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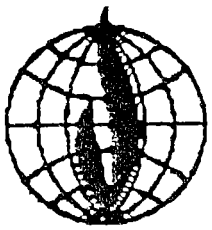

WILL NAMIBIA'S ELECTION BE FREE AND FAIR ?

by

Geoffrey Bindman

INTERNATIONAL COMMISSION OF JURISTS
BP 120, 1224 Chêne-Bougeries/Geneva, Switzerland
Tel. 022-49 35 45

PREFACE

In August 1989 Geoffrey Bindman, an English solicitor, was asked by the International Commission of Jurists to attend the hearing of an application by the Legal Assistance Centre to the Supreme Court of Namibia. The application sought to dismiss a challenge by the Government to the freedom of the Centre to represent litigants in proceedings alleging human rights abuses by the police and security forces.

As the application was decided quickly in favour of the Centre, Mr. Bindman spent the remainder of his time in Namibia looking into the role of the law in Namibia's transitional period from being a dependency of South Africa to becoming an independent state.

He came to the conclusion that the dominant role of the South African-controlled Government endangers the prospect of a free and fair election. Accordingly, this document, in addition to being a report of the legal proceedings before the Supreme Court, recounts disturbing features of the run-up to the independence election which is due to be held in November 1989.

In view of the urgency, the International Commission of Jurists has decided to publish his report in this form.

Niall McDermot
Secretary-General
International Commission of Jurists

WILL NAMIBIA'S ELECTION BE FREE AND FAIR?

Introduction

The immediate purpose of my visit to Namibia was to observe on behalf of the International Commission of Jurists the hearing of an application by the Legal Assistance Centre to the Supreme Court in Windhoek. The application sought to dismiss a challenge by the government to the freedom of the Centre to represent litigants in proceedings alleging human rights abuses by police and security forces.
The Supreme Court disposed of the application quickly and I made use of the remaining days of my stay in Namibia to look more generally at the role of the law in the current transitional period, as Namibia changes its status from a de facto dependency of South Africa to an independent state.

Background to the independence process

Resolution 435

On 22 December 1988 an agreement was signed between South Africa, Angola, and Cuba to begin implementation of United Nations Resolution 435 on 1 April 1989. The main consequences of this agreement were as follows:
(a) 'free and fair' elections were to be held for the whole of Namibia as one political entity under the supervision and control of the United Nations Transition Assistance Group (UNTAG)
(b) the elections would be held in November 1989 (the current proposed date is 7 November)for the purpose of electing a constituent assembly which by 1 April 1990 would draw up a constitution for the new independent state.
(c) Until independence the country would be governed by an Administrator-General, appointed by the South African government, but before the start of the election campaign he would repeal all remaining discriminatory or restrictive laws, regulations, or administrative measures which might prejudice the election.
(d)Before the start of the election campaign, the release of all Namibian political prisoners or political detainees held by the South African authorities would be arranged so that they might participate freely in the electoral process.
(e) All Namibian refugees would be permitted to return peacefully and participate fully in the electoral process, and the UN would ensure that Namibians in exile would be given a free and voluntary choice whether to return.
(f) A binding cease-fire would be implemented by all parties and South African and SWAPO (South West Africa Peoples Organisation)armed forces would be restricted to base.The South African controlled counter-insurgency force known as Koevoet would be disbanded.

The current situation

In mid-September 1989 the achievement of 'free and fair elections' remains in doubt. The main problem has been the failure of the South African authorities to bring to an end the state of hostility between the police and security forces under its control on the one hand and SWAPO on the other. While the military cease-fire has taken effect the underlying pattern of conflict has remained, and there have been many well-authenticated reports of intimidation and violence by the police against those believed to be potential SWAPO voters.
The peace settlement provided for the confinement of the SADF (South African Defence Force - the permanent South African army) to base and the disbandment of SWATF (locally-recruited South West Africa Territorial Force - under the direction of SADF). SWAPOL (South West Africa Police - under the direction of the Administrator-General) was to continue to perform ordinary police duties but its counter-insurgency unit (Koevoet, or "crow-bar"), a separately structured force commanded by General Hans Dreyer with a reputation for extreme brutality against the local population in the North, was also to be disbanded. At the same time SWAPO's military wing (PLAN - the People's Liberation Army) would be withdrawn.
Apart from the apparent incursion of PLAN units on 1 April, which was met by a violent response from South African troops who left their bases for this purpose, the cease -fire has largely held, but there have been many allegations of serious and persistent intimidation carried out by former members of Koevoet and SWATF.

The role of Koevoet

The major problem is that the disbanded Koevoet members were immediately recruited to SWAPOL and General Dreyer became SWAPOL commander for the Northern area. There is considerable evidence that Koevoet command structures have remained intact and their previous habit of patrolling populated districts in the fearsome Casspirs (heavily armoured South African military vehicles) has continued as at the time when they were seeking out PLAN guerillas.
In response to strong criticism from UNTAG and from the independent United States Commission on Independence for Namibia, the Administrator-General recently announced a reduction of 1200 in the number of ex-Koevoet members within SWAPOL but this is believed to be less than half the number still active.
Moreover, the senior UN official in the northern area, Mr. John Rwambuya, interviewed by Victoria Brittain of the Guardian at the end of August (see the Guardian of 1 September 1989), said conditions for a free and fair election were a "very very long way off." He also pointed out that removing some ex-Koevoet police was not enough to solve the problem. "Koevoet, General Dreyer, and Casspirs are linked for ever in people's minds here. If things are to change, and people are to believe they have changed, all three will have to go."
Mr. Rwambuya also stressed the enormous difficulties of UNTAG

in monitoring SWAPOL activities.He said there were far too few UN police. Frequently SWAPOL go on patrol without telling UNTAG or there are simply not enough UNTAG police to accompany all the patrols. In Ovamboland,where about half the population of Namibia lives, there are now only 462 police. There are daily demands for UN protection which cannot be met through lack of manpower.

