

For the Rule of Law**THE REVIEW****INTERNATIONAL COMMISSION OF JURISTS****HUMAN RIGHTS IN THE WORLD**

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Human Rights in the World

Argentina

October 30 1983 will be remembered for ever in Argentine history as the date that heralded the start of the return to a democratic way of life after nearly eight years of military government. On that day, presidential and legislative elections were held in Argentina, and took place in a tranquil and orderly atmosphere. A very high percentage of the electorate – apart from the tens of thousands of exiles who were unable to vote – went to the polls and cast their vote unmistakably for democracy. The Radical Party won by a wide margin with 52% of the votes cast, followed by the Partido Justicialista (the Peronists) with 40%.

The military junta, which, on 26 March 1976, had removed from office a legitimately elected civilian government and proclaimed itself the supreme governing body of the State, must now give way to a civilian government.

Those eight years of military government have, however, left a tremendous debit balance: thousands of dead, hundreds of political prisoners, a list of “disappeared” persons which the most conservative estimates place at 15,000*, tens – perhaps hundreds – of thousands of exiles, the denial and systematic violation of the most

basic human rights and fundamental freedoms, and the destruction of democratic principles and their replacement by others of a repressive and authoritarian nature. The dictatorship’s so-called “military process of national reconstruction” aroused violent emotions by adopting a “dirty war” strategy, first against subversive groups and later against all opposition, whether legal or illegal. It was a political repression that knew no limits and that constituted a veritable State-sponsored terrorism practised by the armed forces and police acting both officially and as paramilitary extremist bands, organized and managed from the summit of political power. In short, the military government in Argentina failed to assume its responsibilities under both national and international law to protect the inhabitants of the country and ensure their enjoyment of their rights. The elaborate legal system for the protection of human rights ceased to function in relation to violations by the armed forces and police in connection with State security (as the military understand this concept).

The military régime was an utter failure in every field, in human rights as well as in economic matters. Military control was extended over the life of the nation in order

* There are documented lists showing the circumstances of arrest or kidnapping of some 7,000 of the disappeared. The human rights organisations in Argentina which have investigated the disappearances are convinced that these lists represent less than half of the total number of disappeared.

to introduce a particular social, political and economic model, which met with resistance from the people. To impose that policy, the military had to close Parliament, ban the activities of political parties and trade unions, censor the press, restructure education along dogmatic lines, and alter the institutional system through which the State functioned. The result of the "model" was the worst crisis in the history of a country that had the potential to be one of the richest in South America. Paralysis and closure of industrial and business companies was followed by unemployment of more than 20%, and wages that are totally inadequate for those who have managed to keep their jobs. The inflation rate is already 600% this year, the external debt is 40,000 million dollars and these are accompanied by financial scandals and widespread corruption in the higher civilian and military spheres.

The failure of the régime in its own military sphere by losing the war with the United Kingdom for the possession of the Falkland Islands (Malvinas) is also important in order to understand the call for elections and a return to democratic life.

All these factors, to which must be added the unceasing resistance of many sectors of society, such as human rights organisations, the families of missing persons, the trade unions and the political parties, gradually forced the military junta to call elections at the end of October with the intention of handing over power in January 1984 to the civilian government elected by the people. The date has now been advanced and the new government is due to take office on 10 December 1983.

There can be no doubt that the task confronting the new government is enormous. Shortly before the elections, two new laws were approved by the military government. These laws will be a further obstacle on the already difficult road back

to democracy and the achievement of national reconciliation and social peace.

Defence of Democracy Law

This law, dated 26 September 1983, is known as the law on the defence of democracy or repression of terrorism. Although it gave the ordinary courts of justice jurisdiction over cases of terrorism — since the 1976 coup they have been tried by military courts — many of its aspects are open to criticism. It was not of course approved by the Parliament, which was dissolved after the military coup d'état, nor was its adoption preceded by a debate in which the opinions of lawyers, judges and others were expressed and exchanged. The law establishes a procedure for pre-trial judicial investigation, and confers unduly wide powers on the security forces and police, who are authorized to enter and search houses at any hour of the day or night, and to search and detain people, all without a previously issued judicial warrant, the only requirement being that the agents concerned should notify the judge involved in the case after the investigation has been completed. They may also intercept written and telegraphic communications and listen in to telephone conversations. Moreover, they can hold people in custody for 48 hours without bringing them before a judge and, with the consent of the judge, extend the period during which they are held incommunicado to as much as 15 days. Lastly, there is no possibility of appeal from the decision of the court in these cases.

The 'Self-Amnesty' Law

Law No. 22,924 has much more serious implications than the defence of democracy law and has given rise to a tremendous

wave of protest. It was approved on 23 September 1983 and is entitled the "Amnesty Law". Under its provisions the military, apart from pardoning *certain* crimes committed with a political motive or purpose, use the amnesty mainly to exonerate themselves from blame for all the violations of human rights committed during the period between 25 May 1973 and 17 June 1982.

This law was preceded by the "Final Document of the Military Junta on the War against Subversion and Terrorism", published on 28 April 1983, and rejected openly and clearly, at both the national and international levels (within the country by the main Argentine human rights organisations, by the families of the persons who have disappeared, by the political parties and groups, by the trade unions and by the Argentine Episcopal Conference). This document, like the Institutional Act by which it was approved, after recognising and unequivocally admitting that the actions and operations undertaken against subversive organisations and against individuals were invariably undertaken by military and police forces of the State, in accordance with plans drawn up by the commando units of the armed forces and by the military junta itself, concludes that "the excesses" committed which "at times overstepped the limits of human rights" were justified by the nature of the struggle, and that these "excesses" may not be investigated by human justice but must be left to the judgment of history and of God.

These "excesses" include the murder of opponents, including political prisoners, torture and ill-treatment and disappearances. The central purpose of the document is to put a stop to all inquiries into these questions, to prevent members of the State security services from being held liable for crimes committed in the so-called struggle against subversion, and to establish a presumption of death in the case of mis-

sing persons.

The problem of the disappeared is one of the most serious consequences of the military dictatorship. As already indicated, it appears that more than 15,000 persons disappeared in Argentina in the last few years. They were, in nearly every case, political opponents of the government, critics of its actions, or had simply denounced violations of human rights. Of the documented cases, 80% were arrested by members of the armed forces or the police, sometimes in the presence of numerous witnesses, at their homes, places of work or study, or on the street. The families of the persons who vanished in this way then suffered the anguish of searching for information about them, approaching all the official institutions, exhausting every possibility offered to them by national law, and even appealing for international action, without, in the vast majority of cases, learning anything as to the whereabouts and fate of their loved ones. As far as the military junta is concerned, these missing persons are to be considered dead and their families and friends who have searched for them for years will never know — if indeed they did die — who killed them, where, when and for what reason.

Among the presumed deaths are those of more than a hundred children who were arrested with their parents or who were born while their mothers were held in captivity. The admirable campaign undertaken by the associations of mothers and grandmothers of the Plaza de Mayo have led to the discovery of 11 missing children who were still alive. It is essential to find out who handed these children over to other families, what happened to their parents, and what was the fate of the remaining children.

Law No. 22,924, the so-called "Amnesty Law", was approved by the President of the Nation, Lieutenant-General Reynaldo

Bignone, acting in the absence of Parliament, under the powers conferred by the Statute of the National Reorganisation Process, a military document which in 1976 redistributed the powers of the State. The text of the law was discussed solely within the military sphere. As noted above, as soon as its main lines were known, they evoked a vast wave of protest, both national and international. Argentine political and social forces rejected it energetically and there were no voices raised in its support.

The law purports to extend the benefits of amnesty to:

1. the authors, participants, instigators, accomplices or accessories after the fact in the case of crimes committed with the motive or purpose of terrorism or subversion, as well as related common crimes and military crimes.

Excluded from the amnesty are a large number of people:

- a) members of illegal terrorist or subversive organisations who, on 17 June 1982, were not residing legally in the country;
- b) those who "by their conduct have demonstrated their intention of continuing to be linked with such associations".

The exceptions given in (a) and (b) mean that, if the law is valid, a large proportion of the exiles (i.e. the class of persons most likely to benefit from an amnesty law) will be unable to return to their country.

- c) those condemned for the crimes mentioned and who have been given a final sentence. In these cases, the law establishes that they may benefit from pardon or commutation of the

punishment which may be decreed by the Executive Power if it is deemed expedient, in the exercise of its powers under article 86, para. 6 of the National Constitution; and

- d) the authors, etc., of common crimes of economic subversion under law No. 20,840.

2. the benefits of the amnesty are likewise extended to the authors, participants, instigators, accomplices and accessories after the fact in the case of crimes committed "upon the occasion or with the purpose of preventing, averting or terminating terrorist or subversive activities, whatever may have been their nature or the legal rights violated". This self-amnesty is intended to shield those responsible for violations of the right to life (homicide).

In all cases, the amnesty applies to crimes committed between 25 May 1973 and 17 June 1982.

In order to comply fully with the purpose of exonerating the agents of the authorities from all responsibility, articles 5, 7 to 12, and 14 of the law carefully establish procedures for doing so. It is interesting to note that no judicial inquiries may be made into the acts covered by the amnesty. Judges, whether civilian or military, "shall reject without any substantiation" charges that are brought, for example, offering evidence as to the liability of the military or the police in the disappearance or death of a prisoner or opponent. A wall of silence has been erected to protect the violators of human rights, a wall that will not be broken down even in the event — already a frequent occurrence in Argentina — that a person formerly missing provides proof that he or she was held secretly in an official place, together with other persons who are still missing. Furthermore, cases

that were being heard in a particular court and that made accusations against a government agent for perpetrating a crime, which was under investigation, will be filed away. A good example of this is the case brought against Admiral Emilio Massera, a former member of the military junta and one of those responsible for the coup d'état, in connection with the disappearance of two persons. Although the case was accepted by a federal judge, it will be filed away and the Admiral will benefit from the amnesty.

Lately, Argentine lawyers, showing remarkable courage, have started legal proceedings in which they have managed to establish the liability of certain government agents in cases of disappearances. Now all these will be relegated to the archives by virtue of the "Amnesty Law".

Lastly, article 6 announces that civil actions (for financial compensation) arising out of the crimes amnestied shall lapse. A special law will determine a régime of compensation by the State.

If the amnesty for crimes with a political motive or purpose served to bring Argentines together again, establish national harmony and social peace and offer one of the bases on which a democratic future could be securely constructed, it would undoubtedly be a positive step. In the present case, and with the text as it has now been conceived and worded, there is obviously a danger that it will become a barrier across the path to national peace and harmony, and jeopardise the aspirations of the government recently elected by the people for national reconstruction without hatred or bitterness.

There can be no doubt that the aim of the military junta in passing this law was not so much to extinguish the penal proceedings and sentences imposed for political crimes, with the consequent release of prisoners and the return of exiles, but to prevent any investigation from being made

into the extremely serious crimes committed over many years against life and integrity of the human person by officials – military and police – endowed with formal authority to act, and who did so in their official capacity, as is evident from the Final Document of the military junta. The result of the application of the law so far has been the release of 200 political prisoners (there are some 300 still in prison) and the placing of a large number of exiles in danger of arrest and trial if they attempt to return.

During the campaign which preceded the elections of October, the majority of candidates and parties spoke out in favour of declaring invalid or repealing the "self-amnesty" law, once the National Parliament has been reconstituted. The legal method of reversing the law should be carefully studied, since, depending on the one chosen, the legal effects may be different.

In Argentine law an amnesty extinguishes the crime and, if a sentence has been passed, it ceases to have effect. It is, in fact, a legal fiction whereby it is presumed that certain acts of a criminal nature never took place and hence, that no liability can be attached to the perpetrators of such acts or to those who were involved in them. Hence the importance of determining whether the Amnesty Law was valid or not. If it was valid, it may appear invidious to seek to repeal it if it was to remove the exoneration conferred by the amnesty and to hold that a person who has been declared under a valid law not to have committed a crime is nevertheless criminally responsible. On the other hand, if the true position is that the Amnesty Law was not valid, and is declared either by the Parliament or by the courts to have been void *ab initio*, no such problem arises. In this case the offenders have never been validly amnestied and remain criminally liable for their acts and omissions.

There are strong arguments for saying that the law was void *ab initio*. In the first place, the original seizure of power by the junta in 1976 was clearly unconstitutional and their assumption of legislative power was illegal. On the return to constitutional rule the courts are, therefore, entitled to refuse to apply the decree laws except where recognition of their validity is authorised under the doctrine of necessity. This was the position, for example, taken by the Supreme Court of Pakistan in the case of *Malik Ghulam Jilani and Altaf Gauhar v. Province of Sind and others* in April 1972 after a military government which had seized power was replaced by a constitutionally elected government.

Another cogent argument is that the Amnesty Law was itself an abuse of power in that it was an attempt by the military junta to exonerate itself and its agents from responsibility for their own crimes.

It is noteworthy that two Argentine examining magistrates, Judges Ledesma and Edwin, have already refused to apply the law in that it would compel them to stop the inquiries they had instituted into the fate and whereabouts of two citizens who disappeared after being arrested by a group belonging to the armed forces. These magistrates consider that, in view of the abominable and inhuman nature of the crimes it was proposed to amnesty, it would be impossible for them to break off their investigations. In October 1983, both declared that they considered the law invalid.

Finally, it would be desirable for the new Argentine government, in deriving its legitimacy and moral prestige from the will of the people, to support the demands for truth and justice made by the families of the victims and take steps to ensure that the conduct of officials and their authorised agents is properly investigated, whatever their rank. Only then, and depending on the results obtained, would it be appropriate to begin to consider the question of an amnesty for officials and others who have some criminal liability. It is imperative for the future of Argentina to protect one of the essential concepts of the rule of law, namely, the liability of servants of the state and their agents, invested with certain powers, for the acts they commit, all the more so when, as in the present case, the crimes committed are particularly heinous, such as the murder of political opponents, imprisonment, abduction, disappearances, torture and cruel, inhuman or degrading treatment. Crimes of this kind, committed with the impunity of state power abusively exercised, arouse the conscience of mankind and can be compared to the category of crimes known under international law as crimes against humanity. On the other hand, without loss of time, the new government should announce a true amnesty for the victims of political persecution, free the prisoners and allow the exiles to return, so that they may all play their part in the process of national reconstruction.

Indonesia

Since our last article on Indonesia (Review No. 18, June 1977) the general election to the House of Representatives has

taken place and President Suharto has been re-elected by the Supreme Consultative Assembly.

The general election in May 1982 was contested by the government sponsored Golkar or Joint Secretariat of Functional Groups, the Partai Persatuan Pembangunan (PPP) or United Development Party and the Partai Demokrasi Indonesia (PDI) or Indonesian Democratic Party. No other parties are permitted to function in Indonesia. The Golkar party secured an overall majority of seats in 25 provinces, with 246 of the 364 seats. Interestingly the Golkar party is not considered as a political party. It is a federation of 260 trade, professional and regional organisations ranging from organisations of civil servants and teachers, to village leaders and students. These organisations which were formed by the former President Sukarno were brought under the control of the New Order Government established by President Suharto after the 1965 attempted coup. Though the leadership of Golkar is dominated by persons from the armed forces, it provides the civilian basis for the military dominated régime of President Suharto. The opposition parties alleged irregularities in the election, in particular accusing the Golkar of using the government machinery and the armed forces for "influencing the electorate".

The other major political event, the re-election of President Suharto took place on March 10, 1983. He had already served three full five-year presidential terms commencing in 1968. He was re-elected unopposed for another five-year term by the People's Consultative Assembly. The People's Consultative Assembly consists of 920 members of whom 460 members belong to the House of Representatives comprising 364 elected and 96 appointed members. The rest of the 460 members of the People's Consultative Assembly are appointed from the regions and from 'functional groups'. A practice prevails that 75 percent of the appointed members belong to the armed forces. Thus the armed forces

are strongly represented in the highest law-making body of the country. This political role of the armed forces was further strengthened by the enactment in October 1982 of the 'Basic Defence Law'. This recognises the 'dual function' of the armed forces by stating that the armed forces are a component of the 'defence force' and at the same time a component of the 'social force'. Thus the armed forces, who assumed power after the 1965 coup, have established a permanent place in the government.

Besides the domination of the armed forces in the government, the 1965 coup has also left the legacy of the problem of political prisoners and the existence of KOPKAMTIB or the Operational Command for the Restoration of Security and Order.

The number of political prisoners still under detention is not clear. In 1979 the government announced that it was releasing the political prisoners in a phased manner. In December 1979, a government spokesman announced the existence of only 166 political prisoners of whom 61 were considered hard-core communists. These numbers were contradicted in a statement released in December 1981, according to which there were 249 'A' category detainees or hard-core communists to be brought to trial and 36,648 persons still in detention under category 'B' (i.e. those who are considered dangerous although there is insufficient evidence to prosecute them). The great majority of the category B prisoners have since been released. The actual number now imprisoned is not known. A conservative estimate puts it as 300 to 400 persons, most of them having been in detention for more than 18 years, but others claim that there are still some thousands of detainees.

The political prisoners who have been released continue to face restrictions on their civil and political rights. According to

an Election Commission announcement made in December 1981, 43,084 ex-political prisoners were debarred from voting in the elections. Restrictions on practising their profession and employment in some private and public sectors continue. Some of the former political prisoners are also required to report regularly to the authorities. Any citizens whose overseas activities might, in the government view, endanger national stability are prevented from travelling abroad. According to an Immigration Department official, approximately 12,000 persons were denied permission to leave the country in 1981.

As already stated, the other legacy of the 1965 coup is the existence of KOPKAMTIB which has become the main institution for the maintenance of internal security. Presidential Decrees made after its inception have enlarged its scope and powers. Presidential Decree No. 179 of December 1965 empowered it to 'restore security, order and authority and integrity of the government through physical military and non-military operations'. Presidential Decree No. 19 of March 1969 authorised it to 'take part in securing the authority and integrity of the government and its apparatus from the central to the provincial administration' and to 'surmount... extreme and subversive activities'. In effect KOPKAMTIB has powers to arrest and detain without warrant, has access to all private and public premises, has powers to ban publications, and scrutinises and approves the passport applications of persons wanting to travel abroad. It has even banned a report of the People's Consultative Assembly, the highest national legislative body. By maintaining the existence of KOPKAMTIB the government deals with the threat to national security without resorting to emergency regulations. KOPKAMTIB is not used only for the maintenance of national security. It also conducts campaigns against corrup-

tion and criminality. Thus an organ with unlimited powers is used for tackling day to day law enforcement problems. But no law has been passed to control or prevent the misuse of such wide powers. Regrettably even the new Criminal Procedure Code passed in December 1981, which provides for minimum safeguards to detained or arrested persons, is not applicable to persons arrested for security reasons by the KOPKAMTIB. KOPKAMTIB was established during a time of crisis in 1965, and it is submitted that if it is to continue under normal conditions, sufficient legal safeguards should be provided to ensure that its powers are not misused and to prevent it from becoming an extra-legal institution. The dangers of the use of extra-legal methods for dealing with ordinary law enforcement was illustrated by recent methods resorted to for curbing the rising crime rate.

A practice has developed in Indonesia whereby, in an attempt to keep down the crime rate, suspected criminals are summarily executed by the armed forces, many merely on the grounds that they are known to be former convicts. This campaign began in 1982 in East Java where nearly 200 persons were shot in this way by security officers. At the beginning of 1983 the practice spread to other areas, including Jakarta the capital. A report published in the Far Eastern Economic Review of 29 September 1983 states that at least 1,400 alleged criminals have been killed by the security forces. A surprising and deplorable development is the open support the security officers have received from persons holding official positions, including the Attorney-General, the Speaker of the Parliament and the Minister of Justice. The Minister of Justice, Mr. Ali Said, admitting that the killings could be the work of security forces, sought to justify their action by saying that the lives of scores of criminals was insignificant compared to the possibility of many thousands

of people falling victim to their criminal deeds.

Following protests about the killings, the Indonesian authorities imposed a ban in August 1983 on the publication of news concerning the killing of criminals. Fears are already being expressed that similar methods could in future be resorted to for eliminating political opponents.

Another allegation made against the Indonesian government is its violation of human rights in East Timor, occupied by its troops since December 1975. Reports that come from East Timor indicate that the armed forces in order to suppress the resistance organisation Fretilin, resort to arbitrary killings, torture and arbitrary arrests. Cases of disappearances of arrested persons are alleged to be common. A disturbing fact was that these violations by the armed forces are officially condoned. This was confirmed when Amnesty International made public manuals issued in July-September 1982 by the then Indonesian Commander for East Timor and his intelligence chief to military personnel serving in the Baucau district of East Timor. These manu-

als contain guidelines which condone the use of physical and psychological torture in certain circumstances during interrogation; provide guidelines to prevent its exposure; condone the issuing of threats on the lives of persons undergoing interrogation to ensure their cooperation; and prescribe a policy of transporting Fretilin supporters and the families of Fretilin members to 'determined places' including the island of Atauro.

Most of the people detained in this island are said to be old people, women and children who are related to Fretilin members and are held as hostages. The International Committee of the Red Cross (ICRC) which is involved in a relief programme in the island states that about 4,000 people are held in the island.

In October the ICRC announced that it is suspending its activities on the main island of East Timor following the refusal of the Indonesian authorities to grant ICRC delegates access to all villages requiring assistance. Such a refusal by the Indonesian authorities reinforces the fears that the human rights situation in East Timor has deteriorated in recent months.

Lebanon

An unusually impartial study on the Lebanon was published in August 1983 by the Advisory Committee on Human Rights in Lebanon (a project of the Middle East Programme of the American Friends Service Committee)¹. After a useful résumé of the background to the present troubles, the study examines the rôle and comportment

of each of the three protagonists, the Syrians, the Israelis and the Lebanese, in the areas they respectively control. It ends with a set of conclusions and recommendations.

The following is a brief summary of the report, which deals with the situation as at July 1983 and well before the armed con-

1) The full report is available from American Friends Service Committee, 1501 Cherry St., Philadelphia, PA 19102, USA.

flict between the pro-Arafat PLO forces and the Syrian-backed 'dissident' PLO, and before the agreement between Israel and the PLO for the release of some 4,000 PLO prisoners in Southern Lebanon in exchange for 6 Israeli prisoners of war.

Background

Lebanon gained its independence in 1943 after more than two decades of French mandate rule. Its population of about 3.2 million citizens (plus one million non-Lebanese, including almost 400,000 Palestinians) is divided among 17 officially recognised religious groups and it is considered a confessional democracy. That is, it operates on the basis of a political system which, by informal agreement, allocates positions in government to different religious groups proportional to their representation in the last official census (in 1932). While at the time of the 1932 census, Christians were in the majority, Lebanon today almost certainly has a Muslim majority. Lebanon's system of government and political participation has not been modified to reflect this shift, nor has it proved receptive to emergent political forces. This has caused internal tensions and frustration on the part of underrepresented groups. It is an oversimplification to say the fighting has been along strictly sectarian lines or over religious issues. In a sense, it is a war between two different conceptions of Lebanon, that of the National Movement, a coalition of progressive groups under the leadership of Druze leader, Walid Jumblatt, which has been calling for a redesign of the Lebanese political system, and that of the Phalange Party, primarily Maronite Christian, which supports the existing political order which ensures continuing Maronite dominance.

A key source of tension over the years

has been that the socio-economic cleavages in the country have reinforced certain religious divisions.

The Syrian-Controlled Area

Syrian troops were invited into the Lebanon in 1976 by the Christian leaders to help the Maronite Christian forces in the civil war. In 1976 their presence was legitimised, with US approval and Israeli acquiescence, at an Arab summit as the major component of an Arab Deterrent Force (ADF) officially charged with helping the central government re-establish law and order, and to keep the peace between the warring factions.

Syria dominates Northern Lebanon and the Bekaa Valley, has over the years supported different sides in the civil war, and is widely believed to be motivated by its long-term goal of making the Lebanon part of 'Greater Syria'.

In autumn 1982, at an Arab summit, it was agreed that the mandate of the ADF not be extended and Syria withdrawal be negotiated.

The status of Syrian forces in Lebanon is now ambiguous. They no longer possess a regional sanction nor has the Lebanese government repeated its original request to the Syrians to play a peace-keeping rôle in the country. The Lebanese have not, however, formally requested Syria to withdraw its forces from Lebanon. Whether or not it is proper to consider the Syrian forces an occupying army, the international law governing occupation is the minimum standard against which Syrian actions in Lebanon should be judged.

Central to the duties of an occupying power, as set out in article 27 of the Fourth Geneva Convention and article 43 of the Regulations attached to the Hague Convention, are the obligations to ensure the

proper protection of the civilian population under its control and to refrain from making any changes in the existing law and administration of the occupied territory.

Safety of Civilians

In all Syrian-occupied areas, Syrian soldiers lack discipline. Civilians stopped at roadblocks are often subject to verbal abuse, harassment, intimidation and physical harm. Cases of kidnapping and arbitrary arrests have been documented and corruption is also common, with many reports of extortion.

In addition, Syria is unable or unwilling to control violence on the part of the zone's various armed groups. As a result, civilians there remain vulnerable.

