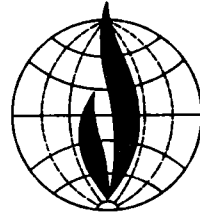


For the Rule of Law**THE REVIEW****INTERNATIONAL COMMISSION OF JURISTS****HUMAN RIGHTS IN THE WORLD**

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No. 33

December 1984

Editor: Niall MacDermot

Box 15

Human Rights in the World

Argentina The Truth About the Disappeared

On 20 September 1984, tens of thousands of people gathered in front of the Casa Rosada in Buenos Aires to express their support for the work accomplished by the National Commission Concerning Missing Persons (CONADEP), which that day delivered to Dr. Raúl Alfonsín, President of the Nation, a 50,000 page report giving the results of the Commission's investigations. The report contains a thorough and detailed account of the political repression conducted by the security forces of the Argentine armed forces and police during the seven-and-a-half years of the military dictatorship. It shows that the principal method of repression was to make opponents and persons critical of the régime "disappear".

A few days later, CONADEP provided the press and the general public with a summary of its report. The full report will be published in book form within the next few months.

CONADEP was established on 15 December 1983 by the new democratic government of Argentina under Decree 187. It was composed of ten members appointed by President Alfonsín, all of them eminent persons who had distinguished themselves for their determined defence of human rights during the difficult years of the military dictatorship. Six other members were

to have been elected by the National Congress, but in the end no further appointments were made.

The report constitutes an overwhelming condemnation of the military régime responsible for the coup d'état of March 1976. It describes with appalling clarity the atrocities committed by the security forces, both military and police, and shows how they took advantage of their powers and of their immunity to kidnap, torture and kill thousands of citizens as well as foreigners, innocent or guilty, even though this latter distinction is not relevant to the issue under investigation. The official security forces acted in an unlawful, ruthless and savage manner, responding to terrorist acts on the part of the far left by terrorism of an infinitely worse kind than the actions they claimed to be combatting.

The Commission succeeded in documenting the disappearance of 8,961 people, but believes the number to be much higher on the grounds that many disappearances have not been reported for fear of reprisals or of another military coup. The Commission also found that there had been 340 detention centres operating in secret into which the victims 'disappeared', while at the same time military authorities of the highest rank who visited these centres were assuring national and international public

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opinion that there were no "disappeared persons" and that those described as such were subversives who had fled abroad or had fallen victim to a settlement of accounts among themselves.

The painstaking investigations undertaken by CONADEP over a nine-month period have established that virtually all the allegations made by the International Commission of Jurists¹ and many other NGOs, in articles, lectures and oral and written reports prepared for various United Nations bodies and for the Inter-American Commission on Human Rights, were only too true. On various occasions, the ICJ was fiercely attacked by representatives of the military government for "inventing falsehoods", "spreading lies", and mounting a campaign against Argentina.

The CONADEP report shows that the illegal kidnappings by the security authorities began even earlier than the military coup of 24 March 1976. Before this date, over 600 persons are now known to have been kidnapped by them. It was, however, after the coup, when the armed forces had at their disposal all the levers of power of an authoritarian state, that the disappearances rose to such an exceptionally high level and that this spiriting away of people became a common practice.

In preparing the report, serious difficulties had to be overcome; members of the Commission were threatened and insulted, no doubt by the authors of the crimes they were investigating, and the security forces destroyed data, files and even buildings that had served as detention centres, or else changed them out of all recognition. The Commission based its findings on written documents that had been preserved, military orders given by superiors, official declarations, the testimony of survivors who had disappeared

only for a time, testimony given by families, friends and neighbours and by members of the public, the documentation accumulated by various NGOs and, what is more important, the testimony of repressors, members and ex-members of the armed forces and police, who had taken part in the kidnappings and arrests that had ended in torture and subsequent disappearance. These agents of repression who agreed to give evidence were mainly activated by base motives, such as revenge against former colleagues, the feeling of "having been abandoned by their chiefs", or anger at an unfair division of the spoils of the "dirty war". This made it necessary to sift and choose their evidence carefully. In a few cases, they were motivated by guilt or ethical reasons to give evidence.

Main features of the report

The report begins by explaining that the Commission was not created to pass judgment since that is the responsibility of the judiciary, as indicated in the Constitution, but to inquire into the fate of the people who disappeared. Although the last word will be for the courts, the Commission felt bound to state that events in Argentina went far beyond what "may be considered a penal offence", to enter into "the dark realm of crimes against humanity". It established that, through the technique of causing people to disappear, human rights were trampled upon and ignored, and that this constitutes "the greatest and most terrible tragedy of our history".

The report states that, in general, the horrors that took place cannot be explained away as "individual excesses" — although these also existed — but were the product of state terrorism as ex-

1) See ICJ Review No. 31, December 1983.

pressed in the systematic and continued violations of human rights "planned and executed by the high military command". The report asserts that no member of the security forces was ever tried or punished for being implicated in disappearances, the use of torture, or the death of detainees held in the detention centres that were official but whose existence was denied and thus remained clandestine. The few members of those forces who were convicted and sentenced were found guilty of economic offences committed in the struggle against subversion. This clearly demonstrates the degree of immunity which the security forces enjoyed and which encouraged them to overstep all legal, ethical and humanitarian bounds.

The repression was inspired and shaped by the doctrine and ideology of national security. To demonstrate this, CONADEP recalls and reproduces phrases that formed part of declarations by the military leaders. Made arrogant by their unchallenged power, they justified what they called the "dirty war" as the best way of defending the "western and Christian values that inspired the life of Argentine society" which, according to them, were threatened by "atheistic materialism".

The report then analyses the repression of subversives, which it describes as "generalised to the point of insanity", and which assumed dimensions as vast as they were unforeseeable. The result was that members of religious orders, both male and female, journalists, teachers and university staff, lawyers, judges, doctors, psychologists, workers in general, relatives of the victims, friends, friends of those friends – people of all ages, children, adolescents and the elderly – came to be regarded as subversive and to be included among the tortured, the murdered and the disappeared.

The Commission explains that it did

not study the crimes committed by the far left and the terrorism of the early years because its task was not to investigate these but to inquire into the fate of the people who had vanished, whatever group they belonged to. The earlier terrorism – the report states – led to deaths but never to disappearances. Furthermore, the Argentine people had been informed in detail by the media – radio, press and television – day after day, of the crimes of the far left. CONADEP expressly condemns all terrorism of whatever origin, and professes its faith in democracy, stating that only democracy is capable of guaranteeing and safeguarding human rights.

The report gives a thorough account, in separate chapters, of the different stages of a disappearance: the kidnapping, the torture, the death of the detainee.

The operations in question were carefully organised by the security forces using modern communications equipment and vehicles. Although acting clandestinely, without identifying themselves, they ordered the police posts of the area in question to treat it as a "free zone", so that they would not interfere with the operations. Kidnappings – since this is what they were – took place in private homes, places of work or study, in the street, even in military units in the case of some young people who were doing their military service. Members of state services, dressed in civilian clothes, broke into houses by day, or more often by night, heavily armed, smashing doors and windows, terrorising the family, hitting the victim in front of them, hooding and handcuffing him and finally dragging him to a car and driving off with him. It often happened that the team stole everything of value that could be carried away. When the family or neighbours went to the

police to complain, no inquiries of any kind were made. The victim was utterly defenceless.

The kidnapped person was taken to one of the 340 secret detention centres and there subjected – whether it was a man or a woman – to inhuman treatment of unbelievable horror, usually resulting in death. Brutal and sophisticated methods of physical and mental torture alternated, including beatings, electric shocks on sensitive parts of the body, immersion of the head in water to the point of suffocation, rape, sometimes in the presence of the husband and/or family, sexual ill-treatment and abuse, being kept chained and hooded without clothes for long periods, or being buried naked up to the neck in pits dug in the earth for two to four days without water or food, until ready to make a statement. Children and old people were tortured before a member of the family solely to make that person tell the interrogators what they wanted to know.

The Commission has proof that these clandestine centres were run by high-ranking members of the armed forces. They were used for a number of purposes: to terrorise the victim in order to break down his resistance, to torture with impunity, and to be able to deny all responsibility if the detainee died.

It is believed that a policy decision was taken later to liquidate detainees who had been made to disappear. This too is borne out by evidence. "Transfers" took place involving many victims; some were dropped into the sea, alive or dead, from aeroplanes; in other cases, when persons had died, their bodies were dynamited and the remains burnt or buried. In other cases again, armed confrontations that never took place were invented, and it was said that persons acknowledged to be held in custody had attempted to escape, or attempts had been made to rescue them, and that they had

lost their lives in these attempts.

CONADEP drew up a list of 1,300 people who are reported to have been seen alive in secret centres, but who are missing to this day.

Of the thousands of detainees, the Councils of War (i.e. military tribunals) introduced by the military régime, convicted only 350. This gives an idea – points out the Commission – of "the other ways that were used to do away with thousands of opponents".

In its report, CONADEP has individual chapters for the different categories of victims, such as disappeared children, pregnant women, and the physically disabled. This is perhaps the most cruel aspect of the repression. Children who were abducted together with their parents, and children who were born while their mothers were in captivity in clandestine centres, have not yet been found. The report relates the deeply distressing circumstances in which the mothers gave birth and how their babies were taken from them. In some cases, as was confirmed by the grandmothers of the Plaza de Mayo, the infants were handed over to persons who had been implicated in the disappearance of the parents and who registered them as their own children.

In spite of the scale of this phenomenon, not one kidnapping was prevented by the police or armed forces, not a single clandestine detention centre was discovered or a prisoner rescued, nor was it ever heard that the guilty parties had been punished – and this in a country under the strict control of the security forces. It demonstrates without any doubt that the repression was meticulously planned, organised, directed and carried out by high-ranking officers in the armed forces, and that very little can be blamed on "individual excesses", although they undoubtedly occurred as well.

CONADEP, after reiterating that it had not been set up to pass judgment but to

investigate the fate of the disappeared, reports that its work led to charges being preferred before the competent judicial authorities in 1,086 cases. It thus discharged its mandate, under article 2(b) of Decree 187, to remit to the judicial authorities without delay accusations and evidence received by it, when these related to an apparent criminal offender.

The progress made in discovering the fate of each of the persons who has disappeared has been subordinated – the report concludes – to the “progress that may be made in identifying the persons responsible for repressive acts”. In order to facilitate this task, the report includes a list containing several hundred names of military men and police responsible for repressive and illegal acts, according to numerous and concurring statements and other evidence.

Trial and Punishment of the Guilty Parties

On taking power, the constitutional government of President Alfonsín ruled, in Decree 158 of 13 December 1983, that the Supreme Council of the Armed Forces (the supreme organ of military justice) would try the nine members of the first three Military Juntas that held power from 1976 to 1982. They were to be tried for the crimes of “homicide, illegal deprivation of freedom, and application of torture to detainees”, without prejudice to other offences that might be uncovered in the course of the proceedings. Another Decree (no. 157) also provided for the trial of the leaders of the guerrilla movement – the Montoneros and Revolutionary Army of the People – for homicide, illicit association and various offences against public order.

On 16 February 1984, the Argentine government promulgated a controversial law, no. 23,049, amending the Code of Mil-

itary Justice. The amendments were as follows:

A. In relation to the past, that is, offences committed *before* 26 September 1983:

- offences committed by civilians during the struggle against subversion are to be tried by the civilian courts (Justicia Ordinaria);
- offences committed by agents of the security services (military, police and prison staff) are to be judged by a single military court (Supreme Council of the Armed Forces);
- convictions and sentences passed by the Supreme Council of the Armed Forces can be appealed to the civilian Federal Court of Appeal;
- a number of criteria were established for determining the cases or investigations which are to be the responsibility of military justice, namely where:
 - the offence was committed in the course of “the anti-terrorist struggle”;
 - it was committed in the performance of “acts while on duty” or inside the premises of a unit of the security forces;
 - the offence was completed before 26 September 1983; or
 - the criminal act or acts occurred in the course of a “control operation” in the campaign against subversion.

In all these cases, different degrees of responsibility are specified for:

- the heads of security forces who gave orders to liquidate guerrillas without regard for the means employed;
- persons who exceeded the orders given in these cases;
- persons who confined themselves to obeying orders. These accused are en-

titled to plead in their defence, in the absence of proof to the contrary, that they acted in 'unavoidable error'. In other words, the justification of due obedience is established for persons who acted in response to orders or directives from their superiors and who carried out plans approved and supervised by high-ranking military officers.

B. For the future, that is with respect to offences committed *after* 26 September 1983:

- offences committed by civilians, in peace-time, are to be tried by the civilian courts (Justicia Ordinaria);
- common law offences committed by members of the security services, even if arising out of acts performed while on duty, are to be tried by the civilian courts;
- offences of an essentially military nature committed by members of the security services are to be tried by tribunals.

Once the reform of the Code of Military Justice had been approved by parliament, the civilian Federal Court of Appeal granted the Supreme Council of the Armed Forces a period of 180 days in which to pass judgment and sentence in the cases brought before it. This period was subsequently extended as regards the trial of the members of the first three Military Juntas, until October 1984.

Five days after the report by CONADEP had been remitted to President Alfonsín and the press, the Supreme Council of the Armed Forces declared that it was unable to pass sentence on the military leaders who had comprised the first three Military Juntas for lack of evidence against them. The Council expressed the view that the military orders issued for the combating of subversion were "unobjectionable". More-

over, the case against the defendants was based on charges brought by or on behalf of victims or their relatives, and the Supreme Council therefore doubted their impartiality and credibility. It considered that, for the offence of illegal deprivation of freedom to have occurred, it had to concern persons who had not violated penal laws since, if they had done so, it would not be unlawful to deprive them of their freedom. Finally, the military judges stated that the persons who had disappeared were suspected of having committed serious crimes.

This decision of the military tribunal led to political turmoil and a tremendous wave of protest in Argentina. In our opinion, it represented a dereliction of their duty as judges, after ten months spent in considering the evidence. It was a decision inspired by military arrogance, that goes so far as to justify the abuses and violations of human rights that took place during the repression.

The arguments used to avoid the administration of justice are, moreover, invalid under Argentine law. A criminal charge is often brought by the victim himself, by his family or by his friends. The courts are compelled to investigate the charge, whatever its source. What is more, if the offence is of a serious nature and is liable to prosecution *de officio*, whether or not a charge has been brought, it is sufficient for the institution of penal proceedings that there should be, in the minds of the prosecuting authorities, reason to believe that a crime has been committed by the accused. The evidence required to prove guilt is another matter, but, even at this stage, the judges may not disregard testimony on the grounds that it is given by a victim or his relatives. Moreover, in this case, the evidence did not derive from these sources alone. It was also obtained from the agents of repression themselves, and other factors, circumstantial or corroborative evidence, searches of

premises, or the compatibility of testimony. To accept the fanciful theory that, to a great extent, the deprivation of freedom was not unlawful in the circumstances in which it occurred, is tantamount to erasing by a stroke of the pen the principles and rules designed to protect the integrity, liberty and security of the human person, whether innocent or guilty, to deprive him of his inalienable right to a fair and impartial trial and to be defended. Lastly, it would leave the right and power of punishment in the hands of groups like the armed forces and security services that are dependent on the Executive Power, to be wielded when, where and how they please.

As soon as the ruling of the Supreme Council of the Armed Forces was made known, the Argentine civilian judges decided to involve themselves in the matter and to assume responsibility for continuing the penal proceedings against the nine members of the first three Military Juntas. Thus, the Federal Criminal Court of Appeal took immediate charge and ordered the military authorities to place Lieutenant General Jorge Rafael Videla and Admiral Emilio Massera, who were being held in military custody, in the direct custody of the Court. The Court further summoned the other seven members of the first three Juntas, who were still at liberty, to make preliminary statements and orders for their imprisonment are expected.² In addition, the Court ordered strict security measures to be taken to ensure the safety of the evidence collected and deposited in various civil courts, in view of the recent theft from the courts in Rosario of important documents on the military repression.

Concern is still felt as to the future course of judicial investigation and trial in the hundreds of cases that have been brought before the civilian courts. Private

lawyers, including those acting for organisations that defend human rights, such as the Centre for Legal and Social Studies (CELS), the Permanent Assembly for Human Rights and the Argentine League of Human Rights, are actively engaged on behalf of the victims and their families.

In the case of most, if not all, the charges laid, as soon as a member of the armed forces or of other security bodies is seen to be involved, the military court, at the request of the defence counsel, claims that it alone is competent to try the case.

It is natural that the persons concerned with such matters should wonder whether the Supreme Council of the Armed Forces, two-thirds of whose members have no legal training, will not adopt the same attitude in these cases as in the proceedings against the members of the first three Juntas.

Law 23,049 was passed by a small parliamentary majority against strong opposition. The human rights organisations were utterly opposed to the armed forces being entitled to be judged by their peers and that persons who had committed abnormal and hideous crimes, comparable to crimes against humanity, should be absolved from all responsibility simply on the grounds they were obeying orders from their superiors, as if it were not even open to question whether an order entailing the commission of a grave offence has to be obeyed.

It is clear that the Radical government of President Alfonsín which, from the very beginning, demonstrated its concern for the observance of human rights and the stability of the democratic system, did not feel secure enough to ensure that hundreds, perhaps even thousands, of officers in the Armed Forces were brought to trial, the reason being that the majority of these officers were still on active service and many of them were in command of troops.

2) Subsequently, General Roberto Viola was imprisoned.

The purge of the military undertaken by the President was on a large scale and sent many generals and colonels into retirement, but this was not enough to dispel the risk of a new coup if the persons involved had been sent to jail.

The demand that those guilty of the crimes described in the CONADEP report should be made to answer for them is becoming a critical aspect of the democratic consolidation of the country. It is also regarded as a means of dissuading the armed forces from again launching attacks on the Constitution and the democratic form of government chosen by the Argentinians. At the present stage of the discussions on the issue of civilian versus military justice various civilian judges have argued against the claims of the military court to jurisdiction, alleging that law 23,049 is unconstitutional in that it deprives the civilian judiciary of part of its jurisdiction under the Constitution. The Supreme Court of Justice has not yet ruled on this question

but it has expressed a majority opinion to the effect that it is not for the trial judges to decide on the unconstitutionality of a law, and that this is a matter for the Supreme Court to decide when the issue is raised before them by one of the parties.

If, as seems likely, the Court will support the constitutionality of the law, the possibility remains that the Federal Court of Appeals will remedy any omissions or errors of military justice. This is, of course, far from being the best solution, since the cases are conditioned from the outset by the limitations inherent in proceedings in a military court as regards evidence and other matters.

These events in Argentina are undoubtedly being followed with close attention in other countries of the region, and the success of the new democratic government, in which we have confidence, will have a positive influence on the development of events in other countries.

Malta

Democracy and respect for human rights in this Mediterranean island have been gradually and steadily eroded since the 1970s. The independence of the judiciary has come under attack and the government has tried to circumscribe the activities of the independent trade unions, the press and the Roman Catholic Church to which over ninety percent of the population belongs. It has also enacted legislation giving it control over all relations with foreigners, including trade union and cultural relations. A senior minister has spoken publicly of the possibility of establishing a one-party

state, suspending freedom and democracy and not holding elections.

Confrontations have occurred with increasing frequency between the Socialist Party (SP) and the Christian Democratic Nationalist Party (NP) particularly since the 1981 elections. Although the NP received 51% of the popular vote, the SP obtained a majority of the parliamentary seats. The NP has protested against alleged electoral irregularities and continues to contest the SP's right to govern. It has persistently called for new elections; for a period of 15 months immediately following

the elections it boycotted the meetings of parliament.

