by Law 6.534 in the province of Mendoza, Republic of Argentina, and the creation of organizations such as: the Juvenile Prosecution Office, charged with investigation, promotion and implementation of criminal and defence proceedings concerning minors. The aim is to ensure the intervention of organizations, which guarantee due process of law, taking into account the principles of the International Convention on the Rights of the Child, article 18 of the Argentinean Constitution and the sanction of Law 6.730 of November 1999, which modified the Code of Criminal Procedure.

“Probation” (suspension of judgment on a trial basis) is starting to be applied in criminal proceedings against juveniles subject to Law 22.278/803, with a wide area of discretion in the cases of crimes where it is applicable, taking into account the sanction or penalty attributed to the offence. The system considers the intervention of the victim, reparation of damage, the application of the principle of appropriateness when finding a solution to the problem, etc. These are valid instruments for achieving social harmony and the implementation of behavioural norms, among other things, with educational and restorative goals, and have produced satisfactory results so far.

#### II. Standards

Article 151 of Law 6.354 has come into force and sets out the following principles:

*“When criminal law provides for the suspension of judgment on a trial basis, the Juvenile Criminal Court Judge must make this circumstance known to the minor and his or her representative, under pain of the hearing being declared void”* and in accordance with Article 152 of the same law, *“the preliminary hearing will be declared closed and an order issued consisting of the suspension of judgment and of the conduct rules which the juvenile must follow according to the principles of Article 27 of the Penal Code”*.

Among the preconditions for the application of the said institution provided for in Article 76 bis of the Argentinean Criminal Code, the following are relevant for the subject we are dealing with:

- a) Article 26 of the Penal Code must be applicable to the matter at hand,
- b) reparation of the damage as far as possible and
- c) the intervention of the injured party.

In accordance with the provisions of Law 6730 on the Code of Criminal Procedure of the Province of Mendoza, suspension of judgment will be applied “when Article 26 of the Penal Code is applicable” - in other words, when a suspended sentence is applied. Under pain of non-validity, this must be based on the moral character of the accused, his or her attitude after the offence, the motives that drove

him or her to delinquency, and the nature of the act committed. The Argentinean Penal Code grants this right to *individuals accused of a public offence subject to a penalty of no more than three years' imprisonment or a combination of offences for which the sentence does not exceed three years*. The limit imposed by the Penal Code of three years' detention or prison, according to part of the doctrine which I do not share, requires the exclusion of offences for which greater penalties apply, even when the final sentence to be imposed may be conditional once the evaluations of Articles 40 and 41 of the Argentinean Penal Code are taken into account. Therefore, in cases where the penalty provided by the Penal Code is greater than the three-year maximum, the only way out appears to be a declaration of unconstitutionality, which makes the local law prevail over the provisions of Articles 71 and 76 bis of the Penal Code.<sup>1</sup>

Article 4 of Law 22.278/ 803 on the "Criminal Justice Regime for Minors", valid for the whole of Argentina, states that: *"in the case of declaration of criminal responsibility, the imposition of a sentence on the young person depends on whether he or she has reached the age of 18 years and received supervisory treatment lasting at least a year, renewable if necessary until the age of majority. Once the requirements have been satisfied, if the judge considers a sanction unnecessary in the light of the nature of the offence, the juvenile's history, the results of the supervisory treatment and his/her direct impression of the juvenile, the judge can give a discharge, even if the young person has reached the age of 18 at that date."*

<sup>1</sup> Enrique Sosa Arditi and Luis Jaren Agüero - Law 6730 - Commentary on the Mendoza Code of Criminal Procedure. Ed. Jurídicas Cuyo Mendoza, 2000 page 171.

Article 71 C.P.A.: "all criminal actions must be initiated officially".

Article 76 Bis C.P.A.: A person accused of a public offense carrying a detention or prison sentence of no more than three years, or in the case of a combination of offenses, s/he can also request suspension of judgment on a trial basis if the maximum sentence does not exceed three years."

As we can see, these standards do not discriminate according to the length of sentence applicable to the offence. I therefore consider that the length of the sentence is not relevant to this matter, since the basic legislation does not discriminate when giving accused persons a discharge, when treatment and the imposition of rules of conduct have been carried out, the target of re-education and social reinsertion of the young person has been reached and the juvenile has gained a fresh start in life with socially acceptable behaviour (Article 40 of Law 23.849) and been finally reintegrated into society.

We must take into account:

- the following objectives of the system stipulated in art. 76 bis of the Argentinean Penal Code which regulates "probation": reparation of damage as much as possible and the imposition of measures or rules of conduct which favour the re-education and social reinsertion of the young person,
- The spirit of Law 6.354 (judicial system for minors); articles 150 and 151 make it mandatory to inform the offender and legal representative when the criminal law provides for Suspension of Judgment (Probation) under pain of the proceedings being declared null and void,
- Article 11. 1 of the Beijing Rules which advocates the closing of cases with the aim of preventing the young person being caught up in the judicial system and the resulting stigmatisation,
- Juvenile legislation with the principle of "favor minoris", and which enshrines the "best interests of the child", the objectives and special treatment expressed, inter alia, in Article 40 of the Convention on the Rights of the Child, which stipulates: *"States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and*

*fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."* ... and in Article 40.3 "*States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children ... whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings*". We can observe the usefulness of the instrument of probation, especially in order to avoid the labelling which conditions future behaviour<sup>1</sup>.

Its implementation is beneficial, since the final aim is to differentiate the treatment of young people from that of adults, avoid the stigma of a declaration of criminal responsibility and the resulting sentence if the young person follows the rules imposed.

### III. Intervention of the victim

The application of "*probation*" gives rise to the intervention of the injured party, as in the "restorative justice" model.

Restorative Justice has been cited by many authors, and inspires various forms of judicial intervention in Canada, New Zealand, Singapore and Belgium among other countries. In some countries it is part of legislation and in others it is being explored in a search for new answers, based on the idea of going beyond current models of Juvenile Justice. It is felt that the system of protection is not sufficiently centered on the offence and does not leave enough room to the notion of the juvenile accepting responsibility. On the other hand it is felt that the so-called justice system puts too much emphasis on the act committed and on the sanction to be imposed, which in the end is counter-productive since the penalty does not

"cure", but rather separates the minor from society and even turns him or her against it.

It is thus a matter of finding a method of intervention which returns to centring, at least partially, the act which gave rise to the intervention and at the same time making the offender recognize his or her actions, and if possible reconciling him or her with society.

The victim is given a new place - which by right however is a fundamental entitlement. The entire intervention is reoriented towards the young person's recognition of the damage caused by the offence, the necessity of repairing it and recognizing that the values, which the community understands, must be respected.<sup>2</sup>

This intervention of the victim, according to Mendoza law, only takes place in the "preliminary hearing" only upon request and to hear and decide upon offers of restitution made by the accused. The introduction of a civil suit within criminal proceedings is prevented by the provisions of Article 119 of Law 6.354.

A confrontation and bringing together takes place between both parties and also with the parents of the young person, who are a "necessary" part of the hearing, with the aim of reparation (total, partial or symbolic) of the material or moral damage caused, not forgetting to respect the principle of confidentiality. This also has the consequence of making reparation towards the community to which the minor belongs, especially when he or she is required to perform a service for the community.

In a purer system of restorative justice, (Belgium, Australia, New Zealand), this bringing together of the two parties can take place in the form of *conciliation* or *penal mediation*. It can be organized either in a court with the ju-

<sup>1</sup> Urra Portillo "Justicia de Jóvenes" (Youth Justice), Centro de Publicaciones, Madrid, 1995

<sup>2</sup> Zermatten, Jean: "Modern experiences in Juvenile Justice". Paper presented May 8<sup>th</sup>, 2001 at the International Seminar on Juvenile and Family Affairs, Mendoza.

dicial set-up of the confrontation between the offender and the victim, thus respecting the usual forms of the trial, or on the other hand it can take place outside the official system and be entrusted to third parties, for example mediators acting outside of the court environment.<sup>1</sup>

A true balance can only be achieved when the needs of victims, offenders and the community are considered in every case and within the system as a whole.

This method of working is an important element of any modern, effective justice system. There is the need to improve responses on the part of the Juvenile Justice system for the sake of young people who enter the criminal justice system and for the sake of society.

The things we must consider for a more appropriate application of this instrument are:

- a. Who would be the best "facilitators" for this meeting,
- b. The necessity of informing individual victims and/or the community,
- c. The involvement of parents, the extended family, the community and others in the rehabilitation and reintegration of the young people.

I consider it a good idea that the offending party should offer to make restitution as an educational measure, since in this way the cost of the damage done and the process fulfils an educational function.

Judges and Magistrates with criminal jurisdiction in the province of Mendoza, Argentina, are applying "probation", often on a daily basis, with satisfactory results.

In the Juvenile Justice Jurisdiction in my charge, in eleven per cent (11%) of the cases which arrive at a preliminary hearing stage, judgement has been suspended, on condition that the young person observe rules of conduct. This measure has a high rate of compli-

ance and produces a favourable response from the victims, who in many cases declared that more than monetary restitution, they hoped that this new opportunity offered would have the result of preventing the young person from returning to antisocial behaviour.

