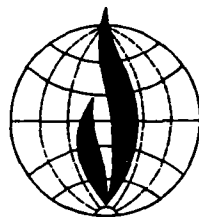


**For the Rule of Law****THE REVIEW****INTERNATIONAL COMMISSION OF JURISTS****EDITORIAL**

Torture in Al-Fara'a Prison: A Reply to the Israeli Ambassador 1

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# *Editorial*

## **Torture in Al-Fara'a Prison: A Reply to the Israeli Ambassador**

Under the rules of procedure of the UN Commission on Human Rights non-governmental organisations do not enjoy a right of reply. Accordingly a reply is given here to an attack on the International Commission of Jurists and its West Bank affiliate made in February to the Commission on Human Rights by the representative of Israel, Ambassador Ephraim Dowek.

On 30/31 January, 1985, the International Commission of Jurists published a 50 page report by Law in the Service of Man (LSM), its affiliate in the Israeli Occupied West Bank. The report is entitled "Torture and Intimidation in the West Bank: the case of Al-Fara'a prison". It is a collection of affidavits made by former detainees in this prison camp and interrogation centre, describing torture and ill-treatment which they say they received while detained there. The affidavits were taken by lawyers of LSM who took 'great care to follow the rules of evidence observed by the courts'. In other words, they did not ask any leading questions suggesting answers to the deponents.

This prison, opened in 1982, is a centre used for interrogating and punishing young Palestinians suspected of throwing stones or explosive bottles, or organising demonstrations and public disorders in the West Bank. It is the only detention centre in the West Bank run directly by the Military Government, unlike other prisons which are run by the Israeli military police. The specially trained interrogators seek to extract confessions on which these youths can be convicted by military tribunals. It claims a success rate of 60 to 70 percent.

Four days after publication of the LSM report the 41st session of the UN Commission on Human Rights opened in Geneva and its first item was the Israeli Occupied Territories. The discussions began with interventions by the representatives of Syria and the PLO, both of whom referred at some length to the Al-Fara'a report. The third speaker was the Secretary-General of the ICJ, who referred only briefly to the report, his main subject being a recently published Israeli road plan for the West Bank. He stated however that the Al-Fara'a report was the first convincing report of the systematic use of torture by Israeli forces to reach the ICJ for over 10 years.

The Israeli Ambassador made two statements in reply, one on the same day and another more considered statement a few days later. It is sometimes said that people who have a bad case resort to abusing their opponents. The Ambassador began by attacking LSM saying that it was a 'notorious front organisation created by local PLO sympathisers

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with the open aim to discredit Israel, stain its reputation of integrity and clean hands, attract world attention, blow up minor incidents out of all proportion and give a semblance of credibility and respectability to unfounded allegations'. Readers of the ICJ Review and of other ICJ publications will judge for themselves whether this description fits the carefully prepared and moderately phrased articles and publications by LSM, published jointly by the ICJ and LSM.

On March 23, a Co-Director of Law in the Service of Man addressed the following letter to the Israeli Ministry of Foreign Affairs, with a copy to the Israeli Ambassador in Geneva.

"Dear Sirs,

We have recently received a copy of the Statement made by Ambassador Ephraim Doweck, of the Israeli Permanent Mission at the United Nations in Geneva, at the 41st Session of the Commission on Human Rights, with respect to the report of Law in the Service of Man (LSM) on the conditions of Fara'a prison.

We fully understand the political, and often polemical nature of statements made before that forum, particularly by representatives of the different states, and we do not wish to engage in such debates, and will not address here most of the points raised by the statement of Ambassador Doweck. None the less, there were some very serious charges and innuendoes made in that statement which we cannot ignore, since they come from an official representative of the state under whose authority we are living in the occupied territories, and because they carry serious consequences for our organisation.

Most serious of those is the charge that Law in the Service of Man is a "... front organisation, created by local PLO sympathisers..." Such a charge is very serious, and if proven, would render LSM illegal under the prevailing Military Orders in the West Bank and would subject members of LSM to prolonged prison sentences. Other statements published in the papers attributed to Israeli spokesmen have labelled LSM a "hostile" organisation. Mere contact with a "hostile" organisation under Military Order No. 284 subjects a resident of the West Bank to a prison term of up to ten years.

We therefore wish to state categorically that LSM is a fully independent body affiliated with the International Commission of Jurists, that it is not a "front" for any body or organisation, and that it is duly registered with the competent authorities of the Military Government. Such false accusations concerning the character of the organisation and its independence, therefore, go beyond political discussions or even polemics and can have serious legal consequences for us.

*Secondly:* Ambassador Doweck states that LSM has the "open aim" to (1) discredit Israel, (2) stain its reputation of integrity and clean hands, (3) attract world attention, (4) blow up minor incidents out of all proportion and (5) give the semblance of credibility and respectability to unfounded allegations. LSM admits that one of its aims is attracting world attention (aim No. 3) but emphatically denies all of the four other aims attributed to it.