The situation became highly charged in September-October 1984 after the Civil Court declared a 1983 law allowing the expropriation of church property unconstitutional. The decision was given on 25 September. On 28 September a group of dockyard workers attacked the law courts and the office of the archbishop after having been addressed by the Senior Deputy Prime Minister, Mr Mifsud Bonnici. The minister remained with the group but did not actually participate in the forced entry. The police did nothing to prevent the violence although they had been alerted to the group's approach and were aware of its probable destination. The archbishop's office is a few yards from police headquarters.

No investigation into these events was conducted until the Malta Chamber of Advocates filed a formal complaint requesting the police to investigate the incident and charge those responsible. Perhaps more troubling than this inaction on the part of the police were the remarks made by the senior deputy prime minister following the attack on the law courts:

"We want to settle our accounts with the lawyers. Today it is no longer the workers who tremble when they see the lawyers coming but as happened in court recently, it is the lawyers who tremble when they see the workers coming."

About two weeks after the attack the offices of the Chamber of Advocates were invaded and large portraits of the deputy prime minister and the prime minister were pasted on the walls.

Also of concern are statements made by the Senior Deputy Prime Minister that he would use workers to assist the police in carrying out their functions. Legislation was recently passed which makes it mandatory

for private schools to have an operating licence. Most of the private schools on the island are run by the Roman Catholic Church. The archbishop has refused to apply for licences claiming that the conditions set out in the legislation are too onerous and would make it impossible for the schools to continue to function. The church has filed proceedings challenging the legislation's constitutionality.

At one point the Church stated that it would reopen the schools without obtaining the licences, but because of the risk of violence it was decided not to do so. While the question of reopening the schools was still under consideration, a paper was distributed listing the names and addresses of teachers likely to go to the schools, saying "the duty of the workers is to stop them". During September some of the teachers received threatening phone calls and letters.

The senior Deputy Prime Minister has admitted that he circulated the list for the purpose of having workers "support the police to stop these teachers". The alleged purpose of the lists was to allow workers to be able to identify persons as they approached the schools. He did not explain why this was thought necessary when padlocks had been placed on the gates of many of the schools and police were stationed outside in order to prevent people from entering. Such government sponsored harassment can only be seen as a threat to the maintenance of the rule of law.

The Foreign Interference Act

In September 1982 the government passed the so-called 'Foreign Interference Act'. The Act does not specifically define foreign interference; it provides that "it shall not be lawful to hold any foreign activity in Malta except with the permission of the minister granted in accordance with the

provisions of the Act". The Minister may impose such conditions, limitations and restrictions as he deems appropriate.

A foreign activity is defined as "anything done by, or sponsored, promoted or in any manner whatsoever assisted or encouraged by any foreign person and includes in particular, but without prejudice to the generality of the foregoing, the provision of money, equipment or other material or thing whatsoever." Sporting, tourist, diplomatic and "purely commercial or industrial" activities are excluded from the provision of the Act, but "no activity shall be deemed to be purely commercial or industrial if it provides or serves to provide a financial or valuable advantage, whether directly or indirectly to a political party or to an active member or supporter thereof."

In addition the Act makes it illegal for Maltese citizens or residents to participate in any broadcast to Malta from abroad or "in any manner to aid or abet the making of such broadcast, or to do anything which may directly or indirectly be of assistance or encouragement to such broadcast or to its reception in Malta, and in particular to publish the times or details of any such broadcast". This section was included because the NP had set up an independent radio station on the island of Sicily after their request to establish such a station in Malta had been denied. They had requested their own station because they believed they were not being given sufficient access to the government controlled radio and TV stations. The government of Italy later requested the NP to cease the transmissions from Sicily after receiving complaints from the Maltese government.

The government has interpreted the Act as requiring permission for the active participation of foreign or non-resident clergymen in religious functions, for lectures by foreigners to groups of businessmen and trade unionists and for foreign journalists

to report from Malta. Members of the NP have been questioned about their trips abroad. Some minor government harassment occurred during a meeting of the European Democratic Union. The organisation asked for permission to hold its meeting in Malta, although it stated its disagreement with the act. The EDU was informed that it could hold its meeting but it did not receive an official letter. While the meeting was in progress the executive secretary was summoned to the ministry of foreign affairs and was warned against contravening the Act. There were no further problems, but such actions will serve to dissuade others from holding meetings in Malta.

In January 1983 the Maltese foreign ministry sent a note to all diplomatic missions in Malta in which it strongly objected to any kind of contact being made by members of foreign missions with NP members, including attendance by NP officials at embassy receptions. This caused the Australian High Commission to cancel a reception planned for Australia Day. In a published communication, the embassy of the United States stated that the Maltese government's note ran counter to the Vienna Convention on Diplomatic Relations and was "not in conformity with the spirit of the Helsinki Final Act (Principle VIII), which condemns the kind of anti-opposition discriminatory activity normally associated with totalitarian regimes." Several other foreign governments strongly protested against the restrictions and the government withdrew its note.

The Judiciary

During the past few years there have been several incidents which have undermined the independence of the judiciary. In January and February 1981 the courts were closed for several weeks ostensibly

because of the resignation of the Chief Justice and the "atmosphere in the courts", but to most observers familiar with the situation the closing was motivated by the government's desire to delay the hearings in a controversial lawsuit between it and a private hospital¹.

Following the presidential decree closing the courts, there was an outcry from the Chamber of Advocates, and the criminal and constitutional courts were reopened. However the civil court where the case was being held remained closed. During this same period the Code of Organisation and Civil Procedure (Amendment) Bill, 1981 was passed; it deprived the courts of an important part of their jurisdiction to review the use of discretionary powers accorded to ministers and their officials. The law provides, in pertinent part that "no court in Malta shall have jurisdiction to enquire into the validity of any act or other thing done by the Government or by any authority established by the Constitution or by any person holding a public office in the exercise of their public functions or declare any such act or thing null or invalid or without effect" unless such act is *ultra vires* or clearly in violation of an explicit provision of a written law, or due form or procedure has not been followed.

Recently controversies between the Roman Catholic Church and the government have led the executive to interfere again with the workings of the courts, this time with the concurrence of the parliament. On 13 November 1984 the parliament adopted a resolution whereby it suggested to the Minister of Justice that in cases where a judge continues to hear a case in which he might be prejudiced the Minister should consider whether it would not be less harmful to continue to pay the judge while removing him from performing

his functions. The resolution had been introduced by the Senior Deputy Prime Minister because a judge had refused to disqualify himself on grounds of bias from the school licensing case.

No objection was raised by the government when the hearing first started, although the information it later used to assert prejudice was made known at the initial hearing. This was that the judge had attended a Catholic school as a child, even though he was the son of a worker. One of the reasons the government has given for the licensing legislation is the need to end class bias in the Catholic schools; it asserts that this can only be accomplished if the schools are prevented from charging fees.

Some procedural rulings were made by the judge from which an interlocutory appeal was taken. After the hearings resumed the Archbishop was called to give evidence. At one point he stated that the church schools were open to all, irrespective of means and social standing. Someone in the public gallery shouted that this was not true. The judge then observed that he had been a worker's son and had attended a Catholic school. No objection was raised by the government to this comment at the time. Two days later however the government requested the judge to remove himself from the case. The motion was denied by the court.

The government then introduced a resolution in parliament which asked the Chief Justice to suggest to the presiding judge that he remove himself, and that should the judge continue to sit in the case the Minister of Justice should consider removing him from his functions while continuing to pay him. The resolution noted that in the circumstances it would not be constitutionally permissible to remove the judge. The resolution was subsequently amended

1) See CIJL Bulletin No. 7.

when the judge decided to abstain on his own motion, saying that in view of the prevailing circumstances, independently of the truth of the allegations of partiality, he would abstain because justice had to be seen to be done as well as being done.

Passage of this resolution has seriously undermined the independence of the judiciary. In order to fulfil its functions properly the judiciary must be free from interference by both the executive and the legislature. This resolution suggests that an arm of the executive branch, the Minister of Justice, should use his authority to supplant decisions of the courts and to avoid the normal judicial and constitutional mechanisms for removal of a judge. The European convention on Human rights to which Malta is a party guarantees the right to a hearing before an independent and impartial tribunal. The recent actions of the government and the parliament adversely affect the fulfilment of this right in Malta. The Malta Chamber of Advocates has condemned the motion stating that it constitutes a very serious attack on the independence of the judiciary.

The Media

Radio and TV in Malta are controlled by the government. There is a broadcasting authority whose constitutionally mandated function is to ensure that "impartiality is preserved in respect of matters of political or industrial controversy relating to current public policy and that broadcasting facilities and time are fairly apportioned between persons belonging to different political parties". However members of the opposition parties, the independent trade unions and the Roman Catholic Church have repeatedly alleged that their viewpoints are not adequately covered. During the last election the NP charged that it was not being allowed

to present its programmes to the electorate in an adequate fashion. As noted earlier they sought a government license to set up their own radio station and when the application was denied they set up an independent broadcasting station in Sicily which was later closed by the Italian government. At the same time the NP called on its members to boycott goods advertised on the Maltese stations. The boycott received a considerable response and led to a great deal of acrimony between the SP and the NP. In January of this year the NP decided to end the boycott.

The government has on several occasions attacked those newspapers which have published articles critical of its policies and has suggested that they might not be allowed to continue to publish. In 1979 the Progress Press building was attacked and a considerable part of its machinery was destroyed. The Progress Press publishes the Times newspapers which often print articles written by members of the NP, the independent trade unions or the Catholic Church. No proceedings have ever been brought against those responsible for the destruction. The rebuilding of the premises was completed in 1983. Shortly after its completion, the Minister of Foreign Affairs insinuated that the rebuilding could not have taken place without foreign assistance and suggested that the government could not allow such an influential institution to remain outside government control.

Trade Union Rights

Malta has one large trade union affiliated with the government party, the General Workers Union (GWU), and a confederation of independent unions, the Confederation of Maltese Trade Unions (CMTU). On occasion, government officials have suggested that there should be a single union, claiming

that pluralism is not in the workers' interest. In 1983 the CMTU representatives were dropped from the Maltese delegation to the annual conference of the International Labour Organisation (ILO). The government has refused to implement labour legislation enacted at its request, calling for the establishment of a Joint Negotiating Council, because it does not want the CMTU to sit on the Council. The ILO Committee of Experts recommended in June 1983 that the Council be established. To date, the government has not heeded the Committee's recommendations.

Conclusion

Tension has increased markedly during the past few years. The government has de-

liberately pursued measures it knows will provoke strong reactions from the opposition party and other groups within the society, such as the independent trade unions and the Church, and which do not necessarily have the backing of the majority of the population.

Of grave concern is the tacit tolerance if not provocation of mob violence against the courts, the Church and the press. This can only lead to a further deterioration in the situation. An effort is needed on all sides to have a constructive dialogue which would allow the country to continue to function as a democratic state. The government must also refrain from holding itself above the law and should not seek to thwart the effective administration of the system of justice. Only in this manner can the rule of law be guaranteed.

Mauritania

At its last session held in Geneva in August 1984, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities examined the report filed by Mr. Marc Bossuyt, a member of the Sub-Commission, on the mission he undertook to Mauritania from 14 to 21 January 1984. The mission's main aim was to gain an insight into the situation prevailing in Mauritania after the abolition of slavery proclaimed by the Military Committee for National Salvation on 5 July 1980 and confirmed by Decree of 9 November 1981. The mission was also designed to obtain information on the assistance that Mauritania might need from the international community in order to be able to overcome the effects of

slavery more easily.

The origins of this mission go back to August 1981, when the Anti-Slavery Society, a London-based non-governmental organisation, informed the working group about the existence and perpetuation of slavery and related practices throughout Mauritania, in spite of the Decree of 5 July 1980. The Society said that about 100,000 people were still being held in a state of slavery.

These allegations were rejected by the Mauritanian authorities, whose representative made a declaration at the thirty-fourth session of the Sub-Commission, inviting the latter to send a delegation to study the situation. At the thirty-fifth session in 1983, the Sub-Commission's members made a

point of expressing their gratitude to the representative of Mauritania for the constructive and instructive attitude of the Mauritanian government. They took the view that Mauritania should be held up as an example for the United Nations' future work on slavery.

When submitting his report to the Sub-Commission, Mr. Bossuyt said that the director of the Anti-Slavery Society had taken part in the mission as a personal guest of the Mauritanian government. Furthermore, he expressed his satisfaction at the facilities that had been made available to him. It is true that the Mauritanian government has displayed a courageous attitude, since, as was pointed out by the Sub-Commission expert: "All too often when questions relating to human rights in a particular country are raised within the United Nations the country in question merely denies the existence of the problems without really entering into a dialogue with the United Nations agencies that represent the international community".

In his introductory remarks the expert emphasized the fact that in his opinion those who claimed that slavery still existed in Mauritania were in fact talking about the poor social conditions, and that they were complaining about de facto rather than de jure inequalities. He made the following summary of prevailing points of view on the matter:

- slavery no longer really existed as such in 1980 and the proclamation basically confirmed a situation which already existed;
- slavery did exist prior to 1980, but had been eradicated since the proclamation;
- slavery had already declined dramatically before the proclamation but some forms of slavery still exist in certain isolated areas, despite the proclamation;
- the proclamation has done nothing to

alter the situation and slavery still exists in Mauritania.

In his report the expert stated that he was convinced that he had been able to gather sufficient information and had heard a sufficient number of opinions to be able to assert that slavery as an institution enjoying the protection of the law had genuinely been abolished in Mauritania; and that he thought it was justified in future to speak of the elimination of the "effects" of slavery. Unfortunately he did not specify what these effects were, stating merely that one cannot rule out the possibility that in isolated parts of the country where the government has little influence it is possible that de facto situations of slavery still exist.

He also stated that on visits to Nouakchott, Nouadhibou and Boghe he had been able to see for himself that economic development is the best means of eliminating the effects of slavery. In view of the importance that the international community attaches to the abolition of slavery - a particularly serious violation of human dignity - he appealed to all states, both jointly and severally, to give effective and generous assistance to the campaign that the Mauritanian government was waging to eradicate the effects of slavery. Furthermore, he recommended that the government of the Islamic Republic of Mauritania should:

(a) Take the necessary steps to ratify or accede to the international human rights instruments, including those adopted under the auspices of the specialized agencies, to which Mauritania is not yet a party;

(b) Promulgate an implementing decree, pursuant to the Ordinance of 9 November 1981, declaring that applications for compensation made by former masters of slaves more than three years after the

abolition of slavery shall no longer be admissible;

(c) Proceed to set up a specific body which would be entrusted with co-ordinating the struggle against slavery and to which any person experiencing difficulties in this field could apply

(d) Involve former slaves to a greater extent in the struggle against the consequences of slavery;

(e) Carry out the reform of the civil status legislation now in preparation, in such a manner that it can become, *inter alia*, a means of helping former slaves to become conscious of their legal personality as free men;

(f) Issue a circular once again drawing the attention of the administrative authorities to the unlawful character of slavery and laying particular stress on their obligation to refer to the judicial authorities any breach of that prohibition which may come to their knowledge;

(g) Disseminate at frequent intervals through the communications media in all the languages of the country, including Hassaniyab, programmes which stress the importance of the abolition of slavery and the conclusions to be drawn from that abolition;

(h) Invite the religious authorities to explain that the abolition of slavery has been decided upon in conformity with the Shari'a;

(i) Inform the public more widely of the criminal penalties applicable to former slave-owners who ill-treat or victimize their former slaves;

(j) Strengthen social inspection, especially in the field of employment relations, with regard to former slaves who have remained with their former master of their own free will;

(k) Pursue actively its policy of establishing new schools, particularly in the agricultural sector, where the greatest number

of former slaves are to be found;

(l) Develop sociological research on Mauritanian society;

(m) Study the possibility of forming and establishing small handicraft enterprises;

(n) Encourage former slaves to become owners of livestock by granting them loans on concessional terms.

The expert also recommended, *inter alia*, that the Sub-Commission forward a copy of the report to the member states as well as to the specialized agencies and institutions of the United Nations, inviting the latter to examine, in the light of the said report, what assistance they could give Mauritania with a view to helping eradicate the effects of slavery.

It is, of course, true, as the expert said, that the aim of the mission was not to conduct a legal inquiry or scientific study; it was essentially a fact-finding, consultative mission carried out on behalf of a United Nations agency at the invitation of the Government of the Islamic Republic of Mauritania. Nevertheless, it must be noted that the report does not mention some points which are extremely useful for an understanding of the phenomenon of slavery in Mauritania and for the definitive abolition of this phenomenon. These aspects may be summarised as follows:

- since slavery is not regarded as a racial phenomenon in Mauritania, why does it involve only blacks? The expert pointed out that there were cases of white slaves working for white masters, but that this was exceptional;
- How many slaves actually exist in Mauritania? What is the breakdown according to ethnic group as well as within the population?;
- How can one define the problem of slavery and improve the situation of

former slaves in the absence of any figures?

- As Mauritians have justified their use of slaves on religious grounds, how will the Mauritanian authorities reconcile their desire to eradicate slavery with the teachings of certain "ulemas" and with the people's mentality?
- How can one protect de facto slaves living with their masters' families (this includes nomadic slaves who have become domestic slaves as a result of economic problems arising mainly from drought)? The argument advanced by the Mauritanian authorities is that there is a labour code and that these people are paid wages.

On the other hand, in a letter submitted to the expert by people purporting to belong to the "El Hor" movement it is stated that "the problem in Mauritania at present is not to eradicate the effects of slavery but to eradicate slavery itself". El Hor is a movement which includes the *Haratines*, descendents of black slaves who have been set free. Contrary to the interpretation which claims that this movement is one of emancipation of blacks as part of a general struggle against whites, El Hor has always been opposed to the use of the *Haratines* in a cultural and racial conflict. According to El Hor, there are still slaves in the interior of the country who are totally subjugated, who have never heard of the abolition of slavery and for whom the term would not mean anything anyway. In the towns and at the courts there are slaves who carry out the tasks of servants without any remuneration whatsoever (just as there are in front of the tents in the interior of the country) and who, even if they had heard of the Decree of July 1980, would be physically unable to get out of the situation in which they find themselves. In its letter El Hor expressed the wish that active

elements favourable to emancipation should become more involved in the economic and social projects which, until then, had all too often been entrusted to the sons of feudal lords. The movement declared that a genuine desire to abolish slavery should be matched in practice by a real effort on the part of the government to implement the new policies. And that in effect, if no action is taken immediately, there is no reason to hope that slavery will ever be abolished, or to believe that the Mauritanian government ever seriously intended to achieve this.

The position of El Hor, which claims that slaves and *Haratines* have an active part to play as full-status citizens and not as mere tools, whatever the level involved, is indeed convincing. One simply cannot overlook the fact that a social phenomenon with long and deep roots does not disappear at a stroke as soon as a law is enacted. Although time is needed to change such a situation, concerted action is also required to change the status of former slaves.

At the thirty-sixth session of the Sub-Commission the representative of the Islamic Republic of Mauritania produced a note on "slavery in Mauritania" the purpose of which, he said, was to explain the facts of this phenomenon by elucidating its origins, development and possible solutions. After painting a grim picture of the country's economic situation, the representative pointed out that "the Mauritanian Government, aware as it is of economic factors and of the resultant economic problems, has decided to abolish slavery once and for all". and that "this decision should form a suitable framework for an overall emancipation programme which places this problem in its proper context, i.e. the fight against under-development in all its forms". This remark by the representative of the Mauritanian Government is noteworthy in that it

appears to be well-founded. By financing projects intended exclusively for former slaves does one not run the risk of creating an atmosphere of animosity amongst the poor sections of the population? On this question of financial aid it would appear wiser to draw up projects to benefit former slaves and the poorer classes without distinction. But this should not have prevented statistics from being prepared on the extent of the phenomenon of slavery. Although at present there are no reliable figures it is nevertheless true that the practice of slavery continues on a broad scale.