Belief in bias of South African authorities

Notwithstanding their formal compliance with most of the conditions of the tri-partite agreement , it is widely believed that the South African authorities are using whatever means are available to deter potential supporters from voting for SWAPO in the forthcoming election.Apart from the activities of Koevoet within SWAPOL, the disbanded members of SWATF and Koevoet are still being paid by the authorities.Naturally,their loyalty thus purchased to the pro-South African parties contesting the election is strong and active.. Most prominent among these parties is the DTA (Democratic Turnhalle Alliance), which, by dominating the puppet Interim Government, ruled Namibia before the present election process began.

Among the numerous allegations of intimidation of SWAPO supporters, many are against people wearing DTA T-shirts,who are usually said to be receiving active or at least tacit support from the police.Mr. Rwambuya told Victoria Brittain that a large number of outsiders had moved into the area during August saying that they had come to protect the DTA.Ms Brittain also cites diplomatic sources as saying that many white supporters of the DTA now in the northern area are former Koevoet and SWATF commanders whose command structures remain intact within the new DTA groups.

Monitoring the election campaign

As well as UNTAG with its limited resources, there are other groups which seek to monitor the electoral registration process.

The Namibian Council of Churches(CCN) has established a monitoring organisation (CIMS) with officers in various parts of the country. It has been able to bring complaints of intimidation to the attention of the authorities but ultimately it is powerless to do more than publicise them. Visits by foreign observers, such as the well resourced US Commission referred to earlier, have also helped to publicise such complaints and to bring pressure on the authorities to take action.

The Press has also exposed a number of incidents, especially "The Namibian",but the state television corporation has been severely criticised by UNTAG for pro-government bias - so far without visibly altering its performance.

In response to widespread concern the Administrator-General appointed a statutory commission (the O'Linn Commission)to investigate complaints of intimidation and gave it wide powers (see below).

The legal process

Since, however, the human rights abuses which are the subject of most complaints are illegal under the law of Namibia, the obvious way of tackling them seems to be through the courts. However, the prosecution process is under the control of the Government, which shows little willingness to use it against its own supporters.

Because of the extreme shortage of lawyers willing to act in civil cases against Government interests, and the absence of any state provision for legal aid, the burden of litigation in such cases has fallen almost entirely on the Legal Assistance Centre.

The Legal Assistance Centre

Its history

The Legal Assistance Centre was established in Namibia in July 1988 as a public interest law centre modelled on the Legal Resources Centre of South Africa.

The Legal Resources Centre, with its headquarters in Johannesburg, has been in existence for about 10 years, and has steadily expanded throughout that period. It now has offices in all major cities in South Africa. The work of the Legal Resources Centre has been largely to represent those who oppose the apartheid system and who have come into conflict with the security forces. Legal aid is virtually non-existent in South Africa and legal representation for such persons can only be provided by a body such as the Legal Resources Centre which charges no fees to clients and is supported by charitable or other donated funds, or where individuals seeking legal assistance are able to obtain funds to pay the fees of lawyers in private practice.

Shortage of legal services in Namibia

In Namibia no legal aid at all is provided by the Government and there is a considerable shortage of lawyers in practice throughout most of the country. In Ovamboland, in the North, where more than half the population lives, there is not a single lawyer in regular private practice. In that area as in others traditional means have always been available for settling diputes between local people without the need to resort to the ordinary courts, but the military campaigns in that area by the South African controlled police and security forces in their efforts to eliminate the guerilla activities of PLAN produced many complaints of human rights abuses. Complaints of torture, brutality, unlawful arrests, and wanton destruction of property have been made by local people against members of the SADF, SWATF and SWAPOL.

The most serious and persistent allegations have been against 'Koevoet'.

Organisation and work of the centre

The Legal Assistance Centre was established by a trust (the Legal Assistance Trust) among whose members is a retired

Supreme Court judge, other senior lawyers and churchmen. The director of the Centre is David Smuts, an advocate, and the staff includes another advocate and two attorneys. The headquarters is in Windhoek but within a few days of its foundation a Human Rights Centre - in effect a branch of the LAC - was opened at Ongwediva, in the Northern 'war zone' and since then advice offices have been established at Rundu (in the Caprivi strip), at Tsumeb, and at Walvis Bay, which the South African government claims to be part of South Africa and administers accordingly.

Litigation is prepared and largely conducted at Windhoek, where the lawyers are based and the Supreme Court sits, and the other offices are manned by para-legals who interview complainants and witnesses and transmit the information they collect to Windhoek.

The complaints received by the Centre at its various offices have led to the issue of proceedings in some hundreds of cases none of which has yet come to trial but some of which have been settled by agreement. These cases are in the main claims for damages against members of the security forces. Where the claims amount to less than 5000 rands, they can be brought in local magistrates' courts. When the amount of the claim exceeds that figure they must be brought in the Supreme Court. The total claimed in the 263 cases now pending is about 2 1/2 million rands (about £700,000

The Legal Assistance Centre, with its limited resources, plainly has a major role to play in ensuring a peaceful and just transition to independence. The importance of its role is confirmed by the vigour with which the government and the security forces resist its efforts to secure redress against them. The attitude of government to the centre also confirms confirms one's scepticism about the impartiality of the government in the election process.

The preparation of litigation in a country of huge distances, poor communications and a largely illiterate population is a daunting task. Tracing witnesses may involve many hours of driving and much patience and persistence. There is a six months limitation period for claims against the security forces in Namibian law (which is the same as South African) and one month notice must be given of an intention to commence proceedings. Pleadings and discovery inevitably take several months and the Centre has done well to bring a number of cases close to trial. It is estimated that some 20 cases will be ready to be tried during the next two months.