The true aims of the organisation are clearly stated in its articles of incorporation and reflected in its yearly activities. They are the promotion of the principles of the rule of law and of respect for human rights, and compliance with international norms. It is true that in pursuit of these goals LSM objectively monitors the human rights

record of the Israeli Military authorities and it is not surprising that the results of such investigation is not pleasing to the Israeli authorities. They should not be. However it is both false and dangerous to deduce from this that the "open aim" of LSM is to "discredit Israel and stain its reputation for integrity and clean hands, etc..." LSM endeavours to investigate these matters with integrity and objectivity, but it cannot be blamed for the substance of the violations it documents and the results it brings to light.

*Thirdly:* The statement of the Ambassador contained a direct attack on the credibility and truthfulness of LSM's documentation. Specifically it stated that "In the past, many affidavits, including quite a few channelled through "Law in the Service of Men" (*sic*), were proven, after proper investigation, as completely unfounded." (my emphasis). Another spokesman referred to the Al-Fara'a report as an "unfounded web of lies".

LSM strenuously endeavours to maintain the highest possible standards of accuracy and truthfulness. Great care is taken in collecting information and sceptically investigating allegations of human rights violations. Evidence which does not meet our exacting standards of accuracy is never published. Our identity as a human rights organisation is closely linked to this careful approach to facts. That being the case, we would be most grateful to learn *which* of our affidavits have been proven to be unfounded. Even more, we hereby commit ourselves to amend, or retract any published material that is proven to be materially inaccurate and to publish such corrections or retractions as widely as possible. Such a commitment is not a concession by LSM but an essential ingredient of its nature as a serious human rights organisation on which it stakes its credibility. We therefore welcome a specific reply indicating which of our published material you believe you have proven to be false or inaccurate. Barring that, we would appreciate it if official spokesmen for your ministry would refrain in the future from making unsubstantiated attacks on LSM's credibility.

Yours faithfully,  
(signed) Jonathan Kuttab, Adv.  
Director."

At the time of going to press LSM has received no reply to this letter from either the Foreign Ministry or the Ambassador. The Secretary-General of the ICJ has also asked the Ambassador to substantiate his allegation, but he has not done so.

In his first reply to the Commission on Human Rights the Ambassador suggested that the report did not merit credence as it came from Palestinian lawyers. This is the equivalent of saying that allegations of anti-semitism can be ignored if they come from Jews. In fact similar allegations about Al-Fara'a prison have been made by Israelis. The Israeli League for Civil and Human Rights petitioned the High Court of Justice in Israel in March 1984 for an injunction based on similar affidavits made by other former detainees at the prison. This case is not yet concluded. The Court has asked the government to investigate the allegations and report on them.

On March 22, 1985, *Haretz* and *Ma'ariv* newspapers in Jerusalem published interviews by Israeli journalists with two recently released detainees from Al-Fara'a. One was arrested on 26 January 1985, and the other on 8 February 1985, i.e. while the Commission on Human Rights was in session. Both gave detailed statements corroborating the affidavits in the LSM report.

The Ambassador also said that "The fact that the interventions by the PLO, the Syrian Republic and the ICJ were not only synchronised but also complementary, is for the least 'disturbing' – not to use the stronger word". There is no cause for disturbance. The Secretary-General of the ICJ had no knowledge that the PLO and Syrian representatives were to speak until the morning of his intervention and there was no kind of collusion with them.

The Ambassador, in denying the allegations of torture and ill-treatment, told the Commission on Human Rights that "The Fara'a prison is constantly visited, including by the press, and all these visitors are allowed to talk with the detainees privately and without any interference from the prison warders". On 8 April 1985, the *Washington Post* published an account by its correspondent, Edward Walsh, of a visit he made the previous day to the prison. He said that "From the *guided tour and brief conversation* with some of the inmates, it was impossible to verify the charges made Jan. 30 by the International Commission of Jurists" (emphasis added).

One of the complaints made by the Israeli Ambassador was that prior notice of the report had not been given to the Israeli authorities, and that the ICJ Secretary-General had not disclosed its forthcoming publication to the Ambassador when he paid a courtesy call on him a few days before the report was published.

LSM comments "It is not LSM's practice to present its reports to the Israeli government for comment before making them public. We do however make interventions and request specific replies on human rights violations that come to our attention. We address such letters to the Minister of Defence in his capacity as minister with ultimate responsibility for the Military Government of the occupied territories. When a reply is received, which is not always the case, it is only after a long period of time and comes generally from the Legal Advisor to the Civilian Administration of the West Bank. ... It is precisely because of the gravity of the circumstances related in the report that we are not willing to delay issuing the report while we wait for a response which experience has shown we are unlikely to receive."

The Secretary-General of the ICJ did not feel at liberty to disclose the forthcoming publication to the Ambassador without prior consultation with LSM. He has, however, now told Ambassador Dowek that he considers it would have been preferable to have advised LSM to give a summary of the report to the Israeli authorities before publication and invite their comments. It should be said, however, that this was not the first report by LSM on torture practices in Al-Fara'a. A previous report on the treatment of detainees there was published by LSM in April 1984.

Ambassador Dowek made a point that the Al-Fara'a prison was visited regularly by delegates of the International Committee of the Red Cross (ICRC). The ICRC undertakes not to publish confidential reports to the government on such visits, but the government is free to do so. The ICJ has challenged the Israeli government to publish in full the reports of the ICRC on its visits during the period covered by the LSM report, namely March 1982 to March 1984. This would show whether the implied suggestion that the ICRC delegates found no evidence of torture is correct. None of these reports has yet been published.