Should one not be apprehensive that a

decision as important as that of abolishing slavery is difficult to implement simply because it is dictated by economic interests? Mr Bossuyt emphasized in his report that "Mauritania would doubtless be very disappointed if the international community were to shirk its duty of expressing solidarity in this field". It is true that the help of the international community is vital if the integration of former slaves into the life of the country is to be facilitated but it is also necessary that penal sanctions be implemented against some former masters who continue to torture and harass their former slaves.

Peru

Violence and Abuses in Ayacucho

After twelve years of a de facto military régime, Peru gradually returned to a democratic system. In 1978 a Constituent Assembly was elected by popular vote and given the task of drafting a new Constitution. All the political forces in Peru had the possibility of being represented in the Constituent Assembly and of taking part in the drafting of the Constitution.

The Constitution was finally adopted by popular plebiscite and entered into force in July 1980.¹ It contains a number of norms that have been carefully drawn up to provide satisfactory protection for human rights and provide the people with legal remedies for ensuring the observance of their rights. With the Presidential, legislative and municipal elections of 1980, the process of restoring democracy was completed.

Unhappily, the constitutional and democratic system in this country of 18 million inhabitants is once again threatened. In the mountainous region to the south, which includes the departments of Ayacucho, Apurímac and Huancavélica, with 500,000 inhabitants, there have been political assassinations, torture, disappearances and other violations of human rights. Figures supplied by the government indicate that, between May 1980 and July 1984, 4,145 persons have met a violent death.

The origins of the violence and its victims

The political violence has a dual origin. On the one hand there is an armed revolu-

1) ICJ Review No. 27, December 1981, where an analysis of the Constitution is made.

tionary body, organised on a military basis, which has turned its back on participation in the democratic process in favour of fighting the government. It is known as 'Shining Path'. On the other hand, the armed forces and police have had recourse to illicit methods that violate human rights and the rule of law in striving to stamp out the revolutionary organisation.

Shining Path is an underground organisation of Maoist tendencies, and is composed mainly of young people from the Ayacucho region, where the group settled ten years ago to do political work. Its militants are familiar with the geography of the area and the people, and look for a social base among the poor indigenous peasants, by giving the Maoist message a strong ethnic and regional content. Ayacucho and the neighbouring departments form one of the poorest areas of the country, where government investment to lift it out of its economic and social backwardness has been minimal. The life expectancy of the people in this area is eleven years less than in other parts of the country.

The victims of the violence practised by Shining Path have, in general, been persons in the more subordinate strata of the power structure (village mayors, local judges, police and soldiers) but have also included members of the indigenous peasant population who do not support or actually oppose the activities and doctrines of Shining Path. There have also been major acts of sabotage and terrorism which have spread to other areas of the country, including the capital - Lima. In 1982, the organisation intensified its armed action. There were more direct clashes with the police and armed forces, the main example being an armed assault against the prison of Ayacucho, when most of the prisoners were freed.

The response of the government has been military and violent. In October 1981, the Executive Power, invoking article 231 of the Constitution², proclaimed a State of Emergency in Ayacucho and neighbouring provinces. Later, in December 1982, they were designated an "emergency zone" and placed under the "politico-military control" of the army. The first to be sent to fight the guerrillas were the "Sinchis", an anti-guerrilla police group; then the armed forces were sent in. The methods used by the zone command were similar to those of the "dirty war" as in Argentina and rapidly led to large-scale violation of human rights. Nevertheless, the State of Emergency has been renewed several times.

Of the official figure of 4,145 deaths as a result of political violence, it was reported that 2,074 were "subversive delinquents" or "terrorists", that is, members of Shining Path; 1,923 were civilians and 148 were members of the security forces. Human rights organisations in Peru believe the total number of deaths is higher than the figure given by the government. There is no way of knowing whether nearly 50% of the victims were really "subversive delinquents" and, if so, in what circumstances they died. Throughout 1983, the politico-military command issued a large number of official communiqués reporting armed clashes in places that were never clearly defined, resulting in the death of subversives who were never named, while there were virtually no victims among the security forces. Nor were subversives ever wounded or taken prisoner.

As regards the deaths among the civilian population, the official figures do not indicate who was responsible. Shining Path was undoubtedly responsible for many, given the massacre of peasants in which it was

2) Art. 231 authorises the proclamation, in serious situations, of two kinds of emergency measure - the State of Emergency and the State of Siege.

involved in certain areas, and which was widely publicised by the government and press. But it is equally certain that the security forces were even more to blame. Numerous accusations and charges made by first-hand witnesses and survivors report the assassination of civilians by military and/or police forces.

For example, on 1 August 1984, six peasants who were members of the National Presbyterian Church were killed in Callqui, and the military command attributed the crime to Shining Path. It was later discovered from first-hand evidence that the six evangelists had been dragged out of the church, where they were taking part in a religious service together with other people, by troops of the Marine Infantry from Callqui (in the neighbourhood of Huanta) and shot only a few metres from the church. None of the people attending the service were armed, and naturally there was no struggle or resistance.

In the last few months, the Peruvian people learnt with horror of the discovery in the neighbourhood of Huanta of about 100 corpses buried without clothes in three common graves, their hands tied behind their backs, killed by gunshots. In the case of those who were identified, it was found that they were people who had been arrested in their homes by uniformed men and about whom their families had known nothing more.

Such cases lend credibility to the accusations made in the Peruvian parliament and press, and to the concern expressed by the human rights organisations, that security forces were carrying out "extra-judicial executions".

On 10 October 1984, the Public Prosecutor³ submitted to the civilian authorities a criminal charge against the commanding officer of the Marine barracks at Huanta for multiple aggravated homicide and other offences, following the discovery in August of a grave at Pucayacu containing 50 bodies.

Forced and involuntary disappearances

The Andean Commission of Jurists, a regional body with its headquarters in Lima, estimated that by July 1984 the number of people who had disappeared in the emergency zone amounted to 904, according to the complaints made before the Office of the Public Prosecutor. Of these cases, 129 had occurred in July.

The families of the people who have disappeared are forced to tread the same distressing path as the families of persons who have disappeared in other Latin American countries, despite the constitutional system in force in Peru. The police and military posts where they go for help deny the arrests, and if the families bring a charge before the Office of the Public Prosecutor — which has to be done through the medium of the Provincial Prosecutor — the former has little possibility of obtaining results in the inquiries that are set in motion, since the authorities concerned either fail to reply to the Office's requests for a report or simply continue to deny that the persons have been detained.

This situation is extremely serious and is beginning to arouse public opinion in Peru.

3) In Peru the Public Prosecutor, in addition to his responsibility for prosecutions, exercises a role comparable to an Ombudsman. Among his functions are to ensure the correct application of the law, the independence of the Judiciary, and the protection of human rights and correct police procedures. He is entitled to be present at the interrogation of suspects.

Breaches of the Law

The State of Emergency, which is carefully regulated by the new Peruvian Constitution, authorises the suspension of four fundamental rights only, namely those of not being arrested save by judicial order (article 2,20, g, of the Constitution); inviolability of the home (article 2,7); freedom of assembly (article 2,10); and freedom of movement (transit or circulation) (article 2,9). All the other rights guaranteed by the Constitution and the law remain in force. In spite of this, the trend of events shows that the situation has become much worse and that since the Executive granted wide powers to the military in charge of the emergency zone, they have grossly abused them. As a result, torture, ill-treatment, the maintenance of detainees incommunicado for a long period of time⁴ and disappearances have become every-day occurrences, and severe restrictions have been placed on the powers of the Judiciary and the Office of the Public Prosecutor in the emergency zone. The military command has declared that it is entitled to transfer the assignment of legal proceedings from one judge to another, as it did in the case of the eight journalists who were assassinated in January 1983 in Uchuraccay (a small village in Ayacucho), causing an international scandal.

In addition to the repression conducted by the State security forces, they have been promoting the training of para-military groups of civilians who are used as guides, back-up groups and, in many cases, for combat purposes against the members of

Shining Path. On certain occasions, the para-military groups have become involved in violent clashes with other indigenous communities with whom they have long-standing quarrels, leading to abuses and deaths.

Danger for Democracy

The escalation of violence, the militarisation of society, the fact that the armed forces are starting to take decisions that are the province of civilian authorities, combined with the violations of human rights, represent a serious and specific threat to democracy. Those in authority should recall the experiences of other Latin American countries in the last decade and realise in time that the rule of law and democracy cannot be safeguarded by methods which violate the very values they are supposed to defend.

The Peruvian government should also redouble its efforts to introduce economic, social and cultural measures to bring the peoples of the Sierra (high table-land) out of their profoundly backward state, thus depriving Shining Path of the support it has gained among the indigenous peasants. Subversion and terrorism must be combatted within the law and with respect for human rights, so that the forces of democracy, which unquestionably constitute the great majority in Peru, will be able to overcome the escalating violence of Shining Path and the armed forces. This is not only vital for Peru but of immense importance for the rest of Latin America.

4) The Constitution facilitates such abuses since it provides that "terrorists" may be kept in custody for 15 days without being brought before a judge (article 2,20, g). This is an exception to the general rule that every arrested person shall be brought before a judge within 24 hours.

The Philippines

A three-member mission of the International Commission of Jurists visited the Philippines from 31 December 1983 to 14 January 1984. The members of the mission were: Professor Virginia A. Leary of the United States, Mr. A.A.T. Ellis, Q.C. of New Zealand, and Dr. Kurt Madlener of the Federal Republic of Germany. Their terms of reference were to assess the human rights situation since the lifting of martial law in January 1981, including economic and social rights, as well as civil and political rights.

Members of the mission travelled north to Bagnio and Legaspi in Luzon, and south to Davao City in Mindanao, Cebu City in Cebu and Bacolod in Negros, to receive first-hand information. They interviewed government officials, military officers, opposition leaders, lawyers and members of the judiciary, prisoners and other persons with first-hand information concerning human rights violations, community workers and members of the hierarchy of the Catholic church, university professors, diplomats in foreign embassies, trade unionists and human rights activists.

In their report* entitled: 'The Philippines: Human Rights After Martial Law', they deal with four main subjects: human rights abuses by the military and security forces; legal limitations and restrictions on human rights; the independence of the judiciary and the legal professions; and economic and social rights.

The following extracts from the report illustrate the situation of human rights in the Philippines.

Abuses by the Armed Forces and Police

"Military and security forces have become powerful institutions within Philippine society. The growing role of military forces in Philippine society is commonly referred to as militarisation. This process, set in motion from 1972 to 1981, is continuing despite the lifting of martial law... The insidious effects of militarisation are apparent in the extra-judicial killings by the military, arbitrary arrest of suspected persons, torture, prolonged detention, and hamletting; all carried out by military or security forces."

On 'salvaging' (a term used in the Philippines to refer to summary execution or extra-judicial killings), massacres and disappearances, the report cites the estimate made by Task Force Detainees (TFD), an organisation of the Association of the Major Religious Superiors of the Catholic Church. According to this report, there were, in the first nine months of 1983, 191 'salvagings', 126 massacres and 74 disappearances carried out by the armed forces in Mindanao alone. The report qualifies this estimate by stating that: "these figures are necessarily approximate, but they err, if at all, on the conservative side since many incidents are unreported". After dealing extensively with four specific incidents of 'salvaging', the report concluded: "the above four incidents of 'salvaging' and massacres are only a small sample of many similar cases reported to us and confirmed by us in interviews with witnesses and by

* The 123-page report is available from the International Commission of Jurists, B.P. 120, 1224 Geneva, Switzerland, or 777, U.N. Plaza, New York, N.Y. 10017, U.S.A., at US\$5 or SFr.12.50, plus postage.

written documentation... The information we obtained confirms allegations of extensive 'salvaging' and massacres by the military made by other human rights organisations. Killings by the military are increasing."

On arbitrary arrests and torture, the report states: "We received ample evidence... that arbitrary arrests of individuals was a widespread occurrence in the Philippines. Evidence of concern for the poor and oppressed, participation in activities to aid the underprivileged and dissent from government policies have been taken as evidence of incitement to rebellion, subversion or affiliation with the New People's Army. Church workers, human rights activists, legal aid lawyers, militant labour leaders and recently outspoken journalists, have been particularly subject to arrest on flimsy grounds. In many cases, such persons are held for lengthy periods and then released often without trial because of insufficient evidence. Often they are tortured. Detention, fears of torture and instances of actual torture are powerful means used to suppress dissent."

The government has issued an order forbidding the practice of 'hamletting', a term used for the herding of rural residents into special camps by military or civilian authorities, allegedly to protect them from the rebels of the New People's Army. The report states, however, that despite the order the practice is continuing.

"The farmers frequently claim that danger from the rebels is not such as to require these evacuations; they claim that the true purpose of hamletting is to force them off their land so that it may be used by powerful corporations or officials. Hamletting causes severe economic and personal disruption to large numbers of individuals and is a serious violation of the rights of the individuals involved... The evidence is strong, based on the careful reports of the respected

Integrated Bar of the Philippines and others, that hamletting under orders of the armed forces is continuing in some areas despite the order of Minister [of National Defense] Enrile. The practice is a serious infringement of the rights of the hamletted residents to freedom of abode and movement. It subjects them to extreme psychological pressure and physical and economic deprivation."

Legal limitations and restrictions on human rights

After analysing the Constitutional provisions, laws and decrees, the report concludes that: "Despite the lifting of martial law in 1981, numerous features of the law indicate clearly that the Philippines is still a dictatorship, and not the democratic form of government which President Marcos claims to project. Amendment no. 6 of the 1973 Constitution (adopted in 1976 during the martial law period) permits President Marcos to issue decrees and letters of instruction which form part of the law of the land. President Marcos has freely availed himself of this right to legislate. He has issued more than 900 decrees, orders and letters of instruction. His decree-making powers have been upheld by the Supreme Court. Safeguards under the Constitution and under the Rules of Court concerning arrest and detention have been completely set aside by Presidential Decrees. A person may be held indefinitely under a so-called Preventive Detention Action on the authority of the President, and he has no means of obtaining judicial redress even if his detention lasts for years. No effective civil remedies are available against the state for injury, loss and damage caused by illegal abuses by the armed forces and police."

The independence of the judiciary and the legal profession

On the independence of the judiciary, the report states: "Criticism and scrutiny of the judiciary will undoubtedly continue, however, as long as corruption and bribery continue within the ranks of the judiciary. Relatives of detained persons whom we interviewed shared the widely-held belief that bribery expedited the release of detainees... We also heard from many sources that most judges are susceptible to political and social pressures, and the military in particular blatantly tried to use such influence, for example, by mounting an unwarrantably large presence at a court hearing, or briefing judges as to the current state of armed insurgency. It is hard to assess this except by reference to the decisions handed down by the courts. The Supreme Court's decisions on the legitimacy of the 1973 Constitution, the constitutionality of the Judiciary Reorganisation Act, 1980, and its failure to intervene in cases of alleged gross violations of human rights, as well as its support of President Marcos' power to legislate by decree, have led to the conclusion that the Supreme Court, as well as lower courts, have abdicated their independence and become subservient to the executive."

On the role played by the legal profession, in addition to the stand taken by the Integrated Bar Association, the report mentions specifically the part played by private lawyers' organisations formed to assist those who suffer at the hand of the executive, and states that: "The combined efforts of these lawyers and church agencies are the real basis of hope for improvement. If their efforts are recognised by the Executive Government, especially the military/police, and if they are supported by the judiciary at all levels, substantial improvements may be to hand."

Economic and Social Rights

The report analyses the economic situation, the restrictions on freedom of association and other trade union rights, the condition of labourers working in the Bataan Export Processing Zone and in the sugar plantations, the implementation of land reforms, the state of the health services and the situation of tribals. Among the conclusions on these subjects are:

- "The Philippines is in a serious economic crisis... The severity of the present economic crisis is attributable in major part to the Marcos administration which has been in power since 1966;
- Corruption, inefficiency, 'cronyism', government spending on prestige projects and an export-oriented industrialisation policy have contributed to the crisis which is depriving Filipinos of their economic and social rights;
- Freedom of association and trade union rights are severely curtailed by provisions of the Labour Code;
- Unsatisfactory living and working conditions of workers in the Bataan Export Processing Zone and of sugar plantation workers on the island of Negros are particularly egregious examples of the sub-standard situation of workers in the Philippines;
- The agrarian reform programme is a laudable objective and has had some positive results. Very few tenant farmers have become owners, many have defaulted on payments and are deeply in debt. Doubts persist as to the successful implementation of the programme;
- The health situation... is bad. Malnutrition is widespread, curable diseases take many lives and health facilities are unavailable for much of the population, particularly in rural areas. The adoption of primary health care as a key strategy...

is a positive step... but remains to be implemented;

- The survival of the tribal communities in many parts of the Philippines is threatened by the exploitation of the resources of their ancestral lands by Philippine and foreign enterprises."

The report acknowledges that "the lifting of martial law in 1981 was a positive step despite the continuation of many of its features. It signalled a move towards normalisation; civilians are no longer tried by military courts or commission; fewer persons are held in detention." However, the report has made several recommendations to ensure a return to democratic government and the protection of human rights.

Among the recommendations are the abolition of the Presidential power to legislate by decree and to arrest and detain without trial; full restoration of habeas cor-

pus; repeal of laws making non-violent political activities criminal offences, trial of the military by civilian courts for offences against civilians; termination of abuses; repeal of repressive labour laws; and restoration of other economic and social rights as well as civil and political rights.

The Conclusions and Recommendations of the ICJ mission are reinforced by the latest report of Task Force Detainees (TFD), covering the period between January-June 1984. According to this, the repressive practices continue in the form of arbitrary arrests, torture, disappearances, and 'salvaging'. There is documented evidence that during the period January-June 1984, 798 persons were arrested for political reasons and there were 53 cases of disappearances and 108 cases of 'salvaging', showing an increase of approximately 50% in comparison with the first six months of 1983.

South Africa

The South African government's attempt to transfer KaNgwane to Swaziland was extensively discussed in ICJ Review No. 32. A proposal of this nature had been seen as another modification of the apartheid policy in South Africa and as a striking example of the lengths to which the regime is prepared to go to ensure separate development of the white and black population in the country. When the Review had gone to press the South African government decided to disband the commission responsible for conducting investigations into this transfer proposal. In future the government will consider only proposals made jointly by the leaders of Swaziland and KaNgwane.

As the leaders of KaNgwane are opposed to any form of integration of their country with Swaziland such a joint proposal seems unlikely.

Since the beginning of the second half of 1984 an atmosphere of violence has reigned in South Africa, with almost 200 dead and thousands injured among the black population. This situation was predictable since the South African government had decided to erect a legal barrier between the coloureds and Indians on the one hand and the black majority on the other. Furthermore, the vast majority of coloureds and Indians have refused to cooperate in what is called "the Parliament of

apartheid", boycotting elections to the Parliament, to protest the fact that blacks are completely excluded from the parliamentary process and responsibility for black affairs lies directly with the head of state. The first consequence of the implementation of the new South African constitution was a reappearance of the spectre of Soweto. While the coloured and Indian communities were boycotting the new institutions, the black townships were the scene of clashes between the "security" forces and black schoolchildren demanding reforms. Whilst rent increases in several townships acted as a catalyst, the exasperation of a black community bereft of all rights is undoubtedly the real cause of the flare-up of violence which is at present sweeping the country.

