

For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

HUMAN RIGHTS IN THE WORLD

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THE INTERNATIONAL COMMISSION OF JURISTS

It was to realise the lawyer's faith in justice and human liberty under the Rule of Law that the International Commission of Jurists was founded.

The Commission has carried out its task on the basis that lawyers have a challenging and essential role to play in the rapidly changing ecology of mankind. It has also worked on the assumption that lawyers on the whole are alive to their responsibilities to the society in which they live and to humanity in general.

The Commission is strictly non-political. The independence and impartiality which have characterised its work for some twenty years have won the respect of lawyers, international organisations and the international community.

The purpose of THE REVIEW is to focus attention on the problems in regard to which lawyers can make their contribution to society in their respective areas of influence and to provide them with the necessary information and data.

In its condemnation of violations of the Rule of Law and of laws and actions running counter to the principles of the Universal Declaration of Human Rights and in the support that it gives to the gradual implementation of the Law of Human Rights in national systems and in the international legal order, THE REVIEW seeks to echo the voice of every member of the legal professions in his search for a just society and a peaceful world.

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Nobel Award to Seán MacBride

Mr. Seán MacBride, who was editor of this REVIEW and Secretary-General of the International Commission of Jurists from 1963 to 1970, was awarded the Nobel Prize for Peace on October 8, 1974.

The Chairman of the Award Committee stated that it was given "in recognition of his efforts of several years duration in order to develop and protect human rights throughout the world".

The award is at once a personal tribute to his untiring work in the causes of human rights and peace, and an important recognition of the relationship between these two causes. As Mr. McBride has always stressed, violations of human rights are a common source of danger to peace, and the greatest violations of human rights occur in armed conflicts.

It was in 1949 and 1950, as Foreign Minister of Ireland, that Mr. MacBride first came into prominence in the international field in connection with human rights. He then did much to promote and achieve adoption of the European Convention on Human Rights, the first and still the most effective international convention of its kind, with machinery for implementation.

From 1963, when Mr. MacBride became Secretary-General of the ICJ, he soon transformed the status and influence of non-governmental organisations in the field of human rights. As Chairman of the Special Geneva Committee of NGOs for Human Rights he succeeded in bringing about a greater degree of cooperation than ever before existed between organisations of widely differing objectives and orientations. His influence was particularly felt at the UN Conference held in 1968 to mark Human Rights Year in Teheran. He played an important part in helping to draft resolutions which laid the groundwork for much that has since occurred in this field.

Among his initiatives as Secretary-General of the ICJ were to help launch the proposal for a United Nations High Commissioner for Human Rights. He called together a meeting in Geneva of those principally concerned, which formulated the proposal and prepared a draft UN Resolution. He was also active in promoting the Ombudsman idea in many parts of the world.

Perhaps his greatest contribution to the furtherance of human rights has been in the field of humanitarian law for the protection of victims of war. He has campaigned ceaselessly for the creation of an impartial and public procedure for enquiry into violations of human rights in armed conflicts under UN auspices.

His Nobel Peace Prize is a source of immense pleasure and encouragement to all who have worked with him and benefited from his inspiring leadership over the years. As UN Commissioner for Namibia he is now throwing his energy with renewed zest into helping the people of South West Africa to obtain their freedom and prepare for self-government.

Some Hopeful Signs for Human Rights

Until recently one would have considered as text-book maxims that situations involving social turmoil give rise to repressive régimes, that these régimes offer political stability in return for the surrender of political rights, and that the severity of their repressive measures is in direct relation to the dangers their power faces. Recent events in various parts of the world raise questions as to the universal validity of these propositions, and an analysis of the reasons can give grounds for greater confidence about the future of human rights.

The most startling development within recent months was the collapse of the authoritarian régimes of Portugal and Greece, and their end came precisely when it became clear that they had failed in their promised mission of maintaining stability. This was soon followed by the fall of another absolute ruler, in the person of the Emperor of Ethiopia, though it remains to be seen whether this will lead to any liberation of the régime. Less dramatic, but yet of great interest has been the reaction of other authoritarian régimes to the pressures brought to bear upon them. The case of South Korea is instructive. When faced by a student led movement against an anti-democratic Constitution imposed on the people of South Korea, President Park introduced the most draconian measures, such as 15 year jail penalties for criticizing the Constitution or the death penalty for having given aid to certain student organizations, but when in place of the peaceful protest there was an assassination attempt against the President which killed his wife, the expected response of greater repression was not forthcoming. In spite of the attack the government proceeded to revoke some of the emergency decrees.

Or to take the case of the Philippines; whereas President Marcos seized power and changed the Constitution to perpetuate himself in power, imprisoning in the process many opposition leaders, on the ground that there was social unrest, he has recently released some of these prisoners at a time when an open Moslem rebellion was spreading. Or Spain, where a period of political instability has set in as a consequence of the evident end of the reign of President Franco, but instead of, as might be expected, a tightening of the reins, the government proposes some mildly liberalizing reforms.

There have been some indications still contradictory at the time of writing, that a liberalization process is starting in Brazil, and the liberalization of the attitude of the Soviet Union to the emigration of its Jewish citizens is also a factor to be noted.

What runs as a common thread through all these events is that the world community is growing ever more interrelated and interdependent which has an ever greater effect on the internal politics of its members. In this situation a government which isolates itself from its own people or from world opinion will find it ever more difficult to continue in power.

The final overthrow of the Portuguese Government, which had ruled with a strong hand for fifty years, appeared a relatively simple procedure because it had become internationally isolated by its colonial policies and isolated from its own people by its repressive policies. When this reached the stage where the popular anger and frustration manifested itself through the Armed Forces Movement, the government had nowhere to look for support.

The Greek Military Government did not even have to be overthrown. It merely disintegrated when its possible reactions to the Turkish landing on Cyprus were check-mated. Having isolated itself internationally by its repressive policies and its open interference in the affairs of Cyprus, and being totally isolated from all political forces within the country, the government was paralyzed when Turkey took advantage of the situation to achieve long sought goals in Cyprus at the expense of the Greek position. The Greek Junta could neither fight a war against Turkey, for modern war requires a much greater degree of popular support than it possessed, nor could it abandon its militaristic stand, for fear of exposing its impotence, it could only fade into the background.

The three thousand year old Ethiopian absolute monarchy would not have come to an end so peacefully,* if modern communications had not exposed the cynicism by which Ethiopian leaders were exporting food for profit while their own population was starving.

As regards South Korea, President Park was straightforward in stating that the abrogation of the repressive decrees was influenced by the "misunderstanding" of their purpose by "friends" abroad. It is rare that a government admits so openly to the effectiveness of international pressure.

Chile and, to a lesser degree, Brazil have been the object of much international pressure with respect to violations of human rights. Brazil has over a period of time sought to lessen its international isolation in various ways, including reducing (though not ending) some of the more flagrant practices of torture. It is to be expected that the Chilean Government too will find that it cannot live in internal and external isolation. The first hesitating steps aimed at reducing international pressure may be an indication that this is coming to be appreciated in Chilean Government circles.

The Soviet change in attitude on immigration policies is clearly related to international pressure, particularly economic pressure. The Soviet economy could use international technology in its development and in order to pay for it requires export markets. These are being blocked in part by the reluctance of the United States Congress to grant "most-favoured" nation status to the Soviet Union by reason of Soviet immigration policy.

Thus the international element in internal political processes is making itself felt in many ways. There is however another factor, international in scale which may already, and certainly will in the future, influence the attitude of governments, requiring them to seek a popular base at home. This is the developing economic problems of inflation and crisis, which are international in character and for which authoritarian régimes offer little in the way of expertise. In the face of this unknown, governments need cooperation and support both within and without.

* These lines were written before the execution of 60 former Ethiopian leaders gave the Ethiopian revolution a more menacing turn.

Human Rights in the World

Brazil

On April 1 of this year, the Brazilian military régime celebrated its tenth anniversary. The new President, General Ernesto Geisel, nominated by the leaders of the Armed Forces, had his mandate confirmed by Congress on 15 March last. General Ernesto Geisel is the fourth general to occupy the presidential office since the military *coup* in April, 1964, put an end to the constitutional régime presided over by João Goulart. General Ernesto Geisel, like his predecessors before him, has promised to re-establish a democratic régime during his term of office. Till now none has succeeded, the reason given always being the overriding needs of national security. The expression "national security" in this context is defined as the "guaranteed pursuance of national aims against both internal and external antagonism", (National Security Law, s. 2 of Decree Law No. 898 of 29 September 1969). There are, however, positive signs that some moves towards democratisation may now be made under President Geisel.

The aim of the Brazilian military government would appear to be to transform the country into a major power while attempting to avoid political opposition to the greatest extent possible. The aim in itself is scarcely a new one, since it merely takes up the republican motto which figures on the national flag "Order and Progress". The original element is to be found in the manner in which the aim is being pursued, that is, the particular sort of "order and progress" which is being imposed on the people of Brazil. Section 1 of the National Security Law provides that "every person, whether natural or legal, is responsible for national security to the extent defined in this law".

Since 1964 the Brazilian government has issued a series of enabling acts and decrees designed to give a legitimate character to its own existence. The notion of national security pervades all of this new legislation which is characterised by an excessive concentration of power in the hands of the executive on the one part, and the suspension or restriction of guarantees of individual civil liberties on the other. A typical instance of a law granting extraordinary powers is Institutional Act No. 5 of 13 December 1968. This gives the President of the Republic absolute power to prorogue Parliament, to intervene in state and municipal governments, and to suspend the political rights of the citizen. Section 10 of the Act suspends the constitutional guarantee of habeas corpus in cases of political offences against national security. The Act is in many respects equivalent to a permanent state of emergency and is completely at odds with the notion of legal protection of rights, which is an essential element of the Rule of Law.

In spite of the declarations of good will on the government's part as regards basic human rights, the minimum conditions for the guarantee of these rights are still lacking. In other words, although the intensity of repression may have been relaxed in recent months, the machinery of repression continues intact, and reports of torture of political prisoners are still being received. The absence of legal guaranties enables, when it does not actually encourage, police and military groups to act outside the legal

framework, i.e., beyond both governmental and judicial control. The ever growing autonomy of the forces of repression (the army and the police) is a phenomenon common to all governments exercising extraordinary powers, no matter what the political bent of the régime.

In Brazil, arbitrary detention, arrests followed by the disappearance of the victim, physical and psychological torture, searches on private premises, clandestine arrests and detention, intimidation of the detainee's family and lawyers, all continue to be used by the security forces. At present more than twenty political detainees have vanished and the responsible agencies refuse to admit that these persons have ever been taken into custody. Among those who have disappeared are former opposition members of Parliament, trade union leaders, students, lawyers, journalists and teachers.

Para-police commandos known as "Death Squads" are still operating in various Brazilian cities and already have between 1,500 and 2,000 deaths to their credit since the beginning of their activities in the late fifties. Most of the victims are common criminals who are "judged" irredeemable by the Death Squads, but they also include a number of political suspects. Only a few of those responsible for these crimes have been arrested and brought before the Courts.

On April 3, 1974, in the city of São Paulo, Mr. Wellington Rocha Cantal, a lawyer, was arrested in front of his office, severely beaten in the street and brought hooded before the local branch of military security. He was detained *incomunicado* for three weeks and brutally tortured. At the request of the Brazilian Bar Association the Military High Court ordered that Mr. Rocha Cantal should no longer be held *incomunicado*. On two separate occasions members of the security service attempted to evade the decision of the military court. With the support of the Brazilian Bar Association, Mr Rocha Cantal has now lodged a formal complaint calling for criminal proceedings against the members of the armed forces responsible.

On May 10, the Brazilian Bar Association issued a ten-point memorandum urging the Government to grant basic democratic and human freedoms to the people. Among the rights and freedoms it demanded were: an independent judiciary, restoration of a fully operative habeas corpus, an end to secret arrests and the practice of holding accused persons *incomunicado* without charges, a halt to the abduction of lawyers to pressure them into disclosing the whereabouts of their clients and to the practice of putting black hoods over the heads of interrogators to avoid subsequent identification. At its sitting on 12 June the Federal Council of the Brazilian Bar Association set up a commission to enquire into the arrest and disappearance of individuals.

Up to now the Brazilian Bar Association has been able to intervene on behalf of human rights and basic freedoms without restriction. A Government Decree of May 3 last provides for the placing of the Bar Association under the control of the Ministry of Labour. The Bar Association protested against this measure as striking at the independence of the profession and demanded its repeal. Indirectly the Decree also affects the Independence of the Judiciary, since the Bar Association participates in the appointment of the judges.

With the aim of saving the lives of arrested persons, and avoiding their ill-treatment, a member of Parliament of the official opposition party, "Movimento Democrático Brasileiro", Mr. Lisaneas Maciel, presented a Bill proposing that authorities under whose responsibility persons were

arrested would be under an obligation to bring them before a judge, whose sole function would be to inquire into their mental and physical state. This Bill was never debated in Parliament.

Another important feature of the system of repression is press censorship. The Government controls virtually all the communications media. Where this control is not direct by the placing of a censor in newspapers' editorial offices, it is indirect through intimidation resulting in self-censorship by the journalists themselves. It should be noted that no legal provision governs press censorship in the manner in which it is being carried out at present, and this is contrary to the Constitution. No criteria exist to which an editor can conform and he remains at the mercy and whim of the particular censor. Certain taboos exist regarding matters on which journalists are not supposed to dwell. Subjects such as the situation of political prisoners, the impunity with which the Death Squads act, demands of university staff, conflicts between the landless farmers and the big corporations, events in Chile, the position of the Church, and the cost of living are generally considered dangerous and are to be avoided.

Even parliamentary immunity, which safeguarded freedom of speech, in the Congress, has been withdrawn. Mr. Francisco Pinto, a deputy of the opposition Brazilian Democratic Movement, was sentenced to six months imprisonment for criticising in a speech in Parliament General Pinochet's presence at the inauguration of President Geisel.

These are some of the principal features of the Brazilian system of repression. The system is not, of course, monolithic and does not always act uniformly. The increasing economic difficulties of the country, the mounting opposition to the severity of the forces of repression and the unfavourable image they have created abroad appear to have led some of the military authorities to seek greater popular support. A number of recent events lend hope that progress towards the greater liberalisation promised by General Geisel may be achieved under his presidency.

For example, attempts are being made to reconcile Church and State, the dialogue between them having been broken off under the Garratazu Medici Government. There is also evidence of Government efforts to keep the political and military organs of repression under control. An instance of this is to be seen in the Government's reaction to the evidence of the brutal murder by the Rio State Police at Nova Iguaçu on August 17, 1974, of two youths suspected of criminal activity. The youths were simply lined up against a wall and shot. The policemen responsible have been arrested and a judicial investigation set in hand. Since June 1974 there appear to have been fewer cases of ill-treatment of political suspects. It remains to be seen whether this improvement will be permanent, or be restricted to the pre-election period.

Both of the existing political parties, the National Revolutionary Action Party (ARENA) and the Brazilian Democratic Movement (MDB) recently sought through their leadership to put an end to the state of emergency. Debates and lectures on the subject of institutionalising the political régime have been frequent in the country's main cities. The November National Congressional elections gave rise to discussions of issues and criticisms which had hitherto been stifled by censorship and resulted in a major victory for the legal opposition party.

The most important recent event concerning civil liberties was undoubtedly the national conference of the Brazilian Bar Association which met at Rio de Janeiro from 11 to 16 August last, where 700 jurists gathered to

discuss the topic "Lawyers and Human Rights". The most prestigious jurists of the country, representing the various trends of national legal thought, took part. Among the subjects discussed were: Human Rights and their Protection under the Law; Human Rights and Lawyers' Privilege; Human Rights, Public Order and National Security; Political Parties and the Citizen's Right to Participate in Politics; Rights of Freedom of Speech and of Association; Abuses of Economic Power and the Right to Social Welfare.

In the principal resolutions adopted by the conference, the idea was implicit that formal statements on human rights are insufficient if effective legal protection of these rights does not exist and, similarly, that mere legal protection, unless it is to be entirely meaningless, must be coupled with an economic, political and social infrastructure which will provide the citizen with the conditions necessary for the enforcement and exercise of these rights.

Professor Heleno Claudio Fragoso, Brazilian member of the ICJ and Rapporteur on the subject "Human Rights and their Legal Protection" stated in this regard: "There cannot exist effective protection of human rights, except under the Rule of Law". This can be assured, he said, "within the framework of a representative government, i.e., a government whose power and authority emanate from the people and are exercised through their freely chosen representatives, responsible to the people".

On the subject of "Human Rights and their Legal Protection", the conference adopted the following conclusions, the contents of which are highly significant in the light of the current situation in Brazil:

1. There can be no effective protection and safeguard of human rights except under a legal system in which the Rule of Law defends basic freedoms from arbitrariness and predominance of those in power by means of a system of security under the law.
2. Lawyers have a particular responsibility in respect of the improvement, defence and practical realisation of Human Rights. This responsibility cannot be effectively discharged without professional privilege and independence within the profession.
3. The Brazilian Government should ratify the U.N. International Covenant on Economic, Social and Cultural Rights and that on Civil and Political Rights, with its Optional Protocol, as well as the American Convention on Human Rights, since these instruments are of major importance and significance for the protection of human rights at the international level.
4. Institutional Act No. 5 is incompatible with the Rule of Law. The defence of public order and national security can and must be carried out under a system of law in which the exercise of exceptional powers in situations of emergency is for a limited time and subject to appropriate legal guarantees.
5. There can be no effective protection of Human Rights unless the independence and impartiality of the Judiciary are assured.
6. A free, respected and independent Legislature is essential for the protection of human rights and parliamentary privilege must be restored in order to ensure the freedom of speech which is fundamental to the exercise of their mandate by members of Congress.
7. Section 10 of Institutional Act No. 5, which suspends the constitutional guarantee to the right of habeas corpus, an essential instrument in the

- defence of the right of freedom from arbitrary arrest or detention, must be repealed without delay.
8. In view of repeated and constant abuses, the inalienable right of communication with any arrested or detained person must be faithfully observed.
 9. Freedom of the press is of the greatest importance in the struggle for Human Rights and their defence and protection. The system of censorship, now operating outside of the law, must cease.
 10. The recommended cessation of press censorship does not imply acceptance of other types of censorship exercised over public and private means of communication.
 11. The full realisation of economic, social and cultural rights cannot be achieved merely through formal legal protection, but only in the context of a just social order, the establishment of which is the duty of the State.