# *Human Rights in the World*

## **Albania**

The best known fact about Albania is its obscurity. Since the end of World War II, this country of under three million people has been cut off from the rest of the world and held on a course of isolationism resolutely steered by Enver Hoxha, the Albanian leader who died on 11 April this year after over 40 years in power. The constitution of Albania defines the dominant ideology as Marxism-Leninism and states that "the entire socialist social order is developed on the basis of its principles." Hoxha adhered rigidly to that ideology, shunning those states which he felt embodied the demon capitalism and breaking off relations with those "revisionist" states which strayed from the ideological straight and narrow path (or attempted to challenge his supremacy).

Yugoslav support of Koci Xoxe (a post-war Albanian leader and rival of Hoxha) led in 1948 to the termination of relations with Yugoslavia, a party purge resulting in the execution of Xoxe and a rapprochement with Russia. However, Khrushchev's wooing of Tito in 1955 led first to another purge of colleagues with pro-Yugoslav tendencies and, in 1960 to a final break with Russia bringing an inevitable purge of Khrushchev supporters in its wake. A friendship with China filled the resulting void, but in 1978 that too was broken off when China started making overtures to the United States.

Albania has essentially made her way alone for the past 40 years, governed by what was characterised in the *Guardian* (12 April 1985) as Hoxha's "peculiar type of rule, based on a very Balkan form of charismatic folksiness" covering a hard autocratic core.

There is no doubt as to the charismatic quality of Hoxha's leadership, not least based on his wartime record as head of the Communist Party and leader of a resistance movement which in three years and with little or no outside assistance, freed the country of the occupying Italian forces.

In addition, it has been said that like a latter-day knight errant he led Albania out of the Middle Ages, making her self-sufficient in food and energy and independent of foreign trade (which accounts for only 7% of the GNP); contributing to increased life expectancy which climbed from 38 years at the end of World War II to its current 70 years; and helping to free women from the medieval conditions imposed on them by Turkish rule under Islam (the international Convention on the Political Rights of Women and the Convention on the Nationality of Married Women are two of the few international instruments to which Albania is a party).

There is equally no doubt as to the autarchy inherent in Hoxha's leadership. Frequent party purges ensured the termination of even embryonic opposition to his regime.

By 1958, nearly half of the 31 members of the Communist Party's Central Committee of 1948 had been put to death. In 1973, figures published by the official news agency in Tirana showed that "to protect the regime's stability" police had in the last 30 years "exterminated" 550 armed gangs, killed or arrested 4,000 "revisionists" and repulsed 3,000 border incursions. But the most startling event occurred in 1981 with the death of Mehmet Shehu, fellow resistance fighter and friend of Hoxha, who had been Prime Minister (head of the Council of Ministers) for more than 25 years. He was said to have committed suicide but was almost certainly executed without trial because of differences with Hoxha. This belief is supported by the fact that he did not have a state funeral; was not accorded a eulogy or any of the customary posthumous honours; there was no official period of mourning; his sons and his wife were reportedly imprisoned (the latter for 25 years); and three other former ministers, all associates of his, were executed.

Hoxha not only tightly controlled the life of the party, he also regulated the life of the citizen – to the extent of allegedly having special police units to look for home-made antennae being used to listen to foreign radio stations, a crime punishable by imprisonment. Indeed, all aspects of daily living are strictly controlled, no doubt following the spirit of article 39 of the Constitution, which states "... the rights of the citizens are inseparable from the fulfilment of their duties and cannot be exercised in opposition to the socialist order. . ."

It is extremely difficult for Albanians to leave their country and for non-Albanians to enter it (Tirana, Albania's capital, has only two hotels – testimony to this aversion to foreign visitors). Attempts to leave illegally are potentially capital offences though they seem generally to be punished with prison sentences (the minimum

being 10 years). In addition, there are many reports of the families of those who successfully escaped across the border being administratively interned – punishment both retributive and designed as a deterrent to others seeking to flee.

The state-owned press is tightly censored and literature and the arts are subject to strict control, being seen as weapons of revolutionary change as exemplified in article 35 of the Constitution "... the state supports the development of the literature and art of social realism, which uphold the ideals of socialism and communism and are permeated by the national and people's spirit. . ."

The most overt interference with individual freedom (or rather the most obvious to foreign observers able only to scrutinise the meagre information that is officially released or that is gleaned from the small band of escapees) concerns freedom of expression and religion.

While most other repressive regimes have constitutions which at least preserve a facade of the existence of such freedoms, Albania's constitution is characteristically straightforward. Article 55 prohibits both the creation of any type of organisation of a fascist, anti-democratic, religious, war-mongering or anti-socialist character and also any fascist, anti-democratic, religious, war-mongering and anti-socialist activities and propaganda. For good measure article 37 declares that "the state recognises no religion whatsoever and supports atheist propaganda."

From the start of the Hoxha era, a steady clamp-down on religious activity had taken place. A particularly severe anti-religious offensive occurred in 1967, ten years before religious activity was formally outlawed in the 1977 constitution. More than 200 priests and mullahs were reportedly imprisoned or sent to labour camps. In May 1974, the official news agency reported the death (which had occurred

six months previously) of Mgr. Damnian, the 80-year-old head of the Albanian Orthodox Church and Archbishop of Tirana. He died in the prison where he had been held since the 1967 repression when the regime heralded Albania's status as "the first atheist state in the world."

