

**For the Rule of Law****THE REVIEW****INTERNATIONAL COMMISSION OF JURISTS**

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# Human Rights in the World

## Ghana

Military interventions in Ghana have been of a somewhat different character to those in other African states. When the armed forces intervened to overthrow Nkrumah, they pledged to return the country to multi-party civilian rule within two years. They held to their promise, and Dr Busia's government duly came to power as a result of free elections. Deception at the failure of his government to grapple with the country's severe economic problems led to another military intervention in 1972. At first it appeared to have greater success on the economic front, but in recent years there has been growing criticism of the regime and a demand for return to civilian government. The military rulers have shown greater patience than is usual in their attempts to find an acceptable form of constitutional government to replace the military regime. Obviously disillusioned by the failure of the multi-party experiment, General Acheampong has been seeking a solution in the form of a national union, which seems to be a 'no-party state' with a mixed military, police and civilian government. Recent events illustrate the difficulties involved in trying to return a country from a military regime to this limited form of constitutional government.

The educated class of this ebullient people, particularly those in the professions, have shown an outspokenness and independence of mind which is rare in African authoritarian states, and the military government for its part has tolerated protest actions, including strikes by the professions in which the lawyers have been in the lead, to a degree that is also rare. This tolerance is limited, and alternates with more familiar methods of military government, including preventive detention, political trials before military courts, censorship, and repression of student activity, all aimed at keeping the protest movement under firm control.

After the military coup in 1972 a National Redemption Council (NRC) was formed, which legislated by decree. In 1975 this was replaced by a smaller Supreme Military Council (SMC) with only seven members. This change was accompanied by an even greater concentration of power in the Executive and in particular in the Head of State.

When it came to power in 1972, the NRC set out to "capture the commanding heights of the economy" and to uphold and protect civil liberties. However, as it became apparent that the military were not succeeding in achieving their goals, Ghanaians became more vocal in their opposition and a spate of repressive decrees resulted.

One of these, the much dreaded Preventive Custody Decree of 1972 is self-explanatory. The Subversion Decree (NRC 90) of 1972 declared any attempt to overthrow the government to be an offence of 'subversion' punishable by death before a firing squad. The decree also included under the heading of subversion smuggling, embezzlement of

public funds and other offences normally punishable with up to seven years imprisonment, which became punishable by military courts for periods ranging from 15 to 20 years.

Another is the Prohibition of Rumours Decree. Originally issued by the NRC it was re-enacted by the SMC. It makes it an offence punishable with five to ten years imprisonment to reproduce or spread by word of mouth any false statement, report or rumour likely to cause public fear, alarm or despondency or to disturb the peace or cause disaffection against the NRC or SMC among the public, armed forces or police, or to publish defamatory and insulting matter intended to bring the government into hatred, ridicule or contempt. With these vague definitions it inevitably imposes severe restrictions upon freedom of expression.

Freedom of the press is effectively curtailed by a decree requiring newspapers to apply for licences every year. The Legon Observer, which had to cease publication in 1974, is still awaiting a decision on its application made last December for a license to publish. Government warnings have been given to the Ashanti Pioneer and the church weekly, Catholic Standard, for their criticisms of government policies.

The period since 1975 has witnessed increased opposition to the SMC. The legitimacy of the regime was seriously questioned, and there have been demands for the government's resignation. In 1977, the food situation was precarious, and there was spiralling inflation. University students demonstrated in the streets. In June 1977, numerous professional bodies, including the Bar Association, doctors', engineers', accountants' and pharmacists' organisations came out on strike. Representing a large segment of Ghana's professional class, they demanded the immediate resignation of the SMC and the transfer of power to a 'presidential commission' pending a return to constitutional rule. The response of the government to this was the Professional Bodies Registration Decree of 1977 which withdrew the legal recognition of professional bodies and thus their right to take disciplinary measures against members disobeying a strike call. The Decree enumerated new registration requirements and made it illegal for the Professional Bodies Associations to join with other organisations for political or other purposes. The government also dismissed certain high-level professionals from their posts, though after protests some of these were reinstated.

In July 1977, General Acheampong indicated that the people of Ghana would be invited to choose between Union or National Government and other forms of government. Union government envisages a government formed by army, police and civilian representatives in which party politics have no place. Advocates of Union government hold varying opinions on both the degree and nature of military participation in such a government.

To sample citizens' opinions an Ad Hoc Committee headed by the Attorney-General, Gustav G. Koranteng-Addow, had been appointed in January, 1977. Its enquiries centred around the type of Union government which citizens wanted and how the proposals might best be implemented.

In an effort to defuse the mounting opposition and to end the

professionals' strike, the government brought out a time-table for a return to constitutional rule, following a dialogue' in July with the Ghana Association of Professional Bodies. Briefly, the time-table provided for:

- (1) The Ad Hoc Committee to report on citizens' views on the "union proposals" by 30 September, 1977;
- (2) Voter registration and publication of the laws governing the conduct of the referendum, August 1977 until January 1978;
- (3) A referendum on the proposed Union Government on 30 March, 1978;
- (4) A constitution-drafting commission to be established in April 1978, and to complete its draft by October 1978;
- (5) A constituent assembly to be established in November 1978 to establish a new constitution by March 1979;
- (6) General elections to be held under the new constitution, 15 June, 1979;
- (7) The assumption of power by an elected government on 1 July, 1979.

The Ad Hoc Committee's report was issued in September 1977, in accordance with the time-table. In reporting on public attitudes it stated that "while the preponderance of representations was against active participation of the Forces in the Union Government, it was in favour of some kind of participation in a future government". The report also contained detailed and complex constitutional proposals for a non-party single chamber parliamentary system, with a strong executive president on the American model elected by direct suffrage. It also proposed legally enforceable human rights with an independent judiciary, an Ombudsman, and a press commission to ensure the independence of the state-owned media.

It was essential for the public to be educated before the referendum regarding the issues involved in the Ad Hoc Committee report. General Acheampong repeatedly promised full and frank debates. Numerous debates were planned but a symposium organised by the Professional Bodies Association was disrupted by pro-Union Government supporters. A curious incident followed. The Ghana Bar Association issued a writ against those responsible. On 7 December, 1977, the SMC promulgated a decree granting immunity to the defendants. Following protests this was repealed three weeks later. On the sixth anniversary of the regime, 3 January, 1978, students in Kumasi blocked the main road into the city and are alleged to have assaulted car passengers who indicated support of Union Government. In Accra, on the other hand, bands of citizens supporting Union Government reportedly intimidated anyone who expressed opposition to it.

The opponents of Union Government complained that the media had not given them equal facilities to present their point of view. An organisation known as the People's Movement for Freedom and Justice representing virtually the entire spectrum of Ghanaian political attitudes was launched to oppose plans for Union Government. Its leaders included Dr Gbedemah, Nkrumah's Finance Minister, General Afrifa, a prime mover in the coup which overthrew Nkrumah, and Mr William Ofori-Atta, Dr Busia's Foreign Minister. Within a few weeks, violence

erupted at a news conference sponsored by the new movement. Political opponents clashed, and it was reported that three persons were killed.

A government statement, reminding the public that any activity likely to assist in the formation or operation of a political party was illegal, was widely thought to be aimed at the new Movement. The statement further reminded the public that a permit was required before a public meeting could be held. In a radio interview in February, General Acheampong assured his audience that the Movement would not be suppressed. Describing it as an "unholy alliance designed to do mischief", he observed that the police might refuse to give permits for meetings out of fear that more bloodshed would result. Not surprisingly, the Movement found their applications for permits consistently rejected.

### **The Referendum**

As the question was framed on the ballot papers, the voter could vote either yes or no for or against Union Government. There was considerable criticism that other options, such as a multi-party system, one-party government, or traditional rule by chiefs had been excluded from consideration.

To the credit of the government and its Electoral Commissioner, Justice I.K. Abban, the voting at the 30 March referendum was meticulously conducted. Unfortunately a controversy arose over the counting of the ballots. Justice Abban cited the Referendum Regulations, 1977, which specified that the votes be counted at the polling stations in the presence of observers representing each alternative. The SMC favoured counting the ballots at regional centres. On election night, at 11.30 pm, armed soldiers appeared at Justice Abban's office. In fear for his safety, he 'disappeared' and next day was dismissed from his post. This incident, involving a man of known integrity and impartiality, seriously impugned the credibility of the referendum results. The results as announced showed that of 4.6 million registered voters, less than 50 per cent voted. Approximately 1,103,000 (56%) voted for Union Government, and about 800,880 (46%) voted 'no'. Of the nine regions of Ghana, three, the Eastern, the Brong-Afaho, and the Ashanti regions registered majorities against Union Government. These results hardly justify the remark of Mr S. O. Lamptey, Special Aide to the Head of State, that Ghanaians had "massively accepted the Union Government proposal".

Since the referendum, the most serious development has been the arrest and detention of many of the opposition leaders.

The use of preventive detention had become a major issue in the events leading up to the referendum. In August 1977 Justice A. K. Agyepong had ordered the release of 178 detainees out of 451 who had been detained for periods of up to five years. The proceedings had been brought on their behalf by the Ghana Bar Association. The judge ruled that there was no Executive Instrument authorising the detention of the 178. The government at first released some of them, but then apparently decided to ignore the order and re-arrested those released.

On 14 December an Executive Instrument 151 was published giving authorisation for the detention of 224 detainees, 118 of whom had been in detention for periods varying from two to five years. The rest had been detained in the last two years.

In April 1978, after the referendum was over, the government announced that it had arrested 35 opposition leaders including many former ministers in the governments of Nkrumah and Busia and the President of the Ghana Bar Association, Mr W. Adumua-Bossman. Many others escaped the country to avoid arrest, and some of these allege that up to 300 have been arrested. The government assert that those arrested were conspiring to overthrow the government by force. Habeas Corpus proceedings have been started by the Ghana Bar Association to secure the release of some of the detainees. On 3 April the Ghana Bar Association again decided upon strike action alleging malpractice during the referendum. It has since unanimously voted to continue the strike until all detainees held since the referendum are released.

After the referendum lecturers at the University of Science and Technology struck in protest at the way the referendum had been conducted and the treatment of Justice Abban. A group of citizens started proceedings for a declaration that the referendum contravened the Regulations. Legon University lecturers and others at Cape Coast University also struck, saying they were being intimidated. On 6 May it was announced that the University of Ghana had been closed and the students sent home as it was impossible to carry on normal teaching.

In this turbulent atmosphere General Acheampong has announced the appointment of the Constitutional Committee whose duty it will be to frame constitutional proposals for the Union Government. Following that, a Constituent Assembly is to be held. It is hoped that these steps will bring the country nearer to the promised return to civilian rule, but the present auguries are hardly promising.

# Democratic Kampuchea

On 3 March 1978 Mr Evan Luard, Under-Secretary of State for Foreign Affairs of the United Kingdom, asked the Commission on Human Rights to make a "thorough study" of the human rights situation in Democratic Kampuchea (former Cambodia). To support this request he submitted a bulky dossier of horrifying allegations of violations of human rights, many of which he described orally to the Commission. The Commission decided to submit the report to the government of Democratic Kampuchea for its comments and remarks.

The former French protectorate declared its independence in 1953 during the Indochina war. As a neighbour of Vietnam it was affected adversely by the Vietnamese war and the Government of Prince Sihanouk had to cope with growing activity by guerrillas under the name "Khmers Rouges". He was ousted as Head of State by a right-wing coup in March 1970. The new regime under the leadership of General Lon Nol received considerable military support from the US in its fight against the guerrillas. Prince Sihanouk and his followers found shelter in China and joined with the "Khmers Rouges" in the NUFC (National United Front of Cambodia). The large-scale bombing of "guerrilla-territory" by the US airforce met with growing opposition from American public opinion and in the summer of 1973 the US Congress forced the government to bring the bombing in Cambodia to a halt. On 10 July 1974 Prince Sihanouk said in a statement issued in Peking: "This war is not a civil war, but a war of aggression and colonisation against Cambodia by the US... Peace can be realised immediately if the US ceases to interfere in Cambodia and ceases to give military aid to the Lon Nol clique. This will suffice for the Cambodian problem to be solved ipso facto...". These proved to be prophetic words because the gradually reducing military support from the US was accompanied by the military progress of the NUFC. The Front started to prepare for a political take-over and at a national congress held on 24-25 February 1975 in the "liberated zone" a list was approved of seven traitors who would be executed for treason, including the names of President Lon Nol and Prime Minister Long Boret. Prince Sihanouk explained in Peking that the congress resolution could be seen as a general amnesty (except for the seven) and that the Khmers Rouges had given him assurances that there would be no "bloodbath". In the first three weeks of April 1975 the Khmers Rouges, who were increasingly recognised as the dominating force within the NUFC, overcame all republican resistance. On 17 April, the capital, Phnom-Penh, surrendered to the victorious guerrillas.

The Khmers Rouges started to build a new society on the ruins of a country destroyed by guerrilla warfare, American bombing and five years of intensive civil war.

## Phnom-Penh

Immediately after the surrender the entire population of the capital, Phnom-Penh, estimated at about two million at the end of the war, was



forcibly evacuated. Old, sick, young and even pregnant people were not exempted and the harsh conditions under which the transfer to the villages took place cost many lives. This move was thought necessary by the new leaders to "purify" the decadent Americanised city ("the Big Prostitute") and to "revolutionise" its citizens by putting them to work in the rice-fields. It was also argued that it was easier to bring the population to the food than the food to the population. It should be observed that about  $\frac{1}{4}$  of the inhabitants were people who had migrated to the capital from areas ravaged by the war.

Recent visitors to the city have described it as still largely depopulated with a population of 20,000-50,000 inhabitants. Only the main streets were open, with side streets and pavements blocked off by vegetable gardens; the city seemed self-sufficient in food. Cambodian officials said that Phnom Penh would never again be a large city.

### **Executions and killings**

In spite of the formal promise that there would not be a blood-bath, confirmed by Hou Min, Minister of Information, in a broadcast on 10 May, 1975, there were many executions reported in addition to those of the two "traitors" who remained in the country: Long Boret and Sivik Matak. The Times of 23 April 1976 reported the story of Chong Bo, a former Khmer Rouge, that he personally took part in the execution of some 5,000 people. Ear Soth, a former Khmer Rouge, described 16 cases of collective executions and he watched another... between April 1975 and March 1977. Other eye-witnesses reported large-scale executions of former army-officers at Phnom Tippadey. The summer months of 1975 brought some relaxation but throughout the following years the killings seem to have increased again. Precise figures are not available. The government has closed down most contacts with the outside world and information has to be gathered from accounts by refugees and scarce private diplomatic reports. The estimates run from "tens if not hundreds of thousands" to over a million dead. The figures include people who have been the victims of evacuation, starvation and disease. Prime Minister Pol Pot in a remarkable autocritical speech on 28 September 1977 did not go further than to admit that excesses had occurred.

### **Other events**

A new Constitution for Democratic Kampuchea was adopted by the National Congress in December 1975. It states, inter alia, that Cambodia is a "state of the people, workers, peasants and all other Cambodian working people. The legislative power is vested in the Cambodian People's Representative Assembly of 150 members representing the peasants, 50 representing other working people and 50 representing the armed forces. It will be elected every five years. The Assembly will define internal and external policy, elect the Administration and the State Presidium, and appoint judges". The State Presidium will represent the state inside and outside the country.

Although the right to worship in any religion, or not to worship, is guaranteed, "reactionary religion which is detrimental to Democratic Cambodia and the Cambodian people is absolutely forbidden".

On 4 April, 1976, shortly after the general election for the Assembly, Prince Sihanouk's resignation was accepted by the Cabinet. The Assembly elected Khieu Samphan President of the State Presidium and appointed a new government headed by Mr Pol Pot. The new leadership continued the policy started by the former government of trying to make Cambodia economically independent. To that end the entire population has been mobilised to work in strict discipline, above all in the rice-fields. The village co-operatives introduced throughout the country in 1975, were replaced by communes comprising several villages. Private property and the use of money have been completely abandoned. Cambodia wants to develop in the words of the government a classless society of "perfect harmony", a society which discards private ownership as "the source of egoist feelings and consequent social injustices". Refugees describe a picture of a "gigantic labour-camp" in which everyone aged six or more works at what they are told from 10 to 13 hours. Family life has broken down under the Spartan life-style, the communal meals and the separation of children and parents. This picture is fully supported by a remarkable film made by a Yugoslav film producer. Of all the women, workers and children shown in this hour-long film the only person among this normally cheerful people seen to smile was the Prime Minister, Pol Pot.

The national religion, Buddhism, is outlawed and 70,000 monks have been forced to abandon their meditation to work in the fields. Although the food production seems to be sufficient — Cambodia is even planning to export large quantities of rice — most people have to live on a ration of two meals a day of rice and vegetable soup. This and the lack of foreign medicines, the import of which is strictly limited, have caused great suffering, in particular among the weakest of the population. This was confirmed by President Khieu in a broadcast on 16 April 1977 by Phnom Penh Radio in which he said that "every commune must produce its own medicine and provide its own medical service".

Another source of misery which brought death and damage to many Cambodians were the clashes between Cambodian and Vietnamese troops early this year in a conflict that seems to have a territorial and historic rather than ideological thrust. Both countries have accused each other of raids, aggression and atrocities against the civil population. Similar clashes of a minor nature have been reported on the Thai border and continue to threaten the safety of villagers along the Thai-Cambodian border. Some observers think that the Cambodian government is trying to establish a depopulated buffer zone along its entire border to counter infiltration and prevent further escapes by refugees.