The 263 pending cases in which the Centre is representing victims of alleged human rights abuses have been brought against the Administrator-General of Namibia, who is responsible for SWAPOL, and the South African Minister of Defence, in his capacity as head of the SADF.

Government obstruction

Several of the complaints which were brought to the centre in its early days were by PLAN members who had been arrested and assaulted or tortured by Koevoet. By the time they managed to

escape or were released, more than 6 months had usually elapsed since the acts they were complaining about. The law allows an extension where a complaint cannot reasonably be made in time. Yet in every case the defendants have needlessly argued that the claim is statute-barred.

Another tactic is to meet every claim with an extremely long and detailed demand for further particulars of the facts alleged. This puts the complainant to great trouble and causes delay while the Centre contacts the client and obtains further instructions on the numerous questions raised.

The most serious challenge by the Administrator-General and the Minister of Defence was made by way of a special plea or jurisdictional challenge made in each of the 263 cases in identical terms in June 1989. The claim made was that the proceedings were a nullity because the Centre did not have the legal standing to act as attorneys representing the individual litigants.

The original ground of this defence was a very narrow technical one based on the fact that summonses issued by the Centre were signed by one of the employed attorneys not in his or her name but in the name of the Centre itself. The point was valid - though utterly trivial - because strictly speaking attorneys represent individual clients. The Centre cannot do so in its own name because it is not treated as equivalent to a firm of attorneys.

On being notified that this point was being taken the Centre immediately accepted that the summonses should have been signed by the attorneys on their own behalf. They offered to amend the summonses and clearly that offer should have been accepted because no possible harm was done by this purely semantic error.

Instead of abandoning its objection, the Government persisted and widened its complaint to argue that the Centre, though it had obtained the full approval of the Law Society of South West Africa for its legal practice, was in breach of the Attorneys Act and the rules of the Law Society because it was not a law firm composed exclusively of practising attorneys.

The issue raised by the Government has been historically of importance in relation to attempts by commercial undertakings, not subject to the ethical and disciplinary codes which bind members of the legal profession, to carry on legal practice. The legal profession has always resisted such encroachments on its monopoly and governments in many countries (including Britain and the United States) have given legislative backing to the professional monopoly for the protection of the public against inadequate legal representation.

The Law Society had waived the application of these rules to the Legal Assistance Centre because obviously by no stretch of imagination could it be said that the lawyers working in the Centre had surrendered their independence to commercial interests. In any case, it was reasonably clear that the rules did not apply at all to a non-profit making body.

The government's determination to pursue a point with so

little merit demonstrates an ulterior motive. Possibly it hoped a strongly pro-government judge would find a way of upholding its claim. In any event, it must have known that even if it failed the work of the Centre would be disrupted and embarrassing judgements would be postponed until after the election.

The Supreme Court is asked to intervene

To bring the matter to a head the Legal Assistance Trust decided to apply to the Supreme Court for a declaratory order "that any duly enrolled and admitted attorney employed by it at the Legal Assistance Centre, Windhoek, is entitled to sign summonses and other process, provided that no charge is made for such services (and subject to the rulings of the Law Society of South West Africa relating to the Centre)"

The application came before the full bench of the Supreme Court of South West Africa on 28 August 1989. The judges were Mr. Justice Berker, Judge President, Mr. Justice Hendler, and Mr. Justice Strydom.

The Trust was represented by two South African senior counsel, Arthur Chaskalson S.C., and Jeremy Gauntlett S.C. Mr. Chaskalson is the director of the Legal Resources Centre in South Africa.

The Administrator-General was represented by Mr. van der Byl S.C. a former government legal adviser, and by junior counsel. The Minister of Defence was also represented by leading and junior counsel.

Arthur Chaskalson's submissions occupied the first morning of the case. He demonstrated that the restrictive rules imposed by the Law Society were not applicable to non-profit practice and that in any event the Law Society was entitled to waive the application of the rules. He pointed out that the development of public interest law centres had been widespread and beneficial in many countries and that the effect of upholding the government's claim would be to stop short that development in Namibia to the huge disadvantage of the many people who had no other source of legal advice or representation.

When he had finished the Judge President made a statement from the bench affirming the support of the judiciary for the Legal Assistance Centre. He said all the judges felt very strongly that it should continue its work without interruption. He turned to Mr. van der Byl and invited him to explain whether the government was seeking the closure of the Legal Assistance Centre and whether it was relying for this purpose on purely technical or tactical points. Mr. van der Byl denied both propositions and, after some negotiation, both defendants agreed to abandon their challenge to the Centre subject only to the Law Society being invited to review its ethical rules. Mr. Chaskalson had no difficulty in accepting this innocuous condition on behalf of his clients.

Thus the Centre again became free to pursue its clients' litigation but after a delay of some 3 months as a result of the defence tactics. The court made it clear that it regarded

these tactics as bogus and an abuse of process.
Since the instructions given to government counsel must be presumed to have come from the Administrator-General and the South African Minister of Defence these obstructive tactics may be seen as belonging to the same pattern as the interference with the elctoral process uncovered by the O'Linn Commission (see below) and by all those observers who have reported widespread intimidation of SWAPO and other supporters of Namibia's independence from South Africa.
A delay of three months in the work of the Centre is an extremely serious matter in this crucial period leading up to the November election. It is anticipated that some 20 of the 263 cases may be tried before the election, but the number would have been much greater had it not been for the government's obstruction.
The government may by its cynical manoeuvres have succeeded in averting the exposure in court of intimidation and other human rights abuses by soldiers and police officers under its control.

Other work of the Legal Assistance Centre
The Centre has also pursued other approaches through the courts in its efforts to restrain intimidation and violence by government forces. It has also defended those who have been sued by the Government or its supporters.

