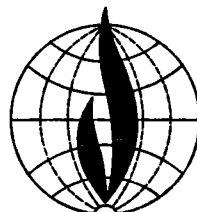


**For the Rule of Law**

# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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Editor: Niall MacDermot

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The International Commission of Jurists is a non-governmental organisation devoted to promoting throughout the world the understanding and observance of the Rule of Law and the legal protection of human rights.

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# *Human Rights in the World*

## *France*

Since the success of François Mitterrand in the presidential election in May 1981 and of the socialist party in the parliamentary election in June, a number of measures have already been taken which together represent a notable advance in the field of the legal protection of human rights.

First there was an amnesty law, which was followed by a number of presidential decrees of pardon resulting in the release of many prisoners who had committed political or relatively minor offences. Thereafter the Court of State Security was abolished and its powers transferred to the ordinary courts of justice, the death penalty was abolished, and the right of individual petition to the European Commission on Human Rights was recognised. Finally, it is proposed to amend the much criticised Law on security and freedom.

### *Law of Amnesty*

A few months after assuming power the government introduced an Amnesty Bill, which was approved by Parliament. Its main object was to solve the serious problem of the surplus prison population. The increase in crime had led to serious overcrowding in the prisons, which rendered impossible any programme of reform and led to an increase in recidivism. The policy of the government, as described by the Min-

ister of Justice, was to facilitate the reintegration of former delinquents into society, to limit prison sentences to the cases in which it was essential to protect society, and to make use of other measures such as probation and more frequent paroling of prisoners.

### *Abolition of the Court of State Security*

This was a court with exceptional powers, which was brought into being by a law of January 1963 to replace two courts with similar powers which had been set up as a result of the war in Algeria, the Supreme Military Court and later the Military Court of Justice. The Court of State Security had a wide jurisdiction, covering crimes against the security of the State, numerous military and political offences, the crime of treason, including economic treason, and attempts or conspiracies to commit such offences. A written order from the Minister of Justice was necessary for the Court to sit. The Court consisted of a president, two other judges and two military officers of high rank, all nominated by the Executive. Their verdicts could not be appealed against, except on points of law by means of an appeal to the Court of Cassation.

The main criticism of the Court of State Security was that as a court of exception

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it did not fully respect the two cardinal principles of the independence of the judiciary and the preservation of full rights of the defence. Moreover, the existence of an emergency court of an overtly political nature constantly threatened to open the door to arbitrary action and anti-democratic political repression. A highly criticised provision of the law governing the operation of the Court granted exceptional powers to the Prefects in urgent cases, although these officials were subordinate to the Executive Power and were not law officers. In cases of offences that came within the jurisdiction of the Court, the Prefects were empowered, when the matter was urgent, to order arrests, searches and interrogation without the need for judicial authorisation or control. All these powers could be exercised within the first 48 hours. The Prefects did not, of course, possess such powers in the case of ordinary offences.

Powerful arguments were put forward in favour of abolishing the Court, and it was pointed out that the officers of the ordinary civil courts were perfectly capable of taking vigorous action to protect the security of the State and at the same time to uphold individual rights. After a lengthy discussion in parliament the bill was approved and the Court of State Security was abolished in early August 1981.

### *Abolition of the Death Penalty*

An extensive debate was reopened in the press, on radio and television, among lawyers and jurists, religious and humanitarian organisations and among the public in general, on the subject of the death penalty. This had been a controversial issue for some time, but the previous government had thought it desirable to maintain the death penalty. It is not necessary to go over all the arguments that were advanced

for and against abolition. They followed the same lines as the arguments that had been put forward for years both nationally and internationally relating to deterrence, irrevocability, retribution, humanitarian considerations, the feasibility of reintegrating certain types of delinquents into society, etc. The question was debated in parliament, and on 9 October the death penalty was abolished in France for all offences and in all circumstances, in spite of the fact that opinion polls indicated that a majority of the population were in favour of its retention.

Persons who have committed crimes which were punishable by the death penalty, and those who had already been condemned to death, will be sentenced instead to life imprisonment. This raises the problem of whether it is desirable to maintain penalties that hold out no hope of rehabilitation. The Minister of Justice has announced that in the course of 1982 the government will propose to Parliament a far-reaching and substantive reform of the Penal Code and that the problem of penalties involving loss of freedom and other types of punishment will be examined at that time.

By abolishing capital punishment, France has given effect to the policy expressed by the international community on various occasions to reduce progressively the number of offences subject to the death penalty, to exclude certain persons from its application e.g. the young, the aged, pregnant women, etc., and eventually to do away with it altogether. Mention should be made in this connection of resolution 32/61 adopted by the United Nations General Assembly on 8 December 1977, and also of art. 6 of the International Covenant on Civil and Political Rights and art. 4 of the American Convention on Human Rights. The latter provision goes further than the others in stating that the death penalty may not be

reinstated in those States where it has been abolished.

### *The Right of Individual Petition to the European Commission on Human Rights*

In May 1974 France ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, which safeguards and guarantees a number of rights and freedoms and also sets up a system of international control for their effective observance. There are two main organs of control – the European Commission on Human Rights and the European Court of Human Rights.

The Commission is competent to hear complaints made by another state party or, if the state complained against has made a declaration accepting this procedure, by individuals claiming to be victims of a violation of their rights under the Convention.

France was the one of the last remaining countries not to have accepted this right of individual petition (those which have still not done so are Cyprus, Greece, Malta, Spain and Turkey). On 2 October 1981 the new French government made the necessary declaration. Since then, any individual, whether a French national or a foreigner resident in France, who considers that his or her rights under the European Convention or its additional Protocols have been violated may, after exhausting any available domestic remedies, take the matter to the European Commission, and the Com-

mission or the state concerned may, in certain circumstances, refer the matter to the Court.

### *Amendment of the Law on Security and Freedom*

The Minister of Justice has also announced that the Law on security and freedom, which was strongly criticised by judges and lawyers at the time of its adoption in February 1981 will be radically amended. For this purpose, a Commission chaired by Professor Jacques Léauté of Paris University, one of the leading critics of the law, has been established.

The Léauté Commission has already indicated some of the amendments it will propose. If they are accepted, only a permanent judge (*juge de siège*) will have the power to make an order for pre-trial detention, and only after having afforded the defence lawyer an opportunity to be heard. The time for “*garde à vue*” (i.e. police custody) will be restored to a maximum of 48 hours, instead of 72 as it was for some offences under the Law on security and freedom. Others amendments proposed are to reduce the numbers of persons sent to prison by using other forms of punishment which do not involve deprivation of liberty. Finally, the Commission considers that a lawyer should not be able to be sanctioned for misconduct by the Court, but only by his bar association (*ordre des avocats*), and that the powers of the police to check a person’s identity documents should be limited to certain specifically defined cases.

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#### ERRATUM

In ICJ Review No. 26, p. 18 the official figure for the percentage of affirmative votes in the referendum on the South Korea constitution is given in error as 99.9 %. We are informed that the correct figure is 91.6 %.

# Iran

## Justice in Iran

After the initial liberation under the new regime in Iran following the overthrow of the Shah in February 1979 there has developed steadily an ever greater repression with a sickening growth in the number of executions and increasing violence throughout the country. According to the most recent statements, 3,350 persons have been executed since 1979, more than 2,000 of them since the dismissal of President Bani-Sadr, i.e. from June to October 1981. These figures may be substantial underestimates.

Immediately after the February 1979 revolution so-called Islamic Revolutionary Courts were set up to prosecute agents of the Pahlavi regime. The procedures of these courts clearly violated Iran's international obligations. People were tried under retroactive legislation for acts which did not constitute penal offences at the time when they were committed. Accused persons were put on trial with no previous warning of the charges, no opportunity to prepare a defence, to engage a lawyer or to bring witnesses in their defence. They were condemned to death and immediately executed without any rights of appeal, whether in law or for clemency. Those not condemned to death were in peril of double jeopardy; an example was General Nazemi who was condemned to 15 years imprisonment and a few months later was retried on the same charges, condemned to death and executed in violation of all international norms, including the International Covenant on Civil and Political Rights to which Iran is a par-

ty<sup>1</sup>. Death sentences have often been accompanied by flogging or carried out by stoning.

Having dealt with former officials of the Shah's regime, the courts began to concentrate on people accused of moral transgressions and of being 'counter-revolutionaries' (i.e. anyone opposed to the Khomeini regime). The charges included "corruption on earth" and "waging war against God, his Prophet, his Imam and the representatives of the Imam". This policy followed the line of action which Ayatollah Khomeini emphasised in a speech in the Feyzia Islamic Institute of Learning: "It is... a day-to-day programme of identifying the opponents of Islam. Our struggle against them shall become more intense"<sup>2</sup>. And so it did. Numerous official statements point to the conclusion that the present repression has now discarded all the safeguards of the Rule of Law. In the words of President Bani-Sadr "There is no more law". Examples of this arbitrary rule are as follows:

- many prisoners under the Shah's regime were released in February 1979, only to be arrested again under similar charges (such as spying), arbitrarily tried and sentenced to imprisonment, if not executed. Such was the case of Reja Saadati who, first sentenced to ten years imprisonment, was shot after a second and secret trial;
- ethnic minorities (Kurds, Baluchis, Turkmenes, Azerbaijanis, and Arabs) have seen their demand for a greater degree

1) *Human Rights Violations in the Republic of Iran*, Chicago, I11., May 1980.

2) Imam Khomeini, "The revolutionary line of action", Great Islamic Library.

- of self-government met with a repression, which can only increase the risk of rebellion against the central government. Cases of massacres, imprisonment and executions have been widely reported;
- religious groups banned by Islam are increasingly harassed under the new regime. The Baha'is, who represent a population of 400,000 in Iran, face charges such as promotion of prostitution, co-operation with Zionism, spying for imperialist powers, corruption on earth and warring against God. Thousands have lost their homes and possessions, hundreds have been dismissed from their jobs and many of them have been executed by revolutionary firing squads;
  - the main opposition groups after the overthrow of the Shah (democratic groups, moderate Islamic groups and left-wing opposition including the Fed-dayin Khalq and the radical Moslem groups led by the Nujahiddin Khalq) have not only been denied the right to share power in the post-revolutionary Iran, but are severely repressed. Not a week has passed without arrests and executions of many of their members;
  - writers, poets and artists are particularly harassed. The first Islamic Revolutionary Judge and now also a member of parliament, Sheik Sadeg Khalkhali, has not hesitated to demand the execution of intellectuals such as Chamlou, a famous Iranian author who is well-known for his non-adherence to any political party and his non-involvement in any political activity. Five prominent intellectuals who fought against the previous regime, were arrested recently: Homa Nategh (sociologist and professor at the University of Teheran), Mr. Rawandi (historian and journalist), Mr. Parham (sociologist), Mr. Rahimi (literary critic and writer), Mr. Monzawi (islamologist). Professor Nategh is reported to have been executed in November;
  - lawyers and judges are also among the victims of government's policies. According to Judge Abdolkarim Ardebili, President of the Supreme Court, islamic judges have been convicted because they "made mistakes" and are at present detained in Kevin prison. There is also evidence that defence lawyers have been arrested, imprisoned and in at least one case, executed;
  - those who face firing squads now include women and youths. It was reported in Time Magazine on 20 September 1981 that 150 youngsters were shot in a mass execution on 4 September<sup>3</sup>. In a recent statement, Teheran's revolutionary prosecutor, Assadollah Lajevardi declared: "Of course, even a 9-year old can be executed if it was proved to the court that he or she is grown enough"<sup>4</sup>. Although the Prosecutor asserted that such a case had not happened yet, it has been reported in the Iranian press that 13-year-old children have been shot<sup>5</sup>;
  - 'counter-revolutionary activities' include the distribution of leaflets, incitement of innocent youths to subversion, and participation in demonstrations (charges often leading to death sentences). In a campaign to muzzle dissent in the schools, the government has arrested teenagers. The number of students barred from school is estimated at up to 70,000;
  - cases of torture and ill-treatment have been regularly reported. An example of ill-treatment was Nasrollah Entezam,

3) Time Magazine, 20 September 1981.

4) International Herald Tribune, 30 September 1981.

5) *Ghiame Iran* newspaper, Teheran, 28 June 1981.

aged 82, former president of the fifth Session of the UN General Assembly, who died in prison for lack of medical attention. When Bani-Sadr was still President he said "They are arresting people as before, they torture... Everybody knows there are tortures. It is just like before, man has no rights, they arrest him and eliminate him just as one throws out garbage".<sup>6</sup>

The government seeks to justify these measures as necessary to repress attacks made by terrorists. Undoubtedly, the attack against the Islamic Republic Party on 28 June 1981 (killing 74 of the party's officials and leaders and Ayatollah Beheshti) and the bombing on 30 August 1981 (killing President Mohammed Ali Radjai and the Prime Minister Mohammed Bahonar) were turning points in the escalation of violence and repression. Recently the government of Iran claimed that the entire population condemns these criminal acts so strongly that "even relatives of the terrorists help the Judicial Body for their arrest and for their execution". The International Commission of Jurists in no way supports acts of terrorism, but where a regime treats all criticism of itself as treason and as an offence against God, to be met with execution, attempts at political assassination are to be expected.

The Ministry of Foreign Affairs on 12 August 1981 ordered Iranian embassies and missions to draw up a list of Baha'is, counter-revolutionaries and "so-called students" living in their jurisdiction. It has also prohibited the renewal of their passports and has ordered instead the delivery of a "transit-paper" which is valid only for a return journey to Iran<sup>7</sup>.

## *Present Trial Procedures*

In ICJ Review No. 25 of December 1980 the Rules of Procedures of the Islamic Revolutionary Tribunals were summarised. While recognising that the rules covered a number of safeguards, concern was expressed about important omissions regarding the preliminary investigations, lack of adequate time for the preparation of the defence, limitation of the maximum period of the trials to one week and the denial of any right of appeal or revision.

Since then it is clear that the rights of the defence as provided for in the Rules of Procedure are being disregarded. Frequent use is made in official reports of the expressions "summary trials" and "justice on the spot". 'Summary trials' appear to cover either cases in which there is no trial at all, or in which, following a mere examination of the 'file', a person is condemned without being heard, or with little or no defence rights. That this is official policy appears from a statement made by the High Judicial Council after the bomb attack on 30 August 1981, in which President Radjai, the Prime Minister and many others were killed. It asked all persons in charge of the judicial system to "shoot immediately traitors to Islam and to the Islamic country after a rapid examination of their files"<sup>8</sup>.

Arrested persons who are tried are still held incommunicado, without being told the charges against them and without access to a lawyer. No mention is ever made of defence counsel taking part in trial proceedings. It seems that practicing lawyers are not now permitted to defend in political trials. Indeed, according to statements by higher judicial officials, the defence of offenders would be contrary to Islamic

6) ICJ Review No. 26, p. 23.

7) The ICJ is in possession of a photocopy of this instruction.

8) *Le Monde*, 2 September 1981.



laws, in that the defender is thereby an accessory to the accused person's crimes. This is borne out by a report that a newly qualified lawyer, Mr. Mohsen Jahandar, was accused of defending prisoners before Revolutionary Committees, condemned to death and shot before a firing squad about the end of August 1981.

The Teheran Procurator General, Mr. Lajevardi, when asked why journalists could not attend trials, answered: "We don't have time to invite journalists. We work hastily day and night"<sup>9</sup>.

The Revolutionary Tribunals have recently turned to trying cases which are not within their jurisdiction as defined in the regulations<sup>10</sup>. These include charges of prostitution, adultery, simple theft and drinking alcohol. Sentence of death by firing squad or by stoning have been imposed for prostitution or adultery, and the cutting off of a hand for simple theft.

### *Justice 'in the streets'*

In other cases there has been no trial of any form, and this has been justified on the highest authority. On 19 September 1981, in an address broadcast on radio and television Ayatollah Moussave, the Revolutionary Procurator General, stated that "to kill the people who stand against this regime and its just Imam is a prescribed duty according to Islamic laws. If they are captured, our men will not let them eat and sleep for a few months. The trial of these people is in the streets. I also order the city prosecutors to do the same; otherwise they themselves will be punished"<sup>11</sup>.

On the same day, Ayatollah Mohammadi

Gilani, the Ghazie Shara' of Teheran, stated at a press conference in Evin prison, "Islam permits people engaged in armed demonstrations in the streets to be captured, stood against the wall of the street and shot"<sup>12</sup>.

### *The Law of Talion*

An unusual Bill known as the 'Bill concerning the Law of Talion' was submitted to the Parliament in April 1981, but has not, at the time of writing, been passed into law.

The Bill, which contains 199 articles, was drafted by the Higher Judicial Council. It would revive the right of a person physically injured or the relatives of a person put to death to seek revenge by inflicting a similar injury or, in the second case, by causing the death of the assailant. The Bill goes into a great deal of detail as to the manner and circumstances in which the right can be exercised.

The provisions of the Bill follow closely the requirements of the Islamic Law of *Qesas* as enumerated in the late seventh century AD and as developed by Islamic Jurisprudence in the eighth and ninth centuries. It disregards, however, later developments of Islamic jurisprudence which apply the principles underlying that law to changing circumstances in such a way as to moderate their application.

In spite of the title of the Bill, 119 of the 199 articles of the Bill do not relate to the Law of Talion but are concerned with the punishment of various offences such as adultery, sodomy, lesbianism, proxenetism and drinking of wine. If the Bill passes into

9) *Le Monde*, 22 July 1981.  
10) See ICJ Review No. 25, at p. 21.  
11) *Kyhan* newspaper, Teheran, 20 September 1981.  
12) *Ibid*.

law, it will replace large parts of the existing civil and penal codes.

## *Protests*

The manner in which 'Islamic justice' is being administered in Iran has been denounced by courageous Iranians within the country, as well as those in exile.

In a recent speech addressed to the Majlis (Parliament), Mehdi Bazargan said that "bloodshed and intolerance was threatening the future of the Islamic republic". Mr. Bazargan has been reported to be in hiding after a violent reaction following his speech.

A group of 38 prominent Iranian intellectuals (writers, academics, lawyers) said in an open letter that two years of Islamic rule had brought repression, torture and injustice.

Fanaticism, rule by torture and destruction of the country in the name of Islam were among the criticisms made by Hojatoleslam Hossain Khomeini, the Ayatollah's grandson, in a speech in Mashad which led to his imprisonment for a brief period<sup>13</sup>.

Very recently, Ayatollah Shariat Madhari, perhaps the most moderate of the religious leaders, who is confined to his house in Qom, asked for a visa to travel abroad. This request is seen as a protest against the repressive measures and the arbitrary executions of opponents to the regime<sup>14</sup>.

Outside the country, voices have been raised against the regime both from organisations and individuals. In an open letter to the Human Rights Division of the United Nations, Chapur Baktiar denounced, early 1981, the ongoing violations of human rights which resulted, among other things, in the death of Nasrollah Entezam referred

to above. In another letter to the General Director of UNESCO, he denounced the cultural repression which represents a systematic destruction of Iranian culture.

In September 1980 and in April 1981, the European Parliament adopted two resolutions requiring protection of Baha'is and of their freedom of religion. In September 1980, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities adopted a resolution stating it had heard statements 'clearly demonstrating the systematic persecution of the Baha'is in Iran, including summary arrests, torture, beatings, executions, murders, kidnappings, disappearances, abductions, and many other forms of harassment' and expressing its conviction 'that the treatment of the Baha'is is motivated by religious intolerance and a desire to eliminate the Baha'is Faith from the land of its birth'. This comes close to an allegation of genocide. The resolution went on to draw the attention of the Commission on Human Rights to the 'perilous situation faced by the Baha'i Community of Iran'.

The Human Rights Committee under the Covenant on Civil and Political Rights decided at its meeting in Bonn on 26 October 1981 (after its proceedings had been interrupted by a group of Iranian students) to request the government of Iran to submit its overdue report on the protection of civil and political rights of Iranians. The Iranian Ambassador to Bonn declared that his government had every intention of fulfilling its obligation but was not in a position to finish work on the report due to the state of war. Nevertheless, the Chairman of the meeting, Mr. Mavrommatis, asked for a report or at least an interim report without further delay.

It is hoped that the United Nations' Hu-

13) Iran Press Service, 10 June 1981.

14) *Le Monde*, 9 November 1981.

man Rights Commission and other organisations will do all in their power to bring pressure upon the government of Iran to observe its obligations under international law

by instituting a system of fair trials under the rule of law, with full respect for defence rights, rights of appeal and the other rights specified in the International Covenant.

## *Malaysia*

### *Amendments to the Societies Act and to the Constitution*

Malaysia is one of the few countries in South East Asia with an elected government under a democratic constitution. Unlike most other countries in the region, where participation in political life tends to be limited under one or another form of authoritarian government, Malaysia has retained the structures of a Parliamentary democracy supported by an active and effective "informal sector". Nevertheless, recent events give cause for concern and have even led some to fear that democratic freedoms in the country may be restricted.

These concern in particular amendments to the Societies Act and changes in the constitution which are seen by some to pose a potential threat to these democratic freedoms, especially freedom of speech and association. The changes to the Societies Act may result in restrictions on political dissent and the alterations to the constitution mean that the country could be ruled by decree indefinitely after the declaration of an emergency. The amendments, which were passed through parliament precipitately are causing widespread disquiet among lawyers, non-governmental organisations and professional people including some members of the government parties. It is

relevant to examine these two amendments in the light of opinions voiced against them.

#### *Amendments to the Societies Act*

Already in 1975 the *Universities and Colleges Act* restricted student activities in the country's campuses. In 1979 regulations were drawn up to forbid university lecturers from participating in politics. Further, in 1980, Parliament passed amendments to the *Trade Union Ordinance*, placing numerous restrictions on the activities of trade union organisations and giving much stronger powers to the Trade Union Registrar.

Recent amendments to the existing *Societies Act* 1966 give the government sweeping powers through the Registrar of Societies to control the activities of the 14,000 societies registered in Malaysia.

- The changes make it illegal for any society to comment on political affairs or anything to do with government unless it has been registered as a political society.
- The Registrar is given power to de-regis-

ter any organisation, remove its office-bearers, amend its rules and include certain provisions in its constitution.

- Moreover, organisations may no longer challenge the Registrar's decisions in court. They can only appeal to the Home Affairs Minister, whose decision will be final.
- Organisations are no longer allowed to affiliate themselves with foreign organisations, nor to receive funds from any foreign source, except with the Registrar's permission. These amendments will now be considered in more detail.

### ***Definition of "Political Societies"***

The amended Act introduces a new category of societies called "political societies" and reclassifies organisations into three categories: political parties, political societies, and friendship societies. While political parties are easily recognisable by their objective of participating in elections, the distinction between political societies and friendship societies is much more vague. In the amended Act, a political society is defined as one which, inter alia,

"by any of its objects or rules, regardless whether such object or rule is its principal object or rule, or constitutes merely an object or rule which is ancillary to its principal object or objects or to its principal rule or rules, makes provision for the society -

- (i) to secure in any manner any degree of control of, or to influence in any manner, the government of Malaysia, or the administration of any local authority; or
- (ii) to influence in any manner the poli-

cies or activities or any of the policies or activities, or the functioning, management, or operation, of the Government of Malaysia, or of the Government of any State, or of any local authority, or of any statutory authority, or of any department or agency of any such Government or authority; or

- (iii) to assist in any manner any other society or societies to secure such control or exercise such influence as is referred to in subparagraphs (i) and (ii);"<sup>1</sup>

or which "supports or expresses in any manner support or sympathy for... opposition to any political party, or... any candidate... for election..." (to a control or local authority).