#### IV. Principle of Appropriateness

Another method which our legislation permits is the application of the principle of appropriateness through the "conflict solution" instrument as a new way of concluding the criminal process, contained in Law 6.730 which reforms the Code of Criminal Procedure in my province.

The leading standards include article 5 which states: "the courts must resolve the conflict which has arisen as a consequence of the offence committed, in accordance with the principles contained in legislation, in an attempt to contribute to restoring social harmony between the protagonists". Article 26, section 2 states: "penal action may be omitted if the conflict is solved"<sup>2,3</sup> This is in accordance with Article 150 of Law 6.354<sup>4</sup> and follows the guidelines of the United Nations Minima Rules for the Administration of Juvenile Justice (Beijing Rules). Article 11.1 calls for the closing of proceedings with the aim of preventing young people being caught up in the criminal justice system and the resulting stigma, in cases where the characteristics of the offence allow it.

<sup>2</sup> Aguinaga, Juan Carlos: "Reforma Procesal Penal" (Criminal Procedure Reform currently in force), Ed. Morcos Mendoza 1999 page 30

<sup>3</sup> Art. 26 Code of Criminal Procedure. **Principle of Appropriateness.** "With authorization of his/her hierarchical superior, the representative of the Prosecutor's Office can request that criminal prosecution be suspended totally or partially, that it be limited to one or more offenses or to one or more of the individuals involved in the act, when a solution to the conflict has been found, which will be granted summarily".

<sup>4</sup> Article 150, Law 6.354: "in cases where the criminal law allows the application of criteria to avoid the continuation of criminal prosecution or bring it to an end, the prosecutor, the accused or defense counsel can ask the Juvenile Criminal Court Judge to close the case".

<sup>1</sup> Judges' Corridor, Singapore on line, Willie Mc Carney

With the participation of the injured party, the proceedings may lead to reparation of the damage caused and include work personally performed by the young accused, with an educational function. When a solution to the conflict is reached, criminal prosecution is suspended and the case is ordered closed (Expte N° 552/01/2°PM F c/ GRE, NAG, RCA and others for serious damage according to the Second Juvenile Criminal Court).

#### V. Conclusion:

I believe that there are no magical solutions, but also that we must think of valid alternatives to achieve the aim of re-education.

From any point of view, in my case from the viewpoint of the administration of justice, taking into account the scarce monetary resources and programs available and legislative tools, we must favour the active participation of the parties involved: young people, families, victims, the community and the State, always thinking of the best solution, respecting the best interests of the child but also social harmony. This will ultimately turn to the advantage of everyone. I therefore consider it appropriate to take into account constitutional legislation (International Convention on the Rights of the Child, Articles 3, 37 and 40 ); international legislation (United Nations Minima Rules for the Administration of Juvenile Justice, Beijing Rules), national legislation (Articles 26, 27, 76 bis, 76 ter, and others in the Penal Code), and some provincial laws in force (Articles 5, 26, 30 of the Code of Criminal Procedure, and Articles 119, 150, 151 and others of the Law 6.354). We must also follow the principle that criminal proceedings must also have an educational function and favour the following principles:

1. Application of the instrument of suspension of judgment on a trial basis or “*Probation*” by the Juvenile Justice System in order to bring together the young accused and the victim.

This enables the young person to reach awareness and encourages “empathy”, resolution of the conflict, thus managing to avoid labelling which can condition future conduct of young people accused of actions which come under the Penal Code, supporting a “lenient interpretation” of the offences it includes and achieving social harmony.

2. Where permitted by legislation, the application of the principle of appropriateness through the “conflict solution” instrument. This also makes it possible to bring together both parties with the victim well informed, reparation of the damage caused and closing of proceedings, with priority given to the best interests of the child, re-education and closing of cases (Articles 3 and 40 of the International Convention on the Rights of the Child and Article 11.1 of the Beijing Rules).

3. Reparation of damage as an educational measure.

4. The necessary intervention of parents, and in cases where this is not possible, the extended family.

5. Engaging the community and relevant Institutions in the task of facilitating tasks of benefit to the community.

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## JUVENILES IN CONFLICT WITH THE LAW

### THE SOCIAL WORKER AT ALL STAGES OF THE PROCEDURE

**André DUNANT,**

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Depending on the country, social workers operate within businesses, factories, hospitals, large administrations, town halls, urban areas, schools, etc. All have the same basic training. Their studies take three or four years, in many cases including a common core of courses shared with specialized educators.

The social workers (or probation officers) we are concerned with here are those primarily working in the context of ministries of social affairs and of justice, local authorities, and NGOs.

In most cases, a social worker deals with two broad categories of children and young people: juveniles at risk and juveniles having committed an offence or juveniles in conflict with the law. The two are in actual fact one and the same, or at least in most cases. The difference is that the latter has committed a legal offence, has been questioned by the police and is subject to legal proceedings. The former has committed no offence, or not thus far, or perhaps has not been caught.

When, where and how does a social worker intervene?

In the case of a juvenile at risk, not (in principle) having committed an offence, a social worker intervenes at the request of parents, family, local administrators, social welfare officials, the police, or the juvenile him/herself. A social worker may also intervene on his or her own initiative, as in the case of street children.

Except where a social worker is required to comply with specific instructions, he/she can

offer assistance or social and educational support. This is never imposed. It does not include financial support, but rather advice, assistance with practical or administrative arrangements, job seeking, temporary shelter, obtaining identity papers etc.

Juveniles not having committed an offence but having been simply “picked up” on the street by the police are still too often found at police stations or in prison.

Only juveniles between the ages of 14 and 18 years (or between 13 or 15 and 18 years, depending on legislation) having been accused of and charged with a crime or offence may be deprived of their liberty by the police, prosecutor or judge. This can never be the case for a juvenile not having committed a criminal offence.

Emphasis should be placed on the fact that if a juvenile is lost or abandoned, a vagrant, beggar, runaway, victim of or witness to an offence, his/her place is not in a police station or cell, and even less in prison – even under the pretext that it is for his/her own protection.

It may be that under some very exceptional circumstances, a child or young person might be placed in a welfare centre or open institution. This entails the risk that he/she might leave without asking permission from an educator. This constitutes a runaway, but not an offence. Consequently, even if a young person runs away from a home or welfare centre on more than one occasion, there is no legal reason to lock that person away. Any individual ordering such a juvenile to be deprived of lib-

erty is himself violating the law and this should be penalised.

Whatever our position or function, we should all use our influence at every level to have vagrancy and begging excluded from the criminal code.

In all parts of the world, without exception, the social worker (or educator or probation officer) plays a key role, and holds a leading position with regard to juveniles in conflict with the law. At all stages of criminal proceedings he/she represents the keystone of juvenile justice. The social worker is therefore quite simply essential and unique.

In many countries, the social worker already plays a role prior to the judicial stage, i.e. at the stage where the police are involved. He/she is however most present during pre-trial investigation, custody, at hearings and after the trial, when educational measures or penalties may be applied.

Without a social worker or probation officer, a juvenile judge might just as well relax or go on holiday! Without a social worker, a juvenile judge is like an eagle with its wings clipped, or a carpenter who is expected to make a piece of furniture without tools and with his bare hands.

The main function of the social worker or probation officer is to be the contact, the link or go-between between juvenile justice professionals on one hand (police, prosecutor, examining magistrate, juvenile judge, prison, institution, ordinary or juvenile court, criminal court) and the juvenile and his or her family on the other, and in many cases the victim as well.

Children are still all too often arrested and detained for minor and petty offences.

The social worker contributes towards promoting more equitable and effective juvenile justice aiming at social reintegration and avoiding recidivism.

In all too many States a child may be sentenced to several months or years of imprisonment for a relatively minor offence. Suspended sentences tend to be unheard of in such instances, even where they may be expressly provided for in the criminal code. The outcome is likely to be that the authorities succeed in or contribute to turning a youngster who has committed a relatively harmless offence into a real offender. As everybody knows: prison is the best school for crime.

Does it have to be pointed out once again that today's child is tomorrow's citizen?

What is the social worker (or probation officer's) role in all this?

The first and most usual task is to undertake a character study of the juvenile. The social worker gathers information particularly about the juvenile's personal situation, personality and background, the conditions in which he/she has lived or been brought up, his/her schooling, the family's material and moral circumstances.

This information about the juvenile's personality and needs is a determining factor for the procedure as a whole. It enables the examining authority to take any provisional measure that might be called for, and the sentencing authority to determine the most appropriate measure and/or sanction.

The social worker (or probation officer) will make positive suggestions, perhaps already to the police and/or prosecutor, depending on the system in a given country, and in any case to the examining magistrate, the juvenile judge where he exists, the juvenile or criminal court. The judicial authority imperatively requires conclusions in the form of proposals from the social worker.

At each stage in the procedure, the social worker continues the untiring work as link and intermediary, mainly between the juvenile, the juvenile's family and the authorities, and sometimes also the victim. At each stage in the

procedure the social worker makes proposals to the juvenile, the juvenile's family and the authorities. For their part, the authorities then have to assume their responsibilities and make a decision.