The state clamp-down on religious activity extends to confiscating all incoming religious literature and founding an anti-religious museum which is located in Shkoder in north Albania. Prison sentences of five years or more are given for such offences as listening to Radio Vatican or possessing a bible. Amnesty International cites the case of a priest, Fran Mark Gjoni, who allegedly received 12 years imprisonment for possessing bibles and of Father Shtjefen Kurti, a Roman Catholic priest who it is claimed was executed for secretly baptising a child at its mother's request.

Restrictions on freedom of conscience and expression are not limited to matters of religion — the majority of political prisoners held in labour camps or prisons convicted of "crimes against the state" have been found guilty of expressing dissatisfaction with the political or economic situation in Albania. All crimes against the state (with one exception) carry a minimum of 10 years in prison and a non-mandatory death sentence. Amnesty International has recently published a report on political imprisonment in Albania in which it states it has no record of anyone accused of crimes against the state ever being acquitted. The report details many restrictions on the fundamental human rights of those accused of such crimes. Perhaps this is only to be expected in a country where the predominant consideration in formulating legislation, including penal legislation, is declared to be protecting "the interests of the Party as the tip of the sword of the

working classes."\*

Among abuses cited in the report are provisions for detention for up to 14 days without charge in "exceptional cases", without defining the criteria for such cases; the absence of specific legislative provisions allowing an accused to call witnesses for his defence; the fact that, at most, an accused is shown a copy of the charges against him but is not shown any of the other documents in the case; and that it is the Court rather than the accused that decides if legal advice is necessary "because of the nature of the case or because of other circumstances". Even when legal advice is accorded, the defence lawyer comes from one of the Legal Aid Bureaux created by the state in 1967, which are under the jurisdiction of the Supreme Court and whose members are appointed and dismissed by the President of the Supreme Court.

Allegations of ill-treatment during detention, most commonly of beatings, have also been made, and reports of conditions of imprisonment are consistent in their description of the harsh existence in the major labour camps and prisons. Labour camp internees are forced to work long arduous hours building dams and irrigation channels; mining; constructing factories and military airfields, etc. The US State Department's Country Reports on Human Rights Practices cites one camp where "prisoners mined copper in eight-hour shifts, six days a week, with little protective clothing, were forced to meet excessive work quotas and when they failed to do so, faced extra work hours or solitary confinement."

Such a description matches accounts given to Amnesty International. In addition, much misery is caused, especially to elderly prisoners by unheated concrete

\* *Drejtësia Popullore* No. 1, 1979, journal of the Supreme Court.



barracks, lack of sufficient bedding and hot water, and poor diet (deficient in protein, fruit and vegetables).

Descriptions of special isolation cells where prisoners are kept in solitary confinement are particularly vivid. One metre square by two metres high, these cells are too small to lie down in – it is easy to see how they acquired the nickname 'cloaks'.

Information about Albania is difficult to come by. From what is available, however, it is certain that under Hoxha the social and economic status of the population improved to the extent that self-sufficiency in food and energy has provided everyone with an adequate, though necessarily restricted diet, warmth and shelter. However, the cost in terms of the free exercise of civil and political rights seems intolerably high.

From the outset, Hoxha's self-righteousness and conviction that in his chosen ideology alone lay the successful reform and advancement of his country, plus his

inherent mistrust of the rest of the world (not helped by such events as the parachuting of armed Albanian insurgents into the country organised by the UK and USA in the early 1950s), allied to a ruthless and charismatic personality resulted in his doggedly leading Albania down the path of self-sufficient isolationism he had chosen for it.

Absolute control seems to have been the ruling principle. This Orwellian quality of the Hoxha period is illustrated in an interesting statistic published by the official Albanian news agency – at the 1974 elections 100 percent voter turnout was reported; of the 1,248,530 votes, 1,248,528 were cast for the official (and only) list of candidates... two ballots were declared invalid.

It remains to be seen whether Ramiz Alia, Hoxha's successor, will change Albania's hostile stance towards the rest of the world and begin to loosen the physical and mental constraints forced on Albanian citizens by Hoxha.

## Persecution of the Baha'is in Iran

In the wake of the Islamic Revolution in February 1979, many representatives of the former regime such as politicians and senior officers of the armed forces and secret police were arrested, tortured and even summarily executed. This wave of violence and persecution later turned against the religious and ethnic minorities. In particular, the Baha'is became a target of the fundamentalists who gained importance after the overthrow of the Shah.

The present and past persecution of the Baha'is is based on the popular attitude of

the Shia Muslim majority that the Baha'is are heretics and that Baha'ism is not a separate religion (Dinnist). This is because Baha'ism, the origin of which is traced to one of the numerous sects of the Shia branch of Islam, does not accept that with Muhammed the 'door of prophethood' was closed forever. Moreover, the claims to prophethood by the founders, the Bab and the Bahauallah, puts them and their followers beyond the pale of Islam. As heretics they are denied the protection they might otherwise expect as dhimmis or

non-Muslims living under Muslim rule.