Societies falling within these definitions will have to register as political societies with the Registrar of Societies. Where the Registrar is satisfied that a society not so registered is a political society, he shall denote it as a political society. He may also de-register a society which

"shows disregard for the Federal and State Constitutions and their provisions pertaining to the Constitutional Monarchy, Islam, other religions, the national language, the position of the Malays and of the natives of Sabah and Sarawak, the legitimate interests of other communities and any other matter as provided under the Constitution" (SS 2A(1)); or

being a 'political society' retains non-citizens as members (SS 18F(4)) or receives funds from overseas (SS 18G(3)).

The Registrar will be able to instruct non-political societies to remove any com-

1) Societies Act, amended Section 2.

mittee member or adviser.

This classification of organisations has given rise to much controversy. If it is based on the belief that "politics should be left to politicians" and the assumption that political activities can be divorced from other activities within a parliamentary democracy, it manifests little understanding of a democratic system.

An appeal submitted by representatives of 48 societies and organisations to the Home Affairs Minister on 6 April 1981, noted that:

"— All individuals and groups have the right to discuss affairs of state. They have a right to influence policies and activities of governments. A voter in an election is in a sense expressing his opinion on state policies...

- A literary body which endeavours to engage society in discussions on language and culture is exerting some influence over government thinking on these issues. A religious movement which tries to examine society from an ethical perspective is at the same time evaluating government policies...
- A consumer group which advocates better goods and services for the consumer is involved directly with government policies and activities. An environment society which seeks to create a more livable environment cannot help but try to make an impact upon government activities...
- Obviously then influencing government is theoretically everyone's responsibility."

Thousands of organisations in the country, ranging from recreation clubs, youth groups and consumer associations to religious or professional bodies, educational institutions and chambers of commerce, are placed in a dilemma, not knowing

whether they should register as political societies, simply because they hope to obtain support from the government or to influence governments in a manner favourable to their activities. If they do so, they run the risk of finding themselves subject at the least to bureaucratic interference and harassment. If they decide not to, they may find that the Registrar regards them as 'political' in which case they may be 'de-registered'! Whichever course they choose, the Act is likely to have a dampening effect upon their activities.

### *Denial of Access to the Courts*

The Amendments emphasise that the Registrar's actions cannot be challenged in any court. In the past, because this was not explicit a society could always turn to the courts. The denial of this implied opportunity means that a fundamental liberty, the right to association, is subject to the decision of a member of the executive and is not reviewable by the Courts. This is a drastic inroad into the Rule of Law.

### *Restrictions on Links with Foreign Organisations*

The 1966 Societies Act contains a provision (in section 13A) giving the Registrar power to prohibit any society from having any "foreign affiliation" or "connection". The amended Act goes further than this. It gives the Registrar sweeping powers to prohibit a society.

'From having directly or indirectly, any affiliation, connection, communication or other dealings whatsoever, with any society, organisation or other body whatsoever outside the Federation, or with any authority, governmental or otherwise, in any country, territory or place outside the Federation...'

Any organisation in Malaysia having foreign affiliations or connections must apply to the Registrar to commence or to continue doing so. A society will not be allowed to receive funds or donations from foreign individuals or organisations except with the permission of the Registrar.

The vagueness of various terms in this Section such as "connection", "communication" and "other dealings" gives rise to *uncertainty*. For instance, does "communication" include receiving a publication or letter from abroad?

No criteria are laid down for the exercise of these sweeping powers. The Registrar does not have to give reasons for his decision. There is a right to make representations before the decision is reached by the Registrar, but no right to be heard when appealing to the Minister against the decision. These are extraordinary powers to give to an Official or a Minister.

It is, therefore, not surprising that many varied societies representing a broad spectrum of Malaysian life are united in their opposition to the amendment. A newly formed Societies Act Coordinating Committee (SACC) representing 115 societies has called on the country's registered societies to defy the Registrar and ignore his call to come forward and be politically screened. The SACC stand will put great pressure on the Registrar's office, which already has to go through thousands of society minutes and accounts and vet them as a matter of routine. Studying the constitutions of all the societies afresh, identifying their aims and comparing these with their actual activities without cooperation from the societies in question could take several years. On the other hand, selecting a few societies for exemplary punishment would meet with extensive litigation as members of the Malaysian Bar Association are ready to challenge the validity of the amendment as being in violation of the Malaysian consti-

tution. To date no society has come forward to challenge the constitutionality of the Act as none of them has yet been asked to show cause why they should not be denoted as a political society. This may indicate that the government is having second thoughts about enforcements of the amendments. Members of the Bar Association have said that they will not charge legal fees and will help any society which falls foul of the Registrar.

SACC has also resolved to have the amendment repealed. The haste with which the Bill was presented to the House of Representatives of the Parliament and the lack of public debate on its contents, despite the *recommendations of various interest groups* for a review of the Bill, are matters for concern. The Bill was first given to Members of Parliament (in English) on 30 March 1981. It was debated on 8 April and passed on 9 April after a brief five hours debate. No account seems to have been taken of the views expressed by various interest groups.

### *Constitutional Amendment Concerning Emergency Powers*

Another amendment which has raised a great deal of concern is the amendment to Article 150 of the Malaysian Constitution. Before its amendment Article 150 provided that the Yang di-Pertuan Agong (the King) was "empowered to issue a proclamation of emergency where he is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, whether by war or external aggression or internal disturbance. If a proclamation of emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are

sitting, promulgate ordinances having the force of law if satisfied that immediate action is required. Such a proclamation of emergency and any ordinance so promulgated in the absence of Parliament shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such proclamation or ordinance".

Under the amendment to Article 150, the Yang di-Pertuan Agong is now given the power to issue proclamations of emergency and to promulgate ordinances without having to refer them to Parliament except when both Houses of the Parliament are sitting concurrently. This amended provision may be invoked when the King "is satisfied that a grave emergency exists in the country whereby the security or the economic life or public order in the Federation or any part thereof is threatened". Unlike the former provision in Article 150 where an emergency can only be declared after an actual threat has occurred, the amended provision makes it possible for an emergency to be proclaimed "before the actual occurrence of the event which threatens the security, or the economic life or public order" if the King is satisfied "that there is imminent danger of the occurrence of such event".

As Malaysia is a constitutional monarchy, this power is exercisable by the King "in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet"<sup>2</sup>. Thus the government can exercise this power through advising the King, who would then make the necessary proclamation of emergency or ordinances.

It has been said that these amendments

would give the government unlimited powers to act without any restraints. The King's decision will not be appealable in any Court. This is provided by Article 150, Clause 8(a) of the Amended Constitution which states that the King's decision to proclaim an emergency or to promulgate ordinances under it "shall be final and conclusive and shall not be challenged or called to question in any court on any ground". Accordingly, the Cabinet through its advice to the King, may confer upon itself sweeping powers free from the checks and balances that are built into any democratic constitution.

These amendments met with strong criticism and objection from the legal profession in Malaysia. The Bar Council, which had previously been critical of the abuse of power in Malaysia<sup>3</sup>, viewed the amendments as another erosion of fundamental liberties in the country. It noted in its memorandum to the government that "the government has shown itself to be quite unconcerned with the constitutional rights of individuals over the last few years by resorting to legislation at the slightest excuse". It added that "often laws have been promulgated for no purpose other than to validate the unconstitutional acts of the government and its servants with total disregard for public opinion". In support of this it quoted numerous examples of laws passed in the last few years in order to validate the government's stand on different issues.

### *Conclusions*

It is unfortunate that the Government of Malaysia did not take note of the opi-

2) Article 40(1) of the Constitution.

3) See for example ICJ Review No. 22, June 1979, pp. 6-10, concerning administrative detention and prison conditions.

nions and views voiced by various organisations when these two series of amendments first appeared as parliamentary bills. In view of the widespread criticisms levied against them, the Government would perhaps have done better to refer them to an indepen-

dent body for further review. Instead, they were enacted rapidly with the minimum opportunity for debate. It is to be hoped that the government will still be willing to review these two amendments and to introduce changes to them.

## *Mozambique*

### *Mozambique's Re-education Camps*

After achieving independence on 25 June 1975, the government of Mozambique arrested large numbers of people, some pursuant to campaigns against 'prostitution and banditry', others on 'security' grounds.

When the prisons were full, detainees were held in camps, called re-education centres. There are two categories of camps, one for common law criminals and delinquents (marginals), the other for political suspects. Camps were situated in Gorongosa in Sofala Province, at Ruara and Chaimité in Cabo Delgado Province, and in Niassa and Nampula Provinces. The political centres are under control of the SNASP (popular national security services of Mozambique).

It is alleged that some 15,000 people were detained in the first month. Almost all were detained without charge or trial, if only because there were neither the trained lawyers nor the judges to conduct such trials. Many of those detained are reported to have since disappeared and few have been released. Reports have been received of brutal treatment in the re-education centres. Allegations include prolonged detention in underground cells, inadequate and rotten food, torture, frequent beatings

and floggings, and even executions by shooting or by being buried alive.

After President Samora Machel visited the Niassa camp in mid-1979, he announced that he had ordered the release of 600 people, some of them alleged common law criminals and others former Frelimo dissidents.

More recently he again visited re-education centres in Niassa and Cabo Delgado Provinces. A remarkable editorial in the "Domingo" journal provides confirmation of the conditions in the camps by describing President Machel's indignation at the prolonged detention of people who were sent to these camps and simply left to rot and die, as well as allegations of brutality, torture and abuse of power. It is reported that the President has ordered the closing down of some of the centres, and a permanent system of inspection of those which remain.

A translation of the editorial is as follows:

#### *"On Re-Education*

The newspapers have at last reported what everybody already knew. This is that



our re-education centres, besides interning delinquents, also unjustly interned many people who were detained without a warrant of arrest, without evidence of any offence and without anyone knowing the reason for their arrest...

In his recent tour of a number of centres in Niassa and Cabo Delgado provinces, the President of the Republic detected serious violations of the spirit that should govern the re-education process.

He saw men who were detained for years for ridiculous offences, without being given any opportunity to defend themselves. Among them there were old men, sick men and cripples, as if re-education were a medieval quarantine to which a person was sent and where he remained forgotten to rot for the rest of his life.

Samora Machel was indignant. He ordered old men, the sick and the weak to be returned to their families, as well as those he found to be in an irregular situation.

Nonetheless, inertia still prevails. The people being released are those who have been specifically ordered to be released, but others in identical situations continue to be detained for "lack of directives". In the final analysis their continued detention stems from fear that they may end up on the "other side". This, by itself, already reveals the idea people have of re-education, how to re-educate and whom to re-educate.

The absence of any functioning system of supervision left people under re-education in the hands of those in command of the centre, who were generally very ill-prepared for the work of re-education. Instead of reforming, it resulted rather in deforming.

In 1978, Governor Aurelio Manave ordered the detention of the Naisseko (Niasa) re-education centre commandant, who

was accused of brutality and abuse of power.

I was informed by former inmates that the commandant frequently ordered them to be tied with ropes soaked with salt. This form of torture, generally meted out to Jehovah's Witnesses, definitely crippled many people and consolidated the fanaticism of many others.

Very recently, the President of the Republic had to order the arrest of the commandant of the Ruarua re-education camp for investigation. The centre was neither re-educating nor producing, notwithstanding that the land is rich.

The lack of self-sufficiency of the centres, albeit generalised, perpetuated their character of a penal colony, in contradiction to the idea of re-education as originally proposed, which was to reintegrate the delinquent into society by making him participate in the process of socialist production.

In reality, how did re-education work?

In his recent visits, the Head of State ordered the closure of a number of re-education centres and laid down guidelines to start turning the centres without delay into future towns.

The work to be done will be based on work done in terms of ideological reconversion. The difficulties of social reintegration will be directly proportional to the mistakes made during re-education.

In future, it will be imperative to assure permanent supervision of the existing centres without necessitating inspection by the President. We must ensure respect for human dignity, which, after all, constitutes the proposed objective of re-education.

Revolutionary legality as an instrument of class domination ought to be taken seriously."

## Peru

### *The New Constitution and Human Rights*

Early in 1978, following internal and international pressure, the Military Government which had seized power in Peru by a "coup d'état" in October 1968, engaged in a process of return to democracy. In June 1978 a Constituent Assembly was elected by popular vote to prepare a new Constitution. All political parties were able to take part in this election. As planned, the Constituent Assembly was dissolved after completing its work and the main provisions of the new Constitution entered in force on 28 July 1980. Only those parts concerning the organisation of elections entered into force at an earlier date. On 18 May 1980 Mr. Fernando Belaúnde Terry was elected President and a Congress was also elected.

#### *The Rights Guaranteed Under the Constitution*

The new Constitution contains a long and exhaustive list of human rights, making it particularly wide-reaching in comparison with the general run of Constitutions. Two reasons can explain this. After 10 years of military government the population was tired of military rule and was anxious to enshrine as many human rights in the Constitution as possible. The second reason is an external one, resulting from the fact that during the period in which the deliberations of the Constituent Assembly took place, human rights issues were particularly focussed and debated in international circles, and the military government was most anxious to improve its international image.

Chapter I of Part I contains the list of individual rights: to life, to equality before the law, to freedom of conscience, freedom of information, opinion, expression and publication, the right to personal and family privacy, freedom of intellectual, artistic and scientific creation, the inviolability of private property, of private papers and communications, free choice of residence, freedom of movement within the national territory and to and from the country, prohibition of exile<sup>1</sup>, freedom of assembly, of association, freedom to aspire to a standard of living adequate to ensure well-being, participation in the political, economic, social and cultural life of the country and personal freedom and security.

As regards to the right to personal freedom and security, the following specific rights are defined *inter alia*: not to be tried for a criminal act or omission which at the time of commission was not considered to be criminal; to be presumed innocent until such time as found guilty by a competent court of law; no arrest except pursuant to a judicial warrant or during the actual commission of an offence; in all cases a person in custody must be brought before a judge within twenty-four hours of arrest (except for cases of "... terrorism, espionage and illegal trafficking in drugs", discussed below); the right of every arrested person to be informed immediately and in writing of the grounds of his arrest; the right of a detained person to communicate with, and to be counselled by a lawyer of his choice as from the time of his being arrested or charged; prohibition against holding prisoners *inco-*

1) During the military rule, more than 80 deportations of Peruvians took place.

*municado* and the duty of the authorities to inform those concerned of the place of detention of a person in custody; nullity of statements obtained through violence; impossibility of being transferred to a jurisdiction not provided for by law and of being judged under procedures other than those duly provided for by law; no extraordinary tribunals or special commissions to be established for this purpose.

The 1980 Constitution provides that civilians shall not be subjected to military jurisdiction (s. 282). During the 10 years of Military Government there was a marked expansion of military justice. Military tribunals progressively extended their competence to offences which were in no way military and in respect of which the accused were civilians. One of the reasons for this was the "ideology of national security", according to which the duty of the armed forces was not only to prepare to defend the country's borders in the event of attack from outside, but also internally to attack the bases of instability and unrest which might arise within the country.

Section 235 of the Constitution provides for the abolition of the death penalty except in cases of high treason when the country is in external war (but not under a state of emergency).

Among the rights of citizens are the set of political rights in Chap. VII of Part I, such as the right to participate in political affairs, to vote and to organise political parties. In addition, there are others relating to social security, health and well-being (Chap. III of Part I), and to education, knowledge and culture (Chap. V of Part I). Among the rights of workers are the right to security of employment (s. 48), the right to establish trade unions without prior authorization (s. 51), the right to collective agreements which have the force of law (s. 54) and the right to strike (s. 55).

The right of insurrection should also be

mentioned. Section 81 states that power emanates from the people. The authorities act as the people's representatives. Section 82 states that nobody shall obey a usurper government or those who assume public functions in violation of the constitution and laws. Their acts are void. The people has the right to insurrection in defence of constitutional order.

If all these rights are applied it will represent a significant innovation in the daily practices of the authorities in respect of civil liberties. Whilst some of the provisions are not new others are very much so. An example is the right to be informed of the grounds of arrest. This would do away with the frequent cases of political and trade union personalities being arrested without having the slightest information as to the charges against them. Previously they were not informed of the charges during the whole time of their detention. They were just kept in "preventive custody" at the behest of the public authorities.

Another significant new feature is the right to be assisted by legal counsel as from the moment of arrest. This constitutional provision is an important tool both for lawyers in the free exercise of their calling and for the protection of those arrested. The difficult situation in previous years of legal advisers of trade unions and political leaders could be singularly improved. The provision prohibiting the concealment of detainees by giving the right of communication is also important.

There is, however, an exception to the rule that persons in custody must be brought before a judge within twenty-four hours. The exception covers terrorists, spies and drug traffickers who, pursuant to section 2, sub-section 20(g), can be kept in preventive custody for up to fifteen days. Given the latitude with which governments sometimes endow the expressions "terrorist" and "spy", there is a danger that the use of

this provision could become a regular practice when dealing with political prisoners.

### *Judicial Remedies for the Protection of These Rights*

The new Constitution provides for four remedies; habeas corpus, amparo, the popular action and the action of unconstitutionality. Habeas corpus proceedings safeguard the citizen against the acts or omissions of any authority, official or persons which violate or threaten individual security. Amparo proceedings gives protection against threats or violations concerning other Constitutional rights. Compared with the 1933 constitution the new provision (s. 295) limits the scope of habeas corpus and amparo. Formerly it could be used to enforce all individual and collective rights, not merely the individual freedoms guaranteed by the Constitution. On the other hand, there is a considerably more flexible requirement with respect to the definition of the person committing the violation. There is now no condition that the impugned agent must be a government official; it is sufficient that the impugned act be a violation of individual freedoms.

The third remedy, the "popular action" enables interested groups to contest rules of a general character, not relating to particular cases, such as general regulations issued by the executive, or issued by regional and local governments and other public law authorities. It can also be used to impugn abuse of office and other offences committed by the judiciary. It covers all the rights recognised by the constitution, with considerable latitude in respect of the identity of the agent.

Finally, the "action of unconstitutionality" (s. 298) enables legislation, including laws, legislative decrees, regional legislation of a general character and municipal bye-

laws to be set aside as unconstitutional, either in whole or in part, when they are in breach of provisions of the Constitution. As in the case of the popular action, the petitioner need not have a personal interest in the outcome of the action. This action is brought before a new body, the Court of Constitutional Safeguards, composed of three members appointed by Congress, three by the Executive and three by the Supreme Court of Justice.

When a decision declares a law unconstitutional in whole or in part it must be communicated to Congress, which is then required to pass a law repealing the unconstitutional legislation. If after 45 days no such repeal has taken place, the unconstitutional legislation will be deemed to have been repealed *ipso jure*. The range of persons empowered to introduce this kind of action is limited. Petitions may be submitted by President of the Republic, the Supreme Court of Justice, the Solicitor-General of the Nation, 60 members of the Chamber of Deputies (of a total of 180), 20 Senators (of a total of 60) or 50,000 citizens, whose signatures are certified by the National Elections Jury.

### *States of Exception*

Like some other Latin American countries, the history of Peru is marked by states of exception which, whether pursuant to general legislation on emergencies or otherwise, have resulted in the suppression of civil rights in different ways and under various forms. The plain fact is that periods of relative observance of constitutionality, which is the guarantee of civil rights, have been regrettably few and far between.

The chapter of the new Constitution covering the states of exception contains a single section, s. 231, providing for two

possible states of exception: the state of emergency and the state of siege. In both cases it is the executive which proclaims the states of exception and then informs Congress or its Standing Committee.

A state of emergency can be proclaimed in cases of "... threats to peace or public order, disasters or serious circumstances affecting the life of the Nation". Its period of validity is for sixty days, thus doubling the time provided for in the 1933 Constitution. The proclamation can be renewed upon expiration as many times as necessary by simple executive order.

The state of emergency has two consequences. First certain constitutional safeguards relating to individual freedom and safety may be suspended, namely the inviolability of private dwellings, freedom of assembly and freedom of movement within the country. Imposition of the sanction of exile is explicitly prohibited. Secondly, it is provided that during a state of emergency "... the Armed Forces shall be responsible for the maintenance of public order when the President so orders" (s. 231(a)). Thus under the new constitutional provision, it would appear that the proclamation of a state of emergency does not automatically entail the transfer of power to the military. This is left to the President of the Republic to decide.

There are very few provisions concerning the state of siege. It may be imposed in time of "... invasion, foreign or civil war or any imminent danger thereof". A state of siege may be proclaimed by the executive but only for a maximum period of 45 days. Approval of Congress is necessary for its renewal.

The Congress plays no part in the declaration of either a state of siege or a state of emergency. It is not even required to approve the declaration *ex post facto*. Moreover its consent is not required for the renewal of a state of emergency, which can,

therefore, be proclaimed and extended indefinitely solely by decision of the Executive. The Congress has, however, some limited control over action taken by the Executive during a state of exception. The Chamber of Deputies has the power to lay charges against the President of the Republic or his Ministers for violation of the Constitution or other serious offences (art. 183). These charges are then considered by the Senate. If the Senate agrees with the charge the President or Minister will be suspended and sent to trial before the courts. The President is not authorised to dissolve the Chamber of Deputies during a state of emergency or siege (art. 229). (He can never dissolve the Senate.)

It is a common feature of many constitutions that a declaration of a state of emergency will lapse after a few days if it has not been approved by the Parliament, which if not in session, must be recalled immediately for the purpose. The history of states of exception, not only in Latin America but in other regions, shows the need for such a provision if human rights are to be adequately protected. It would also be desirable to give the Judiciary an express power to enquire into the situation of detainees under a state of exception, in order to protect their lives and their personal integrity. This could be done by means of a law regulating the functioning of art. 231 of the Constitution.

### *The Political and Economic Situations*

The 1980 Constitution of Peru contains improved protection of human rights. It is clear that the government is making genuine efforts to return to democracy, but the path is not easy. The social and economical situation has deteriorated and there exists serious discontent in the society, particu-

larly among the poor. Trade unions have been actively engaged, including strike action, and the Congress is discussing a new law regulating the right to strike. The opposition has alleged widespread corruption in governmental circles.

In the city of Cuzco, an indigenous region, the police reacted harshly against a demonstration of workers and students protesting against fare increases in public transportation. One of those detained was Antonio Ayerbe, a student who later died in prison. After this serious incident, the Minister of the Interior resigned from his post apparently because he did not approve of the "strong methods" to be applied by the police, as demanded by some leading members of the army and also members of his own political party.

The power to declare an emergency was used for the first time in October 1981. In recent months a political group of Maoist ideology perpetrated a number of bomb attacks in the Ayacucho province. This group,

the so-called Luminous Path (Sendero Luminoso) from the name of a newspaper in Ayacucho, is in fact a group which splintered from the Communist Party in 1970. Its members adopted Maoist positions and did not participate in elections for the Constituent Assembly in 1978. With the appearance of terrorism in Ayacucho the police invested the National University in Huamanga, searching for arms and weapons which they did not find. The University authorities strongly protested against the invasion, at the same time denouncing the terrorists activities of the Luminous Path.