Czechoslovakia — Double standards

The International Commission of Jurists and this REVIEW have often referred to violations of the Rule of Law in Czechoslovakia. Before the Dubcek era the victims of these violations were primarily people hostile to the communist system, although the purge trials in the late 1940s and early 1950s show that even communist leaders were not immune. Since the overthrow of the Dubcek régime following the intervention of Soviet and other Warsaw Pact armies in 1968, a new oppressed class has emerged, supporters of a communist society but who wish the society to be more humane and more concerned with human rights. Many of these have been subjected to arrest, imprisonment and other deprivations of their freedom.

The Society of Czechoslovak Lawyers, which has remained silent in face of these events, recently published a statement denouncing the suppression of human rights in Chile. This provoked a group of these communist and socialist dissidents to write a remarkable open letter to the Society which exposes the violations of human rights occurring in Czechoslovakia. It was published in the London *Times* on November 1, 1974, and is reproduced below in full:*

“ An open letter from Prague

On June 14 the Czechoslovak press published a protest about events in Chile issued by the Society of Czechoslovak Lawyers. This document states that Czechoslovak lawyers were deeply disturbed by reports of intensified illegal terror directed at all progressive forces in Chile.

The society condemned the persecution, torture and mass executions of Chilean patriots. Its members called for a renewal of constitutional and democratic freedoms; they protested that these representatives of the Chilean people have been totally deprived of their civil rights and have no legal protection. The Czechoslovak lawyers demanded to be allowed to attend the trial of Luis Corvalan so that they might assist in his defence and the defence of other patriots.

* Reproduced from The Times by permission.

All progressive people in the world should do everything in their power to provide Chilean revolutionaries and democrats with full material and moral aid in their just struggle for a democratic society and for socialism. If we are rather late in expressing our views it is because many of us have had no opportunity until now. We hereby proclaim our wholehearted solidarity with the progressive forces in Chile and unequivocally condemn the brutality of the fascist junta.

We claim the right to express our solidarity because we are linked with progressive Chileans by common ideals and aims and in many cases by a common fate. But we emphatically deny you, gentlemen of the Society of Czechoslovak Lawyers, the right to express support.

We do not know of a single case in which you have defended human rights or civil liberties or have insisted that the norms of legality be observed in your own country—Czechoslovakia. Or do you regard the dismissal of tens of thousands of Czechoslovak citizens and their relegation to employment in which they cannot use their qualifications as being in accordance with the law and its role in society?

Do you think it right that children of “bad” parents should be denied secondary and higher education?

Do you think it right that many of our citizens should be maligned in the press for their recent political activity and not be allowed to defend themselves against this smear campaign?

Gentlemen of the Society of Czechoslovak Lawyers, do you really believe that freedom of expression, the press, assembly and association, scientific research and freedom of movement, including the possibility of leaving our country and returning to it, are guaranteed in Czechoslovakia?

Is it in conformity with the role of the penal code that under a section carrying milder sentences 47 communists and socialists—including the former Rector of the Communist Party Political University, Milan Hubl, university lecturers Jaroslav Meznik and Antonin Rusek, regional party secretaries Alfred Cerny, Jaroslav Sabata and Jaroslav Litera, historian Jan Tesar and former student leader Jiri Muller—were awarded prison sentences of up to six-and-a-half years in 1972?

Do you really believe that these trials were conducted in conformity with the penal code, that during the preliminary proceedings the secret police did not employ psychological pressure and resort at times to physical torture?

Are you not aware that political prisoners are subjected to harsher treatment than common criminals, that their food rations are inadequate, that they are suffering from malnutrition, that they do not receive proper medical care, that their mental processes are being stultified, that the prison authorities are trying to reduce them to mental wrecks by keeping them in complete isolation?

We live in one and the same country and we are all aware of the legal state of affairs. If responsibility for this lies with every one of us, your share is the greater, for you are more informed and experienced.

Your resolution in support of civil rights in Chile against the fascist junta is hypocritical. You speak with a false tongue. We, released political prisoners, who were imprisoned in Czechoslovakia during the early seventies, are closely linked in friendship, solidarity, ideology and conformity or affinity of action with Chilean socialists, communists, revolutionary Marxists, Christians and other democrats, according to our political opinions.

You, however are linked by no bonds, and hypocritical words cannot disguise this. You use propaganda to safeguard the status quo in our country, one feature of which is active trade between Czechoslovakia and the fascist Chilean junta.

We are convinced that our Chilean comrades, friends and brothers will triumph in their just fight against fascism and terror and for democracy, freedom and socialism. We should like them to know that they have many true allies in Czechoslovakia.

Karel Bartosek, Rudolf Battek, Ivan Binar, Jan Dus, Karel Fridrych, Ladislav Hijdánek, Jiri Hochman, Karel Kaplan, Vavrinec Korcis, Anna Koutna, Bohumír Kuba, Vít Lepil, Jan Lestinsky, Vladimír Nepras, Jan Schopf, Josef Stehlík, Jaroslav Suk, Jan Svoboda, Jan Sabata, Václav Sabata, Anna Sabatova, Pavel Sremr, Zdenek Sumavsky, Petruska Susteroová, Ales Richter, Zuzana Richterová, Petr Uhl, Zdenek Vasíček, Radko Vyáorlek. ”

Equatorial Guinea

“ There are some small countries in Africa about which little is said, because they are unknown and people have difficulty in placing them on a map, but where dramas are occurring which ought to attract attention, if only because their victims, black peoples oppressed by black despots, cannot count on the support of either the United Nations or the Organisation of African Unity. ”

This cry for help about the situation in Equatorial Guinea, sounded two years ago by a Christian weekly published in Paris, *La Croix*, has unfortunately received little response from international opinion. Meanwhile, the history of this country since independence in 1968 appears to be largely one of repeated political assassinations. As recently as June 10-20, 1974, no less than 80 political prisoners are reported to have been killed in cold blood with no kind of trial in the prison at Bata, the capital of the province of Rio Muni. The victims were supposed to have plotted against the regime of President Macias Nguema.

This small republic of 28,000 sq. km. situated in the Gulf of Guinea between Cameroun, Gabon and Nigeria, has a population of about 400,000. It comprises the island of Fernando Po, four other smaller islands and the mainland province of Rio Muni. A former Spanish colony, it moved gradually towards independence from 1959 when it obtained the status of an overseas province of Spain. In 1963, on the initiative of the main political groups in the country, Equatorial Guinea obtained the status of “ internal autonomy ”. An autonomous government was formed which prepared the country for independence.

In 1968 a Conference in Madrid brought together to treat with the Spanish Government a delegation from Equatorial Guinea composed of the principal political leaders of the country, with representatives of the different economic, social and cultural interests. At this meeting a new Constitution was drawn up, which was subsequently adopted by a popular referendum under United Nations control. Ironically, the Constitution was a western style liberal democratic republic, offering much greater guarantees of individual freedom than those to be found in Spain. Independence was proclaimed on October 12, 1968.

In the elections which took place after this first consultation, Mr Macias Nguema, as candidate of one of the parties, the *Monalique*, was elected president of the Republic heading a coalition of the four political parties (IPCG, Monalique, Munge and Bubi Union) who had agreed upon a common programme. Once installed in power, Mr Macias showed no respect either for the terms of the coalition or for the newly created Constitution.

Governmental Terrorism

In November 1968, one month after independence, the President ordered the arrest of Mr Bonifacio Ondu Edu, former prime minister of the autonomous government and principal rival of Mr Macias in the presidential election, together with three other influential personalities of his political entourage Mariano Mba and Antonio Ndongo, both members of the Assembly, and Simon Ngomo, former governor of the province of Rio Muni under the autonomous government. Shortly afterwards, without any charge, trial or judgment against them, Mr Mba and Mr Ndongo were murdered in the prison of Bata, while Mr Ngomo was transferred to the prison of Santa Isabel, where he was confined with Mr Ondo Edu.

Four months later, on March 5, 1969, President Macias claimed that there was a plot aimed at overthrowing his government, which he attributed to the Minister of Foreign Affairs, Mr Atanasio Ndongo, an influential member of the government coalition whose support had been decisive for Mr Macias' success in the presidential election. His opponents contend that this was a fictitious plot, a manoeuvre by the President, aimed at the elimination of any possible political opposition.

President Macias took advantage of this incident to set off a vast campaign of political persecution against members of the opposition as well as ministers in his government who were hostile to his regime of personal power. He dismissed several ministers and members of the Assembly, disregarding their constitutional prerogatives. He did the same to members of the Council of the Republic (a body to supervise the constitutionality of the laws) and provincial and municipal assemblies. Several of their members were murdered; others are reported to have died in prison as a result of severe tortures. The President then nominated his most faithful supporters to replace them in government or in parliament, without any form of election.

Among those reported to have met their death in prison are Mr Atanasio Ndongo, the Minister of Foreign Affairs, Mr Ondo Edu, the former Prime Minister, Mr Torao Sikara, President of the Assembly, Mr Enrique Gori Molubela, former President of the Assembly of the autonomous regime and Vice-President of the Provincial Council of Fernando Po, Mr Saturnino Ibonga, member of the Assembly and permanent representative at the United Nations, and Mr Armando Balbao Dongan, Secretary-General of the Assembly. There then followed a veritable man-hunt on the instigation of the President who was more and more obsessed by a kind of persecution mania. On repeated occasions he ordered the arrest of ministers, members of the Assembly and of the intellectual and economic élite of the country, whom he accused of plotting subversion. Time after time these disappearances were explained by an announcement that the person in question had committed suicide in prison.

Well-known political figures like Carlos Cabrera James, Counsellor of the Republic, Jesus Eworo Ndongo, Minister of Justice, Roman Boriko

Toichoa, Minister of Industry, and Expedito Rafael Momo, who had also been a Minister of Justice, disappeared without a trace. Other personalities who it is believed died as a result of tortures include Morgades Besari, an advocate, Nguema Obono, Watson Bueko and Komo Madje, doctors, and Eñeso Nefe and Castillo Barril, university professors.

In this way, of the élite which was prepared for independence, only a few remain alive; more than two-thirds of the members of the Assembly elected by the people in 1968 have disappeared.

The Structure of Dictatorship

In Equatorial Guinea the press and radio are under the direct control of the President. There is also postal censorship and suspect correspondence is seized and action taken against the author or his family.

In the administration there is complete centralisation. No minister or senior official has the freedom to discharge his functions. In particular, they are forbidden to give interviews or to make public statements, above all to the foreign press. Several ministers are very bitter about this in private.

In 1970, President Macias created by decree a single party, The Single National Party of Workers (PUNT). In consequence, all the traditional political parties became illegal and many of their members and leaders were imprisoned or murdered. Those who could took refuge abroad. Today thousands of people from this small population have fled abroad, mainly to Gabon, Cameroun, Nigeria and Spain, but also to other countries of Africa, Europe and America. The issue of passports has been suspended, and embassies have been instructed not to renew passports of nationals abroad, other than those who have close links with President Macias or his ministers.

On May 7, 1971, the President "regularised" the situation from a formal point of view by decreeing the repeal of certain articles of the Constitution and assuming directly as President the powers of the legislature, the executive and the judiciary, as well as the prerogatives of the Council of the Republic. From this moment the ascendancy of the President was complete. He rules through the single Party and his para-military police, the "Youth on the March with Macias".

In July 1972, a constitutional decree (No. 1/72) proclaimed President Macias as President for life, head of the nation and the party, commander-in-chief of the army and Grand Master of education, science and culture.

On July 29, 1973, a new Constitution was introduced. It was presented to the Third Congress of the PUNT approved by its Assembly and ratified by a referendum organised by the PUNT. Under it, President Macias is proclaimed president for life and the article of the Constitution which requires election of the president by direct secret universal suffrage is suspended in relation to him. The People's National Assembly is composed of 60 deputies designated by the party, PUNT, and can be removed at any time by it. The President can dissolve the Assembly and call fresh elections at will. The judicial power, according to Article 67 "emanates from the people and is exercised in its name by the Supreme People's Court and other civil and military courts". All the judges are nominated by the President and are revocable by him, as are the Public Prosecutors. Under Article 31 no one is to be detained or sentenced except by a competent authority under laws in force at the time of the offence and subject to the formalities and guarantees established by law. The next article states,

however, that this does not apply to persons accused of offences against the security of the state or subversion.

It is hardly surprising that under such a regime the country is reported to be falling into economic and social ruin and that discontent and opposition are reported to be growing throughout the country.

India — Preventive detention and prison conditions

Preventive detention is permitted in normal times under the Indian Constitution, Article 22, and is not, as in most democratic countries, restricted to times and areas in respect of which a state of emergency has been declared. On the other hand, a number of important safeguards are provided for in Article 22. The detenu¹ must be informed of the grounds for the order "as soon as may be" and must be afforded "the earliest opportunity" of making a representation against it. He cannot be held for more than three months unless an Advisory Board consisting of High Court Judges (or persons qualified to be such) consider there is "sufficient cause" for the detention.²

The original Preventive Detention Act was passed in 1949, but preventive detention is now governed by the Maintenance of Internal Security Act, 1971. This authorizes the Central Government or any State government (other than Jammu and Kashmir) to make a detention order if satisfied that it is necessary to do so with a view to preventing the person concerned from acting in a manner prejudicial to the defence or security of India, its relations with foreign powers, the security of the State, the maintenance of public order, or the maintenance of supplies and services essential to the community. In addition, a foreigner may be detained with a view to regulating his continued presence in India or to making arrangements for his expulsion. A temporary order may be made by any District Magistrate or Commissioner of Police. Such orders lapse after 12 days (or 21 days if the grounds of the order have been communicated to the detenu), unless confirmed by a State government.

The grounds for the detention have to be disclosed to the detenu ordinarily within five days or, in exceptional circumstances and for reasons to be recorded in writing, not later than 15 days after the detention. The detenu must be afforded the "earliest opportunity" of making a representation against the order. Every detention order must be referred to the Advisory Board within 30 days of the detention with the grounds for the order and any representation made by the detenu. The detenu has a right to be heard, but not to be represented by a lawyer. After calling for any information it deems necessary, the Advisory Board must report within ten weeks of the detention, advising whether there is sufficient cause for it.

¹ In India a person under preventive detention is referred to as a « detenu ».

² Parliament may exceptionally remove this safeguard in particular circumstances and in respect of particular classes of persons. An attempt to do so in Section 17 A of the Maintenance of Internal Security Act 1971 was held invalid and overruled by the Supreme Court in *Sambhu Nath Sarkar v. State of West Bengal* AIR 1973 SC 1425.

Where the Board considers there is no sufficient cause, the government concerned "shall revoke the detention order and cause the person to be released forthwith". The maximum period of detention is 12 months. The revocation or expiry of an order shall not bar the making of a fresh detention order if "fresh facts have arisen after the date of revocation or expiry" justifying a further order. Persons subject to a detention order may be released temporarily upon condition.

The Supreme Court, in a number of cases, has enforced strict standards in respect of

- precision in stating the grounds of detention,³
- relevance and sufficiency of each and every one of the grounds alleged for each detention,⁴
- promptness in the State's consideration of the detenu's representation.⁵

In *Manu Bhusan Roy Prodhan v. State of West Bengal* AIR 1973 SC 295, the Supreme Court held that a murderous assault on one individual when the motive for the assault was not well explained was not a relevant ground for a detention order, and ordered the detenu's release. The Court also said "Where one of the two grounds on which detention order is based has no relevance or relation to the disturbance of public order but that ground is not of unessential nature and its exclusion from consideration might reasonably have affected the subjective satisfaction of the detaining authority, the detention cannot be sustained though the other ground is quite germane to the problem of maintenance of public order".

In *Babul Mitra v. State of West Bengal*, AIR 1973 SC 197, one month's delay in considering the detenu's representation was held not to be unreasonable in the circumstances then prevailing (colossal refugee problem and spurt in extremist activities). The court explained that the distinction between "law and order" and "public order" was one of degree. "The act by itself is not determinant of its own gravity. So in each case it should be seen whether the detenu's acts have any impact upon the local community or disturb the even tempo of the life of the community of that specified locality." Forcing entry into a school, preventing the staff offering any resistance and setting fire to the school resulting in its indefinite closure, were held to be acts connected with public order.

On the other hand in *Satyabrata Seal v. State of West Bengal and others*, AIR 1973 SC 756, a delay of 39 days in considering the detenu's representation was held to be excessive. The explanation given by the government (that there was an abrupt increase in detention cases at the time due to a spate of anti-social activities by Naxalites and other extremists) was held to be too vague and indefinite. In *Debendra Nath Goswami v. State of West Bengal*, AIR 1973 SC 757 the detenu's representation was received on January 22, 1972, and considered by the government on February 15; the detention was confirmed on February 25 (after receiving the report of the Advisory Board), and communicated to the detenu on March 1. The

³ *Sundara Rao v. State of Orissa*, AIR 1972 SC 739; *Tapan Kumar v. State of West Bengal*, AIR 1972 SC 840; *Debu Ghose v. State of West Bengal*, AIR 1972 SC 530.

⁴ *Ram Krishna Paul v. State of West Bengal*, AIR 1972 SC 863.

⁵ *Singh v. State of Manipur*, AIR 1972 SC 438; *Baidya Nath v. State of West Bengal*, AIR 1972 SC 1198; *Abdul Karim v. State of West Bengal*, AIR 1969 SC 1028; *Jayanarayan v. State of West Bengal*, AIR 1970 SC 675.

government's explanation for the delay was the sudden and abrupt increase in the number of detentions causing great pressure of work. In this case the delay was held to be unreasonable, with the result that the detention became illegal, and the detenu's release was ordered.

Among other rulings given by the Supreme Court have been that prejudicial activities are not confined to acts prohibited or punishable by law, nor need the threatened activities necessarily be within India (*Giani Bakshish Singh v. Government of India*, AIR 1973 SC 2667); an order can validly be made after the detenu has been discharged in a criminal case in connection with the very incidents which form the basis of the order (*Sri Ramayan Harijan v. State of West Bengal*, AIR 1973 SC 758); breaking open a goods wagon to steal brass rods is a valid ground for detention as being bound to cause disruption in the maintenance of essential supplies and services (*ibid*).

As a result of the constitutional safeguards and the strict attitude adopted by the courts towards preventive detention, detenus are in many cases considerably better off than prisoners awaiting trial or "under trial". Amnesty International published a report in September 1974 on the detention of "Naxalite" prisoners in West Bengal. Naxalites is the name given to Marxist-Leninist communists who advocate armed struggle to bring about social and political change. They were responsible for widespread acts of violence in 1970 and 1971. The Indian authorities agree that some 17,000 were arrested after this wave of violence, but claim that the great majority have since been released. According to Amnesty International between 15,000 and 20,000 political extremists are being held in West Bengal under very unsanitary and overcrowded conditions, bar fetters being used for prisoners considered to be dangerous or a security risk; some are said to have been in chains for up to two years; allegations of torture are made by prisoners and their lawyers; 88 prisoners were killed in 12 jail incidents in a period of 12 months (according to the authorities, when trying to escape); prisoners found not guilty on one charge are often immediately rearrested on different charges or detained, and prisoners have been denied their legal rights.