In the event of error (to err is human), abuse or infringement of the law, the social worker's duty is to intervene so that the error can be remedied or the abuse rapidly halted. He/she will take official and semi-official steps, and where necessary seek the support of a lawyer who will take legal and/or administrative steps if need be.

When reporting verbally and in writing to the authorities, the social worker (or probation officer) should use simple, clear, transparent and direct language. The authorities must accept such communication. Disagreement and difficulties exist but this is not serious in itself. Each player has a part to play; the judge is not going to do the work of a social worker, while the social worker is not going to act as a police officer or a nurse. The main thing is to maintain communication. Things must be expressed the way they actually are.

The judge and the court will appreciate not only the descriptive part of the social investigation but its conclusions as well. Proposals made by a social worker (or probation officer) should not be idealistic or beyond reach, but practical, taking local reality into account.

Where the system runs smoothly and all those involved in juvenile justice are acquainted and show mutual respect, it is rare for the judge or the court not to follow the social worker's recommendations.

In many countries, it is the same social worker (or educator or probation officer) that, after undertaking the social study, follows up on the juvenile when an educational measure or sanction is applied. He/she will be responsible for making regular reports on the child's progress to the juvenile judge, and proposing any modifications to the measures taken, or their suspension when no longer justified. In cases where a juvenile is serving a sentence involving deprivation of liberty, it is also up to the social worker (or the probation officer) to provide the juvenile judge (or the judge who follows-up on individual sentences during probation and post-release periods) with a proposal for conditional release midway through the sentence (or after two-thirds of the term, depending on the legislation). In this respect, it is totally incomprehensible why in some countries such conditional release is barely recognised, or worse still, systematically refused even where it is expressly provided for in the criminal code. It is a right and not a favour.

Once again, the focus is on the key role of this essential component of juvenile justice.

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Geneva, June 2002

## THE AGE OF CRIMINAL RESPONSIBILITY IN ACCORDANCE WITH THE CRIMINAL CODE OF THE RUSSIAN FEDERATION (1996)

Oleg Osheev, Judge,  
Chaykovsky, Perm region, Russia.

In order to be able to answer for his or her actions and to be criminally liable, a person must have a definite level of moral and social development. This is connected with attaining sufficient age when under the influence of family and social circle, a teenager realizes the difference between good and evil, and in what cases his or her actions can do harm to other people. In her novel, "The Wolf-Hound", Maria Semyonova says: "Just don't tell me about innocent infants, who don't know what is right and what is wrong, and who don't understand that it hurts, when you are beaten. When he is beaten himself, surely, he understands..." A sufficient level of social and moral development is required before juveniles can conform their behaviour to the order established in society. A juvenile does not realize the social danger of his or her actions, the factual nature of them and is not able to foresee the consequence.

In Russia in the XV – XVI centuries the question of the age of capacity was not of a social, but of a religious nature. Personality was considered to be the creation of God, developed according to God's laws, that is why only the Church, and not the State Power, had the right to establish the age level. Since the Church considered crime to be a sin, responsibility for the offence committed was connected with the ability to sin. In Russia this age was set at seven, which was thus set as the age of criminal responsibility, in accordance with the laws of that time, so that children under the age of seven could not commit a criminal offence. This age level was connected with reaching civil majority - age 12 for females and 14 for males. At this age children could be held responsible for sex crimes. And it was the age of marriage under "The Greek laws" (12 for fe-

males and 14 for males). Once married, a person got property responsibility and could be made to answer for a whole range of immoral and disorderly deeds before the Church.

In Russia in the XVI – XVII centuries capital punishment could be applied to juvenile offenders at the age of 8. In the XVIII – XIX centuries the age of discretion was raised to 10 and this remained the law until 1917. During the period of Soviet Power the age of discretion was increased to 12, and, finally the Criminal Code of the RSFSR (the Russian Soviet Federative Socialist Republic) in 1960 set 14 as the age of discretion for the perpetration of grave crimes and 16 for perpetration of other crimes.

According to article 20 of the Criminal Code of the Russian Federation (1996), a person who has attained the age of 16, at the time of the offence, is liable to be held criminally responsible. Part 2 of the above-mentioned article, establishes criminal responsibility beginning from the age of 14 for the perpetration of grave crimes, grave intentional mercenary crimes and violent crimes. Other articles in the Criminal Code concern crimes in which the offenders can only be persons aged 18 or over or special subjects, such as official persons, military personnel etc.

Article 20 part 3 of the Criminal Code of the RF (1996) establishes that a juvenile, while having attained the age of discretion, should not be held criminal responsibility, because he cannot realize totally the social danger and factual nature of his or her actions or cannot put them into practice at the time of perpetration of the crime, because of limited mental development. Such a humane statement ap-

plies especially to juveniles with retarded mentality, whose intellectual development does not match their chronological age. That is why psychological and psychiatric examinations must be carried out as part of the judicial proceedings if there is any suspicion of mental defectiveness in the juvenile offender or if medical or educational authorities recommend such examinations. Based on the report's conclusions and on expert opinion a decision may be taken to discontinue the proceedings even though the juvenile could technically be held to be criminally responsible by virtue of his/her age.

In practice, legal investigators determine the above-mentioned examinations and/or exempt juvenile persons from criminal responsibility after consultation with psychiatrists.

Because the lowest level of the age of discretion is a rather high one, it allows work with juveniles in administrative and state institutions to focus on prevention with neglected children and young offenders and on the defence of their rights. However some researchers and workers within the criminal judicial system in Russia have recently been urging that the age of discretion for the perpetration of grave violent crimes be reduced to 12.

### **The Particularities of Preliminary Investigation and Criminal Justice Relating to Juveniles.**

The Beijing Rules - the Minimum Standard Rules of the UN - set the international standard for the administration of juvenile justice. These Rules are reflected in the Criminal Legislation and in the Criminal Procedure Legislation of the Russian Federation. In the code of Criminal Procedure there is a special section regulating the examination of juveniles. Where a young person is charged with a criminal offence and a preliminary investigation is ordered a counsel for the defence must be appointed to protect his/her interests and the legal representative has great proceeding power under the law. During criminal investigations and criminal hearings, the law obliges

legal investigators, attorneys and the court to pay special attention to the age of the juvenile, conditions of his or her life and education, the reasons put forward for the perpetration of the crime, the presence of adult accomplices, whether or not a firearm was used, the possibility of retarded mental development and whether the juvenile was fully aware of the gravity of his or her actions.

Although the Code of criminal procedure permits the preliminary investigation of a juvenile accused jointly with an adult to be a separate one, I have never known this to happen during my 11 years as a federal judge. It seems to me that this clause is interpreted as a recommendation only and is not taken up during the criminal investigation and criminal hearing because of inconvenience and extra work.

The arrest and detention of a juvenile can be applied only in exceptional cases, and his/her legitimate representatives must be informed. Once approval has been granted for a juvenile's arrest, an attorney personally interrogates him and the question of his/her being detained in custody depends on the outcome of the talk. In practice, the arrest of a juvenile is usually made in the presence of his/her legal representatives during daytime.

Beside the measures of restraint established in the Code, a juvenile can be placed under the supervision of his/her legal representatives or other responsible persons, or under the administrative supervision of an institution designed for juveniles.

An education specialist can attend the interrogation of a juvenile, who has not attained the age of 16, at the invitation of the legal investigator, or at the request of his/her legal representative. The participation of an education specialist is obligatory if the young person being interrogated has not attained the age of 14 at the time of the investigation.

At the hearing of charges against a juvenile, the charges are laid by an attorney. The legal procedure is regulated by general conditions

(established in the Code) with several exceptions and additions.

As a rule, the legal representatives of the juvenile accused, representatives of institutions for the prevention of neglect and delinquency and representatives of the system for the defence of the human rights of juveniles participate in the legal hearing. If it is necessary to protect a juvenile against the negative influence of some of the evidence being presented, the court can temporarily send him out off the courtroom.

According to the Code of criminal procedure, a legal hearing in camera is allowed in cases involving crimes committed by persons under the age of 16.

In passing sentence on a juvenile accused, the law obliges the court to discuss the question of awarding a punishment which does not involve the deprivation of freedom or to consider dispensing with punishment and applying measures of an educational character.

All those involved in dealing with cases of crimes committed by juveniles - legal investigators, attorneys, defence counsel and judges should be specialists in working with juveniles. Education specialist, psychologists and doctors are recommended to be assessors.

In regional courts and in the Supreme Court of Justice there is a special judicial assembly, which deals with the more serious charges against juveniles.

In the Criminal Code of the Russian Federation (1996) one of the sections contains details of criminal responsibility and different forms of punishment for juveniles aged 14 to 18.

These options include the possibility of relieving the young person from criminal responsibility for the perpetration of intentional crimes; the waiver of criminal punishment in passing a sentence and the substitution of a penalty of an educational nature; putting the accused in a special educational or medical-educational institution for juveniles; awarding

a punishment as set out under the Criminal Code relative to juveniles. Punishments, which can be applied to juveniles, include fines, deprivation of the right to do certain activities, obligatory work, correctional work, the withholding of part of the salary as state income. Juveniles cannot receive a life sentence, cannot be sentenced to sequestration of property and there are strict rules with regard to the restrictions of freedom.