In the North, civilians are primarily threatened by continuing fighting between anti-Syrian Lebanese Sunni Muslim forces (including members of the fundamentalist Muslim Brotherhood) and Syrian-supported Lebanese Alawites. In predominantly Sunni Syria, the minority Alawite government of President Assad views the Muslim Brotherhood as a serious threat and therefore seeks to contain it in both Syria and Lebanon. By fighting what is essentially an internal Syrian conflict on Lebanese soil, Syria contributes to the hostilities in Northern Lebanon and impedes the extension of Lebanese central authority to the region.

In the Bekaa Valley, one significant source of danger to the civilian population is the conflict between Syrian-backed PLO rebels and the loyalists of PLO chairman, Yasser Arafat. As the occupying power, Syria bears the responsibility for preserving order and protecting people under its control. Instead, as further North where it backs the Alawites, in the Bekaa it is also actively supporting and supplying one side

in the conflict and fuelling hostilities which directly jeopardise civilians. Another factor which contributes to the insecurity of the Bekaa for civilian residents is the presence of armed Iranians and Libyans who entered Lebanon through Syria in order to oppose the Israeli invasion. In their zeal to impose conservative Islamic standards, they have, for example, bombed liquor stores and movie theatres. Iranians have established many checkpoints in the Bekaa and are thought to be responsible for a number of kidnappings.

Detainees

Little information is available on detainees being held by different parties in the Northern regions. It is suspected that Syria is holding an unspecified number of people for political reasons within Syria and that some of these people may have been held since 1977. In addition, Syrian soldiers have detained people in the course of patrols of the area. In the Bekaa Valley, 11 Israelis are being held by Syrian and Palestinian forces. Syria is also believed to be detaining an undetermined number of Lebanese, primarily Phalange militia men, under harsh conditions in Masnaa' and Choura.

Law and Administration

The most serious threat to Lebanese law and administration posed by Syrian actions is their urging, since May 1983, leading Lebanese politicians who oppose the Lebanese-Israeli withdrawal agreement to form a 'presidency council' and establish a separate governmental administration in all parts of Lebanon under Syrian control, thus forming a virtual provisional government challenging the legitimacy of Presi-

dent Gemayel's government. Such a move would add to pressure for the three-way partition of Lebanon and would almost certainly entail the extension of intra-Lebanese hostilities in which civilians would once again be placed most at risk.

Summation

Present Syrian actions in Lebanon constitute a clear threat to the civilian population and to the integrity and future of Lebanese law and administration. A continuation of present trends or the rekindling of the civil war will result in more civilian deaths and the effective separation of the Syrian-controlled zone from the rest of the country. These trends would be reversed by Syrian acceptance of the responsibilities and limitations incumbent upon an occupying power according to international law.

Israeli-Occupied Zone

As late as July 1983, Israeli armed forces occupied the Southern 40% of Lebanese territory. Although Israel and Lebanon signed an agreement on 17 May 1983 that provides for the withdrawal of Israeli forces from the country, Israel has stated that it will not evacuate Lebanon until PLO and Syrian forces also withdraw.

Israel has contended that it is not an occupying power in Lebanon as defined by international law. No international legal authority, however, has supported this position. On 13 July 1983, Israel's High Court of Justice also ruled, in a case concerning the status of detainees Israel holds in Lebanon, that the Geneva Conventions apply and that Israel is an occupying power.

Safety of Civilians

Beginning in last June 1982, Israel permitted the Phalange militia to take up new positions in areas controlled in recent years by the Druze under National Party leader Walid Jumblatt and to establish roadblocks controlling traffic into Druze villages in the Chouf. This introduction of the Phalange has led to harassment and tension that has erupted in armed clashes, shelling and kidnapping of both Christian and Druze civilians by militia groups.

If Israel had acted to freeze the status quo that existed upon the Israeli Defence Forces' (IDF's) entry into the area and to intervene to stop sectarian fighting most of the subsequent deaths and suffering of the civilian population could have been prevented.

Palestinian civilians living in Israeli-occupied Lebanon continue to face serious threats to their lives, property and well-being. The special threat to the Palestinian civilian population in the South is a product of the extreme animosity toward them borne by the Lebanese Phalangists and other rightist Christians and the continuing Israeli policy of allowing the Phalangist and other militia elements access to the Palestinian-populated areas.

The IDF and Israeli-sponsored militias and committees have on several occasions interfered with the operation of UNRWA and other organisations assisting the Palestinians in the South. Clinics and schools have sometimes been closed temporarily, employees have been harassed, cars have been stolen and property destroyed.

Israel also forced the closure of the medical facilities of the Palestinian Red Crescent Society in South Lebanon and arrested most of the male staff members.

It is highly possible that the Israelis hoped to encourage a massive Palestinian refugee exodus from the South Lebanon.

Phalangist militiamen have been left in a position to threaten Palestinians and implement their goal of expelling the Palestine civilian population from the Israeli-occupied city of Sidon. None of the measures the IDF have taken to counter anti-Palestinian violence has ended or reduced the evictions or the accompanying acts of violence. Lebanese also are subject to illegal and sometimes violent actions by the militias and the new civil guard units that Israel has established in the area, and they have been seized and detained at militia offices and bases and have reported being beaten and subjected to degrading treatment while in custody.

Militia and civil guard elements have also interfered with the operation of Lebanese voluntary and charitable agencies working in the South. Especially in the villages of South Lebanon, local militia commanders or heads of the Israeli-appointed civil guard units have coerced local residents to pay 'taxes' and to contribute recruits to their forces with threats of reprisals if their demands are not met.

The most serious threat to the Lebanese in the South as in the case of the Palestinians, stems from Israel's policy of arming and encouraging the proliferation and operation of militia groups.

In recent weeks, Israeli authorities have begun to institute measures that have created new threats to the rights of the civilian population. These measures have been a response to increasing attacks on Israeli forces in Lebanon by guerrillas identifying themselves as the 'Lebanese National Resistance Front'. Incidents which have recurred in Tyre and Sidon have raised fears that West Bank-style policies would become the norm in Israeli-occupied Lebanon.

Detainees

More than a year after its invasion, Israel

continues to hold about 5,000 Palestinian, Lebanese and other prisoners at the Ansar prison camp in South Lebanon, according to both ICRC and official Israeli figures. In addition to those detained at Ansar, Israeli officials have admitted holding prisoners at other locations in Lebanon. There is, moreover, evidence that some prisoners are held at undisclosed locations in Israel. In the early weeks of the occupation, conditions for detainees were frequently very bad. Released detainees report that conditions at Ansar improved considerably after the ICRC obtained access in mid-July 1982. However, the physical facilities are grossly inadequate for long-term detention. Detainees are also at present denied a number of Geneva Convention humanitarian rights that could alleviate the circumstances of their confinement.

As well as the large number of persons arrested on suspicion of security violations, smaller numbers continue to be detained for other reasons. Local Lebanese leaders have been held for non-cooperation with occupation authorities.

Israel continues to refuse to recognise those whom it holds either as prisoners of war or as civilian internees and the treatment of detainees fails to meet the standards of the Geneva Conventions.

Law and Administration

Israel has said that one of its objectives in Lebanon is to encourage the restoration of central government control to the country. Israeli occupation authorities in South Lebanon however continue to carry out policies that contradict this stated aim, for example:

- Israel has encouraged three different militia groups in South Lebanon: the Phalange, the Free Lebanese Army and the

National Guard.

- The IDF has tried to set up a new civilian administrative council in the South. (These attempts to establish militia and civilian units are violations of international law prohibiting an occupying power from changing the existing law and administration of an occupied territory.)
- The IDF has circulated a questionnaire regarding village population and economy to all village heads. This has increased Lebanese fears of a long-term Israeli occupation.
- Israel has interfered with Lebanese trade, commerce and communications.

Summation

Israeli policies in occupied Lebanese territory threaten the lives and welfare of the civilian population, particularly of Palestinians, fail to offer adequate protection of the rights of detainees and create facts and pressures for separating South Lebanon from the rest of the country. These policies continue despite the achievement of a Lebanese-Israeli withdrawal agreement, and create obstacles to the eventual implementation of the agreement. Both to offer adequate protection of civilian rights in the present circumstances and to allow for the possibility of an Israeli withdrawal in the future, it is essential that Israel comply with the international law of belligerent occupation in occupied Lebanon. This should not imply any alteration of Israel's obligation to withdraw in compliance with UN Security Council resolution 508-9.

Lebanese Government Administered Zone

Since the invasion and particularly since the massacres in the Sabra and Shatila re-

fugee camps in September 1982, there has been a tentative re-emergence of pre-civil war accords among Lebanese traditional leaders and a new determination not to let the country slip into anarchy again. In accord with the November 1982 action of the Lebanese parliament, the country is in effect in a state of emergency with the government granted extraordinary powers, presumably to continue until such time as law and order are fully restored to the country. Under these conditions, citizens and residents do not enjoy all the rights and protections usually afforded them.

Safety of Civilians

In the area of Beirut under the control of the Lebanese government serious threats to the safety and welfare of civilians include random violence due to the fact that political stability in the area has not yet been fully restored, a pattern of attacks on opposition groups, the lack of available housing for poor communities, the need for affordable medical and social services, and problems related to visas, work and residence permits.

In addition, the failure of Lebanese prosecutors to bring to trial any of those who carried out the Sabra and Shatila massacres even when the identities of some were known, creates an impression that the security of Palestinians in Lebanon is not given adequate consideration.

In Mount Lebanon and East Beirut, the Lebanese Forces (the militia of the Phalange Party) have, as in the Chouf and South Lebanon, been implicated in some of the most brutal abductions and killings in the period under consideration. These are directed for the most part at Palestinians, Lebanese Muslims and those sympathetic to groups advocating reform in the Lebanese political system. As a result,

those who differ politically or ethnically from the Phalange are at serious risk when travelling in areas under their control.

Phalange checkpoints are often the site of such attacks. Passengers are frequently forced out of cars, and verbally harassed or physically abused and detained, sometimes for a period of hours or days or longer.

The problem of housing people displaced in the last eight years of conflict has reached crisis proportions and poses a serious challenge to the ability of the Lebanese government to respond effectively and sensitively to the needs of all its people. From a strictly humanitarian point of view, these people should not be displaced unless adequate provisions can be made for them.

Palestinian Red Crescent Society (PRCS) facilities, medical supplies and staff have since the invasion become targets of official and unofficial harassment and abuse.

A pattern is emerging of official obstacles faced by certain groups (e.g. the Palestinian community) and individuals in their efforts to obtain work and residence permits and visas and to renew travel documents.

Detainees

In October 1982, the Lebanese Military Attorney General admitted 1,441 people were being held in detention. The government said that it was holding them because their papers were not in order, but in many instances the motivation appeared to be political. Arrests were carried out without warrants. Conditions of detention were bad; press reports spoke of extreme crowding, lack of sanitation, etc. There were reports of beatings during interrogation and of deaths in prison; the prisoners were not allowed family visits or access to legal counsel and the ICRC was not permitted to see them. The Lebanese government finally

granted the ICRC access to some of its prisoners on 19 March 1983 and by June most prisoners' situation had improved considerably. Many of those detained have been released and many still being held are being accorded due process under Lebanese law. It is impossible to establish the number of people who have been detained or are currently being held by the Lebanese Forces as they have never granted international representatives access to their places of detention. After the massacres at the Sabra and Shatila refugee camps perpetrated by Lebanese rightist militias, in addition to the 384 killed, another 991 were missing. Hundreds more have joined the ranks of the disappeared since then.

On 23 March 1983, the Lebanese Minister of Internal Affairs and the Great Mufti (the Muslim religious leader) expressed the belief that all those taken by the Lebanese Forces, particularly those abducted during the massacres at Sabra and Shatila, had been killed. The number of such deaths estimated at the time was over 800.

The government of President Gemayel at present exerts effective control over only greater Beirut and relies for assistance in keeping the peace upon MNF contingents from Britain, France, Italy and the U.S. Lebanese authority is slowly being restored. There are two potential issues of concern from a humanitarian point of view, the evolving relationship between the government and the Phalange, and the likely future government attitude toward members of heretofore under-represented and poor communities including, but not limited to, Palestinians.

By distancing himself from the Phalange militia and by courting the leaders of West Beirut, President Gemayel appears to have gained the support of the Phalange Party and of significant elements of Lebanon's Muslim community.

Lebanon has yet to articulate firm poli-

cies regarding the approximately 400,000 Palestinians in the country and regarding housing and residence and work permits.

Although Lebanese governmental authority theoretically extends to the Kesroun and Metn districts of Mount Lebanon and East Beirut, in fact the Phalange and its militia are the dominant military and political authority in these areas and continue to exert considerable influence in regional affairs.

The Phalange, which has a natural constituency in these traditionally predominantly Maronite areas, has carried out a number of quasi-governmental functions there for many years; for example, it has collected taxes to pay for maintenance of roads, collection of garbage and other urban projects or public works, in addition to protection of the population.

This situation now interferes with the efforts of the central government to extend its authority into these areas. President Gemayel faces a delicate situation regard-

ing the Phalange Party, which is his party and was founded by his father, and regarding the Lebanese Forces which were commanded by his brother and are reluctant to cede the considerable power they have gained. The situation may have been improved by President Gemayel's victory over the Lebanese Forces in the recent elections for the Phalange Politburo.

Summation

Application of the rule of law and respect for internationally accepted human rights standards are essential to the efforts of the government of Lebanon to re-establish its authority, win the confidence and cooperation of its people and secure vital international support. Recently, there have been encouraging signs that some human rights abuses by the government have diminished.

South Africa and the Ciskei

South Africa persists in its policy of creating homelands with the objective of making all Blacks citizens of these supposedly independent puppet states and aliens in the rest of South Africa. This leaves South Africa with the problem of the status of the Coloureds (i.e. those of mixed race) and the Indians. This has now been resolved by a new Constitution which grants the Coloureds and the Indians very limited participation in parliamentary activity. The changes were approved in a referendum by two-thirds of the White South

Africans (who alone were entitled to vote). In this way a legal wedge was drawn between the Coloureds and the Indians on the one hand, together totalling 3.5 million, and the Black majority on the other (25 million). The proposal for this constitutional reform caused chain reactions among the Blacks, leading in four months to the formation of three large political coalitions, which the South African press characterised as an unprecedented event in the past quarter of a century. There has not been any consultation with the Coloureds and

Indians about the proposal. Prime Minister Botha has simply said: "We will see later how their traditional leaders wish this to be done."

Under the new Constitution the Parliament, composed of 308 members, is made up of three Houses: the House of Assembly with 178 White members, the House of Representatives with 85 Coloured members, and the House of Delegates with 45 Indians members.

The President of the Republic assumes the functions of Head of State and Government. He is elected by a simple majority by an electoral college made up of 50 Whites, 25 Coloureds and 13 Indians, elected separately by the three chambers.

Each House legislates separately on matters concerning its own community, and it falls to the President of the Republic alone to decide, without any appeal even to the Supreme Court, if a matter is of a 'community' or of a 'general' nature.

The Houses each vote separately on matters of a general nature. In the case of a disagreement between the three Houses, the President submits the draft text to the 'President's Council' either for decision or advice. This Council has 60 members, 20 Whites elected by the House of Assembly, 10 Coloureds by the House of Representatives and 5 Indians by the House of Delegates. The remaining 25 are appointed by the President, of whom 10 are nominated by the opposition parties in the three Houses.

The President is head of Executive, appoints the ministers, presides over the Cabinet, and is Commander in Chief of the armed forces. All legislation requires his assent. He also nominates 8 members of parliament (4 Whites, 2 Coloureds and 2 Indians). He continues to be responsible for the control and administration of "Black affairs", i.e. the affairs of the overwhelming majority of the population, the unrepresented Blacks.

The Ciskei Homeland

An article in ICJ Review No. 30 of June 1983 described the practice of torture in one of the homelands, Venda. Since then another homeland, the Ciskei, has become notorious for its brutally repressive government as a result of a report published in October 1983, prepared by Mr. Nicholas Hayson of the Centre for Applied Legal Studies of the Witwatersrand University in South Africa. The report is entitled "Ruling with the Whip".

The Ciskei was the fourth homeland to be granted 'independence', in December 1981. It has a population of about 700,000, almost half of whom have been re-located there from 'white' South Africa in the last 20 years. The capital, Mndantsane, is a 'township' (i.e. a dormitory suburb), second only in size to Soweto, which provides the labour force for the neighbouring town of East London in 'white' South Africa.

The Ciskei is ruled by Lennox Sebe, who ousted the Chief Minister in 1973. Although a commoner he has proclaimed himself a Chief, and more recently 'President for Life'. He is leader of the single party, the Ciskei National Independence Party (CNIP). He rules largely through the Chiefs and the headmen who, as Mr. Hayson points out, have in addition to their power to allot land, "extensive executive authority, control the distribution of social welfare grants, and receive financial rewards". The Ciskei parliament has only 22 elected representatives and 32 appointed tribal personages. To enforce his rule Sebe has an extensive security apparatus, including the police force, the Ciskei Central Intelligence Agency (CCIA) (which works closely with its South African counterpart), the Traffic Police, and, at times of unrest, an unruly force of auxiliary police or vigilantes, formerly known as the Green Berets. The head of this apparatus was the

President's brother, Major-General Charles Sebe, until he was recently arrested along with several colleagues, including the Minister of Transport (another brother of the President) apparently for plotting to overthrow the President for Life.

On 19 July 1983 the publicly owned Ciskei Transport Corporation (CTC) announced an 11% fare increase. The leaders of the SAAWU and other unions formed a 10-man Committee to negotiate with the CTC, but were curtly told that the increase would come into effect. Thereupon a boycott of the buses was called. At tremendous sacrifice and in face of appalling brutality and harassment the workers have maintained an 80%–90% successful boycott for months. The President's determination to break the boycott and the severity of the methods used has had the opposite effect to that intended. It has strengthened the determination of the people not to yield, has increased recruitment to the unions, and produced a remarkable confrontation between the people and their oppressive government.

The authorities have attempted by quite illegal use of force to make people catch the buses. Among the methods used have been violent attacks by vigilantes and police against car owners and taxis trying to take people to work or to the railway stations; passengers have been whipped with sjamboks (made of dried rhinoceros hide); cars have been confiscated; assaults have resulted in broken limbs and other serious injuries to men and women alike; commuters attempting to catch trains have been similarly assaulted and even fired upon, in over 90 cases fatally. Seeking to avoid these assaults many workers have walked up to 40 kilometres a day to and from work or the trains. A curfew was imposed from 10.30 pm to 4.00 am and enforced by vigilantes for longer hours as a harassment. Of 700 alleged curfew violations in the first week,

only 32 were convicted, they were fined 100 Rand or 50 days imprisonment.

Over 1,000 people have been arrested, many for non-existent offences, such as failure to produce on demand documents they were not obliged to carry. Most of these have eventually been released, either without trial or on the prosecution's failure to produce any evidence against them in court, but only after they have been detained for days or weeks in abominable overcrowded prison conditions. The most horrific of the places of detention is the Siza Dukashe stadium manned by vigilantes. Up to 80 persons at a time have been locked for days in rooms only 8 metres square, with no toilets, no washing facilities, no food or water and no blankets. They have had to defecate on the floor.

Systematic torture included, in addition to beating with sjamboks or electric cables, the 'helicopter' (suspension for hours from a rod or pipe with the hands handcuffed to the feet), hooding with a wet sack to the point of suffocation, and other familiar South African torture methods.

Extensive use was made of the powers of administrative or 'preventive' detention under which people can be held incommunicado without charge and without any right of appeal to the courts for up to 90 days (renewable). Their families are not entitled to know their whereabouts. These powers under the National Security Act have been used to detain over 70 people, including trade unionists, students, journalists, political figures and community leaders. One was a defence lawyer, Hintsa Siwisa, who had made an application to the Ciskei Supreme Court for an interdict restraining the police from assaulting commuters (the order was granted, but the practice continued). The effect of his detention was, of course, that many victims of assaults felt there was no law firm to which they could turn for help. When two

South African lawyers were engaged to replace him, they were promptly banned from the Ciskei. Similarly a Dr. Mauli who recorded evidence of assaults by the security forces was detained.

At the date of publication of Mr. Hayson's report in October, the boycott was still being successfully maintained in spite of, and largely because of, the brutality with which it had been met. At the time of going to press in December, it is understood to be still continuing.

The Rule of Law in South Africa

A 62-year-old Anglican clergyman, Reverend Timothy Stanton, was imprisoned in September 1983. He is to serve a sentence of six months in Diepkloof Prison for having refused to answer questions connected with a police investigation of alleged high treason by a 22-year-old student, Carl Niehaus. The student tried to commit suicide a month after his detention, and he has since been condemned to 15 years imprisonment. The Reverend Stanton stated, "Mr Niehaus is my friend, although I don't know him very well. I have no idea of what he has done or is supposed to have done to be accused of high treason, but I have faith in him. I believe that he is concerned with contributing something towards a more just order of society than the one existing here. I would wish to support him in this. Testifying for the State against this young man would be a cause of shame for the rest of my life. I feel that this would be a form of treason and I cannot do it." This case illustrates the acuteness of the situation of State witnesses in political trials.

South Africa has for long been finding it difficult to persuade people to testify against the accused in political trials. Since 1965 the detention of witnesses in police cells has been authorised. Today, Section

31 of the Internal Security Act 1982 authorises the detention of potential witnesses until the completion of the trial, provided only that the accused is charged within six months of the date of the witness's detention. This may result in detention for months and even years. The government's argument that such detention is to protect the witness, does not bear examination, especially in view of the conditions of detention. They are kept in isolation, they have no legal representation, and they are interrogated brutally to obtain from them information which may be used before the courts. Those who refuse to testify may be prosecuted and condemned to sentences of up to 5 years in prison. Those who testify but whose testimony differs from previous statements may be accused of perjury. In spite of these pressures the resistance to acting as State witnesses is increasing.

Press Freedom

Since the introduction of new press regulations in South Africa in February 1983, the task of the liberal press has been made increasingly difficult. For several months there has been practically no news concerning the activities in Namibia of the armed wing of SWAPO or of the South African Defence Force, except for official reports.

A political correspondent of the Windhoek Observer, Gwin Lister, has been charged under the South African Customs and Excise Act, the Publications Act, and the Internal Security Act on the basis of certain documents found in her possession. On returning from the United Nations Conference on Namibia held in Paris on April 25-29, she was detained for several hours at the Jan Smuts airport by the security authorities. Documents she had brought back from the conference were seized. They

included United Nations publications, and also other publications made available to conference participants such as the International Defence and Aid Fund's 'Apartheid's Army in Namibia' which, like other publications of this 'banned' organisation, are prohibited in South Africa. She was called to the Windhoek Security Police headquarters in June to learn that legal proceedings had been started against her and that the case was being studied by the Attorney-General of Transvaal. Proceedings have also been taken against several other journalists, and a number of South African newspapers have been warned that an investigation has

been opened against them under Section 27(b) of the Police Act. This section makes illegal the publication of any statement concerning the South African police or one of its members in the exercise of its functions without having reasonable grounds to believe that the statement is true. These proceedings apparently relate to reports in the Rand Daily Mail, The Sowetan, The Citizen, Die Burger, and a report of the South African Press Association concerning comments made by the Catholic Archbishop Denis Hurley on atrocities committed by the South African forces in Namibia.

Sri Lanka

At the end of July 1983, Sri Lanka witnessed its worst outburst of ethnic violence since independence, causing severe loss of life and property to the Tamil minority*. This did not come as a surprise to those who have been following events in the country.

The October 1982 Presidential election and the referendum held in December to extend the life of the Parliament (see ICJ Review No. 29 for comments) were followed by an increase in the activities of the small Tamil terrorist organisation called the 'Tigers'. A Sri Lanka government publication lists 16 instances of violent acts by the Tigers between October 1982 and the beginning of July 1983, which includes the killing of eleven persons belonging to police, army and navy.

With the growing failure to prevent the terrorists' activities, the government started using the Terrorism Act more widely. For example, on November 11, 1982, 30 people were arrested. These included 8 priests, 6 belonging to the Catholic church and two to the Anglican and Methodist churches. A university lecturer and his wife were also arrested on the same day. On November 17, two of the Catholic priests, Fr. Singarayer, Fr. Sinharasa and the university lecturer Mr. Nityanandam and his wife Mrs Nirmala Nityanandam were charged under the Prevention of Terrorism Act. They were accused of withholding information about terrorists and harbouring them. (The other six Catholic priests were released.)

Fr. Singarayer in a letter addressed to the President of the Bishops Conference of

* For a detailed analysis of the ethnic problem see *Ethnic Conflict and Violence in Sri Lanka*, by Prof. Virginia A. Leary, ICJ, Second edition updated by the ICJ staff, August 1983.

Sri Lanka stated that he was tortured and made to sign statements.

In the predominantly Tamil districts protests were organised for the release of the priests and others. On 10 December a protest fast and a prayer meeting were organised at St. Anthony's church at Vavunia. After the prayer meeting, the gathering was attacked by the army, who even entered the church to assault some of the people. This led to further protest in the form of *hartal* (closing of shops and business establishments) in the town of Vavunia.

The beginning of 1983 saw a continuing escalation of the violence by both sides, the Tamil terrorists and the Sri Lankan army. In January a U.N.P. organiser was shot dead at Vavunia by the terrorists. In February a police Inspector and a driver were shot dead. In March an army vehicle was ambushed and five soldiers were injured.

The counterviolence by the army and police included an attack in March on a refugee settlement helped by a voluntary organisation called the Ghandhiyam Society.