In March 1977 a purge claimed many victims among the Khmers Rouges themselves. In what is described as a "coup d'état" there was a shift within the Khmers Rouges and probably within the CPK (Communist Party of Kampuchea) itself, which enforced the position of Prime Minister Pol Pot and his close supporters. The new leaders are,

said to form a small tight group who are inter-related by marriage and who have known each other for almost 30 years. Most of the intellectuals in this group studied in France in the pre-independence days.

The total number of Cambodian refugees, mainly in Vietnam and Thailand, probably exceeds 100,000. The poor circumstances under which they live adds to the toll of suffering.

In an effort to establish the facts more coherently an International Cambodia Hearing was organised from 21-23 April 1978 in Oslo, Norway. There were 10 refugees and five experts present, including François Ponchoud, author of the book "Cambodge année zéro" and Charles Meyer, author of "Behind the Khmer Smile" and a long-time adviser on foreign policy to Prince Sihanouk. The Hearing received evidence confirming most of the reported violations. At the same time the Hearing tried to bring some more understanding of the context in which the atrocities took place. Mentioned were: the usual practice in Cambodia of eliminating former opponents after a war; other violent and bloody events in the recent history of Cambodia such as the brutal repression of a peasant uprising in 1967 in the Battambang region, the massacre of Vietnamese residents in the week following Lon Nol's coup d'état, the "immoderation" which has characterised most of the acts by the Khmers, and the widespread fear of Vietnam's domination of Indochina. All experts made clear, however, that none of this can justify or make acceptable the cruelty and massiveness of the killings and maltreatment.

President Khieu Samphan described in an interview for the Italian journal *Famiglia Christiana* (26 September 1976) the tragic fate of Cambodia in losing one million inhabitants during the five years of civil war. The present population of the country, he continued, is five million; before the war it was seven million. When the journalist asked what happened to the other million, Samphan answered "It is incredible the way you westerners worry about war criminals". This arithmetic underlines the double tragedy which has overwhelmed this country in recent years.

# El Salvador

El Salvador, one of the smallest and most densely populated Latin American countries (4,092,000 inhabitants in an area of 21,000 km<sup>2</sup>), has for many years experienced great political instability together with a general disregard for fundamental rights and freedoms, although these are nominally guaranteed by the National Constitution. One of the main causes of this instability is the extreme social inequality. A large proportion of the people are desperately poor and have virtually no possibility of obtaining education or health care, while the indices of infant mortality and malnutrition far exceed acceptable levels.

Although the country has a reasonably high level of industrialisation, the land is still the basis of production and more than 60 per cent of the population is engaged in agricultural or rural activities. The system of land tenure is one of the main examples of the denial of economic and social rights, as 57 per cent of the area is owned by only 1.9 per cent of the population, while 21.9 per cent is distributed among 91.4 per cent of the inhabitants. Economic power is in the hands of a few families with interests in land, industry, trade, banking and finance. To maintain their privileged position, the regime in power has had to resort to increasingly harsh political repression against all those who dare to criticise the present state of affairs.

## **Elections and the state of siege**

The last civilian President was deposed by a military *coup d'état* in 1931. Since then the Government has been in the hands of the military. Presidential elections were held on various occasions but the military candidates were invariably successful. On 20 February 1977, Presidential elections were held again, and General Carlos Humberto Romero, candidate of the Government Party (Party of National Conciliation — PCN) was returned to power. The honesty of the elections was openly challenged by the opposition, who accused the PCN of "again resorting to fraud".

As a result of the unrest that followed, with a wave of protests, street demonstrations and political rallies, the Government decreed a state of siege on 28 February 1977, which was subsequently extended until the end of June by a Legislative Assembly consisting of members of the PCN only.

## **Political and trade union repression**

During 1977 and 1978 the International Commission of Jurists has received numerous denunciations from reliable sources relating to some hundred cases of violations of the fundamental human rights and freedoms. In virtually all cases, the victims have been trade union or political leaders, peasants and workers, men and women alike. The accusations range from murder, abduction and torture to the arrest and

disappearance of detainees whom the authorities deny they have ever arrested.

The worst forms of this illegal repression are believed to have occurred in the rural areas, directed against the peasants. According to the complaints lodged, the Army frequently closed off wide tracts of land and installed what they called an "Occupation Command" where the repressive activities within the area were centralised. The peasants have reported murders, searches of their homes, the destruction or theft of their modest belongings, the destruction of plants and crops and the slaughter of animals, which often forced them to flee to the woods and mountains. In other cases, these abuses were directed by the police and other forces of repression. In many of the cases, members of ORDEN, a private paramilitary body, took part in the proceedings with impunity, side by side with the official security forces.

One allegation which recurs time and again in the accusations is the multiple rape of women or other physical ill-treatment when the security forces carried out "inspections" of living accommodation. In several cases, the victims were minors.

The military operations to seal off particular areas and villages were usually in response to peasants' strikes or their forcible occupation of land, generally in support of demands for higher wages and better working conditions. The seizure of land by the peasants was partly a result of the fact that the Land Reform Law of 1975 was met by organised opposition on the part of the landowners and business community, leading to amendments of the law in 1976 which rendered it almost wholly ineffectual. This gave rise to deep discontent among the agricultural workers.

It should also be noted that since 1932, when the Government in power forcibly put down a peasant uprising, killing an estimated 10,000 to 20,000 people, the law does not recognise either the peasants' right of association or their right to form a union.

Repression has also been unleashed from time to time in the towns against factory workers, students, intellectuals and office workers, for example, in April 1977, after the assassination of the Minister of External Relations by guerrillas. Repression has also been directed against mass meetings, notably on the occasion when tanks and troops were used to quell thousands of people who had congregated in the Plaza Libertad of San Salvador to protest against the election results (the UNO opposition party alleged that the results had been falsified). This attack, which took place in February 1977, left a death-toll of 100, with hundreds more wounded and arrested.

In several cases, peasant organisations such as FECCAS and UTC (see below) have requested the international community to provide them with legal aid in securing the release of their comrades who have been detained and in lodging complaints in the courts about the abuses to which they have been subjected, since they themselves have no financial means to pay for a lawyer.

From the available information it would appear that these violations of the rights of political and trade union opponents of the government are not isolated incidents due to an excess of zeal on the part of members of the security forces, but form part of a deliberate campaign

to preserve the privileged position of the ruling minority. Their position has been threatened since 1976 by the growing strength of the peasant organisations and political parties, who are calling for change, and by the progressive attitude of the Catholic Church.

The repression is conducted by official and unofficial means. The former is carried out by the Army, the National Police, the Criminal Investigation Service (SIC), the National Guard and the *Policía de Hacienda*. Prominent among the unofficial organs of repression is a paramilitary body known as the Nationalist Democratic Organisation (*Organización Democrática Nacionalista* — ORDEN), which enjoys full official support. It was set up in 1968 for the declared purpose of "stopping Communist subversion in the rural areas". Its members are authorised to carry firearms, and do so publicly in collaborating with the official forces to clamp down on political and trade union activities in the rural areas. They are linked to the State apparatus at two levels: the Ministry of Defence acts as their co-ordinator, and the President of the Republic is the commander-in-chief of the organisation. In many incidents members of ORDEN are reported to have been involved in illegal acts of repression together with the official security forces.

Other private militia bodies such as the White Guerrilla Union (*Unión Guerrillera Blanca* — UGB), an extreme right-wing terrorist group connected with FARO (see below), and the Anti-Communist Armed Forces of Liberation, War of Liberation (*Fuerzas Armadas de Liberación Anticomunista, Guerra de Liberación* — FALANCE), consisting of members of the armed forces, are also involved in the work of repression. So are associations of landowners such as the Eastern Region Farmers' Front (*Frente de Agricultores de la Región Oriental* — FARO), although less directly. The FARO was one of the organisations that successfully blocked the enforcement of the Agrarian Reform Act of 1976.

At the political and government levels there is the PCN (*Partido de Conciliación Nacional*), consisting of senior army officers, landowners, and representatives of the financial, banking, big business and export industry sectors. Its Secretary-General is General Romero, who is President of the Republic.

## Opposition

Within the opposition, the main political party is the National Opposition Union (*Unión Nacional de Oposición* — UNO), a coalition which comprises three of the principal parties — *Demócrata Cristiano*, *Movimiento Nacional Revolucionario*, which is of a social democratic tendency, and the Nationalist Democratic Union (*Unión Nacionalista Democrática*), which is accused by the Government of being influenced by the banned Communist Party of El Salvador. In 1976, the UNO withdrew from the legislative and mayoral elections in protest against what it described as "flagrant electoral fraud". Accordingly, the parliament and all mayoral offices have since then been composed entirely of members of the government party.

In recent years the People's Revolutionary Bloc (*Bloque Popular Revolucionario*) has been created from six trade union and student

organisations, but it did not participate in the 1977 presidential election. The most important of its constituent organisations are the Christian Federation of Agricultural Workers of El Salvador (*Federación Cristiana de Campesinos Salvadoreños* — FECCAS) and the Union of Rural Workers (*Unión de Trabajadores del Campo* — UTC)

To round off this complex picture there are two left-wing guerrilla movements — the Popular Liberation Front Farabundo Martí (*Frente Popular de Liberación Farabundo Martí* — FPL) and the People's Revolutionary Army (*Ejército Revolucionario Popular* — ERP). The former was responsible for the kidnapping of Mr Borgonovo, the Minister for Foreign Affairs, in April 1977, and his assassination in May when the Government refused to accept the movement's proposal to exchange him for 37 of their members held in custody. This incident was exceptional. The scale of the guerrilla activities has in general been modest, and the government's repression has been directed mainly against the non-violent People's Revolutionary Bloc.

### **Persecution of the Church**

As soon as the Catholic Church in El Salvador publicly supported the social demands that were being made, and denounced the violations of human rights, it became a target for the forces of repression. Monsignor Oscar A. Romero y Galdámez, Archbishop of San Salvador, who is well-known for his defence of human rights, stated, in a report which was published in the press in June 1977, that from February to May of that year the rights of 25 priests belonging to different Catholic congregations were violated in one way or another.

Two Salvadorean priests were murdered, but the crimes were never investigated, and three were forced to leave the country because of threats against them. Fifteen foreign priests were expelled from the country, and five Salvadorean priests were arrested and detained. Of the priests listed, at least seven have been ill-treated or tortured. In nearly every case they were accused by the Government of subversive activities, one charge being that of inciting the peasants to form associations, which, as already stated, have been banned since 1932.

### **New Public Order Law**

On 25 November 1977 the Government promulgated a Law to Protect and Guarantee Public Order. Its provisions state that the Law was enacted to protect the republican, democratic and representative regime against terrorism and international subversion, and to give full effect to the Universal Declaration of Human Rights. However, it has certain aspects that completely contradict its stated purpose.

The new Law provides for a number of offences (or amends others already in force) which are entirely consonant with the basic tenets of a democratic system and the Universal Declaration of Human Rights (e.g. the offences of rebellion, armed uprising, handling of explosives, conspiracy to overthrow the Government, assassination, kidnapping,

treason, etc.). However, it also formulates new penal offences which run counter to the basic principles of a democratic system, the Universal Declaration of Human Rights, and the American Declaration on the Rights and Duties of Man, which was approved by El Salvador.

Limitations on freedom of speech are imposed by Article 1, no. 7, which makes it an offence to propagate or encourage either orally or in writing or by any other means, doctrines which tend to destroy the social order or the political and juridical organisation established by the political constitution.

Article 1, no. 15, also makes a serious attack on freedom of expression, particularly that of the press, by making punishable by imprisonment the act of disseminating in the country or transmitting abroad "tendentious or false information or news intended to disturb the constitutional or legal order, the peace and security of the country, the economic or monetary regime, or the stability of public assets and effects. ..." The article is also applicable to nationals who "being outside the country, disseminate news or information of the same nature abroad".

Article 1, no. 11, is incompatible with the effective exercise of trade union rights in that it establishes penalties for persons involved, directly or indirectly, in a strike or other collective disruption of work. A prison term is imposed for "stoppages or any other action or omission which is intended to change the normal pursuit of the productive activities of the country with a view to prejudicing the national economy or to disrupt a public service or services that are essential for the community".

Article 1, no. 13, penalises meetings that are held to make arrangements for one of the above-mentioned 'crimes'.

Criticism of this law is not invalidated by the fact that it requires the acts in question to be performed "with a view to introducing or supporting totalitarian beliefs" (art. 1), due both to the extreme vagueness of the concept and to the indications given at the end of the article, in sub-paragraph (d), of elements that can be taken as proof of the intention to introduce such beliefs. Those elements include connections between the punishable acts and phrases, words, signs or symbols representing "clandestine groups". The effect of these provisions is that the fact of founding or joining a peasant association or union, or of joining or possessing links with the Communist Party could be enough to raise a presumption of the existence of a criminal intention.

Finally, the Law makes no provision for conditional or early release for persons committing such offences, who must serve out their sentence in full (art. 6, paragraph 2).



# South Africa

Recent developments demonstrate that the erosion of the Rule of Law in South Africa continues unabated. These developments — the trial of the Pretoria Twelve, the inquest into the death of Stephen Biko and the enactment of Criminal Procedure Act No. 51 of 1977 — manifest a pattern of police and prosecution misconduct, abetted by legislative curtailment of the rights of accused persons, which now threatens the very integrity of the judicial system. The government seems determined to stop at nothing in its efforts to stifle any political opposition aimed at radical change of the apartheid system. It will take considerable judicial vigilance to preserve more than a semblance of integrity in the system of legal process.

The wide-spread use of preventive detention in political cases is central to the problem.<sup>1</sup> Section 6 of the Terrorism Act authorises indefinite detention without formal charge “for interrogation” of any person thought by the security police to be “a terrorist or . . . withholding from the South African Police any information relating to terrorists or offences under this Act . . .” Detention under Section 6 of the Terrorism Act is incommunicado: “No person other than the Minister [of Justice] or an officer in the service of the State acting in the performance of his official duties shall have access to any detainee, or shall be entitled to any official information relating to or obtained from any detainees”. The police practices disclosed during the trial of the Pretoria Twelve, and at the inquest into the death of Stephen Biko, are an almost inevitable consequence of such a system.

## Trial of the Pretoria Twelve

In May, 1977, the government of South Africa brought charges in the Pretoria Supreme Court against twelve persons (the Pretoria Twelve) for violations of the Terrorism and Internal Security Acts. The defendants were alleged to have been members or active supporters of the African National Congress (ANC), the South African Communist Party or Umkhonto We Sizwe (military wing of the ANC) and to have conspired with others to distribute propaganda advocating the violent overthrow of the government, to recruit persons into the ANC for military training overseas, to smuggle arms and explosives into South Africa, to commit acts of sabotage, and to establish secret cells and infiltrate organisations. In presenting its case over a period of three months, the state called more than 80 witnesses. Many of these were either members of the police or persons who had been held in detention (including solitary confinement) under Section 6 of the Terrorism Act for periods of up to 17 months.

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<sup>1</sup> The Minister of Justice has stated that 2,430 persons were detained for questioning in terms of security laws during the period June, 1976 to August, 1977; and that 336 persons were held in detention as of 26 May, 1977. The South African Institute of Race Relations calculates that 714 persons were in detention without trial as of 30 November, 1977.

*A Survey of Race Relations in South Africa, 1977*, p. 144.

In a dramatic incident early in the trial, Mr Ian Dewey Rwaxa, the state's principal witness, after testifying for four days, retracted as untrue the testimony he had given. He then gave a harrowing account of having testified in accordance with police demands after repeated brutal assaults, threats of death, torture and promises of immunity by security police during a lengthy period of pre-trial detention and solitary confinement. As the state's case continued, other witnesses retracted earlier testimony, refused to testify and provided accounts of torture and brutality by police while in detention. Before the defence could present its case, the trial was unexpectedly terminated owing to the death of the presiding judge and a new trial was ordered. Mr Rwaxa was returned to detention (his earlier request for an order protecting him from police retaliation having been denied) but other state witnesses were released.

When the new trial began early this year, the prosecutor recalled as a witness Mr Rwaxa who, having been in police custody in the interim, proceeded to withdraw his earlier accusations of police coercion and brutality and sought to moderate his revised testimony in favour of the prosecution. In contrast, the testimony of a number of those witnesses who had been released from police custody between the two trials departed from, and was considerably less supportive of the prosecution's case than was, their earlier testimony. The presiding judge, Judge Myburgh, evidently deeply troubled about the reliability of the prosecution's evidence, acquitted six of the defendants. As to those convicted, he rejected the prosecution's request for the death penalty, and, instead of the customary alternative of life sentences, imposed sentences for fixed terms which were relatively light compared with those which have been given in other similar cases.

The treatment of Mr Rwaxa, and other witnesses, is of course no isolated incident, but the unusual circumstances demonstrate forcibly the utter unreliability of police evidence obtained from prosecution witnesses kept in solitary confinement for long periods before the trial. Similarly, in last year's trial of the Pietermaritzburg Ten, one state witness testified to having been brutally tortured by the police until he agreed to testify falsely. For this he was subsequently charged with and convicted of perjury. Another witness, after recounting how he had been tortured by police during his seventeen months of pre-trial detention, said under cross examination that he could no longer distinguish between that part of his testimony which was true and that part which had been suggested to him by the security police. In Namibia in May 1978 the state withdrew the prosecution of Victor Nkandi, a prominent SWAPO member, for alleged complicity in the assassination of Filemon Elifas, Chief Minister of Ovamboland, when confronted by a defence proposal to call some 30 witnesses to support the defence contention that the defendant's confession statement, on which the prosecution case was based, was obtained by coercion.

