

MASTER
low 10/2

R E P O R T

of the

FOLLOW-UP MISSION

to the

DAR ES SALAAM SEMINAR

on

HUMAN RIGHTS, THEIR PROTECTION AND
THE RULE OF LAW IN A ONE PARTY STATE

* * *
*

INTERNATIONAL COMMISSION OF JURISTS
Geneva, Switzerland

10/2

INTRODUCTION

In September 1976 the International Commission of Jurists convened an international seminar on "Human Rights, their Protection and the Rule of Law in a One-Party State". The participants, both lawyers and non-lawyers, governmental and non-governmental came from the following six countries: Sudan, Tanzania, Zambia, Botswana, Lesotho and Swaziland. The 37 participants agreed by consensus upon a considerable body of practical conclusions and recommendations and they asked the International Commission of Jurists to communicate these before publication to their respective governments. This was duly done and in July 1977 the report was published by Search Press in London, under the title "Human Rights in a One-Party State". The final recommendations are to be found on pp. 109-124 of this report.

After the seminar in Dar es Salaam some participants suggested that it might be useful if a mission comprising one of the leading African participants with a representative of the International Commission of Jurists were to visit the countries from which the participants came in order to discuss with the relevant authorities and with some of the participants both the existing implementation and the possible further implementation of the conclusions of the seminar. Mr. Justice F.M. Chomba, then a Judge of the Supreme Court of Zambia and formerly the Investigator-General of Zambia, kindly agreed to lead such a mission, and his government agreed to release him for this purpose. He was accompanied by Mr. Hans Thoolen, the Executive Secretary of the International Commission of Jurists. The mission was made possible by a grant from the Ford Foundation.

The staff of the International Commission of Jurists in Geneva prepared a questionnaire, based on the conclusions of the Dar seminar, and this was sent as a basis for discussion to the participants at the seminar and to the government's offices the mission intended to visit.

The mission began on April 6, 1978, when Mr. Justice Chomba and Mr. Thoolen met in Khartoum and ended on April 28, 1978 in Lusaka.

The purpose of this mission was in no sense investigative. As stated, its objective was to provide an opportunity for constructive discussion in the countries from which the participants came on the implementation of the Dar es Salaam recommendations.

The report does not deal with events subsequent to April 1978, such as the further release of political prisoners in the Sudan and Tanzania, the increased tension in the front-line states bordering Zimbabwe after the murderous attacks by the Rhodesia armed forces, and the elections held in Swaziland.

The International Commission of Jurists is very grateful to the governments of the countries concerned for the courteous reception given to the mission and for the frank and constructive discussion which took place.

It also wishes to express its thanks to the Honourable Frederick Chomba, now Attorney-General and Minister of Justice in Zambia, for leading this mission.

Niall MacDermot
Secretary-General

International Commission of Jurists
Geneva - Switzerland

R E P O R T

General observations

The terms of reference of the mission were to discuss the implementation of the recommendations contained in the Conclusions of the Dar es Salaam seminar on "Human Rights, their Protection and the Rule of Law in a One-Party State". (These Conclusions are to be found on pp. 109-126 of the report of the seminar published by Search Press, London, 1978).

The field covered by the Conclusions was too large for the mission to be able to cover them all in the brief visits averaging three days which they made to the six countries from which the participants came (Sudan, Tanzania, Zambia, Botswana, Lesotho and Swaziland).

To prepare for the visits a questionnaire was circulated in advance to the governments concerned regarding the application of the Dar es Salaam conclusions. The members of the mission agreed that in their discussions and in their report they would not seek to cover all the items contained in the questionnaire. Although the countries concerned shared many common features, including a legal system based on english common law, their differences were such that it did not seem useful to try to deal with the same items in all the countries visited. The discussions tended to concentrate on those which seemed most important in the country concerned.

One of the most obvious differences is that between the three larger States (Sudan, Tanzania and Zambia) and the three smaller States (Botswana, Lesotho and Swaziland).

The larger three are de jure and de facto one-party states, while the smaller three comprise one multiparty state (Botswana), one nominally multiparty state with a unitary national government (Lesotho), and one no-party state (Swaziland).

The smaller countries each have a population of approximately 1 million, while the three larger countries range from 5,5 to 18 million. The mission is convinced that a very small population affords a certain extra-legal protection

against some violations of human rights. For example, any ill-treatment of prisoners or any arbitrary arrests are less likely to remain undiscovered, and the channels through which any complaints have to go tend to be shorter and simpler. Also, because of greater linguistic and tribal unity in the smaller countries, nation-building problems are less preponderant.

The three smaller countries attained independence a few years later than the larger ones. They are still economically dependent upon the Republic of South Africa and their legal system is much influenced by South African law. As very few african lawyers were trained in these countries prior to independence, the "africanisation" of the judiciary, the legal profession and the law itself are less fully developed. This tends to widen further the social gap between the population and the law.

Although the mission obtained much information on other subjects, it is proposed to focus in this report on the following subjects:-

Party and Parliament,

in which questions of membership and the relation between the single party and the branches of government will be discussed.

The judiciary and the legal profession,

in which some features of the independence of the judiciary and the organisation of the bar will be discussed and some reference will be made to existing legal aid schemes.

Preventive detention,

in which the report deals with preventive detention on security grounds. It was notable that Zambia was the only country where the relevant legislation contained nearly all the procedural safeguards recommended by the Dar es Salaam seminar. Important topics, closely related to preventive detention, such as the question of "prohibited immigrants" and the treatment of prisoners in general, were the subject of some discussion, but are outside the scope of this report. From its interviews with Ministers, lawyers, police officers and in particular prison-officials, the mission is convinced that one of the main obstacles to improvement of the penal system is under-development as such. General prison conditions in matters such as food, clothes

and educational materials understandably do not exceed the average standard of the whole country. In the allocation of scarce resources prison departments tend to have a low priority. Moreover, as in many developed societies, there exist widespread feelings both among parliamentarians and the public at large that the (common) criminal deserves punishment rather than special treatment. Expenditure on prison facilities and re-education schemes for this unpopular segment of society, does not appeal very much to the poor but law-abiding citizen.