The Ghandhiyam Society, which was formed in 1976 as a social service organisation, had been involved in rehabilitating the refugees of the 1977 and 1981 racial riots. These refugees had fled from the southern parts of Sri Lanka and had settled down in the existing Tamil villages in and around Trincomalee district. The Ghandhiyam organisation with the help of church agencies from West European countries had been helping these refugees to build houses, dig wells, and use better methods of cultivation, and was conducting health and education programmes.

One such village settlement in Pannakulam in Trincomalee district was attacked on 14 March 1983. Sixteen huts were burnt and the Ghandhiyam volunteers were intimidated. Though the affected families filed a complaint, no action was taken. In the beginning of April Dr. Rajasundaram,

the Secretary and Mr. S.A. David, the President of the Ghandhiyam Society were arrested. It was alleged that both were tortured, and even after a court order access to their lawyers was delayed. Both were accused of helping the Tamil terrorists through the Ghandhiyam organisation. Dr. Rajasundaram was one of the persons killed in the Colombo prison riots between 25 and 29 July 1983.

Events that took place in the months of May and June clearly indicated that the situation was deteriorating seriously.

On May 18, polling took place for 37 municipal and urban Councils and 18 Parliamentary seats. It was reported that between nominations and polling day, militant Tamil youths had launched a violent campaign for the boycott of the polls. Two U.N.P. candidates and the party secretary of the Jaffna district were shot and killed. Acts of violence to disrupt the elections in the Jaffna district were maintained right up to election day on 18 May, when several polling stations were attacked with homemade bombs. The major confrontation came after the voting ended, when a gang of armed Tamil youth stormed a polling station two miles from Jaffna in a bid to seize the ballot boxes. An army corporal on guard duty was killed and four policemen and a soldier were wounded.

At 5 pm on the same evening, a state of emergency was declared. Later in the night, in what was clearly a retaliatory strike, soldiers burnt houses and vehicles and looted in the general vicinity of the polling booth in which the incident had taken place. Several million rupees worth of damage was done before the soldiers were pulled back to their barracks.

A report published on the incident in the *Far Eastern Economic Review* of 2 June 1983 quoted a senior police officer as saying, "what happened in Jaffna after the shooting is exactly what the terrorists want;

they want the people to be resentful and embittered with the army”.

On 1 June 1983, a farm and a children's home in Kovilkulam village near Vavunia and run by the Ghandhiyam Society was burnt. Mr. Tim Moore, Honorary Treasurer of the Australian Section of the ICJ who was able to visit the place in June 1983, says in his report that he “discussed the operations of the movement with a wide range of people in Sri Lanka and came to the conclusion that it is not involved in politics or with the Tigers, but is a genuine social service organisation”. The Sinhalese suspicions with respect to its resettlement activities appear to arise more from increases in Tamil populations in areas close to Sinhalese settlements than from any legitimate grievances about its activities”.

The army continued to penalise the Tamil community at random for the actions of the militant Tamil youth. For example on 1 June, two members of the airforce were killed by the Tamil youth while they were making routine purchases in the local market in the town of Vavunia. One of the shops was alleged to have been used by the Tamil youth to attack the two airmen. In retaliation, soldiers set fire to the shop and the adjacent shops. Mr. Tim Moore, who inspected the site, says that the damage “extended to some 16 or 17 small shops and destroyed the means of livelihood and a considerable portion of the assets of the traders involved”.

The innocent Tamils affected on both occasions had no possibility of claiming compensation for the losses incurred by the illegal acts of the soldiers. Such disciplinary action as was taken against the soldiers involved in the May 18 incident was withdrawn by the government when 40 soldiers of the same regiment deserted in protest.

The situation was aptly summarised by a correspondent of the Far Eastern Eco-

nomics Review of June 23, 1983, reporting from Jaffna on the May 18 incident. He said, “At present the northern and eastern provinces are experiencing a vicious circle of violence: terrorism followed by reprisals by the army and other security agencies, which have led to a drastic deterioration of law and order”.

In the midst of this increasing violence by the army and police an Emergency Regulation was promulgated on 3 June 1983, authorising the police, with the approval of the Secretary to the Minister of Defence, to bury dead bodies in secret without any inquest or post mortem report. This extraordinary ordinance applies to the burying of any dead body, including persons who have died in custody.

In October this year when the report of the Sri Lanka government was presented to the Human Rights Committee under the International Covenant on Civil and Political Rights, some members of the Committee expressed serious misgivings about this Emergency Regulation. They questioned the need for providing such unlimited powers to the police in respect to burial or cremation of dead bodies. When replying to questions, the Sri Lanka representative argued that the Secretary to the Minister considers documents pertaining to the case like a magistrate before authorising a burial without inquest, the only difference being that the proceedings were not public. He said that people were excluded from the funeral in order to prevent attendance by sensation-seeking journalists who might further exacerbate the feelings of the majority community. This hardly seems an adequate reason for excluding the relatives.

Inquest proceedings on deaths in custody is a safeguard against torture and extrajudicial killings. An inquiry by an executive officer cannot be considered equal to a judicial inquest.

In addition to the promulgation of this

Emergency Regulation, the government's lack of respect for the rule of law was evident in three cases in which a mantle of protection was thrown over officials who had exceeded or abused their powers. In the first case two soldiers who had been arrested and remanded in connection with the shooting of a lame Tamil youth were released by the magistrate on the instructions of the Attorney General. In the other two cases the government promoted police officers against whom the Supreme Court had passed strictures for exceeding their authority. This was justified by the government on the grounds that the police must be able to do their duty without fear of the consequences of adverse court decisions.

Asked by members of the Human Rights Committee to comment on these cases, the government replied that in one case the promotion was of a 'routine nature' and in the other the officer concerned had complained to the Supreme Court that he had not been a party and that his fundamental right to a fair hearing had been denied. It appears from this that the government still disregards the opinion of the Supreme Court which found that the actions of the police were unlawful.

In face of this it is not surprising that the police and army increasingly take the law into their hands.

In these circumstances, the tension between the Tamils and the Sinhalese increased and became widespread. The Far Eastern Economic Review of 23 June 1983, reported "what cannot be ignored is the current total alienation of the Tamil region from Colombo, plus an unusually high degree of antipathy between the Tamils and the majority Sinhalese communities of Sri Lanka".

In the same month Gamini Navaratnae, a Sinhala journalist wrote in the Saturday Review, an English language weekly published in Jaffna,

"After six years of United National Party rule, Sri Lanka is once again near the incendiary situation of 1958. Let's hope to God that no one, from any side, will provide that little spark that is necessary to set the country aflame. The politicians of all parties, should be especially careful about their utterances in this grave situation."

Unfortunately the spark was provided on 23 July, when thirteen soldiers were killed in an ambush by members of the small Tamil terrorist organisation. According to a report published in the London Times on 27 July, the soldiers were killed in reaction to the abduction and rape of three Tamil women by a group of soldiers. In addition, three days before the ambush, two suspected terrorists were shot by army soldiers at Meesalai Chavakacheri, fifteen miles from Jaffna. The government denies the rape allegation and says that it was fabricated after the ambush. Tamil sources insist that the incident took place, and that as often occurs the women concerned, afraid of the social stigma, were not willing to state it publicly.

These conflicting reports only go to support the demand for an impartial inquiry to investigate the causes of recent violence.

The official death toll of the riots between 24 July and 2 August 1983 is 387 and the number of homeless in Colombo alone at the peak of the violence was estimated at 90,000 by a senior official. Tamil sources claim that over 2,000 people were killed.

The most disturbing aspect of the riot was the conduct of the armed forces. On 7 August President Jayawardene disclosed that the army in Jaffna had gone on the rampage in response to the killing of the thirteen soldiers on 23 July and had killed 20 innocent civilians. He also disclosed that this information had been withheld from

him by the army until 7 August. The Civil Rights Movement of Sri Lanka has alleged that the number of people shot and killed by army personnel was much higher than the 20 officially admitted. It has also been reported that on 25 July a group of 130 naval personnel in Trincomalee in another outburst of violence burned down 175 Tamil houses, killing one Tamil and wounding ten others, before they were stopped.

There are numerous reports that police and army stood by idly, while rioters beat or burned people to death. An example is the following Associated Press report from Norway,

"A Norwegian tourist back from Sri Lanka told an Oslo newspaper yesterday that she had witnessed the mass murder of Tamils by a Sinhalese mob.

"A bus full of Tamils was forced to stop just in front of us in Colombo, a Sinhalese mob set it on fire and blocked the doors. Hundreds witnessed that about 20 Tamils were burned to death," said Mrs Eli Skarstein of Stavanger.

Mrs Skarstein added that "Swedes they met said they had also seen people pour petrol directly over Tamils on the road and put them on fire. There was no mercy. Women, children and old people were slaughtered. Police and soldiers did nothing to stop the genocide".

Another deplorable incident during the riot was the killing of 52 Tamil prisoners in Colombo's Welikada jail. The government allege that they were killed in a riot by other prisoners. Of the 52 prisoners, 35 were killed on 27 July and another 17 on 29 July, raising questions as to how the assassinations could have been repeated after an interval of two days without the connivance of the prison officials. In the magistrate's inquiry held on the killings, the Chief Jailor of the prison is reported to

have said that the authorities at the Colombo prison had information that there might be a second attack but the Tamil prisoners "could not be moved in time... to save them". The magistrate's inquiry returned a verdict of homicide in all cases and directed the police to make further inquiries as the prison officials testified that they were unable to identify any of the persons responsible for the killings.

The impact of the communal violence on the Tamils was shattering. More than 100,000 people sought refuge in 27 temporary camps set up across the country. Commenting on the violence Neelan Tiruchelvam, a Tamil lawyer and member of Parliament, stated, "the latest round of violence has put the finishing touch to the eradication of the Tamils. This time the Tamil professional and entrepreneurial class has been destroyed".

A government spokesman has denied that the destruction and killing of Tamils amounted to genocide. Under the Convention on the Prevention and Punishment of the Crime of Genocide, acts of murder committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such are considered as acts of genocide. The evidence points clearly to the conclusion that the violence of the Sinhala rioters on the Tamils amounted to acts of genocide.

Surprisingly President Jayawardene in his first public comment made three days after the riots had begun, did not condemn the violence against the Tamils. In trying to placate the majority Sinhalese, he seemed by implication to justify the atrocities. The most likely explanation of this extraordinary statement is that it was only by speaking in these terms that he was able to restore discipline in the army and police, and reestablish order.

Following the communal violence the government announced the banning of three

left-wing parties for their alleged involvement. The three banned parties were the Janata Vimukti Peramuna or Peoples Liberation Front, the Nava Sama Samaj Party or New Equal Society Party and the Communist Party of Sri Lanka. Several members belonging to these parties were arrested and detained incommunicado without access to relatives or lawyers. No evidence has been published to establish any link between the violence and these three parties. Subsequently it has been reported that the ban on the Communist Party of Sri Lanka has been lifted and the arrested leaders released.

In August the Parliament approved an amendment to the Constitution under which all members of the Parliament, other local bodies and government employees were required to take an oath that he or she 'will not directly or indirectly in or outside Sri Lanka support, espouse, promote, finance, encourage or advocate the establishment of a separate state within the territory of Sri Lanka'. Any person who fails to take such an oath would cease to hold office.

The Tamil United Liberation Front (TULF) which is the main opposition party in the Parliament instructed its members not to take the oath with the result that on 21 October the TULF members of Parliament forfeited their seats by not attending sittings of the House for three months.

At the time of its formation in 1976 the TULF did pass a resolution advocating secession. However, the subsequent history of the Party shows that its leaders have repeatedly shown readiness to compromise, have never advocated or had recourse to any unconstitutional action and have clearly denounced and dissociated the party from the terrorist 'Tigers' organisation. Even after the recent disturbances they indicated to the Indian Prime Minister, who was trying to mediate, that the TULF was

willing to negotiate with the government of Sri Lanka, if no preconditions were imposed. Given this background the amendment to the Constitution has only alienated the TULF, since the leaders of the party were placed in an impossible situation politically, for they would have forfeited the confidence of the Tamil population if they had decided to take the oath. The amendment to the Constitution has left the Tamils without any representation in the Parliament and in effect has disenfranchised the Tamil people.

Even after the visit of the Indian Prime Minister's envoy to mediate between TULF and the Sri Lanka government, President Jayawardene was not willing to recognise the political role of TULF in the negotiations unless the TULF members took the oath. As a consequence TULF was not invited to the all-party conference called by the President on 21 October to deal with the problems of the Tamils. All major opposition parties invited to the conference declined to attend on the grounds that the conference would not serve any purpose without the participation of the Tamils.

The non-recognition of TULF's political role and the constitutional amendment may well contribute further to the politics of separatism. The present lull gives an appearance of normalcy, but the grievances of the Tamils still exist and have grown with the injustices done to them during the recent disturbances. Reports of violations by the police and army continue, and a renewal of violence is widely feared.

In a statement circulated in August 1983 to members of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the International Commission of Jurists urged that

— since innocent Tamils unconnected with violence or terrorism have been the prime victims, immediate measures should be

- taken to ensure the safety of Tamils in refugee camps, en route to Jaffna or elsewhere in the island, and to convince them that they will be adequately protected;
- humanitarian assistance to the uprooted and displaced Tamils should be facilitated;
 - firm control over elements in the armed forces and elsewhere which are found to have contributed to the recent violence should be established, and the killing of and other attacks on innocent Tamils by the armed forces in retaliation for terrorist actions must cease;
 - a dialogue with legitimate representatives of the Tamil population with a view to resolution of outstanding grievances should be established. National unity can clearly be maintained only with the

effective political participation of the Tamils who represent 20% of the population;

- it should demonstrate its commitment to the Rule of Law through repeal of the Prevention of Terrorism Act which violates Sri Lanka's international obligations under the International Covenant on Civil and Political Rights to which it is a party; and
- it should establish an independent judicial inquiry to investigate the causes of the recent violence, the events occurring during the violence, and to assess responsibility for the resulting loss of life and devastation. The killing of detainees in Walikada prison should be the subject of a special investigation. Those responsible for arson and killing should be prosecuted regardless of any official position.

Tanzania

Seven years have passed since the Dar-es-Salaam seminar of the International Commission of Jurists on Human Rights in a One-Party State. In the introduction of the publication resulting from this seminar, Niall MacDermot observes, "the experience of the last 25 years has shown that the Western type of parliamentary democracy in its full sense has survived in very few Third World countries, and then usually only in countries with a very small population. New forms of society have emerged, many of them authoritarian, others of a more liberal nature. Perhaps the most interesting of these is the one-party democracy as developed by Tanzania and Zambia. These countries have repeatedly declared their commitment to the principles of the

Rule of Law and to the enjoyment of basic human rights. They consider, however, that their one-party system is better adapted to their needs and political, economic and social circumstances and offers them a truer form of democracy than would the Western multi-party system".

Tanzania has a tradition of respect for the Rule of Law, marred only by the widespread use for many years of administrative (or "preventive") detention. One need only recall the creation by President Nyerere of an Investigation Commission to investigate torture and ill-treatment of prisoners. The results of this investigation led to the resignation of two ministers and two higher civil servants who were in no way implicated directly in the treatment inflicted upon the

suspects. President Nyerere stated that he accepted their resignation 'with great sorrow', in order to establish the principle of political responsibility in Tanzania. It is also in Tanzania that for the first time in Africa the institution of an ombudsman appeared in the form of a collegial board: a permanent investigation commission directly answerable to the Head of State. In these circumstances it is all the more disappointing that Tanzania should have recently introduced a law, examined below, which seriously violates the principles of the Rule of Law.

Constitutional Debate

Tanzania is at present engaged in a nation-wide debate on the amendment of its Constitution. The process has been inspired by a desire to ensure a greater degree of participation by the people at all levels. The three main issues around which the discussion focuses are the role of the National Assembly (the parliament), the tenure of office of the President, and the structure of the federal government (Tanzania being a federation of the islands of Zanzibar and Pemba and the mainland of Tanganyika).

At present 53% of the National Assembly are executive appointees, which ensures a permanent majority for the government. A legal seminar at the beginning of 1983 recommended that the majority should be composed of elected constituency representatives to make it a more effective check on the executive.

The debate on the tenure of the Presidency derives from Nyerere's declared intention not to stand again in 1984 after his 22 years' presidency. Most people seem to prefer a maximum of two terms of five years. There are also recommendations for an organ to advise the President on preventive detention, and declarations of war and

states of emergency.

The most important issue is the structure of the government. The principal conflict is between those who wish to see a single central government and those, in particular in Zanzibar, who want a considerable degree of autonomy for the constituent parts of the federation and a weaker central union government. The Attorney-General of Zanzibar and Chairman of Zanzibar's Law Reform Commission said in London recently that Zanzibar's President, Sheikh Aboud Mwinyi Jumbe, who is also Vice-President of Tanzania, would "go all out for a new, loose federal system with strong governments for Zanzibar and mainland Tanganyika and a third federal Tanzanian government with fewer powers".

Another matter worth mentioning is the question of legal aid to the poor, and in particular the rural poor, which has aroused interest in Tanzania. The Chief Justice, Ndugu Francis Nyalali, has said that he would soon take up the matter with the Tanzania Law Society, in the hope that "barefoot lawyer practice" would flourish to help peasants.

These and many other issues have been discussed by the Congresses of the single party, the Chama Cha Mapinduzi (Rally for the Revolution) in 1981 and 1982, and a special committee of the party is now scrutinising some 9,335 proposals from different individuals and institutions.

Economic Sabotage

The Party and the Government have at the same time been considering measures to face up to the mounting economic difficulties resulting from various internal and external factors. It will be remembered that at the end of 1979 Tanzania rejected the economic reforms proposed by the International Monetary Fund (IMF), which

included currency devaluation, reduction in the growth of the public sector, loosening of governmental control on imports and foreign investments, and liberalisation of monetary controls. Moreover, the economic crisis has worsened owing to the most severe drought that Tanzania had known in 20 years.

Among the measures adopted was a campaign against 'economic sabotage', which led to the resignation of a number of higher civil servants and party leaders.

On 22 April 1983 an Economic Sabotage (Specific Provisions) Act 1983 was passed, and made retroactive to 24 March 1983. It is to remain in force for one year, unless prolonged for a further six months. Among other provisions it

- (i) gave the President power to establish a special tribunal (made up of nine members presided over by a judge) to try crimes of "economic sabotage";
- (ii) authorised the President to order that all economic sabotage offences be heard and determined by the Tribunal;
- (iii) defined "economic sabotage" to include a number of existing economic crimes (e.g. exchange control offences, hoarding, dealing in stolen goods, illegal trade practices, unlawful acquisition of property, corruption) as well as a new offence defined in the following vague terms: "an act or omission ... which ... if done or omitted without lawful excuse and for a purpose prejudicial to the economic safety or interests of the United Republic would or is likely to damage, hinder or interfere with a necessary service or its operation";
- (iv) excluded any concurrent jurisdiction of the ordinary criminal courts for such offences;
- (v) gave the Tribunal power to pass sen-

tences of up to 15 years imprisonment;

- (vi) excluded the normal rules of evidence and entitled the Tribunal to receive any evidence it thought fit to be received;
- (vii) excluded any right of appeal, other than an appeal to the President of Tanzania against sentence.

A few days before this law was passed, the ICJ Secretary-General wrote to President Nyerere urging its reconsideration and pointing out that in a number of respects it appeared to be in conflict with Tanzania's international obligations under the International Covenant on Civil and Political Rights to which Tanzania is a party (e.g. retroactivity, absence of a right of appeal against conviction).

It was pointed out that experience in other countries has shown that where special tribunals are created with exclusive jurisdiction to try particular classes of offences, with no right of appeal,

- the special tribunals tended to be lax and arbitrary in their application of the law, knowing that they cannot be overruled;
- it undermined the independence of, and public respect for, the ordinary judiciary, particularly where, as here, the special tribunal is composed largely of non lawyers.

There is no doubt that crimes of corruption, black market dealing and other economic crimes are extremely serious for a country such as Tanzania struggling to overcome poverty. Nevertheless, it was submitted, the creation of special courts was neither necessary or desirable to deal with the problem. If there was temporary congestion of the courts, the matter could be resolved by designating ad hoc temporary

Commissioners from those lawyers qualified to be appointed as judges. To erode international standards for defence rights and the jurisdiction of the courts only served to undermine confidence in the justice system.

On 8 July 1983 an Economic Sabotage (Special Provisions) (Amendment) Act was passed, also made retroactive to 24 March 1983. So far from removing the conflicts with Tanzania's international obligations it added to them by

- excluding the right to counsel or other representative ("No person, other than the accused person, by whatever title or designation known, and whatever the position he holds in relation to the accused person, shall have a right to appear before the Tribunal and be heard for the purposes of advocating the case for the defence of the accused person" (section 13));
- excluding even the right to appeal against

sentence ("The decision of the Tribunal in any proceedings before it shall be final and conclusive, and shall not be subject to review by any court or person in any capacity" (section 22)). This appears to exclude even the Presidential power of clemency or amnesty).

Among the other amending provisions was one excluding the possibility of bail or other provisional release from custody of accused persons (section 4).

The prospects for a fair trial before a special Tribunal of which the vast majority need not be, and presumably will not be, qualified judges, and which operates within the procedures specified in the Act and Amending Act, can only be described as remote. Moreover, the very existence of such a Tribunal strikes at the independence of the judiciary and of the legal profession, and runs the risk of bringing the judicial system into contempt.

Uruguay

The plebiscite of November 1980, when the electorate rejected the draft Constitution prepared by the military, can be regarded as marking the beginning of the slow but gradual process of replacing the military régime, a process that has not yet been completed.

Trade Unions

In May 1981, the government passed law 15,137 on Professional Associations, which regulates the organisation and activities of the trades unions. Although this law

restricts trade union rights, and is criticised by the ILO Committee on Freedom of Association, by international trade union confederations and by the Uruguayan trades unions on the grounds that it violates ILO Conventions 87 and 98 (to which Uruguay is a party), it nevertheless enabled the trade union movement to become active once again. The workers have organised themselves in a skilful manner by using the legal openings afforded to them by law 15,137.

In a short time, they transformed themselves into a large and organised force, which began to ask serious questions about the economic policy of the régime and to

call for urgent measures to deal with the decline in wages and employment and the economic crisis in general. The extent of their following is shown by the fact that they managed to bring together more than 100,000 people in Montevideo to celebrate the 1st of May. This was the first demonstration of its kind permitted by the government in the last ten years. It was convened by the Inter-Union Workers' Plenary (PIT), which, in spite of comprising 130 trades unions, is not officially recognised by the government.

Law on Political Parties

In June 1982, the government approved the "Organic law on Political Parties" which partly restored political activities that had been in suspension and subject to persecution since the 1973 coup d'état. However, the law is clearly anything but democratic in that it only allows three existing parties to be active – the Colorado, the Nacional (Blanco) and the Unión Cívica – to which should be added any new parties that conform to the requirements of the law (art. 57). This law severely restricts the right of political association. It maintains in force Institutional Act No. 4¹ of September 1976 and the proscription from political activity of 11,000 Uruguayan citizens for 15 years. It also forbids all political activity by parties "which, by their ideology, principles or denomination, or their mode of activity, indicate that they

are directly or indirectly connected with parties, institutions or organisations that are foreign or are connected with other states" (art. 10). In addition, it forbids all political activity on the part of parties in which there are persons who "have belonged to associations that have been declared illegal by the competent authority". The competent authority is the Executive, acting by virtue of special powers granted by the state of emergency in force since 1968.

Consequently, parties such as the socialist, communist and christian democrat parties, those affiliated to the socialist international and to the social democrat movement, are forbidden to be active and even to exist. The socialist and communist parties have been banned by law since 1973 and their militants continue to be persecuted and punished under the terms of law 14,068 on state security.

This was the situation at the time of the "internal elections" of November 1982 when the electorate had to vote by secret ballot for members of the National Conventions – governing bodies – of the three authorised parties. Proscribed citizens, who included left-wing militants as well as various leaders of the authorised parties, could not stand for office. The Convention members who were elected then nominated the directorates or executive bodies of their respective parties.

The political campaign before these elections was marked by persecutions and arbitrary arrests. Five leaders of the Nacional Party (Blanco) and one from the Colorado

1) The "Institutional Acts" are a new category of legislation that had not been envisaged in Uruguayan law. They come into effect simply by Executive Decrees, known as Constitutional Decrees, and hence approved with far fewer conditions and with the intervention of a smaller number of authorities than are required for the adoption of an ordinary law. They nevertheless are utilised to amend the Constitution without following the procedure laid down in it for that purpose, and above all without the submission of the amendment to the decision of the electorate by plebiscite, as is required in the constitution. The 14 Institutional Acts approved so far have been based explicitly on the doctrine of national security, a concept which was incorporated only after the military coup d'état of June 1973.

party were arrested and tried by military courts on the grounds of "insulting the Armed Forces" in speeches made in party meetings. A large number of meetings and events were prohibited.

The result of the internal elections was a defeat for the candidates supporting the régime and an unambiguous expression of the people's desire to return as soon as possible to a democratic way of life. The votes cast for the lists that were most strongly opposed to the régime, added to the blank votes cast by banned left-wing groups, represented 83% of the total vote, while the candidates supporting the régime obtained only 17%. This was the second electoral reverse suffered by the régime.