This situation led the government to proclaim a state of emergency in the Ayacucho province at the beginning of October 1981. The Commission of Human Rights of the Chamber of Deputies published a report expressing their concern about the situation and describing some cases of violations of human rights in Ayacucho province following the declaration of the state of emergency.

## *South America*

### *"Openings" in the Military Regimes of the South Cone*

The countries of the 'South Cone' of South America have been seeking to demonstrate that they are moving in the direction of an "opening to democracy", in order to appease both international opinion and the restive internal demands for a return to democratic rule and a greater respect for human rights. Essentially, however, nothing has altered, and the leaders of the movement for change are still in danger

of arrest, imprisonment and, at times, tortured.

#### *ARGENTINA*

In Argentina, the state of siege continues. Some of the prisoners held in administrative detention without trial have been released, the press has been able to publish

more than before, though still far from being a free press, and the 'suspended' political parties have been invited to enter into discussions with the government.

On the other hand, President Viola repeats that no elections will be held during the next few years, and that in 1984 another military president will be nominated by the ruling Junta, this despite his having said in a speech to the Business International Corporation that "the nation has recovered its peace and security".

When the armed forces seized power in 1976, among their declared objects were to create the basis for a democratic system and to end corruption. They have as yet failed on both counts. There is a severe economic crisis, with increasing bankruptcies in industry and financial scandals which have led to a big drop in Central Bank reserves. Annual inflation has risen to 135 %. All these factors are the basis for growing economic and social discontent and protests.

In June 1981, 1,200 automobile workers were arrested following a demonstration protesting against the closure of their factory. In July, 24 union leaders were imprisoned for organising a National Day of Protest about the crisis in the economy. In November, the CGT trade union confederation organised a march, with the implicit support of the Catholic Church, to the Church of San Cayetano, the patron saint of labour, demanding 'Bread, Peace and Work'. It is claimed that 50,000 workers took part in the march and ended chanting slogans against the dictatorship.

Political parties, bar associations and human rights organisations are actively pressing for a return to constitutional rule. They are consequently subject to persecution, threats, physical attacks and arrest. The Nobel Peace Prize winner, Arg. Perez Esquivel, has received threats of assassination and has had bombs thrown at his office.

Another target for attack are the 'Mothers and Grandmothers of May Square', so-called after their demonstration there on behalf of their 'disappeared' sons and daughters and grandchildren. They have recently submitted 74 documented cases of disappeared children to the Working Group on Disappeared Persons of the UN Commission on Human Rights.

Not only has the Argentine government never given any explanation of the disappearances, which are now believed to number over 15,000 since 1975, but they enacted a law in 1979 (Law 22068) whereby either the State or a member of a disappeared person's family can ask for a declaration of the death of a missing person 90 days after an official demand for information on the person's whereabouts. This law, which infuriated the wives and parents of the disappeared, has already fallen into disuse.

Reports by many non-governmental organisations charging that the disappearances were the work of the security forces, or of paramilitary organisations in collusion with the security forces, were dismissed as Marxist propaganda. However, when a committee of the inter-governmental Inter-American Commission on Human Rights came to the same conclusion at the end of 1979, the military Junta could no longer dismiss the accusations. It is clear that they gave instructions accordingly, with the result that the annual disappearances which were numbered in thousands up to the end of 1979, fell in 1980 to some 60 cases and still fewer in 1981. Moreover, following the international machinery established in the United Nations for reporting disappearances, some of those who have since disappeared have reappeared some days later. This is gratifying evidence of the effectiveness of international action.

Recognition of the armed forces' responsibility for some at least of the disap-

pearances came in a remarkable form in a lecture given by General Nicolaidis on the power structure in Argentina. He said that the armed forces had participated in March 1980 in the arrest of 10-14 persons who are still missing and that he had personally interrogated one of them. By way of justification he commented, "We must remember that there is a Communist Marxist international movement, which has been in existence since 500 years before Christ and still influences the world". It is difficult to attribute to anything other than anti-semitism this remark by one of those who are supposedly preparing the country for a return to democracy.

The Ministry of Interior recently stated that they still held 980 people under administrative detention without charge or trial. Some of them have been held since the state of siege was established in 1974. They are denied their constitutional right to elect to go into exile instead of remaining in detention (*derecho de opción*).

Military Tribunals, known as Councils of War, established by Law 21461 in December 1976 are still in operation. They have jurisdiction to try civilians for political offences, and have given sentences of up to 25 years imprisonment. Under the ordinary law confessions are admissible only when made in the course of the preliminary judicial investigation (*summario*). Now the law has been changed to make admissible statements made to the police and other security authorities during administrative detention, when the suspect has no defence lawyer and is held incommunicado. This operates almost as an invitation to use torture.

Two of the suspended political parties recently called for discussions with other parties to draw up an 'emergency plan'. They have been joined by three other parties and a 'Political Junta' composed of the five leaders of these parties, though not

legally recognised, has been able to meet. They are in the process of seeking agreement on proposals for ending the emergency and returning to democracy. The military Junta has made clear that a condition for any change is that no inquiries are made into the activities of the armed forces under the military regime.

Even the limited relaxation which has taken place has given rise to fears of an internal coup by hard-liners in the army to put a stop to the growing expressions of protest. With 2 million Argentinians in exile, the majority for economic reasons, the rest as political refugees, the discontent is likely to grow. As was stated in the report of the Colloquium in Madrid in October 1981 on the *Challenge of Human Rights in Latin America*, organised by the Council of Europe, the continuation of underdevelopment and of deep social inequalities is at the root of the violations of human rights, and the solution can only be found in a pluralist democratic system.

## URUGUAY

ICJ Review No. 24 (June 1980) reviewed the human rights situation in Uruguay. Since then the regime has attempted to achieve some legal validity by submitting to a popular referendum a mockery of a 'democratic' Constitution drawn up without any process of consultation. It was decisively rejected by the people. Anticipating this result, military leaders announced beforehand that rejection of their draft constitution would be interpreted as acceptance of the existing regime.

A new departure in the violation of human rights is the retrial of political prisoners for acts for which they had already been tried and sentenced, and the trial of prisoners for subversive offences alleged to have been committed in prison. The aim is



to prevent the release of prisoners whom neither torture nor years of imprisonment in harsh condition has broken or shaken in their political beliefs, and who are accordingly considered dangerous.

The device for re-trying convicted prisoners is a 1975 decree which retroactively transferred cases in the civilian jurisdiction to the military jurisdiction. As there is an elaborate and prolonged procedure for reviewing trials in the civilian jurisdiction, this enabled the military courts to re-try prisoners who had already served many years of a sentence given by a civilian court. Among the accusations of subversive activities while serving sentences in prison is an incredible charge of preparing an invasion of the country from abroad in order to secure the release of the political prisoners.

Another development relates to associations of members of the families of political prisoners, meeting together to provide the prisoners with material and moral assistance and with legal aid, which have been prohibited.

Formerly the members were arrested for short periods, and subjected to threats and occasionally a beating up. Now the members of such associations are tried and condemned for 'assisting a subversive association'.

The state of siege remains in force, as does Institutional Act No. 4, which banned nearly 10,000 citizens from all political activity for 15 years.

However, the government has invited certain political parties to discussions, but as the rights of assembly, association and political activity are still prohibited, it is the government which chooses their spokesmen.

The reasons for this limited 'opening' are to be found in the need for Uruguay to improve its international image and break out of its isolation.

## CHILE

In 1975 an organisation representing all trade union tendencies in Chile, known as Coordinadora Nacional Sindical (CNS) was formed. In November 1980 it organised a 3-day consultation of 600 delegates from 267 organisations, most of them legally recognised, at Punte de Tralca in the Province of Santiago.

The meeting recognised that the CNS, although not legally recognised, was the "main leader of the Chilean trade union movement" and unanimously mandated it to draw up a document with their demands to present to President Pinochet.

A summary of the conclusions of the consultation was published, signed by the textile workers' leader Manuel Bustos and the mine workers' leader Alamiro Guzman. Both were prosecuted under Decree Law 2347 of 20 October 1978 for 'opposing public order and state security' by 'arrogating to themselves representation of sectors of workers without having the required legal personality'. They were each sentenced to imprisonment on 17 June 1981, but were released on parole.

On 18 June 1981, in accordance with the Punta de Tralca decision, a National Petition demanding certain minimum rights, signed by 500 trade union organisations, representing 800,000 workers, was sent to President Pinochet, after the Minister of Labour and Social Security had refused to grant an interview to the CNS National Executive. The demands put forward related to the legislation on contracts of employment, freedom of association, collective bargaining, wages, social security and housing.

Proceedings were launched immediately through the Minister of the Interior against the 11 leaders of the CNS. One who was abroad was prohibited from re-entering the country. The other 10 were arrested. All

except Manuel Bustos and Alamiro Guzman were released on bail. The accused are charged with the same offence under Decree Law 2347, and with political proselytism, activism, and violation of Article 8 of the new Pinochet Constitution which states that all organisations considered as being against the interests of national security are classed as totalitarian and terrorist organisations. (Is this how terrorists are born in the so-called 'authoritarian but not totalitarian' societies?)

In response to this, a group of over 25 prominent persons, including the Christian Democrat former President, Eduardo Frei, was formed, who rejected the action of the government and expressed their solidarity with the prisoners and their intention to defend freedom of association. Four of them, prominent lawyers who had offered their services to defend the accused, including Jaime Castillo, Chairman of the Chilean Commission for Human Rights and Minister of Justice in the Frei Government, were expelled from the country. As these were the only ones to be expelled, the conclusion is irresistible that their expulsion was due to their being the defence lawyers of the accused. The rest of the group were publicly threatened by the Minister of Labour 'not to take any action of solidarity with the prisoners if they do not want to suffer the same fate as the lawyers who were banished'.

It remains to be seen what view the Chilean courts will take of these prosecutions against trade union leaders for exercising their right of petition supposedly granted under the Chilean Constitution. It is hard to be expected that they will be acquitted.

As to the exiled lawyers, it should be added that there is no form of appeal against an executive order for expulsion from the country. The only requirement under Article 24 of the transitory provi-

sions of the 1980 Constitution is that a "state of danger of disruption of internal peace" must have been proclaimed beforehand, in addition to the state of siege in force since 1973. General Pinochet took the precaution of making this proclamation on 11 March 1981, when he began his new 8 year term as President. In his inaugural address he said that all political activity would continue to be prohibited and that terrorism would continue to be combatted.

The position of Chilean exiles wishing to return is very uncertain. On 10 March 1980 the Supreme Court confirmed the decree forbidding Andres Zaldivar, President of the Christian Democrat Party of Chile, to enter the country. Those with a passport marked with the letter "L" (limited) must inquire at a Chilean consulate to learn whether they will be given permission to return. A survey of requests made to one of the European Chilean consulates showed that two replies were received to 50 requests. Both were in the negative. Persons without an "L" on their passports must run the risk of going to Chile and finding out at the frontier whether their entry will be permitted. Those who do manage to return have to face considerable economic difficulties as well as harassment from the security services. In some cases, this has led them to leave the country again.

## PARAGUAY

The general state of repression has not changed from that described in ICJ Review No. 22 (June 1979). Nor have any statements been made concerning an "opening" towards democracy.

The state of siege, in force since 1954, has been continued.

Political bans continue and the only political parties to be active are those that have received the necessary authorisation

from the regime.

Political prisoners remain few in numbers. There are believed to be only 11 still in prison.

There is a growing sense of prosperity in the capital and south-east part of the country, linked with the benefits of the im-

mense hydro-electric plants under construction which will export electricity to Brazil. Paraguay's growth rate is now the highest in Latin America. As yet the benefits have not been felt by the mainly Indian (*indigenos*) urban and rural poor.

# COMMENTARIES

## *Implementation of the International Covenant on Economic, Social and Cultural Rights: ECOSOC Working Group*

The International Covenant on Economic, Social and Cultural Rights entered into force on January 3, 1976. It has so far been ratified or acceded to by 69 States. The Covenant entrusts the Economic and Social Council of the United Nations (the Council) with the responsibilities of monitoring the implementation by States Parties of its provisions and of ensuring progress made in the rights recognized therein.<sup>1</sup>

The principle function assigned to the Council by the Covenant is the examination of the reports States Parties are required to submit periodically (in accordance with procedures set out in articles 16–18 of the Covenant) on the measures adopted and the progress made towards the realization of the rights set forth in the Covenant. The Covenant suggests, but does not require, that the reports also discuss the difficulties that States have encountered in achieving these rights.

The Council may also take action with regard to States reports in any of three forms. It may, under Article 19, refer the report submitted by States Parties or by specialized agencies of the UN to the UN Commission on Human Rights for study

and for general recommendation or information. Under Article 21, it may submit reports with recommendations of a general nature to the General Assembly. And under Article 22, it may bring to the attention of other UN organs and specialized agencies matters arising out of the reports which might assist those bodies in deciding on the advisability of measures likely to contribute to the effective implementation of the Covenant.

In contrast both to the International Covenant on Civil and Political Rights and to the Convention on the elimination of All Forms of Racial Discrimination, the Covenant on Economic, Social and Cultural Rights contains no provisions which allow for the filing either of inter-state or of individual communications alleging failures by States Parties to give effect to the Covenant. So far, the Council has concentrated on developing effective procedures for the consideration of State reports. Its progress in this regard has been slow and it has encountered considerable difficulties in this task. It has taken no action yet under Articles 19, 21 and 22.

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1) Several proposals were advanced during the drafting of implementation procedures for the Covenant at the 21st session of the General Assembly in 1966, including the formation of a committee of experts organized along the lines of the Human Rights Committee under the Covenant on Civil and Political Rights and the Committee on the Elimination of Racial Discrimination. The existing formula was adopted on the basis that the requisite expertise for the consideration of reports was already available in the Council and specialized agencies, and that the Council was better suited to the task of taking action under articles 19, 21, 22 and 23 of the Covenant (see pp. 4, 5 in Report of the Secretary General, E/1981/6).

## *Development of Procedures for Examination of States Reports*

Upon entry into force of the Covenant in 1976, the Council adopted resolution 1988 (LX) which established procedures for the submission of reports by States Parties to the Covenant and by specialized agencies, and procedures for the consideration of these reports by the Council. The Resolution provides for reports to be submitted in three biennial stages. First stage reports, initially due in 1977, cover Articles 6 to 9 of the Covenant, which focus on employment, trade union and social security rights. Second stage reports, dealing with the right to health, the right to an adequate standard of living, and rights of the family, were initially due in 1979. Third stage reports which focus primarily on educational and cultural rights and were due in 1981. The resolution requests the Secretary-General, in cooperation with the specialized agencies concerned, to draw up general guidelines for the reports to be submitted by States Parties and by specialized agencies.

Resolution 1988 (LX) also calls for the establishment of a sessional working group of the Council to assist it in the consideration of these reports. The group's membership is to be constituted with due regard to equitable geographical distribution. Representatives of specialized agencies concerned can take part in the proceedings of the working group when matters falling within their respective fields of competence are considered.

Accordingly, in 1978, the Council in decision 1978/10, established a framework for the composition and administration of a Sessional Working Group on the Implementation of the Covenant, subject to review in 1981. The Working Group is composed of 15 States members of the Council which are also States Parties to the Cove-

nant, chosen in equal numbers for the five geo-political regions of the UN: i.e. 3 members from African, Asian, East European, Latin American and from West European and other States. Members are appointed by the President of the Council in consultation with the regional groups. Any State Party or UN member State can participate as an observer in the proceedings of the Working Group, as can representatives of concerned specialized agencies. In this same decision, the Council requested the Working Group to prepare for the consideration of the Council, recommendations on its methods of work in connection with reports of States Parties to the Covenant.

During its Spring session of 1978, the Council also decided (1978/9), in order to facilitate the work of the Working Group, to request the Secretary-General to prepare an analytical summary of States reports, and to submit the analytical summary to the Council in connection with its consideration or reports at each stage of the reporting program outlined in resolution 1988 (LX). The Council also decided that the Working Group be provided with summary records of its proceedings.

The Sessional Working Group on the Implementation of the International Covenant on Economic, Social and Cultural Rights met for the first time in 1979. It devoted its first session to the formulation of methods of work, which were subsequently adopted in resolution 1979/43 of the Council. They provide, *inter alia*, that the Working Group meet annually during the first regular session of the Council; that the President of the Council notify the States Parties as early as possible of the opening date and duration of the session of the Working Group; that representatives of the reporting States may be present when their reports are examined by the Group, and that they may make statements on these reports and answer questions put to them

by members of the Group. Furthermore, the resolution entrusts the Working Group with the task of considering reports of the specialized agencies, submitted to the Council in accordance with article 18 of the Covenant and the programme established under resolution 1988 (LX), on the progress made in achieving the observance of the provisions of the Covenant falling within their scope of activities. The resolution, in addition, provides that the Working Group may submit to the Council proposals concerning the recommendations of a general nature referred to in article 21 of the Covenant. It may also make suggestions for the consideration of the Council with reference to articles 19, 22 and 23. The decision calls on the Working Group at each session to consider the status of submission of reports under the Covenant and to make appropriate recommendations to the effect that the Secretary-General should send reminders to delinquent States Parties.

At the conclusion of each session the Working Group is required to submit to the Council a report on its work, and it is asked to try to work on the basis of consensus.

### *The Sessional Working Group, 1980-1981*

The Working Group began its consideration of reports at its 1980 session and recently held its second substantive session in April 1981. It has so far considered 26 first stage reports and 21 second stage reports, and devoted considerable time to the discussion of its procedures. It has hardly made an encouraging start. The examination of reports has been cursory, superficial, and politicized. It has neither established standards for evaluating reports nor reached any conclusions regarding its examination of reports.

The Working Group's own reports to the Council have been procedural, giving no indication as to how States Parties are complying with the provisions of the Covenant. They have merely provided a listing of States reports considered. This has been discouraging for some States who have put considerable effort into fulfilling their reporting obligations under the Covenant. Italy, for instance, noted during the most recent session of the Council (May 8, 1981) that the preparation of its report on economic rights, just completed, had taken almost a year of intensive work and that the prospect of seeing this report mentioned in next year's working group report only by its document number was hardly encouraging for the preparation of its report on social rights.

The development of its working procedures and their application have been hampered by political considerations. This has been particularly evident in the Group's disputes over procedures for participation by specialized agencies. Despite the strong cooperative role provided for specialized agencies with respect to the examination of States reports in the Covenant, and its specific elaboration in Council resolutions 1988 (LX) and 1979/43, there have been attempts within the Group to impede the participation of specialized agencies. The Group has so far made no recommendations to the Council regarding articles 19, 21, 22 or 23 of the Covenant.

Numerous difficulties have hindered the Group in its work. These have been the subject of much discussion both formally and informally, within the Working Group itself and within the Council in its review of the composition, organization and administrative arrangements called for initially in its resolution 1978/10.

The difficulties encountered by the Working Group are related in large part to its composition and membership and to the

timing and duration of its meetings. Present scheduling, which provides for only one session of a few weeks during the Spring session of the Council each year, has prevented the Working Group from thoroughly examining the reports submitted under the Covenant. Members of the Working Group generally have other meetings of the Council to attend concurrently, and this has often led to irregular attendance at meetings of the Working Group and to inadequate preparations by members. Two to three weeks a year has been insufficient time in which to conduct more than a superficial review of the reports. At both its 1980 and 1981 sessions, the Working Group examined a total of over 20 reports each time at a rate of 2-3 reports a day. Moreover, this schedule has not allowed enough time for the Working Group to draft adequate reports on its work for consideration by the Council.

In keeping with the changing membership of the Council, members are selected for one year terms. The result has been a general lack of continuity and consistency in the Group's work particularly in the development of procedures for evaluating reports.

Neither the Covenant nor relevant Council resolutions specifically require that reports be examined by experts in matters dealt with under the Covenant. Most participants have been drawn from mission staffs with a political or diplomatic rather than a technical expertise. This lack of expertise results in a level of questioning often below the level of the reports themselves.

### *Review of the Composition, Organization and Administrative Arrangements of the Working Group*

Preliminary discussions concerning the 1981 review of the Working Group, called

for in Council resolution 1978/19, were held both formally and informally during the 1980 sessions of the Working Group and the Council. The review which began formally during the Council's organizational session for 1981, was continued in the Council's Spring session and has been extended for another year.

The review has centered on the efficacy of the Working Group in its present form and on the necessity for restructuring it. An increasing number of States, mostly States parties to the Covenant from Eastern and Western Europe, have submitted their views on the subject, and the Council has recently decided on some improvements. But no consensus has yet emerged on the central question, which is whether there is need for reform or whether existing mechanisms should be maintained. The Council agreed in its most recent session that further time was needed for a thorough examination of the question.

There are strong divisions on the question of reform, primarily between European and Western States. Relatively few developing countries have formally presented their views on the subject. Many States (mostly Western) feel that the present procedures do not enable the Council to discharge its responsibilities under the Covenant, and are calling for a substantial revision of the Working Group's arrangements as set forth in Council resolutions 1978/10 and 1979/43. A number of these including Italy, France and Cyprus are calling for a step-by-step approach to reform. Other States, primarily East European, are generally satisfied with the Group under its present framework as established in resolution 1978/10.

There is a growing body of opinion within the Council concerning the problems encountered by the Working Group with recommendations for improving its procedures. In accordance with Council

resolution 1980/24, the Secretary-General has also made recommendations. An increasing number of States parties, mostly Western, have expressed interest in raising the stature of the Working Group closer to that of the Human Rights Committee under the International Covenant on Civil and Political Rights. In this regard frequent reference has been made throughout the review to resolution 32/130 in which the General Assembly accords equal importance to the two international human rights Covenants. A number of carefully considered proposals for reform have been put forward to this end.

At its first regular session in 1981, the Council decided that the title of the Working Group be changed to a "Sessional Working Group (*of Governmental Experts*) on the Implementation of the International Covenant on Economic, Social and Cultural Rights" (emphasis added), and that the Group hold annual meetings of three weeks beginning one week *before* the first regular session of the Council. The Council also agreed to some refinements in the Working Group's methods of work: that a review of the status of the submission of reports by States parties to the Covenant be annexed to the report of the Working Group at each session along with a list of States parties to the Covenant; that the understanding reached on the role and participation of the specialized agencies by the 1980 Group after much dispute be formalized;<sup>2</sup> and that the preparation of analytical summaries be suspended. These changes had been suggested to the Council in the 1981 report of the Working Group in the form of a draft decision (see E/1981/64). The Coun-

cil adopted the decision without a vote on May 8, 1981, along with the decision to continue its review at its first regular session of 1982 (E/1981/L.38). Many States regarded these changes as a first step toward increased effectiveness, but felt that in themselves they were not adequate for real improvement.

A more detailed account of the review and recommendations for change will now be given.

The Working Group during its 1980 session discussed some of the difficulties it had encountered in 1979 and 1980. It included in its report to the Council (E/1980/60) a number of proposals for improvement which it had also considered albeit inconclusively. The Group recommended to the Council that these proposals be taken into account in the Council's review. They suggested

- that the Working Group meet pre-sessionally, for a period of 3 weeks annually before the first regular session of the Council;
- that in view of the difficulties encountered every year in connection with the appointment of the members as a result of annual changes in the membership of the Council, that membership be appointed instead from a list of candidates nominated by States parties which are members of the Council and possessing expertise; and
- that these members be appointed for terms of 2-3 years.