Defending SWAPO and the churches
An example of the latter type of case was an attempt by a number of tribal chiefs in the North to obtain an order of the Supreme Court requiring the government to protect then against illegal acts which they claimed were threatened against them by SWAPO, the Council of Namibian Churches, and the students' and teachers' trade unions. They also sought an order prohibiting the admission of returning refugees (whom they claimed were supporters of these organisations) until satisfactory protective measures had been taken. The Supreme Court dismissed these claims, holding in June 1989 that no prima facie case had been established. Judge President Berker said:
"Whilst it is probably inevitable that in a highly emotionalised situation illegal and improper actions by members of all political factions, including members of the First Respondent (SWAPO), are inevitable, the general acceptance of the process of implementation of Resolution 435, the presence of UNTAG as a monitoring agency in the Territory, the introduction of certain measures such as the O'Linn Commission to deal with any acts of intimidation and other measures, have created a basically changed situation to that existing prior to the implementation of Resolution 435. This, in my view, has vastly diminished, if not totally done away with, a reasonable apprehension of danger to the lives and property of the Applicants."
While no doubt this was a correct decision as far as danger to the chiefs was concerned, the Judge President underestimated

the danger for opponents of the government, as the following cases demonstrate.

Restraining the security forces

In May 1989 the Centre applied on behalf of the Namibian National Students Organisation and several individuals for an interdict against SWATF and SWAPOL to restrain repeated attacks on them especially by ex-Koevoet members. The defendants gave an undertaking to the court that there would be no repetition of the numerous incidents of which evidence had been given.

Among the individuals on whose behalf the Centre brought the application was Petrus Joseph, who gave remarkable evidence of his experiences when he himself was a member of Koevoet. He explained that in 1978 he had left Namibia to join PLAN. In 1981 he had been captured inside northern Namibia and until 1983 was held prisoner in a Koevoet base. After that he was forced to become a member of Koevoet and threatened with death if he left its service. Until February 1989 he continued working for them until he could tolerate it no longer. He said he wished to resign and was immediately arrested on fabricated charges of "possessing communist ammunition". He was kept in custody but eventually the charges were dropped and he was allowed to go.

Joseph swore on oath that he knew that the security forces in Namibia "are intent on waging a political campaign in favour of those parties who favour the Interim Government." He claimed that during the whole of his active service with Koevoet the officers fed him with anti-SWAPO propaganda and instructed him and his colleagues to intimidate SWAPO supporters, by , for example, arresting anyone wearing a SWAPO or trade union T-shirt and taking them to the police station. When in January 1989 Koevoet was supposedly disbanded, Joseph says that they were told to remove their badges because they were to be issued with SWAPOL badges, but he says there was no other change in their orders and that, up to the date of his leaving, the light green uniform of Koevoet was still worn. They were given training in crowd control in which they were told to attack SWAPO.

Tragedy for Petrus Joseph

The sequel to this courageous application was tragic for Petrus Joseph. In fear of the police he went into hiding. Although any further harassment was clearly in contempt of court, the police openly looked for him. The Legal Assistance Centre wrote to the police in May on his behalf asking why they wanted him. There was no satisfactory reply. On 28 July 1989 he gave a statement to a SWAPO official at Rundu that the previous day two Koevoet members had visited his house and spoken to a neighbour. They informed the neighbour that Koevoet were watching Petrus Joseph and suspected he had firearms in his house. They could come back any time.

On 2 August, two policemen returned to the house with rifles

and told neighbours they were looking for Joseph. A neighbour ran to find the UNTAG police monitor. However, when he eventually brought him, Petrus Joseph had already returned to his house. Other eye witnesses said he knocked on his door which was opened by a policeman. He then ran away but was caught and taken back to the house. A neighbour, a local school teacher, heard screams and heard a policeman say "we are going to shoot and kill you now." Joseph shouted to her to go to the SWAPO office and "tell our people that I am going to be killed." He was taken back to his house and shot dead. When the UNTAG policeman arrived there shortly afterwards he was told by a SWAPOL officer that a "terrorist" had been shot at Joseph's house.
Subsequently, the police issued a statement saying that Joseph had pulled a gun while a search for weapons was taking place in his house and he had been killed in self-defence. There is to be an inquest at which the Centre will be representing Petrus Joseph's family.

Continuing complaints
The Centre is continuing to receive complaints of intimidation, assault and wanton destruction of property. There are also complaints of electoral malpractice, including a complaint that Koevoet officers were transporting UNITA members over the Angolan border to register to vote in the Namibian election. Other recent complaints are from former PLAN members captured by Koevoet and press-ganged into working for them. This appears to be a common practice. Their evidence corroborates the account given by Petrus Joseph of the conduct of Koevoet towards him.

An interesting case
Another case of considerable interest recently handled by the Centre, though not directly related to the election, is that of a garage employee detained by the police in Walvis Bay on suspicion of theft. His very specific allegations of torture by electric shocks in the police station led to a successful application by an attorney from the Centre to the Supreme Court for an order permitting a search of the police station to look for the torture instruments. This imaginative use of the 'Anton Piller' procedure devised in Britain for commercial cases had already led in Cape Town three years ago to the discovery of such material. In Walvis Bay torture instruments were found and an action for damages is now being pursued by the Centre on behalf of their tortured client. The case may also be relevant to the appeal of Leonard Sheehama (see below) because he also alleged torture at the same police station.

The Government's own legal measures.

The O'Linn Commission
The Commission for the Prevention and Combating of Intimidation and Election Malpractices was created by

proclamation AG11 of the Administrator- General issued on 22 May 1989. The chairman of the Commission is a senior advocate, Brian O'Linn S.C. The other members are a former magistrate , a retired senior civil servant and a minister of religion from Ovamboland.
The powers of the Commission are extremely wide though its procedures are complex. It may investigate any complaint of intimidation, bribery and corruption in relation to the election process. Such practices will amount to criminal offences and prosecutions may be launched by the Attorney-General in the light of any findings by the Commission but the Commission may impose its own sanctions. It may order the cessation of any act or may require any act to be done to achieve the purposes for which it was established. It may require the publication of its findings in any newspaper or broadcast. It may recommend the removal from his or her post of any political party worker or any officer appointed to administer the registration of voters or the election. For the purposes of its investigations it is given power to require the attendance of witnesses and the disclosure of any information or documents.