This situation is hardly surprising since as was pointed out by Marion Raoul: "From now on one can no longer entirely rule out the possibility that the victims of apartheid will resort to force. Faced with the institutional and physical violence which is directed against them, some of them regard the use of force as being the ultimate means of obtaining recognition of their fundamental rights"¹. However, the South African government does not see things in this light, and is even strengthening its repressive arsenal in order to ensure the permanence of white power. Arbitrary arrests, detention without trial, torture, inhuman and degrading treatment, detainees dying in custody: such is the gloomy picture of the situation in South Africa at the end of 1984. To this one must add the continued use of that terrible instrument of repression Section 28 of the Internal Security Act, as well as the policy of forced resettlement which continues unabated.

Detention

More than 100,000 people are languishing in South African jails. Some prisons are worse than others, for example, Fauresmith prison is overcrowded by 352%; those in East London, Port Elisabeth and Bloemfontein are overcrowded by 146%, 131% and 207% respectively. The situation of child prisoners is equally grave. More than one thousand children below the age of 18 are in prison. According to a report by the KAIROS working group, 403 of these children had been sentenced for criminal offences and among the others who were awaiting sentence there were two children aged 10 and 11 years.

The number of detainees is constantly growing and the target groups that are the worst hit are the militants of the anti-apartheid organisations, schoolchildren and students. Although some of these detentions are only short-term a relatively high number of detainees are being held, most of them in "administrative detention" under Section 28 of the Internal Security Act.

Section 28 gives the authorities the power to arrest and detain an individual without trial, bypassing normal procedures. "Administrative or preventive detention" may be indefinite and is used to isolate an individual from society, to prevent him from doing something the Minister of Law and Order thinks he might do. An individual detained on this basis is entitled to no protection whatsoever.

Several cases of detainees who died during detention were recorded at the beginning of the second half of 1984. For example, a 23-year-old student, Mthethusa Ephraim Thausanga was found hanging in his cell at Durban central prison during the

1) The Universal Declaration of Human Rights and the South African Reality, UNESCO 1983, p. 93. A ICJ study commissioned by UNESCO and prepared by Marion Raoul, former ICJ legal officer.

week-end of 25/26 August. Before this date, his lawyers had drawn the authorities' attention to the mental illness from which he was obviously suffering; they had done all they could to get him transferred to a hospital where he could be given psychiatric treatment, but in vain. Mthethusa was a victim of solitary confinement (imposed under Section 29 of the Internal Security Act).

The autopsy on Ngalo Johannes Bona-kele who died on 16 July 1984, at Parys police station revealed that Ngalo died as a result of serious internal injuries, probably an internal haemorrhage. Mr Terror Lekota, the publicity secretary of the UDF, declared that he had witnessed a man matching Ngalo's description being beaten while he was at Parys police station a few hours before his death.

Sipele Mxolisi died at Sulenkama hospital after a lengthy period of detention at the Transkei security police station. The cause of his death is unknown. Transkei security police maintain that he had been released before being admitted to hospital, but his widow pointed out that she was never informed of his release nor of his transfer to the hospital. However, the strangest aspect of all is that the victim's clothes were still in the prison at the time he died.

Medical negligence during detention was probably the cause of Thisikhudo Samuel Mugivhela's death, but no inquiry has yet been opened.

These deaths in custody are a chilling example of the South African government's idea of protecting detainees. As long as detainees can be held secretly and as long as they can be interrogated by the security police without any legal protection the toll of such victims will continue to rise.

Torture

In addition to these deaths, the South

African press and the Detainees' Parents Support Committee have reported a number of cases of torture and ill-treatment. A detainee named Mandla Ndlore informed the judge of Ermelo that two members of the security police had beaten him up so violently on his arrest that the shock to his eardrums had prevented him from hearing for two weeks.

Another detainee declared before the court of Vereeniging that he had been tortured by the police. He claimed that policemen had applied electric shocks to his genitals and placed a plastic bag over his head until he became unconscious. At Brixton police station several detainees were seriously injured following acts of torture committed by members of the South African police. It is alleged that after being interrogated, the policemen kicked them, twisted their arms, stuffed stockings down their mouths and gave them electric shocks.

South Africa celebrated the year of George Orwell's "1984" with the installation of closed-circuit television in the country's prisons. The decision to install these systems had already been announced in Parliament in May, 1983 by the Minister of Law and Order, Mr Louis le Grange. The latter had indicated that the aim was to prevent suicides. Following a number of protests against this decision the Minister undertook to consult the opinion of all sections of the community and the advice of experts before it was implemented. When one realises that the installation of these closed circuit TVs means that detainees' cells have to be permanently illuminated one cannot help taking the view that apart from interfering with detainees' private lives, the South African authorities' aim was to increase the number of cases of depression amongst black prisoners. Despite the undertaking given by the Minister of Law and Order, proof that his decision has been implemented is contained in the

account of a detainee, Mr Peter Makgoba, who was detained for 12 days at John Vorster Square last May. Mr Makgoba declared that the closed circuit television system is indeed in operation at John Vorster Square, and that he had seen the permanent electronic "eye" in his cell, as well as the monitor in the warden's office. The only explanation the police gave to justify the installation of this system was that closed circuit television systems are used all over the world and very widely in "stores, factories etc."

As was pointed out by Mr Nicholas Haysom from the Centre for Applied Legal Studies, "The installation of such a camera in a cell may constitute an extra punitive element in the already punitive nature of solitary confinement. Indeed, the institution of closed circuit TV may in itself constitute a cruel and unusual punishment... Surely the first preventive measure against suicide by detainees is to provide for proper legal protection against abuses by policemen, and for proper means of enforcing the rights that detainees may have".²

Forced resettlement

This aspect of apartheid policy continues to be a source of daily worry for the black population of South Africa, who are constantly being forcibly transferred by the South African government to be resettled in the so-called "independent bantustans". The South African government uses this device to make these blacks foreigners in the country of their birth, and thinks that it can thus disown all responsibility for them, disregarding the fruits of their labour,

which have done so much to contribute to the country's economic prosperity. One of the most cynical examples of the forced resettlement policy was described in a letter addressed to, amongst others, the International Commission of Jurists by Bishop Desmond Tutu, General Secretary of the South African Council of Churches and winner of the Nobel Peace Prize. In his letter, Bishop Tutu states that "During the last few days (of July 1984) the South African authorities have repeatedly destroyed plastic shelters of "squatters" in Crossroads (Cape Town). Men, women and children have had to jump out of bed and stand shivering in the rainy South African winter as government officials first ripped plastic sheets off the wattle frameworks and then removed the wood. This is regarded as the appropriate way to convince people to move 'voluntarily' to Khayelitsha - a newly assigned township 35 km from Cape Town. Further the allocation of control at Khayelitsha will be used to sift out "illegals" and deport them over 600 kilometres to starving areas in Transkei and Ciskei".

This example given by Bishop Desmond Tutu is self-explanatory. It is an eloquent illustration of the fact that the South African government is persisting in its apartheid policy, the ultimate aim of which is the expropriation and exclusion of the black majority from South Africa. By the end of 1984 more than eight million South Africans will have been stripped of their South African citizenship, and deprived of the right to work or to live in South Africa. More than three and a half million blacks have already been forcibly resettled and more than two million are threatened with deportation at any time.

2) In *Lawyers for Human Rights*, Bulletin no. 4, August 1984, pp. 103-104.

South Korea

ICJ Review No. 26 (June 1981) described the adoption of the new Constitution in October 1980, the large-scale arrests and the restrictions imposed on politicians, journalists, scholars and others under the campaign launched by the government in June 1980 for the 'purification of society'.

The three years beginning in 1982 were less eventful and there were some positive developments in the release of political and other prisoners through amnesties granted by the President.

In March 1982, a total of 2,863 persons, mostly political prisoners, were released and the death sentence imposed on the prominent opposition leader, Mr. Kim Dae Jung, was reduced to a prison term of twenty years. In December 1982 his prison term was suspended and he was permitted to travel to the United States for medical treatment.

In two amnesties granted in August and December 1983, another 306 political prisoners were released and the 1981 ban imposed on 567 persons from taking part in political activities was reduced to 300 persons.

While these amnesties are to be welcomed there remain about 300 persons imprisoned for political reasons. Also, civil liberties continued to be severely restricted by repressive laws, in particular the National Security Law (NSL) and the Law on Assemblies and Demonstrations (LAD).

National Security Law

Under this Law, 'any person who has organised an association or group for the purpose of assuming the title of the government or disturbing the state' can be punished for 'anti-state activities', a phrase nor-

mally associated with the legal system of the U.S.S.R. The vagueness of this phrase is hardly compatible with the requirement for precision in a penal law. Punishment under this law ranges from a minimum sentence of five years to a death sentence.

The following are some examples of prosecutions under this law illustrating the scope of the concept of 'anti-state activities':

In January 1982, Mr. Lee Tae Bok, a Catholic publisher, was sentenced to life imprisonment, later reduced to imprisonment for twenty years, for publishing and distributing marxist books and organising student and labour groups. The books complained of included 'Development of Capitalism' by Maurice Dobb, a well-known British marxist economist.

In February 1983, nineteen students were detained for up to three weeks. One was subsequently charged with anti-state activities for preparing a document analysing South Korean society.

In December 1983, the Director and two professors at the Christian Institute for the Study of Justice and Development (CIJSD) were arrested for having commented favourably on the North Korean proposal for unification in a research study on the presentation of the unification issue in current school books. They were charged with attempting to disseminate ideologies sympathetic to the North Korean cause and calling for the establishment of a socialist régime in a unified Korea. Following international representations on their behalf, they were released but on condition that the charges against them remain pending for a probation period of two years. At the time of their arrest the ICJ represented to the government that an open discussion on such a

crucial issue is in the best interests of the nation, and it seemed incomprehensible that serious scholars should not be allowed to express in good faith their views on unification, still less that they should be indicted as criminals for doing so.

Reports have also been received of arrests or detention for short periods of several political or religious personalities under the National Security Law.

Law on Assemblies and Demonstrations

This Law, which prohibits gatherings 'feared to trigger social unrest', is used by the government to suppress freedom of expression, freedom of association and the right to demonstrate peacefully. A maximum sentence of seven years or a fine of up to about US \$3,750 can be imposed under this law.

Peaceful gatherings of workers and students, and at times even meetings held inside churches, come under the scope of this law and the participants are arrested and punished under it. For example, in June 1983 police entered a protestant church and arrested students who were participating in a meeting there.

This law is used mainly to curb student activities, in particular peaceful demonstrations by students. According to a report published by church sources, in 1983 alone more than one thousand students were arrested for violating this law. Further, in comparison with earlier years the courts imposed harsher sentences. It has been common for students to receive a sentence of two to three years imprisonment for violating this law.

The same sources also reported that there were instances of arrested students being taken forcibly for military service. This is indirectly confirmed by the Minis-

try of Education which has stated that in the last three years 465 students had been forced to take leave of absence and were sent to the barracks for 'guidance', a euphemism for military service.

According to a report prepared by five church-related student organisations, when students are arrested for violating this law and are taken forcibly for military service their parents and the College authorities are usually not informed. The students are ill-treated by the regular soldiers and are asked to recount in detail their campus activities. The report also alleges that six students have died while doing their military service and the authorities have failed to clarify the circumstances of their death.

Torture Allegations

Allegations of torture have also been made by those arrested under these laws. In May 1982, Mr. Kee Jung Do, who had been arrested for violating the law on assemblies, died while in custody. In a letter written to his son a few days before his death, he said he had been tortured.

In the trial arising out of an arson attack made on a U.S. cultural centre in the city of Pusan in March 1982, several defendants alleged that evidence had been obtained from them under duress and one told the court that his confession, which he denied, was extracted under torture.

The government's intolerance towards any organisation or activity of workers, is evident; in the last three years about 500 teachers and students have been arrested for helping in the running of 'night schools for workers'. Some of these have been prosecuted for 'anti-state activities' and others have been detained for periods without trial. These night schools, run by local churches, provide the only opportunity for workers to continue their education.

According to the organisers of these night schools, many of those arrested for working in them have been tortured and made to sign false statements saying that the purpose of their night school activity is to build a socialist society.

Trade Union Restrictions

In addition to the two laws discussed above, the labour laws enacted during the 1980 'purification' campaign impose severe restrictions on the rights of workers to organise and bargain collectively. For example, only company unions are recognised and formation of industrial or regional unions are prohibited. This reactionary step is, of course, designed to reduce the bargaining capacity of the unions and has resulted in the formation of thousands of separate unions, which are mostly small and weak.

Moreover, in the State Department's country report to the U.S. Congress in

February 1984, it is stated that: "religious labour ministries such as the Catholic Working Youth and the Protestant Urban Industrial Mission are forbidden to participate directly in local unions' bargaining activities and are severely limited in assisting indirectly or even offering advice",

It is regrettable that the government, under the guise of 'national security' and preventing 'anti-state activities' resorts to such pervasive control over activities of all sections of the people. In our article in June 1981, we stated that: "it is to be hoped that the Government of South Korea will respect the guarantees contained in the Constitution and work actively to provide the civil liberties demanded by its people". In repeating this we would add that it is not sufficient to grant amnesties. The government should consider amending or repealing laws that severely restrict freedom of expression and association and should take steps to permit greater participation of the people in the political processes of the country.

Sudan

The announcement of President Nimeiry's decision to apply Islamic law (Sharia) instead of the penal code caused consternation and concern among non-Muslims and moderate Muslims alike in the Sudan in September 1983. On 23 September the archbishop of Khartoum published a pastoral letter in which he emphasized that the Christians (1.2 million Catholics and 300,000 to 400,000 Protestants) did not regard Islamic Law as their rule of conduct. The letter stated that "Islamic law favours Muslims in disputes with Christians and

non-Muslims. Christians believe that all Sudanese should be equal before the law. Some of the penalties laid down are unacceptable; mutilation is contrary to human dignity..." But the Sudanese government remained deaf to these protests and plunged the country into a process of Islamisation (70% of the 20 million Sudanese are Muslims and the vast majority of the population in the south is Christian or animist). This process of Islamisation was to help exacerbate the rebellion of the South, united as it was against the religious intoler-

erance of the North. One of the main causes of the rebellion was the decision taken by the head of state to divide the South into three autonomous regions, thereby violating the Addis Ababa agreement, which had put an end to 17 years of civil war between the North and the South in 1972. Thus in February 1984 the liberation movement of the peoples of the Sudan was formed, which brings together most of the southern groups that were fighting separately against the authorities of the North. Furthermore, the proclamation of the state of emergency on 29 April 1984 was seen as being essentially directed against the insurrectional movement in the South. Consequently, President Nimeiry decided to create nine emergency courts at Khartoum to judge those responsible for infringing the provisions of the state of emergency, stipulating that the sentences passed by these courts would be applied immediately, except for death sentences, which he would decide on himself.

Two weeks after being set up these emergency courts had already condemned seven people to amputation of either a hand or a foot. These people are said to have been Christians.

Despite the emotional atmosphere that has developed in the country since promulgation of the Sharia, President Nimeiry has called upon the Sudanese National Assembly to pass a whole series of amendments to the Constitution of 1973 that are designed to bring it into line with Islamic law. However, on 12 July 1984 a majority of deputies (98 out of 153) requested a period of reflection so that they would be in a better position to take a decision on this "delicate" issue. The view taken by the deputies is surely not unconnected with the difficulties that accompanied the application of the Sharia and which could lead to an even more serious situation if the proposed amendments were ever adopted.

This is not the first time that the idea of an Islamic constitution has been put forward in the Sudan. As early as 1968 attempts had been made on these lines, which failed when President Nimeiry came to power after a military coup on 25 May 1969. In addition, it must be noted that the 1973 Constitution contains a provision concerning the matter of religion in the Sudan. This is article 16, which was adopted after a week of intense negotiations between the partisans of Islam as the state religion and the defenders of a secular constitution. This article, which is regarded as a compromise, states that:

- (a) In the Democratic Republic of the Sudan, Islam is the religion and society shall be guided by Islam being the religion of the majority of its people and the State shall endeavour to express its values.
- (b) Christianity is the religion in the Democratic Republic of the Sudan being professed by a large number of its citizens who are guided by Christianity and the State shall endeavour to express its values.
- (c) Heavenly religions and the noble aspects of spiritual beliefs shall not be insulted or held in contempt.
- (d) The State shall treat followers of religious and noble spiritual beliefs without discrimination as to the rights and freedoms guaranteed to them as citizens by this Constitution. The State shall not impose any restrictions on citizens or communities on the grounds of religious faith.
- (e) The abuse of religious and noble spiritual beliefs for political exploitation is forbidden. Any act which is intended or is likely to promote feelings of hatred, enmity or discord among religious communities shall be contrary to this Constitution and the Law.

Moreover, article 9 of the Constitution stipulates that "Islamic law and customary law are the principal sources of legislation. The personal status of non-Muslims is governed by their personal laws".

It is thus clear that Islamic law and customary law are, from a constitutional point of view, on an equal footing; and that in no event could a custom which is contrary to the principles of the Sharia ever be considered null and void.

In order to stop the attacks on the new laws – the new penal code – President Nimeiry of course resorted to the state of emergency. He did not fail to seize the opportunity to declare that the state of emergency was necessary in order to complete the advance of the Islamic revolution and to allow the governmental institutions to reach maximum stability and to achieve the rule of law. The International Commission of Jurists gave its opinion on this matter before the Sub-Commission on human rights in August of this year, pointing out that the population of a country should be free to choose the form taken by its State and the type of government by means of a democratic process, and that the declaration of a state of emergency should not be used to impose a change as fundamental as that affecting the form of the State.

The measures taken following the declaration of the state of emergency had a scandalous effect on the administration of justice. Although the new penal code had not been ratified by Parliament, as required by the Constitution, emergency courts were supposed to judge the crimes defined in the said code, applying the penalties which it calls for. In this respect it should be pointed out that these penalties include the death penalty and that on 15 June 1984 the first public hanging was carried out on a Sudanese found guilty of armed robbery by a court in Omdourman.

Following the Manara affair – named

after an Italian priest who was sentenced to be whipped for having kept wine intended for sacramental use in his home and for not having informed the police of the matter – modest amendments were introduced in the administration of justice under the emergency procedures. It would appear that the authorities realised the injustice of the decision affecting the Italian priest, which received a considerable amount of attention in the international press. Sentencing an innocent man to one month's imprisonment, 25 lashes and a 500 pound fine is undoubtedly an injustice. The modest changes that have been introduced concern the setting up of an emergency appeal court, although some of the judges who have been appointed to it are reputed to be amongst the most fervent advocates of the Sharia. The right to legal representation before this court has also been introduced. Emergency civil courts and emergency civil appeal courts have been set up. These courts have been named "courts of decisive justice". However, the new measures have not been effective enough in achieving a greater respect of defendants' rights.

At the end of last September, these courts and tribunals were suspended as a result of the lifting of the state of emergency which had been in force for five months. Similarly, Islamic law, which had been introduced one year earlier, is for the time being no longer applicable to non-Muslims. The division of the South into three regions is also being reconsidered. In announcing a reorganisation of the judiciary in the Sudan at the beginning of October and in promising a radical move towards prompt and effective justice, but in fact appointing a fundamentalist Muslim Chief Justice, President Nimeiry is giving the impression of someone who is just putting off the evil day. Ought he not rather seize this opportunity to finally draw up principles and clearly state rules that do not violate fundamental

human rights? If one considers the conclusions adopted by the international colloquium organised in Kuwait in December 1980 by the ICJ, the University of Kuwait and the Union of Arab Lawyers, which was attended by highly renowned scholars of Islamic law, there can be no doubt that the Sudan can and must safeguard the fundamental rights and freedoms of the non-Muslim communities, on a par with Muslims. In so doing they would help refute the propaganda campaign being waged against Islam on this subject.