The Indian authorities reject Amnesty's estimates of numbers, saying that the total prison population of West Bengal was 25,000, of whom 17,500 were "under trial" (itself a striking admission of the delays in bringing people to trial) and only 3,000 of whom could be classed as political agitators.⁶ They admit that the prison conditions are bad, pleading lack of money to improve them. They deny the allegations of torture, and have refused to order an enquiry into them. The government also admit the long delays which occur, prisoners often spending years in custody waiting for trial. There seems to be no doubt that the conditions of detention of prisoners awaiting trial in West Bengal fall far short of the U.N. Standard Minimum Rules for the treatment of prisoners (cf. ICJ REVIEW No. 4, December 1969). It is difficult to accept that an Indian administration which was able to provide refugee camps at short notice for millions of refugees from Bangladesh in 1971 should not now be able to provide tolerable conditions for the detention of 25,000 prisoners, most of whom are being made to wait an unacceptably long time before being brought to trial.

On November 16, 1974, the Government by presidential order, established new grounds for detention, namely smuggling and racketeering.

⁶ In Bihar State it is reported that there are 27,000 "under trial" out of a total prison population of 33,000.

Reportedly, persons suspected of such activities may now be detained indefinitely and without right of access to the Courts. Detention orders may be made not only by the Central Government but also by state and district governments. The initial period of validity of the Order has been set at six months or until the present state of emergency is lifted. However, the Government has now decided include the provisions of the order in a Parliamentary Law.

Dents in the Image of Indonesia

Most military governments declare themselves to be temporary in character, and protest their intention to transfer power back to a civilian government as soon as a certain degree of stability has been reached or certain social objectives have been achieved. This is not the case in Indonesia.

In the aftermath of the student-led anti-Japanese riots at the time of Mr Tanaka's visit to Jakarta on January 15 and 16, 1974, a statement was issued by the military security organisation known as the Command for the Restoration of Security and Order (KOPKAMTIB). This statement laid down certain lines of conduct to restore the damage done during the "two black days". One of these read:

The Dual Function of the Armed Forces can not be disputed and one should not entertain any illusion of ever establishing in this country "civilian supremacy over the military" or "the military should go to the barracks"; such an idea can never be realized in Indonesia because the history of the armed forces in this country is quite unique; furthermore what can a complete civilian administration do if an armed batallion stages a coup d'état?

The lamentable situation regarding political prisoners in Indonesia which was outlined in ICJ REVIEW No. 10, June 1973, still continues. Over 30,000 persons are being detained without trial, virtually all since 1966. The government acknowledge that there is no evidence against the greater number of them, but continue to hold them indefinitely. 10,000 of the prisoners have been deported to the notorious camps on Buru island, separated from their families and living under deplorable conditions.

At the end of 1973 there were some signs of liberalisation, and rumours of mass releases, but after the January riots the political repression was again intensified. The government felt acutely embarrassed by the riots and was determined to stamp out all expression of opposition.

Among the measures announced were a ban on demonstrations, on student statements, on "canvassing activities for would-be presidential candidates" and on any unauthorised political activities. Former members of banned political parties were urged to join one of the authorised parties or one of the professional organisations. The statement continued: "if they decide to remain non-partisan they should in no way hinder the government", a striking example of the application of military principles in the political sphere. Among the problems which were to be "avoided" were problems of nationalities, tribes or clans, of religion, of race or of "inter-social differences".

The government also banned 11 newspapers and weeklies, including some of the oldest and most respected, such as *Indonesia Raya*, *Pedoman*, *Abadi* and *Harian Kami*. The editorial staff of these publications have been refused permission to work for other journals. The critical content of the Indonesian press has been reduced to an all-time low.

About 850 people are believed to have been arrested after the riots. Most were released within a few weeks. A hard core of 42 have remained in custody, and these include most of the intellectual leaders who have dared to express views which were critical of government policies. They include some of the most respected university teachers, lawyers, and student leaders.

Among the 42 still detained are:

Mr Thiam Hien Yap, a member of the International Commission of Jurists, Vice-President of the Indonesian Bar Association, Vice-Chairman of the Christian University, a leading member of the Indonesian Council of Churches, and a courageous defence lawyer who has frequently taken a public stand against abuses of power.

Mr Buyung Nasution, head of the Legal Aid Institute, a leading defender of civil liberties and a prominent lawyer.

Mr H.J.C Princen, head of the Institute for Human Rights, a former army officer and parliamentarian, who was imprisoned under President Sukarno.

Professor Sarbini Sumawinata, a leading economist, formerly one of the President's special assistants, who has often criticised Indonesia's excessive dependence on foreign aid.

Dr Dorodjatun Kuntjoro Yakti, an economist and political scientist, and a leading figure among the younger intellectuals. (On the 25th Anniversary of the Universal Declaration of Human Rights, December 10, 1973, in a speech to the United Nations Association he described it as tragic that in the name of economic development "strong government" has been developed which very often tramples on the human rights for which the struggles for independence have been waged. "The final objective", he said, "of economic development should be the realisation of human rights". One of the requirements was "three-dimensional justice, including justice between groups, justice between regions and justice between generations").

Mr Subadio Sastrosatomo, former leader of the banned Indonesian Socialist Party, who was jailed for four years under Sukarno; former editor of *Mahasiswa Indonesia*, a student weekly, and later of the daily paper of the Functional Groups, *Suara Karya*.

Mr Bjuhro Sumitradilaga, a former colonel and an influential leader of the community of West Java.

Mr Hariman Siregar, Chairman of the University of Indonesia's Student Council.

Mr Remy Leimena, Chairman of the Christian University Student's Council.

Mr Sjahrir, leader in 1968 of the High School Students' Action Front.

Apart from the student leaders, the others appear to have been held simply because they are leading intellectuals who have been critical of the

government and who have been in touch with student groups. The government seems anxious to find scape-goats who can be accused of leading the students astray. With the exception of Hariman Siregar, whose trial began in August and has since been frequently adjourned, none of those arrested has been charged with any offence. They are simply held under the "Law on Subversive Activities No. 11/1963", by virtue of which they can be held without charge for up to one year.

Apart from those arrested, a number of other leading figures have been forbidden to travel overseas. These include the writer and former Ambassador to Washington, Mr Sudjatmoko; the novelist and chief editor of the now banned *Indonesia Raya* who was imprisoned for 9 years under Sukarno, Mr Mochtar Lubis; the sociologist and former head of the Radio, TV and Film Directorate, Dr Uman Kayam; the Rector of the University of Indonesia, Professor Mahar Mardjono; a jesuit priest, Father Danuwinata; and a prominent businessman, Dr Sudarpo Sastrosatomo.

A single example may serve to illustrate the situation of political prisoners in Indonesia. Mr Oei Tjoe Tat is an Indonesian lawyer, a former Minister, and an associate of the International Commission of Jurists. When the army seized power on March 11, 1966, Mr Oei was arrested and detained with 10 other ministers in a military camp. During the 8½ years he has been in detention his case has been examined by 3 different interrogation teams, comprising military and civilian prosecution authorities. These interrogations took place in 1966, from September 1969 to March 1970, and from June to August 1972. In each case the conclusion was that there was insufficient evidence on which to charge him with any offence. At the end of 1973 there were rumours that he would be released the following year. However, following the January riots, the atmosphere changed and on April 10, 1974, the District Attorney-General announced publicly that Mr Oei would be charged with subversion and involvement in the abortive September 1965 coup (an unlikely hypothesis in view of his well-known loyalty to President Sukarno). On July 8 the District Attorney-General stated that the case was still under preparation, and on September 16 he said that it would be postponed indefinitely as the file was incomplete without the evidence of witnesses who were remaining abroad.

If there had been any case against Mr Oei, he would surely have been brought to trial before now. Any testimony first produced 8 years after his arrest must be virtually valueless. In these circumstances, the government, with all the might and resources at its disposal, could surely allow him now to go free. If they feel themselves so insecure that his liberty cannot be permitted, humanity demands that at least he should be allowed to go into exile abroad.

The case of Mr Oei is only one among some 55,000. What applies to him applies equally to them. After the student disturbances in January, General Sumarahadi, the spokesman for Kophamtib stated: "There is a dent in the image of our nation. We have to restore it as quickly as possible. We will prevent any type of re-occurrence at whatever cost". It seems improbable that there will be any real improvement in the situation in Indonesia until it is brought home forcibly to the Indonesian Government that their continued and systematic repression of basic human rights and fundamental freedoms is causing a far greater dent in their image than any student violence.

Morocco

Early on a late August morning, while the country was pre-occupied with a government inspired confrontation with Spain over the Spanish Sahara, six prisoners, including one over 70 years of age, were shot. Thus did the government have reason over its own military courts, which had earlier sentenced these men to lesser terms.

The death sentences which were carried out on that morning, seven months after sentencing, were the products of the second Kenitra trial, the government having been dissatisfied with the verdicts in the first trial held in the summer of 1973. Not that the Court had shown itself particularly lenient in the first trial, resulting as it did in 16 death sentences (also carried out during an external crisis, the October War), 15 life sentences, as well as 49 other prison sentences ranging from 2 to 30 years. Nevertheless the government was not pleased, and its displeasure was manifested by continuing to hold 71 defendants found innocent by the Military Court and 8 others given suspended sentences. (Many of those were subsequently released though many months after their acquittal while others are still not accounted for.) In addition, the composition of the Military Court was changed both as to the President and the military judges. The re-trial itself was obtained on a technicality, on an alleged error of the presiding judge in posing the questions of law to the military judges.

Among those executed was a school teacher who in the first trial had only received a ten year sentence. Others had previously received 20 or 30 year sentences and two had previously received life sentences.

The ICJ Observer at the second Kenitra trial had reported that the evidence presented was insufficient to justify conviction on the charges; that it was a reasonable inference that the confessions used in the trial had been obtained by torture and that the circumstances surrounding this re-trial made a fair result most difficult to obtain.

These executions were an example of the use of the "stick" as a tool of government. It's use has been alternated with that of the "carrot", in the form of revoking the prohibition of organizational activity by the political opposition or measured releases of political prisoners. The King has also favoured the leader of the opposition with audiences, but all these gestures have not gone to the essence, a meaningful sharing of power rather than an absolute monarchy.

Peru

Two aspects of the current situation in Peru are of interest from the point of view of the Rule of Law, that of the judiciary in the light of the establishment of the National Council of Justice, and that of the press, in the context of the new Press Act.

In order better to understand the problem, it should be recalled that on 2 October 1968 a military coup d'état took place in the Republic of Peru which overthrew the government of the duly elected President, Belaúnde Terry. The revolutionary government of the armed forces took over total control of the country. It laid down the basis of its future action in a "Statute" which defined its aims and explained the reasons for the action

which it had taken and the principles which it would follow (Legislative Decree 17.063 of 3 October 1968). Pursuant to the Statute, the armed forces represented by the Commanders in Chief of the army, navy and air force, set themselves up as a Revolutionary Junta (s. 3). This Junta was empowered to appoint the President of the Republic, who had to be a member of the armed forces (s. 4). In the Statute the military stated that the previous constitution and laws would remain in force insofar as they were compatible with the aims of the Revolutionary Government (s. 5).

According to s. 6, the new President of the Republic would exercise the "functions with which the Constitution empowers the Executive and, with the approval of the Council of Ministers, the functions of the Legislature, by means of legislative decrees issued jointly with the members of the Revolutionary Junta". Thus, with the dissolution of the Congress, there was no longer any separation of the legislative and executive powers.

The Situation of the Judiciary

On establishing the first precursor of an independent political constitution, José de San Martín stated, on October 8, 1821:

"While there continue to be enemies within the country and until the people acquire a basic notion of self-government, I shall administer the management of State, whose attributes, although not the same as, are analogous to those of the executive and legislative authorities. I shall, however, abstain from ever intervening in the due exercise of judicial functions, since the independence of the judiciary is the sole true safeguard of people's liberty. And though a man utter sentiments of purest philanthropy, these are meaningless when it is he who not only makes and administers the law, but also applies it".

The Peruvian Constitution, like other constitutions inspired by political liberalism and democratic-republican principles, has zealously sought to mould standards to assure the independence and autonomy of the three classic functions of the state, the executive, the legislature and the judiciary. Peru has a venerable and deep-seated tradition which seeks to guarantee that the judiciary shall operate independently of the political authority. Under the 1939 Constitution it is laid down that the Supreme Court of Justice is the highest judicial authority. With a view to ensuring the autonomy and independence of the judges of the Supreme Court and to avoiding undue pressures on the proper administration of justice, it is provided that the members of the Supreme Court may not take any office over which the Congress had power of election or over which the executive or any other authority or administrative body hold the power of appointment (with a few exceptions established by the Constitution itself).

Under the Constitution members of the Supreme Court are elected by the National Congress from a list of ten candidates proposed by the executive. Finally, the Constitution empowers and requires the legislature in its turn to define "the organisation of the judiciary, the form of appointments and the conditions and requirements to which these shall be subject" (s. 221). This the legislature did in the Judiciary (Establishment) Act, No. 14,605, which reiterated the basic principle in the following words: "In the exercise of its powers the judiciary should be independent of the other organs of State" (s. 2).

Neither in the provisions of the Statute by which the new Government established itself, nor in the Revolutionary Government's manifesto issued

on the same day as the coup d'état, was there any mention of plans to alter the constitutional position of the judiciary. The criticisms made of the previous political management of the country were concerned only with the executive and legislative branches of government. Nevertheless, in December 1969, by Legislative Decree 18.060, a new organ was created, the National Council of Justice. The Supreme Court was declared to be in a state of reorganisation and all its judges and officers were relieved of their duties. On the same day a further Legislative Decree (No. 18.061) appointed new judges, among whom were only three of those just dismissed.

The new organ, whose existence is not provided for in the Constitution, is empowered to appoint judges of the Supreme Court (as well as all other judges) by an *ad hoc* procedure. As soon as it was established, the new Council was severely criticised by the legal profession and the judges, and in a very short time the first conflicts between it and the Supreme Court arose. In mid-1971 the National Council of Justice proposed to the Supreme Court the dismissal of two judges. The Court pointed to the basic constitutional provisions and contended that the Council could not empower itself to sit in judgment on the judiciary. This stance was supported by the Lima Bar Association. The government, however, issued Legislative Decree 18.831 enlarging the powers of the Council (s. 14). Under this the Council could "propose" to the Court the suspension, dismissal or other sanctioning of any member of the judiciary. Hitherto such matters had been governed by s. 97 of the Judiciary Act, which provided that the dismissal of a judge could "only be imposed by the Supreme Court". It is evident that it is difficult to reconcile the sovereign powers of the Court with the notion of "proposals" from an external body which does not itself enjoy an independence guaranteed by law.

Another example arose in 1973 when two lawyers, one of them the President of the Lima Bar Association, denounced the improper representations made by a member of the Council to a judge in relation to a case in which one of the parties was related to the Council member. The Council member replied by accusing the two lawyers of having committed criminal libel. The competent Judge dismissed the action as ill-founded and removed the case to the Penal Division of the Supreme Court which affirmed the decision disallowing the libel proceedings. All of the judges in that Division were thereupon dismissed by the Council and new judges appointed in their stead. Two other judges of the Court who resigned in sympathy with their colleagues were also replaced.

Another matter which gives grounds for concern about the impartiality of the new body is that, quite recently, Legislative Decree 20.676 empowered the members of the Council to "undertake elected duties in agencies and bodies which are described by law as falling within the category of social services". Thus the independence of the new Council may be further prejudiced by its members holding appointments in which they will be subject to political control and pressures.

It is difficult to resist the conclusion that the establishment of the National Council and the powers granted to it have undermined the independence of the judiciary in Peru, turning the Supreme Court into a body subject to external control.

The Situation of the Press

For some time there has been considerable conflict between the government and the press, with the government bringing pressure on editors

by the closure or temporary suspension of papers whose criticisms they considered excessive. This was done by executive order not subject to appeal, and resulted in widespread international protest, e.g. by the Inter-American Press Association and the International Press Institute, as well as numerous protests from within Peru. This conflict culminated in the issue of two decrees by the Revolutionary Government on 26 July 1974, which have been much criticised abroad and which have had a mixed reception within the country. The first, Decree 20.680, set out the new Press Act, and the second, Decree 20.681, provided for the expropriation of the six newspapers considered to have a "national circulation". These are *El Comercio*, *La Prensa*, *Correo*, *Ojo*, *Ultima Hora*, and *Expreso*. A third Legislative Decree 20.682 established a Public Corporation for the National Information System, which was entrusted with editing the Government newspaper *La Nueva Crónica*.

The following is a brief summary of the main provisions of the first two decrees.

1. The Press Act

The Act begins by recognising, respecting and guaranteeing the right to freedom of the press, the right which every press organisation enjoys to publish, in entire freedom, news, ideas, editorials, and opinions without having to submit to prior consultation or censorship. The limitations on press freedom are contained in Sections 38-45. They fall into two parts, the first concerning the national press and the second concerning the foreign press and broadcasting. The responsibility for any breaches of the Act will fall upon the author of the offending article or script.

The principle that the press cannot be placed under state control is declared in Section 4, but this does not exclude the State having the power to establish its own press. The real innovation which opened the way to the simultaneous expropriation of the national dailies, was the classification of the press into three categories:

- (a) newspapers of national circulation, meaning those whose circulation exceeds 20,000 copies or which are received in at least half of the departmental capitals of Peru;
- (b) regional or local newspapers; and
- (c) periodical and *ad hoc* publications.

The regulations concerning ownership, control, management and direction of the organs of the press vary according to the categories.

As to category (a), the newspapers of national circulation which are not owned by the state are to be transferred to certain "significant sectors of the organised population". Representative bodies of these sectors will be incorporated and the newspapers which they publish will be organised and operated as "social service agencies". The government has appointed committees to manage the expropriated national newspapers until the new Boards of Directors have been set up by the appropriate social sectors (which must be done within one year). As social service agencies, the new Boards of Directors in addition to their normal press functions will also be responsible for "forming the national consciousness" and constituting "true channels of expression for the aspirations of the sectors which they represent", and educating the people for the construction of a "free and

solidaric society". Further, under section 24 they must reserve space in their pages for the "diverse ideological approaches which fall within the parameters of the Peruvian Revolution".

The editor of every newspaper and two representatives of the "labour community" (i.e. the workers employed in its production) will sit on the Board of Management, together with the representatives of the social sector concerned with the particular paper. The Board will be responsible for the editorial policy of the paper. The labour community will also participate in the management, ownership and profits of the paper.