Ombudsman institutions,

in which these institutions (where they exist) or the discussions about their introduction are described. Each of the three larger countries has an Ombudsman institution. In the three smaller countries only a limited interest was found in the establishment of such an institution. Here the mission, owing to the special knowledge and experience of Mr. Justice Chomba, who was the first Investigator-General of his country, was able to set out fully the possible benefits of such an institution and discuss ways to overcome obstacles.

Among other important topics in the Dar es Salaam conclusions which are not specifically dealt with in the reports on each country are the following:-

Education and propaganda in human rights and the principles of the Rule of Law, which were called "vital" topics by the participants to the Dar seminar (p.116). These did not appear to receive the special attention of governments, parties, press and the legal profession in the specific ways recommended by the seminar.

Freedom of expression, in particular freedom of the press, was discussed extensively with government representatives. Although some instances of straight censorship do occur, the mission gained the impression that there is a growing degree of freedom to criticise even in government or party owned newspapers. On the other hand illiteracy and lack of quality still prevent the wider circulation and greater impact of the press.

The International Bill of Human Rights. The UN Covenant on Economic, Social and Cultural Rights ^{and} the UN Covenant on Civil and Political Rights with its Optional Protocol do not rank high in the attention of the governments of the six countries. Although in some cases active consideration of their ratification has been started, there was a widespread feeling that the standards

laid down in the Covenants are of little relevance to developing countries and the point was repeatedly made that the Third World had not been able to participate fully in the coming into being of these instruments. The mission in turn pointed to the large share that the developing countries had in the deliberations in the U.N. (which was one of the reasons for the delay in the adoption of the Covenants until 1966) and to the large number of Third World countries that had already ratified them.

The mission undertook to bring complaints about a lack of adequate information about the Covenants to the attention of the UN Division of Human Rights in Geneva.

The role of the law and the lawyers. The importance of this aspect, which was stressed throughout the seminar, can best be described in the words of President Kaunda: "Without law the whole structure of society must collapse, but equally, without the respect of the people for the law society is doomed. The question is, how do we win that respect? I believe the answer is to be found in my central theme: that the people must recognise the police and the courts as their police and their courts, that they must recognise the law as their law, as reflecting their needs and aspirations" (in: The function of a Lawyer in Zambia today, 1971-72, Zambia Law Journal, 1-4).

The social distance which often separates ordinary people from the official law of their land, and the qualitative and quantitative need for legally trained personnel characterises most developing countries. Increased economic development, law reform and general education of the population seem to be the obvious answers but are equally among the very goals of development. This report does not claim to bring this problem any closer to a solution; it seeks only to describe certain aspects of the human rights situation in a limited number of countries and to make a few suggestions for their improvement. This is done in the hope that the mission and its report will contribute to increased awareness of human rights issues, to closer contacts between the countries in the region and perhaps to a continuing follow-up in the countries concerned.

SUDAN

Dates of visit: April 5-9, 1978

The mission met, inter alia:

- Mr. Abel Alier, Vice-President of the Sudan
- Chief Justice Khalafalla El Rasheed
- Dr. M.H. Ahmad, Minister for Cooperation, Assistant Secretary-General of the Sudanese Socialist Union (SSU) and former Controller of the People's Assembly
- Dr. Mansour Khalid, Assistant Secretary-General of the SSU (for ideological and political questions)
- Mr. Salah M. Shibeika and Mr. Mahdi El Fahal, Deputy Chief Justices
- several other officials in the Attorney-General's Chambers, members of the Bar and the Judiciary, and Professors of the Law School.

Documentation

Upon arrival the mission was provided with a detailed written answer to the questionnaire and in addition received copies of many legislative texts.

General background

The Sudan, after having been a colonial joint-venture of Egypt and England for half a century, became an independent republic in 1956. It is an immense country and is the largest in Africa (2,560,000 km²). From the start, in addition to its problems of development, it had to cope with a strong secessionist movement in the South. The North, with the capital, Khartoum, is mainly moslem and arabic-speaking, while the South forms rather a part of black Africa, mainly christian or animist with an english speaking élite. In a coup d'état in 1969 Colonel Nimeiry seized power and three years later succeeded in settling the North-South dispute, which had meanwhile escalated into a guerrilla war, by granting to the South in the Accords of Addis Abeba a large degree of autonomy. Since that date genuine efforts have been made to reconcile both the North and the South and political opponents from left and right. Since July 1977 a large number of political prisoners have been afforded the opportunity to apply for amnesty and an increasing number of opposition leaders have been persuaded to return from abroad, including Sadik-al-Mahdi, the leader of the Mahdis.

Parliament and Party

The Sudanese Socialist Union (SSU) is the sole party and the conditions, grounds and procedure for membership are laid down in the Basic Rules of the party.

The rather harsh requirement which would exclude from membership any citizen "previously convicted of any offence relating to honesty or honour", seems in practice not to be enforced strictly. Out of a total population of 18 million there were in January 1977 approximately 4,2 million members.

Candidates may nominate themselves for election to the People's Assembly (300 seats). Although according to the Exercise of Political Rights Act the Socialist Union may object to the nomination of a person for election to the Assembly, it is quite remarkable that in the elections of January 1978 approximately one third of the members were elected from amongst non-party members. The acceptance of this development seemed to rest on the following reasoning: On the one hand the multi-party system was rejected because it encouraged tribalism and hampered economic national development. On the other hand it was firmly believed that every citizen in the Sudan should be free to play a role in the development of the nation and to that end non-members of the SSU should be eligible to contest elections to the People's Assembly, provided that they did not do so as members of a political organisation. Further a belief is held that some institutions are national rather than party organs. As the People's Assembly is one of these institutions, it would frustrate that belief if eligibility was restricted to members of the SSU.

Pursuant to this policy even the tenth of the membership of the People's Assembly which is appointed by the President does not consist solely of SSU members.

The SSU is therefore supreme only in the sense that it is the sole body empowered to formulate general guidelines in the context of national development.

On several occasions more specific legislation proposed by the Executive of the party has been rejected by the Assembly. In 1977 this happened three times.

The Executive

Under the Constitution the President of the SSU is the sole candidate for the Presidency, but he must be elected by a vote of the whole people. According to the Constitution a simple majority would be enough, but President Nimeiry has set a precedent by stating that only with 70% or more of the votes would he accept office. Although it is too early to say, it is quite possible that this custom is gaining constitutional force.