The application of Islamic law in the Sudan has in many respects not been in keeping with the spirit of human rights un-

der Islam. To quote but one of the conclusions of the Kuwait colloquium, "Islamic legislation ensures the accused the right to a hearing before a competent, impartial tribunal and does not provide for any form of emergency jurisdiction; it grants the accused either the right to conduct his own defence or the assistance of a defence attorney appointed by himself in order to prove his innocence or to determine the degree of his responsibility. Furthermore, the existence of texts which provide for compulsory appointment of a defence attorney to a defendant accused of serious crimes is not contrary to Islamic law as the latter guarantees the independence of the Bar."

COMMENTARIES

UN Sub-Commission on Discrimination and Minorities

The Sub-Commission met in Geneva in August 1984 for its 37th Session. Fifteen of the twenty-six members were newly elected.

The Sub-Commission reviewed its work on the basis of a Working-Group's report and recommended for consideration by the Commission on Human Rights that:

- its name should be changed to 'Sub-Commission of Experts of the Commission on Human Rights';
- its members be elected for a term of four years, with half the members being elected every two years; and
- studies prepared under its auspices should pass through a three-year cycle, the completed study to be preceded by a preliminary report in the first year and a progress report in the second year.

Elimination of Racial Discrimination

The Sub-Commission drew the Commission's attention to the fact that in a number of countries, organisations founded on racism and preaching violence against one race or races continue to exist, and urged that vigorous effective legal measures should be taken against the racist activities of such organisations.

It also recommended the Commission to call upon the governments to give the widest possible publicity to the study on the 'Adverse Consequences of Military, Economic and Other Forms of Assistance

Given to the Racist Régime of South Africa'.

Human Rights Violations

The Sub-Commission adopted resolutions on the human rights situation in Afghanistan, Iran, Guatemala, East-Timor, El Salvador, Chile, Sri Lanka and South Africa.

On Afghanistan, it expressed grave concern at the systematic and continued bombardment of civilian targets and the human and material losses inflicted on the people of Afghanistan, as well as on refugee camps in Pakistan. It requested the Commission on Human Rights to ask its Special Rapporteur on Afghanistan to investigate the losses resulting from the recent bombardments and to include his findings in his report.

On Iran, it expressed its alarm at reports of continuing gross violations of human rights and fundamental freedoms, in particular, those of ethnic and national groups such as the Kurds and of the Baha'i religious community.

On Guatemala, it expressed deep concern at the serious, increasing and systematic violations of human rights and, in particular, acts of violence against the civilian non-combatant population, acts of torture, involuntary or forced disappearances and massive extra-judicial executions, as well as displacements of rural and indigenous populations and their confinement in militarised

hamlets in violation of the right to freedom of residence. It urged the government to clarify the destiny of those disappeared since the outset of the conflict, to forbid clandestine prisons, to ensure the effective enforcement of the right of habeas corpus, to establish guarantees to ensure participation of all political forces in the July 1985 presidential elections and to eliminate the climate of intimidation that preceded the July 1984 National Constituent Assembly elections.

On El Salvador, it recommended that the Commission on Human Rights should continue to examine the human rights situation in the country in spite of the change of government, urged that in order to restore peace and security and to establish a negotiating mechanism for a political solution, all states should abstain from intervening in the internal situation in El Salvador and should suspend all supplies of arms, military assistance and support.

On Chile, it expressed deep concern at the general situation of human rights, the situation of indigenous people and the impunity enjoyed by the forces of repression, particularly the National Information Agency (CNI), and urged the Chilean authorities to put an end to all measures of repression, torture and inhuman, degrading treatment.

On East Timor, it requested the Indonesian authorities to facilitate the activities of humanitarian organisations in East Timor and not to impose restrictions on them.

On Sri Lanka, it expressed concern about the recurrence of violence resulting in severe loss of life and property, and hoped that the government will submit information to the Commission on the progress made in the investigation of incidents and the recent efforts to promote communal harmony.

On South Africa and Namibia, it repudiated the efforts of the régime to perpetuate its apartheid policies through the new Con-

stitution and elections and demanded the instant cessation of the campaign of mass terror against those trying to exercise their civil and political rights.

Under this item, the Sub-Commission also noted the existence in various countries of laws or practices providing for the penalty of amputation and recommended to the Commission to urge these governments to take appropriate measures to provide for other punishments consistent with Article 5 of the Universal Declaration.

Mr. Leandro Despouy (Argentina) was appointed Special Rapporteur to undertake a comprehensive study on the human rights of disabled persons and was asked to include in his study:

- violations of human rights and humanitarian law that result in disability or have a particular impact on disabled persons;
- apartheid as it relates to disability;
- all forms of discrimination against disabled persons;
- institutionalisation and institutional abuse;
- economic, social and cultural rights as they relate to disability; and
- a preliminary outline of the topic of scientific experimentation as it relates to disability.

On the effects of gross violations of human rights on international peace and security, it stressed the threat posed by the arms race, and particularly the nuclear arms race, for the achievement of social and economic progress and for the universal realisation of all human rights.

The Administration of Justice and the Human Rights of Detainees

Two of the resolutions under this item concerned Paraguay and Uruguay, countries

which are both under consideration under the 1503 confidential procedure.

One resolution asked the Commission to invite the government of Paraguay to consider ending the state of siege and granting amnesties to enable everyone to participate in the public affairs of the country.

On Uruguay, it expressed concern that a considerable section of the population are prevented from exercising their political rights due to the detention of Mr. Ferreira Aldunate, the presidential candidate of the leading political forces in the country, and urged the government to lift the restrictions on political rights affecting citizens and political parties, in order that truly free democratic elections may be held. It recommended to the Commission to urge the UN Secretary-General to use his good offices to verify whether, as reported, the charges against Mr. Wilson Ferreira Aldunate include that of 'having made requests before specialised agencies of the United Nations'.

On states of emergency, it regretted that lack of time had prevented the preparation of a report on the respect for rules governing the declaration of a state of exception, with a list of countries that have declared or terminated a state of exception. It requested Mr. Leandro Despouy to prepare an explanatory paper on the ways by which such a report can be prepared. It also asked for the appointment of a Special Rapporteur to prepare such a report on an annual basis.

The Sub-Commission asked its Working Group on Detention to revise its draft Declaration Against Unacknowledged Detention on the basis of comments made on it this year. It also asked this working group to continue to analyse the question of state policies and practices regarding restraints on the use of force by law enforcement officials and military personnel.

The Sub-Commission asked the Commission for the appointment of Mr. Marc

Bossuyt (Belgium) as Special Rapporteur to prepare an analysis concerning the proposal to elaborate a draft second optional protocol to the International Covenant on Civil and Political Rights relating to capital punishment.

Indigenous Populations

The pre-sessional working group on Indigenous Populations met this year under a new chairperson, Mrs. Erica Daes, and three of the five-member working group were also new.

The working group decided to retain the plan of action adopted last year. After considering the question of the definition of indigenous populations and the right to land and natural resources, the working group decided to return to these subjects next year and also to consider:

- the right of indigenous populations to develop their own culture, traditions, language and way of life, including the right to freedom of religion and traditional religious practices; and
- the right to education.

In its resolution on Indigenous Populations, the Sub-Commission asked the working group to focus on the preparation of standards on the rights of indigenous populations and to consider the drafting of a body of principles on indigenous peoples' rights based on relevant national legislation, international instruments and other legal criteria.

A recommendation was submitted to the Commission that an edited and shortened version of the study on Discrimination Against Indigenous Populations (E/CN.4/Sub.2/1983/21/Add.1-8) should be published and given the widest possible publicity.

On the establishment of a fund for indigenous populations, the Sub-Commission recommended that it should be named the United Nations Voluntary Fund for Indigenous Populations and should be administered by a five-member Board of Trustees acting in their individual capacity. At least one member should be a representative of a widely recognised organisation of indigenous people and the only activity of the fund would be to assist representatives of indigenous communities and organisations to participate in the deliberations of the UN Working Group.

Slavery and Slavery-like Practices

Further information on debt-bondage, exploitation of child labour and traffic in persons and the exploitation of the prostitution of others was submitted to the Working Group by the ICJ and other NGOs.

The Sub-Commission asked for authority to undertake a study on debt-bondage and another on slavery-like practices against women and children, in order to find ways by which they could be assisted and rehabilitated. It also recommended that the struggle against proxenetism be intensified at the national level and international measures be adopted for dismantling the networks that feed prostitution and for repatriating the victims.

The NIEO and the Promotion of Human Rights

Under this item, the Sub-Commission requested the Secretary-General to invite those governments receiving aid from the United Nations Development Programme (UNDP) to indicate their specific needs for the establishment or strengthening of law faculties; for the development of adequate

law libraries for law schools, judges, lawyers and other auxiliaries of justice; for the training of judges; for the drafting of legal texts in conformity with the provisions of international instruments of human rights, for the publishing of official law journals and for the collection and classification of legal material, including laws and digests of court decisions.

Encouragement of Universal Acceptance of Human Rights

The Sub-Commission requested the UN Secretary-General to consider the possibility of:

- offering technical assistance in the form of legal training of local staff, or by providing experts to assist in the drafting of the necessary laws and regulations to enable member states to ratify or accede to international human rights instruments; and
- designating regional advisors on international human rights standards whose functions would include advising the states concerned on the acceptance and implementation of international human rights instruments.

Human Rights and Scientific and Technological Developments

The Sub-Commission asked for authority to appoint Mr. Driss Dahak (Morocco) as Special Rapporteur to prepare a study on the current dimensions and problems arising from unlawful human experimentation.

In another resolution it requested authorisation to undertake in the future a study on the implications for human rights of recent advances in computer and micro-

computer technology for the dissemination of information on human rights, including information produced by the United Nations in this field.

Definition of the Term 'Minority'

Pursuant to the Commission's request, the Sub-Commission asked Mr. Deschênes (Canada) to draft a definition of the term 'minority' in relation to Article 27 of the International Covenant on Civil and Political Rights.

Mr. Deschênes suggested the elimination from the definition of 'indigenous populations', 'non-citizens' and matters concerning the relationship between the individual and the group to which he belongs. He proposed the following definition for discussion:

"A group numerically smaller than the rest of the population of a State, in a non-dominant position, whose members – being citizens of the State – possess ethnic, religious or linguistic characteristics differing from those of the other

members of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions or language."

Discussion of this definition was postponed to next year.

The Sub-Commission in related resolutions asked the respective rapporteurs to continue their work on the following subjects:

- the revising and up-dating of the report on the question of the prevention and punishment of the crime of genocide;
- the status of the individual and contemporary international law;
- amnesty laws and their rôle in the protection and promotion of human rights;
- the right to adequate food as a human right;
- current trends and developments in respect to the right of everyone to leave and return to his country, and to be able to enter other countries;
- the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers.

Human Rights Committee

Reports Under Article 40

As of 27 July 1984 there were 80 State Parties to the Covenant on Civil and Political Rights, 34 State Parties to the Optional Protocol and 16 states which had made the declaration under article 41 of the Covenant. The initial reports of Sri Lanka, El Salvador, Guinea, New Zealand, India, Egypt, Gambia, the Democratic People's Republic of Korea and Panama and the second periodic reports of Yugoslavia, Chile and the German Democratic Republic were considered by the Human Rights Committee during its twentieth, twenty-first and twenty-second sessions¹.

The consideration of Guinea's report took place without a representative of the State Party being present. Discussion of the report had been postponed four times because of that country's failure to respond to the Committee's request that a representative be present during consideration of the report. This is the first time a report has been considered by the Committee without a representative of the State Party being present.

Prior to Chile's appearance before the Committee there was much discussion by members whether its report should be considered as a second periodic report or as a response to the Committee's request for supplemental information after Chile's initial appearance before the Committee. Chile had refused to reply to the request claiming that it had been singled out for special treatment. The Committee decided that the representatives of Chile should be told that the request for additional information remained outstanding, that the Committee

regretted it had not been complied with and that the present report would serve as a basis for continuing the dialogue between the Committee and the State Party. The Chairman made a statement to this effect at the time of the government's appearance before the Committee.

As noted in the December 1983 report on the Committee (ICJ Review No. 31, Dec. 1983) El Salvador appeared before the Committee during its October 1983 session for preliminary discussions on its report, which was then overdue. The government had decided not to forward a report until proposed constitutional and legislative changes had been made. However, because of the concern expressed by members of the Committee over the lateness of the report, particularly in light of the situation in the country, representatives from the mission in Geneva agreed to appear before the Committee for a preliminary dialogue. The discussions concentrated on recent events.

At its twentieth session in October 1983 the Committee considered for the first time a second periodic report, that of Yugoslavia. A sessional working group was established to suggest possible methods of considering the report. It was felt that the examination of the second report should concentrate on progress made since the State Party's initial appearance and that repetition of questions posed during the initial appearance should be avoided.

Based on the working group's report and extensive discussions during plenary meetings, a procedure was adopted on a trial basis whereby the State Party would be given in advance a list of issues which it

1) These sessions are covered in the Committee's annual report to the General Assembly contained in General Assembly Official Records, 39th session, Supplement No. 40 (A/39/40).

should address. After it concluded its remarks on each issue, members would be permitted to pose questions about matters they felt remained unclear or which were not addressed sufficiently by the State Party. The listed issues were related to articles of the Covenant. Supplementary questions relating to articles not covered by the list were left to the end, as were observations about the report by members of the Committee. It was also decided to request the State Party whether it was willing to respond to the additional questions relating to each issue during the same meeting or whether it would prefer to be given time to respond. Immediate responses were considered preferable by most members of the Committee, but it was felt that the decision had to be left to the State Party. Yugoslavia expressed its willingness to try and respond immediately to questions.

Both the representatives from Yugoslavia and a majority of the Committee felt that the experience had been positive. The Committee decided to entrust a pre-session working group with the task of drafting a list of issues to be taken up with Chile and the GDR. The procedures followed with these two countries was essentially the same as that followed with Yugoslavia except that the GDR requested time to respond to the additional questions. Despite some worries as to the amount of time which has been spent on consideration of the second periodic reports, the majority of Committee members continue to favour the new procedure, feeling that it allows for more of a dialogue. The procedure was employed again during the consideration of the second periodic reports of the USSR and Byelorussia.

Forthcoming Reports

The next session of the Committee will be held in New York during March 1985 when the second periodic reports of Spain and the United Kingdom will be considered along with the initial reports of the Dominican Republic and New Zealand, on behalf of the Cook Islands.

General Comments

This year's report to the General Assembly contained a discussion of the purpose and use of the general comments.² The Committee views the general comments as a means of assisting states in the fulfilment of their reporting obligations by remarking on insufficiencies which have appeared in a large number of reports, as a means of assisting states in the implementation of these rights by elaborating on the content of some of the articles of the Covenant, and as a means of stimulating the activities of States and international organisations in the promotion and protection of human rights.

The general comments have been used in formulating the guidelines for reports and have been used by individual members of the Committee when putting questions to the States Parties. The Centre for Human Rights regularly draws the attention of other human rights organs to the general comments and has circulated a consolidated version of them. States Parties may submit their views on the general comments, but thus far they have not done so. There has, however, been some discussion of them in the Third Committee of the General Assembly.

2) A/39/40 at paragraph 541-557.

During its twenty-first session the Committee adopted general comments on articles 1 (self-determination) and 14 (administration of justice). Extensive debates took place on the text of the general comment on article 1, and it underwent several redrafts before being adopted by the Committee.

The text highlights the importance of the right to self-determination, stating that "its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". The article imposes obligations on States Parties to insure the fulfilment of the right and therefore reports should describe more fully measures taken in this regard. States parties are asked to describe the constitutional and political processes which in practice allow the exercise of the right. The Committee also took cognizance of other international instruments concerning the right, particularly the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

With respect to the paragraph 2 which affirms the economic content of the right (the right of peoples to dispose freely of their natural wealth and resources) states are to indicate factors or difficulties which prevent the free disposal of their natural wealth and resources and the extent to which this affects enjoyment of other rights set forth in the Covenant.

Paragraph 3 of article 1 speaks of the obligation of States Parties including those with responsibilities for the administration of non-self-governing trust territories to promote the realization of the right to self-determination and to respect the right in accordance with the UN charter. With respect to this paragraph the Committee noted that the obligation extends to all peoples, not only those of the States Par-

ties and went on to state: "all States Parties to the Covenant should take positive action to facilitate realization of and respect for the right... Such positive action must be consistent with the State's obligations under the UN charter and under international law: in particular States must refrain from interfering in the internal affairs of other states..." Reports are to contain information on the performance of these obligations.

In its general comments on article 14 the Committee notes that the reports have provided insufficient detail on the implementation of the right and that States Parties have failed to recognize that article 14 applies to civil suits as well as to the determination of criminal charges. More detailed information is needed to show what steps have been taken "to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established in law and guaranteed in practice, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, the duration of their terms of office, the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative".

The Committee makes clear in the general comment that article 14 applies to all courts and tribunals whether ordinary or specialized; this would include military or special courts which try civilians. It observed that "quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take

place under conditions which genuinely afford the full guarantees stipulated in article 14". The Committee also stated that if derogations are made from article 14 under a state of emergency declared pursuant to article 4, they may not exceed those strictly required by the exigencies of the circumstances.

With respect to the minimum guarantees in criminal cases in paragraph 3 of article 14 it was stated that these are not always sufficient to ensure the fair hearing required in paragraph 1. Other than in exceptional circumstances hearings should be public and even in cases where the public is excluded from the trial, the judgment should, with certain strictly defined exceptions, be made public. With respect to the presumption of innocence, there has been a lack of information on its implementation and in some cases it has been expressed in such ambiguous terms so as to render it ineffective. The accused has the right to be treated in accordance with the principle that "no guilt can be presumed until the charge has been proved beyond a reasonable doubt"; it is, therefore, the duty of all public authorities to refrain from prejudging the outcome of a trial.

Each of the subparagraphs of paragraph 3 were commented upon by the Committee. The right to be charged promptly requires that the information outlined in subparagraph (a) be given when the charge is first made by a competent authority. The rights to adequate time and facilities for the preparation of a defence, including access to counsel of one's choosing contained in subparagraph (b), mean access to documents and other evidence necessary for the preparation of the case as well as "the opportunity to engage and communicate with counsel... in conditions giving full respect for the confidentiality of their communications". Furthermore, "lawyers should be able to counsel and to represent their clients

in accordance with their established professional standards and judgment without any restriction, influences, pressures or undue interference from any quarter".

The notion of undue delay in subparagraph 3(c) relates not only to the commencement of proceedings, but also to their conclusion and the hearing of appeals. The right to defence in subparagraph 3(d) has not been given sufficient attention in the reports, including arrangements for those who do not have the means to pay for legal assistance. This right assures to the accused or his lawyer the right to act diligently and fearlessly in pursuing all available defences, and the right to challenge the conduct of the case if he considers it to be unfair.

As to the attendance of witnesses, subparagraph 3(c) is designed to ensure that the accused has the same legal power of compelling their attendance as the prosecution. In referring to article 3(g) which provides that the accused shall not be compelled to testify against himself, the Committee noted that when the accused is compelled to testify it is often by methods which violate articles 7 (right not to be subjected to torture) and 10(1) (right to be treated with humanity and respect for the inherent dignity of the human person). It added: "The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable."

To safeguard the rights contained in paragraphs 1 and 3 of article 14 "judges should have the authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution".

With respect to juveniles not enough has been said in the reports about the juvenile justice system and how laws and practices are designed to take account of "the desirability of promoting their rehabilitation". Furthermore, juveniles should enjoy at least

the same guarantees and protections as are accorded to adults under article 14.