As to categories (b) and (c), the organs of the press included in these categories will continue to belong, or may in future belong, to any individual or corporate person or association, subject only to the limitation that the entire capital assets of the undertaking must be owned by persons Peruvian by birth and resident in the country.

The other provisions of Legislative Decree 20.680 of 26 July 1974, which apply to all three categories, are similar to those which exist in the majority of press laws, such as editorial responsibility and the right of rectification and reply. One novel element is the duty to publish in their entirety all official communications issued to them by an organ of the state.

Certain activities are prohibited with appropriate sanctions, some considered as administrative offences and others as penal offences. Among the latter, two call for attention and may involve significant restrictions on press freedom. The publication of articles or editorials "prejudicial to the security of the state or national defence" constitutes a misdemeanour, as does any article or editorial "offensive to the dignity or honour of high state officials" (s. 40, paragraphs (g) and (h)). Even though the provision is subject to judicial control, thus attenuating the risks involved in administrative application, the very general language employed may operate as a serious restriction on the freedom of the press to criticise the authorities.

The government is empowered to prohibit the entry, circulation and sale of foreign publications which "attack the integrity, security and sovereignty of the country, the prestige of the organs of state and national institutions, the national economy, morality and common decency" (s. 47). Again, the generality and wide scope of the section makes, or may make, it into an instrument endangering the free flow of information, particularly since the decision is left exclusively to the political organs of the state without any judicial control.

2. Expropriation of National Newspapers

Under Decree 20.681 the publication, printing and distribution of newspapers of national circulation was declared to be "of national necessity and social importance". The following are the "significant sectors of the organised population" which have been designated to be responsible for the six papers concerned:

- rural organisations (agriculture, forestry, etc.) to take over *El Comercio*;
- labour communities (industry, fisheries, mining, etc.) to take over *La Prensa*;
- professional organisations (lawyers, engineers, doctors, economists, etc.) to take over *Correo*;
- cultural organisations (writers, artists, intellectuals, etc.) to take over *Ojo*;

- service organisations (cooperatives, credits unions, banks, trade, transport and construction organisation, etc.) to take over *Ultima Hora*;
- educational organisations (universities, colleges, schools, etc. including teaching and non-teaching personnel, students and parents) to take over *Expreso*.

The expropriation covers not only the shares in the capital stock but also all movables and immovables actually in the possession of the press companies, even if they belong to third parties, and includes such of the distribution network of the papers concerned as was considered necessary.

The expropriations follow the normal form and procedure laid down by Peruvian law (Act No. 9125, as amended and consolidated). Compensation for the expropriated property is to be paid in the following manner: (a) 10% in cash; (b) the remainder in 10 annual payments of equal value with an annual accrued interest of 6%.

Conclusion

The problem of the ownership and control of the press in a country which is undergoing a period of intense and revolutionary social change is one which is not confined to Peru. Those in authority understandably do not wish to see the ownership of the national press confined to private interests which are generally hostile to the government's policies. On the other hand, the ownership or control of the press by the government is incompatible with the concept of press freedom, which experience has proved to be one of the greatest guarantees of liberty. The solution reached by Peru is a novel one, which can only be judged in time when it is seen how the new Boards of Directors of the national newspapers will be appointed and what degree of independence and freedom to criticise they will enjoy.

Meanwhile, a promising start has been made under the temporary committees. Soon after the measures of 26 July, in order to prove the truth of his statement that the freedom of the press would be respected, President Velasco encouraged the press to be critical of the government. In consequence of this sharp criticisms were published, attacking the measures taken against the press and the management of the affairs of state. They even included a campaign against police torture and brutality directed against the Chief of Police of Lima, which culminated in his dismissal. At the end of August the periodical "Caretas" returned to the newsstands. It had been suspended for a considerable time by order of the Government and its editor-in-chief, E. Zileri Gibson, who had been threatened with deportation, was able to resume editorship of the periodical. Zileri commented that it was courageous of the government to allow the periodical to be published again without imposing any conditions, and he has continued to criticise the government in it. On the other hand, the Government closed down two magazines, "Oiga" and "Opinion libre" and expelled nine newsmen from the country on a charge that they violated the press law by claiming that Peru was in an economic crisis.

In concluding this brief account of the problems of the judiciary and press in Peru, it is perhaps right to recall briefly the nature of the social changes which are taking place. The attitude of the authorities towards basic rights and freedoms cannot be evaluated in the abstract, but rather should be considered in their political and social context.

The military Government claims to be situated midway between communism and capitalism. Its aim is to establish a humane society, both participatory and with a pluralist economy, and to achieve economic development, together with political and economic independence, and the promotion of social justice. All its actions are permeated by a vigorous national sentiment.

The following are the main features of the changes which are taking place:

- (a) **Industry.** A process of industrialisation and diversification is in progress. Those industries considered as fundamental have been transferred from foreign to national ownership. This applies particularly to petrol refineries, mining and electricity undertakings. In addition to state undertakings, the government also supports a new type of undertaking which is not state-owned. These are the "social ownership undertakings" which are a form of cooperative enterprise.
- (b) **Agriculture.** The old system of land ownership, tenure and use has been changed. These reforms extend over the whole country. In general, land use in the form of producer cooperatives is being encouraged.
- (c) **Communications.** A state corporation for telephone, telegraph and telex services has been established, but as yet it operates only in the province of Lima.
- (d) Numerous reforms in the field of education have been introduced.
- (e) **Labour and social fields.** The existing social security systems have been amalgamated and the services improved. The government hopes that workers will share in the management, administration and profits of undertakings through their labour communities. The building of low-cost housing is also being undertaken.
- (f) **Civil rights.** In 1970 a general amnesty was decreed in favour of political prisoners. This included people who had been sentenced for belonging to armed resistance groups. On the other hand, all these reforms have been carried out under an authoritarian system. Some of the former political parties have been decreed illegal and virtually all political activity has been suppressed. No political opposition is allowed. In contrast with the situation in other military dictatorships or military dominated regimes in Latin America, these radical social changes are being carried out peacefully, without bloodshed, with very few political arrests, and without the systematic torture and ill-treatment of prisoners and intimidation of the population which is unfortunately to be found in many of these countries.

South Africa

New Threat to Freedom of Speech

A defamation suit brought by the former Minister of Justice in South Africa against Professor Barend van Niekerk * and the South African

* For earlier proceedings against Barend van Niekerk see ICJ REVIEWS No. 7, p. 25 and No. 9, p. 75.

Sunday Times is of interest as showing a new tactic adopted by the government to attempt to stifle its critics.

The action arises out of a newspaper report of comments made by the Professor on a refusal of a reprieve for an African sentenced to death for murder. His white co-defendant had previously been reprieved. Among the comments of Professor van Niekerk, who is Honorary Director of the Society for the Abolition of the Death Penalty in South Africa, was the following:

“ The execution of Makinitha must fill all South Africans with shame. Two persons of different races commit the same crime and are sentenced to the same punishment by a court of law: yet they are treated differently by the executive on a plea of mercy. One would have expected the Government to save the life of Makinitha, to avoid the obvious inference of discrimination: that they did not do so speaks volumes for their lack of concern for justice and the reputation of our law. ”

Mr Pelsler has claimed 30,000 Rand general damages. In preliminary proceedings before Mr Justice A.C. Hill on June 11 and 12, 1974, the defence contended that the plaintiff's claim disclosed no cause of action, *inter alia* on the ground that the article could not reasonably be said to apply to the plaintiff; the decision not to reprieve was made by the State President acting on the advice of the Executive Council (i.e. the Cabinet); accordingly the comments referred only to the Government of South Africa and not to any individuals. The defendants argued that if any Minister could sue civilly over derogatory opinions about the Government's policies then no citizen would dare criticise the government without grave fear of the consequences.

Professor William L. Church, of the Law Schools of the Universities of Wisconsin and Zambia, who attended the hearing as an Observer on behalf of the International Commission of Jurists, has emphasized the significance of the case in these terms:

“ On close analysis, the conclusion is inescapable that the government is in fact seeking protection from criticism through this action, and more importantly, that regardless of motives, it will be the primary beneficiary if the action succeeds, even though the plaintiff may also benefit as an individual. Only governmental decisions were criticized in the article—no person was mentioned. The decisions involved were of basic policy and were made by the very centre of the highest political authority. A decision penalizing such criticism must necessarily give pause and induce a fear of reprisal for anyone contemplating future criticism of the government's social, legal, political or racial policies in sensitive areas. It is the very essence that such criticism, above all other forms of expression, should be free from any sort of official constraint. ”

Professor Church went on to point out that the harassing effect of the case was increased by the government's decision to stand behind Mr Pelsler in the matter of his possible liability for legal costs, whereas the defendants, if they lose, will have to pay not only any damages awarded but the costs of both sides. Thus these civil proceedings could result in a much heavier penalty being imposed on the defendants than any fine likely to result from proceedings for criminal libel, a course which was at first considered by the government.

On August 19 Mr Justice Hill gave judgment for the plaintiff on the preliminary issue. He held that the "ordinary intelligent reader... would have known that members of the Executive Council were responsible for the decision" and "that it was probably the Minister of Justice who introduced the matter and took an active if not the leading part in the deliberations and decision... The article was not a criticism of the government on a matter of political controversy or public policy, but an attack on the decision of the Executive Council in a particular case". The words used were "capable of the interpretation that the Executive Council acted shamefully and dishonourably in not relieving Makinitha." The decision of Mr Justice Hill on this preliminary point is under appeal.

As Professor Church commented in his report, "In the political context of contemporary South Africa, and in the specific circumstances of the case itself, it assumes the character of a challenge of very serious proportions to world-wide and traditional South African standards of individual rights and the freedom of speech".

Fresh Arrests of African Leaders

A fresh wave of arrests has been made by the South African security authorities against the leaders of the "black consciousness" movement in South Africa, including officers and supporters of the three principal organisations in this movement, SASO (South African Students Organisation), BPC (Black Peoples Convention) and BAWU (Black Allied Workers Union). This is but the latest in a long series of attacks made over the past few years against the leaders of this movement by means of banning orders, arrests, detentions and prison sentences.

The occasion for these arrests was the first of a series of rallies which were to have taken place, but which were banned, to voice support for FRELIMO and the liberation of Mozambique. In spite of the banning, a crowd of 4,000-5,000 assembled on September 25 outside the stadium at Curries Fountain, Durban, where the meeting was to have been held. The crowd was good humoured and there were no incidents until they began singing national songs and their anthem, *Nkosi Sikele i Afrika*, while others gave the black power salute and chanted slogans including "Viva FRELIMO". When a section of the crowd started to move away from the centre opposite the stadium gates, the police let loose their dogs, who savagely and indiscriminately attacked men and women, and many people were beaten by the police. Large numbers had to receive hospital treatment.

A number of people were arrested at the scene and that evening and next day the offices of the three organisations were raided, documents and office machinery removed, and many of their leaders arrested. A group of 19 were arrested in the Durban area, including the Secretary-General, the Permanent Organiser, the Editor of the journal, and the Director of the Cultural Commission of SASO, a research officer of BAWU, a former public relations officer of BPC and the youth organiser of the South African Institute of Race Relations. The subsequent official statements of the legal basis for their arrest shows how meaningless are the supposed protections under South African law against arbitrary arrest and detention. On September 25 they were said to be held under the Criminal Procedure Act, 1955, which provides that they must be brought before a court of law within 48 hours. The next day they were being held under Section 22 of the General Law Amendment Act of 1966, under which they can be held

incomunicado for 14 days. At the end of this period they were declared to be held under Section 6 (1) of the Terrorism Act of 1967 under which they can be held incomunicado indefinitely until the authorities have completed their investigations. No one, not even their lawyer, has been allowed to see them.

Another 8 leaders were arrested in Johannesburg, Cape Town, Kimberley, Port Elizabeth and Kokstad, and they are also being held under Section 6 (1) of the Terrorism Act. A further 19 of those arrested at Curries Fountain have been charged under the Riotous Assemblies Act and released on bail. Their cases were remanded to November 15, and it is understood would probably be remanded again.

All these matters received scant attention in the press and radio in South Africa. By contrast, the arrest of the Editor of the *Durban Daily News*, who had reported in contravention of the Riotous Assemblies Act that the banned meeting at Curries Fountain was to take place in spite of the banning, was received with a formidable barrage of protest. Editorial after editorial attacked the Minister responsible, the editor was promptly released, the matter was vigorously debated in Parliament, and the Minister had to apologize for authorizing the arrest on incorrect information. Meanwhile, the fact that Africans had been arrested and were being held indefinitely incomunicado, ignoring basic human rights and the principles of the Rule of Law, received no comment from either of the opposition parties in Parliament.

The government's action against these organisations contrasts strikingly with the conciliatory speeches made by Mr Vorster to woo African opinion, following the action taken to expel South Africa from the United Nations.

Commentaries

U.N. Sub-Commission on Minorities and Discrimination

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities met in New York for its 27th Session on August 5-23, 1974. A new trend towards implementation of human rights was noticeable. Progress reports on two important studies were considered and three new rapporteurs were designated to undertake additional studies on self-determination and on the effect of assistance to colonial and racist régimes. The Sub-Commission will also prepare a number of shorter studies, with a view to submitting concrete proposals or declarations to the Human Rights Commission in the next year or so.

Gross Violations of Human Rights

The Sub-Commission considered communications from the public "that appear to reveal a consistent pattern of gross violations" and for the second consecutive year selected several situations to report to the Commission on Human Rights for further action. According to a Reuters News Service report, the Commission and its newly created *ad hoc* working group will consider in January the situations in Brazil, Chile, Indonesia, Israel and Uganda in addition to the eight situations that were held over last February for further action (see ICJ REVIEW No. 12). It is not clear whether the Sub-Commission decided to forward a report on the situation in South Vietnam or to examine further the effect that the non-membership of South Vietnam in the United Nations should have on the consideration of this case. It is understood that the Sub-Commission also decided to take no action on the situation in Cuba.

It will now be for the Commission on Human Rights to determine which, if any, of the eleven situations now under consideration (the recently forwarded Brazil and Indonesia reports were supplementary to the situations already before the Commission) require a thorough study or an investigation by an *ad hoc* committee in accordance with the procedures outlined in ICJ REVIEW No. 9.

Many problems of interpretation and application of the new procedure have emerged during the past two years. Of primary concern to authors of communications is the interpretation to be given to "other relevant information" which ECOSOC Resolution 1503 (XLII) of May 27, 1970, authorizes the Sub-Commission to consider. Under paragraph 5 the Sub-Commission are to consider communications brought before it by their working group and "any replies of Governments relating thereto and other relevant information, with a view to determining whether to refer to the Commission on Human Rights *particular situations* which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission" (emphasis added).

Both the Sub-Commission and the Human Rights Commission are also authorized by an earlier ECOSOC Resolution 1235 (XLII) of June 6,

1967 " to examine *information relevant* to gross violations of human rights and fundamental freedoms ... *contained in the communications* listed by the Secretary-General pursuant to ECOSOC Resolution 728F (XXVIII) of July 30, 1959 " (emphasis added). This power is narrower than that conferred by Resolution 1503, para. 5, on the Sub-Commission since the latter is not confined to information contained in " communications ".

To enable the Commission and the Sub-Commission to carry out their task effectively, it is obviously desirable that they should have the most up-to-date information available. This is particularly so when it is remembered that some of the cases now under consideration are several years old. Supplementary information should be available to enable the members of these bodies (1) to determine the true seriousness of a situation, (2) to treat related communications as evidencing a single situation, and (3) to bring outdated communications up-to-date.

Among the possible sources of " other relevant information " for the Sub-Commission are information in the possession of its individual expert members, information supplied by other governments than that of the country concerned, information supplied by other United Nations organs and agencies, information supplied in other " communications " on the same or related subjects, additional information supplied by the authors of the communications under consideration, and published information in press reports, pamphlets and books.

Bearing in mind the short time available to members of the Sub-Commission and their working group, it is clearly necessary to keep the volume of " other relevant information " within manageable proportions. Presumably some sifting would need to be done by the staff of the Human Rights Division of the U.N. There is, however, one class of information which should be available, namely any supplementary information furnished by the authors of a referred communication, which was not received in time to be considered by the working group.

The more serious problem of supplementary information arises rather in the Human Rights Commission owing to the much greater delay which occurs before the communications reach them. The Resolution 1503 procedure makes no mention of other information at this stage, except by its reference to Resolution 1235 and, as has been seen, this refers only to such information contained in communications listed by the Secretary-General under Resolution 728F. It is important that Commission members should be alert to call for information from other listed communications, particularly those received since the last meeting of the Sub-Commission; otherwise there is a danger that they will not have before them all the available and relevant material.

This applies even when the authors of a referred communication supply supplementary information to be added to their original communication. Any supplements of this kind are treated as fresh communications. Unless the Secretariat call them to the attention of the members, or the members ask for them, they may be overlooked. There would be much to be said for letting members receive directly any supplemental information from the authors of a referred communication.

This seems all the more necessary now that the Human Rights Commission has set up its own Working Group to consider communications referred to it by the Sub-Committee. The Working Group meets a few days before the Commission meeting. Under present procedures it appears that they will not have the Secretary-General's

monthly lists of communications before them, as these are not distributed to the members until the Commission meets. This means that the Working Party will not be able to advise the Commission on the basis of recently available information.

Another means by which the Sub-Commission and Commission could receive up-to-date information would be by interventions made publicly before these bodies when they are considering the general agenda item "violations of human rights and fundamental freedoms... in all countries" under Commission Resolution 8 (XXIII). For such information to be available when communications are considered in private under Resolution 1503, the public discussion must take place first. Unfortunately, the opposite order was adopted by the Sub-Commission at its 1974 meeting.

One member of the Sub-Commission tried to keep part of the discussion on communications open to public debate. He pointed out that a Brazilian government observer had been allowed to comment openly on his government's reply to communications and claimed that other members and observers should be allowed the floor in open meetings as well. However, an immediate motion to close all of this item barred any open discussion of procedures or other relevant information.

The almost obsessive concern for secrecy on this subject extends even to discussion of these procedural questions. A non-governmental organisation's statement, prepared to clarify some of the problems referred to above, was distributed not as an open NGO statement but as a confidential communication to be considered only by the members in closed session. The author was not allowed to make a public statement before the closed meeting began. It is difficult to see why the publication of an NGO statement on a purely procedural matter should be treated as confidential, as the confidentiality rule in Resolution 1503 applies only to the consideration of the working group report on confidential communications.