Limited impact

Although the O'Linn Commission has such wide powers, it has so far had very little impact. It was not established until the third week in May and until August it had no proper offices. It has a small staff and its procedures require it to give full opportunity to those against whom complaints are made to make representations both orally and in writing. It has received some 85 complaints since it began but it had, by the end of August, disposed of only 20 cases many of which were held to be outside its jurisdiction. In relation to one of its investigations it has become embroiled in litigation in the Supreme Court: the Chief Registration Officer, Mr. Visser, has refused to comply with an order from the Commission to give evidence before it and is challenging the validity of the order.
Because each decision has to be made by the full Commission, the burden on the members, especially the chairman, is considerable, and it is hard to see how without greatly increased resources the Commission can make any real impact on an election which at the time of writing is due to take place in only two months. Mr. O'Linn has expressed the same view himself and has asked the government to extend the powers of the Commission to deal with these dificulties and to increase its resources.

Some impressive investigations

Nevertheless some of the first decisions of the Commission are impressive and provide further powerful evidence that the South African controlled police are still using illegal means to deter SWAPO voters. They also illustrate, as does the action of Mr. Visser, and the difficulties encountered by the Legal Assistance Centre which have already been described, the

extremely determined and uncompromising tactics which the authorities will adopt to defend themselves when faced with any kind of legal challenge.

A report in the Namibian

One case resulted - surprisingly -from a police complaint that the 'Namibian', a newspaper which is generally sympathetic to SWAPO, had published a false story under the headline "SCORES INJURED IN SWOOP ON SWAPO MEETING: POLICE OPEN FIRE"
Part of the background to this particular investigation was a statement released to the Press by the Administrator-General,Mr. Louis Pienaar, in which he said :"...I have insisted that all allegations of intimidation be fully investigated and I am now also asking the O'Linn Commission specifically to address the situation in the North and come forward with recommendations.We are not insensitive to the issue and we are monitoring the situation on a day to day basis."
The SWAPO meeting referred to in the 'Namibian' headline was at Onankali. The investigation by the O'Linn Commission revealed that there was a SWAPO meeting there on Sunday 4 June but there was also a meeting later in the day at Okatope.
At the Onankali meeting between 300 and 600 people were present .Police arrived and claimed that the meeting was illegal because no prior notice had been given to the magistrate. They authorised the meeting to proceed provided that no freedom songs were sung or slogans shouted. Not surprisingly the crowd did not comply .UNTAG police were summoned by the SWAPO organisers and with their help the crowd was calmed down and the organisers agreed to terminate the meeting.Warrant Officer Grobler invited the organisers to meet him shortly afterwards at the police base at Okatope, between 10 and 15 kilometres away,where he promised he would help them to obtain permission for a further SWAPO meeting to take place two weeks later.
The O'Linn Commission found that the SWAPO organisers and the police led by Warrant Officer Grobler behaved responsibly at Onankali.It criticised Grobler, however, for his ignorance of the legal requirements for holding a public meeting. Although notice was required, there was no need to seek approval, so there was no need for the police to intervene. Nor was there any point in Grobler's invitation to the SWAPO members to go to Okatope -unless, of course, it was a deliberate trap.
Contrary to the Namibian report, however, the Commission concluded that the police did not open fire at Onankali and no one was injured.
So it looked as if the Namibian story was wrong. But its mistake turned out to be a trivial one,because the Commission found that the events at Okatope, to which SWAPO members had been invited by the police, were exactly as reported by the Namibian. All that had happened was that they had got the wrong place name.
The Commission examined a large number of witnesses on the events at Okatope. Warrant Officer Grobler claimed that he and

his men (almost all of whom were ex-members of Koevoet) had intervened to disperse supporters of SWAPO and the DTA (a political party supporting South African domination of Namibia) who were fighting each other. He said that the DTA supporters were armed with pangas, bows and arrows, sticks and at least one firearm, and that the SWAPO supporters were unarmed save possibly for the sticks to which their flags were attached. He said he saw shots fired by the DTA at a bus carrying SWAPO members or supporters. He accepted that neither he nor any of his men made any attempt to arrest the DTA marksmen who were plainly guilty of attempted murder.
Although this story largely exonerated SWAPO and put the blame for the disturbance on the DTA, the Commission rejected Grobler's evidence and that of the DTA witnesses who supported him.
The Commission's report says:
"On various occasions the Commission invited Warrant Oficer Grobler and SWAPOL and the DTA to produce witnesses on various issues such as whether or not anyone but SWAPO members were injured, whether or not any crime or offence was committed by members or sympathisers of the DTA or committed by members of SWAPOL.....Mr. N.A.Smit representing the DTA did eventually produce some witnesses but they were so pathetic as witnesses that no weight could be attached to their evidence except where it was corroborated by other credible evidence."
The DTA witnesses included at least two men who had been members of Koevoet.
The SWAPO account, accepted by the Commission, was that they had come ot Okatope in order to get Grobler's assistance as arranged at Onakali. When they arrived they were arrested by Grobler, who was accompanied by an ex-Koevoet Captain Goosen (claimed to be "off-duty" and only present because he was a friend of Grobler) and other ex-Koevoet policement.. Red flares were fired into the air and they were then set upon by policemen and people in DTA T-shirts. Four heavily -armed Casspirs suddenly emerged from the police base and joined in the attack on the SWAPO members who fled but were followed and attacked again.
The Commission found - and indeed it seems not to have been seriously disputed - that many SWAPO people were injured , that there was no evidence of any injury to the police or their supporters, that the SWAPO people were unarmed, that 13 SWAPO supporters were arrested and no others, and that Grobler initiated the attack on them with no prior warning to them to disperse..
"It would be futile and frustrating to quote in detail the various inconsistent, evasive, ambiguous and totally unsatisfactory explanations of Grobler," said the Commission. Captain Goosen was also heavily criticised. "Goosen certainly was aware that the SWAPO supporters were being attacked, intimidated, assaulted and humiliated. Nevertheless he , as the most senior officer on the scene and on his own evidence, turned his back to the scene as if nothing was happening requiring his attention..."