### **Inquest into the death of Stephen Biko**

The inquest into the death of Stephen Biko in detention proved to be one of the most dramatic revelations of police practices and attitudes in

South Africa. Following the hearing on the inquest the Chief Magistrate, Mr M. J. Prins, summarily declared, without giving reasons, that there was no proof that the police were responsible for the death. In contrast, two prominent international observers of the inquest, concluded that the police investigation of the conduct of fellow officers had been "perfunctory in the extreme", characterised the police testimony at the inquest as "mendacious", and further concluded that "Mr Biko died as a result of a brain injury inflicted on him by one or more unidentified members of the Security Police . . ."<sup>2</sup> The South African authorities announced their decision before the inquest began not to bring charges against any of the police or security officers involved in the Biko case.

### **Criminal Procedure Act No. 51 of 1977**

The new Criminal Procedure Act which came into effect in the second half of 1977 has continued the process of whittling away the rights of accused persons in criminal cases. The following are among the most significant changes it effects:

1. Departing from the generally accepted prohibition against self-incrimination, Section 115 of the new Act permits a magistrate or judicial officer to question an accused person with respect to the substance of the charge after he has entered a plea of not guilty, but before evidence has been introduced by the State. If the accused consents, undisputed allegations can be treated as admissions in the criminal proceeding relieving the state of the necessity of proof. The Minister of Justice introducing the new Act to the Assembly, said that these provisions were intended to speed up trials and save the accused "unnecessary remorse".
2. Section 213 of the Act provides that "a written statement by any person, other than the accused . . . , shall [with the consent of all parties to the proceeding] be admissible to the same extent as oral evidence" in criminal proceedings without calling the witness. This is a departure from the normal procedure under which witnesses testify in open court and submit themselves to cross examination. While a summary procedure of this sort, and that for which provision is made in Section 115, may be acceptable where accused persons are represented by competent counsel, it has obvious dangers in a country like South Africa where the great majority of criminal defendants are unrepresented, and often illiterate, and would not be able to appreciate the significance or implications of admissions they may make.
3. Section 217 of the new Act provides that a confession made by an accused person to a magistrate shall, unless the accused proves to

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<sup>2</sup> These quotations are taken from the report of Sir David Napley, past President of the Law Society of Great Britain, who attended the inquest as an independent observer on the invitation of the Association of the Law Societies of South Africa. Dean Louis H. Pallak, dean of the University of Pennsylvania School of Law, who attended the inquest on behalf of the Lawyers' Committee for Civil Rights Under Law in Washington, expressed his agreement with Sir David Napley's report.

the contrary, be presumed to have been made freely and voluntarily. In the past, the prosecution has had the burden of establishing the voluntariness of a confession.

4. Section 153 of the new Act makes provision for criminal proceedings to be held *in camera* if it appears to the court to "be in the interest of the security of the state or of good order or of public morals or of the administration of justice". The discretion conferred on the court by this provision is dangerously wide. The danger is illustrated by the decision of Judge Curlewis to hear *in camera* the whole of the trial of 18 PAC members at Bethal in a remote part of the Transvaal. Even representatives of the US and Swedish embassies were refused admission. The reason given by the judge for this decision, surprising as it may seem, was the need to protect the witnesses.

A further example of the curtailment of defence rights is the withdrawal of permission to visit their clients in detention for four of South Africa's most prominent defence lawyers — David Soggot, an advocate who represented the family at the Stephen Biko inquest, and three attorneys, Ishmael Ayob, Shun Chetty and Christopher Nicholson.<sup>3</sup> The ban was imposed under prison regulations which entitle the Commissioner of Prisons to deny any person access to a prisoner if he considers it would not be 'in the interests of the State or the good order and administration of the prison'. In fact it appears that the decision was taken by the Minister of Justice and not by the Prison Commissioner, following publicity given (not by the lawyers concerned) to complaints of ill-treatment made by prisoners to their lawyers. No suggestion of unprofessional conduct has been made against the lawyers. Originally the ban applied to visits to unconvicted as well as convicted prisoners. Following vigorous protests by the professional organisations in South Africa the ban was confined to prisoners under sentence. Nevertheless, convicted prisoners still have the right to the services of a lawyer (as was recently decided by the European Court of Human Rights), and this ban restricts the independence of the lawyers and the right to free choice of counsel.

This massive undermining of the principles of the Rule of Law by the police and prosecuting authorities, and by the legislative curtailment of defence rights, confronts the South African judiciary with a serious challenge. The acts of the government are calculated systematically to corrupt the judicial process. The judiciary can maintain its integrity and independence only by responding vigorously to the threat posed by police and prosecutorial lawlessness. Even under the South African system, it is available to the judiciary to exclude unlawfully obtained evidence and even, in a case where the pattern of police coercion or other tampering with witnesses is sufficiently pervasive, to dismiss the prosecution or allow an appeal in its entirety. A case was cited in ICJ Review No. 18 (at p. 10) where Chief Justice Rumpff, presiding over the Appellate Division, took this course.

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<sup>3</sup> The London Times, 15 May, 1978

## South Korea

The coming presidential elections in South Korea in which the only candidate is Park Chung Hee, President since 1961, focuses attention once again on the performance of his administration in the field of human rights.

The 13th issue of the ICJ Review contains a comprehensive analysis of the authoritarian system of government introduced into South Korea in 1972 by the revised "Yushin Constitution". This vested wide powers in the presidency and severely weakened the powers of the legislative branch of government — the National Assembly. In any event, the system of appointment and election of members of the National Assembly ensures the government a permanent majority.

The Constitution also vests wide powers in the President to suspend the freedom and liberty of the people whenever "national security or public safety and order is threatened or anticipated to be threatened". The introduction of the Yushin system and the declaration of martial law in 1972 caused wide-spread demonstrations amongst a large body of intellectuals, parliamentary opponents, churchmen and businessmen. The government met this challenge by promulgating emergency decrees and laws which outlawed any form of criticism of the Constitution, the government or of the decrees themselves.

Since 1974 the Park administration has intensified its suppression of government critics with the aid of the ubiquitous Korean Central Intelligence Agency and extraordinary military tribunals established to try civilians charged with violating one or more emergency decrees or laws. Many thousands of Koreans have been subjected to harassment, arbitrary and illegal arrest and long detention without trial, and many of them to torture to elicit confessions to their alleged crimes. Where political detainees have been brought to trial they have been denied a fair hearing and sentenced to long terms of imprisonment.

Of particular concern is the manner in which the Park administration has reacted to pleas made within South Korea in March 1976, in March 1977 and again this year calling for the restoration of fundamental liberties in Korea. In March 1976 a small group of Koreans gathered together in a cathedral in Seoul to commemorate the abortive coup against the Japanese in 1919 and to protest against the harsh realities of political life in Korea by endorsing a public statement entitled "the declaration for democratic national salvation", calling for the restoration of democracy in the country. The major thrust of the declaration was that the restoration of a democratic system of government is the only answer to communist subversion, and that political stability can be realised only when the fundamental freedoms of all Koreans are respected. Military strength alone is incapable of achieving this imperative and will in fact become "a power for self-destruction".

The 18 signatories were immediately arrested and indicted under emergency decree No. 9 on charges of agitating to overthrow the government. The trial was open to international observers but was a mockery of justice. The defendants were not permitted to call witnesses

as the court reasoned that as they had confessed to their crimes they had no case to present. However, an abundance of evidence has been compiled by reporters on Korean affairs to show that political prisoners are frequently tortured to extract confessions from them and many Koreans acknowledge that torture is widely practised in their country. The defendants were represented by defence counsel but the latter complained during the trial that they had been forbidden to interview their clients in prison or given the opportunity to peruse the indictment or adduce evidence on behalf of the defendants. Various members of the defence team complained of being harassed by Korean security officers or warned not to act for the defendants. Several reported that they had lost clients and that they were constantly under close surveillance during the trial. Members of the prisoners' families and close friends made similar complaints and some alleged that they were temporarily detained.

The prosecution adduced totally insubstantial evidence in support of the indictments. An American lawyer, Mr Charles A. Prescott, who attended the hearings on behalf of the International Commission of Jurists, commented that "in essence my lawyer's sense told me that neither judges nor prosecutors were working very hard to either find the truth or make a case, because the decision had been already dictated" (from above).

All 18 defendants initially received long prison terms. Included amongst them were former President Yun Po Sun and the opposition presidential candidate Kim Dae Jung who were both given eight year prison terms. These terms were later reduced to five years by the Seoul Appellate Court. Some of the elderly defendants had their sentences deferred but nine including Yun Po Sun were held in solitary confinement from March 1976 until, following considerable international pressure, they were released in March of this year.

In March 1977, a group of prominent Koreans reiterated the plea contained in the 1976 declaration. This led to a further round of arrests and the detention of over 100 people. Although the government continued to insist that harsh reprisals were necessary as the protesters were aligned to communist North Korea and were intent upon subverting the state, many of those arrested represented a non-ideological, heterogeneous body made up of groups such as the church, the legal profession, students and the parliamentary opposition.

In March 1978, a renewed plea for the restoration of fundamental rights was made by forty Koreans in a document entitled "The March first declaration of democracy". The document states that: "The legislature does not represent the people and is no longer responsive to the aspirations of its constituency... one third of [it] is appointed by the President... Because there is no autonomy of legislature, the judiciary has been reduced to the status of a loyal attendant to the dictator... The result is that the honour and dignity of the Korean people and Korean nation have tragically fallen... We know very well that the Yushin system in 1972 is not the system necessary for reunification of North and South. Nor is it necessary to overcome the threat from the North. It is an instrument to make one-man dictatorship permanent". The declaration made the following demands:

- In this election year, peacefully rescind the Yushin Constitution and dissolve the National Assembly, then let the people create a new democratic constitution through free and just participation;
- release unconditionally all political prisoners including intellectuals, students, labourers and religionists, and restore immediately the civil rights of all released persons who fought for justice and freedom;
- re-try openly all the accused in the case of the so-called People's Revolutionary Party;
- end immediately the military regimentation of schools, and guarantee the autonomy of academia and academic freedom;
- stop immediately the censorship of the press, and restore freedom of speech.

The South Korean government's response to these demands has been to arrest and detain the forty signatories. It is not yet known whether they will be put on trial.

# United States

## The Use of Chemical Weapons in Prisons

Chemical weapons are in widespread use in American prisons. The chemicals employed include chloracetophenone, commonly found in tear gas, mace and CN gas, and orthochlorobenzal malononitrile, commonly referred to as irritant gas or CS gas. Several instruments are employed to administer the gases: hand-held applicators, various types of grenades, and fog-generating machines. Originally developed for riot control purposes and used in open spaces, they are generally believed to have no serious adverse effects.

In fact these gases, in sufficient concentrations, produce serious toxic effects: first and second degree burns to the skin, dermatitis, permanent eye injuries, damage to the respiratory tract including acute pulmonary eczema and chemically induced pneumonia, and neurological damage including cerebral anoxic necrosis. These toxic effects are particularly indicated when the gases are administered in closed spaces and when the victim is mentally disturbed, thus rendering their use in prisons particularly dangerous, since most prison rooms are small and poorly ventilated and prisons contain a high percentage of mentally unstable individuals.

In several documented cases the use of gas in prison has resulted in death. One such case, in 1975, concerned a 48 year old black inmate of the Queens (New York) House of Detention. This individual had been diagnosed as psychotic and was awaiting transfer to a mental hospital when, early one morning he was found to be agitated and acting erratically, cursing, spitting and eating soap. A nurse tried to administer a tranquilizing drug to the inmate through the bars of his cell, but was unsuccessful because of his resistance. It was decided to use gas in order to put an end to this resistance. Gas was administered twice, followed by the tranquilizer. Approximately one hour after the gas was first administered, he was removed from the cell and taken to a psychiatric hospital. The following day he developed a fever of 107° and succumbed to "massive hemorrhagic bronchial pneumonia" caused by exposure to the gas.

In other cases prisoners have died of extreme mental and physical exhaustion. When gases are used against psychotic or extremely agitated persons, rather than having a sedative effect they sometimes cause these persons to enter an extremely combative hyperactive state in which they struggle until all strength is gone and they literally die of exhaustion.

As the example indicates, these weapons are used not only when there is a rebellious group of prisoners who pose a threat to prison security or when a prisoner is armed and dangerous, but they are used routinely to control disruptive or disorderly individuals. They are commonly used, for example, on the prisoner who refuses to leave his cell when ordered to, or the prisoner who shouts loudly or argues loudly with a guardian or perhaps begins to throw items within his cell. In the majority of these cases the individual is locked securely in his cell and presents no threat of riot, escape or physical injury.



The use of chemical weapons in such circumstances is clearly unwarranted. Moreover, the use of such potentially dangerous weapons appears to violate internationally established standards for the protection of prisoners. Art. 10 of the International Covenant on Civil and Political Rights requires that prisoners be treated "with humanity". Advocates of prison reform have long been attacking this abhorrent method of disciplining inmates. Some successes have been realised, notably the 1976 court decision of *Spain v. Procunier* (US District Court, Northern District of California) and the 1971 decision *Landman v. Royster* (US District Court, Eastern District of Virginia) both of which held gassing of inmates already confined to their cells unconstitutional. Also, regulations effective 1 March 1978 pertaining to local facilities in New York no longer allow gas to be used "to effect the movement of recalcitrant and belligerent inmates", but requires that the use of gas "is necessary to protect any person from serious physical injury".

While such developments are important they have only local effect. Experts in this area believe that not only is the practice widespread throughout the country, but that in most areas the courts do not give relief to prisoners who complain of this practice unless exceptional circumstances exist, such as permanent injury to the victim. Such judicial reluctance to grant relief does not help to curb the practice. The limited success of domestic efforts to remedy this problem after years of effort indicate that a demonstration of concern by the international community might be timely and appropriate.

## Commentaries

### The Human Rights Committee

The Human Rights Committee, a body of 18 independent experts created by the International Covenant on Civil and Political Rights, held its third session for three weeks in Geneva in January and February 1978. An article on the first two sessions appeared in ICJ Review No. 19. There are 49 states parties, including five which have ratified since the second session: the Dominican Republic, Guinea, Peru, Senegal and Venezuela.

A major part of the Committee's work is the study of the states parties reports on the measures adopted, difficulties encountered and progress made in the protection of the rights incorporated in the Covenant. This study proceeds by two stages, the presentation of the state report by a government representative, and the posing of questions and comments by members of the Committee. In the second stage responses to the questions and supplementary information is submitted to the Committee, which then proceeds to its final analysis of all the information submitted.

During the third session the preliminary examination of Czechoslovakia, Denmark, the German Democratic Republic, the Libyan Arab Jamahiriya, Norway and Sweden was completed. The initial examination of Iran, Mauritius and the United Kingdom was begun but not completed. The examination of Iran and Mauritius will be continued at the fourth session to be held in New York in July. The Committee also plans to examine then the reports of Chile, the Federal Republic of Germany, Jordan, Madagascar, Yugoslavia and the USSR.

Eighteen states have ratified the Optional Protocol recognising the competence of the Committee to receive individual communications, which are considered in private. Little is known about progress made. A communiqué was prepared by Sir Vincent Evans, the chairman of the working group of communications, but it did not meet with unanimous approval and lack of time prevented a new communiqué from being drafted. Thus no information about the proceedings was released. It was apparent from the discussion of the Committee's work load, however, that relatively few communications have been considered so far, and that although some decisions have been made regarding admissibility, the Committee has not yet begun consideration of the merits of any case.

A third function assigned to the Committee by the Covenant is consideration of inter-state complaints pursuant to Article 41. However, this procedure has been accepted by only six states, four less than are required for the procedure to come into effect.

#### Questions of Competence

One of the most important matters facing the Committee is

clarification of its role under the Covenant. Article 40 (1) describes only a single duty of states: to submit reports. This has been seized upon by one or two Committee members as requiring a very minimal role for the Committee. Dr Graefraeth, of the German Democratic Republic, argues that states parties consent to "a reporting procedure, not an investigatory procedure", and that once they have submitted a report, they have no further obligation to co-operate with the Committee.

Other members have emphasised the three characteristics which Article 40 ascribes to state reports: that they describe the measures adopted to give effect to the rights included in the Covenant, the progress made in the enjoyment of those rights, and "the factors and difficulties, if any", affecting the implementation of the Covenant. According to this view the states have not met their obligation unless the state reports meet all these qualifications, and the need to determine whether they do so justifies a process of examination as well as the development of guidelines concerning the content of state reports.

In practice the Committee members have been active in seeking clarification and additional information from states. Certain tendencies are noticeable in the questioning, which may foreshadow the development of jurisprudence regarding the Covenant. For example, almost all members of the Commission expressed concern about the interpretations and practices of governments regarding limitations of rights for reasons of public security and *ordre publique*, a question which arose with respect to all states. Another feature was the insistence of some members that states must not only report on the laws, but also on the "progress made in the enjoyment of these rights", that is the way in which the legal measures taken have been applied in practice. As no state has yet responded in writing to these questions (some questions are answered orally at the time) it remains to be seen how effective this procedure is. One improvement which is called for, given the significance of these exchanges to the development of international law, is to record the questions verbatim rather than in summary form, as is currently done.