The right to have a conviction reviewed by a higher tribunal is not to be limited to the most serious offences. More attention needs to be given in the reports to review procedures and how they take account of the fair and public hearing requirements of paragraph 1. A review of state reports indicates that the right to compensation in certain cases of miscarriage of justice is not adequately guaranteed and more has to be done to ensure implementation of this provision.

Finally, the Committee sought to clarify the confusion that has arisen about the meaning of paragraph 7. This paragraph incorporates the principle of *ne bis in idem* and does not affect a resumption of a trial justified by exceptional circumstances.

At its twenty-third session in October 1984 the Committee adopted a general comment on article 6 (the right to life) reiterating that it is the supreme duty of states to prevent wars. This general comment was adopted during the October meeting so that it could be taken into account immediately by the General Assembly. The Committee associated itself with the concern expressed by representatives from all geographical regions at the General Assembly about the proliferation of weapons of mass destruction because of their threat to human life and because they "absorb resources that could otherwise be used for vital economic and social purposes...", and stated that such weapons are the greatest threat to the right to life confronting mankind.

The Committee further noted the climate of suspicion that has resulted from the gravity of the threat and its hindrance of universal respect for and observance of human rights. It then declared that "the

production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity" and called on all States "to take urgent steps, unilaterally and by agreement, to rid the world of this menace".

Mr. Roger Errera, who was not present when this general comment was adopted, expressed his disagreement with the text.

Statement of Views Under the Optional Protocol

The annual report contains a useful survey of the Committee's jurisprudence under the Optional Protocol thus far, with respect to both procedural and substantive matters.³ All the issues which have been addressed to date in the statement of views are set out and accompanied by a brief summary of the principle statement of views with references to all other cases touching upon the issue.

Only seven final views were given by the Committee during the twentieth, twenty-first and twenty-second sessions. Six of the seven involved Uruguay; the other concerned Zaire. Each of the Uruguayan cases raised questions concerning the conditions of detention or treatment while in the custody of the authorities. In all but one, *Oxandabarat Scarrone v. Uruguay*, 103/1981, the Committee concluded that violation of article 10(1) existed, either because the person had been held *incomunicado* or because they had not been treated with humanity and with respect for the inherent dignity of the human person. See *Martinez Machado v. Uruguay*, 83/1981; *Alfredo Romero v. Uruguay*, 85/1981, *Gomez de Voituret v. Uruguay*, 109/1981; *Viana Acosta v. Uruguay*, 110/1981; and *Manera Lluberas v. Uruguay*, 123/1982.

3) UN document A/39/40, paragraphs 569-620.

In one case, *Viana Acosta v. Uruguay*, the Committee concluded that there had also been a violation of article 7 (the right not to be subjected to torture). Four of the cases dealt additionally with the right to counsel and the right to be brought promptly to trial, namely *Martinez Machado v. Uruguay*, *Oxandabarat Scarrone v. Uruguay*, *Viana Acosta v. Uruguay* and *Manera Lluberias v. Uruguay*.

The allegations in *Gomez de Voituret v. Uruguay* are extremely troubling. The case was filed by the mother of the victim, a doctor, who had been arrested on 27 November 1980 at the airport of Carrasco, Uruguay upon her return from a medical seminar in Buenos Aires. She was held in solitary confinement in a cell almost without natural light until June 1981 when she was brought to trial. The mother states that her daughter was subjected to torture in order to force her to confess to being a member of a political group which maintained close links with persons in Libertad prison, where her husband had been detained since 27 December 1974. The other confession the interrogators sought to extract from her was that she had tried to mobilize international human rights bodies and related religious institutions, inside and outside Uruguay, drawing their attention to the critical situation of her husband and other prisoners in Libertad. At the trial she was charged with "subversive association and attempt against the Constitution followed by preparatory acts". The persecution of persons attempting to use international human rights machinery is an affront to the international community and its work in the field of human rights.

In *Viana Acosta v. Uruguay*, the Committee rejected the State Party's argument against the admissibility of the communication, which was that the victim had been released from custody on 5 April 1981, had left the country to live abroad and therefore

was not subject to the jurisdiction of the state. The Committee observed that the events complained of had allegedly occurred while the victim was subject to the State's jurisdiction and that article 1 was clearly intended to apply to such cases.

Unfortunately Uruguay continued to ignore the Committee's request for precise information, such as copies of court decisions and medical records. It also did not comply with requests that it make a good faith investigation into allegations of mistreatment in places of detention.

The case against Zaire, *Muteba v. Zaire*, 124/1982 involved violations of articles 7 (torture) and 10(1) (dignity of the human person), article 9(3) (right to be brought before a judge after arrest), 9(4) (right to bring proceedings to test lawfulness of detention), 14(3)(b), (c) and (d) (right to adequately prepare a defence, to be tried without undue delay and to defend oneself or to have counsel do so) and article 19 (right to hold opinions without interference). The State Party had failed to furnish any information or clarification to the Committee. An individual opinion was submitted by five members of the Committee, stating that the facts were not sufficient to find a violation of article 19.

Decisions on Inadmissibility

Three decisions on inadmissibility were made public by the Committee. The communication in *M.A. v. Italy* 117/1981 contained several sets of allegations, all of which were found to be inadmissible. Those relating to M.A.'s conviction for "reorganizing the dissolved fascist party" concerned events which preceded the coming into force of the Covenant in Italy. Moreover, the acts for which the author was convicted were not protected by the Covenant, and the communication was inadmissible as

being incompatible with the provisions of the Covenant. With respect to his complaints about extradition proceedings brought in France, the Committee observed that there was nothing in the Covenant making it unlawful for a State Party to seek extradition of a person from another country.

Another communication against Italy, *Disabled and Handicapped Persons in Italy v. Italy*, 163/1984, was found inadmissible because essentially it requested the Committee to review the compatibility of national legislation with the Covenant without showing that any individual's rights had been violated. The portion of the communication concerning an organisation of disabled persons was declared inadmissible because only individuals have the right to submit communications.

The third decision on inadmissibility, *The Mikmaq Tribal Society v. Canada*, 78/1980, involved one of the indigenous populations of Canada. The author of the communication (A.D.) alleged that the Canadian government was violating the group's right to self-determination. The Committee declared it inadmissible finding that the author had not proved that he was authorized to act as a representative of the Mikmaq Tribal Society and that he had not "advance(d) any pertinent facts supporting his claim that he personally was a victim of any violations".

The author is the Grand Captain of the Mikmaq Tribal Society. The Mikmaq nation is governed by a Grand Council composed of a Grand Chief, Assistant Grand Chief and a Grand Captain. While the case was being considered by the Committee a communiqué was received from the Grand Chief saying no one was authorized to speak on behalf of the Grand Council unless authorized to do so in writing. The Committee sought clarification of the author's standing, received a telegram from the author's attorney stating that A.D.'s

authority to pursue the communication had been reaffirmed and a document was being forwarded. Six months later a letter was received, signed by the author, who was the Grand Captain, and the Assistant Grand Chief. The Committee did not consider this sufficient, stating that it was not the Grand Council in its legal entity which had given authorization, but the author himself who was confirming his self-authorization.

Mr. Roger Errera submitted an individual opinion, stating that the Committee's decision did not address the relevant admissibility issues, i.e. does the right of all peoples to self-determination as enunciated in article 1, paragraph 1 constitute one "of the rights set forth in the Covenant" in accordance with the terms of article 1 of the Optional Protocol, if it does, may its violation be the subject of an individual communication and finally do the Mikmaq constitute a people within the meaning of article 1, paragraph 1 of the Covenant.

Publicity for the Covenant and the work of the Committee

In the past few years the Committee has emphasized the need to give additional publicity to the Covenant, in particular by having it translated into more national languages. Although some steps have been taken in this direction, a number of members have remarked that not enough has been done by governments or the United Nations to make the text available locally.

The Committee has also requested the publication of a volume of its selected decisions. Work on this has not progressed as promised by the Centre for Human Rights and the publication date has recently been postponed.

On a more positive note, the Committee has noticed a marked improvement in the

coverage of its sessions by the United Nations Information Service. An independent television company has filmed some of the Committee's sessions for inclusion in a documentary programmes on human rights. The annual report also refers to the work of non-governmental organisations and notes that they give valuable publicity to the work of the Committee in their journals and communiqués.

Relations with other human rights organs

The reports of the Committee are considered annually by the Commission on Human Rights, the Economic and Social Council and the General Assembly. Some concern has been expressed by these bodies at the decreasing number of ratifications and accessions to the Covenant. At the August 1984 session of the Subcommission on Prevention of Discrimination and Protection of Minorities a resolution was passed which requests the Secretary General to hold informal discussions concerning the prospects for ratification of human rights instruments with government delegations on the occasion of UN meetings such as the General Assembly and the Commission on Human Rights. Among the instruments to be discussed in this way is the Covenant.

It is the feeling of some members of the Committee, as well as some delegates to the Commission and the General Assembly, that an expanded advisory services programme might assist in increasing the number of ratifications and accessions. The obligations imposed by the ratification require the investment of resources, both human and monetary, which presents difficul-

ties for some states. Reviewing instruments to determine whether they should be ratified or acceded to entails a similar investment of resources. Recently there was a meeting of Chairpersons of the various committees and UN organs concerned with human rights, which was requested by the Human Rights Committee and authorised by the General Assembly.

The unanimous sentiment of this group was that one of the most effective means of assisting states parties to the various human rights instruments was to devise and implement a programme of advisory services and technical assistance to enable the states better to comply with their obligations. They strongly recommended to the General Assembly that the Secretary-General be invited, and provided with the means which would enable him, to carry out such a programme of advice and assistance in an effective manner. Specific recommendations were made as to the contents of such a programme.⁴

Membership

Elections for nine seats on the Committee were held on 14 September 1984. Several existing members were re-elected, Mr. Andrés Aguilar, Venezuela, Mr. Andreas V. Mavrommatis, Cyprus, Mr. Anatoly Movchan, the Union of Soviet Socialist Republics and Mr. Alejandro Serrano Caldera, Nicaragua (who had been elected in February 1984 to complete the term of Leonte Herdocia Ortega after his untimely death in October 1983). The new members of the Committee are: Mrs. Rosalyn Higgins, United Kingdom; Mr. Rajsoomer Lallah, Mauritius; Mr. Fausto Pocar, Italy; Mr. S.

4) A more complete description of these recommendations and others made in the Subcommission and Commission is contained in "The Need for Technical Services in the Field of Human Rights", ICJ Newsletter 22, July/September 1984.

Amos Wako, Kenya and Mr. Adam Zielinski, Poland.

At the final meeting of the twenty-third session tribute was paid to those members of the Committee who would not be returning, Mr. Mohammed Al Douri, Iraq, Mrs. Gisèle Coté-Harper, Canada, Mr. Felix Ermacora, Austria, Sir Vincent Evans, United Kingdom, Mr. Vladimir Hanga, Romania. Especially warm remarks were directed to Sir Vincent Evans who had been with the Committee since its inception and who had been an active partici-

pant at all the meetings of the Committee. In their farewell remarks, Sir Vincent Evans and Mrs. Coté-Harper thanked the non-governmental organisations for the assistance they had given the Committee.

It is to be hoped that the new members of the Committee will follow the tradition of independence and the spirit of cooperation which has characterised the Committee's work and helped to make it one of the most respected bodies in the human rights field.

France's Consultative Commission on Human Rights

By Decree No. 84-72 of 30 January 1984 the French government established a new Consultative Commission on Human Rights "to assist the Minister of External Affairs with advice on all matters relating to action by France in favour of the defence of human rights in the world", in particular within the framework of human rights institutions and multi-lateral negotiations relating to human rights.

The Commission, as at present constituted, is composed of some 40 members. They include representatives of the ministers most concerned, the Ministers of the Interior, of Justice, of the Rights of Women and of Social Affairs and National Solidarity, two parliamentarians nominated by the Presidents of the National Assembly and the Senate, five representatives of the trade union confederations, 14 leading hu-

man rights activists belonging to the principal non-governmental organisations, and ten personalities 'having authority in this sphere'.

The parliamentarians are the chairmen of the Interparty Human Rights Groups of, respectively, the National Assembly and the Senate. Among the NGO activists are leading members of the French sections of several international human rights organisations, including the International Commission of Jurists, Amnesty International, and the International Federation of Human Rights, as well other well-known French or French-based NGOs. The ten personalities of 'authority' include Madame Simone de Beauvoir, M. Roger Errera, M. Louis Joinet, and Madame Nicole Questiaux, a member of the Council of State, who has been appointed to chair the Commission.

The Commission can set up working groups on particular subjects, and these working groups can coopt experts who are not members of the Commission to assist them. Four such working groups have been established dealing respectively with (1) science, technology and human rights, (2) the definition of terms, (3) forthcoming meetings of inter-governmental bodies, in particular new proposals, and (4) information and education on human rights.

The Chairman of the Commission attends all meetings of the Working Group.

The Commission has to meet at least twice a year and in practice meets quarterly. It reports to the Minister of External Relations and its secretariat is provided by his department. The Secretary is Madame Cécile Sportis, who is a member of the 'cabinet' of the Minister.

France is not the first country to have such an Advisory Commission. Norway has had a most effective one with a similar composition for seven years. Others are to be found, *inter alia*, in Australia, Italy and

the Netherlands. The French Commission is particularly interesting, due to its impressive mixed governmental, parliamentary and non-governmental composition, the positive working relationship already established between its politically varied members, the high level support which it receives from the government and in particular from the Minister of External Affairs, and the ability of its Chairman whose impartiality is accepted on all sides. Though by its constitution an advisory body, it appears to be the intention of the government that it should play a significant role in the decision making process.

At the opening meeting of the Commission the Minister of External Relations, M. Claude Cheysson, told them that their role was not limited to following and monitoring French actions within international organisations. All France's activities for the protection of human rights which relate to its external affairs fall within their competence, and is open for their advice, initiatives, criticisms, and proposals.

ARTICLES

The Denationalization of Black* South Africans in Pursuance of Apartheid

A Question for the International Court of Justice?

by
John Dugard**

Introduction

Apartheid or separate development, as the South African Government now prefers to call its policies, is synonymous with racial discrimination. For more than three decades South Africa has been the moral outcast of the international community on account of its institutionalization of racial discrimination in a world committed to racial equality. But things are changing in South Africa. Discrimination on grounds of race is giving way to discrimination on grounds of nationality as millions of black South Africans are deprived of their South African nationality by legislative fiat and allocated, in its place, the nationality of some unrecognized mini-State carved out of the body of South Africa. In many ways the new discrimination is worse than the old. The new aliens are confined to their new States, often in pitiful poverty in squalid resettlement camps in barren wastelands; they are deported as aliens from the country whose nationality they previously held; they are hounded by the South African police as unlawful immigrants; and, as aliens,

they have lost all claims to participate in the political life of South Africa — even if they qualify to reside within the borders of South Africa itself. International law does not oblige a State to admit aliens to share in its economic wealth; international law allows States to deport unwanted aliens; international law permits law enforcement agencies to monitor the movement of aliens within its territory; and international law accepts that aliens have no right to participate in the political life of a foreign State. In short, the new degradation to which blacks in South Africa are subjected is perpetrated in the name of international law, behind the figleaf of nationality.

South Africa's courts are closed to the argument that the new policy of nationality-based discrimination is contrary to contemporary international law, for South Africa has no Bill of Rights and no court may question the validity of an Act of Parliament on the ground that it violates international law. Only the International Court of Justice may make this judgment. And, as South Africa does not accept the compulsory jurisdiction of the International

* The word "black" is used in this paper to include Africans only.

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Court, an advisory opinion of that Court is the only form in which this judgment may be made. Individual victims of the denationalization laws may not approach the International Court for an advisory opinion on the lawfulness of these measures; nor may individual States make such a request. But in terms of Article 96(1) of the Charter of the United Nations and Article 65(1) of the Statute of the International Court of Justice an advisory opinion on any question of international law may be sought by the General Assembly or the Security Council of the United Nations. The purpose of the present paper is to enquire whether this is an appropriate course.

What follows is an examination of this question. It is written in the belief that international law has a humanitarian role to play in the world and in South Africa; that it can contribute both to peace between nations and to peace within a nation.

Euphoria and Reality in South Africa

Important things are happening in South Africa. Parliament, endorsed by a referendum among white voters, has adopted a Constitution that makes provision for coloured and Indian participation in the mainstream of the political process. Agreements have been entered into with Mozambique, Swaziland and Angola that effectively curb the military activities of SWAPO and the ANC. Legal job reservation has been repealed, black trade unions recognized, university segregation relaxed and special permits allow blacks to mingle with whites in the expensive hotels and restaurants. A mood of euphoria prevails among white South Africans that seems rapidly to be spreading to many Western nations. And the realities of South African political life are often overlooked.

But what should not be ignored is that apartheid or separate development remains largely unchanged – in fact if not in fiction. The old laws of white domination, enacted in a previous era of National Party rule, remain firmly ensconced on the statute book and are vigorously enforced by officials unmoved by the heady rhetoric of change that covers the surface of white South African politics. The pass laws, the resettlement laws, the Group Areas Act, the Reservation of Separate Amenities Act, the Internal Security Act and a host of other racist and repressive laws that constitute the core of apartheid are still with us. Moreover the new Constitution makes no provision for black participation, with the result that 75% of the South African population is compelled to satisfy its political aspirations in impoverished homeland States.

Unfortunately euphoria is promoted and reality obscured by a new fiction in the body politic. This is the fiction that all black South Africans are aliens or potential aliens in terms of South Africa's denationalization laws. These laws and the question whether they may be adjudicated upon, will form the subject of the present study. But before this is done, it is necessary to consider previous attempts and efforts to promote peace in Southern Africa by means of the International Court of Justice in order to place the question posed in historical context.

Apartheid – A Domestic Issue?

Apartheid, so Pretoria argues and has argued for over three decades, is a domestic issue, and as such it is shielded from international scrutiny by Article 2(7) of the United Nations Charter, which provides that

“Nothing contained in the present Charter shall authorize the United Nations to

intervene in matters which are essentially within the domestic jurisdiction of any State..."

The validity of this view has been hotly contested by nations and by lawyers who have argued that this provision does not provide immunity to a State that violates human rights, as enshrined in the Charter and contemporary international law. Some States, whose own record in the field of human rights leaves much to be desired, have preferred to base their attacks on apartheid on less secure grounds. Apartheid, they argue is *sui generis*, a special case of man's inhumanity to man by reason of the institutionalization of racial discrimination, and this suffices to remove it from the protection of Article 2(7).

When this dispute first arose in 1946 over the discriminatory treatment of South Africans of Indian origin, the South African Government, then headed by General JC Smuts, itself requested that advice be sought from the International Court of Justice. But South Africa was unable to muster sufficient political support in the General Assembly for its request for an advisory opinion¹. Disheartened General Smuts told the South African Senate that in requesting an advisory opinion

"... we claimed a right which any man has, to appeal to a court of law. There has been a great deal of talk... of fundamental rights. What is the most fundamental right of all of a free man and a

free nation? It is the right to appeal to law, to a court of law"².

In retrospect, the refusal to request an advisory opinion on South Africa's racial policies was a tactical error on the part of the international community as it enabled the South African Government to adopt an "uncooperative and somewhat truculent attitude"³ towards the United Nations. But it was understandable. Apartheid, as an institutionalized form of racism, was yet to come. Nations of the world were uncertain of the full consequences for themselves of the new world order with its uneasy balance between State sovereignty and the promotion of human rights. And the International Court of Justice was itself too fragile and untried an institution to be burdened with so highly politicized a subject as the parameters of a State's exclusive domestic jurisdiction. So it is not surprising that the General Assembly chose to interpret its Charter itself and to build up a body of law that denied to South Africa the right to shelter behind Article 2(7) when its racial policies were in issue⁴.