An arrest warrant cannot be issued for a young person under 16. Those over 16 can be arrested where they are suspected of the perpetration of crimes of medium gravity (those which could draw a prison term of from 1 to 4 years). The maximum period of deprivation of freedom for a juvenile, even for the most serious crimes, is 10 years.

Unfortunately, the absence of special institutions able to provide programmes as alternatives to custody forces the courts to impose punishments. This has a more negative influence on juvenile offenders. The court can give a conditional discharge or impose a penalty involving the deprivation of freedom but suspend the sentence and order a period of probation and duties that the juvenile must perform during that time. If he/she does not carry out the duties as instructed, the court can extend the probation period or abrogate the conditional discharge/suspended sentence and send the offender to an educational establishment for the period decreed by the court. If the juvenile commits a new offence during the period of probation, the court will abrogate the suspended sentence/conditional discharge and impose a final punishment in two sentences, applying the principle of partial and full addition of punishments, so that both offences are taken into account. Where the young person is of good behaviour and has served at least half of the probationary period he/she, or his/her legal representative, may apply to the court to have the period of probation discharged and the criminal record erased. The court can direct an institution charged with carrying out a sentence, to pay attention to particular aspects of a young person's personality in devising a programme of treatment.

Where a young person who has been placed in an educational institution attains the age of 18 they may, with the assessor's approval, remain in the institution with a view to completing their secondary education or professional course. However, they may not be retained within the institution beyond the age of 21.

Enforcement measures of an educational nature involve placing the young person under the supervision of his/her legal representative or state institution with directions regarding programmes to be followed, limitations on spare time together with any special demands regarding the juvenile's behaviour. Such sanctions are prescribed for a definite period (usually till he or she attains the age of 18). On default of educational measures, the court can recall the case according to discovery of documents, reopen the criminal proceedings and impose any penalty or punishment, which it might have imposed in the first instance. Putting a juvenile in a special institution is the most rigorous measure of enforcement the court can take. It is usually imposed till a person attains the age of 18, but it cannot exceed the maximum term of punishment established by the Code for perpetration of the crime in question.

The period of time in which previous convictions can be taken into account in the case of juveniles is half that for adults (as is the period of parole from educational institutions). Findings of guilt as a juvenile are not treated as "previous convictions" should the young person later appear in an adult court.

In exceptional cases the court can apply the above mentioned guidelines from the Criminal Code to offenders aged between 18 and 20, except that they cannot be placed in institutions reserved for juveniles.

An analysis of the situation with regard to criminal responsibility and criminal procedure relative to juveniles in the Russian Federation allows one to conclude that there is some non-conformity with the UN's Minimum Standard Rules for the Administration of Juvenile Jus-

tice. These relate in particular to the guarantee of confidentiality/articles 8, 21/; the consideration of the question of releasing juveniles from custody/article 10.2/; the absence of a report about the social examination/article 16.1. The Law Reform, which has been ongoing in Russia since 1991, must fill these gaps. The aim must be to set up specialist juvenile and domestic courts in Russia. The President's program of Law Reform (1991) outlines this conception of juvenile justice and the need for specialist courts. A working group of experts and representatives of law-enforcement agencies prepared a report entitled "Domestic and Juvenile Courts". In 1994 a group of researchers headed by Professor Culnikova outlined a philosophy of juvenile justice and proposed a project for the reform of juvenile justice legislation. Professor Culnikova built on the work of another group of researchers headed by Professor V. Ermakov in 1991 entitled 'The basis of juvenile justice legislation in the Russian Federation'. Professor Culnikova's report was given to the Administration of the President of Russia and was also presented in the State Duma. The authors opted to develop juvenile justice as a subsystem of common justice because this was believed to be the least costly alternative.

Reports such as those mentioned above must be approved by the Administration of the President of the RF and by the various committees in the Duma of the RF. Researchers and practitioners realize the necessity to introduce these law reforms quickly in order to deal with the growth of criminality among juveniles. The decline in the influence of family relationships, the failure of parents and legal guardians to inculcate traditional ideas of social norms make it imperative that new approaches are introduced as quickly as possible to deal with the increasing levels of lawlessness amongst young people.

## NEW CRIMINAL CODE TO SHAKE UP RUSSIAN JUSTICE SYSTEM CRITICS SAY REFORMS NOT ENOUGH TO BEAT CORRUPTION

**Ian Traynor**

Russia embarked on major changes to its criminal justice system yesterday (01.07.02), boosting the rights of defence lawyers, cutting remand periods and providing for the broader use of jury trials. The moves are aimed at improving the chances of a fairer trial in a notoriously corrupt system.

In the latest example of President Vladimir Putin's campaign to overhaul the way Russia functions, the changes were part of a new criminal code, based on legislation passed last year and part of a bigger reform of the judicial system.

The reforms are intended to replace the politicised Soviet-era code utterly dominated by judges and prosecutors, who almost never acquit defendants. They aim to provide fairer trials, curb abuse and corruption, ease the critical situation in the disease-ridden, overcrowded prison system, and grant defendants more rights and better chances of acquittal.

The code, drafted by Mr Putin's top aides, has been fiercely resisted by senior figures in the police and prosecutor-general's office, and is the 12th attempt in seven years to introduce a new system. Previous efforts were frustrated by opposition in parliament and among law and order agencies.

"There's no doubt this is a major breakthrough," the former justice minister Pavel Krasheinnikov told the newspaper Izvestiya. "The truth is that until July 1 our system was obsolete and good for nothing."

But legal experts and human rights activists say the reforms do not go far enough and leave the playing field tilted in favour of the state, judges and prosecutors.

"We expect that the new criminal code will worsen the situation in the remand centres," said Elena Gordeyeva, a lobbyist for reform of the criminal justice system.

Not least of the problems will be the inability of thousands of judges, prosecutors and investigators to change the habits of their lifetimes, after being reared on the Soviet model of summary justice and the enjoyment of unchecked powers.

"It is still an inquisitorial system, not an adversarial one," said Mara Polyakova of the Independent Legal Council. "There's nothing about police torture, about falsification of evidence. The problem in Russia is we have enough good laws that are just ignored."

Human rights activists say acquittals in Russian trials amount to 0.05% of cases, effectively ensuring that once in custody awaiting trial, a defendant does not come out of jail for years. Jail terms are also common for minor offences. The result is that Russia's prison population is around one million, much higher in per capita terms than in Western Europe.

Some 250,000 of inmates are on remand awaiting trial. The justice minister, Yuri Chaika, argues that the new system could cut that figure by 100,000.

Under the new system, detainees are entitled to a two-hour meeting with a lawyer before being questioned and can only be remanded for two days without an extension granted by a judge.

Judges are now empowered to authorise arrests, searches and detentions where state prosecutors previously enjoyed untrammelled powers of arrest and detention. The rules for admitting evidence in criminal cases also make it easier to challenge the state and have police evidence thrown out.

But money and corruption lie at the heart of Russia's judicial problems and the new code does not solve that. A detailed study of corruption released in May found that Russians spend \$274m a year in bribes to the courts, an average of \$2 per capita.

The government has pledged to increase the number of judges from 17,000 and to boost their low salaries, but the security agencies and the prosecutor's office complain that the new system will overtax their capacities.

A lack of funding is also hampering the widespread introduction of jury trials, which are being conducted on an experimental basis in nine regions and are to be introduced for serious criminal cases from 2004.

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**DATE FOR YOUR DIARY**

**THE RIGHTS OF THE CHILD**

**WHAT ABOUT THE GIRLS?**

**SION, SWITZERLAND**

**01-05 October 2002**

**Course Director:** Mr. Willie Mc Carney, Vice President of AIMJF,  
Belfast (Ireland) (solicited)

**Location:** Institut Universitaire Kurt Bösch (IUKB)  
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**Languages:** French, English and Spanish with simultaneous translation throughout  
the plenary session.

With the sponsorship of the Committee on the Rights of the Child  
International Association of Youth and Family Judges and Magistrates  
OMCT and UNICEF (solicited)

With the support of the  
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## **THE VEILLARD-CYBULSKI AWARD 2002**

The Veillard-Cybulski Fund Association aims to reward deserving works, particularly those which make a new contribution towards perfecting methods of treatment for children and adolescents in difficulties and their families.

To achieve this objective the Association has established a Veillard-Cybulski Award.

### **Rules (summary)**

- The award is made every four years, on the occasion of the quadrennial Congress of the International Association of Youth and Family Judges and Magistrates (IAYFJM).
- Candidates must submit four copies of their work in English, French or Spanish, together with a summary of not more than ten pages, to the address of the Association.
- The next award will be made in 2002. The deadline for submission of works will be 31 October 2001. Papers will not be returned.
- The prizewinner receives an award of 10,000 (ten thousand) Swiss Francs. The amount of the second prize, where appropriate, will be decided by the VCFA Committee. Where two winners are classed ex aequo, they share the award. There will be no addition to the total amount of the prize.