Unlike the Zoroastrians, Jews and Christians, the Baha'is are not recognised as a 'religion of the book' entitling them to special protection. On the contrary, as heretics, Baha'is are considered as *Mahdur al-damm* or those whose blood may be shed with impunity. For this reason, Baha'ism has from its inception faced severe hostility and enjoyed no protection under successive constitutions.

Under the Shah's regime, even though the constitution did not recognise the Baha'is as a religious minority, this did not cause serious disability. They were permitted in practice to leave unanswered any official question regarding their religion, thus enabling thousands of Baha'is to be employed by the State in contradiction to the law that prohibited Baha'is from being employed in government service. Many Baha'is held senior posts under the Shah.

However, the fundamentalist nature of the 1979 revolution revived the old hostilities and the Baha'is once again came under attack. For example, in mid-1980 a leading Islamic authority called on all the Muslims to 'chase the Baha'is from all administrative positions and to 'deliver them to the revolutionary courts'.

According to the Baha'i International Community, since the start of the Islamic revolution a total of 140 Baha'is have been summarily executed and a further 54 have been murdered or assassinated or have died mysteriously in prison, or have simply disappeared.

In addition to actual physical violence, sustained economic pressures have been imposed on individual Baha'is and the community in general. A corporation in which was vested the entire property of the community, including the holy places and religious sites, was confiscated, all the Baha'i employees were dismissed and the

majority of the properties were physically taken over. The assets of a major Baha'i banking company have been appropriated, thus wiping out the savings and pensions of some 15,000 Baha'is. There has also been widespread destruction of Baha'i communal property, including that of the single most holy Baha'i shrine in the country. At the individual level a campaign has been started to dismiss all Baha'is from both private and public employment. For example, the Baha'i International Community has published a copy of a letter from the Ministry of Oil addressed to a Baha'i employee, suspending him from employment because of his affiliation with the Baha'i religion. Another circular by the Department of Justice instructs the Registrar of Trade and Properties to stop commercial dealings with the 'depraved Baha'i Sect'.

The Chief Justice of Iran, Ayatollah Moussavi Ardebili, ordered that Baha'is who had formerly been in government service must return all their salary, including money paid to them under the Shah's regime, failing which they are liable to imprisonment.

Since many aspects of personal status and law are now governed exclusively by religious law, the Baha'is are forced to choose between denying their faith or breaking the law. For instance, the Baha'i marriage rites are not recognised and children born to such a marriage are deemed illegitimate. The Baha'is are also not permitted to hold public meetings, express their faith openly, or publish their literature. Indeed, Baha'is arrested on vague charges have been forced to renounce their faith as a condition of their release from prison.

The Iranian government for its part either totally denies that any oppression of the Baha'is has or is taking place, or alternatively states that they are persecuted not

because of their religious faith, but because of their participation in the crimes perpetrated by the previous regime.

On the contrary, the available evidence clearly indicates that the Baha'is are being persecuted because of their religious beliefs and not because of their alleged past activities. The root cause is that Baha'ism is regarded as a heresy and is persecuted as such. Shia Muslims are, of course, fully entitled to regard them as heretics, if that is their belief, and to exclude them from their religious communities and worship. But to discriminate against them, to deny their religious freedom and to persecute them for their alleged heresy is a violation of Iran's international obligations.

The UN Declaration on the Elimination of Religious Intolerance states that freedom of thought, conscience and religion includes the freedom of everyone to have a religion or whatever belief of his choice and states that no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

The persecution of the Baha'is is a clear violation of Article 18 of the Covenant on Civil and Political Rights to which Iran is a State Party. Indeed, when the report of Iran under the Covenant was considered by the Human Rights Committee, the members of the Committee observed that the treatment of the Baha'is appeared to be

contrary to the provisions of Articles 18 (freedom of thought, conscience and belief), 23 (the right to marry), 25 (the right take part in public affairs and to have equal access to the public service), and 27 (the right of religious minorities to profess and practice their own religion in community with others). They might well have added Article 6 (the right to life).

The Iranian representative who presented his government's report to the Human Rights Committee stated that in the case of differences between the Articles of the Covenant and the teachings of Islam, the tenets of Islam would prevail.

As the Special Rapporteur on Iran of the UN Commission on Human Rights, Mr. Andres Aguilar, stated in his report to the Commission this year, "... the community of nations cannot accept that one State should isolate itself to the extent of destroying the validity of a system of law which has developed through universal acceptance and remains one of the most important elements in the relationship between States, forming the backbone of the community of nations as it exists in the world today." He specifically mentioned freedom of thought, conscience and religion as one of the universally accepted standards of conduct which all States members of the United Nations are bound to abide by.

## Pakistan

Since the article on Pakistan in *ICJ Review* no. 30 (July 1983), the main developments have been the holding of a national referendum on 19 December 1984 and elections for the National Assembly

and Provincial Assemblies in February 1985.