Dialogue Between Politicians and Military

On 13 May 1983, a "dialogue" was opened between the military and the executives of the three authorised parties. The generals demanded the approval of a new constitutional text as the prerequisite to the re-establishment of democracy. In this text an attempt was made to reintroduce many of the ideas that were embodied in the text which was rejected in November 1980, viz., the maintenance of political bans, the right of military courts to try political crimes committed by civilians, restrictions on the right to strike and the authorisation of long periods of incommunicado detention of persons arrested on suspicion of having committed a political offence. An attempt was also made to perpetuate, through the constitution, the Armed Forces' control over governmental institutions and the people in general.

The three parties were agreed in opposing these demands. They broke off the dialogue on 5 July 1983 on the grounds that it was a military monologue rather than a

dialogue, that the basic rights of the inhabitants of the country were not a proper subject for compromise, that the Armed Forces had shown a complete lack of flexibility, and that the government had abused the patience of the political parties, all of which was incompatible with the continuation of the dialogue.

Decrees of 2 August 1983

On this date, the government adopted two new repressive and particularly serious measures in response to the firm attitude displayed by the parties, measures which call into question the "military time-table" (the name by which the military plan for a return to a civilian government is known).

The first measure was an Executive Decree, which again prohibited all public political activity as well as the dissemination, by any means whatsoever, of any news or commentaries referring to political activities or matters prohibited by this decree. This meant the suspension of the meagre political activity that had been authorised some months earlier in preparation for the dialogue with the military, and the imposition of complete censorship on these matters.

The second measure was the approval, on the same day, of Institutional Act No. 14, which authorised the Executive to sanction, by the loss of their political rights for two to fifteen years, citizens who:

- a) violate or have violated the law of June 1982 governing the activities of political parties;
- b) have been tried since 12 June 1976 or may be tried in the future for crimes against the nation (i.e. political offences) or against the public administration. "Tried" signifies persons against whom penal proceedings have been instituted,

whether or not the trial ends in a stay of proceedings or the discharge of the prisoner on the grounds that he has been proved innocent;

- c) by their disorderly behaviour, acts or omissions disturb the peace and public order.

These three premises involve serious sanctions of a penal nature, applied by administrative means. As the measures adopted under Institutional Act No. 14 are considered for all purposes "acts of government" (Art. 1), they cannot be questioned or disputed before the courts, and there is no recourse whatsoever against them. Moreover, (a) and (b) are retroactive, and thus contravene a basic principle of Uruguayan law. Premise (c) is so vague as to permit the government to penalise anyone it wishes by the loss of his or her political rights.

Institutional Act No. 14 continues and amplifies the effects of Institutional Act No. 4, which was enacted in September 1976 and on the basis of which more than 11,000 cases of political proscription have been decreed in a country with fewer than three million inhabitants.

Human Rights Organisations

Ten days after the decrees, on 12 August, several members² of the Servicio Paz y Justicia (SERPAJ-URUGUAY) began a fast which was to last until 25 August, on which day the people were asked to reflect on the situation of the country, refraining from all non-essential activities (it was a

public holiday) in order to meet together in their homes, parishes and clubs.

SERPAJ was created in 1981 to promote and safeguard human rights. Its activities included denouncing torture and ill-treatment and the situation of political prisoners, providing legal aid for them and financial assistance for their families, searching for persons who had "disappeared", assisting and advising trades unions and their members, helping the homeless and the marginal population, teaching adults to read and write and publicising questions of human rights. It very soon became extremely active and was indeed the only body to succeed in organising itself and working – despite the repression – in defence of human rights³.

Its relations with the government were never good but deteriorated drastically when SERPAJ touched on highly sensitive areas of government policy as, for instance, when it disseminated a document on the torture in June 1983 of a group of more than 20 young students who were accused of being militant communists, or when it denounced the treatment as hostages of nine Tupamaro leaders, who have been kept for ten years in almost complete isolation in various military units and subjected to inhuman and destructive treatment. The fast and the general mobilisation it brought about lit the fuse. On 25 August, their premises, which had already been surrounded by the police and deprived of running water and electricity, were invaded and the occupants expelled. Early in September, the government approved a decree by virtue of the special powers granted under the state

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- 2) The Jesuit Fathers Luis Pérez Aguirre and Jorge Osorio and the Protestant Pastor Ademar Olivera.
3) The families of political prisoners were always dealt with harshly when they tried to organise themselves. Some were tried in the military courts for "helping a subversive association" in denouncing the conditions of imprisonment. Finally, in July 1982, with the sponsorship of SERPAJ, they submitted a petition for a general amnesty to the government, which was later taken up by the trades unions and political parties. The government has not replied to the petition.

of emergency, prohibiting indefinitely all activity on the part of SERPAJ and authorising the seizure of its property, assets and premises.

The decree expressly bases itself on the assumption that the body in question maintains links with "subversive organisations" without any supporting evidence or particulars. It goes on to state that SERPAJ undertook a "mixture of religious and typically political activities" which "creates confusion".

Protests by the People

In the last few months, after the interruption of the politico-military dialogue, the decrees of 2 August and the muzzling of SERPAJ, a widespread movement of protest has begun among the people, and is expressing itself with increasing strength and frequency in such ways as simultaneously banging pots and pans through Montevideo and in several other towns, turning off the lights in a co-ordinated fashion for about 15 minutes, street demonstrations in different parts of the town, which have brought together tens of thousands chanting slogans against the military and calling for a return to democracy. For example, "national days of protest" were held on 25 August, 25 September, 23 October, 9 November and 30 November⁴ 1983. These events were sometimes organised by the political parties – both banned and authorised – and sometimes by the PIT trades unionists or by university students. During the protest of 9 November 1983, in addition, all activities ceased nation-wide for a few minutes, the street demonstration was stopped by violent repressive action on

the part of the security services, ending with scores of wounded and more than 200 under arrest.

On 8 October, the two principal parties, the Blanco and the Colorado, made a very firm public statement, associating themselves with the people's protest and calling on the military to take concrete steps that would give the plan for returning to a constitutional régime and the rule of law some credibility, and put an end to political persecution while restoring public freedoms.

It seems clear that the elections which have taken place in Argentina and the establishment in that country of a democratic government on 10 December will play a positive and significant part in the restoration of democracy in Uruguay in view of the closeness of the two countries and the important ties that link them.

Constitutional and Economic Situation

The decade of military rule, during which the Armed Forces assumed complete control over the political, economic and social life of Uruguay⁵, have plunged the country into a profound crisis. The constitution has not been respected and has been arbitrarily amended by 14 Institutional Acts which have altered the constitutional structure of the state; since 1968 a state of emergency has been in force; Parliament has been closed since June 1973, a General has been made President of the Republic; the political parties and trades unions have been forbidden to be active; the right to strike has been rescinded; the rights of meeting and assembly have been considerably curtailed, and more than 11,000 citi-

4) The protest held on 30 November was the most important one in which about 400,000 people participated in Montevideo.

5) See *ICJ Review*, Nos. 24 and 27, and *Bulletin of the CIJL*, No. 9.

zens have been proscribed and prevented from exercising their political rights. Torture has been practised repeatedly and systematically and has led at times to the death of detainees; the treatment in the military detention establishment is inhuman, as the UN Human Rights Committee has recognised on various occasions when considering communications; the judiciary has lost its independence, and military judges have replaced civilian judges in trying civilians accused of infringing state security; habeas corpus has never been granted by the military courts; detainees have sometimes been held incommunicado for months and the rights of defence during trial have been restricted. The press has been severely censored; more than 150 decrees have been issued closing newspapers and publications and suspending radio broadcasts⁶ without any judicial intervention. State employees regarded as opponents of the government, including teachers and university staff, have been dismis-

sed on a massive scale and far-reaching changes have been made in education, the curricula being altered in order to orient them ideologically.

From the economic point of view, the application of a highly liberal model has had severe negative effects and worsened the crisis considerably. National industry is partly paralysed, and the rate of unemployment is 16% according to the official figures and 25% according to the unions. In the first nine months of the year, inflation reached 40% and the external debt is 4,000 million dollars, having increased six times over during the last decade. In the same period, the purchasing power of salaries has decreased by 55%.

Against all this, a vigorous wave of protest has now arisen, led by the political parties, the trades unions and the university students, who are calling for the return of the military to their barracks, the immediate restoration of democracy and respect for the rule of law.

6) In September 1983, the weeklies "Aqui" and "Opinar" were closed for a month on the grounds of disturbing the peace and public order. In both decrees (16 September) whose texts are almost identical, they are censured for having printed news of a trade union day of protest that was being planned because its petitions included political demands and in particular a call for amnesty.

Discrimination in Employment Special Studies by the ILO

In June 1979, the ICJ published an article in its *Review* No. 22 which described the operation of a number of procedures established by the ILO to monitor the application of its agreements.

This article examines another kind of procedure involving situations of discrimination in employment and occupation, which has been prohibited by ILO Convention No. 111 of June 1958. In 1973, machinery was set up by the ILO Governing Body for carrying out "special studies" prepared by experts appointed by the Director-General of the ILO, to verify and evaluate allegations of violations and to seek solutions.

The first requirement is the existence of a pattern of violations – and not isolated cases. Discrimination is taken to mean any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Special measures of protection for certain types of workers are not deemed to constitute discrimination.

Requests for "special studies" may come from four distinct sources:

- a) a member state of the ILO, with respect to questions that arise within its jurisdiction;
- b) a member state, with respect to questions arising in another member state;

- c) employers' organisations;
- d) workers' organisations.

In this way, the tripartite character of the ILO is respected.

When the Director-General receives a request of this kind, he must consult the government in whose jurisdiction the problem arises and, if the government concurs, the study will be undertaken in consultation with it. If the request is made by the very government in whose jurisdiction the difficulties arise, no procedural problem exists. But in what cases will a government ask for a study to be made of a situation in its own territory? One such case might be if the presence of external and impartial observers would help it to dissipate internal difficulties and to demonstrate that any complaints levied against it are baseless. Another reason might be to dispel concern expressed at the international level.

It is more usual, however, for the requests to come from the other sources mentioned, for example, when a government claims that its nationals working in another State are discriminated against. The admissibility of the request depends on whether it indicates the existence of a clear and direct link between the interests of the requesting government and the alleged discrimination. Unless it does so, the request will not be acted upon.

Requests from employers' or workers' organisations must emanate from a national organisation directly concerned with the

situation, from international organisations having consultative status with the ILO, or from other international or regional organisations, always provided that the questions directly affect or concern their national affiliates.

The Director-General, who will have before him a report by the ILO Committee on Discrimination, may ask the requesting party and the State concerned to provide further information on the matters under consideration. If the request is regarded as reasonable, and provided that the government concerned gives its consent (or the request has come from it), the Director-General will lay down the terms and scope of the study, after consulting the parties concerned.

The study will be carried out either by the ILO itself or by independent experts from different regions of the world, selected from an existing list.

On the basis of the findings of the study, or on the background information available if the government has not agreed that the study should be carried out, or if for any reason the study could not be finished, the Committee on Discrimination will submit the recommendations that it deems appropriate to the Governing Body, to which it is answerable.

In 1982, a request was made for a study on Uruguay. It came from the Convención Nacional de Trabajadores, a trade union confederation (in exile) which had been declared illegal by the military government in 1973 and which, at the time it was dissolved and banned, consisted of more than 80% of the unionised Uruguayan workers. The CNT pointed out that Institutional Act No. 7, approved by the *de facto* regime on 27 June 1977, constituted a legal basis for discrimination in matters of employment and occupation on the grounds of political opinion. Institutional Act No. 7 had abolished the guarantee of security of tenure

for government officials, although the Constitution in force guaranteed tenure in order to safeguard them against political persecution. It also authorised the dismissal of officials from the public administration on the grounds of improving the service or of public interest without any obligation to justify the dismissals, and such dismissals are deemed to be ordered by government decision and cannot be reviewed at any judicial level. The application of the Act made it possible for a large-scale political and ideological purge of government employees to take place, when such employees were known to be active members of unions, of political parties in opposition to the government or of political parties proscribed by the government, even if their activities dated back to the time when they were permitted by law. Tenure of office thus no longer depended on merit or dedication but on ideological beliefs. In this way, reasons based purely on ideology, or on political or trade union affiliation underlay others claiming to be inspired by the interest of improving the service or enhancing efficiency.

The Uruguayan government, in addition to denying the allegations made about Institutional Act No. 7, refused to give its consent to a study on the grounds that Uruguay had not ratified Convention No. 111 concerning Discrimination in respect of Employment and Occupation and therefore was not bound by its provisions, as indicated in article 8 of the Convention, and did not fall to be monitored by the ILO. The government stated that "the respect due to the general principles contained in the Constitution of the ILO should not be used as a pretext to require Member States to apply conventions which they have not ratified, as in the case of Uruguay and Convention No. 111".

Although the study could not be undertaken owing to the objections of the Uru-

guayan government, an interesting legal point had been raised. The Committee on Discrimination, in a report of 7 February 1983 (GB.222/CD/2/2) referred to the views expressed on several occasions by the Committee of Experts on the Application of Conventions and Recommendations in dealing with questions of discrimination. The Committee took the view that as protection against discrimination on the grounds of political opinion formed part

of the objectives established in the ILO Constitution, it was not expected only of the countries that had ratified Convention No. 111, but could be required of all ILO Member States. It also considered that the special studies procedure was applicable to all Member States.

The position taken by the Committee on Discrimination is an important premise for the development of international law.

UN Sub-Commission on Discrimination and Minorities

The 36th Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities was held in Geneva from 15 August to 9 September, 1983.

Mr. Kurt Herndl Director, UN Centre for Human Rights, in his opening statement recalled the Commission on Human Rights' resolution (1983/22) in which it had expressed its belief that it would not be appropriate for the Sub-Commission to take decisions affecting its own status, role and competence.

Following a review of its working methods and future work, the Sub-Commission called on the Secretariat to prepare a background note with an outline of a five year programme of work. A five member work-

ing group is to study next year the note to be prepared by the Secretariat and the Sub-Commission suggested that the members of the proposed working group should attend the 1985 Session of the Commission on Human Rights, so as to have an exchange of ideas with the members of the Commission.

High Commissioner for Human Rights

This year the members at the request of the Commission on Human Rights again discussed the establishment of a post of High Commissioner for Human Rights. Differing views were expressed. One was that

the implementation of human rights rested with States and establishment of such a post would run counter to the UN Charter based on cooperation between States. Another was that the proposed High Commissioner would not implement human rights but urge, help and advise states with regard to implementation. Further, establishment of such a post would lead to a progressive absorption by his office of the majority of existing special procedures. The resolution containing the Sub-Commission's detailed proposals for the post of a High Commissioner for Human Rights was adopted by 16 votes in favour, three against and three abstentions. This is a very positive development since a comparable resolution last year obtained only a single-vote majority. The resolution suggested that if the post is established the High Commissioner for Human Rights should,

- Carry out specific mandates and tasks assigned by the General Assembly, the ECOSOC and the Commission on Human Rights.
- Initiate direct contacts with governments whenever necessary to safeguard or restore respect for human rights. Such contacts should be confidential.
- Should report annually to the General Assembly, ECOSOC and the Commission on Human Rights.
- Should give special attention to ensure effective enjoyment of all rights bearing in mind that all human rights and fundamental freedoms are indivisible and interdependent.

Further the Sub-Commission proposed that the bureau of the Commission on Human Rights should act as an advisory Committee to the High Commissioner, and that the High Commissioner should be elected by the General Assembly for a period of five years on the principle of regional rotation.

Elimination of Racial Discrimination

The Sub-Commission recommended that the Commission authorize Mr. Eide to carry out a study on the achievements made and obstacles encountered during the first decade for action to combat racism and racial discrimination, with a special emphasis on the progress made between the first and second world conferences on racism. It also recommended that the Commission adopt a resolution condemning Israel for its continued occupation of Palestinian territories and its persistence in developing colonisation of these territories, and call upon Israel to withdraw immediately from such territories.

Human Rights Violations

The Sub-Commission recommended the appointment by the Commission of Special Rapporteurs for Iran and Afghanistan.

It proposed that the Rapporteur on Iran should study the reports of serious violations of human rights, particularly the allegations of summary and arbitrary executions, torture, detention without trial, religious intolerance and the lack of an independent judiciary.

On Afghanistan, it proposed that the Special Rapporteur examine the human rights situation with a view to formulating proposals which could contribute to the protection of human rights of all residents of the country, before, after and during the withdrawal of all foreign forces.

On Chile it deplored the fact that the peaceful demonstrations undertaken by democratic groups have been brutally repressed causing loss of many lives, and urged the Chilean authorities to put an end to all repressive measures.

Concerning El Salvador it recalled the General Assembly resolution expressing

concern about the prevailing climate of repression and insecurity, and expressed the view that the situation of armed confrontation must be considered as falling within the scope of Common Article 3 of the Geneva Conventions of 1949 and the Protocol II to these Conventions. The Sub-Commission suggested that the Special Rapporteur should give attention to the respect or violation of humanitarian law in armed conflicts.

On Guatemala it expressed its deep concern that the persistent and systematic nature of the violations of human rights have made impossible the effective exercise of economic, cultural, civil and political rights. It called upon the Government of Guatemala to refrain from forced displacement of the Indian communities and their confinement in strategic hamlets, as well as massacres, scorched earth policies and forced disappearances.

On East Timor, recalling its earlier resolution which deplored the fact that the gravity of the situation was not being given sufficient attention by a large part of the international community, it recommended that the Commission continue to consider with attention the evolution of the situation of human rights and fundamental freedoms in East Timor.

On Sri Lanka, many members and NGOs, including the ICJ, expressed concern about the events in Sri Lanka at the end of July. A resolution expressed concern about the recent communal violence and requested the Secretary-General to invite the Government of Sri Lanka to submit information on the recent communal violence and to submit it to the Commission.

The Sub-Commission adopted a resolution concerning the human rights of disabled persons in which, commenting that human rights violations continue to be a substantial cause of disability, it decided to

consider at its next session the question of preparing a thorough study on human rights and disability.

The Effects of Gross Violations on Peace and Security

During the discussion on this item, many members expressed the view that it was a complex subject and should be examined in greater depth before arriving at any conclusions. Speaking on this item Mr. Artucio, an ICJ Legal Officer, drew attention to the existing situation in central America as one where violations of human rights give rise to a risk of war between the countries of the region, threatening both peace and international security.

A resolution pertaining to Nicaragua recommended that the Commission express its vehement concern about the situation of undeclared war threatening the future of the country. Another resolution requested the Secretary General to prepare an analysis on the subject of 'the effects of gross violations on peace and security' and to present it to the Sub-Commission at its next session.

The Administration of Justice and the Human Rights of Detainees

The Working Group on detention made the following recommendation, which was adopted by the Sub-Commission,

- to include an agenda item entitled derogations under Article 4 of the International Covenant on Civil and Political Rights, and to submit to the Commission for its consideration an annual report on proclamations, continuances or terminations of states of emergency with reliably attested information on com-

pliance with the internal and international rules governing states of emergency.

Other resolutions:

- expressed the conviction that unacknowledged detention of persons, whatever their condition, is inadmissible conduct on the part of any state member and requested the Working Group on Detention to prepare a draft Declaration against Unacknowledged Detention of Persons and to submit it at its next session;
- requested the Commission to invite the Committee on Crime Prevention and Control to consider how the question of restraints on the use of force by law enforcement officials and military personnel might be effectively examined by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders;
- taking note of the existence of a state of siege on a permanent basis in Paraguay recommended the Commission to invite the Government of Paraguay to consider ending the state of siege in order to encourage the promotion and protection of human rights;
- expressed alarm at the growing number of deaths of political detainees in South Africa and strongly condemned the campaign of repression, detention and persecution of South African patriots;
- requested Mr. Joinet (France) to prepare a general study of a technical nature on amnesty laws and their role in the safeguard and promotion of human rights.

Protection of Persons Detained on Grounds of Mental Disorder

Mrs Erica Irene Daes introduced her re-

port on the 'Principles Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder'. She concluded that there is an imperative need for action, in particular by states, for the protection of the fundamental freedoms, human and legal rights of the mental patient. Of her 21 basic recommendations the first suggests that the governments should adapt their laws, if necessary, to the draft body of principles, guidelines and guarantees for the protection of the mentally ill, which she appended to her report. Mrs Daes referred in her report to the 'remarkable' contribution of the ICJ and the International Association of Penal Law, which was reflected in her draft principles.

A Working Group established to examine the draft body of principles has not yet completed its work.

The Sub-Commission recommended that Mrs Daes's study should be published and given the widest possible distribution.

Indigenous Populations

For the second year the pre-sessional Working Group on Indigenous Populations was attended by a large number of indigenous people and organisations. The Sub-Commission endorsed a plan of action under which the Working Group will deal in 1984 with the problem of land and other natural resources, and with the definition of indigenous populations. The following four sessions will consider the

- right of indigenous populations to develop their own culture, traditions, language and way of life, including the right to freedom of religion and traditional religious practices;
- right to autonomy and self-determination, including political representation

and institutions; the duty of indigenous populations, as of all others, to respect universal human rights;

- right to education;
- right to health, medical care and other social services;
- right to legal assistance and protection in administrative and judicial affairs;
- right to association;
- right to social security and labour protection; and
- right to trade and to maintain economic, technological, cultural and social relations.

The NIEO and the Promotion of Human Rights

The final report of Mr. Raul Ferrero on the NIEO and Promotion of Human Rights, and the Preliminary report of Mr. Eide on the Right to Adequate Food as a Human Right were discussed.

Mr. Ferrero stated that the present economic order is a serious obstacle to the realisation of human rights and concluded that in the establishment of a new international economic order full respect for human rights must be seen both as an end in itself and as an essential means.

The Sub-Commission in referring the report to the Commission suggested that a study should be undertaken on the impact on human rights of the policies and practices of the major international financial institutions, most notably the International Monetary Fund and the World Bank.

Another resolution requested the special rapporteur Dr. L.M. Singhvi to give consideration in his study on the 'Independence of the Judiciary and the Legal Profession' to the most appropriate means by which the international community could contribute to strengthening legal institutions, especially in developing countries, with a

view to promoting full respect for human rights.

Slavery and Slavery like Practices

The Working Group on this subject received extensive information from the ICJ and other non-governmental organisations on bonded labour, exploitation of child labour and traffic in persons and the exploitation of the prostitution of others.

In its report it requested that its name should be changed to the 'Working Group Against Slavery, Apartheid, Gross Human Exploitations and Human Degradation'. Though many members referred to it in the Sub-Commission no action was taken on the suggestion.

Resolutions under this item recommended the Commission

- to request competent UN bodies to offer states coordinated, legal, technical, administrative, educational, financial and other practical assistance to eliminate conditions conducive to slavery and slavery like practices, and
- to call upon the Government of Iran to cease immediately the use of children in the armed forces, especially in time of war.

Conscientious Objection to Military Service

Mr. Eide and Mr. Mubanga Chipoya presented their final report on the 'Question of Conscientious Objection to Military Service'. They recommended that States should recognise by law the right of persons who - for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian or similar motives - refuse to perform armed service to be re-

leased from the obligation to perform military service.

As a minimum, persons should have a right to be released from the armed service if they consider that their service is likely to be used to enforce apartheid, to occupy illegally a foreign territory, to participate in actions amounting to or approaching genocide, in situations contributing to gross violations of human rights, or in situations where weapons of mass destruction outlawed by international law may be used. The report has also recommended that states should provide alternative service for objectors including social work, or work for peace, development and international understanding. The Sub-Commission transmitted the report to the Commission requesting it to make appropriate recommen-

dations to the ECOSOC.

The Chairman of the Working Group on the Encouragement of Universal Acceptance of Human Rights was asked to prepare a discussion paper analysing the type of difficulties preventing states from becoming parties to the international instruments of human rights.

The Sub-Commission proposed as Special rapporteurs:

- Mrs Odio Benito to prepare a study on the Elimination of Religious Intolerance.
- Mr. Mubanga Chipoya to prepare an analysis of current trends and developments in respect of the right of every one to leave his country and return, and to be able to enter other countries.

Human Rights Committee

It is with sadness and a deep sense of loss that we report the death of two members of the Human Rights Committee, Abdoulaye Diéye (Senegal) in March 1983 and Leonte Herdocia Ortega (Nicaragua) in October 1983. Both made valuable contributions to the promotion and protection of human rights and to the work of the Committee. Special ceremonies were held by the Committee to honour their memories.

Reports Under Article 40

During its 17th, 18th and 19th sessions¹ the Committee considered the reports of Australia, Austria, France, Iceland, Lebanon, Mexico, Nicaragua and Peru. There are at present 77 States parties to the International Covenant on Civil and Political Rights and 31 to the Optional Protocol, and 15 States have made declarations under article 41. The most recent States to

1) These sessions are covered in the Committee's annual report to the General Assembly contained in General Assembly Official Records, 38th session, Supplement No. 40 (A/38/40).

have acceded to the Covenant and the Optional Protocol are the Congo and Luxembourg.