**PLEASE NOTE: APPLICATIONS ARE NOW CLOSED**

**THE WINNER WILL BE ANNOUNCED**

**AT 2.15 pm**

**ON THURSDAY 31 OCTOBER, 2002**

**AT THE WORLD CONGRESS**

**IN MELBOURNE**

Association Fonds Veillard-Cybulski  
c/o Institut International des Droits de l'Enfant (IDE)  
Institut Universitaire Kurt Bösch (IUKB), Case postale 4176, CH-1950 Sion 4 - Switzerland.  
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**PROTECTION OF THE GENERAL RIGHTS OF CHILDREN**  
**LEGISLATION, JURISDICTIONAL AND POLITICAL ACTION**

**DR. JOSE MARTIN GALLARDO**

**JUVENILE AND FAMILY COURT JUDGE, NEUQUEN, ARGENTINA**  
**PRESIDENT OF THE ARGENTINEAN ASSOCIATION OF JUVENILE AND FAMILY**  
**COURT JUDGES, MAGISTRATES AND OFFICIALS**

I am of the opinion that for the law to evolve, adaptation of the positive standards in force is indispensable. We consider the law to be a living organism, as it adapts itself to the realities of the contemporary and changing world and must consider and solve people's problems. In particular, provisions of a constitutional nature must evolve, since they are the basis of the new reality (1).

I agree with the clarifying opinion of Dr. Ricardo Luis Lorenzetti (2), when he states that first of all Constitutions have fundamentally laid down the organization of government, and that their standards are directed at those in government. Therefore they set out the Rights of the Citizen in relation to the organization of the state, and in turn economic and social rights, provisions concerning the economy, and generally speaking, standards connected with Private Law. Constitutional Standards now also affect relationships between individuals. Private Law arises in reality from the legal field, as a limit to sovereign, state or group power, widening the dichotomy between the individual and the state for categories such as: economic groups (individuals or consumers), majorities and minorities. This is without, of course, forgetting individuals among themselves, bringing once more to the forefront protective principles such as *factor debitoris*, *favor debilis*, the principle of tilting the balance in favour of citizens, protection of the environment, the consumer and the general interest. In order to guarantee the functioning of these new constitutional rights, expressed in

the reform of the Argentinean National Constitution carried out by the 1994 Constitutional Convention (3), fundamental procedural norms were incorporated, such as *Protective Action*, designed to protect constitutional rights violated or threatened by official or individual acts or omissions, through blatant arbitrary or illegal conduct. *Habeas Corpus* is effectively a protection of physical liberty and against improper deterioration of the form and conditions of detention and the disappearance of individuals. *Habeas Data* protects the right to privacy in the face of the Computer Revolution. These standards of a procedural character have become a new and additional guarantee.

It is worth pointing out that the new Rights and Guarantees protect public or collective rights recognized in all of society or specific sectors, groups or minorities that form a part of it. According to Professor Dr. Humberto Quiroga Lavie (4), this is "*one of the rules of the Constitutional Reform with the most social impact. Argentina has always had the characteristic of being an individual society with little solidarity with all inhabitants left to their own devices*", informing us that this inclusion was the product of a long and intense discussion within the Commission of New Rights at the Santa Fe Convention. These new rights, enshrined in Article 41, are for the preservation of the environment, our natural, historical and cultural heritage, biological diversity, environmental information and education. Article 42 protects consumers and users of goods and services, health services, security and eco-

conomic interests. Protective action, set out in Article 43, ensures the safeguarding of these new rights against violations or threatened violations and in addition determines that the subjects of these rights will be vindicated. This will be the responsibility of the Defender of the People and registered Associations set up with this aim, in addition to the Prosecutor's Office, especially the Ministerio Pupilar<sup>1</sup> (Article 120).

All citizens enjoy the right to a Healthy Environment, one that is balanced and apt for our development as human beings. Productive activities exist to satisfy our current needs, without compromising those of future generations: it is our duty to preserve them. That is the Constitutional Standard determined in Article 41 mentioned above, preserving the environment. Our claim to the right to live and develop in a healthy, balanced and appropriate environment is a collective right and on the same level as general rights. To general or collective rights, or rights which concern everyone, we can also add rights which have a wide and uncertain application, taking into account that it is not the interest that is uncertain, but the human group concerned that is vague and contains undetermined individuals.

According to Dr. Horacio Daniel Rosatti (5), and according to the second meaning, which he attributes to rights of vague application, "*this uncertain interest would be a collective or supra-individual claim*". We are dealing with rights which bring a corresponding duty, and which cannot be repudiated. This brings Rosatti to the conclusion that not only must the State take responsibility for the environment, but in various ways accept responsibility for each and every one of its inhabitants. (6).

I do not consider it pertinent to enter into the doctrinal dispute between those who deny the

<sup>1</sup> Department with special responsibility for protecting the best interests of the child.

existence of the general or collective interest, those who qualify subjective public rights as vague rights or interests and those who affirm that the subject of Public Subjective Law is society as a collective entity. However without a doubt this controversy faces us, with the problem of legitimising the corresponding claims and preventing the rights enshrined in the law from becoming merely declamatory.

The responsibility for protecting these rights and interests of general and undefined application lies with the parties already mentioned: the Affected Person, the Defender of the People and properly designated Associations working towards these aims. Let us remember that we have added to the Prosecutor's Office a Defender of the Rights of the Child.

- a) The affected person, as determined by Article 43, is "any person" who can intervene with action to redress any act or omission by a public authority or individual, which violates the rights we are concerned with. The affected person is the injured party, the citizen who suffers harm, but who suffers it with other members of society or groups, which make up society. This individual legitimisation of the affected person empowers him or her to call for procedural protection at a Constitutional level, alone or in a class action with other affected individuals, or with an Association. The intervention of one such individual does not negate the legitimate right of the others to do so. However let us remember that it is not a *Popular Action*.
- b) The Defender of the People represents society, acts in a representative capacity and defends the people. His or her mission, determined by Article 86, is the defence and protection of human rights and other rights, as well as legal and constitutional guarantees, and for this purpose he or she has the right to intervene in questions of procedure. The Defender of the People also maintains control over public administrative func-

tions. That is to say that he or she monitors not only the state and state organizations, but also private organizations working in tandem with public services.

- c) There are also Associations, which work to remedy the damage done by the violation of rights. These associations must be registered according to the law, which will determine the requirements and organizational structure required to be recognised. However if the law is not passed by the Congress of the Nation, let us remember that the reform of the Constitution dates from 1994. Supposing that the constitutional mandate is not carried out, I share the view supported by Professor Dr. Quiroga Lavie (7). It will be necessary to recognize the procedural legitimacy of *“sufficiently representative entities which demonstrate suitability and are sufficiently well-informed concerning the defence of the collective rights affected, since otherwise the decision of the Constitutional Convention to offer effective protection of these rights would be completely in vain”*. Or as Dr. Bidart Campos states on the subject of Argentinean Constitutional Law: *“While the law is not being passed and consequently registration is not carried out, associations which have already been formed, with objectives the same as those mentioned in Article 43, must be accepted by the judiciary to promote protective action.”*
- d) The Public Ministry is composed of the Prosecutor’s Office and the Ministerio Púpilar and is another party authorized to intervene with protective action. According to Article 120, it has the function of promoting action of the judicial system, also for the defence of the general interests of society. Drawing authority also from the generous representation given it by Article 59 of the Civil Code. It is authorized above all to represent the general interests of children or the *“best interests of the child”*. As set out in Article 3 of the Convention on the Rights of the Child, Law 23849,

through Article 75 Section 22 now has constitutional status with the 1994 reform, and is complementary to the Rights and Guarantees it recognizes.

We have set out the legal framework with a brief summary of the protection of general rights.

This is a valid conceptualisation. The aforementioned order is applicable in its entirety to the protection of the general rights of children. However to all the Rights and Guarantees in force concerning children, we must add those defined by the Pact of San José de Costa Rica, which in Article 19 stipulates that all children have the right to protection measures, which their condition of minor requires, on the part of the family, society and the state, and the Convention on the Rights of the Child. Both standards have constitutional status, sending a signal that this enumeration of rights at a third level is not exhaustive: non-discrimination (Article 2), the right to life, survival and development (Article 6), sufficient access to information (Article 17), protection against ill-treatment (Article 19), the right to enjoy the maximum level of health and access to medical and rehabilitation services (Article 24), social security (Article 26), an adequate standard of living for development (Article 27). I would like to stress the provisions of Article 30 on the rights of children who belong to minorities or indigenous people and the respect they deserve for their cultural life, their right to practice their own religion and to use their own language... And I will conclude with the paramount and inspiring standard, the driving principle of the Convention for every measure taken concerning the child: due consideration of the best interests of the child (Article 3) and of course the obligation of the state to adopt measures necessary to fully enjoy all the rights recognized by the Convention (Article 4).

I believe that it is now appropriate to enrich these concepts with historical reality. And I

would like to make an example of and show you the reality of the Painemil Group of the Province of Neuquen.

In a part of Neuquen called *Añelo, Loma De La Lata*, which is situated, it must be noted, only 100 km from the Capital of Neuquen province, resides the *Mapuche Painemil Community*, with control over these lands. Close by there is an oil deposit in Loma de La Lata, exploited by various concessionary oil companies since 1970, who are currently engaging in further exploration and exploitation. All these lands, or most of them, are contaminated. The area where the *PAINEMIL* group resides is one of the worst affected. The water is contaminated and contains mercury and lead. According to reports, examinations and biochemical analysis, the children's health has greatly deteriorated through the consumption of this water.