The Commission's conclusions on these two senior policemen were devastating:
"The conduct of Captain Goosen was callous, cold blooded, reprehensible and incompatible with the conduct of a policeman in a civilisesd country and certainly totally inappropriate for the 435 transition period."
The conduct of Grobler was even more reprehensible and it is shocking to think that the public, and particularly SWAPO supporters, must to some extent depend for their protection during the election process on policemen such as these."
The Commission recommended that all prosecutions of SWAPO members in this incident should be dropped and found that Grobler and his men had committed intimidation in relation to the election. Astonishingly, however, they expressed their reluctance at reaching this conclusion, and made no order against either Grobler or Goosen and no recommendation that they be prosecuted.
After examining several senior officers of SWAPOL they considered the wider question of the integration of ex-Koevoet members into SWAPOL.They concluded that "the main reason for the tragic and pathetic police performance at Okatope was precisely because the members involved were Koevoet members who demonstrated their unfitness for ordinary police duties. That the vast majority of black Koevoet members are illiterate or quasi-illiterate , inadequately trained for normal police duties, and perhaps untrainable, is beyond doubt. In addition, years of warfare against SWAPO have left their mark and few if any are capable of adapting to the exigencies of police duties in the 435 transition period. The latter observation certainly also applies to white commanders such as Warrant Officer Grobler."
The Commission thus came to the same conclusion which has been repeatedly urged on the government by UNTAG,SWAPO, and every independent foreign mission which has examined current events in Namibia.Yet, with remarkable complacency, it then decided that it need not go into the matter further because "the deliberation of the Commission has in a sense been overtaken by events in that very drastic steps were taken by the Administrator-General recently to overcome the problem."However, these steps, which the A-G announced on 15 August, clearly fall far short of what is needed to stop intimidation of SWAPO by Koevoet wolves in SWAPO sheep's clothing.What the A-G has proposed(though it is not clear when implementation is to take place) is the withdrawal of some Casspirs, the removal of heavy weapons from the remainder, the wearing of identity tags by all SWAPOL officers, an invitation to UNTAG to accompany all patrols, and the removal from SWAPOL of all remaining ex-Koevoet members from SWAPOL, numbering 1200 who would then be confined to base.
However, these measures alone are unlikely to solve the problem.
In the first place there are believed to be far more than 1200 ex-Koevoet members in the police.The US Commission of Inquiry in its report published after its second mission to Namibia

from 6 to 13 August 1989 cites the Administrator-General as himself saying that there were over 2000.The U.S.Commission repeats the demand, endorsed now by the United Nations and the OAU, for the withdrawal of all ex-Koevoet members from the police, the removal of General Dreyer from his post as Commander of SWAPOL in the Northern area, and the removal of all Casspirs from the area. In addition while ex-Koevoet members and the disbanded members of SWATF are kept on the government payroll - as they are at present - their loyalty will continue to be given to the South African administration and they will continue to carry out what they perceive to be their duty, to prevent a SWAPO victory.

Evidence of systematic bias

Another decision of the O'Linn Commission highlights the systematic bias of the South African- controlled authorities against SWAPO.

The SWAPO organising secretary for the Caprivi Strip area complained generally to the Commission about an anti-SWAPO campaign which he alleged was planned by politicians, military leaders and heads of Government departments under the auspices of the Cabinet of the interim government and the National Security Council. He also made specific complaints about SWATF and SADF making and financing propaganda against SWAPO in the Caprivi after the election period began on 1 April.

The Commission heard a large number of witnesses, including General Meyer, the SADF Commander in Chief in Namibia, and argument by counsel representing the military.

The complainant's evidence was that front organisations were set up, purporting to be cultural organisations, to which members of battalion 701 of SWATF were transferred.The chairman of one of these organisations, a former member of battalion 701, admitted to the Commission that he distributed anti-SWAPO pamphlets compiled printed and distributed by the SADF and SWATF after 1 April.The SWATF Commandant Haefele admitted that such material was produced in April and May 1989.Astonishingly the Commission failed to find that these facts amounted to any election malpractice.

Rather weakly, the Commission merely recommended that former SWATF members should be advised by means of written circulars and word of mouth that they should refrain from using any anti-SWAPO material supplied by the military "in view of the fact that these publications were never intended for such use, that such use was therefore unauthorised, and would embarrass the SADF, the Department of Defence Administration , the Administrator General, and possibly even the South African Government."

As to the complaint that there was an agreed Government strategy to defeat SWAPO, the investigation brought to light that sub-committees were set up by the National Security Council for the evident purpose of planning such a strategy.This was minuted on 7 September 1988 and it was recorded that further discussions were to take place .But the

Commission was refused access to subsequent minutes. Indeed it was unable to establish whether the National Security Council was still in existence. Thus it could not conclude that any Government strategy to defeat SWAPO was being implemented during the election period. It was forced to the lame and unconvincing conclusion that "under present circumstances a discussion on strategy such as is reflected in the 7 September minute of the NSC will not be tolerated by either the Administrator- General or General Meyer and a repetition thereof or the execution of such a strategy is highly improbable in the future."