All Ministers are members of the Central Committee of the SSU, which is a much larger body than the Cabinet. To avoid conflict between government policy and party policy the head of the regional government is generally also chairman of the regional party section. But duplication of office stops below this level, in order not to exclude anyone with the necessary competence.

Judiciary and legal profession

On the basis of the Judiciary Act 1976 the Committee for Judicial Supervision plays an important role in the election, promotion and discipline of judges. It has two divisions, a Civil Division and a Sharia Division, the latter for moslem law. Judges are not required to join the party, nor are they normally party members. However, the Chief Justice, his two deputies and the Grand Kadi are members of the Central Committee by virtue of their office. The Chief Justice is also a member of the political bureau of the Party.

Lay assessors appointed by the Chief Justice, are found in criminal cases of a serious nature in both magistrate's and higher courts. Two lay assessors assist the judge and have equal votes.

The total number of practicing lawyers in the Sudan is 555. Of these 420 are registered as advocates and 135 are employed by the Attorney-General's Chambers (of whom 33 are seconded to state-owned corporations).

The private practitioners give legal aid in serious criminal cases paid by the state. The government spent over the last two years approximately US\$ 50,000 on this scheme. There is no legal aid in civil proceedings nor is there any provision for advisory services, but the Law School of the University is trying to establish a "legal aid clinic". The staff would be glad to receive information and advice from other countries about the best way to operate such a scheme.

Preventive Detention

The mission was satisfied that after the publication of the General Amnesty Act of 1977 a large number of detainees were released. The mission was told that the number of persons held in detention at the time of the visit was approximately 100. The Amnesty Act provides for an application for amnesty to be made to the President. Some detainees have declined to make this application because they did not want to give recognition to a procedure which could be used to liberate equally detainees from the left and from the right.

The mission noted that many of the safeguards mentioned in the final recommendations of the report of the Dar es Salaam seminar are in existence in the Sudan. It hopes, however, that publication of the detention order (or the fact of detention) in the official gazette will be given serious consideration. Notification to the family seems to be given in practice, but the mission recommends that such a requirement should be statutory. The same comment applies to the inclusion of a judge of a superior court in the review body, the State Security Council.

The mission noted the lack of statutory provisions giving the Judiciary the power to ensure that correct procedures have been complied with in the detention of persons and that the detention order is not ultra vires the relevant sections of the State Security Act.

The mission was, however, glad to learn that proposals for the complete abolition of preventive detention are under consideration. Suggestions to this end had been submitted to the President by the Law Society, inter alia encouraged by the outcome of the Dar seminar.

(Shortly after the mission left the Sudan it was informed that another 29 political detainees, who were communists, had been released).

The Ombudsman

Neither at the Dar es Salaam seminar, nor at the first International Conference of Ombudsman (in Canada 1976) was information given about the ombudsman institution in the Sudan.

In 1974 the People's Assembly Committee for Administrative Control Act was passed. After some controversy during the constitutional debates about the branch of government to which the Committee should be responsible, the

question was resolved in favour of the Assembly. Complaints can only be brought to the attention of the Committee through a member of the Assembly. As the chairman of the Committee is the Controller of the People's Assembly and the members of the Committee have to be members of Parliament, it means that the Committee can in practice receive complaints directly. Complaints against acts of the President, the Judiciary, the Attorney-General and the Armed Forces are not within the Committee's jurisdiction. (The Armed Forces have a somewhat similar institution in the office of the Inspector-General of the Army). Matters relating to the security of the state or its foreign relations are excepted, as are questions of working conditions within the administration, including appointment, pay, promotion, discipline and dismissal of civil servants. Among the grounds for complaint specifically mentioned are favouritism, corruption or bias; abuse of discretion; discrimination; neglect of duty and inefficiency. The Committee has full powers to ask for any documents from administrative organs and hear witnesses under oath.

If upon preliminary investigation a reply by an administrative body is deemed by the Committee to be insufficient, an in camera hearing is held in which a quasi-judicial procedure is followed. Lawyers are not allowed to represent clients but can give them advice. If there is no compliance by the governmental body with the Committee's recommendation, the case is referred to the Speaker of the People's Assembly and through him to the Assembly to take any decision it thinks fit. In addition, the Committee submits an annual report on its activities to the Assembly.

For a population of 18 million the number of complaints (approx. 200 a year) is rather low. Most frequent in the first years were complaints relating to land questions.

In addition the Committee was asked by the Assembly to investigate three cases of large scale corruption. To perform this task it recruited additional members from the Assembly, who had to work during a recess of the Assembly.

The mission formed the impression that the work of the Committee was in general appreciated, but that the institution is badly in need of reinforcement. Being understaffed and without an adequate budget it is not in a position to increase its activities with regard to "petty complaints", let alone do self-promoting work in the country. This is all the more of a problem since the Committee members are full-time parliamentarians and have to carry out their normal political work in their constituencies. Perhaps it would help if some members of the Committee were to be appointed from the members nominated by the President who are free of constituency duties.

TANZANIA

Dates of visit: April 10-15, 1978

The mission met inter alia:

- Mr. J.S. Warioba, the Attorney-General
- Mr. P. Msekwa, Secretary-General of Chama Cha Mapinduzi (CCM)
- Chief Justice F. Nyalali
- Mr. Kanywanyi, Dean of the Faculty of Law
- some other officials and members of the legal profession.

Documentation

On the third day the mission was provided with a written answer to the questionnaire. The new CCM party constitution was available in English, but many legislative texts were available only in the official language, Swahili.

General background

A former German protectorate, Tanganyika was mandated to Britain after the first World War. In 1962 it became an independent republic within the Commonwealth and in 1964 it federated with the Isle of Zanzibar into the United Republic of Tanzania. In the early sixties Tanzania was one of the first countries to adopt a One-Party Constitution. Following the report of a Presidential Commission on the establishment of a democratic one-party state, the 1965 Constitution stated that "all political activity in Tanzania ... shall be conducted by or under the auspices of the Party".

Tanzania has approximately 15 million inhabitants, but in natural resources it is one of the poorest countries of Africa. Large-scale development programmes are in existence. Tanzania is heavily affected by the political and military turmoil of Southern Africa where Tanzania is one of the leading so-called "frontline states". The mission had experience of this when in the week of its stay the "Malta-2" talks on Zimbabwe/Southern Rhodesia took place, and naturally took precedence over this mission.