Through the referendum, President Zia sought approval for his policy of "Islamization" and, at the same time, by an unprece-

dented manoeuvre, declared that a positive vote was to be taken as a mandate for him to retain the presidency for a further five years. The referendum question, for which a single "yes" or "no" answer was required, was: "Do you support Pakistan President Zia's programme by which he has started to bring Pakistani laws into line with the Islamic principles in accordance with the Holy Koran and the Holy Prophet and to safeguard Pakistan's ideology; and do you support the continuance, the further strengthening of this programme and the transfer of power to the elected representatives of the people in an organised and peaceful manner?" The result of such a referendum was, of course, a foregone conclusion.

The Movement for the Restoration of Democracy (MRD), a seven-party alliance, fearing that a call for a "no" vote would be widely perceived in Pakistan as an anti-Islamic stance, decided to campaign for a boycott of the referendum. The Government then passed ordinances making it illegal to campaign for a boycott. Penalties of up to three years' imprisonment and a heavy fine as well as prohibition from standing in any elections for seven years were stipulated. There were conflicting reports about the turnout of voters; the opposition parties alleged that only 20 percent participated while the Election Commission asserted that about 62 percent participated, of whom 97.71 percent voted "yes". The Secretary-General of MRD denounced the referendum as a "hoax in the name of Islam".

The referendum was followed in February 1985 by elections for the National Assembly and the four Provincial Assemblies. These elections were held with martial law still in force and the ban on political parties continuing. The MRD rejected the elections and repeated its stand that martial law should be lifted, the 1973 Con-

stitution should be restored and the elections should be held under the rules in force before the 1977 coup. President Zia refused the demands of the opposition and arrested the entire opposition leadership and a large number of party workers. According to some reports, nearly 5,000 persons were arrested before the elections. The electioneering itself was limited to the displaying of posters and banners. Public meetings, processions and use of loud-speakers was banned.

The turnout was reported to be better than for the referendum. The greater participation of voters and the defeat of five of President Zia's ministers in the elections to the National Assembly gave some credibility to the elections. However, those who expected the President to move faster towards democratisation were surprised by the amendments made to the 1973 Constitution immediately after the election. The amendments give him sweeping powers and provide the basis for a presidential rather than parliamentary form of government. Under the amended Constitution the President has the power to appoint the prime minister and cabinet, chiefs of the armed forces and the provincial governors. He can dissolve the parliament and call for new elections, return bills passed by the parliament for reconsideration and hold referendums on any issue. When announcing the amendments, President Zia made it clear that martial law would only be lifted in stages.

President Zia justified his authority to amend the Constitution on the basis of the mandate he received under the controversial December 1984 referendum. However, his authority to make these amendments can be questioned on the basis of the ruling given by the Supreme Court in 1977. In this ruling the Supreme Court, while legitimising the 1977 coup as an extra-constitutional step justified by

the doctrine of necessity, limited the martial law administrator's powers to legislate or change the constitution to those areas judicially recognised as falling within the doctrine of necessity. By these amendments, President Zia, who is also the Chief Martial Law Administrator, has made sure that he would retain his greatly increased powers even after the lifting of martial law. The opposition parties condemned the amendments by stating that the regime had no right to amend the Constitution, and these amendments would only serve to create a controlled civilian government.

The continuation of martial law is disturbing. In 1984 the use of Military Courts increased, as did the use of torture, and the activities of students, workers and other opponents of the regime, were severely restricted.

In the past year the government has continued to use its broad discretionary powers to assign civil as well as criminal cases to be heard before Military Courts. It is reported that Summary Military Courts dispose of cases within minutes, do not grant defendants the right to counsel, and are increasingly used for clearing the backlog of cases in the ordinary courts. In the Special Military Courts which try serious offences, defence counsel have the right of audience but the untrained military judges and prosecutors often treat them contemptuously and are obstructive. For example, members of the Lahore Bar Association have complained that defence lawyers were denied access to the prisoners and to important documents in the trial of 54 persons accused of belonging to the alleged terrorist organisation, Al-Zulfigar.

Nassar Baloach, one of the four men accused of abetting the hijacking of a Pakistani plane in March 1981, who was executed at the beginning of this year, stated in a letter written at the time of the

trial that the Military Court was openly biased against the defendants, made them stand in the Court in fetters all day, denied them access to the report of the investigation officer and arbitrarily disallowed important questions during cross-examination. In this, as in many other cases, it has been reported that the accused were tortured and made to sign confessions.

In 1984, the Lahore Bar Association issued a statement charging that systematic torture of prisoners occurred in five prisons. In particular, the Lahore Fort, where large numbers of political workers are detained, has acquired notoriety for the torture of detainees. The ICJ is in possession of a photocopy of a letter written by a Sub-Division Magistrate to President Zia drawing attention to the routine torturing of prisoners in a prison in which the Magistrate himself happened to be imprisoned.

The past year has not seen any relaxation of restrictions imposed on trade unions and student unions. On 5 February 1984, President Zia imposed a ban on all student organisations in the capital and in three provinces. Following this there were widespread protest demonstrations leading to the arrest of a large number of students. On 12 February, three student leaders of the Islamic fundamentalist student organisation were sentenced to fifteen lashes and imprisonment for a year for disrupting a public meeting addressed by President Zia.