In addition to the provision describing the duties of states, article 40 states in paragraph (4) that the Committee shall "study" the state reports and transmit "its reports" and "such general comments as it may consider appropriate" to the states parties. One of the specific questions discussed was what type of report the Committee is authorised to make after it finishes the examination of state reports. One position is that the only reports authorised are the annual reports to the General Assembly mentioned in Article 45. Since the Covenant authorises only a reporting procedure, the argument continues, the annual report should comment only on the sufficiency of the information being reported to the Committee and should not mention individual states. A contrary view was stated by Dr Tomuschat of the Federal Republic of Germany, who said that in addition to the annual reports article 40 authorised preparation of a report in response to each completed state report, commenting article by article on how well the state was fulfilling its obligations under the Covenant.

It remains to be seen what course will be adopted by the Committee.

Strong arguments, based on the wording of Article 40, can be addressed in support of Dr Tomuschat's interpretation. There was, however, an indication by the Indian delegate<sup>1</sup> during the discussion in the Third Committee of the General Assembly which led to the adoption of the Covenant, that the phrase "general comments" was intended to exclude comments relating to particular states. On the other hand, the Canadian delegate<sup>2</sup> expressed the view that the Committee's role was to "examine, analyse, appraise and evaluate" the states parties' reports and that "it should do so in a searching and critical fashion".

A second question regarding the competence of the Committee is whether it can interpret the Covenant. It is clear that interpretation arises within the "constructive dialogue" which occurs between the Committee and reporting states. In reporting on measures taken to implement the rights enumerated in the Covenant, states inevitably give opinions as to what the substantive provisions of the Covenant require. The formal opinions of states parties of course contribute to the development of international law. It also seems clear that the Committee must interpret the substantive provisions of the Covenant in considering the individual communications. The question is whether this same competence extends to the Committee in making its "general comments" upon state reports. During its presentation to the Committee, Czechoslovakia asserted unequivocally that only state parties have the power to interpret the Covenant, while Denmark affirmed the Committee's right to interpret, but equivocated on whether such interpretations would be binding or merely authoritative. It does seem that the power to make "such general comments as it may consider appropriate" would include the power to interpret, and particularly to respond to interpretations put forward in state reports. In view of the conflicting opinions which have been expressed on this issue, the Committee appears to consider that the question is not yet ripe for resolution.

### **Sources of Information**

Another issue on the functioning of the Committee concerns restricting the information which it receives. Paragraph 3 of Article 40 empowers the Committee to send to specialised agencies such parts of states reports as may fall within their competence. The Committee finds itself faced with the question of what type of information this is intended to elicit from the specialised agencies. Those adopting the "only a reporting procedure" position argue that the only information properly before the Committee is that submitted by the states in their reports, and that communication with specialised agencies is intended to avoid conflicting interpretations of similar human rights provisions. This position is somewhat difficult to reconcile with the argument that the Committee is not authorised to interpret the Covenant. Many specialised agencies have done extensive studies concerning such areas as discrimination in education (UNESCO) or in employment (ILO). It seems at least as likely that the sending of state reports is intended to permit these agencies to comment upon the reports.

An ad hoc working group prepared a draft decision on the question of co-operation with specialised agencies. Upon presentation of the draft, strong disagreement became apparent on three points: the type of information to be elicited, whether the responses of the agencies should be public or confidential, and whether UN bodies such as the High Commissioner for Refugees, technically not a specialised agency, could be included in this process. No decision on these points was reached, and only insignificant parts of the draft decision were adopted.

The question of the information that can properly be considered by the Committee concerns not only specialised agencies but also non-governmental organisations. The Covenant makes no provision for any role for NGOs. Nevertheless, some NGOs have submitted information to members of the Committee in their private capacity. One member objected to the Secretariat forwarding these private communications to the addressees, and during the questioning of the representative of Czechoslovakia another objected that certain of a fellow experts' questions seemed not to be based on information included in the state's report. There can, of course, be no restriction upon private communications between non-governmental organisations and members of the Committee. Several members stressed the value of the services provided by NGOs and expressed their willingness to continue receiving such information in their private capacity.

### **Resources**

The importance of the Committee as a human rights organ lies in the scope of its activity. It examines equally every state party and its enquiry covers the whole spectrum of civil and political rights. This same advantage poses a serious threat to the effectiveness of the Committee, that it will have so much work that it will become involved in interminable delays or perform its functions superficially. Although the Committee has performed well thus far, problems are already becoming visible. It was initially hoped to examine twelve state reports during the third session. In fact, the reports of only nine states were examined, and in the case of three states the initial stage of examination was not completed. As has been mentioned, the communiqué regarding individual communications was not approved because of lack of time, and there was not sufficient time to discuss adequately a number of important unresolved questions.

There are thirty-two states parties which the Committee has not yet begun to examine, and the number of states parties may be expected to increase as other nations have indicated their intention to ratify the Covenant. The experience of regional and other international 'communications' procedures indicate that there will be a very substantial increase in the volume of individual communications as the procedure becomes better known. In addition, none of the 13 states which have already been questioned has submitted its responses and supplementary information, and the Committee has not yet been faced with the task of concluding its study of any country or of writing its general comments. All this suggests that there will be a substantial increase in the work load of the Committee.

Even now the Committee members are under a strain to meet their present responsibilities. Evaluation of state report requires comparison of the 27 substantive provisions of the Covenant with practically every aspect of a country's domestic law, including constitutional law, criminal law, procedural law, matrimonial law, industrial law, prison regulations, and other subjects. During 1978 the Committee plans to meet three times for a total of eight weeks, with an additional two weeks for those belonging to the working group on communications. Most members have full time responsibilities elsewhere, often as professors of law, and receive only a modest honorarium in addition to their expenses. As a result it is difficult if not impossible for most members to spend time between sessions doing the type of preparation which the work calls for. The difficult conditions under which the Committee works has resulted in significant absenteeism (a mere quorum was present for the beginning of the third session) and several valuable members have indicated they would not consent to serve a second term. These conditions must be improved if the Committee is to work efficiently and attract competent international lawyers of the same high standard as the present Committee.

Tentative suggestions have been made. Mr Lallah of Mauritius proposed that a second working group be created to determine whether state reports were complete enough to merit consideration by the full Committee. Mr Opsahl of Norway proposed that the Division of Human Rights perform a similar but more limited function with respect to state reports. However, a representative of the Division expressed doubt that this could be done without making substantive judgements about state reports and usurping the role of the Committee. Subsequently the Director of the Division, Mr Theo van Boven, reported with regret that the Division's limited sources made it impossible to guarantee that all the Committee's requests could be met. This caused serious concern among members, one of whom noted that this would raise the question of a violation of the Covenant, which states in Article 36 that "The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee..." This member stressed the words "shall" and "effective".

A third proposal, made by Sir Vincent Evans seems realistic if the Division of Human Rights is unable to take on more responsibilities in the work of the Committee. It is that members should be given salaries consistent with their responsibilities.

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<sup>1</sup> A/C.3/SR 1435, para 17

<sup>2</sup> A/C.3/SR 1426, para 22

# UN Commission on Human Rights

There was widespread agreement among delegates and observers to the Commission on Human Rights that the thirty-fourth session in February and March 1978 was one of its most positive and productive. The Commission considered every item on its agenda, and adopted an exceptional number of resolutions and decisions. These include eight resolutions dealing with the three areas of long-standing concern, Chile, the Israeli Occupied Territories, and Southern Africa, proposing, inter alia, support for the International Anti-Apartheid Year, which began on 21 March 1978, the distribution of a list of persons alleged to have committed the crime of apartheid or other serious violations of human rights in Namibia, the preparation of a list of those whose activities constitute assistance to colonial and racist regimes in Southern Africa, and the creation of a voluntary trust fund to aid victims of human rights violations in Chile.

Another "re-iterates its previous call for the full restoration of all human rights to the population of Cyprus, in particular to the refugees". There were two resolutions concerning the International Covenants on Human Rights, encouraging further ratification of both Covenants and acceptance of the two optional procedures of individual and inter-state communications under the Civil and Political Covenant, and asking ECOSOC to keep the Commission informed of developments in its examination of state reports under the Economic, Social and Cultural Covenant.

Several other resolutions authorised continued study of areas of special interest. The "Caportorti Report" on the rights of minorities is to be transmitted to member states for comment and is recommended for publication. A draft convention on the rights of the child submitted by Poland is to be transmitted to member states, regional organisations and NGOs, and to receive further study next year. Work on a declaration against discrimination based on religion or belief, which has given rise to a disagreement about the rights of atheists, continues to make slow progress. A study by the Sub-Commission on the human rights of migrant workers is authorised, and states are invited to take measures promoting the reunion of migrant workers with their families. The resolution regarding the Covenant on Economic, Social and Cultural Rights also calls for updating a previous study on the realisation of these rights.

## **"Further Promotion and Encouragement of Human Rights . . ."**

Given the widespread belief that the UN's human rights activities have not proved adequate to the magnitude of the challenge, the topic of "Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, including the Question of the Programme and Methods of Work of the Commission" was one of the most important on the agenda. The Commission's discussions on this topic give some reason for optimism.

Agreement was reached on several of the less controversial proposals: a resolution was approved inviting member states to set up national institutions for the promotion and protection of human rights; another recommends steps to be taken towards creating regional human rights arrangements (which appears to have been framed with the African region in particular in mind); a third authorises a study on UN communications procedures with a view to eliminating duplication. Another resolution requested that the budget of the human rights programme be increased. It is currently less than 1 per cent of the total UN budget. A separate resolution asks that the programme of Advisory Services, recently curtailed because of budgetary considerations, be restored.

Some major questions regarding UN human rights procedures remain unresolved. At the request of the General Assembly the proposal for a High Commissioner for Human Rights received further but inconclusive discussion. In the view of proponents of the office, the High Commissioner would both co-ordinate UN activities concerning human rights and lend his "good offices" to the resolution of human rights problems, particularly problems of an urgent nature. The Commission, which meets annually, is not able to respond to such problems when they arise between sessions.

The Soviet Union fears that the proposal would "replace intergovernmental co-operation by a bureaucratic administration likely to become a tool for interference in the domestic affairs of states". In its view, governments engaged in mass and flagrant violation are unlikely to accept advisory assistance or mediation. On the other hand, the exercise of "good offices" without the consent of the state involved would infringe domestic jurisdiction and violate the UN Charter. Other states maintain that the powers of a High Commissioner could be so defined as to avoid interference in essentially domestic affairs.

The notion of the primacy of "intergovernmental co-operation", which has been raised repeatedly in the UN, warrants a brief digression because it is certain to have an impact on the strategy to be adopted for the "further promotion and encouragement" of human rights. On the one hand, "intergovernmental co-operation" evokes the Soviet position that true progress in human rights comes not from "condemning" governments but from a gradual process of dialogue. This reflects not only the position that co-operation and dialogue are required by the "domestic jurisdiction" clause of the UN Charter, but also the belief that economic and social progress are necessary for the full enjoyment of civil and political rights.

This is a principle which has already won wide acceptance throughout the world. The important resolution 32/130 adopted by the General Assembly in December 1977 states that the relationship between the two sets of rights is one of "interdependence" and that "The full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible". To the extent that the relationship consists of the dependence of civil and political rights upon economic and social progress, condemnations are useless or even counterproductive and intergovernmental co-operation is the appropriate method for promoting human rights. However, neither the



UN Charter nor the complex interdependence between the two sets of rights indicate that co-operation is the sole method for achieving progress in the implementation of human rights. There is ample historical evidence and universal accord that in certain circumstances international pressure is both justified and effective.

The difficult question is when such pressure is indicated and how such circumstances are to be identified. The Soviet position accepts that situations of a consistent pattern of gross violations of human rights are proper matters for international concern and are not within the exclusive jurisdiction of the state. It claims, however, that these situations, when they exist, are "self-evident", and there is no need to create an impartial quasi-judicial means of identifying them. Thus the USSR would also preserve the present ad hoc intergovernmental co-operation which identifies certain situations of gross violations, a position fundamentally inconsistent with western exhortations to "depoliticise" this process.

The Commission's reluctance to find gross violations in any country other than Chile, Israel and Southern Africa renders the proposition that gross violations are self-evident less plausible every year. The High Commissioner proposal is regarded by some as a step in the direction of making the consideration of alleged violations more objective and impartial, although it is clear that his powers would fall far short of deciding when gross violations exist.

Despite the apparent lack of progress over the High Commissioner proposal two positive developments can be observed. Firstly, the mounting pressure for the High Commissioner would seem to have been a factor in procuring the decisions taken this year under Resolution 1503. Secondly, several new proposals emerged which must be seen as counterproposals to the High Commissioner, and as reflecting a general agreement that something must be done to meet the needs which gave rise to that proposal.

Canada proposed that the Sub Commission, composed of independent experts, be given the authority to meet on an urgent basis when circumstances warrant. The effectiveness of this solution would appear to be limited by the size of this 26 member body and by the perhaps limited weight its recommendations have in the Commission. Jordan put forward a proposal that the Chairman of the Commission "monitor", either personally or by delegating this authority to a member of the Commission or Sub-Commission, any urgent reports of gross violations received between sessions of the Commission.

A third suggestion was included as part of a comprehensive draft resolution proposed by Bulgaria, Cuba and Poland. It would empower the bureau of the Commission to meet "when prompt measures are required with respect to mass violations of the human rights of peoples and persons affected by situations resulting from apartheid, from all forms of racial discrimination, from colonialism, from foreign domination or occupation, from aggression and threats against national sovereignty over its wealth and natural resources". It adds that "The states members of the Commission shall be consulted immediately on the measures to be taken in the above mentioned cases".

This draft resolution marks a considerable step forward in the

approach of the sponsor governments, although the proviso would make it unlikely that any action would follow, save perhaps in the most glaring cases.

The enumeration of types of gross violations in which the bureau could act mirrors the list of gross violations which General Assembly resolution 32/130 says should be given priority. There is, however, one significant omission. The words "such as", which indicate that the types of gross violations are only examples and not exclusive of other types, have been omitted. There appears to be no valid reason for so limiting the powers of the bureau, precluding for example consideration of gross violations consisting of massive use of illegal detention, torture, massacres or genocide.

The strength of the proposal is that it would allow for decisions to be reached more quickly while permitting political considerations to be given their proper effect, since the members of the bureau are so selected as to represent all five geo-political regions.

The other major proposal with respect to the working methods of the Commission concerned increasing the working time available to the Commission. The basis for discussion was Jordan's proposal that the Commission should meet twice a year. Counterproposals included meeting annually but for a longer period, or having the annual session reconvene later in the year when it did not finish its agenda during its normal meeting time. A long-term proposal of Nigeria suggests that the Commission be up-graded to the status of a Council, reporting directly to the General Assembly and controlling its own budget. Although decision was postponed on these proposals, there seemed to be general agreement that more working time should be allocated to the Commission. At the end of the session a resolution was adopted requesting ECOSOC's authority for a working group open to all members to meet for one week prior to the next session to expedite progress concerning "further promotion and encouragement of human rights", as well as considering the draft convention on torture.

### **The Draft Convention on Torture**

Following its Declaration on Protection from Torture in Resolution 3452 (XXX), the General Assembly asked the Commission this year to prepare a draft convention on torture. The Commission accordingly set up a working group which considered two alternative drafts, one presented by the Swedish government and the other by the International Commission of Jurists on behalf of the International Association of Penal Law. Upon the recommendation of the working group, the Commission voted to transmit both drafts to member states and other interested governments for comment. It is intended that these comments be considered by the working group to meet before the next session, with a view to submitting proposals to the Commission.

The key feature of the International Association of Penal Law draft is that it would make torture an international crime. Like the Swedish draft it provides for individual responsibility and confers jurisdiction for

prosecution and punishment of the crime upon the countries of which the accused or the victim is a national, or upon the country where the accused is found, if he is not extradited to the country where the crime was committed. The case for treating torture as an international crime is that there are present in the case of torture all the elements common to other crimes recognised under *international law*, namely war crimes, crimes against humanity, crimes against peace, genocide and apartheid. These crimes show the following elements:

- the prescribed conduct violates universally accepted minimum standards of human behaviour; it is conduct so sharply in conflict with commonly shared values and expectations of the world community and with the concept of the fundamental dignity and liberty of the human person, as to outrage and shock the conscience of mankind;
- the offence is usually, although not exclusively, committed by or on behalf of public servants or members of the armed forces.
- repression of the crime can be assisted through international co-operation with provision for universal jurisdiction and individual responsibility.

It may be argued that the concept of an international crime imports an international element in the crime itself, i.e. that the offender commits the crime against a national or nationals of another country. This may be the case in any international crime, but it is not essential to it. War crimes and crimes against humanity can be and frequently have been committed in non-international armed struggles and as such are a violation of common article 3 of the Geneva Conventions. Genocide can be, and in the classic case of the Nazi extermination of the Jews was, committed against a minority within the country. The same is true of apartheid, and of torture.

It is hoped that the draft convention ultimately adopted by the Commission will declare torture to be an international crime carrying individual responsibility. This would, it is believed, make a far greater impact upon world opinion, add to the deterrent effect of the Convention and make an important contribution to the international action against torture.