There are hydrocarbons to be found in wells. The quality of the water is not fit for consumption either by humans or by animals. Children aged 1 to 17, from various families - *Painemil, Cherqui, Rodriguez, Cardenas, Kaxipayin* - have lead in their blood and mercury in their urine. The environment has been damaged. Children's health has been damaged. Therefore these new rights or general interests have also been affected. (8).

Here is another reality - the reality of judicial action - accusations, litigation and recourse to the Judicial Power of the Province of Neuquen.

With this lack of protection of the general rights of children, the Defender of Minors, Dr. Nara Oses, on March 24<sup>th</sup>, 1997 launched a protective action in the capital of Neuquen against the Provincial Executive Power for failing in its obligation to protect health. It had the duty to remedy this omission by providing the drinkable water necessary to the population for its survival, both for consumption and

hygiene, an adequate diagnosis of the situation and the medical treatment urgently needed, as well as presenting a plan of action to control the contamination.

The case (9) remained tied up in a civil suit and the plaintiff, Dr. Bassi, called for protective action on April 11<sup>th</sup>, 1997:

Considering that the Official Defender of Minors is authorized to act as a representative of the group of minors belonging to the *Painemil Community*, in accordance with Article 59 of the Civil Code and Article 120 of the National Constitution and due to the inactivity of the main representatives, protective action is an adequate way of remedying the factual circumstances which require urgent correction, according to Article 43 of the Constitution, reformed in 1994. He recognizes that we are dealing with general and collective interests. It is not important when the Defender of Minors becomes aware of the situation, or by what means. (Article 3, Law 1981). The right to health goes hand in hand with the right to life, states Dr. Bassi, and this principle is enshrined in our National Constitution. Any violation of the latter is unconstitutional and deserves judicial review or judicial monitoring of Constitutionality. State action can take place for an action or omission, which affects rights of individuals and it, does not matter if this conduct on the part of the State takes place in a regulated or discretionary domain. On analysis of samples, contamination of the water table was found which dated from 1995, when a well was dug for water and petroleum came out. And all water consumption in the community is from handmade wells dug in the area where they reside, and this is the origin of the contamination and health problems. The water is contaminated by heavy metals. There is lead present in the blood and mercury present in the urine. If indeed actions are being taken by the State, they lack effectiveness and the promptness demanded by the supreme value at stake, health, and the preservation of the environ-

ment. The delay in adopting measures implies a denial of the necessary services. Dr. Bassi resolved to support the protective action initiated by the Defender of Minors Dr. Nara Oses representing the children and young people of the *Painemil Community* and its neighbours, ordering the provincial Executive Power to carry out the following measures:

- a) Providing within two days 250 litres of water per day per inhabitant of the *Painemil Community* and the neighbouring area.
- b) Ensuring within a deadline of 45 days the provision of drinkable water to the people affected, by any means, which could lead to such a goal.
- c) Putting in place within 7 days actions to determine if the inhabitants have suffered damage to their health through heavy metal contamination and if so, arranging the treatment necessary to cure them.
- d) Take all necessary steps to preserve the environment from the contamination arising from the hydrocarbon and gas extraction.

Dr. Bassi called on the Provincial Executive Power. The Civil Court, Hall 2, presided over by Dr. Federico Gigena Basombrio and Dr. Lorenzo W.A. Garcia (10), confirmed Dr. Bassi's resolution. Dr. Gigena's opinion vindicated the concepts expressed, when he recognized that we were faced with a serious case of contamination in the children of the *Painemil Community*: "*This constitutes a grave attack on health, which is not only a constitutional right, but also a natural and basic personal right*". In the face of the gravity and the consequences of the contamination of the water, the delay in providing the resources and adapting the necessary policies to remedy the situation means there has been an omission of the Provincial Executive Power, which assumes an arbitrary character in the terms of Article 43 of the National Constitution.

As for Dr. Garcia's opinion, I would like to underline the concept that when we are faced with a truly grave and urgent problem such as the denunciation of a failure to act which affects the health of the core of a population, it seems petty and lacking in professionalism to insist on merely procedural questions, such as whether or not the person making the complaint is entitled to do so.

An appeal based on inapplicability of the law was launched before the Most Excellent Superior Court of Justice of the Province (11), where the members of the panel unanimously declared the appeal inadmissible. The decision was based above all on the inadmissibility of the appeal due to the categorical absence of the necessary precautions. Moreover, the factual and qualifying aspects of the appeal are alien in principle to the domain of the appeal court, which exhorted the appealing party to add no further delays to the solution of the problem at hand.

However, the Provincial Executive Power did not pay attention to this exhortation and did not comply. As a result, Dr. Bassi, on September 10<sup>th</sup>, 1997, at the request of Defender Oses, imposed as a warning sanction a daily fine of 50 pesos (US\$50) from the date of notification.

There was a new appeal against this resolution and a new confirmation on the part of the Civil Court, Hall 2 (29). On this occasion, instead of Dr. García, Dr. Isolina Osti De Esquivel was sitting and cast a vote to which Dr. Gigena adhered.

On October 30<sup>th</sup>, the Provincial Executive Power, through the State Prosecutor's Office, presented an appeal against the said resolution. There followed a new resolution of the Superior Court of Justice declaring the appeal inadmissible (13).

In the Provincial Criminal Justice System, the municipal and provincial authorities were taken off the existing case of “*Alleged violation of duty by provincial public officials*” by the Investigative Court No. 5 of the capital of Neuquen, under Dr. Daniel Geloni, and the case of “*Environmental Contamination through petroleum leaks*” was taken up by the Federal Justice system.

In the Federal Justice System, as this is a federal matter, the Federal Criminal Court Judge of Neuquen, Dr. Guillermo Labate, currently has several cases on his hands against companies which have still not been solved, where the community is acting with the appropriate procedural participation.

What surprises us is that the Provincial Executive Power has not shown faithful compliance with the measures ordered and the problem remains, although lead and mercury levels in children and adolescents have diminished, thanks to the provision of drinkable water in cans. In the face of this situation, the Defender of Minors presented the case in 1998 to the Inter-American Commission Of Human Rights (Case No. 12010). On September 30<sup>th</sup>, 1999, a hearing between the parties was convened at the headquarters of the Organization of American States in Washington, USA, where it was agreed upon that the Argentinean state should commit itself to having the affected or exposed children treated in the Hospital Gutiérrez de la Ciudad de La Plata, in the Province of Buenos Aires. The functioning of the treatment plant for making water drinkable for the *Mapuche Communities* was to be monitored and the State was to give out information concerning the exploitation of the *Loma de la Lata* deposits, as well as the abandoned depots of oxidation sinks and piping.

However the Provincial Executive Power continued not to comply, even concerning the terms agreed, and Defence of the Rights of the Child made a new presentation before the In-

ter-American Commission. Both parties made presentations and another hearing was fixed for September 2001 (14). The planned hearing took place in November 2001 and another agreement was reached between the parties, the Communities and the Argentinean State concerning strict observance of the court order. Currently, periodic checks are being carried out on members of the public and water is to be provided from another source, which is not contaminated, or at risk of becoming so.

Just a few days ago (May, 2002), in Juvenile and Family Court No.2 of this city of Neuquen, a request was made to induce labour on a teenage mother carrying an anencephalic baby. Judge Isabel Kohon gave permission for the induction, using a caesarean or whatever other method was necessary to let the delivery take place. The father of the baby is a member of the community referred to in the *Loma de la Lata* settlement. Among other motives, the request was made for the high probability that the malformation was due to the contamination. For this reason it was agreed that a clerk of the court should be present at the delivery and that the foetus should be conserved with the best techniques, in order to carry out studies to determine the origin of the pathology. Later, only DNA samples and proof of blood compatibility with the father will be required and the foetus will be buried.

We have seen the response of the Justice system. It fills us with satisfaction that our justice system takes care of these violated rights. Even if the injustices apply to individual cases, according to the facts and the circumstances surrounding them, another judge or another court can make changes. I am sure that judicial commentary will not remain an isolated phenomenon, and due to its power as an example, will be imitated and applied in the judicial environment. We are very pleased that a supra-national organization, C.I.D.H., can submit for consideration questions concerning the viola-

tion of fundamental individual rights by sovereign states.

### CONCLUSION:

We find ourselves faced with standards of a constitutional and supranational character, which guarantee fundamental rights and the collective or general rights of children. The most important rights of human beings and their environment are protected. These standards are operational, clear and comprehensible. We have clear definitions of the legitimate subjects of rights. The relevant procedures operate rapidly, simply and on a very basic level. We have determined the consequence of not complying with court orders or unconstitutional actions: the final verdict, binding and without appeal, such as that of the Inter-American Court Of Human Rights.

Legislation must indisputably extend to allowing human pursuit of happiness and for this purpose the preservation of the environment becomes indispensable. May legislation not curtail or limit these new guarantees.

It is to be hoped that judges will gain sufficient power to permit them to safeguard rights that have been compromised, and that respect for the rule of law will become generalized. We hope that steps will be taken with adequate policies to guarantee the exercise of rights, and especially to favour human development, preservation of the environment and the welfare of future generations.