The members of the Committee continue to emphasise to each of the delegations appearing before them that they are seeking a constructive dialogue with the States parties concerning the problems being faced in the implementation of the rights protected by the Covenant, and that the Committee's questions should not be viewed in any sense as an attack on a particular State party. The Committee recognises that every country faces problems in the implementation of the Covenant. Most of the States parties have accepted the questions in this spirit. Several have indicated their willingness to have the Committee identify those areas where additional legislation is needed or where changes in legislation might be necessary to bring national legislation into conformity with the Covenant. When members of the Committee have expressed concern about particular legislative provisions, most State party representatives have indicated that they would relay these concerns to their governments.

In order to ensure the effectiveness of this process, the Committee needs additional assistance from the UN Secretariat. The UN Centre for Human Rights has undertaken to review the second round periodic reports, make a comparative analysis with the initial reports, and note whether changes recommended by the Committee have been implemented. This will be very helpful to the Committee but it is submitted that more is needed. Relevant documents concerning each of the States parties need to be collected and studied. Numerous reports are filed with the UN each year by the member states under various conventions such as the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women.

Also there is a great deal of pertinent information in the documents submitted to and the reports of such bodies as the UN Commission on Human Rights and its Sub-Commission.

As observed to the Committee by representatives of Yugoslavia, several requests for information made by members of the Committee are answered by information in reports filed under other reporting procedures. Such a compilation would also be in keeping with the recommendations made by the Third Committee for better coordination between the various organs concerned with human rights.

Although requesting that every State party report contain a discussion of the relevant provisions of its constitution, laws and the pertinent court decisions, the Committee continues to stress that this alone is not sufficient and that "practices" must also be described, particularly when they impede full implementation of the rights protected by the Covenant.

Information frequently requested by the Committee in its questioning of the States parties includes:

1. The steps taken to publicise the Covenant and the State party's appearance before the Committee;
2. The status of the Covenant in national law, the methods chosen for implementation of the rights guaranteed by the Covenant and the ways in which citizens may vindicate their rights under the Covenant;
3. Data available to show the progress achieved in the enjoyment of human rights;
4. Equality between the sexes, rights of minority groups and the treatment of indigenous populations;
5. Types of punishments used in criminal cases and prison conditions;
6. Ability of those imprisoned for rea-

sons other than the commission or the alleged commission of a crime to challenge their continued detention, e.g. those detained on grounds of mental ill health or incapacity;

7. The manner in which freedom of expression is guaranteed and any restrictions placed on the exercise of this right;
8. Guarantees of the right to freedom of association, in particular, the ability of trade unions to organise;
9. What has been done by the State party to further the right of peoples to self-determination;
10. The administration of justice, including constitutional provisions and legislation that guarantees the independence of the judiciary, the composition and the jurisdiction of the courts;
11. What is being done to ban propagan-
da for war and advocacy of national, religious or ethnic hatred;
12. Legislation and constitutional provisions concerning emergency powers.

In addition all States parties are asked to be ready to discuss recent events within the country.

Late Filing of Reports

Late filing of reports continues to be a problem; Zaire the Dominican Republic and Trinidad and Tobago are the most in default. Informal consultations have taken place with representatives of Zaire and Trinidad and Tobago, but thus far their reports have not been filed. The Dominican Republic has not responded to the Committee's request for consultations.

El Salvador has also been tardy in filing its report. An invitation was sent to that State party to meet informally with the Committee. A representative attended the

October 1983 session and explained that El Salvador thought it desirable to wait until the proposed constitutional and consequent legislative changes had been made before submitting its report. However, the representative did agree to a dialogue with the Committee about recent events in the country. This was considered to be a preliminary discussion to be continued when the report is filed during 1984.

Chile continues to refuse to submit supplemental information claiming it has been singled out for special treatment.

Consideration of Guinea's report has been postponed four times due to that country's failure to respond to the Committee's request that a representative be present during the consideration of its report. In July 1983 the Committee decided to consider the report during its October session, even if a representative did not appear, as proved to be the case. The Committee decided to send copies of the summary records reflecting its discussion to the State party. Apparently the Guinean representative in New York later contacted the Secretary-General's office and indicated that Guinea wished to fulfil its obligations under the Covenant and stated it was in need of technical assistance to do so. The Committee has included in its letter forwarding the summary records an offer of assistance to the State party.

Third Committee Consideration of the Annual Report

The question of technical assistance to States parties was discussed during the Third Committee's consideration of the Committee's annual report. This issue has also been of concern to the Committee, particularly in view of the increasing number of conventions requiring reports. Some countries do not have the resources to pro-

duce the reports or supply requested information in the necessary detail.

The Third Committee also discussed the need for greater coordination among the various UN organs concerned with the protection and promotion of human rights. Several delegations suggested that the Centre for Human Rights might bring together representatives from the various organs for consultation. The Assistant Secretary-General advised the Committee at its July session that steps were being taken in this direction, and that "financial resources permitting" the Centre would examine the possibility of holding consultations with the chairpersons of the relevant organs.

Proposals for Steps to Be Taken After a State Party's Declaration of a State of Emergency

Of concern to some members of the Committee is the failure to take a decision on the steps to be taken when the Committee becomes aware of a declaration of a state of emergency by a State party. Two proposals are pending, and although some discussion has taken place, no agreement has been reached. It is to be hoped that this issue will be resolved during the coming year, particularly in light of its importance and the active interest in this question of other UN organs such as the Sub-Commission on Prevention of Discrimination and Protection of Minorities².

Forthcoming Reports

The reports of Gambia, India, Egypt

and the Democratic People's Republic of Korea are to be considered at the March session of the Committee. If it proves impossible for one or more of these countries to appear, then the report(s) of either Panama, Kenya or Venezuela will be considered.

General Comments

After extensive debates the Committee adopted general comments on articles 19 and 20. The divergence of opinions expressed in the discussions caused some members to suggest that it might be appropriate for the Committee to take a vote on the proposals and thereby break with the tradition of taking decisions by consensus. Doubts were expressed about the advisability of doing this, since it is believed that the Committee's comments have more weight and effect when they are issued on the basis of a consensus. The majority were opposed to changing this practice and intensive discussions during and after scheduled meetings eventually resulted in a consensus on the general comments.

Article 19 protects the rights to freedom of opinion and expression. With respect to the right to "hold opinions", the Committee noted that it is a right "to which the Covenant permits no exception or restriction" and stated that it would welcome information from States parties concerning the right. As to freedom of expression, the Committee reminded the States parties that this right "includes not only freedom to 'impart information and ideas of all kinds', but also freedom to 'seek' and 'receive' them 'regardless of frontiers' and in

2) This year's Resolution 1983/30 of the Sub-Commission is discussed in the article on the Sub-Commission in this issue. The resolution proposes that reports be prepared every year by the Secretariat listing the countries which have declared or terminated states of emergency during the previous year and outlining the international and national rules concerning such declarations.

whatever medium, 'either orally, in writing or in print, in the form of art, or through any other 'media' of one's choice'. The Committee went on to state that not all State parties had provided information concerning all aspects of the right, and noted that "little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3".

The Committee said that it needed "pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right" because it is "the interplay between the principles of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right".

Referring to paragraph 3 of article 19, which states that the right to freedom of expression carries with it special duties and responsibilities and therefore may be subject to certain restrictions, the Committee pointed out that any restrictions "may not put in jeopardy the right itself" and that they must adhere to the conditions set out in paragraph 3.

The general comments relating to article 20 make clear that prohibitions of propaganda for war and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" are mandatory. Several States parties have noted in their reports and in their discussions with the Committee that they neither have nor intend to have such prohibitions in their national legislation, stating that such restrictions are perceived as possible sources of abuse of

the right to freedom of expression. The Committee noting this argument has responded by stating that the required prohibitions are fully compatible with the right to freedom of expression contained in article 19, "the exercise of which carries special duties and responsibilities".

The Committee set out its opinion as to what is and is not included in article 20: "The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right to self-defence or the right of peoples to self-determination and independence in accordance with the Charter. The Committee concluded by stating that State parties which had not yet done so, should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy".

Decisions Under the Optional Protocol

During its 17th, 18th and 19th sessions the Committee considered 117 communications. Seventeen cases were concluded by the adoption of the Committee's "views". Of the 17, 12 concerned Uruguay. Although this State party had promised during the presentation of its report to the Committee to cooperate more fully and respond to the Committee's requests for information, it has not done so. Its replies rarely addressed

the substance of the communications and were always general in nature, never giving specific or detailed information. Documents requested by the Committee were with one exception not supplied.

Several of the decisions issued by the Committee contain discussions of the burden of proof and make clear that the burden does not rest solely on the author of the communication, especially considering "that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information" (*Vasilskis v. Uruguay*, No. 80/1980, para. 10.4). The decisions also make clear that general denials by States parties will not suffice. Accession to the Optional Protocol carries with it obligations including the duty to contribute to clarification of matters before the Committee and the implicit duty to investigate in good faith all allegations of violations made against it and its authorities. Where the State party deliberately refrains from providing information requested by the Committee, the Committee may draw conclusions from such failure. See *Vasilskis v. Uruguay*; *Dermit Barbato v. Uruguay*, No. 84/1981; and *Bequío v. Uruguay*, No. 88/1981.

Many of the Uruguayan cases involve treatment of detainees. In *Nieto v. Uruguay*, No. 92/1981 and *Estradt Cabreira v. Uruguay*, No. 105/1981, the Committee concluded that a practice of inhuman treatment existed in Libertad prison during the period covered by the communications (1976-81). This conclusion was based on the Committee's consideration of numerous communications and on the particulars supplied by former detainees in their communications to the Committee, notably, *Estrella v. Uruguay* No. 74/1980 and *Campora Schweizer v. Uruguay* No. 66/1980. The final views published by the Committee in these cases include a summary of the

facts supplied by the authors regarding their treatment as well as the general prison conditions.

Uruguay's 'prompt security measures' were under review in *Campora Schweizer*. Although the Committee decided it was unable "to pronounce itself on the general compatibility of the regime of 'prompt security measures' under Uruguay law with the Covenant it did conclude that the "modalities under which 'prompt security measures' are ordered, maintained and enforced did not comply with the requirements of article 9". The victim was not brought before a judge and was unable to challenge his arrest and detention.

A significant development was the conclusion in *Quinteros Almeida v. Uruguay*, No. 107/1981 that a parent suffers a violation of article 7 (prohibition of torture, cruel, inhuman or degrading treatment) as a result of the "anguish and stress" caused by the disappearance of a child and by the continued uncertainty concerning the child's fate and whereabouts. The author had filed the communication on behalf of her daughter and on her own behalf. Her daughter was arrested on 24 June 1976. Four days later she was brought to an area near the Venezuelan embassy and managed to escape into the embassy compound shouting her identity and the word "asylum". She was abducted from the embassy grounds by at least one Uruguayan police officer. Despite the repeated demands of the Venezuelan government and its breaking of diplomatic relations with Uruguay over the incident, the Uruguayan authorities have done nothing to establish the victim's whereabouts.

Three cases involving Uruguay concerned the right to a passport. (*Lichtensztein v. Uruguay*, No. 77/1980, *Montero v. Uruguay*, No. 106/1981 and under article (1) of the Optional Protocol *Varela Nunez v. Uruguay*, No. 108/1981. In each case the

State party argued that the Committee was not competent to deal with the communication because the author was not within its jurisdiction during the time of the alleged violation as he or she was living abroad. The Committee rejected this argument stating that the issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and the citizen is subject to the jurisdiction of Uruguay for that purpose. The Committee further stated that "a passport is a means of enabling him 'to leave any country, including his own', as required by article 12(2) of the Covenant. Consequently, [it follows] from the very nature of that right that, in the case of a citizen resident abroad, article 12(2) imposed obligations both on the state of residence and on the state of nationality and that, therefore, article 2(1) of the Covenant [Each State Party... undertakes... to ensure to all individuals within its territory and subject to its jurisdiction] could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.

As to the right conferred by article 12 the Committee made the following observations: "Article 12 does not guarantee an unrestricted right to travel from one country to another. In particular, it confers no right for a person to enter a country other than his own. Moreover, the right recognised by article 12(2) may, in accordance with article 12(3), be subject to such restrictions as are "provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse passport facilities to one of its citizens. However, in the cases before the Committee no such justifi-

cation for refusal was put forward by the State party.

Final views were also issued in cases involving Canada, Italy, Madagascar and Zaire. The Canadian case, *MacIsaac v. Canada*, No. 55/1979 concerned the provisions of article 15(1) regarding legislative changes which provide for a "lighter penalty". The Committee concluded that the author had not established that he was denied the benefit of a "lighter penalty". This conclusion did not result from any of the legal arguments put forward by the State party which were based on its national law.

Italy's reservation to article 14(5) concerning its constitutional provisions which provide for trial before the constitutional court in respect of charges brought against the President of the Republic and its Ministers, and which consequently does not provide for an appeal, was reviewed in *Fanali v. Italy*, No. 75/1980. The Committee found that the reservation was applicable.

Trials *in absentia* were discussed in *Mbenge v. Zaire*, No. 16/1977 wherein the Committee stated that the requirement of article 14(3) that everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance did not necessarily render "proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence". There may be some circumstances in which trials *in absentia* are permissible; for example, when the accused though informed of the proceedings sufficiently in advance declines to exercise his right to be present.

The Committee went on to state: "the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art. 14(3)(a)). Judgment *in absentia* requires that notwithstanding the absence of the accused, all due notification has been

made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14(3)(b)), cannot defend himself through legal assistance of his own choosing (art. 14(3)(d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14(3)(e))”.

Although noting that certain limits exist as to what can be expected of the responsible authorities these limits did not need to be specified in the case under consideration, because it was clear the accused had not received adequate notice of the proceedings against him.

No response was received from the government of Zaire concerning the communication in *Magana ex-Philibert v. Zaire*, No. 90/1981, wherein the Committee concluded that violations of article 9, 10(1) and 2(3) existed. Nor was a response received from Madagascar in *Marais v. Madagascar*, No. 49/1979 which involved violations of articles 7 and 10(1) because the victims had been held under inhuman conditions and incommunicado, and of article 14(3) (b) and (d) because he was denied adequate opportunity to communicate with his counsel, and because his right to assistance of counsel to represent him and prepare his defence had been interfered with by the Malagasy authorities.

During its 15th session the Committee had decided that when transmitting its final views it would request the State party to advise it of the actions taken in the particular case. Canada, Mauritius and Finland submitted statements describing their attempts to comply with the final views of the Committee. Both Canada and Mauritius have made changes in their national legislation as a result of the Committee's views.

Although the Committee had concluded in the Finnish case that no violation of the Covenant existed, it did note some difficulties in the full implementation of the rights. The statement of Finland outlines the steps being taken to alleviate these difficulties.

Decisions on Admissibility

Seven decisions on admissibility were published by the Committee. Two communications filed by a non-governmental organisation on behalf of an alleged victim were declared inadmissible because there was not sufficient proof that the author had the necessary authority to submit the communication on behalf of the alleged victim. In one case the organisation had stated that the request to act on behalf of the victim was made through close friends living in France whose identity it felt unable to disclose. In the other case the organisation stated that the communication was submitted at the request of the victim's wife and that this request was also made through close friends whose names it was unable to reveal. In neither case was there any written evidence with regard to the authority of the organisation to act.

In another decision on admissibility, *J.R.T. and the W.G. Party v. Canada*, No. 104/1981 the author's claim was declared inadmissible because it was incompatible with the provisions of the Covenant. The author alleged violations of his rights under article 19 (freedom of expression) because he was not allowed to use the telephone service to disseminate his ideas. The Committee concluded that the opinions the author sought to disseminate constituted the advocacy of racial or religious hatred which Canada has an obligation under article 20(2) to prohibit.

Membership

Four new members were elected to the Committee during the past year. They are Joseph A.L. Cooray (Sri Lanka), Vojin Dimitrijevic (Yugoslavia), Roger Errera (France) and Birame N'Diaye (Senegal). An election is to be held to fill the vacancy left by the resignation of Walter S. Tarnopolsky

(Canada) on his appointment as a judge of the Court of Appeal of the Supreme Court of Ontario. The new members appear to be following the tradition of independence and the spirit of cooperation which has characterised the Committee's work thus far and made it one of the most respected bodies in the human rights field.

The European Draft Convention Against Torture

'One of the most heinous, most persistent, most deliberate and most cruel of all crimes against the human person, torture is an act which is almost always carried out behind closed doors, in the secrecy of the torture chambers.' Philip Potter, Secretary-General of the World Council of Churches, Geneva.

To combat torture effectively, to relieve the physical or psychological torment of its individual victims, one must break down the closed doors of which Mr. Potter speaks and end the secrecy behind which the torturer shelters.

However, no means currently exist at international or regional level either of bringing relief to those who are actually being tortured, still less to prevent torture occurring. The international and regional instruments designed to combat torture deal with situations in which torture has already

taken place. The best, therefore, that a victim can hope for when relying, for example, on the right of individual complaint contained in the Optional Protocol to the International Covenant on Civil and Political Rights, is the very limited satisfaction of a public confirmation by the Human Rights Committee that she or he was indeed tortured and that the state is vicariously responsible for injuries suffered.

A New Approach

Of all violations of human rights that are daily perpetrated throughout the world, that of torture is the most widely and deeply abhorred. It calls, therefore, for an innovative and radical method of international and regional control: a method designed with prevention in mind rather than accusation and apportionment of blame. Such a

method was proposed in 1976 by a Swiss lawyer, Jean-Jacques Gautier, President of the Swiss Committee Against Torture (hereafter called "the Swiss Committee"). Subsequently, the International Commission of Jurists and the Swiss Committee adopted the Gautier proposal in the form of a draft Optional Protocol to the UN draft Convention Against Torture under discussion by the UN Commission on Human Rights. This document was adopted and submitted to the UN Commission in 1980 by the government of Costa Rica.

In order not to impose any further delay on the draft Convention, the government of Costa Rica invited the Commission on Human Rights not to begin consideration of the draft Optional Protocol until it had finalised its text of the draft Convention¹

As consideration of the Draft UN Convention may take several more years, it follows that there will be no opportunity for several years to come to demonstrate at the level of the United Nations the feasibility and effectiveness of this new approach to the problem of torture. The ICJ and the Swiss Committee, therefore, welcomed a proposal from the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe (on the initiative of the French Senator Berrier) that they draft a European Convention Against Torture based on the draft Optional Protocol.

The Proposed European Convention

The contents of the draft European Convention and the UN draft Optional Protocol are very similar, the main changes being made to take account of the different structure of the 21-nation council of Eu-

rope. The text of the draft European Convention will be found at Appendix I. Its essential proposal is to establish a system of visits to places of detention within the jurisdiction of the Contracting Parties. The visits will be organised by a commission of five experts in the field of human rights, serving in their individual capacity. They will be elected by a majority vote of the Parliamentary Assembly of the Council of Europe from a list to which each Contracting Party will have nominated three candidates. The visits will be made either by members of the Commission or other qualified persons delegated by the Commission.

Safeguarding Detainees

When talking about persons deprived of their liberty, the image of convicted prisoners serving prescribed sentences in national prisons most commonly springs to mind. However, it is rare that convicted prisoners are subjected to torture. Usually torture occurs as an instrument of interrogation, either in police stations or secret 'safe houses' or within interrogation centres. Some of the victims may be brought to trial, but others will be subject to administrative detention and detained without charge or trial often under the provisions of some emergency legislation. It is, therefore, important that the Convention ensures delegates will be able to visit *all* places of detention including those where persons are held in provisional, administrative or re-educative detention or are forcibly interned for medical reasons. The proposed procedure is essentially a confidential one. Once having notified a state of their intention to make a periodic visit, delegates may visit

1) When the Commission on Human Rights has submitted its draft Convention to the ECOSOC, it will be invited to consider the Draft Optional Protocol. If approved by the Commission, it will then be submitted to the ECOSOC and the General Assembly for adoption.

any place of detention without prior notice, in order to avoid preparatory 'cleaning-up' of particular institutions. Delegates will be able to visit the whole of the premises and speak alone with any of the detainees, as well as their families or lawyers. In deciding which places to visit, delegates can act upon information from any source – an important provision since as mentioned above, the authorities sometimes strive to keep certain places of detention secret and their whereabouts only slowly leak out through unofficial channels. The Commission will also have the power to arrange emergency visits. Thus, if it has reason to believe torture is being practiced at a specific location, it can take action at once and organise an *ad hoc* visit with a view to bringing immediate relief to the victims concerned.

The Commission will submit a report on each visit to the government. It is hoped that this will lead to a constructive dialogue between the Commission and the government, in which both work together to eliminate any existing torture practices and prevent their future occurrence.

This cooperation between the Commission and the government is a vital facet of the Convention and is in direct contrast to the existing international and regional procedures for dealing with torture. These procedures are all accusatory in nature, forcing governments upon the defensive. As the accusations are generally the subject of widespread publicity, the government tends to deny all allegations, exploit the many opportunities there are for delay, and seek to mobilise the support of friends and allies, thus politicising the whole issue.

States ratifying the Convention on the other hand can be assured that the reports written by the Commission on the visits are confidential and will remain so as long as

the governments cooperate with the Commission. There is, however, an important ultimate sanction of publication of the report in the case of resolute non-cooperation of a state with the Commission, or misrepresentation of its reports.

The Advantages of a Regional Convention

There are many advantages in instituting this system of visits at a specifically regional level.

Speed

As already pointed out, it may take several years before discussion begins on the UN draft Optional Protocol which embodies the Gautier proposal at international level, even if approved in principle, and, it may be several more years before its text is finalised.

At the regional level, however, things have already moved quickly. In summer 1982, the ICJ and the Swiss Committee were asked to prepare their draft of the Convention. On 7 July 1983, a draft recommendation (with the draft Convention annexed to it) was presented by the Legal Affairs Committee to the Parliamentary Assembly of the Council of Europe. On 28 September 1983, after some debate the Parliamentary Assembly voted unanimously to forward the recommendation (Recommendation 971 (1981) (1)² and annexed draft Convention to the Committee of Ministers of the Council of Europe. On 8 to 10 November 1983 the Committee of Ministers began discussion on the Convention. Discussion will be continued in January 1984. Thus within 18 months great strides forward have been made. However,

2) The text of the Recommendations will be found at Appendix II.

it is obviously easier for 21 nations³ from the same region, with similar backgrounds and a fairly developed understanding of their respective differences, to come to agreement than it is for over 150 nations from all over the world, with widely varying cultural, economic and political backgrounds.

Administration

The Council of Europe already has a structure which can readily cope with the administration of the Convention. The Parliamentary Assembly will elect the members of the Commission from the list of nominees of the Contracting Parties (see above). The Commission will be provided with secretarial services by the Secretary-General of the Council of Europe who will also appoint its Secretary, subject to its agreement. In addition, the Council of Europe already has a Convention on Human Rights to which the draft convention will be linked, its terms of reference being to ensure that article 3 of that Convention ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment') is respected.

Cost

As the infra-structure is already in place and as the draft Convention is limited to the geographical confines of Europe, it will be less costly to implement than the proposed Optional Protocol.

A Model for the Future

If the draft Convention can be successfully initiated at the European level it

could provide not only a spur to the progress of the UN draft Optional Protocol but also a source of inspiration for other regional conventions of a similar nature. The Council of Europe would once again lead the way as it has done on previous occasions, most notably in the formulation of the Convention on Human Rights.

Answers to Possible Objections

A number of possible objections have been put forward regarding the need for a European Convention Against Torture. The first is that Europe is no longer a 'torturing' region and, therefore, has no need of such a Convention. However, torture does still exist in Europe and in recent years there have been serious allegations of such practices in Turkey, Greece, Northern Ireland, Italy, Portugal and Spain. Even if this were not the case, merely because at any particular time there have been no obvious cases of torture in a region is not a sufficient reason to deny that region the means to prevent or fight such an occurrence in the future. Given certain conditions, torture can break out anywhere. If it is looked on as a disease then we can continue the comparison by saying that no single state can claim a natural immunity to that disease. However, it is hoped that the Convention Against Torture can provide Europe with, at least, an effective prophylactic.

As Jean-Jacques Gautier has said in arguing for a European Convention Against Torture:

'In the course of the last 50 years and without speaking of the countries of Eastern Europe, three quarters of the present members of the Council of Europe have

3) The member states of the Council of Europe are Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

been subjected [to the practice of torture], imposed on them by their own government or by an occupying power which found accomplices from within their own population. If such barbarity seems inconceivable today, it seemed equally so at the beginning of this century. It is essential, therefore, not to cherish any illusions but on the contrary to profit from this period of calm in order to build within Europe itself solid ramparts against a new invasion of the scourge.'

The second objection is that the Convention is merely duplicating the work already done in this area by the International Committee of the Red Cross. It is true that the inspiration for the Convention sprang from the system of visits made by the ICRC at one time or another in more than 80 countries in the last 38 years. However, there are many differences between the two approaches. Although the ICRC has the authority to visit prisoners of war and civilian detainees in situations of armed conflict under the terms of the Geneva Conventions, its other visits, for example, to political prisoners, are negotiated with the country concerned on an *ad hoc* basis. This points to a major difference with the Convention. Government consent can be withdrawn from the ICRC at any time whereas the Convention leaves Contracting Parties no such bolt-hole; they are bound by its terms. If they denounce the Convention it will be tantamount to an admission that torture is being or will be practised.