Party and Parliament

On 21 January 1977 the Tanganyika African National Union (TANU) and the Afro-Shirazi Party (ASP), the sole party on the Isle of Zanzibar, merged into one new party called: Chama Cha Mapinduzi (CCM). The Secretary-General of

the Party is Mr. Pius Msekwa who, as Vice-Chancellor of the University, made the key-note speech at the Dar es Salaam seminar. Article 2 section 8 of the CCM Constitution states that "a person shall not be admitted or be allowed to continue to be a member unless he fulfils the following conditions:"... of which the most specific is that"he must be a peasant or a worker and must not associate himself with the practices of capitalism or feudalism, such as:

- (a) holding shares in any company,
- (b) holding directorship in any capitalist owned enterprise,
- (c) receiving more than one salary,
- (d) owning houses for purposes of renting to others."

Every applicant must be supported by three referees who are already members of that branch (section 10) and the applicant has to undertake an instruction course by the Party.

The National Executive Committee of the Party is allowed to dismiss members and leaders whenever it is satisfied that their conduct "contravenes the conditions of membership or of leadership as spelled out in this Constitution". The rules of procedure for dismissal or expulsion are laid down in Party Regulations (available only in Swahili). According to the Secretary-General of the CCM the only cases of expulsion were 9 in 1968.

In March 1978 there were 1,5 million members of the Party, representing 25% of the eligible population i.e. of 18 years of age or over.

The interim Constitution of Tanzania (of 1965) was replaced in 1977 by a new Constitution (of which the english version will not be available for some time). It provides for several categories of membership of Parliament:

- constituency-members,
- 10 members nominated by the President,
- ex-officio members (the Regional Commissioners of the Party),
- "national members", elected by the mass organisations (youth, women),
- members chosen by the Revolutionary Council of Zanzibar (who in turn are directly elected by the population).

Conflicts between Parliament and Executive are rare but have occurred at least four times since 1968. In two of the cases the disputed legislation was passed later after interventions by the President.

Judiciary and legal profession

The new Constitution of 1977 has brought no changes in the position of the Judiciary other than the deletion of the provision that there should be a maximum of 15 judges in the High Court.

If the President considers that the question of removing a judge for inability or misbehaviour should be investigated, he must appoint a tribunal the majority of which shall consist of judges or former judges from superior courts in the Commonwealth. In practice no judge has been removed from office although two recent incidents touched upon these provisions.

In the first case a judge refused to accept his transfer. While the government and the Chief Justice deliberated whether this behaviour constituted "misbehaviour" or "inability", the judge in question changed his mind. In the other case a judge was assigned a task outside the judiciary. The Chief Justice was of the opinion that this man was still a judge and, upon request, could be assigned to try cases.

The Chief Justice expressed his anxiety to the government that this assignment could amount to unconstitutional removal from office. Everyone realised that this point had been overlooked and could set a dangerous precedent. The rule is now confirmed that a judge cannot be assigned other duties unless with his full consent.

A Judicial Review Commission, charged with examining the restructuring of the legal profession, had completed its report and its recommendations were discussed at the last Conference of Magistrates and Judges (Arusha, 1978). Although the report was not yet published, it seemed clear that there would be no substantial changes proposed as far as the Judiciary is concerned.

It appears that the report contained a recommendation to abolish private practice completely, but it seems that the Conference of Magistrates and Judges advised to the contrary. This makes it unlikely that such a measure will be adopted in the short term. The number of private practitioners in Tanzania at present is approximately 43. Although the big exodus of '71-'73 has been stopped, there are still 2 or 3 Asian lawyers a year leaving the country. The legal corporation is a public autonomous body which supplies legal services to parastatals and in theory to anyone else who needs them, irrespective of

ability to pay. In practice the only private persons at present assisted by members of the Corporation are those granted legal aid in capital cases. The aspiration is to spread the services of the legal corporation demographically as far as possible under the mandate that it should be self-supporting. The Legal Corporation employs at the moment about 25 lawyers. A short description of the Legal Corporation can be found in the seminar report, pp. 67-69.

Legal Aid

Legal Aid is provided by the private practitioners and the Legal Corporation in criminal cases of a serious nature. The State pays nominal fees with a maximum of 200 shillings.

In civil cases the Tanganyika Law Society, after investigation whether the applicant is without sufficient means and whether there appears to be a good cause of action or defence, may provide legal aid. The average number of briefs is about 100 a year (3 or 4 per lawyer). There is an arrangement with the Court that in these cases no court fees are due. Where the legally aided party obtains an order for costs, the costs of the lawyer's remuneration is paid into the Law Society's Fund for legal aid.

The Legal Aid Committee of the University used to give legal aid in civil cases too, but for practical reasons (e.g. the distance between the campus and town) it had to reduce its services. Now it mainly deals with advisory services in labour disputes and motor insurance cases and students are employed on research. The Law Faculty has three lawyers on its staff who are qualified to plead in court.

Preventive Detention

The broad powers of the President under the Preventive Detention Act 1962 (cap 490) to detain anyone who "is conducting himself so as to be dangerous to peace and good order or is acting in a manner prejudicial to the defence or security of the State" or to detain a person to prevent him from acting in such a way, are still in force. Similar powers are possessed by the Regional and Area Commissioners to detain a person for not more than 48 hours. No such order shall be questioned in any court (s. 3, Preventive Detention Act 1962). There is an Advisory Committee, composed of two presidential nominees

and two nominated by the Chief Justice, to which the President has to refer, at least once a year, the detention order and the grounds for continuing the detention. The powers of the Committee are merely advisory. Access to a lawyer is not provided for in the law, nor is notification to the family or publication in the Gazette. Although it was impossible for the mission to enquire into the practice of preventive detention in Tanzania or, indeed, in any other country on this mission, it is convinced that the lack of the statutory safeguards proposed in the recommendations of the Dar seminar deserves the full attention of the government and legal profession in Tanzania.

Since the Dar seminar the government has on several occasions released substantial numbers of political prisoners. On April 26 the members of the mission learned in Lusaka that another 13 people were freed to mark the thirteenth anniversary of the Union, including several people who were sentenced in absentia by a Zanzibar Court for alleged involvement in the assassination of Vice-President Karume. In May it was announced that Mr. Andreas Shipanga and several other so-called "Swapo dissidents" were released to go abroad.