The efficacy of the Group and its impending review were the main subjects of a

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2) The understanding reads: "The representatives of the specialized agencies concerned would make general statements on matters relating to their field of competence at the end of the discussion by the Working Group of the report of each State Party to the Covenant, and States Parties presenting reports to the Group would be free to respond to, or take into account, the general comments made by the specialized agencies." (See E/1981/64)



brief discussion by the Council of the report of the 1980 Group at the Council's first regular session of 1980. During the discussion, limited to statements by nine States<sup>3</sup>, dissatisfaction with the Group's procedures was strongly indicated and the need for reform expressed by a few. Delegations from FRG and the UK advanced specific recommendations for change.

Noting that the Group had "encountered certain difficulties in discharging its responsibilities under the present arrangements," the Council, in accordance with resolution 1978/10, adopted resolution 1980/24 calling for a review at its organizational session for 1981 of the composition, organization and administrative arrangements of the Working Group; and requesting the Secretary-General to assist the Council in its review by soliciting the views of members of the Council and all States Parties to the Covenant on future arrangements for the Group, and to submit a report together with his own comments, to the Council at its organizational session. This resolution was co-sponsored by Canada, Cyprus, Ecuador, Finland, FRG, Jamaica, Japan, Libya, Senegal, Spain, Sweden and the UK.

At the suggestion of the President of the Council (Mr. Mavrommatis of Cyprus) at the Spring 1980 session of the Council, informal meetings on the subject were held during the Council's second regular session in summer 1980 with a view to facilitating the proceedings at the Council's forthcoming organizational session. However, these were inconclusive.

Only 17 States (all except Thailand being Parties to the Covenant)<sup>4</sup>, primarily East European and Western, submitted their views on the future composition, organiza-

tion and administrative arrangements of the Working Group in response to the Council's request. These were incorporated in the Secretary-General's Report to the Council together with his own analysis. This report (E/1981/6 of 8 January and add. 1 of 26 January and add. 2 of 2 February 1981) represents the first detailed description and analysis of the Working Group to be circulated generally within the UN.

Replies from Western States and Senegal favoured substantial revisions of composition, membership and scheduling of meetings and presented detailed recommendations in this regard. East European States felt that the present arrangements were satisfactory. With regard to composition and membership of the Working Group, many replies called for an expert body and a more consistent and permanent machinery. Replies from Austria, FRG, Finland, Italy, Senegal and the UK supported the establishment by the Council, under its own auspices, of a group of experts to examine reports. The number of members and the question of their geographical distribution could be decided upon by the Council. The Secretary-General also stressed the importance of a more constant machinery, referring as a possible solution to the suggestion made by the Working Group (E/1980/60) that the Council might appoint membership for a period of 2-3 years from a list of candidates possessing expertise, to be nominated by States Parties to the Covenant.

With regard to the timing and duration of meetings, the main concern expressed in replies was to allow more time for consideration of reports and to limit conflicts of schedule. Replies from all States supported extending the duration of meetings to three

3) FRG, UK, Finland, USSR, Chile, France, Libya, Argentina & Brazil.

4) Austria, Bulgaria, Byelorussian SSR, Canada, Finland, France, GDR, FRG, Hungary, Netherlands, Panama, Senegal, Thailand, Ukrainian SSR, USSR, UK.

or more weeks annually. Several replies favoured the option also put forth by the Group in E/1980/60, that meetings be scheduled before the first regular session of the Council. The Secretary-General indicated that such a pre-session arrangement would be difficult to schedule because of the number of other committees already meeting at that time. He indicated however that scheduling conflicts would be avoided if the Group were changed into a group of especially appointed experts or if the Group were to meet as an inter-sessional body, e.g., in May, with its report being considered at the second regular session of the Council.

Some replies commented on the Group's methods of work. In the Secretary-General's opinion, the methods of work adopted by the Council in resolution 1979/43 provide an adequate framework for thorough consideration of reports provided that the difficulties relating to the composition, membership, training and duration of its meetings be resolved.

Several recommendations made called for intensifying the cooperation by the Working Group with the specialized agencies. The Secretary-General submitted excellent comments clarifying the role and functions of the specialized agencies under the Covenant and Council resolution 1988 (LX) and 1979/43, a subject which had been highly contentious and confused during the Group's 1980 session. The Secretary-General pointed out that though Council resolution 1979/43 entrusts the Working Group with the task of considering the reports of the specialized agencies, the resolution does not indicate whether this consideration should be distinct from or made in conjunction with the consideration of States reports. In the opinion of the Secretary-General, greater benefit is to be

derived from the expertise of specialized agencies by referring to their reports in the course of the individual examination of States reports as was done in the Group's 1980 session, rather than by considering them separately. In this way repetition is avoided and the representatives of the States Parties concerned can comment on matters relating to their country arising out of the reports of specialized agencies. The Secretary-General stressed the importance of this given the Covenant's intention (Article 18) that agency reports indicate the "progress made in achieving the observance" of the Covenant, and include "particulars of decisions and recommendations on such implementation adopted by their competent organs."

At its organizational session for 1981, the Council debated the question of the future composition, organization and administrative arrangements of the Working Group in a number of closed informal meetings. No agreements were reached. The Council decided to keep the matter under future review at its 1981 Spring session (resolution E/1981/102).

Though not specifically instructed by the Council to do so, the Working Group during its 1981 session included the review as an item in its agenda and devoted a number of closed informal meetings to it. The Group was strongly divided on the question. It reached a consensus on a few recommendations to the Council for changes in name, scheduling and work methods, which the Council later adopted,<sup>5</sup> but reached no agreement on the question of structural reform.

The first in-depth, open debate by the Council on the question of whether the Sessional Working Group in its present form was effectively monitoring the implementation of the Covenant took place during the

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5) These changes are described above.

Council's first regular session of 1981, lasting for three meetings, on May 6 and May 8 (a.m. and p.m.). Twenty-one States took part<sup>6</sup>, all but one (Brazil) being States Parties to the Covenant, and over half of them from the western group. The ILO presented a statement as well.

An increasing number of States, mostly western, were in favour of reform. East European States felt no need for restructuring. No agreement was reached on the subject. Most States were not satisfied with the outcome of the review so far and supported the proposal submitted by the Netherlands at the outset of the discussion, that the review be continued for another year. The Netherlands delegation introduced its proposal on the basis that the draft decision advanced by the Working Group in its report to the Council (E/1981/64)<sup>7</sup> contained interesting suggestions but did not constitute any real review; and that the Council itself should engage in a thorough review of its monitoring methods. East European States plus a few others in particular Ecuador and India (who were members of the 1981 Group), favoured concluding the review on the basis of the consensus achieved on the subject by the 1981 Working Group (E/1981/64), and objected to a "re-opening of the debate" as proposed by the Netherlands.

The report of the 1981 Working Group which as in 1980 was largely procedural, elicited much dissatisfaction in the Council. The nature and role of these reports was debated for the first time. With the exception of East European States, most States felt that reports should evaluate how each State Party is implementing provisions of the Covenant in order to enable the Council to fulfil its monitoring responsibilities.

Some felt that reports should describe the results of the Group's examination of States reports in a manner similar to the reports of the Human Rights Committee. Denmark pointed out that it was difficult for States which were not members of the Working Group to evaluate States Parties' performance under the Covenant since the report did not indicate this. The Netherlands remarked that as only 15 members (out of 54) of the Council were members of the Group, it was impossible for the Council adequately to discharge its monitoring functions. Its task was further handicapped by the lack of publicity given to the Group's work; the absence of press releases; the long delays in issuing summary records (only 2 summary records of the Working Group's meetings had been issued by the time the Council met to discuss the Group); the limited circulation of documents related to the work of the Group; and the limited seating in the Group's meeting room.

Many States presented to the Council carefully thought out proposals and recommendations for improving the composition, organization and administrative arrangements of the Group. Some (Canada, UK, FRG, France and Italy) reiterated views which they had previously expressed in the Secretary-General's Report (E/1981/6). Most States, however, were presenting their recommendations formally for the first time. Their views were often similar to those contained in the Secretary-General's report.

Most recommendations called for changing the Group into a body of experts. Opinions were divided fairly evenly as to whether or not the experts should represent their governments or serve in their individ-

6) Mexico, Netherlands, Canada, Ecuador, France, U.K., Japan, Norway, FRG, Byelorussia, Italy, Brazil, Bulgaria, GDR, Cyprus, New Zealand, India, USSR, Denmark, Spain, Australia.

7) See (p. 9, paragraph 1).

ual capacities. Several States favoured the establishment of a Group of experts organized along the lines of the Human Rights Committee. In general it was felt that reports deserved to be examined with the same seriousness and expertise that went into their preparation. Consideration was given to the complications posed by the different areas of expertise covered by the Covenant. In this regard, Cyprus suggested that there might be three kinds of experts, with separate ones for economic, social and cultural rights. A number of States called for stronger cooperation with the specialized agencies.

The issues of timing of meetings and their duration were often addressed. Many States called for a schedule which would involve fewer conflicts for participants and which would allow for a more thorough examination of States reports and the preparation of detailed reports to the Council. The possibilities of inter-sessional and pre-sessional meetings were discussed. A number of views favoured longer terms of membership on the Group in order to simplify the annual process of defining the Group's composition and to ensure that the Group accumulate experience in considering reports. Many States favoured extending the appointments of members to terms of 2-3 years. Several States (e.g. France, Italy, the Netherlands) supported the view that there should be a more equitable geographical distribution of the Group. Italy suggested that this could be realized as soon as the Covenant was ratified by half the members of the U.N. Recommendations addressed a variety of other subjects such as increasing publicity for the Working Group.

### *Status of Submission of States Reports*

Many States parties reports under all three stages are overdue. Although the

Council has authorized the Working Group to recommend that reminders be sent to States whose reports are overdue, the Working Group has yet to submit such recommendations.

Neither the Working Group nor the Council have analyzed the problem of overdue reports. The most recent report formally available on the status of submission of reports by States Parties to the Covenant is contained in E/1981/12 of 12 February, 1981, but it deals only with the status of second stage submissions. This document states that as of 1 February, 1981, reports under the second stage had been received from only 22 out of 60 States Parties whose second stage reports were due in 1979. There exists no recent indication of the status of submission of first or third stage reports.

The Working Group raised the problem of overdue reports for the first time in its 1981 session. It recommended in its report to the Council that the Council in its current session address an appeal to the States Parties that have not submitted their reports to do so as soon as possible. As already stated, the Council adopted in May 1981 the Working Group's proposal that an indication of the status of submission of reports be annexed to the report of the Working Group at each session.

### *The 1980 Session of the Working Group*

The 1980 Working Group, under the chairmanship of its member from Hungary, reviewed 24 first stage States reports, dealing with employment, trade union and social security rights. As the Latin American countries were unable to agree on the submission of a third candidate, the 1980 Working Group only had 14 members: Libya, Senegal and Tanzania; India, Iraq,

Japan; Hungary, Romania, and the Soviet Union; Barbados and Ecuador; and Finland, the Federal Republic of Germany and Spain.

The States reports<sup>8</sup> considered by the Working Group at this session were uneven in quality, some being very lengthy and informative and others only a few pages long and containing little or no empirical data. The Secretary-General, pursuant to the Council's request (resolution 1988 (LX)) had worked with the ILO and other specialized agencies to draft guidelines as to the form and content of the reports, but reporting States frequently ignored the suggested formats.

The guidelines, which were transmitted to States Parties in May 1979 were published as an Annex to a Note by the Secretary-General of 4 December 1979 (E/1980/6). They provide in particular detailed guidelines on articles 10 (protection of the family, mothers and children), 11 (right to an adequate standard of living), 12 (right to physical and mental health) and suggest detailed information on measures taken to give effect to these rights as well as information on the relevant laws, regulations, collective agreements or other arrangements.

The Working Group evolved a four-step procedure for its discussion of States reports. First, the group hears introductory statements from a representative of the government whose report is under consideration. Members of the Working Group then present comments and questions to the State representative. At the end of the Working Group's discussion of each report, representatives of the specialized agencies are permitted to make general statements

on matters relating to their fields of competence, following which the State representative replies to the Working Group's questions.

Like the quality of the reports themselves, the expertise of the representatives who introduced their country's reports before the 1980 Working Group varied considerably. Several reporting States sent their permanent UN representative or officials from the State's foreign ministry to appear before the Working Group. Few States sent experts on social or economic affairs. Moreover, in contrast to the general practice in UN bodies, several Working Group members acted also as their government's representative for the purposes of introducing and discussing their State's report.

The Working Group's discussions of the States reports were generally brief and superficial. Although members occasionally posed questions concerning such matters as unemployment rates and average work hours, the group focused its attention primarily on the legislation and government policies of the reporting State and generally avoided attempting to assess the reality behind a State's legal provisions. One exception involved the report of Chile. Members expressed disappointment that the Chilean document contained little or no information concerning trade union rights, sex discrimination, and social security, and criticized the report on the grounds that it did not reflect the real situation in that country. Members referred, in particular, to reports from other UN bodies expressing concern over continuing human rights violations in Chile. The Working Group concluded its discussion by informally request-

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8) The reports were those of Australia, Bulgaria, Byelorussian SSR, Chile, Colombia, Cyprus, Denmark, Ecuador, the Federal Republic of Germany, Finland, the German Democratic Republic, Hungary, Jamaica, Mongolia, Norway, the Philippines, Poland, Romania, Spain, Sweden, Tunisia, Ukrainian SSR, USSR and the United Kingdom.

ing that the government of Chile provide additional information in its next report relating to the rights that were to have been covered in the first-stage report.

Observers for the ILO and UNESCO attended the Working Group's sessions both in 1979 and in 1980, but the ILO was the only specialized agency to have submitted reports to the Working Group under the first-stage of the Council's reporting program.

Disputes over the use to be made of the specialized agencies reports and over the participation of their representatives in the group's work divided the Working Group during its meetings in 1980.

As regards the specialized agency reports, the West German member suggested that they be considered in conjunction with the reports from the States Parties. The Soviet member, however, opposed this suggestion, arguing that the group should postpone consideration of the ILO's reports until after it had examined the reports submitted by States Parties. Although the Working Group failed to arrive at a formal decision on the matter and did not examine the ILO reports as such, they were referred to in the course of the group's examination of individual State reports — sometimes by the representative of the reporting government and generally by the ILO representative. In addition, the West German member frequently cited the ILO reports in posing his own questions to government representatives.

The ILO reports offer a valuable illustration of the potential contribution which special agencies can make to implementation of the Covenant. The reports were prepared by the ILO's Committee of Experts on the Application of Conventions and Recommendations, which is composed of independent experts in legal and labor affairs. The Committee's members drew upon the information contained in the first-stage

State reports under the Covenant as well as upon information contained in government reports on the application of ILO conventions and recommendations. The Committee's reports provide a uniform evaluation of the progress made in individual States and discreetly draw attention to problems of observance with respect to the rights set forth in Articles 6 to 9 of the Covenant.

A more troubling dispute — and one more sharply contested — centred on the efforts of some members to prevent the ILO representative from participating in the group's discussion of States reports. Both under the agreement between the UN and the ILO and under the applicable rules of procedure of the Council ILO representatives are granted the right to participate without vote in the group's deliberations. In spite of these provisions, however, and in spite of the Council's express invitation to specialized agency representatives to participate in the meetings, East European members took the position that agency representatives should not be allowed to participate in the group's discussions. The Soviet delegation, in particular, expressed concern that statements by agency representatives might slow down the proceedings. In opposition to the East European position, the West German member insisted that agency representatives had a right to take an active part in the group's deliberations and should therefore be permitted to speak at any time.

The East European position clearly lacked the support of a majority of the members, but the group ultimately arrived at an informal understanding that agency representatives would be permitted to make general statements, but not to pose questions to representatives of reporting States, following the group's discussion of each State report.

The 1980 Working Group did not reach any conclusions from its examination of

reports, either of a general nature or relating to the situation in individual countries. Although this was due in part to lack of time, an equally important factor was the group's failure to establish standards for the evaluation of reports. Early in its 1980 session, several members had urged the group to formulate criteria, but East European members objected, arguing that the group should first gain experience in reviewing reports and only then consider the question of what criteria to apply. No consensus was achieved on the issue and the subject of criteria was dropped from the discussions.

### *1981 Session of the Working Group*

In accordance with Council decision E/1981/102 taken at its organizational session of 1981, the 1981 Working Group met for three weeks from 14 April to 1 May (compared with only two weeks for its last two sessions). The 1981 Working Group consisted of 15 members, appointed as before for a term of one year by the President of the Council. Members were from Libya,<sup>9</sup> Senegal,<sup>9</sup> Zaire; Jordan,<sup>9</sup> Iraq,<sup>9</sup> India; USSR,<sup>9</sup> Bulgaria, GDR; Ecuador,<sup>9</sup> Barbados,<sup>9</sup> Nicaragua; Spain,<sup>9</sup> FRG<sup>9</sup> and Norway.

All States members appear to have assigned one to two representatives to the Working Group for the duration of the session. Though some States appointed high ranking officials or experts to participate in the Group, by and large the level of expertise of the Group was not high, despite a resolution adopted at the Council's Organizational Session in February 1981 urging States members "to include in their delegations, experts in matters dealt with in the

Covenant" (E/1981/102). Four specialized agencies were represented: FAO, ILO, UNESCO, and WHO.

Under the chairmanship of its member from Ecuador, the 1981 Working Group considered a total of 23 reports (compared with 24 in 1980). It examined the first stage reports of Czechoslovakia and Madagascar dealing with employment, trade union and social security rights. It then began its consideration of second stage reports on rights to health, an adequate standard of living and family rights. 21 of these reports were considered from Czechoslovakia, Syria, Romania, Tanzania, Cyprus, Chile, Austria, German Democratic Republic, Mongolia, Sweden, Federal Republic of Germany, Finland, Poland, Senegal, Iraq, Denmark, Norway, USSR, Byelorussia SSR, United Kingdom, Australia.

In addition to discussing reports, the Working Group held a number of informal meetings to review its own future composition, organization and administrative arrangements. Out of its discussion came a few recommendations and proposals which it submitted together with a brief account of its session in its report to the Council on April 30, 1981 (E/1981/64).

There was a marked improvement in the quality of reports and in the presentation of reports and answers to questions by representatives, who were generally of high calibre. The Working Group, however, again failed in its primary function which is to assist the Council in evaluating the States reports. No progress was made in improving the questioning or in developing standards for evaluating States reports. Its report to the Council contained nothing substantive on the examination of States reports. With the exception once again of Chile, it merely mentioned which reports it

9) These 9 States were also members of the 1980 Working Group. However, only 5 of these States delegated the same representative.

had considered. In general, the Working Group was hampered by time constraints, as well as by its lack of expertise.

The consideration of reports was conducted along the lines developed during the 1980 session. The reports were in general comprehensive and were praised by the Working Group. Reports dealt mostly with constitutional and legislative provisions relating to the rights in the Covenant. Government representatives introducing their States' reports often supplemented their reports with statistical data (e.g., numbers of health centers, budget allotments for social programs over 5-year periods) to illustrate the application of legislative provisions. These government representatives demonstrated a strong degree of expertise, preparation and willingness to cooperate with the Group.

The Working Group itself showed far less technical competence than did the representatives of the reporting countries. Only about half of the 15 members participated regularly in the questioning. Questions covered all issues contained in articles 10–12 of the Covenant (e.g., maternity leave, child care, special benefits and pensions for families, the elderly, the disabled, sexual discrimination in divorce settlements, housing). In general, questioning, as in 1980, was random and superficial with few attempts to assess the reality behind States' legal provisions and official statistics. There were occasional exceptions as in the case of questions concerning Great Britain's social programs for Northern Ireland. A second exception involved the Norwegian participant's frequent remarks urging countries to supplement their descriptions of legislative provisions with information about how these laws were applied and how social systems worked in practice. He also consistently asked for indications as to factors and difficulties involved in the implementation of legal provisions.

Questions were posed in an ad hoc manner, often without reference to relevant articles of the Covenant. This contrasts sharply with the practice of the Human Rights Committee, which methodically correlates its questions with the relevant articles in the Covenant on Civil and Political Rights.

Political considerations continued to influence the procedures of the Working Group. An example of this was the Group's handling of the presentation of Chile's second stage report. The appropriateness of hearing the Chilean presentation and of examining the Chilean report given international condemnation of Chile's human rights violations was put in question. The Chairman, noting that the inclusion of the Chilean report in the Group's agenda had not been contested, called upon the Group to follow regular procedure. The Chilean representative then introduced his government's report, following which none of the members of the Group asked questions. Members then requested that Chile provide additional information concerning articles 10–12 in its next second stage report. The Group made reference to this request in its report to the Council. Again, as in 1980, this was the only exception to the Group's review of States reports.

### *Specialized Agencies*

Reports of the FAO, WHO and the ILO concerning portions of articles 10–12 relevant to their mandate, were presented to the Working Group at this session. The reports of the FAO and WHO describe the agencies' own programs and resolutions pertaining to articles 11 and 12 respectively. The FAO's report was much more comprehensive in this regard than that of the WHO. In contrast to the report of the ILO, the FAO and WHO reports did not evaluate



the implementation of relevant provisions of the Covenant by individual countries. It appears that neither of these agencies possesses the machinery for supervising and collecting information regarding countries' observance of these provisions, as does the ILO.

Representatives of the FAO and WHO introduced their reports with general comments describing their contents. Both agencies expressed their willingness to provide additional information.

Once again the Working Group did not specifically examine reports by specialized agencies.

As in 1980, rather than present its report all at once, the ILO presented relevant portions of the report in conjunction with the Group's examination of individual States reports. At the end of the Working Group's questioning of each State report, the representative of the ILO presented his agency's statements evaluating those laws and practices of that country which fell within the ILO's field of competence. In

contrast to the first stage of the reporting programme in which all matters fell within the competence of the ILO, the ILO was only concerned with a few questions in articles 10-12 such as maternity protection and the protection of employed children and young persons. As in 1980, the contributions of the ILO were of a high level being expert and consistent. With the exception of East European States (as in 1980) many officials presenting their States' reports acknowledged or specifically addressed the remarks of the ILO in their replies.

The representative of the Soviet Union contested the nature of the ILO's comments thereby challenging agreements made and practices evolved in the 1980 session regarding the participation of specialized agencies and the ILO in particular. The criticisms made by the Soviet Union (regarding the specificity of the ILO's remarks) were not accepted by the presiding Chairman of the Group (see E/1981/WG1/SR 2, pp. 2, 3, 7).

## *UN Sub-Commission on Discrimination and Minorities*

The 34th Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities was held at the Palais des Nations in Geneva, from August 17 to September 11, 1981.

The session began with a debate on further developments in fields with which the Sub-Commission has been concerned. One of the issues discussed in this connection was the role and competence of the Sub-Commission, introduced by Mr. Khalifa (Egypt). This discussion was prompted both by the strong criticisms made during the 37th session of the Commission on Human Rights against the growing practice of the Sub-Commission in addressing itself directly to the Secretary-General, governments and international bodies and organisations (see ICJ Review No. 26, June 1981, p. 48), and by the Commission resolution 17 (XXXVII) urging the Sub-Commission in doing its work to keep its subsidiary status in mind and not to exceed the bounds of its mandate.