In addition, the ICRC normally only visits prisons, where torture rarely occurs, whereas under the Convention the visiting delegates would have access to all places of detention. In the rare instances when the ICRC has negotiated access to all places of detention (for example, Greece in 1971 and Iran in 1977/78) the results have been dramatic — an encouraging sign for the success of the Convention.

As the ICRC must negotiate each visit it is vital that it retain the good-will of the state involved. This is accomplished by treating all reports in the strictest confidence. However, this practice (although unavoidable in the circumstances) can result in a state publicly vaunting the fact that it allows visits by the ICRC to its prisons as if this proved that it had nothing to hide, when in fact the ICRC is in possession of a report documenting hundreds of instances of torture in that country on which the country refuses to act and which the ICRC is unable to publicise. No such restrictions tie the hands of the delegates visiting under the Convention. While confidentially is most definitely part of the appeal of this procedure to the Contracting Parties, if they refuse to cooperate in taking effective measures to eradicate torture practices, the report can as a last resort, be made public at the Commission's discretion.

A third objection is that few, if any, governments would in fact accept such an intrusion into their sovereign territory and their affairs as is envisaged by the Convention. As Niall MacDermot, Secretary-General of the ICJ, has said 'the objections that few governments would ratify is one which, perhaps unconsciously, pays tribute to the likely effectiveness of the procedure...'. Nevertheless, this objection can be answered by pointing out that the system of visits under the Convention is likely to be less embarrassing, and give a much better public image to the Contracting Parties, than the accusatory procedures at present used in the Council of Europe for dealing with the problem of torture. In addition, as has been seen, over half the states of the world have already voluntarily submitted to procedures of a similar type by permitting the ICRC to visit their prisons.

A fourth objection has been that even if certain states do ratify the Convention they will be states which do not practice torture

and therefore the visiting delegats will be preaching to the converted. Such an objection can be countered by the argument that governments change, and there is no guarantee that a country which under one regime was free from torture would not fall victim to it under another. If, however, the first government had ratified the Convention, the second government would find itself also bound to accept the visiting delegats, a definite curb on any tendency towards violation of article 3 of the European Convention on Human Rights. The reverse is also true and an offending regime which did not ratify the Convention at its inception may subsequently fall and be replaced by a government for which human rights have a higher priority, and whose leaders will sometimes themselves have been victims of torture and will, therefore, be eager to adopt such a convention.

Conclusion

The draft European Convention represents an exiting opportunity for innovation in the implementation of human rights instruments. Such on-the-spot visits as are envisaged in the Convention cannot but have a salutary effect on conditions of detention within the jurisdictions of the Contracting Parties and can be expected to bring immediate relief to victims of abuse.

In addition, the Convention will reinforce the positive aspects of states' contributions in eliminating torture, rather than emphasising the negative aspects as is the case with the existing accusatory procedures. It is reasonable to expect that states ratifying the Convention will thus be encouraged to increase their efforts to eliminate torture by working with the Commission towards this common goal.

APPENDIX I

Draft European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment

PREAMBLE

(to be drafted)

CHAPTER I

Principles

Article 1

In order better to ensure respect for and observe Article 3 of the European Convention on Human Rights, the Contracting Parties agree to supplement the procedure provided for in the European Convention on Human Rights by creating a procedure for the protection of detainees from torture and cruel, inhuman or degrading treatment or punishment.

Article 2

This convention shall apply in all circumstances and all places to all persons deprived of their liberty, whatever the reason, including persons detained for the purposes of inquiries by civil or military authorities responsible for the maintenance of law and order, persons held in provisional, administrative or re-educative detention, persons accused of, or sentenced for, any offence whatever and persons interned for medical reasons.

Article 3

No provision of this convention may be interpreted as detracting from the enjoyment by detainees of any advantages applicable to them under domestic legislation or under other international instruments, such as the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Optional Protocol thereto, and the Geneva Conventions of 12 August 1949 on the protection of victims of armed conflicts and the Additional Protocols thereto of 10 June 1977.

CHAPTER II

Commission

Article 4

For the purpose of this convention, there shall be established a commission composed of five members, who shall serve in their individual capacities and be selected from among persons of high moral standing, known for their competence in the field of human rights or in the fields covered by the convention. The commission may not include two members of the same nationality.

Article 5

1. The members of the commission shall be elected by the Parliamentary Assembly of the Council of Europe from a list of persons nominated by the Contracting Parties, each of which shall nominate three candidates who are nationals of Contracting Parties, of whom two at least shall be its own nationals.

2. The members of the commission shall be elected for a period of six years. They may be re-elected. However, among the members elected at the first election, the terms of three members chosen by lot, shall expire at the end of three years.

Article 6

The commission shall meet *in camera*. Its decisions shall be taken by a majority of the members present and voting. A quorum of the commission shall be four members.

Article 7

1. Without prejudice to Article 6 above, the commission shall draw up its own rules of procedure. It shall meet whenever circumstances require, but at least once a year.

2. The commission shall be provided with secretarial services by the Secretary General of the Council of Europe. Its secretary shall be appointed by the Secretary General in agreement with the commission.

CHAPTER III

Visits

Article 8

1. The commission may organise visits, by delegates chosen from among its members or other persons, to places of detention within the jurisdiction of the Contracting Parties.

2. Apart from periodic visits in the territory of each Contracting Party, the commission may organise such other visits as appear to it to be required in the circumstances.

Article 9

1. The commission shall notify the government of the Contracting Party concerned of its intention to carry out a visit. After such notification, its delegates may, without prior notice and at any time, visit any place within the Contracting Party's jurisdiction where they believe detainees as referred to in Article 2 above are being or may be held, including police stations and civil and military interrogation centres.

2. The delegates may not inspect places which representatives or delegates of Protecting Powers of the International Committee of the Red Cross are entitled to visit under the Geneva Conventions of 1949 and the Protocols of 1977 thereto and which they do in fact visit regularly.

3. A Contracting Party in whose territory a visit is being made shall provide the commission with every facility to carry out its task and may in no way hamper the visit. In particular, it shall give the commission full information on the places where detainees, including specified persons, are being held.

4. The delegates may interview detainees alone and at leisure.

5. The delegates may communicate freely with the families, the counsel and doctors of detainees.

6. During each visit, the delegates shall ascertain that detainees are being treated in conformity with Article 3 of the European Convention on Human Rights.

7. If necessary, the delegates shall immediately communicate their observations and recommendations to the appropriate authorities of the Contracting Party concerned.

Article 10

1. After each visit, the commission shall draw up a report, setting out its observations and recommendations. On the basis of this report, the commission shall inform the Contracting Party concerned of its findings and, if necessary, make recommendations. The commission may on its own initiative engage in consultations with the Contracting Party with a view to improving the treatment of detainees.

2. As a rule, the reports, findings, recommendations and consultations of the commission shall be confidential. By way of exception, however, if the government concerned fails to co-operate or refuses to apply the recommendations, the commission may decide to make a public statement on the matter, announcing its findings and recommendations. It must publish its findings and recommendations whenever requested to do so by the Contracting Party concerned.

3. The commission shall submit to the Committee of Ministers a general report which shall be transmitted to the Parliamentary Assembly and made public.

CHAPTER IV

Final provisions

Article 11

The convention shall be open to signature by the member states of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 12

1. This convention shall come into force on the first day of the month following the expiry of a period of three months after the date on which five member states of the Council of Europe have expressed their consent to be bound by the convention in accordance with the provisions of Article 11 above.

2. In respect of any member state which subsequently expresses its consent to be bound by the convention, the convention shall come into force on the first day of the month following the expiry of a period of three months after the date of deposit of the instrument of ratification, acceptance or approval.

Article 13

Any state may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this convention to all or some of the territories for whose international relations it is responsible. In respect of such territories, the convention shall come into force on the first day of the month following the expiry of a period of three months after the date on which such declaration is received by the Secretary General.

Article 14

No reservations may be made in respect of the provisions of this convention.

Article 15

1. Any party may, at any time, denounce this convention by means of a notification addressed to

the Secretary General of the Council of Europe.

2. Such denunciation shall take effect on the first day of the month following the expiry of a period of twelve months after the date on which the notification is received by the Secretary General.

Article 16

The Secretary General of the Council of Europe shall notify the member states of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this convention in accordance with its Articles 12 and 13;
- d. any other act, notification or communication relating to this convention, except for action taken in pursuance of Chapter III above.

In witness whereof, the undersigned, being duly authorised thereto, have signed this convention.

Done at this day of 19 . . . , in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member state of the Council of Europe.

APPENDIX II

Parliamentary Assembly of the Council of Europe Thirty-Fifth Ordinary Session **Recommendation 971 (1983)¹** **on the protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment**

The Assembly,

1. Recalling that torture has been universally denounced as one of the gravest violations of human rights, demanding effective measures for its prevention;
2. Recalling its Recommendation 909 (1981), on the International Convention against Torture, and Committee of Ministers Resolution (78) 41, on the teaching of human rights in the member countries;
3. Noting that, by virtue of the domestic legislation of member states and the European Convention on Human Rights, the victims of torture or inhuman or degrading treatment have legal channels open to them for denouncing such violations of human rights;
4. Stressing, nevertheless, that these legal channels only become available once the individual has become the victim of torture;
5. Considering that most acts of torture are committed in places of detention, and convinced that regular visits without notice to places of detention would make a considerable contribution to the prevention of torture;
6. Noting that such visits are recommended in the draft optional protocol to the draft International Convention against Torture currently being studied in the United Nations, and hoping that this will shortly be adopted;
7. Considering that such a system cannot be expected to come into operation rapidly and faultlessly throughout the world;
8. Considering that all prevention of torture and of inhuman or degrading treatment begins with instruction in human rights to be given in all systems and at all levels or education and as part of training for all civil and military service staff, whatever their rank or field;

9. Noting many allegations concerning prison conditions in certain member countries and in particular the use of torture and similar treatment;

10. Considering that the governments of the Council of Europe member states have a duty to combat jointly all torture and inhuman, cruel or degrading treatment, and any abuses that have found their way into prison practice despite the vigilance of their judicial authorities;

11. Considering that, by establishing under the Council of Europe a system of visits without notice to places of detention, so as to protect the detainees against torture or cruel, inhuman or degrading treatment or punishment, the member states of the Council of Europe would, once again, be acting as pioneers in the field of human rights as they did in the case of the European Convention on Human Rights itself.

12. Recommends that the Committee of Ministers:

i. adopt the draft European Convention on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment, the text of which is appended hereto;

ii. ask the Secretary General to assemble information concerning implementation by the member states of its Resolution (78) 41 and to report back to the Parliamentary Assembly without delay.

1) *Assembly debate* on 28 September 1983 (13th Sitting) (see Doc. 5099, report of the Legal Affairs Committee, and Doc. 5123, opinion of the Political Affairs Committee).

Text adopted by the Assembly on 28 September 1983 (13th Sitting).

ARTICLES

The Universal Declaration at 35: Western and *Passé* or Alive and Universal

by
Philip Alston*

In the years since its adoption by the UN General Assembly, on 10 December 1948, the Universal Declaration of Human Rights has, on occasion, been the subject of extravagant, and often conflicting, claims as to its status and validity. While some have argued that the Universal Declaration constitutes the basis for a universally accepted common law of mankind, others have attacked it on the grounds that it embodies a peculiarly Western individualistic approach and reflects "a moral chauvinism and ethnocentric bias" which ensure its irrelevance in all non-Western societies¹. On the occasion of the Declaration's thirty-fifth anniversary, and in view of the fact that it continues to serve as a cornerstone for the activities both of the UN and of most non-governmental organizations in the field of human rights, it seems timely to assess the validity of these competing perspectives.

An appropriate starting point for such a stocktaking is the saying that "nothing endures but change". The concept of human rights is, almost by definition, a dynamic one. Thus, what was acceptable less than 200 years ago (slavery, torture, death from starvation) had become no longer accept-

able by the end of World War II. Similarly, we cannot expect that the standards which the international community has consecrated as of today will be accepted in their entirety 100 years from now.

Given this constant evolution it is useful to reflect on the extent to which our conception of human rights has evolved in the 35 years since the Universal Declaration was proclaimed as "a common standard of achievement for all peoples and all nations". Such a reflection is made all the more necessary by the extent to which many of the Declaration's detractors have portrayed it as a static selection of narrowly-based philosophical principles, which were set in concrete on the day of their adoption and have since grown progressively and steadily less relevant in a world which has changed dramatically since 1948.

From among the ranks of those who have tended to see the Declaration as a time-bound, and therefore increasingly anachronistic instrument, two substantially different prescriptions have emerged. The first and more radical prescription is to jettison the existing eurocentric approach, as said to be embodied in the Universal Declaration, and to embark upon a funda-

* The views expressed in this article are those of the author in his personal capacity and do not necessarily reflect those of the United Nations.

1) Admantia Pollis and Peter Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives* (New York, Praeger, 1979), p. 14.

mental reconceptualization of human rights. The second prescription has envisaged the proclamation of additional human rights and even a whole new 'generation' of human rights, designed to make up for the shortcomings of the Declaration.

In the present article it is proposed to examine the major criticisms which have been made of the approach reflected in the Universal Declaration and to note the most significant developments in human rights thinking which have taken place over the last generation. The main thrust of the analysis is that while many, if not all, of the criticisms which have been made have some validity, the Declaration's philosophical underpinnings are sufficiently eclectic, its text sufficiently flexible, and recent developments sufficiently responsive, to ensure its continuing relevance as a 'living' instrument of incomparable importance in the field of human rights.

"Third World Participation in the Drafting of the Declaration Was Negligible"

This criticism has some basis although it is frequently overstated. While it is true that the great majority of Third World States were still under colonial rule and were unable to contribute to the UN human rights debate in the years between 1946 and the adoption of the Declaration in 1948, the contribution of the Third World was by no means negligible. Indeed at San Francisco in 1945 the main proponents of immediate adoption of a Declaration of Human Rights were Chile, Cuba and Panama with the latter even going so far as to provide a draft "Declaration of Essential Human Rights" which it wanted appended to the UN Charter. At the early sessions of the Commission on Human Rights, India played an active part, while in

the group which drafted the Declaration, the representatives of China and Lebanon were among the most active participants. At the General Assembly in 1948 Egypt, Ethiopia, Liberia, Afghanistan, the Philippines, Thailand, India and Pakistan as well as all of the Central and Latin American States were among the 48 voting in favour of the Declaration (Saudi Arabia, South Africa and the Eastern European States made up the eight abstentions, with no States voting against).

"The Declaration's Philosophical Roots Are Exclusively Western and Its Values Are therefore Inapplicable to Other Societies"

There is no doubt that the general concept of the Declaration, as well as much of its language, bear the stamp of Western philosophical and legal thinking. Nevertheless, the Declaration cannot reasonably be said to be the exclusive reflection of any one ideological conception. Even in the West in the late 1940s many conservatives rejected the philosophy underlying the Universal Declaration on the grounds that it represented an attempt to impose alien beliefs upon them and to destroy individuality. Their fears were epitomized by a 1949 American Bar Association report which warned that:

"Peoples who do not know the meaning of freedom are to be metamorphosed into judges of the freedoms of others. A common pattern is to be set for billions of people of different languages, religions, standards of living, culture, education, and mental and physical capacity. A few people, with beliefs utterly foreign to each other, meet, debate, and by majority vote seek to determine how

the people of the world shall live on a common pattern.”²

The Eastern European input into the Declaration's drafting was sufficient to ensure the inclusion of economic, social and cultural rights as well as the use of language in the Preamble referring not only to individuals but also to peoples and organs of society. Moreover, most of the concerns dealt with in the Declaration had long been recognized within the varying conceptions of human dignity which are an integral part of the world's major religious and cultural traditions. Thus, while the specific terminology of rights may be alien to, for example Islamic, Confucian, Hindu or African approaches, the concerns underlying it are not. For example, an International Commission of Jurists seminar on Human Rights in Islam, held in Kuwait in 1980, concluded, *inter alia*, that “Islam was the first to recognize basic human rights and almost fourteen centuries ago it set up guarantees and safeguards that have only recently been incorporated in universal declarations of human rights”.³

Similarly, UNESCO which, in recent years has been in the forefront of endeavours to promote new human rights, has nevertheless reaffirmed that “the Universal Declaration of Human Rights is, in respect of a number of the rights which it proclaims, the systematic expression of fundamental rights which are stated to be inalienable, and which have been known under different forms by all human communities, long before the emergence of the nation

state”.⁴

But regardless of the strength or otherwise of analyses designed to demonstrate the diverse cultural and philosophical origins of the Declaration's conception of human rights, a more telling point is the extent to which the philosophy embodied in the Declaration has been either endorsed or repudiated in different contexts over the past 35 years. It has been argued that the widespread human rights violations which have occurred since the Declaration's adoption amount to a massive repudiation in practice of its principles⁵. Yet experience has shown that the vast majority of violators (from Pol Pot, Idi Amin and Pinochet on down the list) have either denied the facts alleged or have sought to justify their actions rather than seeking to deny the validity *per se* of the principles contained in the Universal Declaration. In any event, such an argument would be equally applicable to any bill of rights or other statements of principle or belief (including the Koran and the Ten Commandments) and is not convincing as a means by which to refute claims to near-universal acceptance of the principles proclaimed in the Universal Declaration.

More convincing is the fact that the basic principles enunciated in the Declaration have repeatedly been affirmed in instruments reflecting the deepest aspirations of the Third World such as the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, and in a variety of regional and subregional treaties ranging from the 1981 African Charter of

2) *Annual Report of the American Bar Association*, Vol. 74, 1949, p. 318.

3) *Human Rights in Islam* (Geneva, ICJ, 1982), p. 9, para. 10, and see generally Jack Donnelly, “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights”, *American Political Science Review*, Vol. 76, June 1982, pp. 303–316.

4) UNESCO, *Medium-Term Plan 1984–1989*, para. 13022.

5) Pollis and Schwab, n. 1, pp. 7–8.

Human and People's Rights⁶ which both in its Preamble and operative parts (article 60) singles out the Universal Declaration as a particularly important source of inspiration, to the Riobamba Charter of Conduct⁷ adopted by a group of Latin American States in 1980. Moreover, the Heads of State or Government of the Non-Aligned Movement have, at each of their recent summits (Havana, in 1979 and New Delhi, in 1983) reiterated "their commitment to ensure respect for the promotion of human rights of individuals and the rights of peoples in accordance with the UN Charter and the Universal Declaration of Human Rights..."⁸ No other specific human rights instruments are referred to in the Non-Aligned documents.

At the national level the Declaration has been expressly referred to in the constitutions of a large number of Third World States. While it may be argued that such references were often just one more legacy of colonialism, these references have not ceased to be made in recent years.

"The Declaration enshrines an individualistic approach to human rights which is unacceptable in non-Western societies"

It has been suggested that the Declaration is "based on the notion of atomized individuals... [and] predicated on the assumption that Western values are paramount and ought to be extended to the non-Western world".⁹ It is true that the Declaration places greater, and many today would say undue, emphasis on the rights of the individual as opposed to those of the

collectivity (be it an African tribe, an indigenous people or a Soviet commune). Nevertheless in what Schwelb termed the "studiously vague language of its Preamble" specific reference is made to peoples, nations and organs of society while in the operative part reference is made: to "everyone as a member of society" (article 22); to the community (article 27) "in which alone the free and full development" of the human personality is possible (article 29); and to the "social... order" in which human rights can be fully realized (article 28).

The vagueness and flexibility of the language used in the Declaration has enabled the notion of collective rights to be significantly developed in the years since 1948 without doing violence to the basic text. A significant expansion has in fact taken place not only with respect to the rights of peoples to self-determination and to freely dispose of their natural wealth and resources which were enshrined in article 1 of both the Covenants and the rights of ethnic, religious and linguistic minorities, recognized in article 27 of the Covenant on Civil and Political Rights, but also in a variety of other contexts. The most notable of these is the emergence of a category of "people's rights" which have been proclaimed alongside human rights in the African Charter of Human and People's Rights. They include the right to economic, social and cultural development, the right to national and international peace and security and the right to a generally satisfactory environment.

Similarly, the UN General Assembly has, since 1978 and 1979 respectively, recognized the right to development and the right to life in peace as human rights. In doing so

6) *ICJ Review*, No. 27, 1981, pp. 76-86.

7) *ICJ Review*, No. 25, 1980, p. 64.

8) UN doc. A/38/132, Annex 1, Part I, para. 24.

9) Pollis and Schwab, n. 1, p. 8.

the Assembly has sought to find a response, in terms of human rights, to the two most pressing issues on the international agenda. While this is not the place to debate the significance, the merits or even the standing of these new rights, it is appropriate to note that there is a continuing debate within the UN (and particularly within the context of the Working Group of Governmental Experts on the Right to Development set up by the Commission on Human Rights in 1981 to draft a declaration) as to whether the right to development is essentially an individual or collective right or both. A further point of dispute is whether the subjects or beneficiaries of so-called collective rights can include a 'nation' or a 'State', or whether, since human rights are by definition held by human beings, such entities are, unlike peoples, precluded from being the holders of human rights.

In terms of international procedures aimed at protecting the rights proclaimed in the Universal Declaration, and particularly civil and political rights, any suggestion that the collectivity has been neglected would seem wholly unwarranted. Indeed, recognition of the right of individual petition, the inclusion of which had unsuccessfully been sought during the drafting of the Universal Declaration, has developed much more slowly than have procedures designed to ensure the collective protection of human rights. Thus for example what could be called 'collective' procedures or remedies have been provided by means such as the procedure established by ECOSOC resolution 1503 which focuses on 'situations' involving gross violations of human rights rather than on individual cases, and through the focus in recent years on phenomena such as disappearances, extra-judicial executions, and the abuse of declarations of states of emergency. On the other hand, the individual petition procedure provided for in the Optional Protocol to the Interna-

tional Covenant on Civil and Political Rights has received only 30 ratifications and the equivalent procedure under the Convention on the Elimination of All Forms of Racial Discrimination has been accepted by only 10 States.

For present purposes, however, the point is simply that in recent years the principles contained in the Universal Declaration have been interpreted in such a way as to give greater recognition to the rights of collectivities, including peoples. Legitimate fears have been voiced that some of the proponents of concepts such as people's rights may be primarily motivated by a desire to reinforce the power of the State at the expense of the individual in the human rights context. Therefore the challenge for the future is to develop the concept of people's rights in such a way that it complements and reinforces, rather than undermines, the integrity and universality of the existing corpus of international human rights law.

"The Declaration pays scant regard to economic rights"

In President Roosevelt's famous Four Freedoms message to Congress in 1941, freedom from want was placed on the same level of importance as freedom of speech and worship and freedom from fear. Three years later he told the Congress that "We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence... In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights..." Four years later, of the Universal Declaration's 25 paragraphs dealing with specific rights, 6 were devoted to economic, social and cultural rights. In principle the emphasis attached to these rights by the socialist and some other countries had been

recognized. The goals espoused by the Soviet and Mexican Revolutions, by the Constitutions of the Weimar (1919) and Spanish (1931) Republics, and by the emerging welfare states in Western Europe had received international recognition.

In practice, however, the UN was to neglect economic, social and cultural rights as a serious field of endeavour for the next two decades. It was not until the International Conference on Human Rights held in Teheran on the 20th anniversary of the Universal Declaration that the importance of these rights was reaffirmed, primarily at the insistence of the developing countries.

In 1977 the General Assembly adopted a controversial but highly significant resolution (32/130) in which, *inter alia*, it reaffirmed that "equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights". Since that time the concept of the right to development has been used as *inter alia* an important means by which to re-emphasize the importance of economic, social and cultural rights and to seek to reverse their earlier neglect. In 1982 the UN's Sub-Commission on the Prevention of Discrimination and Protection of Minorities embarked upon the first study of a specific economic, social or cultural right ever to be undertaken by a UN body (as opposed to the ILO which has long been concerned with the rights to work and to social security). It chose the right to adequate food, and asked the Special Rapporteur (Asbjørn Eide of Norway) to focus particularly on the normative content of the right with a view to spelling out its precise implications, including the obligations

and entitlements which derive from it.

While the recent development of concern with economic rights has been interpreted by some commentators as resulting in "the elimination of civil and political rights from serious international consideration",¹⁰ an attempt to restore balance into the treatment of the two sets of rights had in fact been long overdue. The Universal Declaration is predicated upon the equal importance of the two sets of rights and recent endeavours are thus consistent with the vision which it represents.

"The Declaration does not take adequate account of the traditions and needs of the Third World"

It is sometimes suggested that "the doctrines of human rights as embodied in the Universal Declaration of Human Rights may not be relevant to societies with a non-Western cultural tradition or a socialist ideology".¹¹ In its extreme form such an approach would thoroughly undermine the existing system for the international protection of human rights and create a "free for all" situation in which each dictator and each military junta, as well as each democratically elected but embattled government, could design its own bill of rights to suit not only local traditions but also its own self-interest.

Nevertheless, the criticism cannot be dismissed solely on the ground that the vacuum which rejection of the Declaration would create is sufficiently horrific to warrant its continued universal acceptance. Many developing countries justifiably feel, as noted at the ICJ's 1978 Dakar Collo-

10) Jack Donnelly, "Recent Trends in UN Human Rights Activity: Description and Polemic", *International Organization*, Vol. 35, 1981, pp. 633-55. Cf. Alston, "A Reply to Donnelly", *International Organization*, Vol. 37, 1983, pp. 538-46.