### **The Resolution 1503 Procedure**

Important steps forward were made this year under the Resolution 1503 procedure, by which allegations of gross violations of human rights are examined in closed session. Previously the Commission had not reached any decision in the terms of the resolution either to order a thorough study or to institute an investigation by an ad hoc committee with the consent of the State concerned. This year, before the public discussion on gross violations of human rights, the President of the Commission announced that some action had been decided upon in the private session with respect to the following nine countries: Bolivia, Equatorial Guinea, Ethiopia, Indonesia, Malawi, Paraguay, South Korea, Uganda and Uruguay.

It was reported by Reuters on 9 March that the action decided on included a special representative to investigate the situation in Uganda. There was no indication what actions were authorised with respect to the other countries, so that the real significance of the Commission's decisions remains to be seen. A resolution was adopted asking the Secretariat to report quarterly to members of the Commission on actions taken to implement its decisions under Resolution 1503.

The announcement of the names of these nine countries was unexpected, since in principle the procedure remains confidential until the Commission reports to ECOSOC upon completion of its action. The announcement was the result of a temporary compromise on a fundamental question — whether human rights violations can be raised in public when they concern a country being examined under the confidential procedure of Resolution 1503. The question arose last year when Canada and the UK introduced a draft resolution concerning events in Uganda. Although allegations concerning Uganda were then being considered under Resolution 1503, the events referred to in the draft resolution were so recent that they were not included in the communications referred to the Commission.

Since progress under Resolution 1503 tends to be very slow, the question whether a case "under consideration" precludes all public debate concerning the same country is of considerable importance. The immunity from public comment which the nine countries enjoyed, for example, was in marked contrast to the extensive presentations, questions and commentary addressed to Argentina and Democratic Kampuchea, neither of which was being considered under Resolution 1503.

With respect to Argentina, much of the discussion consisted of interventions by NGOs which had recently completed missions in that country. Although several member states expressed concern, no resolutions were introduced. With respect to Kampuchea, a resolution was introduced by the United Kingdom. After some compromise, a resolution was adopted by consensus which asks the Secretariat to send the record of the discussion of alleged violations to the government of Kampuchea, and to transmit back to the Commission the government's response "together with all the information that might be available about the situation". This development is also an innovation in the procedure of the Commission.

Despite a lengthy report prepared by the Secretariat concerning the compatibility of public and confidential procedures (E/CN.4/1273 and addenda), no progress was made in resolving the question of principle. As a temporary solution an agreement was reached that no debate would be allowed regarding the countries with respect to which some action had been authorised under Resolution 1503. This necessitated announcing the names of the nine countries.

During the public debate several representatives of NGOs described recent missions to Latin America. Following the established practice, they refrained from naming the country about which they were speaking. Fearing that the speakers were making veiled references to countries upon which public discussion has been barred, members of the Commission asked the speakers to name the states to which they

were referring. This demand, a clear departure from the rule that countries not be named by NGOs, caused a discussion of the wisdom of the rule itself. Several members commented that it makes little sense to permit NGOs to make grave charges of human rights violations without naming the country concerned. As the delegate from Panama noted, the Commission must know what country the information submitted refers to in order to fulfil its duty to evaluate the allegations and determine what response, if any, is called for.

### **Strains on Consensus Decision Making**

The final work of the Commission was to elect the members of the Sub-Commission for the coming session. The Afro-Asian group, allocated 12 seats by an ECOSOC resolution, announced the usual agreement that seven members should be elected from African states and five from Asian states, and this was accepted by the entire Commission by consensus before the secret voting began. After much confusion in counting the ballots, it was learned that seven Asians and five Africans had been elected. Because of the nature of the balloting, it was impossible to determine whether the agreement had been deliberately violated and if so by what states. Much recrimination followed, in which the Asian states were asked to surrender two seats and declined to do so. African states were accused of bad faith, Western states were accused of interference and certain Latin American states expressed resentment of allegations of outside interference. The most probable explanation is that the votes for the African candidates were spread among many more candidates than those for the Asian candidates.

Several countries argued forcefully that the results of the consensus should override the outcome of the voting. After lengthy debate, the Chairman finally ruled that the election was not invalid and that the results must stand as announced. As the Indian delegate pointed out, this could have consequences far beyond the Commission in the UN system. The ECOSOC has since ruled that, while this year's election results must stand, in future the seats for African and Asian states will be separately allocated.

## **UNESCO Communications Procedure**

The Executive Board of UNESCO has recently adopted a new procedure for considering communications concerning violations of human rights in the fields of education, science, culture and information. The complaints can be lodged by the victims or "any person, group of persons or non-governmental organisation having reliable knowledge" of the alleged violations. If the author consents, the communication is first brought to the attention of the government concerned. A committee within UNESCO then determines the admissibility of the communication. The committee tries to bring about a friendly solution and sends a confidential report containing general or specific recommendations to the Executive Board. The Board may decide to consider the report in public, and must do so whenever questions of massive, systematic or flagrant violations are involved. According to the new rules such questions will also be considered in public sessions of the General Conference of UNESCO.

There will presumably be co-ordination between UNESCO and the Human Rights Division of the UN Secretariat to avoid duplication with the communications procedures under ECOSOC Resolution 1503 and under the Optional Protocol to the International Covenant on Civil and Political Rights.

## **Freedom of Movement from the GDR**

The article by Dr Heinrich Schrader under the above title in ICJ Review No. 19 was published with some passages of the author's text omitted and others summarised. The Editor mistakenly thought the alterations had been agreed by the author. The full text of the article in German can be obtained from the "Deutsche Sektion der IJK", Nowack-Anlage 15, D-7500 Karlsruhe 1.

# INDIA'S EX-UNTOUCHABLES

by  
Harinder Boparai\*

Most parts of the world have had at one time or the other their own brand of what have been called "the lowly". The Romans had their slaves; the Spartans their helots; the Russians their serfs; the British their villeins; the north Americans their negroes and 'injun'; the Nazis had their Jews; and the Hindus had, and still have, their "untouchables".

The four castes of the Hindu society came into existence, so we are told, at the time of creation when the gods dealt with the primeval world substance which was then only a conglomerate mass conceived as having the form of a human being. This, it is said, the gods sacrificed and divided. From that being's mouth came the priests or the 'Brahmins'; from his arms the warriors or the 'Kshatriyas'; from his loins came the common people or the 'Vaisyas'; and from his feet the serf or the 'Sudra'.<sup>1</sup> Separate duties were assigned to these four classes to ensure their preservation: "Teaching, studying, performing sacrificial rites, so too making others perform sacrificial rites and giving away and receiving gifts — these He assigned to the 'Brahmins'. Protection of the people, giving away of wealth, and performance of sacrificial rites — the 'Kshatriyas'. Study, trade and commerce, usury and agriculture — these are the occupation of a 'Vaisya'. The Lord has prescribed only one occupation for a 'Sudra', namely, service without malice of these other three classes"<sup>2</sup>. Specifically, the fair skinned Aryan invader settlers from central Asia would seem to have gradually divided into the top three classes while the the dark skinned aboriginals became the 'Sudras'.<sup>3</sup> Thus arose the four classes or castes of the Hindus which, it seems, formed a well knit and almost self sufficient society.<sup>4</sup>

Below these four classes, yet economically tied to them, were a number of 'excluded castes' whose contact, shadow or even sight polluted. They performed 'impure' work, such as scavenging, disposing of the dead animals and leather work, and had to live outside Aryan communities. They were forced to wear distinctive marks and to always warn others of their approach. The concept of 'excluded castes' has continued in the untouchable castes, some of which may go back to ancient times while others probably were added from time to time out of primitive tribes coming to live near settled communities.<sup>5</sup> Thus, in

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fact the untouchables formed a fifth caste, the lowest. It is interesting to note that the untouchables, in the course of time, came to have a carefully graduated caste system of their own.<sup>6</sup>

Those who laid down the rules for Hindu society settled beyond all doubt the religious, social and economic standing of every person. It is not for anyone to choose what he will be; his birth fixes his station and nothing can alter the ordained plan. The view that each man has been created by God to fill a certain position in the great religio-socio-economic order has fostered contentment or at least resigned acceptance of their lot by the Sudra and the untouchables. The religious basis of the caste system and all it represents is probably the most important factor responsible for this unfortunate attitude.<sup>7</sup> The view that the four original castes originated from the sacrifice of the Primeval Being is not only stated in the Rig-Veda but in most of the later works also with only slight variation.<sup>8</sup> In some of them "not only is the origin of the classes interpreted theologically, but also a divine justification is sought to be given to their functions and status".<sup>9</sup> Moreover, 'Dharma'<sup>10</sup> which is variously translated as religion, duty or law, is the central conception of Hindu religious thought and has been traditionally associated with caste duty. Among the Hindus the highest form of religious observance was and is the complete fulfilment of the claims of caste; sin is conceived as a breach of caste discipline rather than of moral law.<sup>11</sup> Manu, for example, laid down in second century BC that "obedience to caste rules is the very essence of 'dharma'".<sup>12</sup>

Another important Hindu concept which lends support and credence to the caste system is the doctrine of 'Karma'. This doctrine based on belief in the transmigration of souls asserts that every single ethically relevant act produces inevitable consequences which determine the individual's fate in his next existence.<sup>13</sup> Thus, wrong-doing in this life leads to birth in a lower caste in the next life.<sup>14</sup> On this view an untouchable's miserable lot is just punishment for sins committed in the previous life. He can hope for birth in a higher caste in the next life only if his actions in this life are according to 'dharma', that is, according to caste rules.<sup>15</sup>

Religion has been the single most powerful factor in the development of Hindu civilisation. Caste is so integral a part of Hinduism that "a Hindu without a caste is almost a contradiction in terms."<sup>16</sup> Is there, then, any ground for amazement at the contentment of the untouchable in particular and of the other sections of the Hindu society in general, even though the untouchables have traditionally been denied human rights as we understand them today?

The inhuman and degrading status allotted the untouchables came to be somewhat questioned with the establishment of the British Rule in India.<sup>17</sup> The study of western literature and thought, history, political and social development and law made the Indian elite sensitive to questions of equality of all human beings and civil rights for one and all. The abolition of slavery, the building of a network of roads, the stamping out of highway 'thuggee', the introduction of tenurial reforms, the development of new towns and cities along with new economic openings, the institution of secular law courts, missionary attacks on untouchability with a vigorous drive for conversion to Christianity and



missionary run schools, colleges and hospitals open to all without any consideration of caste played an important part in the social reforms that have since been attempted. Raja Ram Mohan Roy, Swami Dayananda Saraswati, Swami Vivekananda, Mahadev Govind Ranade, Gopal Krishna Gokhale, Tagore and others condemned untouchability and advocated reform.<sup>18</sup> Mahatma Gandhi who originally maintained that "a caste system, though not perhaps in its present form, is essential to Hinduism", shifted his position significantly after 1936 and declared that caste had nothing to do with religion.<sup>19</sup> Radhakrishnan put forward an idealised conception of caste. He emphasised the principle of equality on the basis of ancient Hindu metaphysical theory of the ultimate unity of all beings in the Absolute.<sup>20</sup> 'Dharma' in this view, was not to be defined in terms of caste regulations but in terms of the free individual's search for truth and morality.<sup>21</sup> However, the reformulated Hinduism of Mahatma Gandhi and Radhakrishnan was, and is, far from being the religion of the masses.<sup>22</sup> No wonder Ambedkar, the undisputed leader of the untouchables during India's freedom struggle and after, and himself an untouchable, took the view that the only hope for his people lay in embracing another religion.<sup>23</sup> A vast majority of his people, however, were not interested in changing their religious beliefs, the reason being that although the converts were accepted as equals in their new faiths, to the Hindus, who constitute an overwhelming majority in India, they remained 'untouchables'.

The practice of untouchability first touched the conscience of the Indian political leaders during the freedom struggle. Its eradication was accepted as a policy programme for action by the Indian National Congress in 1931.<sup>24</sup> Accordingly many provinces came to have enactments prohibiting untouchability. The Constitution of India 1950 forbids the practice of untouchability "in any form", and declares that "the enforcement of any disability arising out of untouchability shall be an offence punishable by law."<sup>25</sup> The Untouchability (Offences) Act 1955 translates these constitutional provisions into action. It outlines the many forms in which untouchability, as it has developed historically, is practiced in society and prescribes their punishments.<sup>26</sup> To make prosecutions more effective it shifts the normal burden of proof by prescribing that where any forbidden practice "is committed in relation to members of the Scheduled Castes [that is, untouchables], the court shall presume, unless the contrary is proved, that such act was committed on the ground of untouchability."<sup>27</sup> This has been followed by a number of State enactments, the most important of them being the Temple Entry Laws in 1956 which have outlawed the practice of prohibiting some groups of Hindus, including untouchables, from entering certain public temples for purposes of worship.<sup>28</sup>

Probably the more important provisions regarding the untouchables in the Constitution of India 1950 are the ones which provide for special privileges and reservations for them in the political, economic and educational fields, the aim being to help them rapidly to achieve parity with the other sections of the society. These measures include, (1) Representation in legislatures through reserved seats,<sup>29</sup> (2) reserved posts in central and state civil services,<sup>30</sup> (3) educational concessions

including free tuition, books, stationary, clothes and meals in addition to stipends and scholarships,<sup>31</sup> and (4) the establishment of 'Harijan' Welfare Departments by the central and state governments to administer various programmes for the economic upliftment of the 'untouchables'.<sup>32</sup>

In the pre-independence era the British rulers adhered to the policy of not interfering with caste practices based on custom in religious matters. However, the principle of equality was applied to uphold the dignity of the individual in other fields.<sup>33</sup> In the post-independence era cases have centred round the political and educational reservations for the untouchables. The courts have clearly upheld the various welfare measures in the area of social upliftment of the "backward classes."<sup>34</sup> However, they have, unfortunately, shown an unwillingness to depart from the long held judicial view that caste managements must be left free to operate in religious matters and that their decisions should be treated with great respect.<sup>35</sup> It is also regrettable that the courts have shown an unwillingness to recognise mobility from a lower caste to a higher caste even in the face of clear evidence to that effect.<sup>36</sup> The fault probably lies with enacted law. The unfortunate result is that an untouchable is not encouraged to forget or give up his background because it is due to this background that he receives special benefits.<sup>37</sup> It would be better to base these rights and privileges on economic need rather than on caste.

It is clear that the untouchables, renamed by Gandhi as 'Harijan', that is, "God's children", were denied human rights for centuries. Strictly speaking it is not correct to speak of 'human' rights because they seem to have been considered, as noted earlier, outside the pale of human society. Some might think that their lot was worse than that of animals. Whereas even the touch of an animal did not pollute, the very sight of an untouchable was enough to pollute and called for the performance of special cleansing ceremonies. Domestic and agricultural animals could live and eat in the same house with high caste Hindus but the untouchables could not even live in the same town.<sup>38</sup> With India's contact with western thought came a re-examination of the untouchables inhuman treatment. Free India's Constitution, as Perceval Spear wrote, "represents the substitution of the idea of the individual with equal rights and duties as the unit of society and a society of such equal units, for the idea of groups of unequal individuals with varying rights and duties arranged in an ascending order. . . . An egalitarian society of individuals has become the official basis of society instead of a hierarchy of under and over-privileged groups."<sup>39</sup> The practice of untouchability is now prohibited and the former untouchables are granted special rights to help them attain the level of the rest of the community in the shortest possible time, the aim being to integrate them completely and thoroughly into the rest of the community and national life.

Have the legal status, rights and privileges granted in law to the ex-untouchables, been realised in practice? The answer, unfortunately, as far as the vast majority of these 85 million people are concerned, is 'no'. A recent report to the effect that "a caste war is threatening in the northern state of Bihar where higher caste Hindus are menacing

Harijans (untouchables)" comes as no surprise.<sup>40</sup> Consider, for example, the following:

- (1) India's Defence Minister Mr Jagjivan Ram, who is himself an untouchable, unveiled a statute at an official function in Varanasi in the State of Uttar Pradesh in February 1978. It is reported that after the official party left, the statute was washed by high caste Hindus with sacred Ganges water to purge it of the touch of an 'untouchable'.<sup>41</sup>
- (2) At the time of the 1977 cyclone disaster in India a problem arose regarding the cremation of the bodies of those that died. The Toronto Star reported:<sup>42</sup> "About 80 per cent of the dead are 'untouchables', members of the lowest Hindu caste. This has made the job of handling the remains even more disagreeable . . . despite India outlawing caste discrimination." No high-caste person was willing to do the job of cremating those bodies because it would involve coming in contact with the bodies of 'untouchables'. Even prisoners (high-caste) are reported to have refused the job although a handsome salary and a partial remission in sentences was offered!
- (3) A survey conducted by the Punjab Agricultural University in 1973 showed that though the nation's rural income had risen by 141.6 per cent in the past decade, this increase had not much benefited the village 'untouchables'. It was found, for example, that 20 per cent of the eight million of them in Punjab were still bonded servants of their employers.<sup>43</sup>
- (4) Bernard Weinraub writing in the San Francisco Examiner and Chronicle in October 1973<sup>44</sup> pointed out that "nearly 80 per cent of India lives in villages . . . in the country. The number of landless labourers — mostly of the untouchable caste — in some form of bondage is estimated to be 45 million. Wages may be as low as seven cents a day; or nothing plus water at midday sweetened with molasses and some wheat or rice. Efforts to crack the system . . . have been met in several states by murder, rape and terror." He mentions a 1973 incident in which four women were branded with red hot iron rods for trying to evade the traditional lot of the untouchables. Local police and doctors are reported to have sought to cover up the incident.
- (5) A survey of eight Maharashtra districts in the early seventies showed that nearly 90 per cent of 'untouchable' families still lived outside the village boundaries. Only 50 per cent of them could use public wells for getting drinking water.<sup>45</sup> (Prohibition of the use of wells used by caste Hindus is a traditional element of untouchability, and is expressly criminalised by the Untouchability (Offences) Act, 1955).
- (6) On 24 February, 1968, a 19 year old 'untouchable' boy was accused by a mob in the town of Kanchikacherla, Andhra Pradesh, of having committed a two dollar theft, lynched and finally burnt alive.<sup>46</sup> He was tied to a pillar and beaten mercilessly for about one hour by seven persons taking turns before being set afire. Only one person amongst the 40 witnessing the gruesome deed, a non Hindu by the way, made any attempt to save the unfortunate child. What

is even more shocking is that the state administration did not move in the matter until the central government intervened. The punishment awarded the seven accused, ranging from three to seven years imprisonment, shows the general attitude of leniency of the courts in such cases.