In introducing the discussion, Mr. Khalifa suggested to his colleagues that the value of their work as experts on human rights would be better realised if their status were changed to that of a Committee of Experts reporting directly to ECOSOC. In his view this is necessary as the Sub-Commission's recommendations have been consistently disregarded over the years by the Commission, owing to the excessive politicisation of the latter's proceedings. Moreover, he thought that after 34 years of experience the Sub-Commission had 'come of age' and should become autonomous from the Commission as, for example, had the Committee on Crime Prevention and Control. This was originally set up as a Special Commit-

tee, but later became first a standing committee under the Commission for Social Development and subsequently an independent committee directly under ECOSOC like the Commission for Social Development and the Commission on the Status of Women.

Supporting Mr. Khalifa, Mr. Jimeta of Nigeria argued that if nothing else, a direct attachment of the Sub-Commission to ECOSOC would bring its work to the attention of a body that is more representative than the Commission.

Opposing Mr. Khalifa's stand, Mr. Sofinsky of the USSR pointed out that if autonomy from the Commission were desired for the Sub-Commission because of the former's political nature, then there is a problem as ECOSOC itself is a political body. Mr. Joinet, alternate for Mme Questiaux (France), reminded members that the ECOSOC would have dissolved the Sub-Commission but for the intervention of the General Assembly. In view of this experience he thought it could not be presumed that the Sub-Commission's work would have a more favourable reception there than it is receiving in the Commission.

Other experts, while regretting the political nature of the Commission thought that it was precisely because of that characteristic that a subsidiary body of experts was set up to have non-political deliberations on human rights issues and present their findings, conclusions and recommendations to the Commission in the hope of infusing greater balance and objectivity into the latter's work.

At the end of this debate, the Sub-Commission decided by an over two-thirds majority to introduce a new agenda item en-

titled "Review of the status and activities of the Sub-Commission and its relationship with the Commission on Human Rights and other United Nations bodies". The purpose of this new item is to enable the Sub-Commission to study the status of other comparable expert bodies set up within the UN system in order to maximise its efficiency and productivity.

### *Rights of Indigenous Populations*

The Sub-Commission's request to be allowed to establish a Working Group on Indigenous Populations offers a possibility to raise the question of discrimination against these populations to a higher level of concern within the UN system. The idea for such a working group was mooted by the Director of the Division of Human Rights in his remarks at the opening of the session. He observed that indigenous populations were amongst the most vulnerable groups in the world and that the international community, which had been seized of the problem for some time, should move from the studying stage to that of action, because the plight of indigenous peoples is now a question of their very survival. He urged that a regular working group on the human rights of indigenous peoples would provide an appropriate forum to which they could address themselves and, which could give regular consideration to their problems.

Several members of the Sub-Commission supported the Director's appeal, as did most NGOs who intervened on the item, including Mr. Alejandro Artucio, ICJ Legal Officer for Latin America.

In a resolution adopted by consensus the Sub-Commission asked for authority to establish an annual working group on indigenous populations which would meet for up to five working days before the meeting

of the Sub-Commission. Its functions would include reviewing developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations and evolving standards concerning the rights of these populations taking into account the similarities and differences in the situation and aspirations of indigenous populations throughout the world.

### *Rights of Detainees*

Under this item Madame Questiaux (of France) presented a progress report on her study on the implications for human rights of states of siege and emergency (E/CN.4/Sub.2/490). Mr. Daniel O'Donnell, legal officer of the ICJ, introduced an interim report on a parallel study undertaken by the ICJ (E/CN.4/Sub.2/NGO/93). Madame Questiaux acknowledged the assistance she had received from NGOs, and stated that the ICJ study would be taken into account in the preparation of her final report. Madame Questiaux suggested the following 'guarantees' relating to the restriction of human rights under a state of emergency:

The state of emergency should

- be officially proclaimed;
- be notified to other States Parties to the Covenant on Civil and Political Rights, with reasons adduced and the nature of the measures taken;
- be occasioned by an exceptional threat, endangering the organised life of the community constituting the basis of the State;
- be such that the emergency measures are in proportion to the strict requirements of the situation;
- not involve discrimination solely on grounds of race, colour, sex, language, religion or social origins;

- in no circumstances derogate from the rights referred to in article 4 of the Covenant;
- be compatible with the obligations imposed by international law.

Mr. O'Donnell summarised certain additional safeguards recommended in the ICJ Study as follows:

"The procedure for declaring a state of emergency should be set forth in the constitution. Early approval or ratification by the legislature should be required, and no declaration should be effective for more than 6 months. The circumstances justifying a declaration of emergency should be spelt out, and it is preferable that there be distinct provisions for different types of emergencies such as war, economic crisis or civil unrest.

Five recommendations regarding the judiciary are made: that the civilian judiciary retain jurisdiction to review the legality of individual cases of detention; that it retain jurisdiction over charges of serious abuse of power such as torture or inhuman treatment; that it retain jurisdiction over the trials of civilians charged with security offences; that the right to appeal criminal convictions be retained and that the independence of the judiciary be preserved.

When a state has recourse to administrative detention, as often occurs in states of emergencies, it is recommended that special attention be paid to implementing the Draft Body of Principles for the Protection of All Persons Subject to Any Form of Detention or Imprisonment.

Finally, it is noted that the most serious violations of human rights occur where the institutions which normally act as a check or counter-balance to the power of the executive no longer function. For this reason it is considered essential to retain the legislature and an independent judiciary

during a state of emergency. Further, care should be taken to ensure that the cumulative effect of restrictions on human rights is not such as to threaten the very existence of non-governmental social institutions, such as trade unions, religious institutions and an independent press, or prevent them making the positive contribution which they can make even in times of emergency."

A number of resolutions were adopted under the item on rights of detainees. One resolution appealed to the Commission to extend the mandate of the working group on Involuntary Disappearances and to consider undertaking an information campaign to popularise this group and its working methods in every country. This resolution urged further that the occurrence of events on which information has been requested should be presumed to be confirmed if the government referred to does not supply the relevant information within a reasonable period of time, provided that the veracity of the denunciation is not invalidated by other evidence. A second resolution recommended the abolishment of capital punishment for political offences, and a third requested the Commission to condemn Israel for its treatment of prisoners.

A working group set up by the Sub-Commission was unable to reach agreement upon whether to recommend that the Sub-Commission should request authority for a pre-sessional working group, meeting for 5 days before the Sub-Commission, to study materials relating to detainees, prisoners and disappeared persons, or whether it should merely seek to establish a sessional working group for this purpose. Accordingly no action was taken on this subject.

### *Independence of the Judiciary*

Discussion of this item centred on the

preliminary report of Mr. Singhvi (India) on a study he has been preparing on the "Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers" (E/CN.4/Sub.2/481).

In his report Mr. Singhvi referred to a meeting of experts he had attended which had been convened in Sicily by the International Association of Penal Law (IAPL) and the International Commission of Jurists from 25-29 May 1981. Its purpose was to exchange information and formulate principles which might be of assistance to the Special Rapporteur.

The draft principles which resulted were annexed by Mr. Singhvi to his report (E/CN.4/Sub.2/481, Add.1). It dealt with the definition of the independence of the judiciary; the qualifications, selection and training of judges; the posting, transfer and promotion of judges, the retirement, discipline, removal and immunity of judges; the organisation of the judiciary including working conditions and administrative and financial arrangements; the role of the judge in a rapidly changing society and, the role of the judge in the protection of human rights. The draft principles were published in full in ICJ Newsletter No. 9.

### *The NIEO and the Promotion of Human Rights*

Mr. Raul Ferrero (Peru) presented a progress report on his study on the new international economic order and the protection of human rights. The report described the origins of the existing international economic order; reviewed the legislative basis for the establishment of a new international economic order; attempted to "present the subject in terms of contemporary realities" by stressing the gross inequalities in and consequent instability of north-south relations and the need for a

change in this relationship to be effected by peaceful negotiation instead of by violence; analysed the impact of the existing international economic order on human rights; and examined the relationship that should exist between a new international order and national orders. In this regard the study urged greater emphasis on the need for internal distributive justice within each country so as to ensure that the beneficiaries of the international change will be the peoples themselves. Finally, a section on the right to development stressed that development, the form of which every country should be free to determine, should be directed to the promotion of human dignity and not merely economic and material well-being.

A summary of the interesting debate which followed, in which many conflicting viewpoints were expressed, will be found in the Summary Records (E/CN.4/Sub.2/SR 918-920).

The intervention of the ICJ Secretary-General was reported in the summary record as follows:

"Mr. MacDermot (International Commission of Jurists), referring to the impact of the existing international economic order on human rights, said that as UNDP had stated in a recent study on rural development, most third world poverty was concentrated within rural society and urban poverty could, in a sense, be viewed as derivative of rural poverty. Unfortunately, the development policies which many developing countries were obliged to apply under pressure from the existing international economic order and the donor countries, which were anxious to market their industrial products and agricultural surpluses in third world countries, and transnational corporations, which sought to obtain large profits by establishing in those countries industrial enterprises employing

underpaid manpower, had served to aggravate rural poverty. That increase in poverty, which had been reflected in a decline in food production, was particularly due to the fact that the emphasis of the agricultural policies of numerous developing countries had been too much on cash crops for export, usually with low employment requirements.

For some years, the International Commission of Jurists had directed its work mainly to promoting human rights in the third world, leading to a close study of the relationship between human rights and development and human rights and the new international economic order. It had recently organized a conference on the promotion of human rights and law, in collaboration with a number of development experts. With regard to agrarian reform programmes, the participants in that conference had reached the conclusion that the failure of such programmes had been due not only to obstruction by powerful landowners and bureaucrats but also to the failure to support the transfer of landownership by offering the new owners the education, technology, agricultural credits and marketing services they needed in order to farm their land effectively, and the failure to provide for agricultural pricing policies.

In many cases that situation was due to the fact that, in preparing their development strategies, the third world countries had placed excessive emphasis on industrialization and production for export. In order to be able to produce goods which would be competitive in the international market, they had had to practise a low-wage policy in industry, leading to excessively low pricing of agricultural products. That, together with the use by the larger landowners and by transnational corporations of advanced agricultural machinery to produce for export, had severely reduced employment opportunities in the rural areas. All those

factors explained the massive exodus from the countryside to the cities.

Those developments in the economic situation had had disastrous effects upon the economic and social rights of the rural population. Those who had sought to organize themselves to assert their rights had frequently been subjected to brutal repression.

Those problems were unlikely to be resolved merely by establishing more democratic processes in the election of national parliaments. It was also necessary for the communities concerned to participate in the formulation and implementation of development policies and to be free to organize themselves so as to assert their rights. Making a reality of civil and political rights at all levels was an essential element in a programme of agrarian reform, as it was in other development policies.

Turning to the question of the right to development and the new international economic order, he said that the right to development, both at the international and the national level, was an essential aspect of the new international economic order and must therefore be precisely defined. The International Commission of Jurists and the International Center for Law in Development had submitted a paper on that subject (E/CN.4/AC.34/WP.4) to the Working Group of Governmental Experts which the Commission on Human Rights had requested to define the nature and content of the right to development, and he read out the preliminary observations contained in that document."

### *Human Rights and Scientific and Technological Development (Rights of Mental Patients)*

Under this item the Sub-Commission had before it a preliminary report by Mrs

Erica Daes (Greece) on guidelines and principles for the protection of persons detained on the ground of mental ill-health or suffering from mental disorder (E/CN.4/Sub.2/474), and a draft body of principles for the protection of mental patients (E/CN.4/Sub.2/NGO/85) submitted jointly by the International Association of Penal Law and the ICJ.

The special rapporteur explained that she intended as a result of her study to submit guidelines relating to procedures for determining whether adequate grounds existed for detaining persons on account of mental ill-health, principles for the treatment and protection in general of persons suffering from mental disorder, and guarantees for the protection of the human rights of persons suffering from mental ill-health, in particular of those who are involuntarily confined in hospitals. She said that her final report would be based on answers to a questionnaire sent in March 1980 to governments, specialised institutions, intergovernmental bodies and NGOs, as well as on other sources such as work done on the subject by the Council of Europe and by the ICJ.

The ICJ representative explained to the Sub-Commission that the draft guidelines contained in document E/CN.4/Sub.2/NGO/85 was a revised version of an earlier one (E/CN.4/Sub.2/NGO/81) submitted, by the same organisations last year. It dealt more fully with 'criminal commitments' and reflected the different views of a differently constituted Committee of Experts upon a number of points. He hoped that both documents would contribute to the Sub-Commission's study<sup>1</sup>.

The Special Rapporteur hopes to submit her final report, including the draft guidelines to the next session of the Sub-Commission. A working group to consider the

guidelines is scheduled to be established during that session.

### *Human Rights Violations*

The debate on this item touched on two main issues, one procedural, the other substantive. The first issue concerned the two parallel procedures for the discussion of this item, namely the private and confidential procedure established by ECOSOC resolution 1503 (XLVIII) and the public procedure governed by Commission resolution 8 (XXIII) and ECOSOC resolution 1235 (XLII). Three members expressed the view that the restriction on publicising issues discussed under Resolution 1503 nullifies the effects of efforts directed at checking such human rights violations. Accordingly they suggested a relaxation of the confidentiality of communications under Resolution 1503. It was suggested by one member that at least decisions by the Sub-Commission should not be subjected to the confidentiality rule.

On the substantive issue of the item various statements were made giving extensive information on current violations, such as torture, disappearances, illegal detentions, mock trials of political opponents and dissidents, religious intolerance, suppression of minority groups and indigenous populations, and violations of the right to self-determination. Sixteen Sub-Commission members and 12 NGO representatives gave information relating to 27 countries during the debate, namely Afghanistan, Argentina, Bolivia, Brazil, Chile, Cyprus, Czechoslovakia, El Salvador, Eritrea, Equatorial Guinea, G.D.R., Guatemala, Haiti, Iran, Iraq, Israel, Kampuchea, Morocco, Northern Ireland, Paraguay, Philippines, South Africa, South Korea, Tunisia, Uruguay, USSR, United

1) The text of the draft guidelines is reproduced in ICJ Newsletter No. 10 (July-Sept. 1981).

States and Zaire. The opinion appeared to be generally held that the information on El Salvador and Guatemala revealed the most systematic and institutionalised practices of torture, disappearances and other inhuman and degrading treatments. Dr. Alejandro Artucio, ICJ Legal Officer for Latin America, intervened with information on violations in Argentina, Chile, Equatorial Guinea and Uruguay. (The text of his intervention will be found in ICJ Newsletter No. 10.)

Several resolutions were adopted under this item among which were those on Afghanistan, El Salvador, Iran, Kampuchea. On Afghanistan, the Sub-Commission expressed its deep concern about the increasing outflow of refugees from Afghanistan. It emphasised the urgent need for a political solution of the situation there. The resolution on El Salvador expressed the Sub-Commission's conviction that only respect for Article 25 of the International Covenant on Civil and Political Rights would assure to the Salvadorian people the full exercise of its fundamental rights in establishing a democratically elected government, adding however that the Sub-Commission was convinced that the conditions for holding truly democratic elections in El Salvador did not exist at the present time. In the resolution on Kampuchea, the Sub-Commission, expressed its appreciation to Mr. A. Eide (Norway) for his preliminary report updating the information on the situation on Kampuchea. The Sub-Commission requested the Secretary-General to transmit to the Commission on Human Rights the materials reviewed by Mr. Eide, together with the summary records of the

Sub-Commission's consideration of the matter. The resolution further endorsed the relevant UN resolutions on Kampuchea designed to bring about the withdrawal of foreign troops from that country and to enable its people freely to determine their own form of government without coercion.

The resolution on Iran concerned the specific plight of the Baha'i religious community in that country. The Sub-Commission expressed its conviction that the persecution of Baha'is in Iran was motivated by religious intolerance and a desire to eliminate the Baha'i faith. It said that statements made at the session demonstrated clearly "the systematic persecution of the Baha'i in Iran, including arrests, torture, beatings, executions, murders, kidnappings, disappearances, abductions and many other forms of harassment" and on this basis recommended measures to ensure further review by the UN of what it conceived as the "perilous situation" facing the Baha'i community in Iran.

On Israel the Sub-Commission deplored the refusal of the Israeli authorities to abide by UN resolutions and made a number of recommendations to the Commission. In addition to those contained in previous resolutions the Sub-Commission recommended condemnation of recent Israeli "bombardment of Palestinian refugee camps in the South of Lebanon as well as in the heart of the city of Beirut, which resulted in the loss of hundreds of civilians lives, both Palestinian and Lebanese, in complete disregard of all norms of international law, of human rights and the Geneva Conventions".



# ARTICLES

## *National Legislation Against Investment in South Africa*

by  
Thomas M. Franck\*

On December 16, 1980, by Resolution 35/206, the General Assembly restated the position "that a cessation of all new foreign investments in, and financial loans to, South Africa would constitute an important step in international action for the elimination of apartheid, as such investments and loans abet and encourage the apartheid policies in that country." The resolution also welcomed "the actions of those Governments which have taken legislative and other measures towards that end."

The struggle against apartheid, broadly speaking, is waged on two fronts: the military and the economic. As in the case of the global struggle against UDI in Rhodesia, these two fronts ought to be complementary, the product of a coordinated strategy.

Using this model, we should next note that the "economic front" consists primarily of two sectors: (1) trade termination, and (2) investment disincentives. The focus of this analysis is on the latter. Both the embargoing of trade and discouragement of investment are crucial aspects of the economic strategy against apartheid. However, it has been noted by one of the leading strategists of the campaign against apartheid, Dr. Hans Blix, when he was Minister for Foreign Affairs of Sweden, that restric-

tions on trade "would require a decision by the Security Council to override obligations under the General Agreement on Tariffs and Trade (GATT)." No such problem applies to disinvestment. Bans on investment and loans can be introduced unilaterally by States. And they have never conferred upon the Security Council an exclusive right to decide upon such bans.<sup>1</sup>

A trade embargo, particularly in respect of weapons, petroleum and nuclear resources, is already a key part of the overall strategy. Extending such a ban to the full panoply of trade in goods and services is undoubtedly desirable and even essential. However, Dr. Blix's remark, coming from a proponent of strong action, puts us on notice that it is an objective the track to which is studded with high hurdles. A Security Council resolution mandating economic sanctions is a logical step in enforcing the charter and the law. But it will not be easily obtained. The gravity of the problem is underscored by the recent disclosure that crop failures and other difficulties have recently compelled Kenya, Zambia and Mozambique to import 528,000 tons of corn from South Africa last year and there are reports of at least six other countries of the African region having also been forced to import grain from the Republic.<sup>2</sup>

\* Director of Research, UNITAR. This paper was submitted to a special session of the UN Committee against Apartheid in New York on 27 March 1981.

Disinvestment would seem to be the more easily manageable sector of the economic campaign against apartheid. Industrialized and capital exporting States are under no legal obligation to invest in any particular country by the terms of GATT. Even in the absence of a Security Council resolution, each State is free to enact national legislation. Since capital investment involves large-scale resource transfers which take the form of documented paper transactions moving through established institutions, it should be easier to police, by national enforcement units already existing within established departments of government which routinely monitor national revenue, the banking industry, and capital movements.

Within the investment disincentive sector of the struggle against apartheid, there are two sub-sectors: one has to do with the liquidation of existing investments, the other with the prevention of *new* investments. For obvious reasons, the latter should be the aspect of the struggle most amenable to immediate and effective action by States. It calls for no sacrifice other than of future, contingent profits. The objective is modest, arguably too modest.

It is to this sub-sector of the struggle that UNITAR's research has directed itself. What has been the response of States to the fundamentally moral, legally inescapable and modest call of the United Nations for national action to discourage new investment in the South African economy?

To begin with, it should be acknowledged that the termination of such investment is not necessarily the most critical part of the front in the overall campaign. There is no way to compare it, for example, in terms of relative importance, to armed struggle. In particular, it should be noted that South Africa enjoys a highly sophisticated money market capable of virtually self-sustaining growth, as well as a research and develop-

ment program able to meet many of the Republic's needs for new technology. Nevertheless, the Republic continues assiduously to court new investment and technology transfer from abroad. In this they are abetted by those who turn a blind eye, but even more by those governments which maintain that any disinvestment strategy is less beneficial to the overall campaign against apartheid than one which actively seeks to harness investment as a "Trojan horse" to infiltrate industrial apartheid and to introduce transforming ideas of equal job opportunity, pay parity, collective bargaining. These states, to use Paul Ricoeur's phrase, are at best doing evil with the good urge.

Our research indicates that compliance with the call for prohibiting investment has been minimal. Among the economically powerful, capital-exporting, technologically sophisticated nations of the world, only Japan and Sweden have moved towards full compliance. In the case of Japan, the Government has adopted a policy "of prohibiting direct investment, such as the establishment of local corporations, in South Africa."<sup>3</sup>

The effect of the Japanese ban on investment is considerable. Japanese sources speculate that between \$5 billion and \$10 billion would have been invested in South African mining, agriculture and manufacturing had the ban on direct investment not been in effect.<sup>4</sup> Moreover, the ban on investment has a multiplier effect on trade, keeping Japan's producers out of competition for South African government and public corporation procurements, due to local content preferences in tenders. Nevertheless, Japanese industry is not precluded from large-scale technology transfer by the ban on direct investment. In September, 1980, for example, Sumitomo won a contract to build two formed coal plants for South Africa.<sup>5</sup> Neither has the investment

ban prevented a startling growth in Japanese-South African trade. In 1973, South Africa's two-way trade with Japan accounted for 18.3 % of Japan's total trade with Africa. By 1979, that proportion had grown to nearly 27 %. In 1975, Japan became South Africa's fourth biggest trade partner, having overtaken France. In 1978, South Africa became Japan's biggest trade partner in Africa. Since 1976, South Africa's exports to Japan have increased 84.5 %, while imports were up 33.3 %.<sup>6</sup>

In the case of Sweden, legislation has recently been enacted to stop expansion of Swedish commercial interests in South Africa. This legislation was enacted at the request of the Swedish corporations themselves, echoing an often-repeated sentiment of transnational corporations that, if they are to be asked to operate on the basis of selected public policy concerns – as opposed to purely commercial considerations – they prefer to have the State legislate to mandate those priorities.<sup>7</sup> The principal purpose of the legislation is to “prohibit the establishment of new enterprises in South Africa by Swedish-controlled groups” which had not previously conducted business in South Africa. The law also “imposes an obligation on the management of the Swedish parent company, under penalty of law, to exercise its influence-over [its] subsidiaries so as to prevent them making investments in South Africa.” The legislation also prohibits a Swedish subsidiary in South Africa from making new investments although it allows some flexibility, for example, to permit replacements of worn-out equipment. However, in the view of the government, these exceptions are to be narrowly defined and “there should be no question of expansion of operations.”