11) Pollis and Schwab, n. 1, p. i.

quium, that the periods of colonialism and neo-colonialism have in many cases imposed cultural systems and development models upon them which are completely alien.¹² They therefore wish to rid themselves of all vestiges of cultural hegemony and to encourage the emergence or re-emergence of traditional and self-reliant approaches to development as well as to human rights.

An assessment of the appropriateness or rather applicability of the Universal Declaration in a given society requires the consideration of two separate issues. The first relates to the rights themselves and the second concerns the manner of implementation of the rights. All too often these issues are inappropriately lumped together and the analysis which follows is inevitably confused.

The first issue can generally be resolved by asking which particular rights are to be dispensed with as being culturally inappropriate in a given society and who is to decide. Within the confines of the present article it is not possible to survey all of the rights and consider which of them may or may not be applicable in a particular society. Suffice it to say that the exercise would (it is to be hoped) not be unduly controversial with respect to rights such as the right to life, the rights not to be enslaved, tortured, or arbitrarily arrested, the right to work, the right to an adequate standard of living and the right to education. With respect to the remaining rights it is pertinent to recall the wise words of José Diokno in rejecting what he termed "currently fashionable justifications for authoritarianism in Asian developing countries":

"One [justification] is that Asian societies are authoritarian and paternalistic

and so need governments that are also authoritarian and paternalistic; that Asia's hungry masses are too concerned with providing their families with food, clothing, and shelter, to concern themselves with civil liberties and political freedoms; that the Asian conception of freedom differs from that of the West; that, in short, Asians are not fit for human rights [... This] is racist nonsense... Authoritarianism promotes repression not development - repression that prevents meaningful change and preserves the structures of power and privilege."¹³

It must also be noted that the language used in the Declaration is, by design, sufficiently flexible to allow each State a "margin of appreciation" in interpreting the requirements of any particular right. To take but one example, "the right to own property alone as well as in association with others" (article 17 of the Declaration) is recognized in virtually every society. However, the right is not absolute and varying degrees of restriction may be placed upon its enjoyment according to a society's basic philosophy. The right was omitted from the Covenants not because of its unacceptability *per se* but because of the inability of States to agree on provisions governing compensation for deprivation of property.

A more contentious and complex aspect of the question of universality relates to the methods envisaged for implementation of the rights. Although the Declaration, unlike the Covenants, imposes no specific obligations upon States with respect to measures of implementation, its general approach is clearly more attuned to a society with a highly developed legal system and a

12) *Revue Sénégalaise de droit*, No. 22 (1977/78), p. 208.

13) José W. Diokno, 1978 Sean MacBride Human Rights Lecture, International Council of Amnesty International, Cambridge, 21 September 1978 (mimeo), p. 9.

sophisticated judicial structure than to one with a more traditional and informal system of justice. On this score, the allegation that the Declaration embodies a strongly Western approach seems well justified.

Nevertheless, in recent years there has been wide recognition of the need for flexibility as well as creativity in determining the most appropriate and effective approach towards implementation in each community. Thus, for example, among the draft conclusions reached (but not formally adopted for want of time) by a UN seminar on "the experience of different countries in the implementation of international standards on human rights", held in June 1983, were the following:

- "In the implementation of human rights, the methods used should take account of the traditions and culture of each society as well as of its legal system..."; and
- "Contribution to the implementation of international standards on human rights at the domestic level may also be made through various bodies including, where they exist, conciliatory agencies, such as human rights commissions, people's organizations, and grass-roots organizations, such as village tribunals."¹⁴

The rejection of unnecessarily legalistic approaches to implementation has also been reflected in the West with an increasing emphasis on non-adversary and often non-legally binding forms of redress or conciliation. In addition there has been growing awareness in both inter-governmental fora and at the national level that remedial or curative action needs to be supplemented with preventive approaches designed to avoid potential violations of human rights. This also implies a further trend away from

the "Western" approach to implementation for which the Declaration has been criticized. Finally, reference should be made to the development of regional machinery, particularly in Latin America over the past few years and potentially in Africa, which significantly enhances the prospects that specific local conditions, as well as traditions, will be taken fully into account.

"The Declaration overlooks the importance of international solidarity"

Each generation quite naturally likes to think that it has made some significant contribution to the further enrichment of the inheritance which it received from its predecessor. And indeed in the field of human rights the present generation has made an important contribution. That contribution has, however, been more in the way of application and extension of the principles contained in the Universal Declaration rather than any fundamental reconceptualization of human rights. One of the most striking examples of this is to be found in the present day endeavours to extend the reach of, or to 'internationalize', States' obligations to take measures for the promotion and protection of human rights.

This approach lies at the heart of much of the thinking on the right to development, particularly insofar as it has been suggested that the right implies a positive duty for 'rich' States to make regular transfers of financial and perhaps other resources to those States that are at present unable to ensure the satisfaction of the fundamental human rights of their citizens. While it seems most unlikely that such a duty will willingly be accepted in the foreseeable future, the principle of the account-

14) UN doc. ST/HR/SER.S/15 (1983), Annex I, paras. 4 and 10.

ability of States for the impact of their activities on the enjoyment of human rights is nevertheless a very important one. In many respects it is the unifying thread which runs through the various so-called solidarity rights of the third generation (civil and political rights being the first, and economic, social and cultural rights the second). However, the great drawback of such a system of compartmentalization into generations is the unfortunate implication that international solidarity is relevant only to a few 'new' rights (peace, development, environment etc.) rather than to all human rights. Thus for example, in the Third World today, enjoyment of the right to life and of the right to food is very often conditioned, at least to some extent, on action or inaction on the part of the international community. In that context international solidarity is no less important than it is with respect to, for example, protection of the environment. As the Sub-Commission's Special Rapporteur on "the NIEO and the promotion of human rights" concluded, "the challenge is... a pervasive one and requires constant vigilance to ensure that economic relations, at the international as much as at the national level, are approached in such a way as to ensure that the concepts of the dignity of every individual and of human solidarity are the guiding principles. In the establishment of a new international economic order full respect for human rights must be seen both as an end in itself and as an essential means."¹⁵

In the present context the point is that, rather than constituting a dramatic expansion of basic human rights principles, efforts towards an internationalization of responsibility for the promotion of respect for human rights basically amount to giving substance to article 28 of the Universal Declaration which provides that "everyone

is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized". The responsibilities of States in this regard are also clearly spelled out in articles 55 and 56, which require cooperation among States for the promotion of both respect for human rights and economic and social progress and development.

Conclusion

Since 1948, when the Universal Declaration of Human Rights was proclaimed, profound and enduring changes have occurred in the composition of the international community. The most decisive of these resulted from the wave of decolonization which swept the world especially in the 1950s and 60s and led, *inter alia*, to a shift in voting power in the General Assembly in favour of the Third World. In all fields of UN activity the consequences were significant. For example, economic development became an issue of overriding importance with the establishment of UNCTAD in 1964 as a vehicle for the expression of Third World demands and the adoption of a range of proposals (demands) for the establishment of a new international economic order in the early 1970s. It was also to be expected that the needs and aspirations of the new majority, representing well over half of the world's population and a highly disproportionate share of those living in absolute poverty, would be reflected in a significant re-thinking of the basic approach to human rights.

In recent years, and especially since 1977, this has in fact been the case. The emergence of new concepts such as the right to development and the right to peace, the growing emphasis on issues per-

15) UN doc. E/CN.4/Sub.2/1983/24/Add. 1, para. 50.

ceived to be of particular importance to the Third World, and the recognition of the need for a deeper approach which attacks the roots as well as the surface manifestations of economic, social, political, cultural and other forms of operation, are all examples of the way in which the UN system has responded.

By the same token, however, these new directions have by and large been more in the nature of a widening and deepening of the vision contained in the Universal Declaration rather than a rejection or replacement of that vision. In today's thinking: the right to property occupies a less exalted place than it did in the Declaration; the right to self-determination has assumed an almost pre-eminent place in the Covenants; a greater emphasis is being placed upon collective rights and several so-called synthesis rights have been proclaimed; the right to petition, which the Declaration omitted, is gradually being given procedural substance through a host of generally uncoordinated initiatives; a considerable effort is being made to take full account of the experience, traditions and particular concerns of developing as well as developed countries; and there is a growing awareness that States' human rights responsibilities do not cease at national boundaries.

To date, however, none of these developments has been presented as a repudiation of the basic principles contained in the Declaration. The dominant ideological disputes of our day were hardly less significant or controversial at the time of the Declaration's adoption. The relationship between the two sets of rights, the extent to which human rights obligations are capable of limiting State sovereignty, the place of the individual in international law,

and the relationship between the individual and collective dimensions of human rights, were all debated at length in the late 1940s and continue to be at the heart of many of today's most troublesome issues.

In 1983, even more so than in 1948, the Universal Declaration stands out as a beacon in a fog of inhumanity. Yet the Declaration does not purport to offer a single unified conception of the world as it should be nor does it purport to offer some sort of comprehensive recipe for the attainment of an ideal world. Its purpose is the rather more modest one of proclaiming a set of values which are capable of giving some guidance to modern society in choosing among a wide range of alternative policy options.

On the Declaration's thirty-fifth anniversary there is a large and growing body of evidence to support John Humphrey's assessment that "in addition to their admitted moral and political authority, the justiciable provisions of the Declaration, including certainly, those enunciated in articles one to twenty-one inclusive, have now acquired the force of law as part of the customary law of nations".¹⁶ Of particular importance in this regard is the 1980 judgment of the US Court of Appeals in the case of *Filartiga v. Peña-Irala* in which it was held that the prohibition of torture "has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights".¹⁷

In conclusion, it is clear that the Universal Declaration has stood the test of time extraordinarily well. As a 'living' document, which has been interpreted dynamically in response to changing perceptions, needs and aspirations, it is neither Western nor passé. Indeed at a time when a variety

16) J. Humphrey, *The Great Adventure: Human Rights and the United Nations* (Dobb's Ferry, Transnational, 1983).

17) 630 F. 2d 876 at 882 (2d Cir. 1980).

of new concepts and even new rights are emerging it is all the more important to reaffirm the continuing validity of the Universal Declaration as a universally recogniz-

ed and accepted foundation stone for national and international endeavours to promote and protect human rights.

Human Rights and the Peace of Nations

by
John P. Humphrey

A question that will naturally arise and which will need an answer when the United Nations celebrates the thirty-fifth anniversary of the adoption of the Universal Declaration of Human Rights on December 10, 1983, is whether the anniversary is worth celebrating. There can be no doubt that some human rights are better respected now than they were before the Second World War, including in certain countries at least economic and social rights and the rights of women and of racial and religious minorities. But other human rights are still violated as badly, some people would say, as they were immediately before and during the war when the massive and cynical violations of the most basic human rights in and by certain countries provided the catalyst for the human rights provisions of the United Nations Charter and the now developing international law of human rights, including the two international covenants and the Universal Declaration.

There is however another and more rosy side of the picture. For, while the gap between commitment and performance may be wide, an international law of human rights now exists by reference to which the conduct of governments can be and is judged. This law hardly existed on the night when the Declaration was adopted.

Traditional international law as it was conceived and practiced before the war had little place for human rights. It was concerned only with the relations of states

which alone possessed rights or owed duties under the order. Only states had international legal personality and what a state did to its own nationals was its own business and beyond the reach of international law. The order did, it is true, protect certain categories of people including aliens; but in the eye of the law the individuals in question were objects not subjects of the law. Thus, if the treatment meted out to foreigners in a country fell below a certain internationally recognized standard, the state of which the injured individuals were nationals had a right to protect them. But this right belonged to the state not to the injured individuals.

The normative order of the world is now changing. There now exists, as already indicated, an international law of human rights by reference to which the conduct of governments can be judged but which also confers rights on individuals. It is to be found in a whole series of international conventions, both bilateral and multilateral, in the constitutions of international organizations including the United Nations and in the customary law of nations. The best example of the growth of customary rules relating to human rights is the Universal Declaration which was adopted as a resolution of the General Assembly and was never meant to be binding on states as part of international law. It has been invoked as law so many times both within and outside the United Nations and is so consistently

used by the Organization to interpret the Charter (which while it mentions human rights in many of its articles does not list nor define these) that by juridical consensus the rules and principles enunciated in the Declaration are now widely recognized as forming part of the customary law and therefore binding on all states.

The fact that this body of treaty and customary law has come into existence in such a relatively short space of time is, without any doubt, of the greatest historic, moral, political, legal and practical importance. In any event from the point of view of normative standards and the eventual creation of a new world order it has been one of the most important developments in the history of legal institutions. It has changed not only the content but the very nature of international law. What has happened is nothing short of revolutionary. Once a purely horizontal phenomenon, international law is beginning to have a vertical dimension. It is no longer a purely inter-state (*jus inter gentes*) order. It would be better indeed to call it world law rather than international law. Notwithstanding the gross violations of human rights that continue to characterize our times, such a development is worth celebrating, not only because it offers some hope that violations of human rights can be curtailed, but because, as will be suggested below, it points the direction that the new world order must take if we are to respond to the challenge of thermonuclear destruction. It is indeed a factor in the creation of such an order. The developing world law of human rights may yet, if we have the time, lead us away from international anarchy towards world peace.

Law is a normative order which prescribes certain conduct; but, unlike the laws of physical science, it says what ought to or should happen not what will happen. Law however is the *sine qua non* of order

even when it is not respected; and there can be neither peace nor human rights without order.

Law that is not obeyed is of course weak law, which is one of the reasons why developed legal systems provide mechanisms for the implementation of their rules. The international order provides very few such mechanisms. For international law is still highly decentralized in that it possesses few centralized executive or indeed legislative or judicial organs of its own. Even where these do exist their commands (too strong a word perhaps in this context) must be enforced, if at all, by the individual states which still possess a monopoly of coercive power. This is one reason why the force of public opinion still remains the most effective sanction of international law, including the international law of human rights. The present priority, therefore, insofar as the developing although still largely normative international law of human rights is concerned, is to press forward with current efforts, modest as they may still be, to set up mechanisms for its implementation. Some such mechanisms now exist including those set up by the Covenant on Civil and Political Rights which probably function as well as any United Nations mechanisms of implementation, and those of the European Convention on the Protection of Human Rights and Freedoms, which function better.

It would seem therefore that, notwithstanding the weaknesses in the system and the gross violations of human rights that continue to characterize the world in which we live, there has been progress in the international protection of human rights since the adoption of the United Nations Charter and the Universal Declaration.

We have already hinted at another perspective from which the developing international law of human rights may be viewed. It is the relation between respect for

human rights and the peace of nations. Few people would deny that this relationship exists. "Is not peace", President Kennedy once asked, "in the last analysis a matter of human rights?" This question has already been answered by President Truman in the speech with which he closed the San Francisco Conference. Referring to the United Nations Charter which had just been adopted, Truman said that it was dedicated to the achievement and observance of human rights. "Unless we can obtain these objectives for all men and women everywhere, without regard to race, language or religion, we cannot have peace and security in the world." The same truth is more formally if less clearly expressed in article 55 of the Charter and in the preambles to the Universal Declaration and the two Covenants.

After the traumatic experiences of World War II and events that led up to it, it should be obvious that violations of human rights, especially where there is a consistent pattern of gross violations, can be a cause of war although of course not the only cause. The point hardly needs to be laboured. It should be equally obvious that war and the fear of war are reasons and sometimes pretexts for suspending the exercise of certain rights. That possibility is indeed recognized by the Covenant on Civil and Political Rights and the regional conventions, which give states parties the right to derogate from their obligations under these instruments in time of national emergency that threatens the life of the nation. These are not however the truths that we are now concerned with. There is another dimension to the relationship between human rights and peace which is less obvious, at least at first blush. The developing international law of human rights – the catalyst for which was the gross violations of human rights that occurred in certain countries immediately before and during the war – is probably the most important fac-

tor in bringing about a change in the structure and nature of international law that is so radical that it challenges the contemporary states system, in which states possess a monopoly of coercive power and are alone recognized as having international legal personality. It is this system which prevents the organized international community from employing its own agents to implement its law and permits the agents of the state to hide behind the collective responsibility of the state. It is probably no exaggeration to suggest that this system has prevented the creation of the kind of world order which can keep the peace of nations much in the same way that national governments have with obvious exceptions been able to keep the peace at the national level. Insofar therefore as the developing international law of human rights is contributing to bringing about a change in that system and replacing it by a new order that is more suited to the realities of the world we live in, that contribution is certainly positive and worth celebrating on this thirty-fifth anniversary of the adoption of the Universal Declaration of Human Rights.

These are, it must be admitted, radical assertions. But they are no more radical than the technical and political realities of the world in which we live. Never before in history has the ingenuity of man produced weapons capable of destroying civilization and indeed its very memory. That is why, in his great book, *The Fate of the Earth*, Jonathan Schell says that the contemporary states system is obsolete. The institutions in use for governing the affairs of this planet are no longer adequate for the job.

Collective security as adumbrated by the Covenant of the League of Nations and the United Nations Charter has not worked and is not working, chiefly because the individual states in the system are too powerful. In part this is because they possess a monopoly of coercive power and the indi-

viduals who act in their name do so in an official capacity which permits them to hide behind the collective responsibility of the states for which they act. The only alternative is a radically different system of world government which will no longer be exclusively inter-state. Under such a system, states would no longer have the monopoly of coercive power and the officials who act in their name could no longer escape personal responsibility for their acts.

International law is still defined in some textbooks as a system of norms that govern the relations of states, and only of states, to the exclusion of other entities including individual men and women. This reflects the still essentially inter-state character of international relations. International law was and essentially still remains, as already indicated, a horizontal order quite unlike the vertical legal orders that operate at the national level where the law reaches down to ultimately the only reality, individual men and women. American constitutional law under the Articles of Confederation, which governed the United States after the War of Independence until the adoption of the constitution of 1787, had such a horizontal character. Alexander Hamilton, in an essay in the *Federalist*, called that constitution the "parent of anarchy", and advocated the adoption of a constitution under which, unlike the Articles of Confederation, there would be a direct legal relationship or *lien de droit* between the central government of the United States and individual Americans. Hamilton was not writing about international law or the states system; but what he said about

the Articles applies *mutatis mutandis* to them.

This exclusively inter-state character of international law has already begun to break down. War criminals were held personally liable for their crimes at the Nuremberg and Tokyo trials, and this notwithstanding their defence that they were acting in their official capacity as agents of their governments. The United Nations itself, which is not a state, has been held by the World Court to possess international legal personality, and the same argument is good for most other international organizations, including the specialized agencies. But it is in the developing international law of human rights that the trend is most apparent. Individual men and women now have rights under international law, and the system is even beginning to provide procedures, most of them admittedly still weak, through which these individuals may seek remedies in their own name.

This trend has only just begun – thirty five years is a very short time in the history of man – but it points in a new direction. If we escape the threat of thermonuclear destruction, historians may be saying, a hundred years from now, that the most important contribution of what we now call the international law of human rights was the part it played in the destruction of an obsolete states system – governed by the parent of anarchy – and the creation of a new world order based on individual responsibility and rights. In the meantime there is much to think about in this thirty-fifth year of the Universal Declaration of Human Rights.

Restructuring Democracy in Turkey

by
Bülent Tanör

Since 12 September 1980, when the armed forces seized power, Turkey has been governed by a National Security Council (NSC), made up of the heads of the general staff, the commanders-in-chief of the army, air force, navy and police forces. The President of the NSC, General Evren, justified this military intervention by referring to the imminence of civil war and the apathy of the State bodies and institutions as well as that of the political groups when faced with this danger. The NSC set itself the aim, first of doing away with elements hostile to "national unity" and "social peace", thus bringing back public order and ensuring national security; then of proceeding with setting up a new legal and political apparatus which would ensure the stability of the régime, prior to a return to democracy which would be protected from the inconsistencies of the recent past¹.

After covering the first two stages towards a "return to normality", that is, by convening a Consultative Assembly and adopting a new Constitution, Turkey has just embarked on the third stage: the elections of 6 November 1983, an event considered and presented, both by official Turkish circles and by part of Turkish and world opinions as a turning point in the process of normalisation.

The purpose of this article is to examine briefly the political and legal conditions of this "return to democracy". The article will refer both to the model of democracy which the present régime is attempting to set up, institutionalise and bring about in the future political life of the country, and the means used in presenting this model, as well as the way in which it will be achieved during the "transition towards democracy". These will be examined under four headings:

- (I) *The methods or form of institutionalisation* – the methods used in establishing the new political and constitutional system;
- (II) *The content or substance of the institutionalisation* – the image of the future Turkish democracy as enshrined in the 1982 Constitution, in other words, the "institutional product";
- (III) *The preservation or consolidation of the system* – the protection of the political and constitutional system, in other words, the long term "freezing of the institutional product";
- (IV) *The political and legal framework of the transition* – the characteristics for launching the transition process, in other words, "selling the institutional product".

1) See: "The legal situation in Turkey", *ICJ Review*, no. 26, June 1981, pp. 24–40.

I. The Methods of Institutionalisation

Three main themes deserve to be presented in order to understand the characteristic features of how the new institutional framework was drawn up, namely the institutionalisation programme, the phenomenon or act of constitutionalisation (constitutional referendum), and the nature of the real instituting power.

(A) *The institutionalisation programme*

On the whole, democratic principles require that a transition towards or return to democracy be carried out according to democratic logic and must, in general terms, ensure (i) the creation of conditions for political and ideological pluralism and the freedom to form political parties, (ii) the holding of parliamentary elections in conditions of freedom and equality for all, be they voters or candidates, (iii) the establishment of a parliament composed of freely elected representatives, and (iv) the drafting of a constitution by this parliament and its eventual submission to a referendum.

Such was the system used, with various nuances, in some Mediterranean countries such as Portugal, Spain and Greece, in the 1970s. As far as the Turkish model is concerned, the various stages were as follows:

- (i) the dissolution of the parliament following the military take over;
- (ii) the prohibition of any form of political activity, especially by the existing parties, followed by the dissolution of those parties;
- (iii) the convening of an Assembly whose members were appointed by the military power and had a purely consultative status;

- (iv) the preparation of a draft constitution by this Assembly, and its approval by the NSC which approved its final form with a few amendments of greater or less significance;
- (v) the presentation of the final project for popular consultation, its acceptance and consecration as the new constitution of the country;
- (vi) the continuation of the military régime which, through the NSC, controls the legal and executive powers, and thus continues to promulgate new laws, etc.;
- (vii) the raising of the ban on political activities, and the acceptance of new political parties;
- (viii) the preparation of elections in which only parties and candidates "approved" by the NSC could participate (see below, IV, B) and very soon afterwards the restoration of the Parliament; its powers, especially those concerning the revision of the constitution, being very much curtailed (see below, III), and above all limited to a period of "transition" (see below, IV).

It is to be noted, therefore, that the road and the stages to normalisation in Turkey are fairly distant from the Mediterranean pattern and are closer to those adopted by some of the Latin American régimes when faced with the same problem of a "return to democracy".

(B) *Ratification of the programme and of the institutional project: constitutional referendum*

The results of the constitutional referendum of 7 October 1982, when the people "expressed their approval of the Constitution" by an impressive majority (91% for,

9% against – with an electoral turnout of 90%), established the formal and definitive validity of this text. It must be said that the referendum took place in a correct manner, without giving rise to serious irregularities.

However, two reservations must be made. The first concerns the use, during the voting, of fairly transparent envelopes, a fact which must sometimes have compromised the secrecy of the vote since the voting papers were of different colours: white for yes, and blue for no. The second reservation is doubt less important. It concerns the difficulty of abstention. Those who abstained lost their right to vote and to be elected in the next legislative elections. This clause, written into the constitution (provisional article 16) thus brought the system applied close to that of a compulsory vote. But it is true that a system of compulsory voting cannot *per se* be considered as a denial of democratic principles. However, it is not enough to judge the character of the referendum and to testify to its honesty in upholding legal norms and technicalities by reference only to the organisation of the poll. It is also necessary to consider and examine the referendum in its whole political and legal context.

In doing so, it will be seen that the referendum of 7 November 1982 suffers from certain faults which transformed this basically democratic institution and converted it in this case into a mere formality. Specifically:

- (i) some of the Turkish politicians were deprived from the start of the right to give their views on the draft constitution;

- (ii) any propaganda to vote “no”, any criticism concerning the provisional articles of the draft or of the speeches that General Evren was to give “in the name of the State” with a view to “making the public familiar with and informing it on the Constitution”, were forbidden as soon as the final text was published²;
- (iii) by joining together in a single popular consultation both a constitutional referendum and a plebiscite designed to designate the sole candidate for the Presidency of the Republic for seven years, if the Constitution were approved, all this created an ambiguity both for the voter and about the nature of the consultation itself;
- (iv) because of lack of prior information on how the problems caused by a possible rejection of the project would be dealt with, the voter found himself faced by a dilemma. Paradoxically, anyone who voted “no”, in order, for example, to express his disagreement with a project considered insufficiently democratic, found himself, in fact, opposing a transition towards normalisation and to some extent opting to maintain the status quo and thus the military régime.

(C) *The real instituting power*

To conclude this section, the following question must be asked: What is the real instituting power³ in Turkey since the military intervention? The answer must be the National Security Council, and this for several reasons in addition to those already mentioned above.

2) Communiqués No. 70 and 71 of the NSC.