Ombudsman

In 1966 the Permanent Commission of Enquiry was instituted. In the 12 years of its existence it has proved to be one of the strongest human rights institutions in the area. The most recent annual report was presented to the National Assembly in April 1978 (in Swahili).

A new record of 3100 complaints was registered in the period 1975/76. Of these 636 were found baseless after investigation and 1739 did not require investigation and were dealt with merely by advising the complainants. 191 cases were not investigated due to lack of evidence or due to the absence of the complainants. 284 cases were still under investigation. 250 cases were found to be well-founded and appropriate action was taken. Of the complaints against the administration about half were brought against the Prime Minister's office, the Judiciary and the Ministry of Foreign Affairs. Although there remains room for improvement, in particular in the Commission's effectiveness in the rural areas, its performance is in general highly regarded.

KINGDOM OF LESOTHO

Dates of visit: April 17-19, 1978

The mission met, inter alia:

- Mr. C.D. Molapo, Minister of Foreign Affairs
- Mr. J.T. Ramoreboli, Minister of Justice
- Mr. J.K. Rampela, Minister of Interior
- Chief Justice T.S. Cotran and Mr. Justice M.P. Mofokeng
- The Solicitor-General and numerous senior officials of different Ministries and members of the Bar.

Documentation

The mission received a written answer to the questionnaire and ample legislative texts.

General background

This mainly agricultural Kingdom, formerly a British protectorate, achieved independence in 1966. It is completely surrounded by South Africa and economically dependent on the Republic. Its sometimes very outspoken position against its powerful neighbour in international fora has, therefore, particular significance. Considerable efforts to bring some welfare to the rural areas have been made but the economic prospects remain difficult.

From the outset government officials stressed that Lesotho is not a one-party state. This was argued at length in the materials that were handed to the mission. On the basis of its findings the mission accepts this, but on the other hand there is not a fully fledged multi-party system either. As the following brief historical sketch shows, this is a sui generis case.

In pre-independence days there were four parties: the Basotho National Party (BNP), the Basutoland Congress Party (BCP), the smaller Marematlou Freedom Party (MFP) and the party of Charles Mofeli (UDF) with only one parliamentary representative. The BNP, which has its stronghold in the rural areas, won the 1965 General Election by a narrow margin. In January 1970 Parliament was dissolved (at the end of its 5 years term) and elections called. Owing to serious disturbances prior to and during the voting, a state of emergency was declared and the elections nullified. A joint communiqué

signed by the leaders of the four parties (of which a copy was handed to the mission) appears to confirm this chain of events. Under the Constitution a Parliament should have been reconvened within two weeks of the declaration of a state of emergency, but because of the dissolution there was no parliament at that moment. The Prime Minister, Chief Leabua Jonathan of the BNP, then suspended the Constitution and started talks with all the parties concerned.

After a period of political adjustment the government passed the Lesotho Order 1973 establishing an Interim Parliament of which

- the 22 principal and ward chiefs were automatically members,
- a further 11 persons were to be nominated by the King (on the advice of the Prime Minister) from amongst distinguished individuals,
- the remaining 60 members were to be nominated by the King on the advice of the Prime Minister from different political parties.

The BCP, claiming that the BNP did not adhere to the agreed formula, split into two factions: one willing to accept nomination (under deputy-leader Ramoreboli, now Minister of Justice) the other, under the leader of the BCP, Mr. N. Mokhehle rejecting the proposal. In January 1974 serious riots, allegedly started by Mr. Mokhehle's BCP faction, broke out and the country suffered heavily from indiscriminate violence by supporters of both sides. When order was finally restored, Mr. Mokhehle and some of his followers had fled the country and others were arrested and charged with subversive activities. The Prime Minister continued his efforts to establish a kind of national government. In November 1975 the leaders of the MFP and the "internal" BCP faction accepted portfolios in the Cabinet. Only Mr. C. Mofeli^(UDF) declined to join the government.

In a subsequent "treason trial", where the accused were defended by the South African lawyer Mr. Kuni, the Executive was severely criticised by the judges and many sentences were reduced on appeal. It is noteworthy that the government accepted these criticisms and made no move against the judges. By the time of the mission's visit all the prisoners of 1974 had been released.

The national government continues to pursue a policy of reconciliation. There has been contact between the government and the "external BCP", but progress seems to be halted at present.

The mission received information that a body operating under the name of a peace corps (Lebotho la Khotse) is sometimes engaged in harassing and intimidating villagers when they complain about the authorities. Only faithful BNP members, it was said, were able to join this body which sometimes operates as a volunteer police reserve under the authority of an Act of 1970.

When the mission brought these reports to the attention of the government officials, it was conceded that in the beginning some mistakes may have been made "by over enthusiastic volunteers", but they said that at least in the last two years no complaints had been received. They stated that the members of the Lebotho la Khotse were merely engaged in the protection of development projects against vandalism and in this capacity they assisted the chiefs, upon request, in their law and order function (which the chiefs carry out under the supervision of the police). Further investigation of this matter fell outside the terms of reference of the mission.

Judiciary

In as small a country as Lesotho (1,5 million inhabitants) the number of judges must be limited. In addition to the Chief Justice and ^{one} High Court Judge there are 13 magistrates, and a Judicial Commissioner hears appeals in customary law cases. The Ministry of Justice are seeking to publish law reports covering the last 5 years, and would be interested to receive reports from other black African countries.

The legal profession

Lesotho has an extremely large number of lawyers enrolled: over a thousand. Amongst these there are only 35 resident legal practitioners in addition to 19 lawyers working for the government. The others are South African lawyers. The reason for this desire of South African lawyers to be admitted to the Lesotho bar lies in the fact that Lesotho, unlike South Africa is a Commonwealth country. It is easier to obtain permission to practice in other Commonwealth countries when one has a number of years' enrolment in a Commonwealth country. Over ninety percent of the lawyers enrolled in Lesotho do not, therefore, actually practice there. Legislation to put an end to this practice is under consideration.

Preventive Detention

Although the Internal Security Act of 1967, as amended in 1974, provides for preventive detention, these powers are in practice not used. The only person detained under it was a lawyer called Kolisang, whom the mission met at a reception given by the Chief Justice at which he started a lively discussion with the Minister of Justice about the legality of his detention.

The mission was well aware that there would be no reason to feel anxious about imminent use of this legislation, but suggested that the government consider the recommendations of the Dar es Salaam seminar and argued that the best time to introduce guarantees in preventive detention legislation was when it was not being applied.