The government also tightened its controls on the press by strictly enforcing an earlier ban on any news or comment about Pakistani political parties or politicians. The intolerance of the regime towards any criticism is evident from the detention of Dr. Hassan Zafar Arif, Associate Professor of Philosophy at the University of Karachi. In September 1984, Dr. Arif was issued with a Show Cause Notice under Martial

Law Regulation No. 51, which provides for trial before a Military Court and summary dismissal from government service for engaging in "agitational activity". Once the Show Cause Notice is issued it is for the respondent to show why he should not be dealt with in the manner prescribed under Regulation No. 51. The Show Cause Notice sent to Dr. Arif accused him of taking part in politics and political activities, guiding, training and inciting students to oppose Islamic ways and visiting foreign embassies without permission. In a general reply to the Notice, he charged the authorities with suppressing all classes and sections of the population, including workers, students, lawyers, teachers, doctors, journalists and women, as well as unscrupulous treatment of all dissent. He was arrested on 21 October 1984 and he is still under detention without being formally charged or brought to trial. He is said to be detained in a Class C prison for convicted criminals.

Besides those who criticise the regime, another group which has complained of persecution is the Ahmadiyya Community in Pakistan. The Ahmadiyya Sect, which considers itself Muslim despite theological

differences, has between three and four million followers in Pakistan. In 1974, the Bhutto government amended the constitution to declare the Ahmadis a non-Muslim minority. As a consequence, an Ahmadi had either to declare himself a Muslim and disown the founder of the sect or declare himself as a non-Muslim. In April 1984, the present government enacted an ordinance forbidding the Ahmadis from professing the Islamic faith, from calling their places of worship "mosques", from making the traditional call to prayer and from calling themselves Muslims. Under the ordinance, it would constitute an un-Islamic act if an Ahmadi performed by word, deed or gesture any act obligatory in Islam.

An Ahmadi can be punished with three years' imprisonment and a fine for performing an un-Islamic act. The enactment of this ordinance which concerns itself with a particular group's belief, is a clear violation of the right to adopt a religion or belief and of the freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching, as stated in the International Covenant on Civil and Political Rights.

## Spain Reacts Against Torture

Torture is a human scourge that is difficult to combat and still more difficult to root out in countries where it has become a daily practice — usually under authoritarian regimes. Habits die hard, especially the firm conviction of those who made use of torture that they were above the law. Moreover, a mistaken and inadmissible belief in the efficacy of torture is still to be

found. Torture is just as likely to produce a false confession as a true one.

This is the case in Spain where, during the long years when Franco was in power, many members of the armed forces and police resorted to torture routinely and systematically against suspected opponents of the regime.

Now that democracy is fully restored in

Spain and the rule of law is once again enforced, with its legal principles applicable to rulers and governed alike, cases of torture nevertheless continue to occur despite the determination of the government authorities, the judiciary, lawyers, the press and human rights organisations to eradicate it.

At the constitutional and legislative levels much has been done. Article 15 of the Spanish Constitution approved in December 1978 expressly prohibits torture together with inhuman or degrading treatment and punishment. Law no. 31 of 17 July 1978 introduced a new article 204 bis to the Penal Code, which creates the specific offence of torture punishable by imprisonment and suspension or removal of the torturer from his post. A series of amendments to the Penal Code and the law on criminal procedure, a new law on the protection of fundamental rights of the person, a law of 1984 regulating the remedy of habeas corpus, all have the effect of providing legal remedies against torture and ill-treatment and represent important instruments for combating torture.

In addition to these legislative advances, a somewhat disturbing law was approved in October 1984 on the Activities of Armed Bands and Terrorist Elements. Some of its provisions may adversely affect certain fundamental rights, for example, the vague definition of the kinds of action it penalises and the length of time detainees may be kept incommunicado.

Internationally, Spain has ratified or adhered to instruments prohibiting torture and cruel, inhuman or degrading treatment or punishment. One example is the International Covenant on Civil and Political Rights of December 1966 (although its Optional Protocol, which grants the right of individual petition to victims or their representatives, has not yet been ratified). Another is the European Convention on

Human Rights of November 1950, including the jurisdiction of the European Commission to hear individual complaints. A Human Rights Office has been established in the Ministry for Foreign Affairs staffed by experts and the Ministry of Justice has organised discussions and training courses in human rights for members of the judiciary, police officers and prison staff.

The judiciary has reacted energetically to the demands made upon it and has already sentenced a large number of officials found guilty of illegal treatment of detainees. Although in many of these cases the victims were political opponents who supported violent action, especially members of the Basque organisation ETA, others were simply citizens suspected of having committed ordinary crimes. The following are some examples:

- The Provisional Court of Almeria, in July 1982, sentenced a lieutenant-colonel, a lieutenant and a guard, all members of the Civil Guard of Almeria, to 24, 15 and 12 years imprisonment respectively for the murder of three young people wrongly suspected of ETA terrorist activities who were spending their holidays in the Province. While this case did not involve torture (the subject of this article) it is nevertheless worthy of note. It was the first time that members of the Civil Guard were tried by an ordinary civilian court for crimes committed in the performance of their duties.
- The District Court of Lugo, early in 1984, sentenced four members of the municipal police to five days' detention for the ill-treatment of two young people. The Mayor of the District subsequently suspended them from their posts as a further punishment.
- In February 1984, proceedings began in the Provincial Court of Bilbao of three

members of the Civil Guard accused of torturing a citizen who was charged with having taken part in an attack on the Civil Guard in which six members of the Guards lost their lives. The citizen was eventually absolved of all charges. The trial of the Guards has not yet ended, but a conviction is expected.