These general rights also require all citizens to act in their defence, not only in our country, but in all countries. The obligation to pass legislation and draw up policies is not limited to within borders, but must transcend them. We need treaties, bilateral agreements and multi-

lateral agreements between states. I believe that our Associations, the Argentinean Association of Juvenile Justice Magistrates and Officials (16), the International Association of Youth and Family Judges and Magistrates, must continue working on the subject at hand, as they have done in the past with subjects they considered important, lobbying with persistence so that the next Congresses may bring clarifying conclusions for legislation, judicial precedents of reference and above all adequate policies.

I believe that in this way, and only in this way, future prospects are promising.

1 – “PROTECTIVE ACTION IN THE NATIONAL CONSTITUTION”, paper presented in the Specialized Course in Private Law, taught during 1996, directed by Dr. JOSE MOSSET ITURRASPE and organized by the Bar of Neuquen.

2 – LORENZETTI, RICARDO L., “LAS NORMAS FUNDAMENTALES DEL DERECHO PRIVADO”, (Fundamentals of Private Law), Rubinzal Culzoni, Pages 203/204.

3 – “NATIONAL CONSTITUTION OF ARGENTINA”, text according to the reform of 1994, Introduction by NESTOR PEDRO SAGÚEZ, Edición Corregida, Ed. Astrea.

4 – “REFORM OF THE CONSTITUTION”, Explained by Members of the Editorial Board: HORACIO ROSATI, RODOLFO C.BARRA. ALBERTO M.GARCIA LEMA, HECTOR MASNATTA, ENRIQUE PAISAO, HUMBERTO QUIROGA LAVIE, with the collaboration of Dr. JORGE MOSSET ITURRASPE, Ed. Rubinzal Culzoni, pág.145.

5 – “REFORM OF THE CONSTITUTION...”, *ibid.*, page.75.

6 – “REFORM OF THE CONSTITUTION...”, *ibid.*, page.82.

7 – “REFORM OF THE CONSTITUTION...”, *ibid.*, page.153.

8 – The journalists MARCELA LEON y ALMA MEJÍA made a report entitled “CURRU CO”, which in the MAPUCHE language means Black Waters, denouncing the reality of the PAYNEMIL group, a video of 23 minutes. It was selected out of 300 pieces of work and won the prize: “MSD JOURNALISM AND HEALTH, Edition 1997, MERCK, SHARP AND DOHME.

9 – Autos Caratulados: “YOUNG PEOPLE OF THE PAINEMIL S/AMPARO COMMUNITY” (Excerpt. N°Z.172149), of Civil Judgement Register N°3 of the City of Neuquen. Sentence pronounced April 11<sup>th</sup>, 1997.

10- Sentence dated May 19<sup>th</sup>, 1997, recorded as N° 74-F°212/215-T°II-AÑO 1997.

11- Interview dated June 4<sup>th</sup>, 1997. Recorded as Protocol N°49,F°118/121-T°I-AÑO 1997.

12- Sentence dated October 23<sup>rd</sup>, 1997, recorded as N°290-F°637/638-T°IV-AÑO 1997.

13- Resolution dated November 18<sup>th</sup>, 1997, Recorded as N°152/97.

14- “C.I.D.H.: CASE N° 12010 - MAPUCHE, PAYNEMIL AND KAXIPAYIN COMMUNITIES – NEUQUEN – ARGENTINA”, Dr. CARLOS FALACHI and Dr. NARA OSES, August 2001.

15- “... and other SPECIAL PETITION”, (Expte. N°.../02), initiated on May 2<sup>nd</sup>, 2002 and resolved on June 13<sup>th</sup>, 2002. Court Register N°321-F°423/427-T°III-2002.

16- The 17<sup>th</sup> NATIONAL and FIRST MERCOSUR MEETING ON JUVENILE AND FAMILY JUSTICE was organized by the Argentinean Association. Its second debate was on “THE PROTECTION OF THE GENERAL RIGHTS OF CHILDREN. LEGISLATION, JUDICIAL AND POLITICAL ACTION”, where I presented what is now the basis of this article.

## THE INVISIBLE VICTIMS

Maria Rosa Dominici

Honorary Judge Bologna Juvenile Court, Italy

In the family, at home, in the quarter, in the city, more and more hideous spells happen. Everybody becomes blind, deaf and dumb.....SILENCE and OMISSION become the daily accessories of Paedophilia, juvenile Prostitution, Pornography - the three "Ps" that cause the destruction and disappearance of many children.

I have been working in the field of "Victimology" for many years and asking - even during a recent conference held at the Senate - for the creation of a teaching post or a short university degree to teach and train sensitive and skilled professionals able to "repair" the damage that these children suffer. Very often they go through these experiences in a twice as dramatic way: first when the abuse and the exploitation happen and afterwards during the legal and judicial proceedings. There is therefore the need for a Juvenile Jurisprudence that will protect the minor in an adequate way even when, after surviving the psychosomatic destruction, he will have to testify in front of other unknown adults who are often unable to understand the violated child in an empathic way. The victim, once the exciting experience caused by the mass media is over, becomes a bother, attracts no sympathies, is forgotten because he seems to point accusingly at hypocritical society; he represents a cruel mirror and the witness of the dark side of our adult-centred society.

Paedophilia is shift and sneaky. I went to Zurich from the 26<sup>th</sup> to the 28<sup>th</sup> January 2000 and participated as the Italian delegate of Terre Des Hommes together with 60 other NGO representatives coming from 47 countries in order to discuss the infiltration of Paedophilia into

these humanitarian associations and it was agreed to work for the setting up of an International Code Of Conduct for the prevention of this risk. On that occasion when I talked about other taboos related to Paedophilia, i.e. the connection that very often arises between Satanism and Paedophilia and about Female Paedophilia, I stirred up many denials. Afterwards, it was realised how widespread and underestimated this phenomenon is. It represents a risk and there is the need to study and monitor these facts. In June 1998, during the working days at the Ministry of Foreign Affairs in Rome where the Losanna Appeal was presented and the setting up of a Standing Criminal Court For Crimes Against Humanity was asked for, they talked about minors, the future of Humanity, and I presented a project for the study and the control of paedophilia. I have worked for many years now with provincial education offices in several regions for implementing my project called *Psicantropos* in schools, from kindergartens up to high schools. The aim of this project is to inform, educate, prevent these abuses, intervene and cure the maltreated and abused child. This interested the *Senate Special Committee On The Subject Of Children* and an observer was often present during the course, which was held at the Rimini office during the school year 1999-2000. Participants in the subsequent Forum in Naples had the opportunity to look over these documents.

This very serious problem must lead to the creation of a joint standing board and to an integrated intervention by public and private institutions, such as schools, justice, health, police departments and associations of volunteers.

It is necessary to set up standing crisis units with specially trained experts, recovery facilities for the victims who need to regain their self-respect and the sacredness of their violated bodies, research and study centres for paedophiles so as to create a “third language” fostering communication, constructive knowledge in order to repair the relation between the victim and the offender. A first project called the *Aurora Project* setting up centres for disappeared children was examined by the European Parliament. This project, made up of a network of agencies, was formed at the beginning of June 2000 in Casalecchio, a town in the province of Bologna.

In a society in which the “weak” are the invisible victims, it is not possible to talk either about civilisation, or about ethics and aesthetics of life. These are part of the sense of assurance, confidence and harmony that the human being has the right-duty to possess, preserve and hand on.....

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ABSTRACT “ The sense of belonging, identity, religiosity: the conflict of the child in a mixed marriage” of Maria Rosa Dominici ....e-mail [psicantropos@libero.it](mailto:psicantropos@libero.it);tele-fax 051-450568

Key words: mixed marriages - sense of belonging, identity, religiosity. The choice, the conflict of the child. International abduction of the minor ...

As Bertrand Russell said in 1929 in his “Marriage and Morals” : *“the marriage is happier when there is less difference between people”*

Today, 71 years later, this still contains an element of truth. There is a primary romantic vision of the positiveness of globalisation, of

inter-ethnic and inter-religious families, of mixed marriages whose child, of double nationality and religion, could represent an important resource, promising a society rich in relationships, an equal society, beyond anachronistic divisions in the Global Village.

There is also a secondary vision, rational and realistic, when the conflict of the difference of origins, of the sense of belonging arises, creating a trauma in the child leading up to the international abduction of the minor.

When from the conjugal dyad, where the project of a new cultural family as integration of two different origins prevails, the family becomes a triad with the birth of a child , the belonging to a religious Creed converts the differences, seductive at first, into the origin and cause of conflicts and failures. The parent who has to cure and look after the child and has to pass on ethnic and religious traditions enters into conflict with the culture of the other parent.

A Third Language is therefore necessary, an Esperanto of affections and traditions in which a deep conjugal relationship allows the child to enjoy the richness of a bicultural choice. The private conflict, caused by religious differences can turn into a social, political and juridical conflict. What is born as the negation of racism, perversely regenerates it, what was love turns into hatred. Parents must be instructed and prepared for the problems of a mixed couple and for the religious and cultural confrontation that real life involves.