Ombudsman

Approximately a year ago a small delegation, including the speaker of the House, visited Tanzania to have a closer look at the operation of the Permanent Commission of Enquiry. Upon return the idea was informally introduced in government circles. The first reactions were, however, not all positive, the main objection being that Lesotho with its freedom of assembly, freedom of speech and accessibility of governmental institutions did not need such an institution.

The mission respectfully submitted that experience abroad and the pertinent complaints referred to above indicate that there would be room for an ombudsman-like institution. Mr. Justice Chomba promised to send the Minister of Information all available information on the Ombudsman of Zambia, and to put him in contact with the Ombudsman Committee of the International Bar Association.

KINGDOM OF SWAZILAND

Dates of visit: April 20-21, 1978

The mission met, inter alia:

- Dr. Zonke Khumalo, Acting Prime Minister
- Chief Justice C.J.M. Nathan
- Mr. D. Cohen, Attorney-General
- Mr. Seth Z.S. Dhlamini, Acting Secretary to the Cabinet
- Mr. B.S.F. Magagula, Permanent Secretary of the Ministry of Justice
- The Commissioner of Police and several officials of the Ministries of Justice, Foreign Affairs and Education, and members of the Bar.

Documentation:

Although no written answers to the questionnaire were furnished, the mission received copies of legislation concerning preventive detention, emergency powers, public order and the Royal Proclamation of 1973. In addition, the mission were given a copy of "the comments and observations by the government of Swaziland in respect of the Human Rights Report on Swaziland", a diplomatic document in answer to the human rights assessment by the United States State Department on 3 February 1978.

General background

In 1968 Swaziland became independent from Great Britain under a Westminster type Constitution. Dissatisfaction with the "imposed" political structure and isolated incidents of anti-monarchist feelings led to a resolution by both Houses of Parliament and a request by the Swazi National Council to the King to repeal the Constitution. This was done by the King's Proclamation of April 12, 1973: "All laws, with exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such modifications, adoptions, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees". Since then King Sobhuza II, by far Africa's longest reigning ruler (since 1921), has governed the country on the basis of traditional concepts of royal prerogatives and elders' advice.

Shortly after the repeal of the April 1973 Proclamation the Royal Swazi Constitutional Commission was appointed "to inquire into the fundamental principles upon which the Kingdom's Constitution should be based, having regard to the history, the culture, the way of life of the people of Swaziland and the need to harmonise these with the modern principles of constitutional and international law". The recommendations of the Commission, based on consultations with 30,000 people, visits to all the Tinkhundla (communal councils) and some 400 written proposals, were submitted to the King in June 1975, but until now no action has been taken.

In the meantime legislation is proposed by the relevant Ministry and drafted by the Attorney-General. After the draft has been approved by the Council of Ministers, it is submitted to the King whose proposed amendments, if any, are referred back to the Council. Proposed legislation becomes law on the assent of the King and promulgation in the Government Gazette.

It should also be pointed out that in the strict monarchical structure of Swaziland the King has full power to intervene in any matter. There exists a right of individual petition to the King on any matter and in practice this right is often used both by government officials and ordinary citizens.

Party and Parliament

In view of what has been said above, it will be seen that Swaziland is neither a one-party state, nor is it a multi-party state. It comes closest to the description of a "non-party state". In other words the ruling elite is not organised in one or more parties or movements.

The official dislike of political parties can best be illustrated by quoting from two Royal Decrees following the Proclamation of April 1973: "All political parties and similar bodies that bring about and cultivate disturbance and ill-feelings within the Nations are hereby dissolved and forbidden", and any meeting or demonstration "of which the Commissioner of Police has reason to believe that it is directly or indirectly related to political movements or other riotous assemblies" is also forbidden.

The envisaged return to some system of participation by the people in the selection of its rulers, in accordance with proposals to be published shortly, will, it is understood, continue the ban on political parties. It is

too early to say whether a solution can be found which will allow public expression in the affairs of the State without in some way providing for forms of political organisation. In Swaziland hopes are directed at the "Swazi way of life".

Judiciary and legal profession

These are still largely expatriate. There is only one permanent Judge in the High Court, the Chief Justice. In the absence of the Chief Justice, the Attorney-General acts as such. As in other recently independent countries in Africa, one of the main concerns in Swazi legal circles is the coordination between the traditional and the statutory courts, between customary law and common law. The establishment of a Law Reform Commission is called for. The lack of resources, inherent in any developing country, has prevented the creation of one until now. The members of the mission were invited by the Chief Justice to attend a special session of the High Court, where the Chief Justice in his opening address welcomed the presence of the mission. The Judiciary, members of the Bar, the Attorney-General Chambers's and the public at large were invited to attend. The Chief Justice gave an account of the performance of the Judiciary in the last year and highlighted some special problems which called for legislative or governmental action. His speech and the public ceremonies surrounding it were reported by the press. In view of the gap often existing between the public and the legal system it would seem to the mission that a special session of this kind could prove of value in other countries.

The legal profession is small in Swaziland. The number of non-resident (South African) lawyers has been diminished through strict requirements for enrolment. In capital cases a pro deo counsel is appointed by the Chief Justice through the Registrar. Legal aid in civil cases is not practiced in any substantial way.

The compiling of law reports was neglected for many years, but recently the reports for 1969-76 were published and it is hoped to keep them up to date in a more regular way. In Swaziland, as in other countries, the desire to have regular exchange of law reports with other black african countries was expressed.

Preventive Detention

A 1973 Decree, annexed to the Royal Proclamation, provided for detention without trial or review for a period of 60 days, and possible re-arrest for a further period or periods of 60 days, whenever the King-in-Council deemed it necessary in the public interest. This power has been used in a limited number of cases. On March 3, 1978, a new Detention Order came into force (King's Order in Council No. 1 of 1978), which gives the Prime Minister, with the consent of the King, the right to issue a written order for detention for 60 days. He has to inform the Council in advance or as soon as possible afterwards. Extension for further periods is possible after the Prime Minister has informed the Council and placed before it such information as is relevant to such further detention, including a report by the Commissioner of Police on the conduct and behaviour of the person detained.