- (7) In spite of legislation reserving 12 per cent of the jobs in state services for the 'untouchables', their share, in 1961, of higher jobs was only 1.2 per cent. By 1968 this had increased to a mere 2.8 per cent. Furthermore, they held only 3.1 per cent of middle grade jobs. But they held 18 per cent of menial jobs which made their overall average more respectable.<sup>47</sup>

No wonder the Elayaperumal Committee which made a lengthy and thorough examination of the practice of untouchability concluded: "... to our utter dismay untouchability is still being practiced in a virulent form all over India."<sup>48</sup> Similarly the 1970 Report of the Commissioner for Scheduled Castes and Tribes pointed out that in spite of the efforts to better the lot of the 'untouchables' "poverty remains, illiteracy continues, while social discrimination slackens at only a slow rate. ... Harijans [untouchables] are still compelled to live in separate ghettos, they cannot draw water from wells used by high caste Hindus and they cannot enter temples." He concluded that the lot of the 'untouchables' can be improved only if they fight for their rights or if volunteers are prepared to suffer with them. Unfortunately, however, "one has to look far for any organisation which might resemble the civil rights movement [of America],"<sup>49</sup> The catalogue of woes of these 85 million unfortunates is indeed endless. It is not that their plight is not known to the authorities in India. In 1973, for example, the then President of India, V. V. Giri, called untouchability "the country's worst social evil and a sin against humanity." He recommended that those who practice it should be executed and called upon the central and state governments to strive to end it within five years.<sup>50</sup> Unfortunately the government's efforts in this regard have sometimes taken the form of hiding the practice of untouchability from the world community rather than new measures to combat it. Admission into India of scholars from the West, for example, has been severely curtailed since 1973 because they "often work in villages and study potentially 'embarrassing' subjects such as caste ..."<sup>51</sup> Recently, however, the government has renewed the pledge to end discrimination based on Hinduism's ancient system of castes. The Prime Minister, speaking at ceremonies to mark India's 30 years of independence in August 1977, declared that his government is committed to end persecution of India's untouchables, outcasts under the Hindu class system, saying 'We have to put an end to this stigma in the next five years'.<sup>52</sup> It remains to be seen whether this government will in fact be more effective than previous ones in achieving this goal.

The heart of the problem of the 'untouchables' difficulties would seem to lie in, (a) the acceptance of untouchability by the people at large, and (b) a hostile administrative machinery which is just not interested in making the life of the 'untouchables' any better. This is best illustrated by the following statement of a police official in Tamil Nadu: "If we take this law [Untouchability (Offences) Act 1955] seriously, half the people of Tamil Nadu will have to be arrested. In any

case the police have better things to do than go about poking their nose into the private affairs of people.<sup>53</sup> Only when qualified 'untouchables' come to occupy key positions on policy making boards and agencies can this administrative apathy change. Unfortunately most of the high placed 'untouchables' so far have been 'Uncle Toms' content with bettering their own lot but completely ignoring their community's needs.<sup>54</sup>

The general attitude of India's masses, especially of the educated, towards the practice of untouchability is profoundly painful and humiliating. The blame must lie with our system of education. The curriculum of not a single institution of learning in India, for example, contains a detailed exposition and denunciation of the origin and development of the practice of untouchability. How many Law Schools, may we ask, have specialised courses and seminars dealing with anti-untouchability laws or even on human rights in general? India's Law Schools, unfortunately, are still 'ivory towers' emphasising 'law in books' and not the 'law in action'. It is wrong to treat the abolition of untouchability as a mere legal or constitutional question to be solved only by the courts. Of all legal and constitutional concepts, the one of human equality has the largest ethical and spiritual content. It represents the very basic values of human civilisation and man's aspiration for a more just society. Moral, ethical and spiritual resources need, therefore, to be mobilised to eradicate the practice of untouchability. The plight of the 85 million 'untouchables' has only marginally improved during the last three decades. The world community must bring pressure to bear upon India to take measures to quicken the pace.

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### Notes and References

<sup>1</sup> See generally: *Traditional India — Structure and Change*, Publication of the American Folklore Society, Bibliographical Series (1959), Vol X; *Introduction to Oriental Civilisations*, Vol. LVI — *Sources of Indian Tradition*, compiled by de Bary, Hay, Weiler and Yarrow, New York (1958), p. 224.

<sup>2</sup> *Rig-Veda* 10.90.

<sup>3</sup> Alan Gledhill, *The Republic of India, The Development of its Laws and Constitution*, London (1964), p. 261; J. Duncan M. Derrett, *Religion, Law and the State in India*, New York (1968), p. 107.

<sup>4</sup> Max Miller's *Chips from a German Workshop*, vol. II, p. 323. It may be pointed out, however, that the origin of the caste system in India is a matter of controversy among scholars. It is enough to say, for the purposes of this paper, that it is of ancient origin, that it exists in the Hindu society even today, that it has acquired a rigidity that according to some scholars was not present in its original form. It has undesirable features that are a blot on any modern civilised society.

<sup>5</sup> *Records of Civilisations — Sources and Studies, Introduction to Oriental Civilisations*, Vol. LVI — *Sources of Indian Tradition*, compiled by Wm. Theodore de Bary, Stephen Hay, Royal Weiler and Andrew Yarrow, New York (1958), p. 224.

<sup>6</sup> William and Charlotte Wiser, *Behind Mud Walls 1930-1960*, University of California Press (1964), p. 39.

<sup>7</sup> J. H. Hutton, *Caste in India — Its Nature, Function and Origins*, Bombay (1951). But see: K. M. Pannikar, *Hindu Society at Cross Roads*, Bombay (1955), p. 3.

<sup>8</sup> Donald E. Smith, *India as a Secular State*, Princeton (1963), p. 293.

<sup>9</sup> Ghurye, *Caste and Class in India*, Bombay (1957), p. 44.

<sup>10</sup> 'Dharma' is a concept difficult to define. It signifies the totality of duties to which one must conform if one is to safeguard one's life hereafter. Its foundation and sanctions are religious though it is essentially social in nature. It includes duties and obligations which are religious, moral, social and legal in nature. Unfortunately, it is not possible to draw any hard line between secular and religious matters. Ancient Hindus considered their law to be revelation, immutable and eternal. The sources of 'Dharma' being the Veda which are considered to be revealed texts of divine nature, the Smṛiti which are founded on memory, and Good Custom. Theoretically, a text of the Smṛiti in conflict with any Vedic text was to be disregarded. Therefore, one should not have recourse to the Smṛiti unless the Veda were silent on the point. For the Hindu all knowledge proceeds from the Veda. All belief takes its source and its justification there. It was supreme like the decalogue of the later Christian. In this lies the importance of the Vedic text, cited earlier, on the origin of caste. Custom could override even the written text of the Veda, but no custom ever arose against caste. See generally: Robert Lingat, *The Classical Law of India* (translated from the French, with additions, by J. Duncan M. Derrett), University of California Press (1933), pp. 3-13; D. F. Mulla, *Principles of Hindu Law*, 13th ed. Bombay (1966), pp. 1-6.

<sup>11</sup> M. A. Sherring, *Hindu Tribes and Castes*, Vol III, Calcutta (1881), p. 276. See also: Max Weber, *The Religion of India — The Sociology of Hinduism and Buddhism*, Glencoe (1958).

<sup>12</sup> R. N. Dandekar, *The Role of Man in Hinduism*, *The Religion of the Hindus*, p. 146.

<sup>13</sup> Max Weber, *supra*, p. 118.

<sup>14</sup> L. S. S. O'Malley, *Indian Caste Customs*, Cambridge (1932), p. 18.

<sup>15</sup> Max Weber, *supra*, p. 118.

<sup>16</sup> L. S. S. O'Malley, *supra*, p. 19.

<sup>17</sup> M. N. Srinivas, *Social Change in Modern India* (1967), p. 89.

<sup>18</sup> *The Complete Works of Swami Vivekananda*, Vol V, p. 19; Chintamani, *Indian Social Reform*, Vol II, pp. 89-95; Speeches of Gokhale, Poona (1957), pp. 740-47; Ronald Scott, *Social Ethics in Modern Hinduism*, Calcutta (1953), p. 161.

<sup>19</sup> Ronald Scott, *Social Ethics in Modern Hinduism*, Calcutta (1953), pp. 158-61.

<sup>20</sup> S. Radhakrishnan, *Eastern Religion and Western Thought*, London (1939), pp. 366-73; S. Radhakrishnan, *Religion and Society*, London (1947), p. 42.

<sup>21</sup> L. S. S. O'Malley, *Indian Caste Customs*, Cambridge (1932), pp. 175-77.

<sup>22</sup> M. N. Srinivas, *A Note on Sanskritisation and Westernisation*, *Far Eastern Quarterly*, Vol 15 (1956), p. 495.

<sup>23</sup> B. R. Ambedkar, *Annihilation of Caste*, Bombay (1937), pp. 37-39. See also: D. S. Sharma, *The Renaissance of Hinduism*, Benaras (1944).

<sup>24</sup> G. S. Sharma, *Legislation and Cases on Untouchability and Scheduled Castes in India*, New Delhi (1975), p. 2.

<sup>25</sup> Article 17. See also: Article 35.

<sup>26</sup> ss. 3-6.

<sup>27</sup> s. 12.

<sup>28</sup> For example: *Bombay Hindu Places of Public Worship (Entry Authorisation) Act*, 1956.

<sup>29</sup> Articles 330, 332, 334, *Constitution of India 1950*.

<sup>30</sup> Articles 16, 355, *Constitution of India 1950*.

<sup>31</sup> In 1954-55 about 10,000 students received such help, but by 1958-59 this number had increased to over 32,000: Report of the Commissioner for Scheduled Castes 1958-59, pp. 58-9.

<sup>32</sup> *India: A Reference Annual 1957*. Also for the year 1965.

<sup>33</sup> *Queen Empress v Bhogi* (1900) 2 *Bombay L.T.* 1078.

<sup>34</sup> *Sastri Yagnpuradasaji v Muldas Bhanwardas*, A.I.R. 1966 Supreme Court 1119.

<sup>35</sup> *Saifuddin Saheb v State of Bombay*, A.I.R. 1962 Supreme Court 853; *Venkataraman Devaru v State of Mysore*, A.I.R. 1958 Supreme Court 255; *His Holiness Sri Sukratendra Thirtha Swami of Kasi Mutt v Prabhu*, A.I.R. 1923 Madras 587.

<sup>36</sup> *V. V. Giri v D. S. Dora*, A.I.R. 1959 Supreme Court 1318.

<sup>37</sup> S. C. Mishra speech, *Lok Sabha Debates* (1955), part II, Vol 3, Col. 5377.

<sup>38</sup> See generally: Sources of Indian Tradition, compiled by Wm. Theodore de Bary, Stephen Hay, Royal Weiler and Andrew Yarrow, New York (1958).

<sup>39</sup> Christian Higher Education in India, International Review of Missions, Vol. 40 (1951), p. 87.

<sup>40</sup> The Sunday Star, Toronto (Canada), 16 April, 1978, at p. 49, col. 1.

<sup>41</sup> "Soach-Vichar", commentary by Narendra Kumar, CHIN (FM) multicultural Radio, Toronto (Canada), 2 April, 1978.

<sup>42</sup> Toronto Star (Canada), Monday 28 November, 1977, p. A-9.

<sup>43</sup> Survey Report, Punjab Agricultural University, Ludhiana (India), May 1973.

<sup>44</sup> Untouchables in Bondage — The Endless Debt, Sunday Examiner and Chronicle, Punch section, dated 21 October, 1973.

<sup>45</sup> Robert Trumbull, As I See India, New York (1956). See also: William and Charlotte Wiser, Behind Mud Walls 1930-1960, University of California Press (1964); Harold Issacs, India's Ex-untouchables.

<sup>46</sup> K. R. Sundar Rajan, The Great Betrayal, The Illustrated Weekly of India, Bombay, issue of 30 September, 1973, p. 9.

<sup>47</sup> Report of the Commissioner for Scheduled Castes and Tribes (1970), Government of India Press, New Delhi.

<sup>48</sup> The Illustrated Weekly of India, Bombay, issue dated 30 September, 1973, at p. 13.

<sup>49</sup> Peter Hazelhurst, India's Outcastes Need New Help, The Times, dated 3 April, 1970.

<sup>50</sup> India Chief Speaks for Untouchables, San Francisco Chronicle, dated 15 September, 1973, at p. 9.

<sup>51</sup> B. Weinraub, India Restricts its Admission of US Scholars to 20 a Year, Int'l Herald Tribune, 3 Sept, 1973, p. 3.

<sup>52</sup> Associated Press, New Delhi: The Globe and Mail, Toronto (Canada), 16 August, 1977, p. 3, col. 4.

<sup>53</sup> K. R. Sundar Rajan, The Great Betrayal, Illustrated Weekly of India, Bombay, issue of 30 Sept, 1973, p. 11.

<sup>54</sup> See generally: Untouchable with a Touch, Time Newsmagazine, issue dated 16 February, 1970; K. R. Sundar Rajan, The Great Betrayal, Illustrated Weekly of India, Bombay, issue dated 30 September, 1973, p. 9.

# COMPENSATING PRIOR DISCRIMINATION: THE BAKKE CASE

by  
Robert H. Kapp

The case of *The Regents of the University of California v. Allan Bakke* currently pending in the Supreme Court of the United States presents a critically important test of the constitutional validity of governmental programmes designed to increase, through preferential or compensatory treatment, the participation of racial minorities in education, employment and other societal activities previously closed to them by reason of discrimination. The decision of the Supreme Court in the Bakke case could significantly affect a broad range of federal and state government programmes in the United States designed to promote equal opportunity through affirmative action; and also the tentative steps taken elsewhere to improve the status of racial minorities and women through affirmative action<sup>1</sup>.

The *Bakke* case involves a challenge to a special admissions programme for disadvantaged minority applicants adopted by the Medical School of the University of California at Davis.<sup>2</sup> The school opened in 1968 and its entering class for that year and the following year included one Chicano and two black students out of a total student body of 100. This proportion compared unfavourably with the proportion of these two groups in the general population of the State of California — 7% black and at least 14% Mexican-American.<sup>3</sup>

In an effort to increase minority enrolment, the faculty of the Medical School in 1970 established a special admissions programme for disadvantaged minority applicants. Under this programme, 15 or 16% of the places in each entering class are reserved for disadvantaged minority applicants admitted through the special admissions programme. The minority students admitted under this programme must be fully qualified to meet the requirements of medical education at Davis, but their applications are separately considered, and subject to somewhat different criteria, from those presented by applicants generally. The objectives of the special admissions programme, as described by the University of California in its brief to the Supreme Court, are "enhanced diversity in the student body and the (medical) profession, improved medical care in underserved minority communities, elimination of historical barriers to medical careers for disadvantaged members of racial and ethnic minority groups, and



increased aspiration for such careers on the part of minority students".<sup>4</sup> The 15 or 16 places reserved under the special admissions programme does not constitute a ceiling on minority enrolment; other minority applicants may be, and have been, admitted under the general admissions programme.

The special admissions programme has led to substantially greater racial and ethnic diversity among entrants to classes at Davis than in 1968 and 1969. For the years 1971 to 1974, aggregate minority enrolment at Davis ranged from 24%-31% and black and Chicano enrolment averaged 5.5% and 9% respectively.

The litigation against the University of California was instituted by Allan Bakke, a highly qualified white applicant who was denied admission to the medical school for the entering classes of 1973 and 1974.<sup>5</sup>

Bakke contends that, except for the factor of race, he was better qualified than some of the minority applicants admitted under the special admissions programme. The trial court upheld Bakke's claim that the special admissions programme discriminated against white applicants on the basis of race and therefore violated the Equal Protection Clause of the Constitution of the United States.<sup>6</sup>

On direct appeal, the Supreme Court of California affirmed the decision of the trial court. It reasoned that the use of racial criteria in any governmental programme, even one for remedial purposes, must be judged by especially rigorous standards where "the extension of a right or a benefit to a minority [has] the effect of depriving persons who [are] not members of a minority group of benefits which they would have otherwise enjoyed".<sup>7</sup> In these circumstances, the Court continued, the governmental programme violates the constitutional rights of the majority unless it can be demonstrated that the programme is necessary to serve a "compelling state interest" and the objective of the programme cannot reasonably be achieved by some other means which would impose a lesser burden on the rights of the majority. The Court concluded that the Davis programme failed to satisfy this standard in that although the objectives of the programme were compelling, the University had failed to demonstrate that there were not other alternatives, e.g. increasing the number of medical schools, aggressive recruiting of minority students, or exclusive reliance on disadvantaged background without regard to race, which would achieve such racial diversity without affording a preference in admissions based upon race.