Namibia and the International Court of Justice

The attitude of the United Nations towards the role of the International Court in the dispute over Namibia contrasts sharply with its approach to the question of apartheid. On three occasions – in 1950, 1955

1) GAOR, 1st Session, 2nd Part, Plenary mtgs, p. 1061.

2) *Senate Debates* 1946–47, cols 4135–7 (30 January 1947).

3) DR Gilmour "The United Nations and Apartheid – Certain Procedural Aspects of the Problem" (1969) 16 *Netherlands International Law Review* 12 at 16.

4) Rosalyn Higgins *The Development of International Law through the Political Organs of the United Nations* (1963) 66–67.

and 1956 – the General Assembly sought advisory opinions from the Court⁵; in 1960⁶ it gave its blessing to legal proceedings initiated by Ethiopia and Liberia against South Africa over South West Africa⁷; and in 1970⁸ the Security Council requested an advisory opinion, for the first and only time in its history, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 176(1970)*⁹.

Here the United Nations has laid a sound legal foundation for its action at every stage and it is this recourse to the World Court that has ensured a greater consensus among States – particularly Western nations – on this issue. Indeed there can be no doubt that the Court's ruling in 1971 that "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory" is the basis for Security Council Resolution 435(1978) and the present United Nations action aimed at the withdrawal of South Africa from Namibia. Moreover, although the South African Government still on occasions formally reaffirms its rejection of the 1971 *Namibia Opinion*, it seems clear that it accepts the futility of arguing against a judicial finding that has been approved by the entire international community. Hence its acceptance of the principle of independence for Namibia

– despite its heel-dragging over the implementation of this goal.

Denationalization and the International Court of Justice

Clearly the United Nations cannot go back in time and request the International Court of Justice for an advisory opinion on the question whether apartheid is a domestic issue within the meaning of Article 2(7) of the UN Charter. It is now too well established that the policy of apartheid, as manifest in a host of discriminatory laws, is a matter of international concern – as demonstrated by a multitude of General Assembly and Security Council resolutions.

But there is now a new issue, of some legal complexity and of considerable political importance, that plagues South Africa and seems appropriate for judicial opinion – and this is the policy of denationalization on grounds of race.

(a) *The policy of denationalization*

Apartheid, in its early form, was simply a policy of racial domination. However, in response to international pressure, it became more sophisticated as successive political leaders sought to adjust it to the new demands for self-determination and human rights. Unwilling to share power with blacks, the National Party devised a policy which would in *law and form* rid South Africa of

5) *International Status of South West Africa* 1950 ICJ Reports 128; *Voting Procedure Case* 1955 ICJ Reports 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* 1956 ICJ Reports 23.

6) Resolution 1565 (XV).

7) *South West Africa Cases, Preliminary Objections* 1962 ICJ Reports 319; *South West Africa, Second Phase* 1966 ICJ Reports 6. See further John Dugard *The South West Africa/Namibia Dispute* (1973).

8) Resolution 284(1970).

9) 1971 ICJ Reports 16.

all black Africans and compel them to exercise their civil and political rights in new States carved out of the body of South Africa. This policy, sometimes described as Grand Apartheid, remains the cornerstone of the present Government's policy. But it is so grandiose in design and so rooted in fiction and fantasy that many refuse to take it seriously – except those denationalized blacks whose lives have been changed by its harsh realities.

The part played by denationalization in the policy of apartheid has been fully described by the present writer elsewhere¹⁰ and is here only briefly summarized.

The South African Government stands accused of denying full civil and political rights to its black nationals on grounds of race. To rebut this charge, and hence secure relief from international pressure, it has two options. It can either extend equal political rights to its black nationals or it can ensure that there are no blacks with South African nationality able to claim such rights. It has chosen the latter course and invoked the international-law concepts of statehood and nationality to further this goal.

Under the Bantu Homelands Citizenship Act (now the National States Citizenship Act) of 1970 every black person with South African nationality became a "citizen" of the ethnic homeland with which he was connected by birth, language or cultural affiliation. Thus every black person became a "citizen" of one of the ten ethnic homelands that at that time were constitutionally still part of South Africa, namely Transkei, Bophuthatswana, Ciskei, Lebowa, Venda, Gazankulu, QwaQwa, KwaZulu, KwaNdebele and KaNgwane. The next step

would be to grant independence to these ethnic units and to decree that the "citizens" of each unit would lose their South African nationality, irrespective of where they lived, and become nationals of the new "State". In this way South Africa could no longer be accused of discriminating against its own nationals. When it discriminated against the new aliens by refusing them full civil and political rights it could now justify its action under traditional international law which permits such discrimination on grounds of nationality.

That this was to be the solution to South Africa's "racial problem" was made clear by Dr CP Mulder, in his capacity as Minister of Bantu Administration and Development. In 1978 Dr Mulder stated in Parliament

"If our policy is taken to its logical conclusion as far as the black people are concerned, there will not be one black man with South African citizenship... Every black man in South Africa will eventually be accommodated in some independent new State in this honourable way and there will no longer be a moral obligation on this Parliament to accommodate these people politically."¹¹

Since 1976, when Transkei was granted independence, fantasy has been translated into fact. Four homelands – Transkei, Bophuthatswana, Venda and Ciskei – have been granted independence and eight million of South Africa's twenty million blacks have been deprived of their South African nationality by the South African statutes conferring "independence" on these "States". These statutes carefully refrain from using race as a criterion for denation-

10) John Dugard "South Africa's 'Independent' Homelands: An Exercise in Denationalization" (1980) 10 *Denver Journal of International Law and Policy* 11; "Denationalization: Apartheid's Ultimate Plan" (1983) *Africa Report* (July/August) 43.

11) *House of Assembly Debates*, vol 72, col 579 (7 February 1978).

alization. Instead language and cultural affiliation feature as the criteria. In practice, however, only blacks connected with these States are deprived of their South African nationality.

As aliens, as nationals of newly independent States, these eight million ex-South Africans experience many of the disadvantages of alien status. They do not qualify for South African passports and they may be deported to their State of nationality. Indeed since 1981 over 4,000 Transkeian nationals have been deported from the Western Cape to Transkei. Still worse, as aliens, they cannot claim to participate in the political life of South Africa, but must remain content with a vote in some distant homeland, which they may never have visited.

But this is not all. Under international law a State may not only deport aliens: it may also refuse them admission. This philosophy now permeates political thinking in South Africa. Denationalized black South Africans living in the poverty-ridden homelands are refused admission to the industrial centres of South Africa; and those denationalized South Africans without special permission to remain in South Africa are deported to their National States. Resettlement camps and rural poverty are therefore the products of the policy of denationalization.

(b) *The response of
the United Nations*

The United Nations has called upon

States not to recognize Transkei¹², Bophuthatswana¹³, Venda¹⁴ or Ciskei¹⁵, and in so doing it has castigated the denationalization of blacks. For instance the General Assembly resolution denouncing the independence of Ciskei describes the policy of creating independent homelands and denationalization as "an international crime"¹⁶, while a Security Council resolution issued at the same time condemned it, *inter alia*, on the ground that "it seeks to create a class of foreign people in their own country".¹⁷

The political organs of the United Nations have responded in political terms to the homelands policy by denouncing it as a manifestation of apartheid to be subjected to the sanction of collective non-recognition. In the process two important legal questions have been glossed over, which remain unresolved – at least as far as Pretoria is concerned. The first is the question whether separate development and the creation of independent black States constitutes a legitimate exercise in self-determination; and the second is whether the denationalization of blacks in the course of the independence-conferring process violates international law. In the absence of a judicial decision on these two matters the South African Government will continue to argue that its policies accord fully with international law and wait patiently for the recognition of its "independent homelands" as its military and economic might becomes more fully appreciated by black African States in the region.

12) General Assembly Resolution 31/6A of 26 October 1976.

13) General Assembly Resolution 32/105 N of 14 December 1977.

14) Security Council Document S/13549 of 21 September 1979 ((1979) 16 *UN Monthly Chronicle* no 6, p 32). General Assembly Resolution 34/93G of 12 December 1979.

15) General Assembly Resolution 36/172A of 17 December 1981. See too the Security Council Resolution of 15 December 1981 ((1982) 19 *UN Monthly Chronicle* no 2, p 42).

16) Resolution 36/172A of 17 December 1981. See too, Resolution 37/69A of 9 December 1982.

17) See the statement of 15 December 1981 reported in (1982)19 *UN Monthly Chronicle* no 2, p 42.

(c) *The possibility of an advisory opinion on denationalization*

As indicated above, two legal questions remain unresolved as far as Pretoria is concerned: the validity of separate development as a form of self-determination; and the lawfulness of denationalization. The first question is completely unsuitable for submission to the International Court of Justice for an advisory opinion, but there appears to be considerable merit in referring the question of denationalization to the World Court.

The concept of self-determination in the modern world is an unruly horse. It has been dealt with exhaustively in the literature of the international law, in UN reports¹⁸ and in two opinions of the International Court of Justice.¹⁹ Despite this, it remains a concept of uncertain content and uneasy application. Probably it is not the type of question on which the International Court of Justice could pronounce in broad principle – as opposed to an *ad hoc* determination in a specific case. To aggravate matters the political organs of the United Nations have already repeatedly determined that in their judgment, separate development fails to comply with UN expectations in respect of self-determination. In these circumstances the International Court might understandably decline to render an opinion²⁰ on the ground that the question falls

for political determination by the General Assembly, in the course of interpreting its own Charter, and that such a determination has already been made. Moreover, even if the Court were prepared to pronounce on the matter, an opinion endorsing a succession of General Assembly resolutions would be dismissed by the South African Government as an instance of judicial rubber-stamping of a political decision. For these, and other reasons, there would be no point in referring so broad a legal question, of substantial political content, to the International Court for an advisory opinion.

Denationalization, however, falls into an entirely different category. Here we have a disputed question of law, not covered by the Charter of the United Nations, which, although narrow in scope, goes to the root of the policy of apartheid or separate development.

(d) *The question of law*

That the question of denationalization in the South African context constitutes a dispute of law cannot be doubted.

South African jurists, who deny the illegality of the denationalization measures²¹, do so on essentially two grounds. First, they contend that the statutes depriving all persons associated with the independent homelands of their South African nationality are not racially based. Secondly, they

18) See, in particular, *The Right to Self-Determination* (prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities) E/CN.4/sub.2/405/Rev./New York 1980.

19) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Reports 16; *Western Sahara Case* 1975 ICJ Reports 12.

20) Article 65 of the Statute of the International Court of Justice provides that "the Court may give an advisory opinion". It is therefore entitled to refuse to give an opinion in appropriate circumstances. See the *Eastern Carelia Case* PCIJ Reports, Series B, No 5 (1923).

21) WH Olivier "Statelessness and Transkeian Nationality" 1976 *South African Yearbook of International Law* 143; GN Barrie "A Legal View of Transkeian Recognition and so-called Statelessness" (1976)3 *Politikon* 31.

maintain that international law places no prohibition on the right of a State to deprive its own nationals of their nationality.

Denationalization has been legislatively effected in the tersest manner possible. The South African statutes conferring independence on Transkei²², Bophuthatswana²³, Venda²⁴ and Ciskei²⁵ all contain a common provision²⁶ declaring that "Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of the Transkei, [Bophuthatswana, Venda or Ciskei as the case may be] and shall cease to be a South African citizen". Schedule B attached to all these statutes varies slightly in each case. In essence, the schedule lists the following categories of persons as nationals of the new State and hence as persons automatically deprived of their South African nationality:

- (a) Every person designated as a citizen of the homeland in terms of the National States Citizenship Act of 1970, that is, every black person linked by birth, language or cultural affiliation with the homeland.
- (b) Every person born in or outside the homeland if at least one parent was a citizen of the homeland in terms of the National States Citizenship Act.
- (c) Every person domiciled in the homeland for at least five years.
- (d) Every South African national who is not already a citizen of another homeland who speaks a language used by

members of any tribe that forms part of the population of the homeland in question, including any dialect of such language.

- (e) Every South African national who is not already a citizen of another homeland "who is related to any member of the population contemplated in paragraph (d) or has identified himself with any part of such population or is culturally or otherwise associated with any member of such population."

These statutes carefully refrain from expressly depriving persons of South African nationality on grounds of race. Instead they prescribe language and cultural affiliation as the criteria for denationalization, in addition to birth, descent and domicile. This has led a South African jurist²⁷ to argue that whites, coloureds or Asians linked with a homeland by language or cultural affiliation are likewise denationalized. This is an interesting argument but it is not borne out by the facts of denationalization or by declared government policy. Certainly there is no known instance in which a white, coloured or Asian person connected with Transkei, Bophuthatswana, Venda or Ciskei has been compulsorily deprived of his South African nationality since the conferral of independence upon these States. In any event, this is a question of fact appropriate for judicial determination.²⁸

The main argument raised in support of the legality of these denationalization laws

22) Status of Transkei Act 100 of 1976.

23) Status of Bophuthatswana Act 89 of 1977.

24) Status of Venda Act 107 of 1979.

25) Status of Ciskei Act 110 of 1981.

26) Section 6.

27) Olivier, *supra* note 21 at 152-153.

28) In its Advisory Opinion on the *Western Sahara* the International Court of Justice emphasized that "a mixed question of law and fact is nonetheless a legal question" for the purpose of giving an advisory opinion: 1975 ICJ Reports 12 at paragraph 17.

is that "there is no rule of international law which prohibits the Republic of South Africa from denationalizing some of its inhabitants"²⁹. Support for this proposition is found in general statements by jurists such as O'Connell³⁰, Brownlie³¹ and Weis³² and traditional international law.

In recent times, however, it has been authoritatively argued that "denationalization measures based on racial, ethnic, religious, or other related grounds are impermissible under contemporary international law"³³. Weis in his seminal study on *Nationality and Statelessness in International Law* (1979) concludes, after a study of State practice and judicial decisions on denationalization measures, that the right of a State to make rules governing the loss of nationality is in principle not restricted by international law³⁴, but he acknowledges the existence of a "possible exception" in the case of denationalization on grounds of race. On this subject he declares:

"Considering that the principle of non-discrimination may now be regarded as a rule of international law or as a general principle of law, prohibition of discriminatory denationalization may be regarded as a rule of present-day general international law. This *certainly* applies

to discrimination on the ground of race which may be considered as contravening a peremptory norm of international law..."³⁵

In similar vein Brownlie declares that "If the deprivation is part and parcel of a breach of an international duty then the act of deprivation will be illegal"³⁶. As States are under a duty not to discriminate against their nationals on grounds of race under contemporary international law³⁷, it appears that large-scale denationalization measures will, on this reasoning, be contrary to international law.

The argument that customary international law prohibits deprivation of nationality on grounds of race is based on State practice, multilateral treaties, and judicial decisions. In particular it is founded on:

- 1) The widespread opposition to the 1941 Nazi decree which denationalized German Jews;³⁸
- 2) Article 15 of the Universal Declaration of Human Rights, which declares that "no one shall be arbitrarily deprived of his nationality";
- 3) Article 9 of the Convention on the Reduction of Statelessness of 1961 which provides that a "Contracting State may

29) Olivier, *supra* note 21 at 154, and at 147. See too, Barrie, *supra* note 21 at 34.

30) *International Law* (2nd ed), vol 2, at 683-4.

31) *Principles of Public International Law* (2nd ed) at 126.

32) *Nationality and Statelessness in International Law* (2nd ed) at 126.

33) McDougal, Lasswell and Lung-chu Chen *Human Rights and World Public Order. The Basic Policies of an International Law of Human Dignity* (1980) at 918.

34) At 126.

35) At 125. Italics added.

36) "The Relations of Nationality in Public International Law" (1963) 39 *British Year Book of International Law* 284 at 339.

37) *Namibia Opinion* 1971 ICJ Reports 16 at 58; *Barcelona Traction Case* 1970 ICJ Reports 3 at 32.

38) Weis, *supra* note 32 at 119-121. In 1968 the Federal Constitutional Court of Germany held that the 1941 decree was null and void *ex tunc*. See Mann "The Present Validity of Nazi Nationality Laws" (1973) 89 *Law Quarterly Review* 194 at 199-200.

not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds;" and

- 4) Article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, in which States undertake to guarantee the rights of everyone, without distinction as to race, to equality before the law, "notably in enjoyment of the right to nationality".

The arguments for and against a rule of customary international law prohibiting denationalization on grounds of race have been only briefly outlined. These arguments do, however, reveal the existence of a dispute over a question of law. Moreover this dispute is clearly not one that is appropriate for determination by the political organs of the United Nations as it does not relate to an interpretation of the UN Charter but to the existence of a rule of customary international law.

Political Factors and the Request for an Advisory Opinion

The decision to request the International Court for an advisory opinion is a political one, to be taken by the General Assembly or the Security Council after a full consideration of the political advantages and disadvantages of such a course. Any resolution requesting such an opinion requires a two-thirds majority vote in the General As-

sembly³⁹ and nine affirmative votes, including the concurring votes of the permanent members, in the Security Council.⁴⁰

Two considerations weigh heavily against an approach for an advisory opinion. First, there is an undoubted reluctance on the part of both the General Assembly and the Security Council to allow the Court to decide on matters that they regard as falling within their competence. Secondly, there are still suspicions in certain quarters about the International Court as a result of the decision of the Court in 1966 in the *South West Africa Cases*⁴¹. On reflection, however, it appears that there is little substance in either of these objections.

It is true that the political organs of the United Nations have shown a preference for resolving legal disputes relating to their own powers and procedures by political means⁴². Disputed interpretations of the Charter have thus generally been settled by a political decision of the organ concerned. To a large extent this explains the unwillingness of the General Assembly to allow the International Court of Justice to pronounce on the scope of Article 2 (7) dealing with the question of domestic jurisdiction. These considerations are not, however, relevant to the question of the lawfulness of South Africa's denationalization measures, for in this case we are confronted with a dispute over the existence of a rule of customary international law not involving an interpretation of the Charter, or affecting the powers and procedures of the

39) In 1946 the President of the General Assembly ruled that a two-thirds majority vote was required for a proposal that the question of South Africa's treatment of Indians be referred to the International Court of Justice for an advisory opinion. See Michla Pomerance *The Advisory Function of the International Court* (1973) 239 note 332.

40) Article 27(3).

41) *South West Africa Cases (Second Phase)* 1966 ICJ Reports 6. For a description of the legal and political response to this decision, see Dugard *The South West Africa/Namibia Dispute* (1973) 332-375.

42) Rosalyn Higgins *The Development of International Law through the Political Organs of the United Nations* (1963) 66-67.

political organs of the United Nations. In these circumstances any purported resolution of the disputed question of law by the political organs of the United Nations will simply be dismissed by South Africa and other States as the expression of a political opinion on a matter of law.

The ghost of the unfortunate 1966 decision of the International Court of Justice in the *South West Africa Cases* continues to haunt the political organs of the United Nations and Third World States; and there can be no doubt this accounts for the little use made of the advisory jurisdiction of the Court since 1966. But it is high time that this ghost was laid to rest. Since 1966 the composition of the Court has changed completely and it is today more representative of world opinion. Moreover, the Court has more than compensated for its cautious and conservative past in decisions such as the 1971 *Namibia Opinion* and, perhaps, the preliminary order of 10 May 1984 holding that, pending the Court's final decision on the matter, the United States should desist from any action endangering access to or from Nicaraguan ports and from any activities that jeopardized the right to sovereignty and political independence of the Republic of Nicaragua.⁴³

The advantages attached to obtaining an advisory opinion far outweigh the disadvantages. Debates in the United Nations over South Africa and apartheid have grown sterile as State after State annually repeats and reiterates its abhorrence of apartheid. Resolutions of the political organs have become equally unproductive. Certainly they have little impact on domestic opinion in South Africa, which has become immune to the rhetoric and resolutions of the General Assembly and Security Council. What is called for now is a new strategy that fo-

cuses on recent developments in South Africa, rather than on past practices and policies. Denationalization is the foundation stone of the "new apartheid" which aims to substitute discrimination on grounds of nationality for discrimination on grounds of race. This shift in policy on the part of Pretoria should be squarely faced. But it cannot be properly contested without a solid juridical base that deprives the denationalization measures of their legitimacy. The political organs of the United Nations cannot do this. Only the International Court of Justice can provide the necessary legal foundation for such a response.