Persons under Detention or Imprisonment

The Sub-Commission this year considered as a separate item the human rights of persons subjected to any form of detention or imprisonment. In this connection it considered the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Standard Minimum Rules for Treatment of Prisoners, and the Draft Principles on Freedom from Arbitrary Arrest and Detention. The leading study relating to the issue was a 1962 study prepared for the U.N. Commission on Human Rights entitled "Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile." Neither the study nor the draft principles published with it have yet been considered by the Human Rights Commission.

Members commented on the lack of coordination between the Commission on Human Rights and the Commission for Social Development on the matter of the treatment of prisoners. However, the Sub-Commission's approach under the new item would be quite different. Because the item had arisen in connection with the consideration of a large number of communications on torture and imprisonment, several members felt the Sub-Commission should concern itself primarily with the situation of political prisoners revealed in those communications, in particular the situation in Chile which has commanded so much

attention in the United Nations organs. Others expressed reservations to such an action oriented approach. Several believed that specific cases should be dealt with under the violations procedures and substantive items should only be studied academically.

In the end the Sub-Commission adopted two resolutions on this subject. The first calls for the Sub-Commission to review each year certain "reliably attested information" from governments, agencies, inter-governmental and non-governmental organisations, that will henceforth be considered separately from the confidential communications procedure. The Sub-Commission noted that such information may lead to a determination of a consistent pattern of gross violations. The resolution went on to stress that there can be no derogation from the right to be free from torture and other cruel, inhuman or degrading treatment or punishment even in terms of public emergency.

The second resolution requests the Human Rights Commission to study the reports of violations of human rights in Chile with special reference to torture and other cruel, inhuman or degrading treatment or punishment. International agencies, organisations and non-governmental organisations were invited to submit reliable information of specific violations of human rights in Chile for consideration by the Human Rights Commission in February, 1975. A representative of the ICJ presented to the Sub-Commission a summary of the recently published report on Chile which analyses the defects in the legal procedures that fail to protect prisoners from ill-treatment and torture.

Studies on Substantive Issues

The Sub-Commission analysed a progress report on a special study of the rights of persons belonging to ethnic, religious and linguistic minorities and a second on the problem of discrimination against indigenous populations. Discussion on the progress of the special study on the crime of genocide was deferred to the next session.

The Sub-Commission also appointed three new special rapporteurs to study the historical and current development of the right to self-determination; the implementation of United Nations Resolutions relating to the rights of peoples under colonial and alien domination to self-determination; and the adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to colonial and racist régimes of Southern Africa.

The Sub-Commission reviewed a short term study already in progress on the exploitation of labour through illicit and clandestine trafficking and recommended that the study be completed with the cooperation of the International Labour Organisation.

In addition, a study will be undertaken of the duties to the community and the limitations on human rights and freedoms under Article 29 of the Universal Declaration of Human Rights. During the discussion, members commented that this study was a change in approach for the Sub-Commission, which is devoted to the promotion of human rights. The powers of the state to impose limitations on human rights should themselves be restricted. Therefore the enabling resolution stressed that the purpose of the study was to review the relationship between rights and duties solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.

The Sub-Commission also held a useful discussion on the implications of drafting a declaration on the human rights of individuals who are not citizens of the country in which they live. They decided to consider its feasibility after a study had been prepared analysing the contemporary international, regional, multi-lateral and bi-lateral instruments relating to human rights of non-citizens.

On the subject of anti-slavery, the Sub-Commission decided that their working group (created in 1973 and due to report in 1975) should be able to consider information from non-governmental organisations *inter alia* of "reliable information on slavery and the slave trade in all their practices and manifestations, the traffic in persons and the exploitation of the prostitution of others as may be available to them".

Conclusion

In recent years, the Sub-Commission has restricted its efforts to special studies and to the confidential communications procedure. Many members have questioned the merits of continuing the long term special studies that often receive no further consideration in the parent organs. One can only be encouraged by efforts made this year to devise new methods of implementation of human rights.

Cyprus, Greece and Turkey

Recent events in Cyprus have shown once again that the grossest violations of human rights occur in situations of armed conflict.

The basic responsibility for the Cyprus crisis clearly lies upon the Greek Junta for having answered President Makarios' call for the withdrawal of the Greek officers serving with the Cypriot National Guard by staging a coup d'état on July 15, 1974, to overthrow President Makarios and install in his place their puppet, the EOKA bandit, Samson. The inevitable effect was the Turkish invasion of the island. This in turn led to the collapse of the Greek Junta and the replacement of Samson by Acting President Glafcos Clerides.

Under the 1960 Zurich Treaty of Guarantee the Turkish forces should not have taken military action to protect the Turkish population of Cyprus until they had held consultations with the British Government. Although they appear to have given notice to the British of their intention to act, there were no formal consultations. No doubt they felt that they could not afford to wait in face of the seizure of power by extremist elements committed to the cause of *enosis* (union) with Greece.

As soon as the Turkish invasion took place, deep passions were unleashed and there can be little doubt that grave atrocities occurred on both sides. The International Commission of Jurists has received numerous allegations from Greek and Turkish Cypriots of massacres, murder, rape, arson, looting and the driving of civilians from their homes. The civilian victims were mainly women, children and the aged.

However justified may have been the original Turkish invasion, it is hard to see any justification for the resumption of hostilities after the initial cease fire, when the Turkish forces had established a wedge from the port of Kyrenia to the capital, Nicosia. The sudden rupture of the Geneva talks and the resumed Turkish hostilities in defiance of Security Council resolutions indicate that the Turkish Government had decided to

seize this opportunity to occupy a third of the island and establish themselves on the so-called Attila line from the area of Lefka in the north-west to Famagusta in the east. From the time of Lord Radcliffe's enquiry in 1956, it has been a Turkish goal to partition the island along this line and to create a federal Cyprus with an autonomous Turkish state to the north. Such a division of the island would be grossly unfair to the Greek Cypriots. It would give the Turkish community, who constitute only 17% of the population, one third of the island comprising its most productive areas and richest natural resources. The Turkish population of Cyprus was not concentrated in this area but was scattered over the whole island, and a substantial Greek majority existed north of the line. Now, by force and terror, this Greek population of some 140,000 people have been driven south leaving their homes, their flocks and their belongings and creating an appalling refugee problem. The Turkish authorities are seeking to obtain the release to Turkey of the Turkish refugees in the British enclaves in the south of the island, presumably in order to resettle them in the north. It is difficult to avoid the conclusion that Turkey is seeking, through the forced exchange of populations causing untold misery and suffering to both sides, to present the Greek Cypriots with a *fait accompli*.

Meanwhile, the principal beneficiaries of the events in Cyprus have been the people of Greece who, for the time being at least, are rid of the military dictatorship which has suppressed all freedom for seven years. All the political prisoners have been released. Some of the most notorious torturers are being prosecuted, and legal proceedings have been started against Papadopoulos and other leaders in respect both of the illegal 1967 coup and the killing of students in 1973. Mr. Caramanlis' substantial majority in the November election will make for stability, but great skill will need to be shown by those in power and patience and moderation by the people if the return to democracy is to prove lasting.‡

In Turkey, too, there has been a substantial shift towards greater democracy. Since the ICJ staff study on "The Rule of Law in Turkey and the European Convention on Human Rights" was published in REVIEW No. 10, June 1973,* the elections in October 1973 saw Mr Bulent Ecevit's Republican Party emerge as the leading party, though not with an absolute majority. This imposed limitations on his ability to carry through the party's programme of democratization, but many of the political prisoners have now been amnestied.

It is difficult to judge to what extent the government's policies are still controlled by the military authorities. It is certain that Turkey's Cyprus policy will have had full military support and pressure behind it. Martial law which had been suspended was reimposed after the Cyprus events began. However, the new Courts of State Security (cf. ICJ REVIEW No. 10, p. 46), in which two of the five judges are military, are now trying political offences. Their decisions do not appear to be very different from those of the Martial Law Courts. For example, the Court of State Security at Istanbul sentenced the director and editor of the paper *Kivilcim* each to 36 years imprisonment. They were charged under Article 142 of the Turkish Penal Code, the article which deals with communist and separatist propaganda. The Court of State Security at Ankara condemned the leaders of an authorized youth movement, the Organisation of Patriotic Youth, to 8 years imprisonment under article 141, for having distributed a

* This Staff Study has been translated into Turkish and was published in Istanbul by Hasat Yayinlari in 1974 under the title *Türkiye Raporu 1971-1973*.

leaflet which opposed the continued presence of foreign troops in Cyprus and holding a meeting in protest of the death of a left-wing Turkish engineer in Germany. Professor Sadun Aren, an economist and former labour member of parliament, is being prosecuted under Article 140 of the Penal Code for having participated in an international meeting of left-wing political parties in Rome in 1968, i.e. three years before the military intervention in Turkey. It is regrettable to see that this kind of trial is continuing and it is difficult to reconcile it with the decision to amnesty political prisoners.

Atmospheric Nuclear Testing

Australia v. France; New Zealand v. France

There are cases which are won in fact if not in law, before or without the final judgment of a court. The litigation brought against France by Australia and by New Zealand before the International Court of Justice may fall into this category. The announcement by the French Government of the suspension of further nuclear tests in the atmosphere in the Pacific, after the series that ended this past summer, may give Australia and New Zealand the relief they have been seeking before the International Court of Justice, although not before two series of tests held subsequent to a preliminary order of the Court issued in June 1973, which asked France to abstain from further tests pending the outcome.

However, both Australia and New Zealand do not consider their cases to be moot by reason of the French statement and are continuing with the proceedings. At present writing, the decision of the International Court of Justice on the matter of its own jurisdiction in these cases is awaited following the hearings held in July of this year.

These cases are among the most important to come before the World Court, and are of considerable interest if for no other reason than the thoroughness of the presentation by the complainants' legal teams on the harmful effects on humans of radiation, and in particular the radiation effect of atomic testing in the atmosphere.

The legal issues raised by both the Australian and New Zealand applications are of far reaching import as they cover matters which would effect other areas of arms development in addition to that of atomic testing itself. If the third point below is upheld, it would tend to put a brake on the arms race by juridical methods.

The Australian and New Zealand applications claim that the French testing in the Pacific violates their rights under international law in several respects, namely:

- (1) they and their peoples, in common with other states and their peoples, have a right to be free from atmospheric nuclear tests by any country;
- (2) the deposit of radio-active fall-out on their territory and its dispersion in their air-space without their consent violates their sovereignty over their own territory and impairs their right to determine what acts shall take place within their territory and in particular whether their peoples shall be exposed to radiation from artificial sources;
- (3) interference with the free use of international waters and airspace, and the pollution of the high seas by radio-active fall-out.

The first two claims deal exclusively with atomic testing. The first raises the issue whether there is now a standard of international law, generally accepted, which prohibits such testing. This concept, in the general terms presented, would appear difficult to establish. Many states have accepted not to test in the atmosphere by adhering to the Atomic Test Ban Convention but other states have specifically refused to adhere and some have actively sought to develop their atomic arsenals.

The second point comes more into the realm of traditional international law, as it claims a direct injury to each claimant in violation of its sovereignty by the wilful act of another state. It is also an injury which cannot be adequately compensated by monetary damages as its effects may be felt for generations.

The third claim has an extension beyond atomic testing, as areas of the international sea have been declared off-bounds by several countries for the testing of missiles or other weapons. If it is a violation of international law for a state to appropriate to itself a part of international waters and air-space for atomic testing, by analogy this would also apply to other unilateral restrictions on international areas for other purposes including missile firings.

It is generally known that France did not participate in the proceedings or give effect to the provisional remedies ordered, confining themselves to a letter to the Court together with an index purporting to show that the Court had no jurisdiction over the case.

The issue of jurisdiction raises interesting legal points. The Australian and New Zealand actions were brought before the International Court of Justice in part as a conflict under the terms of the General Act for the Pacific Settlement of International Disputes, signed in Geneva in 1928. Australia, New Zealand and France adhered to this treaty on May 21, 1931. The reservations made to the jurisdiction of the Court by either of the parties does not appear to cover the subject of this litigation. The French position presented in its letter was to the effect that this treaty was no longer operative. This appears to be based on the claim that this treaty was inextricably bound up with the existence of the League of Nations and the Permanent Court of International Justice. The French signature of the Optional Clause, under the U.N. Charter giving jurisdiction to the Court, to which adherence France did make a reservation on matters relating to national defence, was cited by France as limiting the jurisdiction of the Court.

Although Australia raised some question as to whether nuclear weapons testing would validly come under the concept of national defence the main thrust of its argument and that of New Zealand was that the General Act of 1928 was still in effect. In their efforts in this sense, Australia and New Zealand were both able to cite from the arguments of France in the *Norwegian Loans* case in 1956, to the effect that France at that time considered the General Act still valid.

From the point of view of the development of international law, it would have been a welcome sign if France would have at least participated fully in the debate on the question of the jurisdiction of the Court. As the Court has no means to enforce its judgments other than the moral force of the world community, it is a serious blow to the fragile structures for the settlement of international disputes now existing, when a major power like France simply ignores the proceedings of the World Court.

POLITICAL REPRESSION IN SOUTH KOREA — 1974

by

WILLIAM J. BUTLER*

Political activity within South Korea at the present time continues to be met with severe repression by Korean authorities. Acting pursuant to authority granted him by the newly enacted Yushin Constitution of 1972, President Park promulgated certain emergency decrees in 1974 which made political dissent punishable by death, life imprisonment or prison terms of not less than fifteen years.

The military tribunals created by these decrees have tried leading intellectuals, poets, lawyers, students and political dissidents and have sentenced them to death, life imprisonment and/or long prison terms. Among those so tried and incarcerated is the former President of Korea, Yun Po Sun; the Dean of the Theological Seminary at Yonsei University, the Reverend Kim Chan Kook; a professor of American studies at Yonsei University, Kim Dong Gil; Kim Chi Ha, the national poet of Korea; the prominent South Korean lawyer, Kang Shin Ok; the Roman Catholic Bishop of Wonju, Bishop Daniel Chi, as well as many other prominent civic and religious leaders, intellectuals and students whose only crime was to advocate a change in the present government of General Park Chong Hee. Also under house arrest for electoral law violations is Kim Dae Jong who, in the presidential election of 1971, received approximately 47% of the popular vote.

The Struggle for Democracy 1910-1972

Korea was not born free. It struggles to be free in the twentieth century.

Upon the Japanese surrender to the United States in 1945, and after an agreement between Franklin D. Roosevelt and Joseph Stalin at Yalta, Korea was arbitrarily divided at the 38th parallel, with Russian forces

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occupying the northern part of Korea and United States forces, the southern. A joint U.S.-U.S.S.R. commission was established at that time to agree on terms which would unify a divided Korea. These discussions broke down as the cold war tensions between the East and the West increased.

In 1949, under the leadership of Syngman Rhee, and in close consultation with his American "advisers", a government was formally inaugurated and remained in power until 1960.

It must be remembered that, in 1948, freedom to the ordinary Korean meant freedom from the age-old domination by China, freedom from Japanese domination, which lasted from 1910 to the second World War, and finally, freedom from communism. It did not mean a total commitment to the democratic process as we know it in the West. It was indeed new to Koreans who had for centuries been accustomed to more authoritarian forms of government. In Korea it was a western transplant, the seeds of which were sown by Americans. But it was an arid soil in which to expect democracy to flourish.

To compound the problem, in June, 1950, North Korea invaded South Korea, resulting in the Korean War in which approximately 35,000 soldiers were killed and many more wounded, on the southern side, the majority being Americans serving under the United Nations flag. Although the North Koreans were driven back, the subsequent intervention by Chinese "volunteers" further accentuated the difference between the communist north and the so-called democratic south.

At the end of the Korean War, the government of Korea remained for many years under the authoritarian rule of Syngman Rhee, who was re-elected President in 1952, 1956 and 1960. When the results of the election were announced in 1960, however, waves of protest occurred in Seoul during which nearly 500 people, most of them students, lost their lives and Rhee and his cabinet were forced to resign.

The Rhee government was replaced by a moderate government with John M. Chang, as Prime Minister. Yun Po Sun, now under suspended sentence in Seoul for aiding students in their right to dissent, was elected President on June 15, 1960 by a joint session of both Houses. His government, however, lasted only approximately nine months. In May of 1961, a coup d'état was carried out by a relatively small number of army officers led by the then Major General Park Chong Hee.

Park immediately declared martial law, banned political parties, dissolved the National Assembly and instituted press censorship. Within six days, the government had arrested 2,014 politicians, banned all demonstrations, closed 49 of the 64 daily newspapers, and created the notorious Korean Central Intelligence Agency, which was reported in August, 1961 to have extorted approximately \$37 million from 27 leading businessmen to support the junta. During that same year, court-martial tribunals were created which tried 22,195 cases of sedition in 1961 and 35,044 cases in 1962.

Nonetheless, the military government pledged a return to the democratic process and in 1963 in a democratic election, General Park Chong Hee was elected President by a narrow margin over Yun Po Sun, and has remained in power ever since. Although in 1963 and in 1967 there were anti-government demonstrations of some magnitude, Park was re-elected President in 1967 and in 1971. In the final election of 1971, Park

won by 900,000 votes over Kom Dae Jung, who received approximately 47% of the popular vote.

Park had solemnly promised in the 1971 election not to seek a further term, but he astonished the nation eighteen months later by dissolving the National Assembly declaring martial law and promulgating a new constitution called the "Yushin Constitution", which was approved by a national referendum in 1972

The Yushin Constitution

The primary justification given by the government for the new constitution was its desire to strengthen the nation to facilitate negotiations with North Korea towards the unification of the country. But the result has been the creation of one of the most authoritarian instruments presently known in the annals of national constitutions, including the constitutions of communist nations.

Serious allegations have been made questioning the validity of the referendum, charging that the government's control over the election process guaranteed it a high percentage of approval from those voting, with the result that over 91% of the people voting approved of this Constitution. Many thousands, however, failed to participate in the vote.

The 1972 Yushin Constitution was the subject of a study in depth by well-known Korean and American scholars at Columbia University last year. It was the informal consensus of this group that the Yushin Constitution was fundamentally anti-democratic, authoritarian in nature and designed to perpetuate the autocratic power of the President. An analysis of this document is revealing:

1. The President is elected by 2,000 delegates to a National Conference who are appointed, in effect, by the President, but who cannot be members of any political party. The election is conducted "through secret ballot without conducting debate". The President is also Chairman of the Conference and its affairs are under his direct control.

2. The Prime Minister and members of the State Council are appointed by the President and can be removed by him at will. The heads of all ministries are under the direct control of the President.

3. One-third of the National Assembly is elected by this National Conference on the recommendations of the President. The Assembly may only meet once a year for a period not to exceed ninety days and then only to deliberate and decide such matters as the budget, the monuments to public officials and other non-political subjects.