The Supreme Court of the United States has granted the petition of the University of California to review the determination that the special admissions programme offends Constitutional standards.

The University's Brief argues persuasively that:

1. The Supreme Court of California improperly applied the standard of strict scrutiny in testing the constitutionality of the special admissions programme. That rigorous standard is appropriately applied to racial classifications aimed at harming discrete and insular minorities, but not to measures deliberately designed to aid such groups by remedying prior discrimination. The Supreme Court of the United States has previously upheld in school integration cases and in other instances remedial orders that require the government to use race to

assist in the remedial process. See e.g. *North Carolina State Board of Education v. Swann*, 402 US 43; *Franks v. Bowman*, 424 US 747.

2. Even if the standard of strict judicial review is adopted, the special admissions programme should not be determined to be constitutionally infirm. There is no more "compelling state interest" than the need to reduce the dramatic under-representation of minorities in medical schools and in the medical profession; to increase the provision of basic medical services to minority communities; to inject fairness into admissions programmes by countering the effects on minority applicants of generations of educational deprivation and societal discrimination; and to obtain the educational and societal benefits that flow from racial and ethnic diversity in professional school student bodies.

In 1970, sixteen years after the dual school system was declared to be unconstitutional in the landmark case of *Brown v. Board of Education* and before wide-spread adoption of effective affirmative action programmes, black students constituted only 2.6% of the total enrolment of United States medical schools while 11.1% of the total population was black.<sup>8</sup> The representation of blacks in the medical profession is even more disproportionate; in 1970 it stood at 2.1%.<sup>9</sup> And the scarcity of physicians in the rural South and in urban centres of the United States where blacks are concentrated is particularly acute.

3. The only effective means of substantially increasing minority enrolment in United States medical schools is a race-conscious programme of the type adopted at Davis. The number of applicants to medical school annually far outstrips the available spaces and the problem is accelerating. Minority students, who are the products of generations of racial discrimination and educational deprivation, do not at present produce as high grade point averages and standardised test scores (the principal criteria of admission) as do their white counterparts.<sup>10</sup> Moreover, there is no reason to believe that the racially-neutral means suggested by the Supreme Court of California will work. The proposal that the number of medical schools be expanded is unrealistic in the extreme when considered in the light of the extent of minority under-representation and the limited resources available for this purpose. And the suggestion of "aggressive programmes" of identification and recruitment of minority prospects simply ignores the great amount of such activity that has been going on for years.

4. Finally, the Davis programme does not resurrect the insidious "quotas" of an earlier era of deliberate exclusion by the dominant group of more than a limited number of members of certain minorities.<sup>11</sup> The special admissions programme does not place a ceiling on the number of minorities who may be admitted to the medical school; and there is no floor below which minority presence may not fall. The medical school does not admit unqualified applicants to ensure that the 16 reserved places are filled.

It is to be hoped that the Supreme Court of the United States will reverse the lower court and sustain the constitutionality of the Davis special admissions programme. To do otherwise would be to threaten comparable programmes in colleges, universities and professional

schools throughout the nation, with the consequential threat that access of minorities to the professions will once again be closed. Moreover, it would cast doubt on a wide range of minority-sensitive federal programmes including the all important Executive Order 11375, which requires enterprises holding federal contracts to take affirmative action to correct disproportionately low employment of racial minorities.

Finally, an adverse decision would raise issues for affirmative action programmes in other parts of the world under international instruments. The International Convention on the Elimination of all Forms of Racial Discrimination, Art. 1(4), appears to contemplate affirmative action programmes on behalf of racial minorities, and the Ganji Report<sup>12</sup> recommends that governments consider the establishment of explicit job quotas for women in order to overcome the legacies of discrimination. In this connection, a state government in India has recently proposed legislation which would reserve 26% of the state's civil service jobs for members of the so-called backward castes to make up for generations of discrimination.

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<sup>1</sup> Affirmative action programmes in the United States have been effective in increasing minority access to employment and education, but they are highly controversial. A 1977 Gallup Poll revealed that 83% of the population of the United States rejected the concept of special preferences for minorities, including 64% of non-whites. See *New York Times*, 1 May 1977, p.A33, Col. 1. More recently, a bitter conflict erupted in India over a proposed programme to give job preference to low-caste Hindus. See *International Herald Tribune*, 4 April 1978.

<sup>2</sup> Similar programmes have been established by the great majority of colleges and universities in the United States.

<sup>3</sup> Another minority group, Asian-Americans (persons of Japanese, Chinese or Filipino descent) was proportionately overrepresented. There were 14 Asian-Americans in the classes of 1968 and 1969, but this group represented only 2.65% of the population of the State of California. In any case, Asian-Americans, blacks and Chicanos in the aggregate constituted 25.7% of the population of California but held only 17% of the places in the Medical School during 1968 and 1969.

<sup>4</sup> Brief, University of California, p.3.

<sup>5</sup> Admission to the Medical School at Davis, as in the case of other medical schools in the United States, is highly competitive; there were 2,464 applications for 100 places in 1973 and 3,737 applications for a like number of places in 1974.

<sup>6</sup> The Fourteenth Amendment to the United States Constitution provides in pertinent part: "... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws." Cf. Article 7 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights which proclaim that all persons "are entitled without any discrimination to equal protection of the law."

<sup>7</sup> Slip opinion, 17, 21-22.

<sup>8</sup> Brief for the United States as Amicus Curiae, 45.

<sup>9</sup> Brief, University of California, 23. The situation is much the same in the other professions. In 1970, blacks made up less than 2% of the legal profession and less than 1.5% of the engineering profession. Brief of the Legal Services Corporation, Amicus Curiae on Behalf of Petitioner, p.14.

<sup>10</sup> Brief for the United States as Amicus Curiae, p.43 (footnote 42).

<sup>11</sup> It is the perceived resemblance of the special admissions programmes to the quotas, which were for years used to discriminate against Jews in the United States and Europe, which has brought the major Jewish organisations into the fray on Bakke's side. See e.g. Brief Amici Curiae of Anti-Defamation League of B'nai B'rith et al.

<sup>12</sup> "The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress", by M. Ganji, Special Rapporteur of the Commission on Human Rights, UN Publication Sales No. E75 (XIV 2, 1975).

# NUCLEAR PROLIFERATION AND SAFEGUARDS

by  
Alan F. Westin<sup>1</sup>

*In his article on 'Nuclear Power and Human Rights' in ICJ Review No. 18, Paul Sieghart described the dangers to human rights implicit in the development of nuclear power, and particularly from fast breeder reactors leading to the 'plutonium economy'. He pointed out that a plutonium bomb could be made from a few kilograms of plutonium, a material which can safely be handled with rubber gloves, and described the extraordinary precautions that would have to be taken to try to prevent this material getting into the hands of terrorists. Public discussion of this subject is much further advanced in the United States than in any of the European countries now contemplating the construction of fast breeder reactors. A summary of the different viewpoints in the United States on the civil liberties implications of domestic safeguards against these dangers was prepared for the Congress of the United States by Professor Alan F. Westin and has been published by the Office of Technology Assessment of Congress.<sup>2</sup> The following extracts from his report indicate the depth and seriousness of the discussion which has taken place in the United States — Editor.*

## **The Civil Liberties Context of Nuclear Power**

Civil liberties issues have recently moved to a prominent position in the public consideration of nuclear power development. This growth of concern over the impact of nuclear power on civil liberties would probably have occurred even without consideration of plutonium reprocessing. As incidents of non-nuclear terrorism have mounted world-wide, and as assaults have been made on nuclear facilities in several countries by various radical groups, there has been an increased

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<sup>2</sup> *Nuclear Proliferation and Safeguards*, Vol. II, Part I, pp 127-181, Office of Technology Assessment, Congress of the United States, Washington, D.C. (Vol. I, Praeger, 1977; also Vol. I and Vol. II, Parts I and II are available at National Technical Information Service, with PB numbers PB-275-843, PB-275-844, and PB-275-845, respectively).

program to safeguard such facilities from actions such as sabotage and deliberate release of radioactive materials. Such increased security measures raise some issues of civil liberties impact. But it has been plutonium recycle or other nuclear technologies (such as high temperature gas-cooled reactors) using material that could, if diverted, be made into nuclear explosives — that has set off the current debates.

Plutonium reprocessing offers the greatest opportunity for potential non-state adversaries — terrorist groups, profit-oriented criminal organisations, deranged persons, or disaffected employees of nuclear facilities — to obtain special nuclear material. . . .

### **Safeguards Measures for a Plutonium Industry**

. . . Several points of agreement in the safeguards debate are important to note as a baseline for discussion:

a. There is general agreement that if plutonium recycle is initiated, there would be a genuine need for high-security measures. . . .

b. . . . In the case of potential threats against plutonium plants, there is general agreement that we have no real prospects in the foreseeable future of adopting national or international policies that would remove the causes of *all* political terrorism or of removing the causes of individual derangement or eliminating criminal organisations.

c. There is no complete technological solution available or foreseen that would make it unnecessary to have *some* safeguards measures that would affect civil liberties. . . .

With these initial observations made, let us turn to a closer examination of potential safeguards measures . . . The safeguarding of any highly dangerous or valuable material can be posed in terms of four basic procedures. These are:

**Employee Screening.** These measures are designed to prevent employment in the industry of individuals who might be likely to use their position to steal or harm the materials to be protected.

**Access Controls.** This covers activities aimed at obtaining advance knowledge of attempts to steal or harm protected material.

**Recovery.** In the event that a quantity of protected material is missing, these are measures to locate and recover the material. . . .

The specific measures that could be employed in each of these areas are quite varied.

Those measures which may be used in employee screening are:

- Compulsory disclosure questionnaires, which would force an applicant to supply detailed information about her or himself;
- National agency checks, conducted to gather, and evaluate all the information as to suitability that the Government maintains on applicants or employees;
- Full Field Investigations, in which the character and associations of an applicant or employee are investigated by interviewing friends and associates and asking detailed questions regarding the applicant's background and lifestyle;

- Polygraph testing, where an employee or applicant may be asked a series of questions and the employee's physical responses are evaluated, in an effort to expose any contemplated theft or other threatening activity;
- Personality and psychological testing, which is used to identify employees or applicants who may be considered unstable enough to be compromised by outsiders or to undertake themselves a theft of protected material.

Measures which have been employed to maintain control over access to various types of valuable or hazardous material are:

- Mechanical Detection, which entails a hands-off body search for various types of contraband (e.g., the magnetometer used in airports for detection of weapons).
- Inspection of hand carried items into and out of areas containing protected material, which is employed to assure that no weapons, explosives, or contraband enter or leave the area authorised as proper for the material.
- Identification checks, to maximise assurance that only those persons who have been screened are allowed access to the material.
- On-the-job surveillance, audible or visual, directed at maintaining employee security when employees are handling protected materials.
- Pat-down body searches (frisks), used to assure that an individual leaving or entering an area containing protected material is not carrying contraband.
- Strip searches and body cavity searches, which are employed as a means of absolute assurance that no small quantities of valuable material are being transported out of the authorised areas.
- Emergency responses to alarm warnings or material balance accounting insufficiencies, which may include detention, arrest, search, and interrogation of employees and visitors within the facility at the time of the emergency.

Those measures employed to give advance warning of a threat of theft or harm protected materials by groups in the society at large are:

- Overt intelligence techniques, which include name check, telephone record checks, credit checks, and other techniques used in investigating ordinary crime, applied to individuals or groups suspected by investigators of being potential assailants of plutonium facilities.
- Covert intelligence techniques, which may include electronic surveillance, unauthorised or surreptitious entries, informants and agents in various organisations, and mail openings.
- Creation of a special unit in an existing law enforcement agency or a separate special intelligence force.

In the event that plutonium is diverted, a recovery operation could conceivably include:

- Perimeter searches aimed at cutting off routes by which protected material in a known area might be transported away.

This search may be accomplished through mechanical detection, lessening the scope and degree of intrusion of the search.

- Area searches conducted on large areas, possibly of residential character. These searches may be conducted, partially at least, by mechanical detectors so as to limit, to some degree, the scope and intrusion of the search.
- Evacuation of areas in which a credible threat has been made to detonate a clandestine explosive device.
- Restriction of population movement in the event of a crisis triggering a massive civilian retreat away from a threatened area.
- Press censorship may be employed to minimise the effects terrorist activity seeks: public attention and alarm. Censorship may be contemplated on a voluntary basis or by law.
- Harsh and unusual investigative techniques which may include measures ranging from a general round-up of those individuals suspected of being privy to information regarding the whereabouts of the missing material, to interrogation by torture of individuals who are believed to possess substantial information of the materials' whereabouts.

Some of those activities are mutually exclusive, in that the employment of one may eliminate the need for the other. In those instances, the least onerous alternative may represent a measure with little civil liberties damage. This is particularly true with respect to activities designed to detect or locate nuclear material. For example, if a portal monitor (doorway with a radiologically sensitive alarm) is available which could with great certainty warn of unauthorised removal, then the need for a physical hands-on search would be eliminated.

These devices are available in some cases. The technology for detection of even small amounts of radioactive material has been developed and further advancements are likely. Freedom from unreasonable search and seizure is meant to prevent arbitrary and intrusive actions by Government officials. A method of mechanical detection is a reliable method of locating persons or places which should be searched, and a warning from a mechanical detection device represents the functional equivalent of probable cause. The result is that employees leaving a material-control access area in a plutonium reprocessing plant need not be searched any further, if they can pass through a portal monitor which is properly operating. Present nuclear safeguards have been directed at making the detection devices as fail safe as possible, and with high reliability. If a totally fail-safe portal monitor system could be developed, it would negate the need for hands-on body searches altogether.

The same type of situation exists in the event of a recovery operation. As a result of the weapons program, hand-held radiologically sensitive devices have been developed which, within a certain radius, can detect the presence of even well-shielded radioactive material. As the sensitivity and reliability of these devices increase, the intrusion necessary to assure that an area does not contain radioactive material

decreases. In that sense, some technological solutions are available; current research may yield better solutions.

It is useful to note that different safeguards techniques present different levels of potential civil liberties harm. Some intrusions are not overly onerous when compared to intrusions already accepted by American society. An example already noted is the search conducted by mechanical hands-off devices. In airports, the increasing potential of skyjacking led to the need to assure that weapons were not being carried into the passenger compartment of commercial aircraft. The magnetometer, which can detect a metallic mass such as a small handgun, is used to scan all passengers boarding the aircraft. The judiciary has found this to be an acceptably minimal invasion of privacy, given the serious threat of a successful skyjacking.

A safeguard activity of medium risk is the possibility of escalation of domestic intelligence activities in the interest of nuclear safeguards. The status of domestic security operations is currently unsettled. The recent study completed by the Senate Select Committee, charged with investigating domestic security, found numerous instances of sweeping and unjustified intelligence activity and abuse of lawful intelligence objectives during the past two decades; an absence of guiding standards to govern such activities and inadequate techniques for supervisory control. Some commentators have suggested that domestic intelligence activity for nuclear security may escalate to the same unacceptable levels that prevailed during the past 20 years. This represents the possibility of collecting extensive information, via such techniques as electronic surveillance, surreptitious entry, infiltrators and informants, as well as the creation of extensive files and databanks on anti-nuclear and dissident groups, not just declared terrorists. Whether such a phenomenon would be likely to take place is not clearly predictable, but the danger of it happening is sufficient to constitute a middle-level risk to civil liberties.

Finally, there are areas of concern which involve very high levels of risk. These are mainly in those activities which would result from a successful diversion of plutonium. The type of recovery operations which would follow such a diversion represent serious intrusions on civil liberties, and the likelihood of judicial intervention would be small. For example, if an area search were thought by responsible officials to be necessary, it is doubtful that the courts would interfere even though a sweeping area search represents an activity which is unlawful under current search and seizure doctrines. Although mechanical devices are available which make it possible to scan a room in a dwelling and detect the presence of plutonium, even if shielded, this only reduces the scope of the search: house to house, room by room searches over wide areas would still be required.

Rather than go on further in this section about the risks, tradeoffs, and possibilities for civil liberties protection involved in specific safeguards measures, we will develop these discussions in the context of three main positions about plutonium and civil liberties that have developed during the debates of the past few years, since these positions frame the issues with valuable clarity.



## **A presentation of three positions widely held in US Society as to the civil liberties risks of plutonium recycle**

### *Position One: A Plutonium Economy Would Require Such Extensive Safeguards and Curtailment of Civil Liberties That Its Creation Would Jeopardize Our Free Society*

The general theme of Position One is that the measures adequate to assure the safeguarding of a large-scale plutonium industry would, inevitably, require such severe intrusions into the civil liberties of employees and citizens that the maintenance of a plutonium economy is incompatible with the US system of constitutional rights. In a phrase, plutonium would bring on a nuclear police state.