Too little, too late

Both the decisions of the Commission which have been described in some detail were published only in August 1989. They reveal extremely thorough investigations over a period of about 2 months but it is obvious that they are far too few and unthreatening to have any serious impact on the election process which will be all over before most of the complaints can be dealt with. It is also perfectly obvious that many victims of intimidation will not feel it worth the trouble to complain. Mr. O'Linn is well aware of the problem and - as pointed out earlier - he has urged the government to give him yet wider enforcement powers and dramatically increase the Commission's resources

The integrity of Mr. O'Linn is not in doubt, but the practical achievement of his Commission is so limited that it cannot be regarded as more than a token gesture. And it is far too close to the election date for even a greatly strengthened commission to make any serious impact on the problem of intimidation. It is 'too little, too late.'

What can be done?

Thus the task of restraining interference with the election process cannot be left to the South African controlled government, whatever its protestations of impartiality. Nor has UNTAG yet shown itself able to perform its mandate of ensuring a free and fair election without considerable support. Its sheer lack of manpower has prevented it from adequately monitoring the registration process (which nevertheless has apparently been carried out reasonably successfully) and from effectively monitoring, much less preventing, intimidation. It is understood that UNTAG has received more than 400 complaints of intimidation but how many arrests or prosecutions have taken place? Few if any - and UNTAG seems to lack the will to force the issue.

Nor is it yet clear that the monitoring exercise carried out by the CCN (Council of Churches in Namibia) is more effective, though it has officers permanently situated in each region of the country committed to the task of recording acts of intimidation and reporting them to the police and UNTAG. Monitoring can be of little more than symbolic value if no sanctions are applied to those guilty of intimidation and other abuses. Only effective law enforcement can achieve a real

change and there is no prospect of that coming about before the election.

Political Prisoners

Resolving disputed cases
Resolution 435 provided for the release prior to the beginning of the electoral campaign of all Namibian political prisoners or political detainees held by the South African authorities. Many were released without dispute but in a number of cases the authorities refused to release certain prisoners because they did not accept that were covered by the terms of the agreement.
To try to resolve the difficulty the Special Representative of the United Nations appointed an eminent Danish jurist, Professor Carl Norgaard, to review the disputed cases and to recommend which prisoners, if any, should be released. Professor Norgaard invited the legal representatives of the prisoners and of the government to make submissions to him both orally and in writing both on the facts of the various cases and on the principles to be applied in deciding how 'political prisoner or detainee' should be defined for the purpose of implementing 435.

The problem of definition
Surprisingly, no definition has ever been formulated in international or indeed in any domestic law. The concept of a 'political offence' is well-known in the law of extradition but there are differences in the law of different countries. It was agreed by the lawyers representing the prisoners and the government that the precedents concerning extradition should be taken into account.
The cases of 16 prisoners were in dispute and were referred to Professor Norgaard, including that of Leonard Sheehama, who had been sentenced to death and is even now on death row in Pretoria Central Prison in South Africa. However, before Professor Norgaard had reached any conclusion the Administrator-General withdrew his objections to the release of three of them so only 13 cases had to be resolved.
Namibian law generally follows the law of South Africa, which, in turn, generally follows English law on such questions. Indeed, in its written submissions on behalf of some of the prisoners, the Legal Assistance Centre cited a decision of the full bench of the Natal Provincial Division of the Supreme Court of South Africa (S v. Devoy) in which it was explicitly ruled that whether an offence was of a political nature for the purpose of an extradition agreement was to be tested by reference to English precedents.
The Natal Court applied the definition in the old English case of re Castioni where it was held that "a political offence is committed in the course of some political disturbance and in furtherance of its objects".
The English courts had also made it clear that an apparently non-political offence such as murder or arson could really be

of a political nature.
In the leading English case of Schtraks v. Government of Israel, the eminent judge Lord Reid (widely regarded as among the greatest English judges of the 20th century) said: "We cannot enquire whether a fugitive criminal was engaged in a good or bad cause ..... but not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge, I would not think that that could be called a 'political offence'. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant , and may be decisive."
Lord Reid's test is therefore primarily a subjective one: an offence committed for the purpose of promoting a political cause is a political offence. If - regardless of what the offender may claim - it is found not to have been committed for a political motive, then it is not a political offence. Of the 13 prisoners whose cases were considered by Professor Norgaard, every single one was accepted to be either a PLAN combatant or acting under the direction of a PLAN combatant.All were convicted of offences which appeared to be carried out for political motives, with one exception. Yet Professor Norgaard concluded that of the 13 only 5 were properly to be categorised as political prisoners.They have been released by the Administrator-General.
The others, apart from one who was released subsequently when he was acquitted at this trial, remain in prison. One of them, Leonard Sheehama, who was convicted of murder at Walvis Bay, which the South African government continues to maintain is part of South Africa itself, is on death row in Pretoria Central prison.
The advice given by Professor Norgaard to the Special Representative is confidential but one can deduce from his conclusions the basis on which his advice was formulated. Although it is clear that there was a political motivation in all the cases (save one, Leonard Naftali),and that each prisoner was engaged in the political struggle with the South African- backed government of Namibia on behalf of the national liberation movement, Professor Norgaard held in 8 cases that the offences were not political.
The cases were the following:

Leonard Naftali

He was convicted of the murder of a man and sentenced to 18 years imprisonment.He was also convicted of assault on the man's 16 year old grand-daughter.
He had arrived at the house whereboth of them lived, dressed in camouflage uniform and carrying an AK 47 rifle. He was allowed to sleep there. During the night he asked the girl to have sexual relations with him. She refused. He then assaulted her. She screamed and grandfather rushed to her aid. Naftali

then shot him.

Paulus Kapumburu

He was convicted of the murder of a boy and sentenced to 12 years imprisonment. He had planted an anti-personnel mine on a footpath used by civilians and some distance from any police or military base but in an area where warfare between SWAPO and the police and army was taking place. The boy was walking along the footpath when the mine exploded.
Although Mr. Kapumburu was not a member of PLAN, it was accepted that he had been instructed to plant the mine by a member of SWAPO, though not necessarily at that precise spot. The element of compulsion was accepted by the court as an extenuating circumstance.