4. The judicial system: 16 judges in the Supreme Court, the highest court in Korea, are appointed by the President. Article 105 of the Constitution provides that when the constitutionality of a law is involved, the court must submit this question to a "Constitutional Committee" and be guided in accordance with its decisions. The Constitutional Committee is appointed by the President.

5. Election Committee: This Committee is composed of nine members, again appointed by the President. It deals with all important questions of management of elections and national referendum.

In addition, the President is endowed with supreme powers. He can dissolve the National Assembly; he appoints one-third of the legislature,

as stated above; and most importantly, he may at any time suspend the freedom and liberty of the people as follows:

“In case the national security or the public safety and order is seriously threatened... the President... shall have the power to take emergency measures which temporarily suspend the freedom and rights of the people as defined in the present Constitution, and enforce emergency measures with regard to the rights and powers of the executive and judiciary.”

*Nationwide Protest for Constitutional
Change and the Emergency Decrees*

By October, 1973, a nationwide protest was under way and students of the Seoul National University staged a series of demonstrations calling for an end to “fascist rule”. A substantial protest movement developed among intellectuals, students, opposition politicians, and many businessmen. Tens of thousands of students struck and boycotted classes in an effort to change the oppressive political measures of the Park regime which stifled all political activity except that supporting the government. What they were asking for was simply a return to more democratic freedoms.

In an attempt to pacify this groundswell of opinion, on December 3, 1973, Park replaced ten of his twenty ministers and ousted Lee Hu Rak as Chief of the powerful KCIA. This, however, did not silence his opposition, and on December 13, a group of 15 prominent statesmen—among them Yun Po Sun, former President of the country; Yu Chin Oh, former President of Seoul University; Stephen Cardinal Kim, the leader of the million South Korean Roman Catholics; and Reverend Kim Kwan Sook, General Secretary of the National Council of Churches—joined in calling for revision of the unpopular Yushin Constitution. Again, on December 24, a group of 30 civic and religious leaders began a campaign to collect a million signatures on a petition calling on President Park to accept a new and democratic constitution.

The government immediately responded through the Prime Minister, stating categorically that “the Government cannot condone any acts which go beyond the limit of freedom under the slogan of ‘change the Constitution’ or, ‘restore democracy’”. On January 8, 1974, Park Chong Hee decreed in two presidential “Emergency Decrees” that anyone criticizing the Constitution or advocating its revision would be arrested, court-martialed, and imprisoned for up to 15 years.

The day before he issued this decree, sixty-one prominent literary men, among them poets, novelists, and playwrights, had issued a statement demanding that “the basic rights of the people, including the freedom of conscience and the freedom of expression... be guaranteed constitutionally”. When twenty of the signers gathered in a tearoom in Seoul, the Korean CIA immediately picked up nine of the participants, among whom were the national poet Kim Chi Ha and the novelist Lee Ho Chul. In a wave of arrests and illegal detentions, the Korean police arrested or detained politicians, students, Christian leaders, Protestant ministers and other individuals who had participated.

On January 21, 1974, ten Protestant clergymen were arrested for violating the presidential decree. They have been convicted. Four were sentenced to 15 years imprisonment, two received 10-year sentences with

hard labour. Later, on March 6, the court-martial Court of Appeals turned down the appeal of these six Christian churchmen.

Student demonstrations continued, and on January 24, about one-hundred forty students were picked up, questioned, and with the exception of seven of them, released. On February 2, two of these were jailed for 10 years, three others for 7 years and the remaining two for 5 years. On March 2, the Appellate Court reduced the prison sentences imposed on them. The convictions, however, continued. On March 2, three students of Seoul National University were convicted. In mid-March, the military court sentenced five members of the opposition Democratic Unification Party and three members of the opposition New Democratic party. On March 28, eight young Christian clergymen and students (three of them women) were sentenced. According to official announcements, thirty-four students, churchmen, politicians, and intellectuals were sentenced by these military tribunals from January 28 until March 31.

Despite this, the students during the month of March and early April, 1974, planned further activities opposing the repressive acts of the government of Park Chong Hee, and on March 27, the Catholic University students held meetings demanding the dissolution of the January Emergency Decrees. Five students were arrested. On April 1, universities in four big cities, including Seoul, attempted to hold large demonstrations. These were thwarted by government agents who got hold of secret plans. Forty students were arrested on this occasion.

On April 3, again faced with massive student demonstrations, the government issued the decree known as Emergency Measure No. 4. This decree, perhaps one of the most extreme suppressive laws against students and universities anywhere, made it a crime punishable by death for students to refuse to attend classes or to join in demonstrations, discussions, rallies or any other type of student political activity and specifically provides that these penalties shall also be applied to any individual or individuals who aid or act in concert with these students.

During this time, arrests were a day-to-day occurrence. Not only were students, leading clergymen, intelligentsia, novelists, poets, and ordinary citizens included in the wave of suppression, but one of Korea's prominent attorneys, Kang Shin Ok, who dared to represent some of the students, was arrested, incarcerated and held by the police authorities in Seoul in an attempt to deprive these defendants of legal counsel. He was later prosecuted and sentenced to 10 years imprisonment under the emergency decrees.

Trials of Fifty-five Indicted Pursuant to Emergency Decree No. 4

As of July 2, 1974, there were fifty-five individuals indicted out of approximately two-hundred fifty who had been arrested for violations of Emergency Decree No. 4. Many of those originally arrested were released, but knowledgeable sources estimate that at least two-hundred are still being detained as of November 1, 1974. The fifty-five individuals arrested and indicted were divided into 3 groups to be tried in 3 separate military courts created by Emergency Decree No. 2. Court No. 1 had before it thirty-two students; Court No. 2, twenty-one adults, mostly members of the so-called Peoples Revolutionary Party; and Court No. 3, two Japanese students. The following is a report of the proceedings in each court:

Court No. 1. As of July 2, 1974, there had been 7 court sessions with more sessions scheduled for July 5th and 6th. The defendants had been examined, but denied the right to have witnesses on the ground that they had confessed. However, they all indicated in court through their lawyers that the confessions had been extracted from them by torture and that they wished to proceed to trial with their witnesses. This request was denied and the students were tried and sentenced.

Court No. 2. Prior to July 2, 1974, this court had 5 sessions, the last of which was held on June 26, 1974. This group requested that it have fifteen witnesses to testify on their behalf. All such witnesses were rejected by the court. On the other hand, the judges had allowed four witnesses for the prosecution.

Court No. 3. For political reasons, this court was charged with the trying of two Japanese students known as Tachikawa and Haiakawa. This court had three sessions. The government asked for one witness, which was accepted. The defense asked for two witnesses; both were rejected. Incidentally, these two witnesses were defendants in group No. 1, and the reason for the rejection was the same, that it was unnecessary to have defense witnesses because the legal evidence to convict was present in the form of a confession.

It should be pointed out that under ordinary Korean law, a trial must be completed within 4 months after indictment; that the original detention is to be limited to 10 days for police and 20 days for prosecutor. However, under emergency court-martial procedures, no limits are put on the detention of defendants, and some were held more than three months without being indicted or advised of charges.

As to the conduct of the trials, they were closed to the general public, although each defendant was entitled to a lawyer and one relative. No other public representative was allowed at the trial. Members of the foreign press corps and foreign legal observers were barred from witnessing the proceedings. (A member of the local press, controlled and censored by government agents who were physically present in each newspaper office, was allowed to attend the trials provided he was approved by the Minister of Defense.)

Conversations with four lawyers for the defense and many of the relatives of the student-defendants revealed with certainty that (a) the student-defendants were tortured into giving a confession, (b) all requests for witnesses to defend the cases were denied, although each defendant has repudiated his confession, and (c) at all times the defendants were held incommunicado except for sporadic visits of their lawyers.

Torture of Political Prisoners

In almost every quarter of Korean society, from the religious leaders to lawyers, leaders of the opposition, and intellectuals of the academic community, the torture of political prisoners was considered to be a foregone conclusion—something that happens frequently, if not on arrest, then surely on detention of a political prisoner.

Corroborative evidence, such as photographs of prisoners physically maimed, is rare. In most cases the evidence is in the form of statements from the family of a prisoner, the statement of his lawyer, or the statement of the prisoner himself.

All of the six lawyers defending the thirty-two students recently on trial before military courts told the author that it was relayed to them from their clients that each of them had been tortured in one way or another by the Korean CIA in order to extract from them a "confession". These lawyers related specific methods of torture referred to in this report, such as forcing cold water through the nostrils of individuals, causing of extreme fatigue, the use of "screams and yells" in adjoining rooms as a warning, and the physical beating of the prisoners themselves.

The national poet Kim Chi Ha gave evidence of being tortured. Chang Chun Ha, a well-known Korean intellectual, publisher, and former member of the Korean Assembly, testified that he was subjected to being hanged upside down and simultaneously burned with a flame on several parts of his body.

Soh Sung, a Japanese-born Seoul National University student, was a handsome young man when he entered prison. He appeared in court with a badly burned body and face. His ears and eyelids had disappeared and his fingers adhered together. It was necessary for him to sign a record by using the imprint of his toe. The Korean government explained his obvious change of appearance by saying that he fell into burning oil on a stove.

Reports were made to the author that other methods used involved the use of electric shock applied to the private parts of individuals and "persuasive" techniques in order to extract from the defendants a confession. The author realizes that the evidence produced in this report on torture is not extensive but he believes, on the basis of conversations with credible and responsible people who have direct knowledge of the use of such techniques, that the conclusion reached here is supported by reliable evidence.

Recent Developments

Between July 1st and August 15th, arrests and detentions continued. The military tribunals continued to try and convict all defendants. To date, of the one-hundred fourteen students and eighty-nine other citizens tried, eight have received death sentences and the remainder prison terms ranging from 15 years to life imprisonment. Former President Yun Po Sun was sentenced to 3 years suspended sentence on August 12, 1974, and the prominent religious leaders Reverend Kyu, Dean Kuk and Bishop Daniel Chi were all sentenced to 15 years imprisonment and 15 years suspension of their civil rights.

The situation caused widespread concern in American circles, as evidenced by the congressional hearings held on July 30, 1974, before Donald M. Fraser of the House Foreign Affairs Committee, at which the author and Professor Edwin Reischauer of Harvard University testified in favor of reconsidering the United States' policy of military and financial aid to Korea.

On August 15, a tragic development took place. In an attempt to assassinate General Park, a bullet fired by a Korean national who had been living in Japan, was deflected by a protective shield in front of President Park and mortally wounded the much admired First Lady of Korea.

Approximately one week later, on August 23, the President terminated Emergency Decrees Nos. 1 and 4. Decree No. 2 continued in force, and under its terms, military tribunals continued to try and convict those arrested under Decrees Nos. 1 and 4.

The number of arrests have recently sharply declined and simultaneously political dissent has been increasing. Though some demonstrations have been allowed to take place, the government has done its best to discourage them by using the riot police. The government still makes it clear that all political activity criticizing the State will be considered a threat to the security of Korea. The United Nations, under whose flag foreign military forces stationed in Korea serve, is scheduled to debate the question of whether or not the military forces of the United States should be allowed to continue their presence in Korea under the United Nations flag. And the United States, which has 40,000 troops stationed in Korea and which provides more than \$300 million per year in military and economic aid, will continue to debate further reductions of these assistance programs so long as political repression is taking place.

President Ford has announced his intention to visit Korea on November 22, 1974. When he leaves Korea, the Yushin Constitution will remain. It gives President Park the power to suppress all aspects of human freedom, makes a mockery out of the democratic process and continues to be the legal basis for the suppression of all political thought. Until the repressive provisions of this Constitution are changed, until all those in prison solely for political expression are released and until the proper legal rights and remedies are given to the people, Korea will still struggle to be free in the twentieth century.

THE LEGAL SYSTEM IN CHILE

In April 1974 the International Commission of Jurists sent a mission to Chile to enquire into the situation concerning human rights and the Rule of Law. The mission was undertaken at the request of the World Council of Churches and in response to the public invitation issued by the Chilean Foreign Minister to "respected organisations" to come to Chile to find out for themselves the true situation.

The members of the mission were Mr. Niall MacDermot, Secretary-General of the ICJ, Dr. Kurt Madlener, a specialist in Latin American and Spanish penal law at the Max-Planck-Institute of Comparative and International Penal Law in Freiburg-im-Breisgau, and Professor Covey Oliver, Professor of International Law at the University of Pennsylvania, former U.S. Ambassador to Colombia and former Assistant Secretary of State for Inter-American Affairs.

Extracts from the report prepared by the mission are reproduced below.

In their Comments and Conclusions at the end of the Report, the mission recommended that:

1. The process of release of persons held under administrative detention should be speeded up and the State of Siege should be lifted.
2. As long as such detention continues, in order to reduce the risk of torture and ill-treatment
 - (a) the regulations concerning written warrants for arrests and the limited period of incomunicado (normally 3 days, 8 days in special cases) should be strictly enforced;
 - (b) families and defence lawyers should be informed of the place of detention and authority for the arrest;
 - (c) defence lawyers should be entitled to see their clients at any time after the period of incomunicado;
 - (d) administrative detainees should be held in reasonable conditions in places where their families can visit them regularly;
 - (e) names of administrative detainees with dates of arrest and release should be published in the Official Gazette;
 - (f) an effective judicial remedy should be available to enforce these provisions.
3. The "State of War" and system of "military justice in time of war" should be ended without delay, and all civilians should be tried either by the ordinary civilian courts or by military courts operating under the peacetime procedure with full rights of appeal.
4. Facilities for defence lawyers should be improved and they should be enabled and encouraged to defend their clients vigorously and fearlessly.

5. Studies should put in hand to bring up to date the Code of Military Justice.
6. Penal provisions which violate internationally accepted norms (such as punishment by death for persons re-entering the country clandestinely) should be repealed without delay.

On September 11, 1974, the first anniversary of the coup, General Pinochet announced that the proclamation of a "state of war" would not be renewed, but that the state of siege and the system of military justice would continue. This announcement gave rise to the hope that the system of "military justice in time of war" would be replaced by the system of "military justice in time of peace" which provides greater defence rights and an effective appeal system. Unfortunately, this proved not to be the case. On the day before this speech, the Junta issued a new Decree Law (No. 640) prescribing four different regimes of "state of siege". Under one of them, namely a state of siege for "internal defence", the system of military justice in time of war applies. A state of siege for internal defence was duly proclaimed on September 11, and accordingly the abolition of the state of war leaves unaffected the whole system of military justice which the ICJ mission has denounced as contravening basic principles of justice accepted among civilized nations. It remains to be seen whether the Supreme Court will consider that the termination of the state of war will now enable them to review decisions of the military courts (Councils of War) under Article 86 of the Constitution.

In the same speech General Pinochet announced that political prisoners held without trial under administrative detention would be released on condition that they went into exile abroad. At the same time he issued a challenge to the Soviet Union and Cuba to release their political prisoners upon the same terms. It is not clear whether the release of Chilean prisoners is conditional upon the release of Soviet and Cuban prisoners, but in any event it is understood that no diplomatic approach has been made, directly or indirectly, to these countries to effect such an exchange.

General Pinochet's speech raised considerable hopes among the families and friends of political detainees, but they were soon disillusioned. Within a few days the Minister of the Interior, General Benavides, explained that there would be no mass liberation of prisoners, that a case by case examination was continuing, and that only those would be released who the investigation showed did not constitute a danger to public safety.

There have been some releases pursuant to this policy, perhaps amounting to a few hundred, since the time of the ICJ mission's report, but their places have been more than filled by fresh arrests. For example, during the four months May to August 1974, over 700 individual arrests of political suspects are known to have occurred, and after screening half of them were kept in detention. Of the other half, 50% alleged on release that they had been tortured.

These individual arrests are quite separate from the mass round-ups which have been occurring in the *poblaciones*, the poor working class districts of the towns, allegedly to arrest "common criminals". The usual procedure was for a *poblacion* to be surrounded, house to house searches to be carried out and hundreds of people arrested. Some 10,000 to 15,000 people were arrested in this way between May and September. Most of

them were released after a week to 10 days, but 500-1,000 were sent as detainees to a camp in the north. The extraordinary claim made by officials of the Ministry of the Interior that 50% of these "common criminals" proved to be members of the Communist Party indicates the political nature of these operations. The effect of these mass arrests has of course served to heighten the fear and tension among the poorest sections of the population.

There are no signs of any relaxation of the repression in Chile. In many ways it is becoming more thorough and systematic. The description of the legal system given in the report of the ICJ mission is regrettably still valid.

EXTRACTS FROM REPORT OF ICJ MISSION

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State of Siege, State of War and State of Emergency

On the day of the coup, a Decree Law was announced on radio and television declaring a State of Siege over the whole country. This Decree was published in the Official Gazette on September 18, as Decree Law No. 3, dated September 11, 1973. On September 22, another Decree was

published, Decree Law No. 5, dated September 12, 1973, declaring that the State of Siege was to be understood as a "State or Time of War" for the purpose of applying the time of war penalties established by the Code of Military Justice, and for the functioning of "military tribunals in time of war" with war-time legal procedures.

No authority is found in the Constitution for these declarations by the Junta. The power to declare a State of Siege for internal disorder is vested by Article 72, No. 17 of the Constitution in the Congress or, for a limited period until the Congress meets, in the President. (The Congress refused to grant President Allende a State of Siege after the abortive military coup on June 29, 1973, contending that the President already had sufficient powers to deal with the situation). A declaration of a State of War may be made, under Article 44, No. 11, by the Congress passing a law to that effect on the proposal of the President. The power to declare a State of Emergency rests with the President. There is no authority under the Constitution or under the law entitling the military authorities by Decree Law to proclaim an Emergency or a State of Siege or to declare that it is to take effect as a State of War. In any event, as Congress was in session on September 11, only the Congress could lawfully proclaim a State of Siege or State of War.

According to Article 72, No. 17 of the Constitution, a declaration of a State of Siege may affect "one or several parts of the country". It must be for a fixed period, up to a maximum of 6 months (Article 44, No. 12). It may then be renewed by Congress. The present State of Siege was declared for an indefinite period to extend over the whole country. A further Decree Law in March, 1974, purported to extend it to September 11, 1974.

According to the same Article 72 of the Constitution, the sole powers granted under a State of Siege are granted to the President. These are the powers:

- (1) to transfer persons from one department (an administrative territorial division) to another, and
- (2) to arrest and hold people under house arrest in their own homes or in other places, provided that they are not prisons or places of detention of common criminals.

The measures adopted by virtue of a State of Siege may not last longer than the State of Siege itself.