While the Swedish law does not require the liquidation of existing investments, it does envisage the freezing of most expansion. According to the government, the

rules “will be applied in a restrictive way in order to induce companies, where possible, to find substitute markets outside South Africa.”<sup>8</sup>

The Japanese and Swedish laws are the only comprehensive legal prohibitions on investment enacted by developed market economy countries. Among developing countries, such comprehensive prohibitions on trade and transfers are not unusual but are of relatively less significance. India and Pakistan, with a potential for substantial foreign investment, prohibit all such investment.<sup>9</sup> Brazil, however, has no prohibition on investment in South Africa. Neither does Argentina.<sup>10</sup>

Among the other developed market economy States, there is little compliance. Denmark, Norway and Finland, like Sweden, adhere to the joint Nordic programme of action against South Africa agreed at the meeting of their Foreign Ministers in Oslo on 9–10 March 1978, which includes as its first item “prohibition or discouragement of new investments in South Africa” and, secondly, “negotiations with Nordic enterprises with a view to restricting their production in South Africa.”<sup>11</sup>

Norway has implemented this undertaking by a government decision on capital export which permits “no further currency licenses in order to prevent Norwegian investments in South Africa.”<sup>12</sup> This administrative policy, however, does not prevent off-shore subsidiaries from circumventing the ban.

Among countries with no disinvestment legislation as of the end of 1980, are: Austria, Belgium, Canada, Denmark, Finland, France, Federal Republic of Germany, Ireland, Italy, The Netherlands and the United States. The Canadian government has promulgated on April 27, 1978, a “Code of Conduct on the Employment Practices of Canadian Companies in South Africa.” The code makes explicit recommendations to

companies concerning ways in which the working conditions of their South African employees can be improved and requires companies to make annual public reports in sufficient detail to permit assessment of their progress in realizing the objectives of the code.<sup>13</sup> There are no penalties, however, for non-compliance let alone provisions for prohibition of investment where significant compliance proves unattainable.

A very similar procedure characterized the "Code of Conduct for Companies with Subsidiaries, Branches or Representation in South Africa" of the European Economic Community. The only sanction is that the "government of the Nine will review annually progress made in implementing this Code" as contained in the reports of the investors. An expert critique of the operation of the Code recently prepared for a U.N. conference baldly concludes that the Canadian and EEC Codes "are of no use in the South African situation..."<sup>14</sup>

Although most developed market economy States have enacted no prohibitions on investment comparable to those of Japan and Sweden, there are some lesser steps, many of them administrative, which have been taken to discourage investors. In the case of the United States, the Overseas Private Investment Corporation, which insures U.S. business investment abroad, is mandated by law to "take into account in the conduct of its programs in a country... all available information about observance of and respect for human rights and fundamental freedoms in such country..."<sup>15</sup> In addition, the Evans amendment to the EXIM Bank Act denies credits, insurance or guarantees for commercial transactions "which would contribute to enabling the Government of the Republic of South Africa to maintain or enforce apartheid" unless the President determines that "significant progress towards the elimination of apartheid has been made..."<sup>16</sup>

Similarly, the Government of the Federal Republic of Germany provides no guarantees to cover capital investment in South Africa, no investment promotion, no establishment credits, no tax incentives under the development aid tax law, and no promotion of joint ventures by the German development company.<sup>17</sup> Nevertheless, West Germany has concluded a double taxation agreement with South Africa and the absence of investment promotion has not prevented a rapid increase of West German investment in, and the provision of loans by private German banks to the crucial sectors of the South African economy.<sup>18</sup> Much of the same may be said of the other countries of Western Europe and North America which rely on control devices other than a disinvestment law accompanied by sanctions and administrative enforcement mechanisms.

All this leads one to conclude that the disinvestment sub-sector of the global struggle against apartheid is in no position to support the other sectors of the common front, much less to launch an offensive. In part, this reflects the continued imbalance in investment opportunities as between South Africa and the rest of the continent. Even the Swedish Minister of Trade, in explaining his country's new disinvestment legislation, concluded by pointing out that, since the purpose of the legislation was to compel companies "to find substitute markets outside South Africa" therefore any "assistance that other countries in Africa and elsewhere may give to facilitate such a reorientation will of course be much appreciated."<sup>19</sup>

Given the bountiful investment opportunities of the South African economy, States interested in speeding disinvestment need to take this request seriously and to seek to develop both carrots and sticks to channel investment away from South Africa and into the economies of other nations,

particularly in the Third World and especially in Africa. On the "carrot" side, this means giving serious consideration to ways in which political stability, economic-social "climate" and the legal framework in the potentially rich investment markets of Africa can attract more mutually-profitable capital and technology. On the "stick" side, as Third World States establish themselves as attractive locations for capital investment, they should begin to use their leverage with transnational corporations, individually and collectively, to reward those which shed their investments in South Africa and penalize those which do not.

The basic responsibilities, however, rest with the capital exporting states. Half measures will not do. "Jaw-bone-ing" corporations is useless. As in Sweden and Japan, corporations themselves know they will do what is socially required only when it is legally required. Members of Parliament of the various market economy nations which have not enacted disinvestment legislation must be made aware of the failure of lesser

efforts to effect disinvestment, as well as the political and moral argument in favor of the strategy of disinvestment. In particular, various inter-parliamentary unions and forums, including the European Parliament, should be used to mobilize Members of Parliament from countries – and from political parties – which favor the legislative approach to disinvestment. Enlightened members should be mobilized to place and keep the issue clearly before their less enlightened or well-informed colleagues.

Disinvestment is not the most important part of the global campaign against apartheid, but neither is it an expendable one. Nothing less than legislation of the Swedish model, or administrative decisions of general application such as that of the Japanese Government (and, to a lesser extent the Government of Norway) can hope to have much effect. And no overall effect can be hoped for, unless disinvestment legislation becomes the rule, rather than as at present the exception, among the principal capital and exporting nations of the world.

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# *Basic Human Rights/Needs: Some Problems of Categorical Translation and Unification*

by  
Reginald Herbold Green\*

*On a cloth untrue,  
With a twisted cue,  
And elliptical billiard balls.*

— Gilbert and Sullivan

*We who are only undefeated  
Because we have gone on trying.*

— T.S. Eliot

## *Semantics or Substance*

To choose to write on basic human rights from the entry point of categories may seem either grimly fatalistic or aridly pedantic. If the reductionist structuralist case is correct, linguistic study will indeed throw light on the realities of the debate but also on its predetermined inability to alter conceptual or external reality. At the opposite extreme if one believes sustained attention to definition is a barrier to (or an excuse for not) getting down to substance, then yet another exercise in categorisation is at best banal and at worst noxious.

However, there is an intermediate position — language influences perceptions of what is being discussed but is largely subject to control by the discussants. If that is so, human rights categories do need critical review. At present they tend to divide various 'types' of rights from each other and rights from needs or duties in ways which often seem ideally designed to create conflict among those who are basically on the same side.

It is quite reasonable that some individuals and groups should have the greatest concern and expertise with the right to freedom of expression and others with the

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right to eat (or, to translate, the need to communicate freely and the need to have food). What is neither reasonable nor necessary is that these differences in personal/institutional expertise and concern become, through existing categorisation, transmuted into divisions preventing coherent, combined action against "principalities and powers" which recognise neither right and perceive their self interest in frustrating each need.

### *Individual, Social and Communal Rights*

It is often suggested that the traditional civil liberties are individual rights and the social and economic rights are communal or social. On examination this division disintegrates.

The right to freedom of expression to go very far requires the right to act in groups to communicate (indeed any communication requires a group of at least two). One outcome – not an unusual one – of the right to communicate and to organise is the claim for autonomy or sovereignty which is exercisable only through rather large social groups.

On the other hand the right to eat is hardly self evidently communal as opposed to individual. Human beings as well as communities of human beings are hungry – human beings (rarely whole communities) starve. Action may well need to be social and communal if the right to eat is to be made effective, but that is just as true for the more traditional civil liberties.

### *Positive or Negative?*

The positive versus negative division is surely a presentational one. Freedom of personal security and dignity can be expres-

sed as freedom from torture, arbitrary arrest, etc. The right to pure water can be expressed as freedom from lack of water or polluted water.

In general the negative formulations are used to attack a particular existing reality. They are more specific and have sharper cutting edges for that purpose. The positive formulations are more often used to set out goals, test programmes, set as a yardstick to measure change. They can be more inclusive and more effective in organising for construction (or reconstruction if they follow more precise negative formulations cased in a struggle to overcome a previous order which made positive construction impossible without prior 'demolition and removal' operations).

### *Costless Versus Costly?*

It is sometimes argued that traditional civil liberties are costless and economic/social rights costly. This is surely a rather startling proposition from the point of view of states – including ones whose leadership is committed to increasing basic human rights.

One cannot convince a dictatorial government that the right to criticise and the right to organise will be costless to it. More critical, a government facing real, externally fomented and backed subversion which does entail high costs and real dangers to the survival of the state will also view the 'costless' line of argument with not wholly unwarranted reserve.

Further to render the right to communicate effective – even by wall newspapers, local print shops, access to radio time and radios – takes real resources. A right to communicate when there are virtually no channels beyond word of mouth is not much more effectual than a right to pure water which in practice amounts to digging



one's own well. Making any basic human right effective has real costs and – with a very few exceptions – real costs to individuals and communities who are beneficiaries of more human rights, not simply those who benefit from restricting them.<sup>1</sup>

### *Sequential or Interacting?*

The argument that traditional civil liberties can be established immediately but that economic and social rights must come over time is a variant of the cost categorisation. Some rights can be, in resource terms, and should be, in moral terms, established immediately. Examples are freedom from torture and freedom from starvation. Not lack of resources but entrenched ignorance, apathy and evil are the barriers to implementing such rights now.

However, each of these is in fact a first step toward a fuller right – to personal security and dignity, to an adequate diet which can only be achieved over time, which both raise severe resource allocation and technical/institutional obstacles to be overcome. In general the progress toward one right both depends on progress toward certain others and makes progress toward other rights easier. For example, pure water and health interlock with each other and with the production side of an adequate diet. That whole cluster require (or at least are strengthened by) progress toward effective rights to participate in decision taking and in self organisation to implement decisions.

Therefore, a sequential view of the road toward basic human rights is at best partial. While what can be achieved now is a contextual question limited by time and place, the general approach is interactive. Destruction of one right usually leads to erosion of others; strengthening of one can lead to greater effectiveness of and opportunities for strengthening others.

### *Basic Human Rights or Needs?*

A peculiarly counterproductive debate has arisen over whether basic human requirements which any decent society has an obligation to supply, any decent human being a duty to cooperate in achieving, any decent state an obligation to respect/promote, should be termed rights or needs. Assuming need is reasonably strictly defined (not as equivalent to desire or wish), a basic human need logically gives rise to a right (need for food/right to an adequate diet) and vice versa (right to freedom of expression/need to participate in decision taking).

The debate seems to have arisen for four reasons:

- a) the basic human needs formulations sprang largely from third world development thinking and practice and were not directly addressed to defining rights.
- b) their standard five categories of needs: to a minimum, socially defined standard of personal consumption; to access to

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1) Further, torture and failure to follow due process may not be unrelated to lack of resources to preserve security and to have prompt trials. The Indian blindings, mutilations and 'undertrial' prison hordes illustrate this. Because people do view security as important it is not surprising that there is some genuine sympathy with the police. Similarly in Tanzania the 1976 deaths under interrogation leading to subsequent trials for murder of senior police and prisons officers came in the context of a wave of 'witchcraft' murders in respect to which no hard evidence could be obtained by proper methods. To maintain the right to freedom from torture and also the normal human being's right to reasonable security from armed robbers and 'witches' does require quite costly police and court structures.

basic communal (public) services; to employment productive enough and fairly remunerated enough to allow purchase of the personal consumption needs; to effective participation in decision taking and execution; to have a social and economic structure at society level capable of meeting the four prior categories is – at first glance – ‘biased’ toward social and economic needs/rights. However, it is quite practicable to articulate all of the traditional civil liberties from it and quite unrealistic not to see its inbuilt normative structure.

- c) the World Employment Conference formulation concentrated on the first three sets of needs (the last two had only passing reference) and the Basic Needs (human dropped) approach in some variants is almost totally technocratic and subject to distortion into ‘Bread and Circuses’, ‘Price and Basketball Courts’ or ‘Black Beans and Football Stadia’.
- d) advocates of traditional civil liberties have sometimes been rather slow to see the need to view economic rights as essential to human beings and also as necessary (parallel) conditions for achieving effective civil liberties.

This set of misperceptions is dangerous. There are differences in visions of how rights interact and of emphasis in the initial steps toward advancing them. But Basic Human Needs and Basic Human Rights advocates are basically on the same side, and their tendency to suspect serious divisions plays into the hands of those who reject that side, whether formulated in terms of rights or of needs. As to the dangers of distortion and misappropriation, these are common to almost all worthwhile formulations or programmes – the flattery vice pays to virtue.

## *Rights and Duties*

If there is a right there is a duty to implement it. For example, if there is a right to fair wages or a just price, there is a duty to pay the one and to charge the other. Why, then, the problem most advocates of rights (including the author) have with formulations which include duties – e.g., the interesting (and hopefully influential) Organisation of African Unity Charter of Human and People’s Rights?

The answer is not hard to find. Duties are usually defined by a state and are very frequently so defined and enforced as to deny basic human rights. However, that does not solve the problem that an effective right (or need) of a human being (whether individually or communally) must impose duties on other human beings, social groups and states to respect and to implement it. For example, the right to freedom from torture imposes a duty on the state not to torture and to take action against torturers (whether in the public or private sectors, at least logically including wife and child beaters and the hired ‘enforcers’ of unjust landlords, employers and lenders).

One approach is to ground the justification for duties squarely on basic human rights, and therefore as duties a state, a social group or an individual owes to other human beings. The duty may be through or enforced by the state, but it is not to the state as a subject with rights other than those pertaining to and flowing from the individual and communal rights of human beings.

A slightly different position can be argued for internationally. If there is a right to ‘just prices’ and/or ‘resource transfers’ by the people of peripheral economies, and a duty on the people of industrial economies to negotiate/provide them, the right and duty must in practice be effected between states. Similarly, fair business prac-

tice, consumer protection, renegotiation of oppressive contracts and disclosure are fairly well established as rights in some industrial capitalist economies. Internationally they are enforceable only if each state has the accepted right to enact such statutes and the duty to cooperate in the enforcement of those of other states. Without this, third world states cannot assert any such rights on behalf of their citizens because in these areas the home governments' normal attitude to their trans-national corporations is 'my citizen, right or wrong, is to be protected', even when the conduct challenged would be patently unlawful and likely to be acted against if practiced at home.

### *Enforceability and Morality*

The concept of a human right or a human need is ultimately founded on a view of human nature and usually on a normative judgment. One can go a surprisingly long way in justifying basic human rights on a pragmatic level, e.g., Milton's *Aeropaigica*, the ILO's *Employment, Growth and Basic Needs*, the *Brandt Report*. To do so may – or may not – gain adherents who do not accept a normative case, or accept it in principle but are worried about its cost in practice. But any such case is founded on an underlying view of human and of social nature, and most – including the three cited – probably flow from their author's convictions about what is right as well as about what 'will work'.

But a normative basis is not, in itself, enough to make a right effective. Enforceability – at least in substantial measure – and enforceability in practice as well as in principle, is necessary for that. Evidently law and laws are – or can be – major instruments of enforcement and should be accessible for such use to individuals and groups as well as to the state. But actual

existing laws are rarely enough. Laws and even the main body of the law may well be integral obstacles to achieving basic human rights (e.g., in the Republic of South Africa), or serious secondary obstacles because they have become fossilised in ways which simply do not correspond with concepts of rights which have widespread individual and state acceptance but no legal *locus standi* (e.g., in some respects, Tanzania).

Therefore, enforceability is a broader topic than human rights law. Use of existing law is one means and law reform another; but extra-legal (social and communal) methods and illegal (including armed violence) are at times necessary.

### *Conflicts and Tradeoffs*

It is unwise to deny that there are ever conflicts among basic human rights at the level of progress toward their attainment in a given setting at a given time. To take that extreme a position is all too often a way to be pushed into defending 'freedom of speech with starvation' or 'freedom from hunger with dictatorship'. That usually is a false set of choices. For example, if there were freedom of expression and organisation in the Philippines, could there have been a breakthrough in food production (and into food exports) by mechanisms which also increased hunger and clinical malnutrition? Denial of a civil liberty and of an economic right are in this case Siamese twins.

But what of a weak but popular state subject to real dangers of subversion and destabilisation which has evidence to show a 60–40 chance that A, B, C are plotting action which, if unchecked, will have high social cost. Does one ignore that 'beyond reasonable doubt' standard in the courts? Detain without trial? Allow the action to proceed further in hopes of getting better

evidence even if, a) the likelihood is that innocent bystanders will be deprived of the right to life and b) the plot may then succeed? There are real abridgements of and risks to basic human rights whichever course is adopted.

Further, not all rights widely seen as basic human rights are so perceived by majorities in all societies. In one African state the proponents of the right to freedom from capital punishment seemed to be: the President, the Attorney General, one judge, two advisers, a handful of clerics. It is easy to assert the majority suffered from 'ignorance' or 'false consciousness' but less easy to argue that the 'right to life' should have been enforced, overriding the right to democratic decision-taking in the hope the law itself would educate the 99% who would have opposed it. Nor is there agreement on all contenders for the status of basic human rights. Abortion, euthanasia, private ownership of the means of production are candidates for the status of basic human rights, which equally sincere and by no means self evidently illogical rights advocates see as basic human wrongs. In addition, certain rights – e.g., the right to privacy – while perhaps universal, take such different forms in varying societies that general formulations seem well nigh impossible.

### *Toward a Holistic, Contextual Approach?*

The purpose of this exploration of cate-

gories has been to contend – and hopefully demonstrate – that the full range of basic human rights rest on similar needs and normative premises, have similar problems of achievement and effectiveness and are not merely compatible but basically part of a unifying self sustaining whole.

The enemy of one right is usually the enemy of all or most, the advocate of one should logically be the advocate of all even if his efforts and abilities may quite reasonably be focussed on the one.

Equally, however, once one leaves the level of faith and proceeds to the level of the works, without which that faith is dead, very real contextual diversities of approach arise.

Different degrees of broadening (or defending and sustaining) rights are necessary and possible.

Different interlocks of rights (e.g., right to organise and right to eat in much of South and Southeast Asia) are of special urgency.

A universal set of norms and goals does not deny the need for varied formulations, still less for varied paths toward them, least of all for different emphases and efforts by different individuals and groups (e.g., for Amnesty and War on Want to duplicate each other's work, as opposed to appreciating the common base and the overlapping concerns, would hardly advance civil liberties or freedom from absolute poverty). In the house of basic human rights/needs, also, there are many mansions.

# *The Legal System of the Israeli Settlements in the West Bank*

by  
Raja Shehadeh\*

## *Introduction*

Much has been written about the legal history of Palestine and the status of the occupied West Bank. Many Israelis and apologists for Israel have attempted to interpret that history so as to justify the Israeli military presence and the military authority's extensive amendments of the laws existing there.

It is not my purpose here to add to that literature. I would, however, like to emphasize from the start that even by the standards set up by the Israeli High Court of Justice and the recent publication of the Israeli section of the ICJ, *The Rule of Law in the Areas Administered by Israel*, the extensive legislation on settlements which is the subject of this study cannot be justified.

An interesting analysis of the legal status of the West Bank was made by Dr. Allan Gerson in his book *Israel, The West Bank and International Law*. The conclusion reached by Dr. Gerson is that the West Bank was under tutelage or in trust to the mandatory for the benefit of the inhabitants of the territory; and even though, as claimed by Israel, Jordan may not have been the legitimate sovereign of the West

Bank before 1967, Israel derived from that fact no proper claim of sovereignty. Such sovereignty remains with the Palestinians. However, although the Palestinians possess sovereignty over the territories, Dr. Gerson argues, they have never effectuated their sovereign power so as to establish governmental structures and laws which Israel must maintain in existence pending Palestinian exercise of sovereignty at the termination of the occupation. Thus, in Gerson's view, Israel "would not be barred from implementing any changes in the existing laws or institutions provided such amendments were in the best interests of the inhabitants." (My emphasis.) I do not agree with Dr. Gerson's analysis. However, even if we accept this analysis, the recent military orders affecting the settlements cannot be justified.

Israel has already established more than 80 civilian settlements in the occupied West Bank of Jordan. These have now been granted their own legal structure which is separate and distinct from that of the other Arab population centres in the region. They also have their own court system. In military order #892, the military commander of the West Bank has proclaimed that "the

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Area commander shall determine the jurisdiction of these courts, the law which they shall apply, their constitution as well as any other necessary matter for the proper administration of these courts" (art. 2b). The settlements have also been given their own defence system.

This article is divided into two parts: in the first a comparison is made between the Jordanian laws as amended that are applicable to the local government units of the Arab populated centres, namely the villages and municipalities, and the military orders and the regulations made by virtue of these orders applicable to the regional and local councils of the Jewish settlements. The settlement court and defence systems are also discussed in detail in this part.

In the second part I discuss, in the light of that part of the orders and regulations passed by the military government of the West Bank which I have been able to obtain, the manner in which settlements are administered, the significance of the policy of having the settlements administered by regional and local councils instead of the other units of local government available under the Jordanian law applicable in the territories, and the significance of the timing of the proclamations of these military orders which came after 13 years of settlement activity had already passed with very few legislative enactments on this subject. I also attempt, in the second part, to put this legislation in historical perspective and to show how the military government in its recent enactments, and in its policy towards the Jewish and Arab population in the West Bank is being guided by the policies of the British government of the mandate which ruled over Palestine before the establishment of the state of Israel.

It is not my intention to discuss in this article the question of the legality of the settlements because this has been dealt with adequately in other places (see for ex-

ample ICJ Review #19, December 1977, p. 27). I do, however, intend to consider from the outset the extent to which the military government legislation concerning Jewish settlements is consistent with the alleged scope and justification for military government legislation, as set out in the recent publication *The Rule of Law in the Areas Administered by Israel* attributed to the Israeli National Section of the International Commission of Jurists.

The anonymous authors of that publication in the chapter on the legislation of the Regional Commander write:

"Under International Law, the Regional Commander is empowered to determine obligatory norms of conduct in matters of security, public order and the general welfare of the local population. The exercise of such authority involves a certain latitude in amending existing local law."

They then go on to quote from the majority decision of the High Court of Justice in the case of the *Christian Society for the Holy Places v. The Minister of Defence*:

"... On inquiring whether some enactment of an occupying power is consonant with article 43 of the Convention, great importance attaches to the question of the legislator's motive. Did he legislate to forward his own interest or out of a desire to serve the well-being of the civilian population, "la vie publique" of which article 43 speaks."

The examples the authors choose to indicate to the reader the "selectivity of the military government in amending local law" do not include the legislation (which was in force at the time of the publication of the booklet) affecting the settlements. This legislation clearly goes beyond the scope

which the learned authors describe and cannot be justified by the arguments they put forward.

Despite the large quantity of these orders and the fact that they clearly exceed even the scope which the authors of the booklet posit and which can neither be justified by the precedents of the Israeli High Court of Justice nor the scholars of International Law whose works they quote, the authors reach the conclusion that:

"the law in force in Judea and Samaria (the West Bank) when Israel first took over the administration thereof, has remained in effect... but, in view of the many social and economic developments occurring in the Region, there was an urgent need to amend existing legislation and adapt it to changing circumstances. In doing so, Israel has acted in a lawful manner in accordance with International Law."