3) The term “instituting power” is used here in preference to “constituent power”, which is more technical and narrower.

- (i) the NSC arrogated to itself from the start the right to be able to revise the political and legal structure of the country, and among other things the right to alter the constitution, as is shown by the "Law on the constitutional order" which the Committee itself decreed⁴;
- (ii) when the time came to give the country a new constitution, the NSC did not share its "constituent" power with those elected by the nation, but only with the consultative Assembly whose members had themselves been nominated by the NSC. Thus, the NSC reserved to itself the right to shape the final draft;
- (iii) the draft constitution reflects fairly truthfully the new legal framework formed by the laws and decrees published by the NSC after 12 September 1980. It is thus the constitutional consecration of the emergency legislation produced by the NSC, as much at the level of human rights as in the field of the reorganisation of the State;
- (iv) the NSC continued to make use of both legislative powers (new laws on political parties, elections, etc.) and executive powers (decrees, regulations, etc.). It also intervened directly in the political life, particularly in the electoral campaign (dissolution of parties, screening applied to parties and to candidates for election, etc.). It continued therefore to mould the political and constitutional institutions by altering or even modifying constitutional provisions through laws or decisions, examples of which have been mentioned.

And so the fact that the military power

used popular consultation in order to have the constitution approved is no more than a formality. In reality it is the NSC which deserves the name of the "real instituting power".

II. The Content of the Institutionalisation

What are the main features of the future Turkish régime as far as the "reorganisation of the State" and the "links between State and society", as enshrined in the new Constitution are concerned?

The internal reorganisation of the State

The internal reorganisation of the State, in the sense of the redistribution of rôles within it, is first of all noticeable by its reinforcement of the executive, if not at the expense, at least to the detriment of the legislative power. First of all, contrary to the Constitution of 1961, which considered the executive as merely a function and not a power of the State, the present Constitution considers the executive not only as a function but also as a power (Article 8). Moreover, the executive power is given an extensive legislative power, contrary to the original text of the previous Constitution. Thirdly, to set in motion the process of dissolving the legislative assembly is made easier in the new system (Article 116).

Strengthening of the executive also stems from peculiarities of the new status granted to the President of the Republic. The President, elected for seven years by Parliament, has powers which he did not enjoy previously: those of watching over the "proper functioning of State bodies";

4) See the article "The legal situation in Turkey", note 1, supra.

making the inaugural speech to the Assembly at the opening of the legislative year; putting constitutional amendments to referendum; convening and gathering under his Presidency the Council of Ministers; deciding on the use of the armed forces; nominating the head of the General Staff; proclaiming, together with the Council of Ministers, a state of emergency; nominating the members of the Council of Higher Learning; and nominating the Vice-Chancellors of Universities as well as the Presidents of the superior courts, such as the Constitutional Court, the Supreme Military Administrative Court, the Military Court of Appeal and the Supreme Council of the Judiciary, etc. (Article 104). In addition, among the functions of the President of the Republic, there are some that he can carry out without the agreement of the Prime Minister or of the Ministers concerned. Moreover, the exercise of these prerogatives cannot be questioned before the courts, not even the Constitutional Court (Articles 105/2 and 125/2).

Another tendency apparent everywhere within the executive is the disappearance of the autonomy of the Turkish radio and television Governing Boards, as well as that of the universities, in favour of the central administration, which is highly centralised (Articles 130–133).

As far as the relationship between the judicial power and the political organs of the state (i.e. the legislative and the executive) are concerned, one must note a certain weakening of the judicial power in favour of the executive. To begin with, the judicial power, or rather the Superior Courts, have lost some of their independence, not to say have become totally dependent on the executive. The judges of some of the Superior Courts, among them those of the Constitutional Court, the military Court of Appeal, the Supreme Military Administrative Court as well as a quarter of

the members of the Council of State, etc., are nominated by the President of the Republic (Article 104). Moreover, the powers of reviewing the legality and constitutionality of their activities, exercised respectively by the Council of State over the executive, and by the Constitutional Court over Parliament, have been limited and reduced (Articles 125, 148, 150–153).

What is the situation with regard to the relationship between the "civil power" and the "military power"? From the outset it must be underlined that the new constitution does not explicitly confer on the Turkish armed forces a direct supervisory rôle over the management of political and public affairs, as does, for example, the Portuguese constitution.

Nevertheless, two attempts at institutionalising the rôle of the army in the political régime may be noted. The first relates to the adoption by the constitution of a "transition" period, during which the armed forces will be able to make their weight felt and their choice known in the functioning of the political system (infra. IV). The second consists in keeping in existence an institution already established since the 1961 constitution, but strengthening its status and its rôle in the decision-making process. This is the "*Council of National Security*" (not to be confused with the National Security Council (NSC), the central body of the military régime since 1980).

The Council of National Security is a mixed body, made up of civilians (the President of the Republic, the Prime Minister and certain ministers) and members of the armed forces (the Chief of the Staff, the Commanders-in-Chief of the army, the air force and the navy, and the Commander-in-Chief of the gendarmerie). The Council participates in drawing up the "national security policy" and to this end communicates its advice and proposals to the Coun-

cil of Ministers. This advice, considered as "consultative" in the previous Constitution, becomes, in the present one, if not completely mandatory, at least deserving to "be taken in consideration with priority" by the Council of Ministers (Article 118). Moreover, the function of the Council of National Security is now defined in more ambiguous terms such as "the protection (*inter alia*) of the peace and security of society". These terms are generally used in Turkish official if not scientific, terminology as an equivalent to "political and social agreements", meaning the avoidance of political and social demands considered as excessive.

The picture just described shows the distance which the Turkish constituting power has thought fit to put between itself and the concept of liberal constitutionalism. The divorce between the new tendencies represented by the present constitution and the liberalism of the previous constitution is very evident.

However, strictly speaking, one cannot assert that this type of state represents *in itself* and *as such* an antidemocratic model. There are two main reasons for this.

First: it cannot be contended that a State becomes authoritarian and antidemocratic by the fact that its constitution favours the executive to the detriment of Parliament, that it adopts a semi-presidential régime, that it advocates administrative centralisation, that it proceeds to a certain erosion of the independence and powers of the judiciary, that it includes within the governmental institutions a body of the nature of the Council of National Security, etc. Though all these attempts indicate in their entirety and in the context of the country concerned, a fairly clear general tendency toward the restoration of a strong

and finally threatening power, it nevertheless remains true that the constitutional régime concerned is based, on the one hand, on a separation of the political powers (legislative and executive), with the power of control given to the first over the second and, on the other hand, on the separation and independence of the judiciary from the political power, all the more so when the judiciary possesses fairly effective powers of review (of the legality and constitutionality) of those powers.

Secondly: it must be admitted that merely looking at the *internal* structure of the state does not enable one to get a global view of its true nature. It is necessary to pursue the analysis into a related field, that in which the state is seen in its external relations, i.e. in its relations with the national society and the individual.

Readjustment of the relations between the state and society

It is in this area that the novel features of the new Turkish constitution are most to be criticised. For, while it recognises a satisfactory list of rights and freedoms, it nevertheless empties these of all their content by means of the prohibitions, exceptions and restrictions which it contains. Its approach to freedom is on the whole as follows:

(i) The constitution is marked by its excess of zeal in defending the state against society, on the one hand, and the state and/or society against the individual on the other hand. It permits an excessive curtailment of freedom, by means of the concomitant powers of intervention which it confers upon the legislator, powers which accumulate to the point that they constitute a water-tight lid liable to stifle every aspiration to liberty. First, it enables the legisla-

tor, under a general clause, to restrict fundamental rights and freedoms in order to ensure the "protection of the indivisible integrity of the state with its territory and nation, the national sovereignty, the Republic, national security, public order, public peace, the general interest, public morality and public health" (Article 13/1). This is a provision applicable to all rights and freedoms without exception or distinction (Article 11/3). Secondly, the rights and freedoms can also be limited for the "special reasons" specified in the relevant articles (Article 13/1). Finally, the constitution forbids the abuse of rights and freedoms in the following words: "None of the rights and none of the freedoms mentioned in the present constitution can be used with the aim of threatening the indivisible integrity of the state with its territory and with the nation, of putting in danger the existence of the Turkish state or of the Republic, of suppressing the fundamental rights and freedoms, of entrusting the administration of the state to a single person or to a group of individuals, or of ensuring the domination of one social class over others, or of creating distinctions between individuals because of their language, race, religion or sect, or of creating a state based on these concepts and ideas" (Article 14)⁵.

The reader will thus appreciate the very narrow room for manoeuvre granted to an individual who has to "exercise his freedoms" under the constraints of these three "safety belts".

(ii) The constitution also carries within it a still greater distrust of collective rights (of meeting, of assembly, of association). The vast number and the ambiguity of the

reasons for restrictions as envisaged in the regulation of these freedoms in law, lead one to think that the constituent power wishes to see an atomised society, made up of dispersed and isolated individuals.

This distrust of any form of association in the life of society assumes a stranger character when it deals with *collective social rights* (to form a trade union, to strike, etc.). The specific restrictions imposed on the world of trades unions and labour acquire on that account a purely *antisocial* character.

(iii) The constitution is also marked by a suspicion of "anything political". The prohibitions imposed on the formation of political parties, as well as on their activities are very revealing in this respect. For example, the prohibition of adopting statutes and programmes incompatible with the indivisible integrity of the state with its territory and nation, of extolling and advocating the domination of one class or social group over others, of organising abroad, of forming women's or youth sections, of creating endowment funds (Article 68); of engaging in activities going beyond their statute and their programme, of transgressing the provisions of Article 14 of the constitution (see above), of making contact and collaborating politically with associations, trades unions, endowment funds, cooperatives and professional organisations of a public nature or of receiving material aid from them; of receiving orders or material help from foreign states or international organisations, associations or groups abroad, or of taking part in their activities and decisions aimed at undermining the "independence and integrity" of Turkey (Article 69), etc.

5) Such language in earlier constitutions has been held by the Turkish Supreme Court to justify legislation making it a criminal offence to publish anything in the Kurdish language, for Kurds to sing their national songs, and indeed for anyone to suggest that there is a Kurdish minority in Turkey – Editor.

This same kind of visceral reaction with respect to *politics* also has repercussions in other fields under the heading of prohibition of political activities "of any sort" imposed on associations, trades unions, endowment funds, cooperatives as well as professional organisations of a public nature (Articles 33, 52 and 135). The ban on belonging to a political party for judges, university teaching staff, students, members of the armed forces, as well as civil servants (Article 68) comes within the same category.

It can thus be noted that the constituent power has adopted a concept of society which is not only atomised or atomising, but has also *depoliticised* or is *depoliticising* the society.

(iv) As far as so-called "individual rights and freedoms" are concerned the constitution does not show itself very well disposed towards them either. Already, in the article devoted to the "inviolability of the person" (Article 17) one notes with bitterness a quite unjustifiable derogation from the right to life which clearly contradicts Article 2 of the European Convention of Human Rights: "Death is not considered as an act inflicted in violation" of the right to life in the case when, *inter alia*, it results from "carrying out, in the case of a state of siege or emergency, orders given by the competent authorities".

The articles concerning the protection of privacy (Article 20), the inviolability of the home (Article 21) and freedom of correspondence (Article 22) give the police the right to intervene, despite these freedoms, without a judicial warrant, simply on the orders of the administrative authorities, whenever a "delay could be considered prejudicial to justice".

In the field of intellectual freedoms the most glaring derogations are the following: compulsory religious instruction in primary

and secondary schools (Article 24/4); limits on the very content of freedom of speech by Articles 13 and 14 of the constitution mentioned above, as well as by the principles set out in the Preamble (provisions attempting to legitimise and constitutionalise laws restricting freedom of expression which are found already in the prohibition of expressing or diffusing ideas in "languages prohibited by law" (*sic*) (Article 26/3 and Article 28/2); the constitutionalisation of press, radio, television or film censorship (Article 26/1); the limitation of scientific, academic and artistic freedom through constitutional provisions defining the form of the state (Article 1), the basic principles of the Republic (Article 2), the official language, the flag and the national anthem, the capital of the state and that ensuring the integrity of the state (Article 3) as laid down in Article 27; the power to ban the selling of foreign newspapers in the country (Article 2/3), the adoption of indirect censorship of the press (Article 28/5); the banning of regular publications considered as a continuation of periodicals already banned (Article 28/9), and the seizing and confiscating of printing shops and their outbuildings which may have been used for committing certain offences (Article 30).

(v) The fragility of legal guarantees protecting fundamental rights and freedoms must at this point be underlined. This fragility is due to several factors. *First*, the executive is given the power to intervene in the nomination of judges (see above, II), which, generally speaking, makes a mockery of the guarantees given to judges to ensure the independence of the judiciary (Articles 138 and 139). *Then*, the creation of State Security Courts (Article 143) and enlarging the jurisdiction of military tribunals in time of siege (Article 145), both pose serious problems with regards to the legal

guarantees which individuals should enjoy. *Finally*, the Courts responsible for reviewing the constitutionality of the laws (the Constitutional Court) and the legality of administrative actions (the Council of State) see themselves reduced to playing a more timid rôle in protecting the supremacy of the law (cf. above, II). Above all, the review of the constitutionality of laws concerning human rights becomes more and more difficult due to the ambiguous character of the concepts introduced to limit these rights (see above, (i)). A legislator little preoccupied by principles of liberty will thus be able to justify his actions by relying on these vague terms and escape all judicial control by the Constitutional Court.

All these measures correspond to a search for a "strong state at any price" even if it means undermining free development and fulfillment of society and of the individual. This tendency is revealed very clearly in the term: "the sacred state of Turkey", inserted in the Preamble of the Constitution. "The state made sacred" to the detriment of the "sacrificed" society or individual thus make up the two different panels of the constitutional diptych.

III. Consolidating the System

The constitutional framework, the characteristics of which have thus been defined, is strongly protected against initiatives for revisions considered incompatible with the basic tenets which the constituent power has decided upon. These means of defence are found both at the level of the state bodies, and at the level of non-governmental political institutions and organisations and of society in general.

(i) First of all there are provisions in the Constitution which cannot be revoked; these cannot be amended, and their amendment cannot even be proposed (Article 4). They are the provisions dealing with the republican form of the state (Article 1), with the basic principles of the Republic (Article 2), with the principle of the indivisible integrity of the state with its territory and nation, with the official language, the flag, the national anthem and the capital (Article 3).

(ii) Next come procedural rules for constitutional amendments. A revision of the Constitution cannot be proposed by less than a third of Parliament and must be adopted by two-thirds of the Parliament. Secondly, the President of the Republic is endowed with new powers in the event of constitutional revision, namely, those of asking Parliament to re-examine the draft amendment and, if the Parliament insists on maintaining its position, of submitting the proposal to a referendum (Article 175). Moreover, for a period of 6 years from the opening of Parliament, a qualified majority of three-quarters is required in order for Parliament to readopt the draft amendment if the President demands a re-examination (Provisional Article 9).

(iii) Political life is surrounded by a series of prohibitions and constitutional sanctions which allow for a very limited field of action concerning attempts to look into other possible constitutional models which could be envisaged within the framework of a liberal democracy. The restrictions on the statutes and activities of political parties are a proof of this (see above, II).

(iv) The restrictions imposed on intellectual life of associations or trades unions, and thus on society and the individual, can also be seen as barriers erected against any

attempt at organising support for new ideas and constitutional proposals. As has already been noted, intellectual freedoms are limited by the provisions of the constitution, and associations and trades unions are strictly forbidden to engage in political activities, whatever their nature (see above, II).

To the above restrictions must be added those laid down in the Preamble to the Constitution which stipulate that "no idea or consideration be given protection if it goes against Turkish national interests, against the principle of the existence of Turkey as an indivisible entity with its State and territory, against the historical and moral values of Turkey, against the doctrine of Atatürk... (Preamble, para. 7). This statement is reinforced by the duty to "absolute loyalty" to the constitution (Preamble, para. 10).

IV. Legal and Political Framework of the "Transition"

The process of a "return to democracy" entails another and new stage which must follow the elections and the convening of Parliament. For, a "régime of transition" régime is to be found both in the provisional measures in the constitution and in recent decrees of the NSC concerning political parties and electoral procedures.

(A) *Provisional articles in the Constitution*

These articles, of which there are 16, outline the constitutional framework of the "régime of transition" and present the following characteristics:

(i) The President of the Republic is not elected, but is "designated" as President of

the Republic" (Provisional Article 1) as a result of the link between the constitutional referendum and the plebiscite which brought him, as the one and only candidate, to this office. He has all the functions and prerogatives of an elected President (Provisional Article 1). Moreover, he is, for six years, given a very powerful right of veto which enables him to block any constitutional amendment which he would not consider as opportune (Provisional Article 9, see III above). Moreover, he assumes at the same time the Presidency of the NSC until this becomes the "Council of the Presidency of the Republic" (Provisional Article 1/2).

(ii) The NSC, which continues to function (Article 2.1) and exert its "legislative and executive" powers until Parliament is convened and set up its own Presidential Office (Provisional Article 15/1), becomes for six years from that date a "Council of the Presidency of the Republic (Provisional Article 2/3). This Council will be responsible for examining draft laws passed by Parliament and submitted for approval of the President of the Republic". The Council will give its advice on questions relating to the dissolution of Parliament, on the use of emergency powers, on the administration of radio and television, on the education of young people and on the administration of the Board of Religious Affairs. It will carry out research and investigation into problems concerning internal and external security, as well as into any other questions submitted to it by the President of the Republic (Provisional Article 2/4). The members of this Council enjoy the same advantages and immunities as parliamentarians (Provisional Article 2/3) and are exempt from any criminal, fiscal or civil proceedings concerning the exercise of their office as from the date of the military intervention (Provisional Article 15/1).

(iii) The Constitution also provides for the maintenance of emergency legislation. It stipulates that the laws, decrees, decisions and all actions decided upon by the SNC in the period preceding the convening of Parliament and the setting up of its Presidential office cannot be questioned before the Constitutional Court (Provisional Article 15/3). These emergency measures, coming as they do from a non-constitutional body, constitute an enormous number of supra-constitutional norms. This is incompatible with the principle of the supremacy of the Constitution.

(B) Political parties and elections

The NSC had, on 16 October 1981, disbanded all the then existing political parties. After the adoption of the new Constitution and of the law on political parties, the NSC authorised the creation of new political parties. But the appearance, within a fairly short time, of a dozen new political groups some of which did not hide their links with former disbanded parties, soon aroused indignation in military circles, as is shown in the speeches of General Evren⁶. The military leaders were afraid on the one hand that the "inflation" (Evren) of parties would endanger political stability and, on the other hand, that the reappearance on the political stage of former politicians, even if acting through other people, would provoke a "return to the past".

In fact, there was little justification for these fears. For the electoral law, putting up barriers of 10% both at the level of electoral constituencies and at the national level, only enables the development of two or three parties and prevents the others from

being represented in Parliament. Moreover, the Constitution already prohibits political activities by former politicians for periods of 5 to 10 years. But the NSC, resolved to fight energetically these two "evils" and apparently dissatisfied with the existing barriers, set about defining more precisely the field of political "rivalries":

(i) The NSC showed its determination to prevent any attempt at going back and "returning to the past" by decreeing on 31 May 1983 the dissolution of the Party of Great Turkey which it accused of "prolonging the existence and philosophy of a former dissolved party", an illusion⁷ to the Party of Justice led by Mr. Demirel.

(ii) Control over the elections appeared in various ways. To begin with, the Constitution had already imposed prohibitions against political activity on some of the former politicians (Provisional Article 5). The NSC arrogated to itself, by means of laws which it itself drafted, the power to decide on the participation or non-participation of the political parties. The electoral campaign, thus closed to the non-approved parties, was open to only three parties, at least two of which are completely military in their outlook. Finally, the NSC assumed the right to approve the electoral lists, and disqualified a fair number of candidates whom it considered undesirable.

Thus, on 6 November, in a country throughout which martial law continued to be in force, the seats in Parliament were allocated between the candidates of three "approved" parties and a few independents

6) Speeches in Giresun, Bilecik, Kütahya and Kirsehir, reported in the Turkish press of 20 June and 4 and 24 July 1983.

7) Decision No. 79 of the NSC of 1 May 1983.

who had not been disqualified, all the candidates being in any case "selected" by the NSC.

Problems

Three contradictions inherent in this way of "restructuring democracy" deserve to be highlighted.

The first is at the level of the relationships between the political institutions and society. It is permissible to ask the following question: Does not an institutional framework so restrictive of freedoms and of participation, run the risk of leading to a conflict between the institutions of government and the society, and ending up with a political and constitutional crisis?

The second contradiction focuses on the political institutions themselves. It results in a latent tension between the acknowledged weight of the "de facto powers" and the weakness of those "elected" by the nation. The "screening" applied to the first legislative assembly can lessen its range. But it can also lead in the near future to a conflict between the President of the Republic and Parliament, if Parliament decides to lay claim to its powers.

Finally, the new powers given to the President of the Republic, contrary to Turkish republican tradition, can create misunderstandings between him and Parliament, in such a way as to have an adverse effect on its relations with the Government. This conflict is in danger of becoming graver if the President and Parliament are not of the same political outlook.

BASIC TEXT

A/RES/37/194

**Resolution 37/194 Adopted by the General Assembly
on 18 December 1982**

Principles of Medical Ethics

The General Assembly...

Desirous of setting further standards in this field which ought to be implemented by health personnel, particularly physicians, and by Government officials,

1. *Adopts* the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment set forth in the annex to the present resolution;

2. *Calls upon* all Governments to give the Principles of Medical Ethics, together with the present resolution, the widest possible distribution, in particular among medical and paramedical associations and institutions of detention or imprisonment in an official language of the State;

3. *Invites* all relevant inter-governmental organizations, in particular the World Health Organization, and non-governmental organizations concerned to bring the Principles of Medical Ethics to the attention of the widest possible group of individuals, especially those active in the medical and paramedical field.

Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment

Principle 1

Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.

Principle 2

It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.¹

Principle 3

It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health.

Principle 4

It is a contravention of medical ethics for health personnel, particularly physicians:

(a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;²

(b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.

Principle 5

It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.

Principle 6

There may be no derogation from the foregoing principles on any grounds whatsoever, including public emergency.

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- 1) See the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 3452 (XXX), annex), article 1 of which states:

"1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

"2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

Article 7 of the Declaration states:

"Each State shall ensure that all acts of torture as defined in article 1 are offences under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture."

- 2) Particularly the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)), the International Covenants on Human Rights (General Assembly resolution 2200 A (XXI), annex), the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 3452 (XXX), annex) and the Standard Minimum Rules for the Treatment of Prisoners (*First United Nations Congress on the Prevention of Crime and the Treatment of Offenders: report by the Secretariat* (United Nations publication, Sales No. 1956.IV.4), annex I.A).

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A comparative study by the International Commission of Jurists, 1983.

Available in english (ISBN 92 9031 019 X). Swiss Francs 40 or US\$ 19.50, plus postage.

This 480-page publication contains detailed studies on states of emergency in 20 countries during the 1960s and 1970s, a summary of the replies to two questionnaires sent to 158 governments, and an analysis of this material by the staff of the ICJ, followed by a set of recommendations. The country studies on Argentina, Canada, Colombia, Eastern Europe (Czechoslovakia, German Democratic Republic, Hungary, Poland, USSR, Yugoslavia), Greece, Ghana, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay and Zaire are based on papers prepared by experts, mostly from the countries concerned. The two questionnaires related to the law and practice under states of exception, and administrative detention. The concluding chapter of general observations and conclusions is followed by 44 recommendations for implementation at international and national levels.

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Rural Development and Human Rights in South East Asia

Report of a Seminar in Penang, December 1981.

*Published jointly by the ICJ and the Consumers' Association of Penang (CAP)
(ISBN 92 9037 017 3).*

Available in english, Swiss Francs 10, plus postage.

Ways in which human rights of the rural poor can be adversely affected by processes of maldevelopment are illustrated with a wealth of detail in this report. The 12 working papers on such topics as land reform, participation in decision-making, the role and status of women and social and legal services are reproduced in full along with the important conclusions and recommendations of the seminar.

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Human Rights in Islam

Report of a seminar in Kuwait, Geneva, 1982, 95 pp.

*Available in english (ISBN 92 9037 014 9) and french (ISBN 92 9037 015 7),
Swiss Francs 10, plus postage.*

The purpose of this seminar was to provide a forum for distinguished moslem lawyers and scholars from Indonesia to Senegal to discuss subjects of critical importance to them. It was organised jointly with the University of Kuwait and the Union of Arab Lawyers. The Conclusions and Recommendations cover such subjects as economic rights, the right to work, trade union rights, education, rights of minorities, freedom of opinion, thought, expression and assembly, legal protection of human rights and women's rights and status. Also included are the opening addresses, a key-note speech by Mr. A.K. Brohi and a summary of the working papers.

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Civilian Administration in the Occupied West Bank

*by Jonathan Kuttub and Raja Shehadeh. An analysis of Israeli Military Government Order No. 947, 44 pp. Published by Law in the Service of Man, West Bank affiliate of the ICJ.
Swiss Francs 8, plus postage.*

This study examines the implications of the establishment of a civilian administrator to govern the affairs of the Palestinian population and Israeli settlers in the West Bank. Questions of international law and the bearing of this action on the course of negotiations over the West Bank's future are discussed.

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