The effect of a declaration of a State of Emergency is that the zone which is covered by the declaration comes under the complete control of the Military Commander appointed for the zone, who can then govern it by means of ordinances (*bandos*). Decree Law No. 4 appointed Military Commanders to provinces and departments covering the whole country.

A declaration of a State of Siege is intended to apply to situations in which the country is threatened with attack from abroad, or is confronted with an armed uprising by organised rebel forces. There was, of course, no armed uprising before the military coup on September 11, 1973. There was some fighting after the coup by forces resisting the military take-over, but all organised resistance was brought under control within about 10 days.

Suspension of Civil Rights and Fundamental Freedoms

All the basic rights and freedoms guaranteed under the Constitution have been suspended or severely eroded by Decree Laws and Ordinance (*Bandos*) promulgated by the military authorities.

All political parties are suspended and those of left-wing tendency are declared illegal. No political activity of any kind is allowed. No-one may demonstrate, even in favour of the government. No assembly may take place without prior permission being obtained. Even social gatherings or parties in private houses are prohibited during the hours of curfew.

Freedom of association has been severely restricted, many associations have been declared illegal or dissolved, including political, trade union, agricultural and *poblacion* (shanty town) organisations.

There is little or no freedom of expression. Newspapers and radio stations sympathetic to the former government have been closed. The press and radio are strictly controlled.

Academic freedom has been abolished. The Universities have been brought under control of the military authorities. Some departments, including the department of Sociology, have been closed on the grounds that the teaching was "subversive", and degrees conferred by them have been retrospectively annulled. Many institutes, schools and other centres of learning have been closed. A large number of the teaching and administrative staffs have been dismissed. Students have been required to re-register and have been controlled on political grounds.

Inviolability of the home is not respected. People's houses are liable to be searched by military or police authorities at any hour without a search warrant.

Freedom of movement is severely restricted, internally as well as externally. A curfew is in force.

With respect to the right to work, guarantees against unjust dismissal (under pre-Allende legislation) are no longer available in the public sector. All public employees were placed on temporary employment after the coup and are liable to dismissal at the discretion of the authorities without any right of appeal. For the private sector, the previous Labour Courts have been replaced by special tribunals with one legally qualified judge, one representative of the armed forces and a labour inspector nominated by the Labour Board. Lawful grounds of dismissal have been increased. Among the thousands who are now unemployed in Chile are many who lost their jobs as a result of these measures, causing very severe hardship among the poorer sections of the community.

Perhaps the most severe restrictions on civil rights have been in relation to freedom from arbitrary arrest and detention, and in the trial procedure.

The System of Military Justice in Time of War

The two main effects of the proclamation of a State of Siege are the substitution of the "time of war" procedures of military justice for the "time of peace" procedures, and the power given to the President to detain political suspects by administrative order without any form of judicial process.

"Military justice in time of war" is provided for in the Code of Military Justice and is meant to be applied in actual war situations, such

as in besieged towns or in zones where serious military operations are in progress. The outstanding features of the time of war procedure are the summary nature of the proceeding, and the absence of any right of appeal.

Pre-Trial Investigation

Under the *time of peace procedure*, there are detailed and thorough preliminary proceedings. These take the form of a judicial investigation (*sumario*) carried out by a specially designated officer (*Fiscal*). Some of the *Fiscales* have legal training. This investigation is modelled upon the "instruction" stage of the civil law penal procedure. Defence lawyers are not able to participate in these proceedings, but they are able to see and advise their client after the initial short period of *incomunicado* has ended. After the completion of the *sumario*, the defence lawyer has full opportunities to have witnesses convened and examined on behalf of the defence.

Under the *time of war procedure*, the preliminary investigation is of a very summary nature and is supposed to be completed by the *Fiscal* within 48 hours (Article 180 of the Code of Military Justice). The Defendant is not entitled to see a lawyer until he has been charged following the *sumario*. The Military Commander then convenes a tribunal known as a Council of War, to try the case on a specified date. In practice the trial often begins within 48 hours. The Council of War is comprised of 7 military officers, only one of whom, the Auditor, is legally qualified. The *Fiscal* who has investigated the case is also the Prosecutor before the Council of War.

Right to a Defence Lawyer

In theory the Defendant is entitled to the advocate of his choice as soon as he has been charged following the *sumario*. If he has no lawyer, he should be entitled to free legal representation by the advocate *de turno* (i.e. the lawyer whose turn it is on a roster kept by the local College of Advocates). If none is available, a defending advocate should be designated by the *Fiscal*.

We were told that in very many cases the Defendant is not able to secure the advocate of his choice. In some cases the lawyers are unwilling to undertake the defence for fear of reprisals. In others, too short a period is available between the *sumario* and the trial for the lawyer to be contacted and to enable him to make the journey to the place where the tribunal is sitting. The roster system often breaks down and no duty lawyer is available. The Defendants usually have no confidence in an advocate nominated by the *Fiscal*.

In most cases the short period which is available before the hearing of the case also makes it impossible in practice for the defence lawyer to challenge the evidence collected for the prosecution in the *sumario* and to present evidence for the defence. Also, except in major trials, the defence lawyer is usually unable to object to documents, demand expert appraisals or secure the attendance of prosecution witnesses for cross-examination.

In some cases the defence lawyer has not been allowed to see certain pages in the *sumario* report although they are seen by the Prosecutor and the Court. The reason given is that they touch on matters of national security. Thus the defence does not even know what evidence it has to meet.

The defence lawyer usually has to conduct the case on the basis of accepting the evidence presented by the prosecution, putting forward what mitigation or legal arguments he can on behalf of his client. In most of these cases the Defendant has been in custody under investigation for a period of months with no access to a lawyer. There is no question of the sumario being completed within 48 hours in accordance with the Code of Military Justice. In certain show trials, like the Air Force trial in progress in Santiago at the time of our mission, adequate facilities are given to the defence advocates to prepare their defence. We were assured, however, that this is not typical of the way in which Councils of War operate up and down the country.

Capital offences of treason, sedition and kindred offences are frequently charged against defendants on the basis of their actions in support of President Allende and his government before or at the time of the coup. In such cases defence lawyers are debarred from raising "political issues" in their arguments. This effectively prevents them from dealing with the real issue in these cases, namely the respective legality of the Allende regime and the present regime.

Absence of Right of Appeal

The sentences of the Councils of War are subject to review by the Military Commander of the district where the case is heard. He may approve, revoke or modify (by reducing or increasing) the sentence (Article 74 of the Code of Military Justice). The defence lawyer may make a written submission to the Military Commander, but there is no hearing before him and, of course, he is not a judge nor is he legally qualified.

There is no form of appeal or recourse against the decision as finally determined by the Military Commander, not even when gross irregularities have occurred during the course of a trial, or when the Council of War has exceeded its jurisdiction. Under the time of peace military procedure there is a "Second Instance" or full right of appeal to a tribunal known as the Court Martial. This is a much respected court composed of the three Auditors (Judge Advocates General) of the three Armed Forces together with two civilian Appeals Court judges. In addition, there are other remedies (e.g. *amparo* and *queja*) by which recourse may be had to the "Ordinary Justice" (i.e. the civilian Court of Appeals and the Supreme Court) in cases where it is alleged that irregularities in procedure have occurred or that the military tribunal has exceeded its jurisdiction.

Under the time of war procedure there is no "second instance" and no right of appeal to the Court Martial. A number of attempts have been made to bring proceedings before the Court of Appeals and the Supreme Court, but the Supreme Court has steadfastly refused to exercise any supervisory jurisdiction over the system of military justice in time of war, holding that the proceedings and sentences of Councils of War fall exclusively within the sphere of the Executive.

These decisions of the Supreme Court have been severely criticised by the most distinguished constitutional and penal lawyers, who contend that Article 86 of the Constitution expressly confers upon the Supreme Court a supervisory jurisdiction over "all the tribunals of the Nation". They assert that no precedent for these decisions is to be found on the previous occasions when the "time of war" procedure has been in force.

Judicial Errors

During conversations with defence lawyers we had our attention drawn to many serious errors which it is alleged had occurred and for which there was no remedy. The following are some examples:

- (1) In a decision given by a Council of War at Pisagua on October 29, 1973, six men named Taberna, Sampson, Quinteros, Vargas, Ruz and Fuenzalida were condemned to death. The judgment stated that the court was not unanimous in that one of the members, namely the Auditor, considered that there should be a penalty of 10 years imprisonment. Article 73, paragraph 1, of the Organic Code of Tribunals (which is made to apply to the decisions of Councils of War by Article 87 of the Code of Military Justice) provides that a death sentence cannot be confirmed unless the Council of War was unanimous. In the event of a majority decision the next lowest punishment is applied. Nevertheless, the Military Commander confirmed the death sentence and, as there was no remedy available the six men were illegally executed.
- (2) Article 12 of the Constitution provides that no-one may be tried except by a tribunal specified by law and established prior to the alleged offence, and Article 11 of the Constitution and Article 18 of the Penal Code provide that no-one may be sentenced except in accordance with a law promulgated prior to commission of the offence. In reply to representations made by the College of Advocates, the Ministers of Justice stated publicly that this principle of non-retroactivity was being fully respected and that increased penalties provided for under Decree Laws would not be applied retrospectively. On September 11 and 12, 1973, Professor Nicolas Vega Angel, Vice-President of the University of Chile, Osorno, Professor Luis Freddy Silva Contreras, General Secretary of the University and 10 students of the same university were arrested. They were charged under Article 8, paragraph 2, of Law No. 17.798, on the Establishment of Weapon Control. The maximum penalty under that law at the time of the alleged offence (i.e. prior to their arrest on September 11 and 12) was 540 days. On September 22, 1973, Decree Law No. 5 was promulgated increasing the maximum penalties under this law. On November 17, 1973, a Council of War at Osorno (Caso No. 1585/73, Fiscalia de Carabineros Osorno), condemned Professors Vega Angel and Silva Contreras to 15 years, and the 10 students to 3 years imprisonment. The defence advocate (de turno) pointed out the error in his written defence and in a submission to the reviewing authority. Nevertheless the sentences were confirmed. There is no means of appealing against this erroneous sentence. We were told that there have been many other similar cases, including even cases of death penalties for offences committed before the proclamation of a state of war, although no death penalty was applicable at the time of the offence.
- (3) It appears that in many cases Councils of War have tried offences which they have no jurisdiction to try. In particular, as a regular, and indeed it would seem invariable, practice civilians who are charged with having committed security offences before September 11, 1973, are tried by Councils of War. This includes offences against the Law of State Security (No. 12.927 of August 6, 1958) and the Law on Weapon Control (No. 17.798 of October 21, 1972). By common

agreement among the leading Chilean lawyers,¹ this is in violation of Article 12 of the Chilean Constitution, since it applies retroactively the war time tribunals with their very summary procedure to offences committed in time of peace. The matter has been raised formally by the legal profession with the Minister of Justice whose assurance on the subject has not been carried out in practice (see below). As there is no appellate system, there is no way of having the issue decided by the Supreme Court and of annulling any illegal trials and convictions.

- (4) In many cases it is reported that Councils of War have convicted on the basis of confessions made in interrogation centres, which were denied before the Fiscal as having been extracted under torture, or where there was no other evidence against the accused apart from his confession. This is in violation of Article 509 of the Code of Penal Procedure which provides that a confession shall not be admissible unless (1) it is made before the Judge of Instruction (or Fiscal in the military system), (2) it is made freely and consciously, (3) the confession is possible and plausible considering the personal circumstances of the accused, and (4) the fact of the crime is proved by other evidence and the confession is consistent with that evidence. Article 511 provides that if the defendant wants to retract his confession made before the Judge of Instruction (or Fiscal) under Article 509, he will not be heard unless he proves "unequivocally" that there was error, pressure, or that he was not in the free possession of his reason. This is, of course, a very heavy burden for the defendant to discharge, particularly when it is remembered that the Fiscal is the prosecutor before the Council of War. Moreover, the Councils of War will usually not allow the defendant to testify that he has been tortured, and defence lawyers who have alleged it have been ordered from the court, and in at least one case the lawyer was banned from further practice.
- (5) Councils of War have enquired into matters which did not form part of the accusation by the Fiscal against the Defendant.
- (6) Councils of War have convicted Defendants of offences which were not alleged in the charge and for which the defence advocate could not, therefore, prepare the defence.
- (7) Defendants have been convicted in cases where proof of essential elements in the case were completely lacking.
- (8) Defendants have been convicted of offences not known to the law.
- (9) Councils of War have sat without a qualified advocate as Auditor, or without the necessary six other members.
- (10) Defence witnesses have been intimidated.
- (11) In some provinces, Councils of War have sat *in camera* as a regular practice, although Article 196 of the Code of Military Justice requires them normally to sit in public.

The lack of any procedure for correcting judicial errors under the system of military justice is a violation of Chile's obligation under Article

¹ Cf. « Memorandum concerning the present application of criminal laws in force in relation to political trials » submitted to the government by Professor Eugenio Velasco Letelier and 11 other eminent penal lawyers in December, 1973.

3 of the Geneva Conventions, 1949, to afford "all the judicial guarantees which are recognised as indispensable by civilised peoples". In his Commentary on the Fourth Geneva Convention, published by the International Committee of the Red Cross, Geneva, 1958, Dr. Jean S. Pictet says at page 39: "All civilised nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. We must be very clear about one point: it is only 'summary' justice which it is intended to prohibit."

The Arrest, Interrogation and Detention of Political Suspects

Number of Arrests

No statistics have been published by the Chilean authorities on the number of persons who have been arrested. Estimates with which we were provided and which we consider likely to be reasonably accurate suggest that up to the end of March, 1974, a total of about 60,000 persons had been arrested by the armed forces and carabineros and held for a period of at least 24 hours. Many of these were held for only a few days or weeks and were then released. At the end of 1973, it is thought that about 18,000 persons were still being held in custody. The authorities then began sifting through the longer term prisoners and releasing many of them. By the end of March, 1974, the figure of 18,000 had been reduced to about 9,000 to 10,000 and these included fresh arrests since the beginning of the year.

Arresting Authorities

The arrests are carried out by army, navy or air force personnel or by carabineros (militarized police). At first, mass arrests were carried out by the ordinary units of these forces. Towards the end of 1973, more discrimination was shown and the arrests increasingly were carried out by one of the four apparently independent security services of the three armed forces and the carabineros. In January, 1974, a National Department of Intelligence (DINA) was created to coordinate these various intelligence services, but they seem still to act with a considerable degree of autonomy.

Categories Arrested

The original mass arrests were directed not only against persons suspected of having illegal possession of arms, but against all who were believed to hold left-wing views, including members of the deposed government, political party leaders, leaders of trade unions, of the urban and rural poor and of students, as well as outstanding journalists, artists or intellectuals. Many other people of no particular importance or influence were arrested through denunciation or as a result of "military operations", i.e. search and arrest operations aimed at ensuring complete control by the military authorities. Arrests continue to be made of people in these categories, but appear to be made now in a more discriminating way.

Summary Executions

During these initial search and arrest operations many civilians were killed, some while offering resistance, others by "summary execution". Bando No. 24, issued by the Junta on September 12, 1973, ordered the surrender of all arms, and paragraph 2 stated that "anyone taken prisoner [while resisting with arms] will be shot forthwith". This order was the subject of many protests abroad. Bando No. 24 was then repealed and by Decree Law No. 5 of September 12 (published on September 22), 1973, Article 281 of the Code of Military Justice (which makes it an offence to attack military sentries or guards) was amended by the addition of the following paragraph:

"When the security of those being attacked so requires, the persons responsible may be killed in the act."

If this amendment of the law meant no more than that soldiers on duty were entitled, if necessary, to kill their assailants in self-defence, it is difficult to see why it was needed. As in all countries, this is part of the ordinary law. There seems force in the contention that this Decree was an open invitation to soldiers to shoot at sight. In any event, a considerable number of people were killed in the early stages and it is alleged that many of them were shot after capture by way of summary execution. Others were said by the authorities to have been shot trying to escape under the *ley de fuga* (law of flight). Such cases still occur occasionally.

It has been established beyond doubt that in October, 1973, some senior military officers made a tour of five towns in the north of the country and ordered the immediate execution without trial of over 60 persons then in custody. The execution of 16 of these at La Serena was announced in the local press in October, 1973, together with a completely false report that they had been tried and sentenced by various Councils of War for specified offences. In fact, no such trials were held. Indeed, 4 of these 16 were being tried at the time for other (non-capital) offences before a Council of War. When their defence lawyer arrived at court on the day when they were executed, he was told that the court would not be sitting that day. Some weeks later, when the court eventually gave judgment (with respect to the other defendants in the case), it was stated that as the four missing defendants had "died" during the course of the trial, the proceedings against them were void.

Missing Persons

During these indiscriminate arrests a very large number of people simply disappeared and their relatives and lawyers were unable to find out by whom they had been arrested or where they had been held. Eventually an information centre (known as SENDET—National Executive Secretariat of Detainees) was set up and it was said that information would be available there within 3 days of the arrest. In practice, this organisation proved of little value. The staff would not themselves pursue enquiries about missing persons, and if a missing person was not on their lists, they would simply deny that he had been arrested. In fact, the military authorities were continuing to arrest people without informing SENDET, or, for that matter, any higher authority. They acted, and continue to act, as a law unto themselves. The clearest proof of this occurred a few days before our mission arrived in Chile, when a Swiss journalist, Mr. Pierre Rieben, disappeared. The most energetic enquiries by the Swiss

Ambassador met with the response that he had not been arrested by any of the authorities. Even on the fourth day after his arrest the Secretary of the Junta, Colonel Ewing, insisted that if the journalist had been arrested by any of the authorities, he would know about it. Four hours later the journalist was traced by the Swiss Ambassador to an Air Force interrogation centre where, as he alleged, he had been severely tortured.

Very large numbers of arrested persons have disappeared without trace. Of 3,089 persons whose arrest had been notified to the Committee of Cooperation for Peace in Chile since the coup, 547 (i.e. 17.6%) were missing at the end of March.

Amparo

Amparo is a remedy analogous to habeas corpus, but wider in its scope. It has proved in the past an effective and speedy remedy for securing the release of persons improperly held in custody. Under President Allende, the release of such persons was not infrequently secured within 24 or 48 hours, and the Court would pursue enquiries urgently, if necessary by telephone. The application is normally made to the Court of Appeals with a right of appeal from their decision to the Supreme Court.