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**INTERNATIONAL ASSOCIATION OF  
YOUTH AND FAMILY JUDGES AND MAGISTRATES.**

**XVI WORLD CONGRESS**

**MELBOURNE, AUSTRALIA**

**Oct 26 – 31, 2002**

**FORGING THE LINKS**

This congress is an historic event in Australian and New Zealand judicial history. Under the auspices of the International Association of Youth and Family Judges and Magistrates the Congress is being co-hosted and sponsored by the Family Court of Australia, the Federal Magistrates' Service (Australia), the Children's Court of Victoria (Australia), the Magistrates' Court of Victoria (Australia), the Family Court of New Zealand and the Youth Court of New Zealand.

This World Congress is for Judges & Magistrates, Legal Professionals, Social Scientists, Police, Church, Welfare and Youth Agencies, Community Groups, Educators, Academics, Human Rights Advocates, Legislators, Psychologists/Psychiatrists

**AIM**

The aim of the Congress is to assemble people from all over the world active in the protection of youth and the family to consider issues, which fall within the realm of family courts and youth courts

delivery of child protection, juvenile and family law. We have much to learn and think about from each other.

This Conference seeks to provide the opportunity to FORGE THE LINKS:

**THEME**

The central theme of the conference is "*Forging the Links.*" The structure of the legal system into which children, youth and families may be thrust has long been the subject of international debate. To some, the system appears fragmented and impossibly complex.

- (i) Between courts of many nations making judicial decisions on the same issues.
- (ii) Between courts and the communities in which they serve.
- (iii) Between agencies working in and around the courts.

In many jurisdictions, debates rage over the lack of a co-ordinated, accessible and timely

**SUB THEMES:**

## (i) 100 Years of Juvenile Justice

It is proposed in this section to raise issues such as the minimum age of criminal responsibility; what has been learnt about juvenile crime and punishment; juvenile drug courts; a showcase of the positive initiatives in rehabilitative juvenile programs from around the world.

## (ii) Children in Vulnerable Circumstances

## Sub Themes:

Asylum Seekers; Children Undergoing Sentence; Awaiting Trial; Protective Custody; Mental Health Detention; Abducted Children Out of Home Children

## (iii) Judicial Decision Making in Child, Youth and Family Law

Different types of unified court systems: a critical analysis of the positives and negatives. Who benefits most from the unified court...the lawyers, courts, governments or children and their families? The jurisdictional and procedural issues?

Different types of hearing procedures: a comparative study between the inquisitorial and the adversarial approach to child protection and private law disputes concerning children.

## (iv) The Community Around Us

Who is the community around the child, youth and family court legal systems? What role do/should they have? If links between the community and the legal system are an enhancement of the system, how are they best established and maintained? Do they mean different things to different types of judicial systems?

## (v) The Child's Participation

The risks, benefits and limitations of children's involvement in decision making around them. How much should the judiciary know about child development, psychology, social science theory, relevant clinical research data, the international covenants on the rights of the child? The best model of representation for children in family/criminal proceedings?

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 What the Congress Hopes to Achieve

- To foster links and communication between the international community of judges and magistrates and the range of specialists working in child, youth and family law to improve and exchange knowledge and learning.
- Through communication, debate and exchange in an international forum to strive for the development of best practice and principles in child, youth and family law.

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Government Organisations; Psychiatrists/Psychologists; Social Scientists;  
Academics; Human Rights Advocates; Educators;  
Church, Welfare and Youth Agencies; Community Groups; Police;**

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**For further information visit the Congress Web Site**

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**[youthandfamily@meetingplanners.com.au](mailto:youthandfamily@meetingplanners.com.au)**

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**INTERNATIONAL ASSOCIATION OF YOUTH AND FAMILY JUDGES AND MAGISTRATES.  
XVI WORLD CONGRESS, MELBOURNE  
October 26 – 31, 2002**

**THE GENERAL ASSEMBLY**

**of the IAYFJM will be held in**

**MELBOURNE, AUSTRALIA**

**MONDAY, OCTOBER 28**

At

**1715 or thereabouts**

**The Venue will be the Melbourne Convention Centre  
at the corner of  
Flinders and Spencer Streets**

**The precise location within the Convention Centre will be announced on Saturday or Sunday  
October 26 or 27, during the Congress**

**AGENDA**

1. Welcome by the president.
2. Minutes of the General Assembly, held on 4<sup>th</sup> of November 1998, in Buenos Aires, Argentina
3. Report of the President
4. Report of the Treasurer
5. Approval of the 3 reports
6. Election of the Council (or Executive Council)
7. Nomination of honorary members
8. Miscellaneous
9. Closure.

## OFFICIAL SLATE FOR THE ELECTION OF THE COUNCIL 2002-2006

The Executive Committee at its meeting in The Hague drew up the following list of candidates and recommends them to the General Assembly for election to the Council for the period 2002 to 2006

### EXECUTIVE COMMITTEE

President	Willie McCarney	Northern Ireland
Vice-president	Renate Winter	Austria
Secretary General	Corinne Dettmeijer	The Netherlands
Deputy Secretary General	Hervé Hamon	France
Treasurer	Michel Lachat	Switzerland

### MEMBERS

Alejandro Molina	Argentina
Arsenio Franciso Mendoza	Argentina
Monica Vazquez Larsson	Argentina
Christian Maes	Belgium
Romero de Oliveira Andrade	Brazil
Alyrio Cavallieri	Brazil
Oscar d'Amours	Canada
Yang Chengtao	China
Daniel Pical	France
Frieder Dünkel	Germany
Sophie Ballestrem	Germany
David Carruthers	New-Zealand
D.S. Ncapayi	South Africa
Aysen Betül Onursal	Turkey
Len Edwards	USA

The immediate Past President is an ex-officio member of the Council and acts in an advisory capacity.

Anyone seeking clarification on any issue concerning the above or regarding the General Assembly should contact the Secretary General at the address below.

Corinne Dettmeijer,  
 Mesdagstraat 63,  
 2596XV, The Hague,  
 The Netherlands.  
 Tel: 00 31 70 3240835  
 Fax: 00 31 70 3280913  
 Email: [corinne.dettmeijer@xs4all.nl](mailto:corinne.dettmeijer@xs4all.nl)

## MELBOURNE

### THE CULTURAL, SPORTING, CULINARY AND SHOPPING

#### CAPITAL OF AUSTRALIA

We are delighted that Melbourne has been selected as the destination for the International Association of Youth and Family Judges and Magistrates Congress and General Assembly in 2002 and look forward to having the opportunity to welcoming you there.

Melbourne now Australia's second largest city, is the capital of its most compact mainland state - Victoria. Here it is possible to savour a truly Australian experience within just a few hours of the city centre. You will be amazed by the diversity. You can stroll along a golden beach in the morning, enjoy a close encounter with koalas and kangaroos in the bush in the afternoon and stop off at a winery to enjoy an aperitif before returning to the city in time for the theatre.

Melbourne now a thriving modern metropolis, was settled by Europeans in 1835, but was first a home for the indigenous population (locally known as Kooris) for as many as 50,000 years beforehand. A major gold rush attracted world attention in 1848 and a boom period ensued which lasted nearly 40 years. With the arrival in the city of industrialists, bankers, and some of the leading artists in the country Melbourne soon took on a vibrant and cosmopolitan flavour. Established as the commercial headquarters and seat of government, Melbourne became the birthplace of Australian Federation in 1901. When the forefathers planned the city they felt it was important to ensure breathing space. Today the magnificence of the 19<sup>th</sup> century parks and gardens – are known the world over. Even the native wildlife has been drawn to their tranquil

bounty and all kinds of birds and animals can be readily seen. With its grand boulevards and opulent Victorian mansions and renowned city gardens and covered arcades, the city has a colonial feel. Yet blending with this is a modern cityscape, with its skyscrapers and dazzling modern architecture.

Melbourne proudly showcases the very best in contemporary art, design and theatre. From major festivals and cultural events to the diverse artistic expression found on Melbourne's streets, the City for the Arts is the leader in cultural activity in the Asia Pacific region. The city is also Australia's foremost centre for gastronomy, and shopping. Yes here even shopping is an art! Melbourne offers a shoppers paradise - in its covered shopping arcades, its designer boutiques or the largest and most colourful of its markets the Queen Victoria Market, you can buy just about everything,

Melbourne, is home to 3.2 million people from numerous cultural backgrounds, one quarter of whom were born overseas. Beginning with significant Chinese migration in the 1850s there have been waves of migration ever since so that people from 140 nations now live harmoniously together. The best way to discover their various ethnic communities is by foot or Melbourne's famous trams and along the way sample a few of its 4,000 restaurants and cafes – Melbournians have a real love of food!

They also have a real love of sport – Melbourne is world renowned for its world class sporting events such as the Australian Tennis

Open, the Australian Motor Grand Prix and the 'Melbourne Cup' Horse race – throughout the year there is something going on giving it its name the Events Capital of Australia.

A city of contrasts, Melbourne is sophisticated yet quirky, cosmopolitan yet traditional, historic yet contemporary. It has a unique diversity, vitality and ambience that positions it as one of the world's greatest cities.

Voted the most Liveable City in the world, Melbourne makes sure it lives up to its name in every possible way.

It is a city for everyone.

Do not miss this unique opportunity to visit.

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**Articles for the Chronicle should be sent directly to**

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