Afunda Nghiyolwa

He was convicted of murder and sabotage and sentenced to a total of 23 years imprisonment. He was found to have planted a bomb in front of a bank building at Oshakati. When the bomb exploded a 12 year old boy was killed and five other people were slightly injured. On another occasion he was found to have placed a bomb against an electricity sub-station but only the detonator exploded and no significant damage was done.
He was acting under orders of a trained PLAN combatant and he understood he would be killed if he did not plant the bomb at the bank. It was accepted that there was a political motive.

Paulus Andreas

He was sentenced to 9 years imprisonment for planting a bomb in the privately-owned multi-storey car park at a shopping centre at Windhoek. The bomb exploded and caused extensive damage but no one was hurt.
He was a member of PLAN acting under orders. It was accepted that his motive was to obtain the implementation of UN resolution 435.

Eino Mule and Haidula Andreas

They were both charged with the murder of a man in the Ovambo district. At the time of the examination of their cases by Professor Norgaard they had not yet been brought to trial but the trial in fact began on 1 August 1989 and Andreas was acquitted.
Both were members of PLAN and the state's evidence was that they had killed the deceased in the belief that he was an informer but the State at the same time denied that he was in fact an informer and there was some evidence questioning the motives of the accused.

Simon Abed

He was charged with sabotage and attempted murder having allegedly placed a bomb in a cafe at Swakopmund. The cafe was open to the public and about 20 people were there when the bomb was put in place. it failed to go off.
Mr. Abed denied planting the bomb but there was evidence that he had admitted planting it, claiming that he was a PLAN supporter and had acted on the instructions of a PLAN insurgent.

Leonard Sheehama

He was convicted of murder and sabotage at Walvis Bay and is charged with further murders as a result of the bombing of Barclay's Bank at Oshakati, when 28 people (customers and staff) were killed. He was sentenced to death and is on death row in Pretoria.
The court accepted that he was a member of PLAN and that he was on a PLAN mission when he planted a bomb in a butcher's shop at Walvis Bay. The court held there were no extenuating circumstances but granted him leave to appeal. The appeal to the Appellate Division in Bloemfontein, South Africa is now pending but is unlikely to be heard before 1990.

In each of these eight cases , except for that of Naftali, the existence of a political motive for the offences was clear. The only basis on which Professor Norgaard could have concluded that the prisoners were not 'political prisoners' was by applying an objective test to the facts and deciding that notwithstanding the political motive the offences were not capable of furthering any reasonable or proper political objective. The South African government had argued that such a test was appropriate - that a principle of 'proportionality' should be applied so as to exclude any offence which resulted (or could foreseeably result) in a degree of suffering or destruction outweighing the political gain which the offence could reasonably achieve.
This objective test appears to be inconsistent with the test in English law as formulated by Lord Reid. Apart from the case of Naftali, where there was obviously no political motive, all the prisoners whose cases are described above were engaged in the armed struggle. It is not necessary to condone attacks on civilian targets to recognise that a strategy of destabilisation may include such attacks. Nor is their effectiveness as a political strategy relevant to their characterisation.
The release of political prisoners was plainly intended in resolution 435 to be a means towards reconciliation and the rehabilitation of those who had engaged in military activities before the cease-fire. The continued imprisonment of these individuals is incompatible with that aim and the recommendations of Professor Norgaard should be re-considered.
It should finally be mentioned in this section that there have been allegations that SWAPO also continue to hold politcal prisoners. SWAPO has denied this but has agreed to inspection

under UNTAG supervision of the former camps at which its forces were based in Angola.

The election process

Although the election process was to be supervised by UNTAG the formulation of the election laws and procedures was under the tri-partite agreement left initially with the Administrator-General as the legislative authority for Namibia until independence.
It was as recently as 21 July that the A-G published a draft election law .It has been severely criticised by a number of independent observers.
It is not proposed to analyse the draft election law in this report because this has already been done by others. The US Commission of Inquiry has expressed its profound distress at its serious flaws and has noted particularly the following points:
1.Secrecy of the ballot is jeopardised by a requirement that the envelopes containing the ballot papers marked by the voter will also be marked on the outside with the voter's registration number.
2. Only government officials will be allowed to help a handicapped or illiterate voter to vote.
3. A system of voter verification to be carried out at Windhoek after the election is far too complex and open to abuse.Verification should take place at the polling station.
4.Similarly it is proposed that the ballot boxes be transported from all over he country for the votes to be counted.The boxes would have to be opened and re-sealed no less than 3 times before the final count. This is another recipe for fraud.
5. The political parties are effectively excluded from the polling station.This is a recipe for disputes after the count.It is clearly essential as in every other democratic country for the political parties to be able to see the casting and counting of votes
It is understood that the United Nations has also expressed deep concern at these defects in the election law and is insisting on the final law meeting similar criteria to those outlined above. But there is very little time for a satisfactory election procedure to be implemented.

Conclusion
The dominant role of the South African controlled government in the transition to independence endangers the prospect of fairly identifying the will of the Namibian people as to the identity of their government after independence.
The ability of UNTAG to counter the influence of the governmnt so as to ensure a free and fair election has been shown to be in considerable doubt. The recent tragic news of the assassination of Anton Lubowski, a senior SWAPO officer and leading Namibian civil rights lawyer, illustrates the strength of feeling and determination of a small minority to prevent

the emergence of a SWAPO government. Whether or not that is the outcome of the election, it is vital that every possible step should urgently be taken to ensure that the people of Namibia elect the government they genuinely want. That requires insistence by the United Nations, with the backing of the international community, on immediate and powerful sanctions against all forms of interference with the electoral process, especially intimidation by formal and informal agents of the South African regime.