Unlike the 1973 Decree, the new Detention Order provides for publication of the fact of detention in the Gazette. It stipulates also that a copy of the written order must be left with the arrested person. An internal regulation has been issued in terms of which such a detainee may not be interrogated by the police and is allowed to receive visits in accordance with the normal prison regulations. The mission was assured that only two persons had been held under the new detention order, namely a nephew of the King and Dr. Zwane of the former opposition party "Ngwane National Liberatory Congress".

Although the mission was glad to see that in the detention order many of the Dar es Salaam seminar recommendations were implemented, it regretted that review by an independent body or the right to make a habeas corpus application to a court were not provided for.

REPUBLIC OF BOTSWANA

Dates of visit: April 22-26, 1978

The mission met, inter alia:

- Mr. Legwaila, Deputy Attorney-General
- Chief Justice Dijke
- Mr. Mpotokwame, Permanent Secretary of the Ministry of External Affairs
- The Private Secretary of the President and other officials in the President's Office
- Mr. Ian Kirby, President of Law Society, and other members of the Bar
- Mr. Ramokhua, Director of Prisons
- Mr. S.A. Hirschfield, Commissioner of Police.

Documentation:

A written answer to the questionnaire was not prepared. The mission received, however, copies of several legislative texts.

General background

Botswana, a former British protectorate, became independent in 1965. With its population of 700,000 inhabitants in an area of 581,730 km² it is one of the least densely populated countries in the world. In spite of its limited economic strength, it tries to free itself from the economic dominance of the Republic of South Africa. For this reason it left the Monetary Union in 1976. Its geographical situation (bordering South Africa, Namibia, Zimbabwe and Zambia) places it at the centre of regional turbulence and makes it one of the so-called "frontline states". This is underlined by the fact that Botswana since June 1976 has admitted more than 40,000 refugees, of whom 10,000 are still living in the country. Recently the President of Botswana, Sir Seretse Khama, has been awarded the Friedjof Nansen Medal for outstanding services to the cause of refugees. In development policy the emphasis falls on agricultural development and educational programmes for the rural poor.

More than any other of the countries visited, Botswana adheres to the multi-party system. De jure the Constitution provides for complete freedom

of political association, de facto several parties exist and continue to function without governmental interference, although the three opposition parties together hold only 5 of the 32 seats in Parliament.

The constitutional system was generally seen as an asset and not an impediment to development by providing a forum for criticism and discussion. As was observed by one official, "the existence of opposition parties can compensate for the lack of literacy and newspapers".

Judiciary and legal profession

There are in Botswana two full-time judges and 13 magistrates. The tenure of the judiciary is until 62, but with possible extension to 70. However, the two judges, being expatriate, have 2 or 3 year contracts. There are active customary courts which go side by side with magistrates courts. Appeal from customary courts lies through the District Commissioner to the High Court, which exercises this power rather reluctantly. Lay assessors can be employed discretionally but this has in practice not yet occurred. Although the general assessment of the judiciary was very positive, there were two areas indicated to the mission where the fact that the judiciary is still largely expatriate could be a disadvantage: in cases where Rhodesian or South African infiltrators were brought to court and in cases involving stolen cattle. This common and serious crime in a farming nation encounters difficulties of proof since traditional ways of proving ownership do not always meet the requirements of the english laws of evidence.

For the same reason as in Lesotho there are many South African lawyers enrolled in Botswana. Legislation to curb entry was defeated in Parliament in 1972 as it was thought desirable to have some South African lawyers available to plead in Botswana Courts. There are 15 full-time resident practitioners in Botswana, mostly young lawyers. When some time ago the lawyers planned to create a Botswana Law Society, which would be empowered to take disciplinary measures, the group of resident lawyers succeeded in having the rule accepted that non-resident lawyers could be members but without a vote. The majority then lost interest and the "indigenous" bar is too small at the moment to develop activities.

In addition to the Bar there are about 16 lawyers who work in the Attorney-General Chambers. The more lucrative private practice, however, exerts a big attraction, as is the case in all countries visited except Tanzania.

Legal aid system is not yet developed, but for serious crimes an accused who is not able to have a lawyer of his own is provided with one by the State. The private practitioners divide these cases amongst themselves and are paid nominal fees. In civil cases there is a rudimentary legal aid scheme with a very stringent means test.

Preventive Detention

Section 16 of the Constitution permits preventive detention legislation but it may be applied only in the case of a state of war or declared emergency "when reasonably justifiable for the purpose of dealing with the emergency". The detainee must be furnished within 5 days with a written statement specifying in detail the grounds for his detention, a notification must be published in the Gazette within 14 days, an independent tribunal headed by a lawyer appointed by the Chief Justice must review his case every six months and the detainee is allowed to make representations to the Tribunal himself or through a lawyer. The tribunal may make recommendations but the authority by which the detention was ordered is not obliged to act in accordance with any such recommendation.

The authorities are aware of the possibility of abuse of power by police officers and there have been a few cases where an offending constable has been brought to trial and sentenced. In an interview with the Botswana radio the mission stressed that the fact that erring law enforcement personnel are prosecuted is a better indication of human rights observance than a proud announcement that abuse of power never occurs.

Ombudsman

There is no ombudsman or similar institution in Botswana. Although in certain circles the introduction of such an institution was discussed, and a visit was made to study the institution in Tanzania, it is generally felt that Botswana, being a fully fledged parliamentary democracy, can do without one. In particular in parliamentary circles the establishment of an ombudsman was regarded as superfluous and costly. The mission pointed to the existence of the ombudsman responsible to Parliament in countries like the UK and the Sudan which might prove more acceptable. The mission agreed to supply further information on these parliamentary ombudsman institutions.

REPUBLIC OF ZAMBIA

Dates of visit: April 26-28, 1978

The mission met, inter alia:

- Mr. D.M. Lisulo, Minister of Legal Affairs and Attorney-General
- Mr. S. Zulu, Secretary-General of UNIP
- Chief Justice A.M. Silungwe and members of the Judiciary
- Mr. R.M. Kapembwa, Investigator-General and his staff
- Prof. Nsulo, Dean of the Law School and members of his staff
- Mr. A.M. Hamir, Secretary of the Zambia Law Association
- several governmental officials.

Documentation

No written answer to the questionnaire was provided but members of the mission received copies of the most relevant legislation and the reports of the Investigator-General.