Of course, it is impossible to predict the outcome of a request for an advisory opinion with absolute certainty. There must remain some risk that the Court will repeat its conservatism of 1966 and uphold an argument on denationalization that takes no account of the new world legal order. But this is highly unlikely. Racial equality and the principle of non-discrimination have become so integral and central a part of contemporary international law that the risk of failing to persuade the Court that racially-based denationalization laws violate customary international law must be small.

Would the South African Government accept an advisory opinion refuting its legal claims? The answer is probably "no" in the short term and "yes" in the long term – at least if regard is had to the precedent of the 1971 *Namibia Opinion*. The South African Government initially repudiated the 1971 *Opinion* in the most strident language⁴⁴, and indeed still argues that it is legally untenable. But as State after State, and particularly the Western States, gave their backing to the *Opinion* of the World Court, South Africa was obliged to change its strategy and to accept that independence

43) *New York Times* 11 May 1984.

44) Dugard, *supra* note 41 at 490–491.

for a unitary Namibia was the only politically viable goal. If the International Court were to rule against the South African Government on the question of denationalization there is no doubt that its immediate response would be to reject the opinion as politically biased and legally untenable. But, after this outburst of anger, there is a real possibility that Pretoria would relent and reconsider the course upon which it has embarked. This optimism, which many will dismiss as evidence of misplaced idealism and a naive confidence in the effectiveness of the judicial decision, is premised on two beliefs. First, respect for the judicial decision, be it national or international, still permeates public opinion in South Africa, and no Government can disregard this factor. The Government of Mr PW Botha is becoming increasingly dependent on the support of white, coloured and Indian conservative opinion, rather than upon the reactionary forces of Afrikanerdom that have guided previous National Party Governments, and it is precisely this

constituency that would be most disturbed by a ruling of the International Court of Justice that Pretoria's policies towards blacks were premised on an illegality. Secondly, South Africa's western allies are committed to the promotion of the Rule of Law in the world order and could be expected to bring new influence to bear upon Pretoria, as evidenced by their response to the 1971 *Namibia Opinion*.

That judicial decisions play an important educational role in domestic societies has long been recognized. Thus the judgment of the Supreme Court of the United States in *Brown v Board of Education*⁴⁵ in 1954 provided the impetus for a revolution in attitudes towards race in the United States of America. Judgments and advisory opinions of the International Court of Justice should be similarly viewed. An advisory opinion from the International Court of Justice that the pivotal principle of modern apartheid violates international law could serve the same purpose as the *Brown* decision, both among people and among nations.

45) 347 US 483(1954).

Towards an International Declaration on Land Rights

by
*Eric Lucas**

It seems increasingly likely that a new international charter stating the rights of indigenous people will be drafted and promulgated in the course of the next decade. As yet only preliminary steps have been taken, but they are clearly gathering momentum. For some years the rights of indigenous people have had a prominent place in the agenda of international bodies concerned with human rights; and for the last three years an annual pre-session working group of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities has met to hear the views of indigenous people. One of its tasks has always been "the evolution of standards concerning the rights of indigenous populations", but now this [question] is to be emphasized, for in August 1984 the Sub-Commission requested its Working Group "henceforth to focus its attention on the preparation of standards on the rights of indigenous populations and to relate its consideration of developments affecting the rights of indigenous populations to the process of preparing international standards thereon."

A new charter will be expected to deal with a wide range of issues, such as the right to life, to land, to self-determination and to protection of the group's culture. It

is a vast canvas. This paper seeks to cover only a small portion of it, by reviewing some documents important for the drafting of provisions concerning land rights.

Apart from reasons of space, this limited discussion is justified by the author's belief that the process of evolving standards will bear most fruit if topics are considered seriatim; and that once standards on a topic have been developed, they should be promulgated. If we await the drafting of a final and comprehensive charter, there is a risk that we will wait in vain.

Much of the paper is concerned with existing guarantees of land rights. It is true that indigenous people seek more than these offer, but it will nevertheless be important in negotiating the terms of any declaration on land rights to demonstrate that much of what indigenous people claim is promised to them under present guarantees. For instance although the collective right they assert to their land differs from well-established individual rights in respect of property, still it may be said that at least part of their claims have thereby been conceded. In addition there are standards developed in the past by the International Labour Organisation on behalf of indigenous people. Although these are marred by the assumption that they ought to assimilate,

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and fall short of what is sought, nevertheless they constitute a fairly full guarantee of land rights, to which 26 countries have already acceded.

The Cobo Report

The starting point in the task of elaborating the land rights of indigenous people is bound to be the *Study of the Problem of Discrimination against Indigenous Populations* undertaken by Mr José R. Martínez Cobo. This substantial report was commissioned in 1971, and the final parts submitted to the Sub-Commission at its thirty-seventh session in August 1984, whereupon the expert members of the Sub-Commission affirmed by resolution that it would be of "definitive usefulness" for bodies concerned with the rights of indigenous populations "and, in particular, for the future work on this question of the Sub-Commission and its Working Group on Indigenous Populations".

What is more, indigenous groups apparently share this view. The Working Group reported to the Sub-Commission that several of those who appeared before it "stressed the importance of the report of Mr Martínez-Cobo - especially of his conclusions and recommendations - for the standard-setting activity of the Working Group".

Only brief excerpts from the Report's recommendations on land rights can be given here. The full text can be found in Chapter XVII - Land (E/CN.4/Sub.2/1983/21/Add.4) and in Chapter XXI - Conclusions, Proposals and Recommendations (E/CN.4/Sub.2/1983/21/Add.8).

The Special Rapporteur's key conclusions are:

"511. It must be recognized that indigenous peoples have a natural and inalienable right to retain the territories they

possess, to call for the return of land of which they have been deprived and to be free to decide as to their use and development.

512. Genuine guarantees should be provided and full effect given to the right of indigenous populations to the land which they and their ancestors have worked since time immemorial and to the resources which such land contains, as well as to traditional forms of land tenure and resource exploitation.
514. Recognition must be given to the right of all indigenous nations or peoples, as a minimum, to the return and control of sufficient and suitable land to enable them to live an economically viable existence in accordance with their own customs and traditions, and to develop fully at their own pace...
516. Millenary or immemorial possession and economic occupation should suffice to establish indigenous title to land...
519. ... Land occupied and controlled by indigenous populations should be presumed to be indigenous land. In case of doubt or dispute the *onus probandi* of the ownership of land should fall... on the non-indigenous populations who claim to have acquired a right to part of the land.
520. All indigenous reserved areas should be immediately handed over to the respective indigenous groups...
521. Public land which is sacred or of religious significance to the indigenous populations should be attributed to them in perpetuity.
524. ... No intermediary institution of any kind should be created or appointed to hold the lands of indigenous peoples on their behalf.
526. A protective regime should cover in-

indigenous land... This regime should at least include restrictions on alienation, encumbrance, attachment and proscription...

528. All illegal acquisition of indigenous land should be null and void *ab initio* and no rights should be vested in subsequent purchasers or acquirers of the land...
532. Indigenous populations should be compensated for the loss of all... lands that have been or may be taken.
543. ... the resources of the subsoil of indigenous land also must be regarded as the exclusive property of indigenous communities. Where this is rendered impossible by the fact that the deposits in the subsoil are the preserve of the State, the State must... allow full participation by indigenous communities in respect of:

- the granting of exploration and exploitation licences;
- the profits generated by such operations, and
- procedures for determining damage caused and compensation payable."

It will be apparent that the recommendations have important implications for the claim of indigenous people that they have rights:

1. Over land which they occupy or use, irrespective of whether according to their own customs or an imposed law, they "own" that land;
2. Over minerals and other resources on their land;
3. To the return of land of which they or their forbears have been dispossessed, and to compensation. (This raises the question of the rights of those currently in possession of the land.);

4. To effective protection against future dispossession;
5. To manage their land themselves, free of interference.

On some of these matters the recommendations are inconsistent, ambiguous or silent. However it is probably fruitless to attempt to discover the Special Rapporteur's "true" intentions in such cases. He was not attempting to draft a binding declaration of the rights of indigenous peoples, but to lay the foundations for that task. He no doubt intended that his general statements would be clarified, and his omissions made good, in the course of drafting.

But if the recommendations cannot be immediately transposed into a binding declaration, they nevertheless provide an ample framework for assessing the shortcomings of existing guarantees, a question to which I now turn.

The Universal Declaration of Human Rights

Article 17 of the Universal Declaration provides that "Everyone has the right to own property alone as well as in association with others" and that "No-one shall be arbitrarily deprived of his property".

The author's views on the interpretation of this Article have already been stated, in an intervention on behalf of the International Commission of Jurists, before the Working Group on Indigenous Populations:

"The ICJ believes that this is a far wider guarantee of land rights than is commonly recognised.

In the first place, it recognises common as well as individual rights of property, and calls for both to be respected.

It is commonplace that fundamental guarantees such as this do not depend upon

the idiosyncracies of municipal law. It would be quite inappropriate therefore if Article 17 were so interpreted that a State could escape its obligations simply because under the law of that State, its indigenous inhabitants had never had property in their land.

Article 17 imposes a universal standard. If an indigenous person or group ever enjoyed property rights in land, and was arbitrarily deprived of them, their rights have been infringed. They will have had property in their land if, before the State to which they are now subject imposed its laws, certain conditions were met.

If a previous State, which would include an indigenous State, had recognised their property in land, they cannot be arbitrarily deprived of it. If there was no such central authority to determine the validity of their claims, it does not follow that they did not have rights of property. In such societies groups often reached mutually accepted views as to hunting or cultivation rights, and other matters of concern with respect to land. Provided the result was to exclude others from these rights, they constituted a form of property. The Universal Declaration of Human Rights was not meant to enshrine narrow values, fixed in a particular culture. It is not necessary to point to title deeds, if there were rights over land recognised and enforced by the communities which inhabited those lands.

Even so, it may be that those indigenous people who never faced competition for their land will find it difficult to qualify for protection under Article 17, for they might never have found it necessary to develop any concept of property in land. This is a gap in protection which the ICJ believes the Working Group should attempt to fill, for surely the right of such people to retain for their own use some part at least of the lands they occupied before new settlers arrived should be recognised.

The scope of Article 17 is also qualified in that it protects only against *arbitrary* deprivation of property. It is not a guarantee against taxation, or nationalization, or the seizure of land. Nevertheless, it requires more than that the seizure of an indigenous people's land was lawful, according to the municipal law.

The Concise Oxford Dictionary defines 'arbitrary' as 'capricious, unrestrained, despotic'. Arbitrary deprivation of property implies that the deprivation is without reasonable cause or justification and that it is imposed by the mere exercise of power without giving those affected the right to be heard and to have their interests considered. In a word, it is deprivation which, in its motivation and its manner, is unjust.

It is unnecessary at this point to elaborate these standards. Suffice it to say, if a State made a treaty with an indigenous group, then unilaterally revoked the treaty, there would be a strong case for saying that this was arbitrary, and a breach of Article 17. Similarly, if a State imposed a law which deemed a territory to be "waste" or unsettled, regardless of the fact that there were indigenous inhabitants, and for this "reason" claimed that traditional forms of property in land should not be enforced, it would seem to have behaved arbitrarily.

It must be acknowledged that the abuses of Article 17 which indigenous peoples have suffered will, in many cases, have happened long ago. If the damage is irreparable, then, at the very least, the peoples concerned have a moral claim to compensation. And where indigenous people have been arbitrarily deprived of land, and it is now vested in a State, the State in many cases should recognise the right of that people to its return. It should be noted that in many legal systems, lapse of time does not affect the claims of the rightful owner of property. This is so irrespective of the innocence of a person who has purchased it in good

faith. If such an approach is implied by Article 17, there are many indigenous peoples who could benefit.

In summary, many of the seizures of land from indigenous peoples have been in breach of the principle in Article 17 of the Universal Declaration of Human Rights. It follows that, even if a State has not acceded to the ILO Conventions guaranteeing land rights, it may be in breach of its international obligations if it does not return land which was arbitrarily seized."

The ILO Convention

The *Indigenous and Tribal Populations Convention* (No 107), which was adopted by the Conference of the International Labour Organisation in 1957, provides:

"Article 11

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized.

Article 12

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of al-

ternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14

National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to:

(a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) the provision of the means required to promote the development of the lands which these populations already possess."

In addition the ILO adopted a *Recommendation* (No 104) which supplemented the Convention in some important respects:

"3. (1) The populations concerned should be assured of a land reserve adequate for the needs of shifting cultivation so long as no better system of cultivation can be introduced...

(2) Pending the attainment of the objectives of a settlement policy for semi-nomadic groups, zones should be established within which the livestock of such groups can graze without hindrance.

4. Members of the populations concerned should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth.

5. (1) Save in exceptional circumstances defined by law the direct or indirect lease of lands owned by members of the populations concerned to persons or bodies not belonging to these populations should be restricted.

(2) In cases in which such lease is allowed, arrangements should be made to ensure that the owners will be paid equitable rents. Rents paid in respect of collectively owned land should be used, under appropriate regulations, for the benefit of the group which owns it.

6. The mortgaging of land owned by members of the populations concerned to a person or body not belonging to these populations should be restricted."

It will be noted that the effect of Article 11 is to recognize that if land has been traditionally occupied, that gives rise to a right of ownership. Under this principle, it is unnecessary for indigenous people to establish that they had "owned" their land, according to their own customs and lore, in order to secure title to it under the legal regime established by later settlers.

Article 12 limits the grounds upon which indigenous people can be removed, and by implication similarly restricts the grounds upon which their land can be seized. But the restrictions are loosely drafted. Although seizures must be in accordance with law, it is not specifically laid down that only the government can undertake compulsory acquisition. Moreover it is surely not enough to require "reasons relating to national security etc." The grounds for acquisition and removal should be specified, and must be such as to outweigh the indigenous people's strong claim to their land, and the misery which will follow its seizure. Although Article 12(2) implies that removal should take place only where it is necessary (as distinct from convenient) and as an exceptional measure, in any future draft such restrictions should be made explicit conditions.

Another noteworthy feature of Article 12 is that although it provides for full compensation when land is seized, it does not deal with the difficult question of what compensation should be paid, and whether restitution of land should be an available remedy in cases where the seizure took place before the Convention entered into force.

Article 13 is ambiguous on a crucial issue. One of the striking features of statements by indigenous people is the unanimity and vehemence with which they claim the right to decide for themselves what is good for them. In other words they claim the right to manage their own affairs. If Article 13 implies that national governments are to determine which customs are to be respected, it offends against this principle. On the other hand, provided that indigenous people decide this for themselves, they should be perfectly free to discard obsolete customs governing land use and succession, in accordance with Article 13.

Of course this principle of self-management sits somewhat uneasily with proposals

that indigenous people should be protected against exploitation by restrictions on the right to sell, lease, mortgage or licence the use of their land and its resources. But they can be reconciled *provided* the restrictions represent the desire of indigenous people themselves.

Article 14 represents a different approach from that stressed so far. Instead of protecting indigenous people from seizure of the land which they currently occupy, and fixing reparations for that seized in the past, it asserts their right to enough land to provide for their needs, and their descendants, whatever the mode of life they choose to adopt. It must be said that this approach has disadvantages. Like many such economic rights, the Article is vague, and is better understood as an aspiration, than as a present guarantee. What is more, it would not confer on indigenous people any priority over other members of the community, whereas much of the force of their claim to land derives from the fact that they did come first, and were violently dispossessed of land which was theirs by right.

The foundation of indigenous rights

It will be apparent that between them Article 17 of the Universal Declaration of Human Rights, and the *Indigenous and Tribal Populations Convention*, establish many of the principles which indigenous people would like to see included in a charter on land rights. In particular they give clear support to the principles of recognition and protection of existing property, and restitution and compensation for past abuses. Perhaps these rights are acknowledged because they spring from universal rights of property.

What is missing is recognition of indige-

nous peoples' claims to special treatment. For instance clause 4 of ILO Recommendation no 104 proposes equal treatment in respect of the exploitation of mineral wealth. No doubt this is still necessary as a minimum guarantee, but nowadays indigenous people claim not equal treatment, but different treatment. To make good this claim, they need to ensure that in any negotiations, the foundation upon which it rests is clearly understood.

Nor is the claim to special rights in respect of mining the only such example. We live in an age where property rights are increasingly trammelled by restrictions imposed in the public interest. There is State control of many aspects of land use and development, from which indigenous people will often seek to be exempt.

The foundation of such an exemption, and of the claim of indigenous people that their rights over land should be different from those of the rest of the community, is the principle of self-management. This in turn has a number of justifications.

A principal one, in the eyes of many indigenous people, is that they are separate nations. They have been conquered and colonized, but they retain their right to self-determination. It hardly seems necessary to add that the States which govern them will resist the claim to self-determination, out of fear that it will lead to their disintegration. But much of what is meant by self-determination may be conceded, if it is sought under the principle of self-management, which carries less dangerous implications. The State cannot expect indigenous people to abandon their conviction that they are a separate people, but it can minister to their sense of injustice, and quieten their protests, if it concedes the right to manage their own affairs.

It has been a persistent theme in human thought that a free and independent people, who make the decisions which affect their

future, are likely both to make better decisions, and to be happier withal. This is the principle which underlies self-determination, but it also supports self-management. If self-determination cannot, or will not, be conceded, that is no reason for denying indigenous people freedom on their own land. And the argument of principle is strongly supported by the consideration that the distinct culture and way of life of indigenous people is threatened by events beyond their control. Only by restoring to them a measure of control can we help preserve their separate identity.

There are two main arguments against this. One is the paternalistic proposition that indigenous people are uncivilised and need help. There are all sorts of difficulties with this view, but in any event the plain and unmistakeable fact is that the "help" has not worked. In any event one would have thought that only by exercising personal responsibility, in other words by self-management, could indigenous people change in the fashion paternalists desire.

The other argument is that it is inequitable to accord different rights to indigenous people. It seems useless to deny that there is an element of discrimination involved. But we are used to the idea that special help should be given to the disadvantaged. Self-management for indigenous people can be justified on the grounds that it is the form of positive discrimination which is most likely to have the desired re-

sult, or because the discrimination is based on membership of a group which has the right to maintain a separate culture and way of life.

Finally one might comment, somewhat cynically, that in addition to the force of these arguments of principle, national governments should be swayed by the fact that to concede self-management will absolve them of some responsibility. At present they are blamed for the plight of indigenous people. But if they grant land rights and self-management, they will be able to defend themselves by saying that they have given indigenous people what they wanted. After that, any mistakes the people make must rest on their own heads.

Conclusion

It will be apparent that, in the author's view, three principles need to be accepted in negotiations on land rights. Two of these – guarantees against dispossession of land currently occupied, and restitution and compensation for past seizures – are already supported by international law. The third, the principle of self-management, must be maintained by weight of argument. If indigenous people can succeed in this, they will have an advantage in negotiations, for the other side will be in the difficult position of having to propose specific exceptions to the principles put forward.

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Report of a Seminar in Lucknow, December 1982.

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