Many cases have been brought by way of *amparo* to ascertain the whereabouts and to secure the release of persons who have been, or are believed to have been, unlawfully arrested, or who are being illegally detained or ill-treated. One such case was brought by Bishops Ariztia and Frenz in respect of 131 missing persons, giving details of their arrest. It is believed that in no case has any person's release been secured by an order made in *amparo* proceedings, and in very few cases has the court succeeded in locating a missing detainee. In most cases, the military authorities simply neglect to reply to the enquiries of the Court. Even where a person is located, the Supreme Court will not pursue the case further if the military authorities state that the person is held under an order made under powers granted by the State of Siege. Two cases of *amparo* were accepted by the Court of Appeals, but their decision was reversed by the Supreme Court. One of these related to a 15-year old boy, Luis Adelberto Muñoz Meza, detained in the National Stadium at Santiago. At this age he is exempt from criminal liability. The only accusation which appeared to have been made against him was that he had participated in stoning a vehicle belonging to the municipality of Talagante in 1970. The Court of Appeals ordered his release because there was no written order for his transfer to the National Stadium. By the time the case came to the Supreme Court such an order was produced and the Supreme Court revoked the decision of the Appeals Court, holding that the protection contained in the Law on Juveniles "cannot prevail over the provisions adopted by the authorities during the State of Siege".

Legal Authority for Arrests

Persons may be lawfully arrested either:

- (1) as persons suspected of having committed criminal offences, or
- (2) for administrative detention under Article 72, No.17, of the Constitution, on the grounds that they are a danger to security.

Those belonging to the first category should be dealt with in accordance with the Criminal Procedure Code, which requires them to be

placed under the jurisdiction and control of an Investigating Judge or, in the military jurisdiction, of a Fiscal within 5 days.

Those belonging to the second category should be arrested only on a written order by the President. On January 3, 1974, Decree Law No. 228 was promulgated stating that all arrests of persons by virtue of the State of Siege must be made under a written warrant issued by the Minister of the Interior. In the same decree, all arrests which had occurred up to that date were said to be retroactively validated. In spite of this decree many people continue to be arrested without any written warrant being produced, and many of these arrests are carried out quite anonymously by members of one of the intelligence services operating in plain clothes and arriving in cars with no number plates.

This supposedly clear-cut distinction between persons who are suspected of criminal offences and those who are arrested for administrative detention as security risks is often blurred in practice. A large proportion of the prisoners do not know in which category they fall, and persons who have been held without trial for months are suddenly charged with offences. This violates the Code of Criminal Procedure which requires persons suspected of offences to be handed over to the Investigating Judge within five days of arrest (Article 294).

Incomunicado

Article 321 of the Code of Criminal Procedure lays down strict rules governing the period during which a person in the first category may be held "incomunicado", which means that he is unable to communicate with his lawyer, his family, or indeed anyone outside the place of detention. He is usually kept in solitary confinement. The normal period is up to 5 days, but this may be prolonged for a further 5 days by the Investigating Judge. In the event of new information becoming available which requires investigation, the period of *incomunicado* may be extended for another 5 + 5 days.

We were told by General Bonilla, then Minister of the Interior, that written instructions had been issued that persons detained under the State of Siege (i.e. under Article 72, No. 17 of the Constitution) must normally be held *incomunicado* not more than 3 days, but that this period could be extended up to a total of 8 days on the written authorisation of a senior officer.

Interrogations and Torture

From information we received from sources we consider wholly reliable, the following picture emerges.

When people are arrested they are usually taken first to a military barracks or a police station or to one of the special interrogation centres established by the intelligence services. They may be held there for weeks or even months. "Pressure", often amounting to severe physical or psychological torture, is frequently applied during this period of interrogation. The Conference of Roman Catholic Bishops in their Declaration of April 24, 1974, specifically referred, among other abuses taking place, to "interrogation procedures which employ physical or moral pressure". Methods of torture employed have included electric shock, blows, beatings, burning with acid or cigarettes, prolonged standing, prolonged hooding and isolation in solitary confinement, extraction of

nails, crushing of testicles, sexual assaults, immersion in water, hanging, simulated executions, insults, threats, and compelling attendance at the torture of others. A number of people have died under torture and others have suffered permanent mental and nervous disabilities.

Among the more notorious torture centres have been the *Tejas Verdes* School of Military Engineering, the Air Force Base *El Bosque*, and the *Cerio Chena* Military Barracks.

The object of the torture appears to be three-fold: to obtain "confessions" to serve as the basis for subsequent prosecution; to obtain confirmation about associates and activities; and to intimidate both the victim, his associates, and the public in general.

Usually the authorities deny that torture takes place, or deny that it is a regular practice, and draw attention to 6 or 7 cases in which military personnel are said to have been prosecuted for ill-treating people under arrest. We understand that none of those prosecuted were members of the intelligence services or came from the centres where the worst tortures occur. On some occasions authorities at the highest level are known to have admitted privately that they know torture is carried on and assert that they are unable to stop it. Others have sought to justify it as a means of preventing innocent people being killed by subversive militant organisations.

Most allegations of torture and ill-treatment relate to the period immediately after arrest while the suspect is held "incomunicado" and no-one knows where he is. (Other torture allegations relate to cases where detainees were taken by the intelligence services from a detention camp back to an interrogation centre.) We are satisfied from our discussions with defence lawyers that the instructions limiting the period of incomunicado are not being carried out. It is not uncommon for arrested persons to be held incomunicado for 8 to 12 weeks.

After the initial period of interrogation, the arrested person may be dealt with in one of three ways:

- (1) he may be transferred to a Fiscal with a view to judicial investigation and prosecution for an offence (these are nearly always cases in which a "confession" statement has been obtained, admitting some offence);
- (2) he may be held in detention, presumably under Article 72, No. 17 of the Constitution, or
- (3) he may be released; there have been cases where the same person has been arrested, tortured, interrogated and released more than once, presumably for purposes of intimidation.

Administrative Detention

The second class of persons referred to above are those who are held by administrative order under the State of Siege. They are known as *arrestados*. About half of those in custody fall within this category.

The Constitution carefully distinguishes the treatment of *arrestados* from other persons in custody, namely persons held under judicial investigation by *Fiscales* (*detenidos* or *procesados*), accused persons or defendants (*reos*) and convicted offenders (*condenados*). As has been seen, Article 72, No. 17 of the Constitution authorises the President in a state of siege to hold arrested persons under house arrest or in places other than prisons for common law criminals. The Junta has assumed these powers

for themselves and have also delegated them to all the Military Commanders.

The prohibition on detention in ordinary prisons clearly indicates an intention that administrative detainees should receive more favourable treatment than persons accused or convicted of criminal offences. In practice, their conditions of detention are often worse. They are held virtually "incomunicado" receiving either no visits or only very limited family visits. Only rarely are lawyers given access to them. (The Minister of Justice assured us that lawyers had free access to their clients under arrest; the Minister of the Interior, however, agreed that lawyers had no such right and did not see the need for it, since their clients had not been accused of any offence.) The regime varies from camp to camp. In some there is a regime of very strict discipline and conditions are extremely hard. Those detained in camps are often forced to work (for which there is no legal authority). Their correspondence is subject to prolonged delays. Contrary to the express provision in the Constitution, many are held in prison together with persons accused or convicted of offences (but we were told that conditions in other places of detention are often worse).

Places which have been used for holding arrestados (after they have left the barracks, police station or interrogation centre to which they are first brought), include

- places within the city or area where the arrested person lives, e.g. the National Stadium in Santiago,
- camps in remote areas, e.g. Chacabuco Nitrate Office in the North, and Dawson Island in the South (in these places the detainees do not enjoy the right granted to common criminals to receive visits from their families),
- naval ships (no longer in use),
- places for the detention of common criminals (e.g. common gaol, penitentiary, women's prison).

House arrest may also be applied in several ways. A person may be ordered to stay at home at all times and to receive visits only from his family. In some cases he is merely ordered to stay at home during the hours of curfew. As this restriction applies to everyone, the effect is merely to warn the person that he may be re-arrested later. A person may also be released on parole, with a restriction on leaving the city or area where he lives.

Persons who are subject to these administrative measures of detention or house arrest are not given statements of the reasons or facts on which it is based. They have no means of challenging the case against them, which may of course be based on erroneous information or even on a mistake of identity. As indicated above, many of those who were arrested and detained have subsequently been released, but there is no system of review before an impartial tribunal or other review body. There is, however, no provision for these safeguards in the Constitution.

A Case Report from Ecuador

The Trial of Professor Galarza and Others

Doctor Lisandro Martínez, a distinguished Colombian lawyer who is a specialist in criminal law and an occasional Judge of the Supreme Court of Justice in Bogotá, was requested by the International Commission of Jurists and Amnesty International to enquire into certain criminal proceedings against the writer Jaime Galarza and other Ecuadorian citizens held in Quito, Ecuador. He completed his mission in September 1974.

The authorities in Ecuador cooperated fully. He was allowed to study the official records and to meet defence counsel, the Public Prosecutors, the original examining Judge and members of the Superior Military Court, as well as the accused.

The following are the facts of the case as found by Dr. Martínez:

Jaime Galarza Zabala is a university professor, aged 43, a writer, poet and contributor to various journals, and author of various works on the present situation in Ecuador. He is a militant activist in politics and became a member of the Communist Party and subsequently of the Socialist Party. His writings may well have influenced the course of the criminal proceedings brought against him.

On December 2, 1970, there was an armed attack on the National City Bank of Quito, carried out by four persons who seized some 180,000 Sucres (=US\$7,700). During the hold-up, one of the individuals involved was killed by the police. In January, 1971, a criminal charge was brought against Galarza alleging that he had been connected with these events, but the examining Judge at the preliminary hearing made an order for discontinuance of the proceedings on the grounds that there was insufficient evidence against him. In accordance with the normal procedure provided by law, the case was then formally removed to the Quito Superior Court, and Professor Galarza was set free. However, on November 10, 1972, he was re-arrested and brought to a military barracks where he was severely tortured.* His hands were bound behind his back and he was suspended by the thumbs until he lost consciousness. By these means he was induced to sign a paper, though not a formal statement, in which he admitted minor involvement in the City Bank hold-up. According to Galarza he "would have agreed to anything to avoid further torture" at that time. Once the document was signed, the Security Service sent it to the Ministry of Defence who forwarded it to the President of the Republic, Brigadier General Guillermo Rodríguez Lara. The President, with the agreement of his Ministers, then passed it to the Council of Government (a new organ of the military régime whose duty it is to investigate the activities of former government officials). Finally, the latter body forwarded it to the Quito Special Tribunals. These tribunals have jurisdiction over certain crimes of terrorism, sabotage and other offences

* On February 16, 1972, the Government of President José María Velasco Ibarra was overthrown by a military coup d'état.

against the security of the state (see below). One of the tribunals assumed jurisdiction over the matter, and joined in a single case eight separate criminal cases dealing with different acts committed in different places and hitherto having been the subject of separate trials. One of the cases so joined was being considered by a civil magistrate, but he was neither notified nor consulted as to the new proceedings.

A member of the Special Tribunal attended at the barracks and, in the presence of those who may well have been the torturers, he carried out his duty of verifying the authenticity of the signature. Galarza acknowledged the signature as his own, even when the contents of the document he had signed were read to him. According to Galarza, acknowledging the paper was the price he had to pay so that he could be transferred to a regular prison and thus re-establish contact with the outside world.

The decision of the Quito Special Tribunal, given on May 3, 1973, was to sentence Galarza to three years imprisonment. The sentences for all the 20 defendants totalled 146 years. The defence appealed to the Superior Military Court on the grounds that these proceedings were irregular for lack of jurisdiction. The appeal was argued on May 14, 1973, and the Prosecutor of the Superior Military Court agreed with the petition of the defence counsel that the sentence should be quashed for lack of jurisdiction. Nevertheless, eighteen months later, the Court has still given no decision in the case.

Dr. Martinez in his comments on the case made the following points:

- (1) The Special Tribunal had no jurisdiction both from the nature of the facts alleged in the accusation (in all the cases) and from the point of view of territorial jurisdiction (in two of the other cases joined in the proceedings).

As regards the nature of the facts, Special Tribunals have jurisdiction in four classes of offences (Sections 2 and 3 of Decree No. 618 of 11 June 1972):

- certain crimes against state security;
- certain crimes against the public administration committed by public officials;
- crimes involving terrorism and sabotage;
- crimes which the Council of Government accuses persons of having committed.

Galarza and the other accused were convicted of common law offences against property which quite clearly did not fall within any of these four headings and were therefore outside the jurisdiction of the Tribunal.

From the point of view of territorial jurisdiction, Decree No. 618 established three Special Tribunals in Quito and three in Guayaquil. Two of the joined criminal actions were within the judicial competence of the Guayaquil Tribunals. The Quito Tribunal decided, contrary to all normally accepted principles of joinder, to hear all these cases together. By denying the political basis of the offences, however, it denied the only grounds upon which the cases might conceivably have been properly joined.

- (2) The Special Tribunals were in error in refusing to qualify the accused as political offenders. In spite of the fact that the accused were all left-wing activists (one of them a former member of the National

Congress and former Provincial Mayor; another was Secretary-General of a political party) and that those who actually were involved in the hold-up had obviously acted for political motives, the Court would not accept the subjective test of political offences, which is now commonly accepted in most jurisdictions (cf. Part II of the definition of political crime drawn up by the Copenhagen Conference for the Unification of Criminal Law).

- (3) The offence was wrongly categorized as "terrorism". Although the issue of the alleged terrorist nature of the offence was raised at the trial, the decision neither cites provisions respecting terrorism nor spells out what acts alleged against the accused can be included under this head. Galarza was convicted of violation of Sections 550 and 552 of the Ecuador Criminal Code. These relate to crimes against property (robbery) which are typical common law offences. There was no element of terrorist activity in the attack on the City Bank. The description of "terrorist" was, however, necessary in order to justify the jurisdiction of the Special Tribunal.
- (4) The proceedings before the Special Tribunal violated the principles of *res judicata* (double jeopardy). The case against Galarza alleging his participation in the events at the City Bank was provisionally discontinued on April 10, 1972, by the examining Judge. The Special Tribunal convicted him in respect of the same allegations without the slightest reference to the discontinuance. The case in which the order for discontinuance was made had, however, been *sub judice* in the Quito Superior Court (Appeal Division) since June 18, 1972. By their decision of May 3, 1973, the Special Tribunal brought the case back to first instance without any authority or explanation.
- (5) The language and terminology which the Tribunal used in its decision in referring to the accused indicate that there is some doubt as to the impartiality of the judges. Thus one finds expressions such as "bunch of common, vulgar terrorist assailants", "bunch of criminals" and "evil individual".
- (6) The independence and qualifications of the Special Tribunals and Special Military Tribunal were open to question. Each Special Tribunal consisted of three members, two officers or retired officers of the armed forces who were not jurists and had no legal training, the third being a lawyer. The two military men were appointed by the President of the Republic (himself a military man) and the civilian was named by the Supreme Court of Justice. These Tribunals were ultimately dissolved on August 30, 1974, but it was decided that the cases pending on appeal would be carried on by the Superior Military Court. This body is also composed of retired military officers who are not jurists and have no legal training.
- (7) The time limits provided for under Ecuadorian law have not been complied with. Section 80 of Decree 618 allows 30 days to a court of appellate jurisdiction, in this case the Superior Military Court, to give its decision. In practice the thirty days are counted from the first day of argument at the bar. The case was heard on May 14, 1973. At the time of writing there has still been no decision even though the Prosecutor of the Military Court advised that the appeal should be allowed. Professor Galarza and the other accused are still in prison.

The International Commission of Jurists has written to the Minister of Justice of Ecuador urging their immediate release.

Book Reviews

GOING TO LAW, A CRITIQUE OF ENGLISH CIVIL PROCEDURE. 70 pp.

NO FAULT ON THE ROADS. 58 pp.

Reports by Justice: pub. Stevens & Son, London, each £1 net.

These two reports by Justice, the British Section of the International Commission of Jurists, are of exceptional interest in the field of law reform.

"Going to Law" reviews English civil procedure and concludes that it has four main defects:

- (1) it depends almost entirely on party prosecution; the court has no real power to intervene and this can result in excessive delay, late investigation, danger of surprise, lack of discipline in the proceedings and late or unfair settlements;
- (2) it is insufficiently "open", leading to unnecessary work and expense, unfair settlements and surprise at the trial;
- (3) it depends too heavily on the all-embracing trial, which results in inflexibility and increased expense;
- (4) it tends to formalism at the expense of robust common sense.

The authors then review civil procedures in other countries, including those of the Civil Law as well as other Common Law countries. They conclude by making a large number of detailed proposals aimed at removing the above defects. It is impossible to do justice in a short review to the many recommendations made in this carefully thought out report. Among the more important proposals are that pleadings should be enlarged to show how the facts alleged will be proved and all relevant documents disclosed at this stage, and that the Master should have greatly increased powers on interlocutory proceedings to clear away subordinate issues and have the substantive issues of law or fact identified before the trial. The proposals relate to High Court and County Court actions. For claims under £200 the authors support the proposal for a Small Claims Court put forward by the Consumer Council in their report "Justice out of Reach".

"No Fault on the Roads" proposes the adoption in the United Kingdom of a no-fault insurance scheme for victims of motor accidents. They would be compensated on the basis of existing common law damages, save that there would be no reduction for contributory negligence. Only in the event of gross or wilful misconduct established in a criminal trial would damages be reduced. It would no longer be necessary to prove negligence to establish the right to compensation. Compensation would be assessed by a tribunal with an appeal to the courts on a point of law.

The report contains an analysis of various no-fault insurance schemes in other countries, in particular in Canada, the United States and New Zealand, and summarises the costs and benefits of such schemes. Experience in other countries indicates that the savings in costs of investigation and litigation would more than offset the increased damages to be paid and result in a fairer system of compensation. They point out

that the no-fault principle already applies in the field of insurance for industrial injuries. Both the state and the motoring community would contribute to the compensation fund. The scheme could be administered by the state or by the insurance industry as agents of the state.

The case is most persuasively argued and, as it was first prepared as a memorandum of evidence to the Royal Commission on Civil Liability and Compensation for Personal Injuries, it may be assumed that it will receive the consideration it deserves.

Copies of these reports may be obtained from Justice, 12 Crane Court, Fleet Street, London, EC4.

The ICJ deeply regrets to announce the death of one
of its Members,

Professor Kwamena BENTSI-ENCHILL

former Justice of the Supreme Court of Ghana, who died on
October 21, 1974, from injuries sustained in an automobile acci-
dent on October 14, 1974.

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April-May, 1974.

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Report of Mission to Chile

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The Report of an ICJ mission to Chile, covering such matters as the Junta and the Constitution; State of Siege, State of War and State of Emergency; Suspension of Civil Rights and Fundamental Freedoms; the System of Military Justice in Time of War; Arrest, Interrogation and Detention of Political Suspects; etc.

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