General background

The former British protectorate of Northern Rhodesia became an independent republic in 1963 and was renamed Zambiaⁱⁿ 1964. In 1973 the one-party constitution was adopted. Resulting from its involvement in the liberation struggle in neighbouring countries, there has been a continuous state of emergency in Zambia since 1965. However, the emergency powers were not widely used until 1976.

Although Zambia has rich mineral resources and a climate that is beneficial to agricultural development, the economic situation in recent years has been poor. In addition to the effects of the liberation struggles in Southern Africa, the big drop in the world price of copper has caused economic hardship to many of its approximately 5 million inhabitants. Efforts to diversify the Zambian economy are being undertaken but will take time to become effective.

Party and Parliament

Under the Constitution, a candidate for Parliament has to fulfil inter alia the following conditions:

- he must be a member of the sole party, the United National Independence Party (UNIP);
- he must be one of the three candidates nominated for a constituency by the local party;
- his nomination must not have been disapproved by the Central Committee of the party.

The preamble to the 1973 Constitution refers to the "One-Party Participatory Democracy under the Philosophy of Humanism" and art. 4, to which the fundamental rights in Part III are subjected, elaborates further the link between State and Party:-

"(2). Nothing contained in this Constitution shall be so construed as to entitle any person lawfully to form or attempt to form any political party or organisation other than the Party, or belong to, assemble or associate with, such political party or organisation".

"(3). Where any reference to the Constitution of the Party is necessary for the purpose of interpreting or construing any provision of this Constitution or any written law or for any other purpose, the text of the Constitution of the Party annexed hereto, together with such amendments as may from time to time be made thereto by the Party and published in the Gazette shall be taken to ^{be} the sole authentic text of the Constitution of the Party".

The United National Independence Party (UNIP) seeks to be a mass-party and has at the moment 800,000 members. In the rare cases where Parliament has rejected a bill proposed by the Executive, the UNIP has tried to play a conciliatory role, as in the case of the Social Services Bill of 1977.

Art. 5 of the Party Constitution states that it is open to "any Zambian citizen who accepts the objectives and rules of the Party". Discipline is enforced by the President of the Party and an Appointments and Disciplinary Committee.

Preventive detention

Preventive detention is governed by the Constitution, the Preservation of Public Security Act and by Regulations made under the Act. Under Regulation 33 (1) of the Preservation of Public Security Regulations administrative detention can be ordered by the President. Most of the safeguards described

in the recommendations of the Dar es Salaam seminar are in force. Art. 27 of the Constitution provides that:

- the arrested person be notified within 14 days of the grounds in detail for his detention;
- notification of the detention shall be published in the Gazette;
- an independent tribunal shall review with intervals of not more than a year the case of detainees who ask for such a review (the detainee has the right to legal counsel and representation before such a tribunal, presided over by a judge of a superior court). The recommendations of the tribunal are not binding upon the detaining authority, but in practice the recommendations are accepted.

The detainee can challenge before the High Court the validity of his detention on the ground either that his detention has not been in accordance with the prescribed procedure or that it is ultra vires. It is, of course, comparatively rare for a defendant to succeed on one of these grounds.

Apart from the power of the President to issue detention orders there is a more general provision (Regulation 33 (6)) giving the right to detain without warrant to any police officer above the rank of Assistant-Inspector for a period not exceeding 28 days. During this period the detained person is deemed to be lawfully detained and the authorities will have time to make a decision whether or not a detention order should be made against this person.

Although the power of arrest under this Regulation 33 is limited to cases for the purpose of preserving "public security", some concern was expressed in legal circles that this power is in some instances used for other purposes such as the prevention or punishment of currency offences and common law crimes. Admitting that the repression of crime in general and, in the context of a developing country, of economic crimes in particular is of great importance, it is doubtful whether detention on these grounds is covered by the term "public security".

The number of persons held in preventive detention at the time of the mission's visit was said by government officials to be declining. Official figures were not made available but the published notifications of detentions and releases seem to indicate that as at May 1976 the number was nearly one hundred.

It was reported to the mission that amendments were in preparation that would make further improvements in the establishment of guarantees for persons under preventive detention. In particular :

- the intervals on which review can take place before the tribunal would be reduced from one year to a period of 6 months (it was understood that even a 3 months period had been considered but had been found unacceptable to the government);
- the review would become automatic and not, as now, depend upon an application by the detainee.

The mission strongly supports the suggested amendments to the legislation.

Ombudsman

The office of Commission for Investigations, headed by an Investigator-General, was instituted in Zambia in 1973 and began to function in September 1974. The Constitution (Arts. 117-119) and the Commissions for Investigations Act (No. 23 of 1974, amended by No. 27 of 1975) provide the legal framework. A short description of it can be found in the paper by F.M. Chomba in the Dar es Salaam seminar report (p. 73). The 1975 report by the Commission for Investigations contains as appendices the full text of the relevant legislation and rules. The report for 1976, published in April 1978 by Government Printer, Lusaka, gives the following figures compared with 1975 (in brackets):

- | | | | |
|----|-------------------------------|-----|--------|
| 1. | number of complaints received | 530 | (550) |
| 2. | " declined | 231 | (367) |
| 3. | " accepted | 299 | (183). |

Both in 1975 and 1976 nearly half of the accepted complaints were carried forward to the next year, and sometimes even longer, as they were still under investigation or consideration. More than half of the decided complaints were considered to be justified. The total number of complaints in 1977 was estimated at about 700.

Public reactions to the existence and performance of the Commission are generally positive and its objectivity and skill were highly praised in the Zambian press.

The major comment is that the Commission could do much more if had more resources (i.e. commission members and administrative staff and facilities) at its disposal. As the manpower situation stands now the chances appeared slim that the office would be able to deal in 1978 with the same number of complaints, let alone expand its activities by touring the country more frequently. The press was suggesting extension of the Commission's jurisdiction to the private sector, but whatever the merits of such a proposal might be, without a large increase in personnel and facilities the Commission would not be able to cope with the additional workload.

In conclusion, the mission wishes to express its appreciation and gratitude for the very friendly reception and cooperation it received in all the countries visited, and expresses its warm thanks to all Ministers, officials and others who kindly gave of their time and knowledge to assist the mission.

F.M. Chomba
Attorney-General and Minister of Legal
Affairs, Zambia

Hans Thoolen
Executive Secretary, International Commission
of Jurists

Geneva, 1978