Position One begins with the following key assumptions:

1. The presence of millions of pounds of plutonium in reprocessing plants and in transit — when ten to twenty pounds would be enough to make a nuclear device and with prevailing conditions of domestic and international terrorism — poses a situation so perilous to public safety that only a far-reaching, fail-safe type of safeguards program would be sufficient to protect the public. Therefore, the only kind of safeguards program to envisage, for purposes of considering civil liberties impact, is a far-reaching, fail-safe kind of response. Government could do no less.

2. Despite decisions of the courts during the past decade setting important constitutional limits on personnel security programs, police intelligence operations, government search and seizure, and similar activities, the immense potential consequences of a nuclear diversion from inside or an assault from outside would probably lead the courts to uphold sweeping preventive measures for a plutonium industry. . . .

3. Even if a safeguards program were originally set up with strong civil liberties protections, written into legislation or set out by executive order, public reaction to thoroughly predictable incidents of diversion and blackmail, and certainly to any successful explosion, would probably lead to the dropping of such limitations and the adoption of a maximum security program. Thus no safeguards program can be expected to stay limited as a plutonium economy continues for any length of time.

4. There are special dangers to civil liberties in the fact that a plutonium safeguards program would be jointly administered by private industry and the federal government. Giving industrial security forces and corporate managements a role in collecting data and managing security programs about employees, suspected assailants, and community anti-nuclear groups would be a major step backward in the development of good employer-employee, employer-union, and employer-community relations in this country. . . .

Based on these key assumptions, advocates of Position One have warned that most of the intrusive kinds of safeguards will inevitably be used, that they cannot and will not be conducted in tolerable fashion, that we can expect no timely intervention by the courts, and therefore, that plutonium economy would mean unacceptable levels of

surveillance and government control over free expression for people who would work in plutonium plants, reside in nearby communities, or exercise First Amendment rights of protest against plutonium.

This leads advocates of Position One to two conclusions:

1. Whatever the other objections might be, on civil liberties grounds alone, Congress should reject plutonium recycle as an energy policy and prevent the licensing of plutonium reprocessing plants for commercial use.

2. The United States should not export plutonium technology. Partly, this is to diminish the threat of plutonium diversions that might be smuggled by terrorists into this country and thus create the need for extensive customs-search procedures. It is also urged in order to avoid having the United States export a technology that would inhibit the evolution of greater civil liberties in developing nations. . . .

*Position Two: Safeguards Can be Adopted for a Plutonium Industry That Would be Both Effective Against Threats and Acceptable in Terms of Civil Liberties*

Essentially, this position sees civil liberties problems as manageable ones and the predictions of an inevitable "nuclear police state" as unjustified hyperbole. In their view, safeguards measures must be strong but reasonable, with the necessity for what is adopted vigorously defended before Congress, the public, and the courts.

Position Two proceeds from the following primary assumptions:

1. Both military and commercial operators of nuclear facilities have been managing safeguards programs successfully for decades; adapting these to the new scope and requirements of a plutonium economy would therefore represent not a totally new venture but an expansion of present operations. . . .

2. It is simply unacceptable for a large and strong society such as the United States to let potential threats from a few terrorists, criminals, or disturbed people deprive the American economy and the public of a badly needed energy supply in the next 50-100 years. . . .

3. Whether the size of a plutonium work force would be 50,000 or several million, it is thoroughly justified to set initial personnel clearances and continued-suitability standards for persons who choose to apply for or work in that industry. . . .

4. The intrusions into personal liberties of workers, community residents, and diversion suspects that would take place should a diversion be detected or a nuclear blackmail threat be made — awesome as those situations are — are really no different than if nerve gas or highly-dangerous bacteriological agent were stolen from a civilian or military site, or a credible threat to use such substances were delivered to authorities. . . .

5. As for intelligence-gathering about potential divertors, there is a strong need for obtaining intelligence about terrorist organisations and other groups whose conduct indicates that they might use violence against nuclear facilities. However, this would not be done by any special nuclear intelligence force but by the FBI, operating under clear

controls by the White House and with Congressional supervision. . . .

Based on these assumptions, Position Two reaches the following conclusions:

1. The United States should proceed with a plutonium licensing program, after full public participation in a rule-making proceeding, development of a set of safeguards requirements, and formulation of civil liberties principles under which the safeguards program would operate.

2. The United States should also proceed with sales of plutonium recycle facilities abroad, under a safeguards program that would meet both US and IAEA standards. . . .

*Position Three: An Acceptable Program of Nuclear Safeguards is Possible but Only if American Society is Willing to Run Some Permanent Risks of Diversion in Order to Keep Civil Liberties Risks at a Low Level.*

This position maintains that *if* a persuasive case for plutonium recycle is proven in terms of national energy needs, and *if* safety and environmental problems are met, then a safeguards program could be designed that would be acceptable in civil liberties terms *if* Congress and the American people are willing to live with some risks of diversion [of plutonium] in the interest of limiting risks to freedom.

The assumptions that underlie this position can be summarised as follows:

1. To adopt a fail-safe or zero-risk approach to safeguards, or even to speak of holding threats to negligible proportions, is to insure that the civil liberties costs of such a program will be unbearably high. . . .

2. Instead of this standard, Position Three urges adoption of a standard that would trade off some small risks of diversion against heavy risks to basic civil liberties.

3. This would mean deliberately rejecting some widely proposed techniques of personnel screening, employee monitoring, intelligence gathering on anti-nuclear groups, not merely because many of these techniques are of doubtful real value but because their civil liberties costs are too high. In balancing slightly greater risks of diversion against very heavy risks to basic freedoms, the decision would have to be made to protect freedoms.

4. For plutonium recycle to go forward, such a set of fully-articulated tradeoffs would have to be set out as the philosophy of a safeguards program, tested before the public in a variety of hearings and proceedings, be fully accepted by the commercial firms and government regulatory agencies most directly concerned, be written explicitly into legislation and implementing regulations, be subjected to firm annual reporting duties and legislative reviews, and have procedures created for both administrative appeals and judicial review. . . .

5. It would be especially important to a proper safeguards program that the Nuclear Regulatory Commission not simply turn over to the discretion of the FBI the conduct of preventive intelligence for

plutonium security, or leave the decision-making responsibility in a recovery effort or diversion response to ad hoc developments among federal, state, and local officials. These activities, because they are among the most important for civil liberties, should be defined and supervised by the NRC, possibly with a Congressional oversight role.

6. Holding to this line would involve reaffirming the bargain year after year and decade after decade, especially in the face of predictable low-level incidents and possible serious incidents. This would mean that the American public would have to hold the line of moderation, refusing to let itself be stampeded by demagogues and forcing sufficient public supervision to prevent the program being subverted by secret-government.

Based on these assumptions, Position Three draws the following policy conclusions:

1. Congress should go forward with a full-dress review of the need to have plutonium recycle and breeders to meet America's future energy needs, and of whether this process can be made environmentally and physically safe. If the answer to these inquiries is yes, then Congress should receive from the NRC a fully-worked out plan for safeguards, which then would be publicly reviewed and implemented in the manner described earlier (paragraph 4).

2. There is no automatic judgment in Position Three as to plutonium export policies by the *United States*, nor has this been addressed in the literature thus far produced in support of a civil-liberties-acceptable domestic safeguards program. Certainly the risk of plutonium being diverted in another country and brought into the United States is a serious one, and it does not appear feasible to apply border control search measures to prevent this, even if the authorities knew that a diversion had taken place and an effort to smuggle it into the US would be made. Still, most advocates of this position would probably assume that other democratic nations could and would adopt the same freedom-respecting programs as we would, and that developing nations should be given the chance to have the energy technology they wish. . . .

### **Observations and Comments on the Three Positions**

At the outset, it is fair to note that the effort to isolate the key differences among the major discussants has produced some rigidity in the statement of premises and conclusions. Someone may share a premise or even several premises of one position yet not feel compelled to reach the same conclusion that the advocates cited as holding that position have reached. . . .

Having recognised this, let us turn to a closer analysis of the assumptions and conclusions of the three viewpoints. One problem with the plutonium dilemma is that each of the three positions outlined is partially right.

—Position One points correctly to the dangers of so much plutonium being handled in a world of terror and mishap; the pressure this could create from the public to use draconian safeguards measures; and the remarkably optimistic assumptions as to unbroken national

responsibility and moderation on which both Positions Two and Three rest their faith.

—Position Two reminds us that the year 2020 is not coming immediately; that a plutonium industry would develop slowly and could therefore be safeguarded step by step, modifying the technology, physical locations, plant design, shipment procedures, and many other elements as it went along; and that safeguards techniques could be installed in equally evolutionary and self-correcting fashion.

—Position Three is persuasive in suggesting that it has been a traditional feature of American pragmatism to resist either-or choices, and to seek ways to trade off one set of risks against another in a way that preserves important values of both liberty and order. By taking relatively minor risks of diversion, using all the mechanical and technological means available and going to hardened site, the necessity of using harshly intrusive employee security and potential-group surveillance could be avoided.

Though there are persuasive elements in each position, it is equally helpful to examine what are the weak points, or points of uncertainty, in the three main positions.

The extent to which the concerns expressed by Position One are realistic is dependent to some degree on the specific details of the safeguards and security measures used by a plutonium industry. For example, the concerns about diversion during transportation of special nuclear material would be greatly reduced if colocation of fuel reprocessing and fuel fabrication facilities or coprocessing (without colocation) completely eliminated transportation of weapons material. Secondly, concerns about assaults by outsiders would diminish if facilities containing special nuclear material were convincingly designed to prevent removal of weapons material by a large, heavily armed band.

Such successful perimeter defenses for collocated facilities would probably reduce or eliminate the need for off-site security measures such as surveillance and dossier-building on members of the public. In effect, the industry's attitude would be "We don't care what plans outside groups are making; we can withstand anything they come up with."

If the number of people in the plutonium industry who would be subjected to full field investigations of their backgrounds, and would be subjected from time to time to such measures as physical searches and surveillance were very limited in number (to a few thousand), the civil liberties infringements involved would not be significantly greater than presently exists in the defense industry or other sensitive private activities. It is not clear, however, what number of persons must be affected in order to reach a point of civil liberties concern; some people might regard 10,000 as an acceptable upper limit for such intensive security measures; others might accept higher numbers.

The assurances contained in Position Two would be disputed by many knowledgeable persons. It is not certain that the past and present safeguards system has been totally successful. The very large amounts of material unaccounted for leave the possibility that diversions have already taken place over the past 20 years.

It is not clear that Position Two is correct in saying that an expanded plutonium industry merely represents a difference in degree, not in type. In cases where plutonium facility becomes a major employer (or the dominant employer) in a community, there is less freedom of choice for residents as to whether they accede to the security restrictions or refuse to work at the facility. In small rural communities the company town syndrome may appear, making it difficult for employees to resist extensive security measures.

Position Three is not without its conceptual shortcomings as well. Past experience with security officers makes many persons dubious about the possibility of containing a security program to least restrictive security procedures. Security personnel are prone to seek tighter measures, regardless of civil liberties implications. They tend to gravitate toward easy or foolproof techniques that invariably involve infringement on civil liberties. Moreover, even with tight internal security and strong perimeter defenses, it is likely that security personnel would keep pushing for positive intelligence (e.g. surveillance, informers) about potential attackers or critics. The nature of security officers is to want to reduce all risks to negligible proportions, which contradicts the assumptions of Position Three. . . .

It could also be said that Position Three assumes a greater degree of rationality than has yet been observed in the nuclear regulatory area or any other government agency. The procedural, legislative and administrative arrangements necessary may be beyond realistic implementation by Congress, agency officials, and management of industry.

Finally, Position Three may be ignoring the backlash effect that would occur if a successful diversion resulted in a major threat or actual casualties. It is not clear that the original limited safeguards system contemplated by Position Three would survive the pressures of an outraged public determined to prevent any further incidents. Indeed, it could be argued that to the extent one limits the original problem, one is increasing the risk of an incident, and this will ensure that such a backlash will eventually occur. On the other hand, a maximum safeguards program such as is contemplated by Position Two may preclude any incidents from occurring, but result in the same degree of infringement of civil liberties as would occur if an incident took place as a result of a limited program under Position Three.

In trying to decide which one or combination of these views is more right and therefore should be used in policy-making, we should recognize that we do not have here a problem that can be put to the tests of either logic or empirical investigation. There is no way we could lay out a set of factual questions to be answered by research, or to design a pilot program from whose results clear guidelines for decision could be plotted. The reality is that each of these position rests, fundamentally, on socio-political judgements as to how American government and public opinion have dealt in the past with threats to national security (real or assumed); how government and commercial security forces would be likely to carry out a safeguards program, even one that was highly respectful of civil liberties in its formal framework; how much privacy, dissent, protest, and cultural diversity our civil

liberties traditions demand or our society should encourage; and how the American public would probably respond to diversions, blackmail threats, or a nuclear explosion, in terms of its shocked post-incident attitudes toward the scope of safeguards measures. . . .

One other observation should be made, this one dealing with the capacity of the United States to police the adequacy of safeguards in other nations that might possess plutonium technology. Beyond the issue of whether we could have sufficient continuing powers of inspection to guarantee the internal measures against diversion or the physical security of facilities against attack, it seems doubtful that we could exercise many controls over the *civil liberties dimensions* of such foreign nuclear industries. Neither we nor the IAEA could reasonably expect such nations to allow monitoring of the way they conduct their employee screening and stability-monitoring programs, especially to let outsiders exercise any control over the criteria they used as to loyalty and disloyalty to the country or regime. Outside authorities could not reasonably expect to have supervisory authority over the way that nation's intelligence agencies carried out surveillance of potential terrorist and radical groups, or political dissenters within that country. Finally, if a diversion were suspected or established, any nation would insist upon entire freedom of action in determining how its security forces would respond. Thus it is clear that whatever supervision of physical security measures might be imposed and monitored bilaterally or by international agency, the civil liberties fallouts from a plutonium industry would be beyond such external influence.

The task that faces Congress in trying to control nuclear proliferation, including the decision whether creation of US plutonium industry at home or export of such technology abroad will increase the dangers of such proliferation, is an extraordinarily important choice. What this report has discussed is implications for civil liberties in what we decide, how we proceed initially if we do license plutonium recycle, and how we police the boundaries and operations of a safeguards system throughout its course.

Ultimately, it would seem necessary for the US to make its decision on a total package basis, not on the civil liberties considerations alone. To put this more clearly, Position One becomes harder to maintain *if* the case is made out that pursuing *some* plutonium recycle is essential for the energy needs and national independence of American society. Were that case made out in a public proceeding, there would still remain important issues of how large a plutonium industry needed to be, and how it might be located and used. These matters, as we have seen, would have important implications for safeguards and civil liberties impacts.

The single most important conclusion suggested by this review is that, if a plutonium industry as described in Table I were to be pursued in the near future, steady attention would need to be paid by Congress, the executive agencies, public-interest groups, and the courts to the way in which safeguards are defined, administered, monitored, and reviewed. Keeping such a plutonium safeguards program consistent with civil liberties would become one of the most important, continuing tasks of all those who cherish American freedom.

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## **Human Rights and Development**

Edited by the International Commission of Jurists, Cedar Press, Barbados, May 1978,  
208pp,

SwFr. 15, plus postage

A report of an international seminar on "Human Rights and their promotion in the Caribbean" convened by the ICJ and the Organisation of Commonwealth Caribbean Bar Associations and held in Barbados in September 1977. The 72 participants included governments ministers, senior officials, judges, advocates, law lecturers, teachers and churchmen from 16 countries in the Caribbean region. The report includes the working papers, a summary of the discussions and the Final Conclusions and Recommendations. In the Appendices the full text is published of the most important international instruments on human rights. The seminar gave equal focus to economic, social and cultural rights and civil and political rights. It discussed, inter alia, the importance for the region of the right to self-determination, the right to participate in public affairs, the rights to work and freely join trade unions, the equal treatment of children born out of wedlock, the status of women and the right to education and adequate medical care. The participants recommended the creation of a "regional co-ordinating organisation" for human rights and established a 'Continuation Committee' to seek to bring this about.

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## **Human Rights in a One-Party State**

Edited by the International Commission of Jurists, Search Press, London, January  
1978, 130 pp,

Sw.Fr. 10, plus postage.

A report of an international seminar convened by the ICJ and held in Dar-es-Salaam in September 1976 on 'Human Rights, their Protection and the Rule of Law in a One-Party State'. The 37 participants included government ministers and senior officials, judges, advocates, law lecturers, teachers and churchmen from Sudan, Tanzania, Zambia, Botswana, Lesotho and Swaziland. The report includes summaries of the working papers and discussions on constitutional aspects, the organisation and role of the legal profession, preventive detention, ombudsman institutions, public participation, freedom of expression and association, and individual rights and collective rights. In his preface. Shridath Ramphal, Secretary-General of the Commonwealth says that the seminar performed a signal service "by exploring the reality that underlies the form [of the one party state], as well as by making suggestions conducive to the healthy evolution of those conventions of constraint on which, in the ultimate analysis, good government depends".

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## **Attacks on Judges and Lawyers in Argentina**

Bulletin No. 1 of the CIJL

Sw.Fr. 5, plus postage

The first Bulletin of the Centre for the Independence of Judges and Lawyers (CIJL) was published in April 1978 in English and Spanish. It describes the conditions faced by defence lawyers and by judges who try political cases, and gives the tragic tally of assassinations, disappearances, detention and exile of Argentinian judges and lawyers in the past four years.

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