The authors of the publication in question conclude the first paragraph quoted above about the power of the regional commander to amend existing local law, by stating that:

"needless to say, the publication and circulation of all enactments by the regional commander is a condition sine qua non for the exercise of this power."

They refute the accusation made in *The West Bank and the Rule of Law*, that:

"the military orders are not available to the public (and that) some regulations affecting specific groups of people in the society are distributed only to those with whom they deal. Lawyers are not provided with them."

They do this by referring to the bound

volumes of the collected orders which appear long after the orders are issued as an official gazette. In fact these bound volumes do not qualify to be considered as a gazette because, amongst other things, they do not contain all official announcements and notices such as those for example that are made by the office of the Registrar of Companies, they are not made available to the general public and are not published at regular intervals. They go on to say that:

"further, in order to bring the contents of an enactment to the attention of the local residents as soon as possible, every enactment is published individually, in Hebrew and Arabic, in large quantities. It is then *immediately* distributed in the Region free of charge to all those persons and bodies whose names appear on a list..." (My emphasis).

After inquiring from those persons and bodies whose names are mentioned as being on the list, I have learned that some do not get any of the military orders and none get all of them.

But this unavailability of military orders is not only true of those orders that are published in between the dates of the publication of what is referred to as a gazette. Volume 45 of the collected orders which was published on September 24, 1980 includes orders #781 to #805, i.e. it includes order #783 but does not include those regulations on Regional Councils made by virtue thereof. Article 149 of the Basic Regulations passed by virtue of order 892 which is neither published in a bound volume nor has been distributed, states that these regulations affecting settlements shall be published as follows:

- 1) By posting them on the notice board in the offices of the Council (i.e. the Council of the settlement)

2) In the collection of the council's regulations.

Of course the general Arab public has no access to the offices of the settlements' councils, nor to its collection of regulations, which means that this category of legislation will be unavailable to the general Arab public. It also means that whenever the General Commander of the West Bank prefers that a certain order be immune from the scrutiny of the Arab public, he can call it a regulation and declare that it be published in the manner mentioned above.

The author of this article has therefore been unable to see all the orders referred to in this paper. They are not in the last published volume of the collected orders (referred to as the gazette), nor in the possession of the people or bodies listed in the booklet to whom it was claimed that all the military orders are distributed.

I was fortunate to have access to some of the orders affecting the settlements and these were only available in Hebrew (they do not seem to have been translated into Arabic). My request made to the authorities last July and repeated in October to obtain the rest has not been granted.

This limitation in the available sources has meant that some gaps remain in this study, such as in the definition of the regional councils and the relationship between this unit and the smaller unit, the local council.

Within this limitation of primary sources mentioned above, I have endeavored to analyze the legislation applicable to the Jewish settlements in the West Bank and to put it in historic perspective.

### ***Part I: Comparison between Arab Municipalities and Israeli Councils***

Prior to March 25, 1979 the military

orders pertaining to Jewish settlements on the West Bank consisted of a small number of orders declaring the creation of what the orders called "religious councils" for the administration of specific settlements such as order number 561 of 1974 for the administration of Kiryat Arba settlement. This order states that "the settlement shall be administered in accordance with administration principles which the military commander shall declare by internal regulations." However, these regulations to my knowledge have never been made available to the public.

The most important post 1979 orders passed by the military government of the West Bank on the subject of settlements are order 783 of March 25, 1979 and order 892 of March 1, 1981. The former introduced the local government unit, the regional council. Without defining what a regional council is, the order declared that all the settlements listed in the appendix to that order are to be considered regional councils. As to the manner in which a regional council is to be administered, article 2(a) of the order stated that it shall be in accordance with the manner in which the area commander shall decide in regulations. I have to date been unsuccessful in obtaining copies of these regulations despite several applications to the authorities for them.

It is worth mentioning here that subsection (b) of article 2 which was subsequently repealed by order 806 of September 30, 1979 stated that

"no regulation passed by virtue of the above (i.e. article 2(a)) shall diminish from any law or security regulation unless specifically so stated (or unless stated clearly in any other order or regulation)."

The second major legislation on the settlements is order #892 on the administra-



tion of local councils dated March 1, 1981. By virtue of article 2(a) of this order regulations were passed setting out the rules for the administration of local councils. The order lists the following as the local councils to which the order applies: Alkanah, Ariel, Ma'aleh Adomim, Ma'aleh Ephraim, and Kiryat Arbaa. The first council administering these Local Councils was appointed by the "person responsible" who is appointed by the military commander and who is responsible to him. Thereafter every resident of the local council over the age of 18 is eligible to vote and to be elected. It is worth mentioning here that there is no mention in the order as to how local councils may be created. The list of existing councils can only be enlarged by a new proclamation made by the military commander amending the above order. This means that even if an Arab village or municipality should wish to be turned into a local council there is no mechanism whereby this can be done.

What follows is a comparison between the provisions of these regulations and the Jordanian Municipalities law of 1955, as amended, i.e. the law which applies to the Arab municipalities in the West Bank.

#### *A. The Jordanian municipality law and the Regulations for the administration of Local Councils*

It is important to point out, before beginning the comparison between the Jordanian law on the municipalities and the order on the local councils, that all the powers vested by the Jordanian law in the King, the Council of Ministers and the Ministers of the Interior and Finance have been vested by virtue of military orders 194 and 236 in the hands of the "person responsible" who is appointed by the Commander of the West Bank. As will be seen later, the

military commander also appoints a "person responsible" who has certain powers according to the Regulations applicable to local councils (hereafter The Regulations).

It will become clear from the survey below that Jordanian law has vested ultimate authority in many areas affecting municipalities in government ministers. As these powers are now enjoyed by the "person responsible" who is appointed by and serves the Military Government which is responsible for the creation of the settlements on the West Bank, it is to be expected that he will use his power to ensure that the growth and development of the municipalities does not jeopardize that of the settlements. In practice he uses his authority whenever possible to limit and discourage the growth of these Arab centres. A recent example of this is the prohibition on municipalities without an approved town planning scheme to issue building permits and the transfer of this power to the Higher Town Planning Council, which is constituted exclusively of Israeli officials.

All this is contrary, of course, to how his counterpart, the persons responsible for the 'local councils', act in relation to these councils whose establishment and development is the policy of the government he serves. Unlike the Arab inhabitants, the Jewish settlers have direct access to the persons responsible, either through fellow settlers who work in the Military Headquarters or through friends. They are therefore able to urge that the orders and decisions taken concerning the Arab centres and the Jewish local councils facilitate the development of the latter and restrict the growth of the former<sup>1</sup>.

When studying the Jordanian municipality law (hereafter the Jordanian law), and the regulations for the purpose of making a comparison between them, the first thing that strikes the reader is the length of the regulations as compared with the Jordanian

law. The regulations consist of 152 sections as compared to the sixty-five sections of the Jordanian law. They are therefore the longest single piece of legislation produced by the West Bank Military Government authorities during the fourteen years of occupation.

The Jordanian Law gives the Council of Ministers and the Minister of Interior important powers over the municipal council. The Council of Ministers on the recommendation of the Minister of Interior may for example dismiss a mayor if he is convinced that this serves the interest of the municipality. His decision is final and is not subject to any form of appeal. Similarly the Minister of Interior with the agreement of the Council of Ministers may appoint, in addition to the elected members, 2 members to any municipal council and "these 2 members shall enjoy all the rights of the elected members." No similar powers are given to any official in the military government by virtue of the regulations for the administration of local councils.

Both the municipalities and the local councils are juridical bodies. Both councils are empowered to administer the affairs of their areas and to exercise the powers mentioned in Section 68 of the Regulations and 41 of the Law which are compared below. However unlike the municipal council, the local council has the power to appoint committees for the execution of certain functions.

## Functions

The municipal council has the power over such areas and functions as roads, buildings, water, electricity, gas, sewage, crafts and industries, health, cleanliness, public places, parks, etc. In all the list comprises 39 areas. Some of these powers are similar to the powers given to the local

councils. However the local council enjoys in addition to them other powers. To begin with, a local council acts as the trustee, custodian or representative in any public case involving the inhabitants of the local council<sup>2</sup>. It is also empowered to administer, implement and establish services, projects and institutions which the council believes are important for the welfare of the inhabitants living within its area<sup>3</sup>. It is also empowered to oversee the development of the local council, the improvement of life in it and the development of the financial, social and educational affairs of its inhabitants or any sector of them<sup>4</sup>. It can also organize, restrict or prevent the establishment or administration of any service, project, public institution or any other organization, craft work, or industry of any kind<sup>5</sup>. It is also empowered to oversee irrigation, pastures, the preservation of the soil and any other matter of agricultural significance provided that it is administrated for the benefit of the various farmers within the area of the local council<sup>6</sup>. The council may establish any corporations, cooperative or any other organization for the execution of any of its functions and buy shares in it<sup>7</sup>. It is also empowered to prepare the facilities for emergency and to operate them at the time of emergency including the organization of rationing and provision of the necessary services<sup>8</sup>. The council is also empowered to give certificates and to certify and issue licences for any of the matters included within its powers.

The council administering a local council may, according to Article 88 of the Regulation, with the agreement of the "person responsible" make regulations concerning any matter which the council has jurisdiction over. By Article 93 these regulations shall be considered as security legislation issued by the area commander. They shall be published by posting on the notice

board in the offices of the council and in other public places within the area of the local council or in any other way as the council shall decide. Municipal councils on the other hand, may make regulations only after a decision to this effect is taken by the Council of Ministers with the agreement of the king.

## Taxes

A local council may, with the agreement of the "person responsible" impose taxes called "arnona," membership fees and other obligatory payment<sup>9</sup>. The council is empowered to impose any additions on the arnona after publishing a notice to this effect in the area of the local council<sup>10</sup>. The council may reduce the tax or fine for late payment taking into consideration the financial situation of those on whom it is levied or for any other reason to which the person responsible agrees<sup>11</sup>.

A municipal council on the other hand may impose taxes on vegetables and fruits for sale in the market, or for any of the other matters mentioned amongst its powers in article 41 of the Municipalities Law, the amount and percentage of which is determined in regulations issued by the council with the agreement of the council of ministers<sup>12</sup>.

## Finances

A municipal council may only borrow money after obtaining the agreement of the Minister of Interior who will consider who the lender is and the purpose for which the fund is to be used<sup>13</sup>. It is on the basis of this article that many municipalities in the West Bank are prevented from collecting money contributed to them from Palestinians outside.

Property tax payable to the municipality is collected by the ministry of finance<sup>14</sup> and the customs authority collects custom duties on combustible liquids according to percentages specified in the law<sup>15</sup>. By virtue of article 52 all funds collected for the municipalities by the ministry of finance are kept in trust for the municipalities and distributed in the percentage which the council of Ministers, on the recommendation of the Minister of Interior, decides according to criteria mentioned in article 52 (2), provided that some of these funds may be allocated to finance other matters.

The yearly budget prepared by the municipality is acted upon after it has been approved by the council and authorized by the Minister of Interior<sup>16</sup>. Similarly, a local council needs the approval of the "person responsible" for its yearly budget<sup>17</sup>. However a local council does not need to get approval for borrowing money or receiving contributions<sup>18</sup>.

The accountant who inspects the finances of the municipalities is decided upon by the Council of Ministers. However a local council appoints its own accountant. Also the Minister of Interior with the agreement of the Council of Ministers publishes regulations as to the proper administration of the municipalities financial matters. A local council, however, has discretion to administer its own finances without any interference. Regulations are made for the municipalities as to tenders, purchase of material and all other financial matters. A local Council decides these matters without interference except when the sale involves a monopoly or a concession.

Chapter 16 of the Regulation mentions powers which the area commander and the "person responsible" has in special cases. These include interference in the administration of the local council if they see that the council is failing to carry out any of its functions under the regulation or under a

security order. In case of emergency, and when there is no possibility for convening the council to take a decision which needs to be taken by the council in session, the "person responsible" may order the head of the council to take any action in accordance with the Regulation if he deems that the prompt execution of such action is necessary for the safety of the members of the council. The area commander may also appoint a new council if it has been proven to him that the council does not carry on its duties according to the Regulation or that there are financial misdealings. But he can only do this after he has warned the council and it did not take heed of his notice.

### *B. The Settlements' Court System*

The Military Commander has used his power under order #892 to establish courts for the settlements and declared the establishment of such courts in article 125 of The Regulations. Acting also within his power according to order 892 he has determined the jurisdiction of the court as follows:

#### Art. 126

(a) "the court shall have jurisdiction to look into any offence committed contrary to the Regulations for the administration of Local Councils except those mentioned in chapter three (on rules for election of the council). It shall also have jurisdiction to look into offences against any regulations that the council may make and also any offence committed within the area of the council against any law or military order mentioned in the appendix to The Regulations. The court shall be competent to impose the punishment determined in The Regulation, other regulations made thereby,

and laws or military orders that are mentioned in the appendix.

(b) in addition to what has been said in (a) above the court shall be competent to look into other matters which shall be determined in The Regulations or in any other military order."

The Regulation as it stood on March 1, 1981 mentioned only the Jordanian law of Town Planning in the appendix. However, as is clear from the above, more laws can be added and these need not be Jordanian laws because The Regulation does not restrict the court's jurisdiction to look into violations of Jordanian laws but says "any law mentioned in the appendix." In view of the provision in The Regulations which states that this or any other regulations made by virtue of it or in any other way need not be published except in the offices of the local council, it is possible that the jurisdiction of the court might be enlarged without the knowledge of anyone outside the settlement.

The judges of the settlement's courts are appointed by the commander of the area<sup>19</sup>. Judges for the first instance court are appointed from amongst magistrate judges, and for the appeal court from amongst judges of the District Court<sup>20</sup>. Whereas the judicial system in the West Bank does have District Courts, the implication is that the choice will be from among Israeli District Court judges.

It is important to note here that no connection is made between the West Bank judicial system and the system of settlement courts. For the West Bank the Minister of Justice has been replaced by the Officer in the Israeli army in charge of the judiciary. Judges for West Bank courts are chosen by a committee composed of military officers of whom no mention is made in The Regulations, where the choice of the settlement's judges is left to the area commander.

And although no formal connection with the Israeli system is established, the judges would be from amongst judges chosen in accordance with Israeli laws to serve in Israeli courts.

As with judges, the area commander also chooses the public prosecutor<sup>21</sup>. The appeal court sits anywhere the area commander designates<sup>22</sup>.

The procedure and the rules of evidence which the court applies are those applied in Israeli courts. The court also has all the powers held by an Israeli magistrate court as regards subpoena of witnesses and any other matter related to the hearing of a criminal case. Similarly the appeal court has all the powers which an Israeli District Court in Israel has when it convenes as an appeal court. Furthermore the court has all the powers given to military courts when it looks into the violations to laws and orders mentioned in the appendix<sup>23</sup>.

The court may impose fines which are paid to the treasury of the local council<sup>24</sup>. If a fine is not paid the court may sentence the violator with actual imprisonment for up to one month. It is natural to ask how the court will execute its judgments. Will it use the West Bank execution departments and police, or the Israeli ones or will it have its own? But this is not the only question which The Regulation leaves unanswered. What categories of people does the court have jurisdiction over? What if a Palestinian is brought to appear before it, can he deny its jurisdiction over him and claim that only a local Arab court has the right? And when does the military court have jurisdiction over violators of military orders if these orders are mentioned in the appendix to The Regulation? From the wording of The Regulation it is possible for the settler's courts to assume the powers of the military courts which implies that the settlers are not only given autonomy but also power over the local Arab Palestinian population.

## The Municipal Courts

Until January 1976 municipalities had no courts nor did the Jordanian law give them the power to establish any. To date only the Bethlehem Municipality has applied in accordance with order 631, whereby municipal courts have been established, and has acquired a municipal court of its own.

According to order 631<sup>25</sup>, the Officer in charge of the Judiciary is responsible for the municipal courts<sup>26</sup>. The judges for the court are appointed by the officer from amongst magistrate judges who serve in West Bank courts<sup>27</sup>. No appeal court may be established and the court's decisions are appealable at the West Bank court of appeal<sup>28</sup>. The court shall apply the rules of procedure and evidence applicable in criminal cases in magistrate courts<sup>29</sup>. The court shall have jurisdiction to hear violations against the regulations of the municipality and any violations committed within the area of the municipality which are listed in the appendix, which includes nine laws. The municipality is empowered to execute judgments issued by its court. Although the municipality is empowered to appoint from amongst its employees the officers of the court<sup>30</sup>, these employees are responsible to the officer in charge of the judiciary who may issue instructions to the municipality to change any officer or to cancel his appointment. He may also appoint any employee of the West Bank Ministry of Justice to the court<sup>31</sup>.

## C. The Defence of the Settlements

A number of related orders need to be discussed when considering the powers and functions of a local council. These are the orders dealing with what is called "the Defence of Villages".

These orders are modelled after an Israeli law of 1961, the local Authorities Regulation of Guard Service Law<sup>32</sup>. This law defines in its preamble 'the officer-in-charge of the guard-service' as a person whom the Brigadier-in-Command has appointed to be the officer-in-charge of the guard-service. Provided that in a Command in which the guard-service is in the hands of the Police, the Brigadier-in-Command shall empower the person responsible on behalf of the police for the guard-service. 'Guard-service' is defined to include exercises and any activities which in the opinion of the officer-in-charge of the guard-service is required for protecting the security of the inhabitants of a settlement or their property, and 'local authority' is defined as a municipality or a local council. Article 2 of the Israeli law states that:

"the Minister of the Interior may, after consultation with the Minister of Defence, impose, by order, the duty of guard-service on the inhabitants of any settlement or settlements..."

The connection with Israeli law does not stop at the level of providing a model for the military orders on the same subject. In article 11 of order 432, the first of the orders passed by the West Bank Military Commander<sup>33</sup>, it is stated that whoever is injured while performing guard-service shall be considered as one who has been injured during performance of guard-service in accordance with the above mentioned Israeli law. This direct reference and application of an Israeli law is one of the first to be made in the Military Proclamations in force in the West Bank.

Order 431 defines a village as one which has been established after 1967. As only settlements have been established after 1967, the order clearly refers to settlements. Defence is defined as training or any

other activity deemed necessary by the person appointed by the Military Commander of the West Bank as the officer responsible under the order. The officer is empowered by the order to impose upon every settler the duty to defend the settlement. He is also empowered to appoint an authority to carry out the defence.

Order 669 amended the definition of a resident in order 432 to include:

"whoever lives in the village and is unregistered as a resident in its registers whether he was from the West Bank or from Israel and who does not carry out guard duty in any other village."

The order also determined the age of the person eligible for guard duty as from 18 to 60, and provided that whenever guard duty is imposed on a person he shall be assumed to be eligible as long as he has not proven otherwise in the way that shall be provided by order. A fine is imposed on a person who refuses to carry out the guard duty. Order 817 empowers the director, who is defined in the order as whoever has been appointed director of guard duty according to order 432, "to oblige pupils of an institution (defined as a kindergarten, elementary school, junior high school, field school, advanced education institution, children's vacation enterprise, boarding school, youth and sport cultural centre, institution of higher education, yeshiva or any other institution in which education is provided) aged over 16 to do guard duty as well as the pupil's parents, the principal of the institution, the teachers and the workers." (Article 2 of the order).

A director may also oblige the parents whose children are at an institution to do guard duty. In special circumstances the director may order that an institution be guarded by paid policemen<sup>34</sup>. If the director believes that facilities must be installed

in the institution for its protection, he may, with the consent of the police, order the institution's owners to install them.

Order 848 of June 18, 1980 increased the number of hours of guard duty per person to six hours per week unless the director orders that the number of hours be increased to ten per week for 30 days. An increase above ten hours needs the approval of the commander of the area.

A fifth amendment to the original order<sup>35</sup> substantially increased the powers of the settlers. Article 3 of order 898 empowers them to:

- oblige any person whom the settlers have any reason to suspect of having committed any offence contrary to any military order to show them his identification card;
- arrest any person whose identity has been not proven and to transfer him to the nearest police station and
- arrest any person without a warrant:
  - if he commits before him a felony punishable by five years imprisonment or if he has any basis which makes him believe that a person has of late committed a misdemeanor or a felony punishable by the military orders with five years imprisonment, or
  - if he saw him in suspect circumstance taking precautionary measures to disguise himself without being able to give any reasonable explanation of his actions.

A person who arrests another in the above circumstances must hand him to the police as soon as possible. Any one refusing to obey the orders of the settlers will be considered as one contravening the military order on security of 1970.

Appended to the order is the format of the card with which the settlers will be is-

sued. The above powers are printed on the card.

As with all the other 921 military orders already in force in the West Bank, the power to interpret the provisions of this order are vested in the military courts.

It has been common practice for the settlers to exceed their powers of guard duty and interfere with the Arab inhabitants of the West Bank. There have been many reported incidents when they have set up and manned road blocks and searched passers-by, and they have attacked nearby villages and made their lives intolerable.

Two reservists were quoted in the Israeli English newspaper, *The Jerusalem Post*, as saying after Jewish student settlers from the local yeshiva and from Kiryat Arba in Hebron manned the army check-point alongside them: "this is the first time and the last time we will serve in this area." The settlers had joined them at the check-point because they said they preferred to defend themselves after the incident in Hebron where several of them were killed.

With the orders for the defence of the settlements promulgated, the organization of the military territorial defence system of Jewish settlers serving in the West Bank into organic military units stationed in their own areas under their own command has been completed.

## *Part II: Comments*

When the Israeli army occupied the West Bank, the Jordanian law on local government provided for only two types of local government units: the municipality and the village. The regional and local councils that existed at the time of the British Mandate were abolished by article 105(1) of the Jordanian Municipalities Law of 1955 which declared all previous Ottoman, Jordanian and Palestinian laws dealing with muni-

palties and local councils repealed provided that

"all municipalities and local councils existing at the date of the coming into force of this law shall be considered municipal councils by virtue of the provisions of this law and shall continue to carry out their functions until replaced by municipal councils elected in accordance with the provisions of this law."

Despite the continuous settlement activity that has gone on uninterrupted though at an uneven rate since 1967, no substantial amount of legislation was promulgated concerning the administration of the settlements. They continued to be administered by what was called a religious council (as mentioned above) until March 1979 when a number of lengthy military orders were proclaimed declaring that regional and local councils will administer the settlements.

Under the Jordanian law in force in the West Bank, a group of people in a village can petition the District Commissioner to declare their village a municipality. Whereas this function has now been assumed by an officer in the Israeli army, why then did the military government not choose to use the existing local government laws and structures and declare Jewish settlements to be villages or municipalities? Clearly this would have been the easier course, which would have released Israel from having to justify again a charge of violating international law by amending and adding to the local law in a way that exceeds the scope of the legislative powers of an occupier and cannot be justified as necessary legislation for the welfare of the population of the occupied territories.

A possible justification of this choice which the military government may give could be based on the provision in the Jor-

danian law which stipulates that the candidates for municipal election must, amongst other things, be Jordanian male citizens. However this justification can easily be rebutted by pointing out that the military authorities have already amended this article by removing the condition as to sex, giving the franchise to women. They could have made a further change and eliminated the condition that the candidates and electorate must be Jordanian citizens. It is clear, therefore, that it was not any legislative difficulty that has determined the choice of turning the settlements into local councils rather than municipalities.

Nor is the reason the independence of the municipal councils from the military authorities. As has been shown at length in the first part of this article, the Jordanian law gives more power to the government than the power which the *Regulations for the Administration of the Local Councils* gives to the commander of the area or the person appointed by him to be the "person responsible" for the purpose of the *Regulations*.

The more likely reason for the choice, to my mind, is the desirability of having separate administrative units for Arabs and Jews to enable separate and independent legislation and policy for the growth and development of each of the two communities.

It is interesting to realize how the military government, in making the choice to establish regional and local councils to administer the settlements, seems to be guided by the policy that was pursued by the British Mandatory government in Palestine before 1948. Article 2 of the Mandate runs as follows:

"The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the



Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."

It is not difficult to imagine, though I have no basis to verify this conjecture, that the policy guidelines given by the Israeli government to the military command in the West Bank run on similar lines.

Article 3 of the Mandate provides that:

"The mandatory shall, so far as circumstances permit, encourage local autonomy."

In the yearly reports by the United Kingdom to the League of Nations and in the reports of the Palestine Royal Commission, the rate of progress achieved by the government of the mandate in fulfilling the terms of the Mandate and in assisting the Jewish and Arab communities to attain a greater level of local autonomy was reported.

The 1937 report of the Palestine Royal Commission, for example, reported that

"there are at present only five Jewish Local Councils, but they rank almost next in wealth and population to the four major municipalities of Jerusalem, Haifa, Jaffa and Tel Aviv and have been active and reasonably efficient."

The Commission recommended that:

"the remaining preponderantly Jewish Local Councils, taken together with all the present existing municipalities should be re-classified by means of a new ordinance into groups according to their respective size and importance."

The military orders relating to the Jewish local councils are not, as far as their content is concerned, modelled after the British Ordinances. They give much greater power to the local councils than was available at the time of the mandate. Despite the difference in degree, the same policy followed by the government of the mandate to achieve local autonomy for the Jewish minority in Palestine is now being pursued by the Israeli government towards the Jewish settlements in the West Bank. The only difference (and it is a very significant one) is that the government of the mandate planned a restricted growth for the Jewish community and was interested in ceding local autonomy to both the Arab majority as well as the Jewish minority, in fulfillment of the terms of the mandate and the Balfour declaration whereby two communities would exist in Palestine. The Israeli government, on the other hand, is interested in incorporating the West Bank into Israel and plans to do this by facilitating the development and growth of the Jewish communities living, or who will be imported to live, in the settlements which have been planned to exist around the Arab population centres. Mattiyahu Drobles, an instrumental figure in government settlement efforts, referring to West Bank Arabs as "minorities" said<sup>36</sup>:

"They (the Arabs) will find it difficult to unite and create a continuous territorial entity if they are cut off by Jewish settlements."

Many other legislative actions of the government of the mandate were also aimed at facilitating the fulfillment of the terms of the mandate. The Land Transfer Ordinance of 1920, for example, gave the government the power to control land acquisition to insure that lands in areas designated for Jews did not get transferred to

Arabs. Similarly a military order was passed soon after the occupation whereby the military government acquired the right to control land transfers by making it necessary to get a permit for every transaction in land (order 25).

With strong support from the Jewish Agency and other Jewish organizations outside Palestine, and the greater experience of the European Jewish immigrants in civic administration, the Jewish municipalities and local councils grew often at the expense of the nearby Arab municipalities or local councils. With the establishment in 1948 of the Jewish state, and the exodus of the majority of the Arab population from the region, this policy was pursued systematically, and the present situation of the cities of Jaffa and Tel Aviv is a good example of it. Whereas Arab Jaffa before 1948 was a flourishing sea port and the bigger municipality, with Tel Aviv then considered in size and importance as a mere Jewish suburb, the situation now is reversed with Jaffa a mere suburb administered by the greater Tel Aviv municipal council. The Israeli policy towards the West Bank seems to aim at the continuation of this pattern so that, for example, the Jewish settlement near Ramallah, Beit Eil, whose population is at present approximately 400 would be encouraged to grow and develop to dominate the town of Ramallah which has at present a population of approximately 20,000. Ramallah would then come to be treated as a mere Arab suburb of the Jewish settlement of Beit Eil.

The timing of the legislation for the administration of the settlements as regional and local councils is not without significance. March 25, 1979 was only seven months after the signing of the *Framework for Peace in the Middle East Agreed at Camp David*. Some of the provisions concerning the West Bank in the agreement did not at all please those Jews who had already

settled in the West Bank and those intending to do so.

It is perhaps not too far-fetched to suggest that the activities and legislation in the West Bank which followed the signing of the agreement indicate the intentions which the Israeli negotiators had in mind when they negotiated the wording of the agreement and agreed to sign it as presently worded.

It is not accidental that only in article 1 of the Camp David Accords the expression "Palestinian people" is used. Elsewhere in Sections A.1.(A), (C), (C)1, (C)2 etc. the reference is to the 'inhabitants of the territories' (i.e. the West Bank). The clarification acknowledged in President Carter's letter to Prime Minister Begin on September 22 reads

"in each paragraph of the agreed framework document the expression Palestine or Palestinian people are being and will be construed and understood by you as Palestinian Arabs."

No clarification is sought or given about the expression "inhabitants of the territories". Does it refer to Arab inhabitants or any inhabitants, Arab or Jewish?

Obviously without clarification it will mean what it stands for, i.e. any inhabitant whether Arab or Jewish. This choice of expression was therefore made carefully, and the activities ensuing after the agreement make it clear what the intention was, and what the result of the implementation of the provisions of the Camp David agreement will really mean to the Jewish settlers in the West Bank.

Even the limited powers which the Camp David Accords provide for the Palestinian Arabs will under the newly created reality which Israel has been busy creating, and because of the careful wording of the Camp David agreement, have to be shared by the

Jewish and the Arab inhabitants of the area. The concentrated activities aimed at creating more settlements and bringing more Jews to live in them while changing the legislation to facilitate their independence and growth was intensified after Camp David.

Although at present the Arabs constitute the majority of the inhabitants of the West Bank there is no assurance that the elections for the self-governing authority envisaged under the Camp David agreement will proceed on the basis of proportional representation rather than on a regional basis. If the latter is the method then in view of the large number of the settlements already established Jewish representation in that authority will be substantial. In this way even the limited concessions Israel seemed to be making in the Camp David agreement will have been forfeited. This, of course, presuming the Jewish settlers would like to exercise control in this manner.

It is also possible, however, that the settlers may feel that their separate status as "self-governing authorities" gives them more power and better enables them to grow within the large areas of land that have been allocated for them. They might then leave the Arabs to exercise alone the meagre powers given to them.

## *Conclusion*

More than 950 military orders have been promulgated during the 14 years of Israeli military occupation of the West Bank. This violation by Israel of international law has lately become better known. In response to criticism of this practice, the decisions of the Israeli High Court of Justice in appeals submitted to the court against the military commander, and publications by Israelis as well as apologists for Israeli practices, have attempted to justify such violations. In this paper I have attempted to show how even

if the standards used by the High Court judges and the authors of these studies to justify these changes in Jordanian laws are accepted and applied, legislation affecting Jewish settlements in occupied territories cannot be justified.

I have also attempted to point out the Israeli policy towards the West Bank concerning the settlements by comparing these regulations to the Jordanian law still in force which applies to the Arab population centres. This comparison proves that two distinct communities have been created with different sets of laws applying to each. The separate development of each of these communities is thereby facilitated.

By referring to the legal situation that existed at the time of the British Mandate over Palestine I have attempted to show that the policy followed in the West Bank is similar to some extent to that of the Mandate Government, which by the terms of its mandate endeavored to facilitate the growth and development of an Arab and a Jewish national presence in Palestine. The only difference in the case of the West Bank being that the military authorities there will continue to attempt to retard the growth of the Arab population and encourage the establishment of a Jewish one.

This paper has shown how a complex and elaborate structure for the administration of the Jewish centres equipped with legal and defence systems has already been established to facilitate this process.

Finally, the direction in which matters seem to be going in future as far as Jewish-Arab relations on the West Bank are concerned, is parallel to a version of the South African Apartheid or separate development policy. Granted the reality and conditions of the two areas differ; so does the extent of the similarity. However, enough parallels do exist in the nature of the problem facing the South African government and the Israeli government (anxious as it is with

trying to Judaize and control an area with an Arab majority), and in the nature of the two systems and to some extent the practices of the two governments, to support a conclusion that there are strong similarities which, all indications point, are only bound to increase with time.

### References

- (1) Shlomo Amar, an Israeli official in the military government of the West Bank acting as Minister of Interior, was appointed by the Military Commander on March 27, 1979, as a member of the Council Administering the settlement of Ma'aleh Adomim.
- (2) Article 68(3) of the Regulations for the Administration of Local Councils.
- (3) *Ibid*, article 68(1).
- (4) *Ibid*, article 68(2).
- (5) *Ibid*, article 68(6).
- (6) *Ibid*, article 68(11) and 12.
- (7) *Ibid*, article 68(13).
- (8) *Ibid*, article 68(14).
- (9) *Ibid*, article 76.
- (10) *Ibid*, article 81(b).
- (11) *Ibid*, article 87.
- (12) Jordanian Municipalities Law of 1955, article 41(c) added by a 1956 amendment.
- (13) *Ibid*, article 45.
- (14) *Ibid*, article 47.
- (15) *Ibid*, article 49.
- (16) *Ibid*, article 56(1).
- (17) The Regulations article 97(c).
- (18) *Ibid*, article 101.
- (19) *Ibid*, article 127(a).
- (20) *Ibid*, article 127(d).
- (21) *Ibid*, article 131.
- (22) *Ibid*, article 128(a).
- (23) *Ibid*, article 134.
- (24) *Ibid*, article 137.
- (25) As amended by order 713 of June 10, 1977.
- (26) Military Order 713 article 1.
- (27) *Ibid*, article 4(a).
- (28) *Ibid*, article 10.
- (29) *Ibid*, article 8.
- (30) *Ibid*, article 12(a).
- (31) *Ibid*, article 15(b).
- (32) Published in *Sefer Ha-Chukkim* no. 346, June 13th, 1961, p. 169.
- (33) The date of this order is June 1, 1971.
- (34) Military Order 817, article 7.
- (35) Military Order no. 898.
- (36) Reported in *The Jerusalem Post*, July 26th, 1979.

# *Judicial Application of the Rule of Law*

## *Inter-American Court of Human Rights*

The first case to come before the Inter-American Court of Human Rights, which was inaugurated in September 1979 in San José, is a highly unusual one.

Following a shooting incident in Costa Rica, in which some policemen and one of the assailants were killed, the Costa Rican authorities arrested some members of a left wing political group which allegedly planned to carry out armed attacks. A few days later one of the members of the group, Miss Viviana Gallardo Camacho, a young woman, was shot dead in her prison cell by a member of the Costa Rican Civil Guard. In this incident two other women prisoners were wounded. All three had been detained in connection with charges resulting from the killing of the policemen and for being members of an illegal association. The Civil Guard responsible for the shooting was arrested and is awaiting trial for homicide.

On July 15, 1981, the government of Costa Rica, represented by Mrs Elizabeth Odio Benito, the Minister of Justice, itself submitted the case of the Inter-American Court asking it to determine whether in this case the Costa Rican authorities had committed a violation of human rights guaranteed in the American Convention on Human Rights. Costa Rica is a party to the Convention and has accepted the general jurisdiction of the Court pursuant to Article 62 (1).

The Court can normally accept cases only if certain pre-conditions are met. Among them are that all available domestic remedies have been exhausted (Article 46 of the Convention) and that the Inter-American Commission on Human Rights has examined the matter in accordance with the procedure established in Articles 48 to 50 of the Convention. The government of Costa Rica stated that it formally waives both requirements, and further requests that "if the Court should decide that it lacks the power to deal with the application before the procedures set forth in Articles 48 to 50 have been completed, this application be referred to the Inter-American Commission on Human Rights pursuant to the terms of its jurisdiction".

In its first decision the Court, in view of the unusual nature of the case, neither accepted nor rejected the application, but decided that a decision concerning admissibility will be rendered after receiving legal opinions on the subject from both the government of Costa Rica and the Inter-American Commission on Human Rights. The main problem for the Court is to decide "on the effect to be given to the waiver of the procedures set forth in Articles 48 to 50 of the Convention by Costa Rica and, in general, to determine its jurisdiction to deal with the case at this stage".

# BASIC TEXTS

## *African Charter on Human Rights and Peoples' Rights*<sup>1</sup>

### *Preamble*

The African States members of the Organization of African Unity, parties to the present convention entitled "African Charter on Human and Peoples' Rights",

*Recalling* Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of "a preliminary draft on an African Charter on Human and Peoples' Rights providing *inter alia* for the establishment of bodies to promote and protect human and peoples' rights";

*Considering* the Charter of the Organization of African Unity, which stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African peoples";

*Reaffirming* the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights;

*Taking into consideration* the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;

*Recognizing* on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection and on the other hand that the reality and respect of peoples' rights should necessarily guarantee human rights;

*Considering* that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

*Convinced* that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

*Conscious* of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism and to dismantle aggressive foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion;

*Reaffirming* their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations;

*Firmly convinced* of the duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa;

HAVE AGREED AS FOLLOWS:

1) The Heads of State of the Organisation of African Unity at their meeting in Nairobi in July 1981 approved the Charter unanimously. The text printed here is that which was approved at the OAU Ministerial Conference in Banjul, the Gambia, in January 1981 and is believed to be the correct text of the Charter as approved at Nairobi.

## *PART I: Rights and Duties*

### *Chapter I Human and Peoples' Rights*

#### *Article 1*

The Member States of the Organization of African Unity parties to the present Charter shall recognize the right, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

#### *Article 2*

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

#### *Article 3*

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

#### *Article 4*

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

#### *Article 5*

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

#### *Article 6*

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

#### *Article 7*

1. Every individual shall have the right to have his cause heard. This comprises:
  - (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
  - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
  - (c) the right to defence, including the right to be defended by counsel of his choice;
  - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

#### *Article 8*

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

#### Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

#### Article 10

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

#### Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

#### Article 12

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.
4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

#### Article 13

1. Every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

#### Article 14

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

#### Article 15

Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.

#### Article 16

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

#### Article 17

1. Every individual shall have the right to education.
2. Every individual may freely, take part in the cultural life of his community.
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.



#### *Article 18*

1. The family shall be the natural unit and basis of society. It shall be protected by the State.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

#### *Article 19*

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

#### *Article 20*

1. All people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

#### *Article 21*

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

#### *Article 22*

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

#### *Article 23*

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:
  - (a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;

- (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

#### *Article 24*

All peoples shall have the right to a general satisfactory environment favourable to their development.

#### *Article 25*

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

#### *Article 26*

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

## *Chapter II* *Duties*

#### *Article 27*

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

#### *Article 28*

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

#### *Article 29*

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

## *PART II: Measures of Safeguard*

### *Chapter I Establishment and Organization of the African Commission on Human and Peoples' Rights*

#### *Article 30*

An African Commission on Human and Peoples' Rights, hereinafter called "the Commission", shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

#### *Article 31*

1. The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.
2. The members of the Commission shall serve in their personal capacity.

#### *Article 32*

The Commission shall not include more than one national of the same State.

#### *Article 33*

The members of the Commission shall be elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States parties to the present Charter.

#### *Article 34*

Each State party to the present Charter may not nominate more than two candidates. The candidates must have the nationality of one of the States parties to the present Charter. When two candidates are nominated by a State, one of them may not be a national of that State.

#### *Article 35*

1. The Secretary General of the Organization of African Unity shall invite States parties to the present Charter at least four months before the elections to nominate candidates;
2. The Secretary General of the Organization of African Unity shall make an alphabetical list of the persons thus nominated and communicate it to the Heads of State and Government at least one month before the elections.

#### *Article 36*

The members of the Commission shall be elected for a six year period and shall be eligible for re-election. However, the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years.

#### *Article 37*

Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to decide the names of those members referred to in Article 36.

#### *Article 38*

After their election, the members of the Commission shall make a solemn declaration to discharge their duties impartially and faithfully.

#### Article 39

1. In case of death or resignation of a member of the Commission, the Chairman of the Commission shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.
2. If, in the unanimous opinion of other members of the Commission, a member has stopped discharging his duties for any reason other than a temporary absence, the Chairman of the Commission shall inform the Secretary General of the Organization of African Unity, who shall then declare the seat vacant.
3. In each of the cases anticipated above, the Assembly of Heads of State and Government shall replace the member whose seat became vacant for the remaining period of his term unless the period is less than six months.

#### Article 40

Every member of the Commission shall be in office until the date his successor assumes office.

#### Article 41

The Secretary General of the Organization of African Unity shall appoint the Secretary of the Commission. He shall also provide the staff and services necessary for the effective discharge of the duties of the Commission. The Organization of African Unity shall bear the cost of the staff and services.

#### Article 42

1. The Commission shall elect its Chairman and Vice Chairman for a two-year period. They shall be eligible for re-election.
2. The Commission shall lay down its rules of procedure.
3. Seven members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The Secretary General may attend the meetings of the Commission. He shall neither participate in deliberations nor shall he be entitled to vote. The Chairman of the Commission may, however, invite him to speak.

#### Article 43

In discharging their duties, members of the Commission shall enjoy diplomatic privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

#### Article 44

Provision shall be made for the emoluments and allowances of the members of the Commission in the Regular Budget of the Organization of African Unity.

## Chapter II Mandate of the Commission

#### Article 45

The functions of the Commission shall be:

1. To promote Human and Peoples' Rights and in particular:
  - (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
  - (b) To formulate and lay down, principles and rules aimed at solving legal problems relating to

human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.

- (c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

### *Chapter III* *Procedure of the Commission*

#### *Article 46*

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.

#### *Communication from states*

#### *Article 47*

If a State party to the present Charter has good reasons to believe that another State party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter. This communication shall also be addressed to the Secretary General of the OAU and to the Chairman of the Commission. Within three months of the receipt of the communication, the State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable and the redress already given or course of action available.

#### *Article 48*

If within three months from the date on which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other State involved.

#### *Article 49*

Notwithstanding the provisions of Article 47, if a State party to the present Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman, to the Secretary General or the Organization of African Unity and the State concerned.

#### *Article 50*

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.

#### *Article 51*

1. The Commission may ask the States concerned to provide it with all relevant information.
2. When the Commission is considering the matter, States concerned may be represented before it and submit written or oral representations.

#### Article 52

After having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings. This report shall be sent to the State concerned and communicated to the Assembly of Heads of State and Government.

#### Article 53

While transmitting its report, the Commission may make to the Assembly of Heads of State and Government such recommendations as it deems useful.

#### Article 54

The Commission shall submit to each Ordinary Session of the Assembly of Heads of State and Government a report on its activities.

### *Other communications*

#### Article 55

1. Before each Session, the Secretary of the Commission shall make a list of the communications other than those of State parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission.
2. A communication shall be considered by the Commission if a simple majority of its members so decide.

#### Article 56

Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

1. indicate their authors even if the latter request anonymity,
2. are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity.
4. are not based exclusively on news disseminated through the mass media,
5. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

#### Article 57

Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission.

#### Article 58

1. When it appears after deliberations of the Commission that one or more communications apparently reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to them.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these situations and make a factual report, accompanied by its finding and recommendations.

3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

#### *Article 59*

1. All measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.
3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

### *Chapter IV* *Applicable Principles*

#### *Article 60*

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

#### *Article 61*

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

#### *Article 62*

Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

#### *Article 63*

1. The present Charter shall be open to signature, ratification or adherence of the member states of the Organization of African Unity.
2. The instrument of ratification or adherence to the present Charter shall be deposited with the Secretary General of the Organization of African Unity.
3. The present Charter shall come into force three months after the reception by the Secretary General of the instruments of ratification or adherence by a simple majority of the member states of the Organization of African Unity.

### *PART III: General Provisions*

#### *Article 64*

1. After the coming into force of the present Charter, members of the Commission shall be elected in accordance with the relevant Articles of the present Charter.

2. The Secretary General of the Organization of African Unity shall convene the first meeting of the Commission at the Headquarters of the Organization within three months of the constitution of the Commission. Thereafter, the Commission shall be convened by its Chairman whenever necessary but at least once a year.

*Article 65*

For each of the States that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that State of its instrument of ratification or adherence.

*Article 66*

Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.

*Article 67*

The Secretary General of the Organization of African Unity shall inform member states of the Organization of the deposit of each instrument of ratification or adherence.

*Article 68*

The present Charter may be amended or revised if a State party makes a written request to that effect to the Secretary General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the States parties, it shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary General has received notice of the acceptance.



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## RECENT ICJ PUBLICATIONS

### Development, Human Rights and the Rule of Law

*Report of a Conference held in The Hague, 27 April–1 May 1981, convened by the ICJ.  
Published by Pergamon Press, Oxford (ISBN 008 028951 7), 244 pp.  
Available in english. Swiss Francs 15 or US\$ 7.50.*

Increasing awareness that development policies which ignore the need for greater social justice will ultimately fail was the key-note of the discussions at this conference. It brought together economists, political scientists, and other development experts together with members of the International Commission of Jurists and its national sections. Included in the report are the opening address by Shridath Ramphal, Secretary-General of the Commonwealth and member of the Brandt Commission, a basic working paper by Philip Alston reviewing the whole field, shorter working papers by leading development experts, and a summary of the discussions and conclusions, which focussed on the emerging concept of the right to development.

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### Morocco Trial

*Report of an observer mission by Professor André Tremblay of the University of Montreal to a trial in Morocco arising out of disturbances on 20 and 21 June 1981.  
Published jointly by the ICJ and its Canadian Section (ISBN 92 9037 0100),  
Geneva, October 1981, 25 pp.  
Available in english. Swiss Francs 4 or US\$ 2, plus postage.*

The report describes the background of the case and criticises a number of features of the trial. Professor Tremblay also comments on the way demonstrators were treated by the authorities, and describes the circumstances in which he and other international observers were expelled from the country.

★ ★ ★

### Ethnic Conflict and Violence in Sri Lanka

*Report of a mission to Sri Lanka in July-August 1981 by Professor Virginia A. Leary of the State University of New York at Buffalo.  
Geneva, December 1981, 88 pp. (ISBN 92 9037 011 9).  
Available in english, Swiss Francs 7 or US\$ 3.50, plus postage.*

After a careful survey of the background, causes and nature of ethnic conflict and violence and an examination of the legal and administrative measures adopted by the government, Prof. Leary formulates her findings and recommendations. Among her conclusions are that police behaviour has been discriminatory towards the minority Tamils and that the recently promulgated Terrorist Act violates Sri Lanka's international obligations.

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### ICJ Report on Activities 1977–1980

*Geneva, 1981, 110 pp. (ISBN 92 9037 006 8).  
Available in english, Swiss Francs 7.50 or US\$ 3.75, plus postage.*

The report summarises the main activities of the International Commission of Jurists for the four years 1977–1980 covering both the positive promotion of human rights and their legal protection, studies on violations, and action taken to assist victims. Extensive appendices include the ICJ activities in the United Nations.

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