- In March 1984, the Provincial Court of Gerona convicted five members of the Civil Guard (a lieutenant, a corporal and three guards) for torture and ill-treatment of four local fishermen whom they suspected of having taken part in smuggling a parcel of hashish which they had actually come across by accident while fishing. The penalties imposed on the guards were several months' imprisonment and suspension from their posts for four months.
- In May 1984, the Provincial Court of San Sebastián condemned a member of the Civil Guard for torturing a person suspected of having stolen 300 grammes of gold. The guard was sentenced to six months' imprisonment, a fine and payment of compensation and he was forbidden to exercise his profession for six years.
- In November 1984, a judge of the district of Elda sentenced five members of the municipal police of Alicante and four from Aspe to three months' imprisonment each and four months' suspension from their posts for torture and ill-treatment. The victims were three young people suspected of various thefts, who were eventually cleared of all suspicion. In the course of the proceedings against the police officers, the acting prosecutor, in asking for an exemplary sentence to be passed on them, said "delinquency cannot be combatted by committing new offences".
- In the same month, the Provincial Court of Madrid ordered two inspectors of the

higher police corps of Madrid to be detained and tried for the death under torture of a member of the national police, who had been arrested by them for insulting them in a bar. After his death, the Unified Police Trade Union (SUP), which had only recently acquired legal status, expressed "with the greatest firmness its abhorrence of torture and ill-treatment".

A number of cases brought by persons who allege that they have been tortured and ill-treated in police stations or Civil Guard barracks are now being heard in different courts and tribunals in Spain.

By providing regular and full information on this subject, the Spanish press has helped to create a forceful current of public opinion against every kind of torture and ill-treatment.

The Association for Human Rights of Spain has published various reports on these questions and has also dealt with them in its annual reports on the status of human rights. It has analysed and provided information on prison conditions, after visiting a number of prisons with the consent of the authorities. In its 1984 report on human rights, the Association drew attention to the sentence passed by the Provincial Court of Ciudad Real on the director and eight officials of the top security prison of Herrera de la Mancha for the ill-treatment of prisoners. The sanctions imposed were suspension from their posts for periods of two to three years. On the other hand, the Association points out that the General Directorate for Prison Establishments has for the last twelve months "carried out in prisons a programme based on respect for human rights to bring about the humanisation of prison establishments and to improve the treatment of the inmates".

Finally, an extremely important deci-



sion was given by the Constitutional Court in December 1984. In hearing a petition brought by the remedy of *amparo* against a sentence of the Labour Court it was argued on behalf of the petitioner that evidence considered by the petitioner to have been unlawfully obtained should not have been taken into account in passing sentence. The Court decided that, although there was no legal rule expressly specifying that evidence unlawfully obtained was inadmissible, it was clearly impossible that evidence unlawfully obtained should be admitted. This impossibility derived from "the primordial position of fundamental rights in the juridical system and from their established inviolability (article 10.1 of the Spanish Constitution)". The Court pointed out that in such cases a "conflict of interests" is created between the necessary search for truth and the procedural guarantees that protect citizens. Such guarantees

cannot be superseded when fundamental rights recognised by the Constitution are in question. It stated as its conclusion that all evidence obtained in violation of fundamental rights must be declared null and void.

Although the case that was being heard was not one of torture, the principle that emerges from this sentence is perfectly applicable to cases where confessions or evidence implicating third parties have been extracted by torture or ill-treatment. Such confessions or evidence must be considered invalid and cannot be used as evidence in legal proceedings. This is in accordance with the provisions of various international instruments (e.g. article 8, no. 3, of the American Convention on Human Rights, and article 15 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984).

## Uganda

Six years after the fall of the dictator Idi Amin Dada, Uganda still has not succeeded in regaining the image which earned it the epithet of "Pearl of Africa". Insecurity reigns in some areas, especially in the region of Luwero and in the north and northwest of Kampala. This is said to be due not only to a resurgence of guerrilla activities in early 1983 but more especially to the notorious lack of discipline among the soldiers of the Ugandan regular army. In an interview published in the New York Times of 20 August 1984, Mr. David Anyoti, Ugandan Minister of Information, himself declared that 15,000 people had been killed in the course of political and

tribal disturbances since Mr. Obote's return to power. However, this figure is far below the estimate made by Mr. Elliot Abrams, U.S. Assistant Secretary of State for human rights and humanitarian affairs, who claims that human rights violations resulted in 100,000 to 200,000 deaths in Uganda during this period. However, this figure, which had already been advanced by several groups of opponents in exile in the United States and Great Britain, seems exaggerated and is not supported by any adequate evidence.

These violations continued to take the form of extrajudicial detentions and executions, disappearances, torture, and

arbitrary arrests and detentions. Concentrated in three regions, they reflect the ethnic rivalries which are a powerful obstacle to the reconstruction of the country. The population of the Western Nile is the chief target of Ugandan soldiers, since the Western Nile was the region of origin of Idi Amin Dada. The great majority of the population has been forced to flee and take refuge in Southern Sudan. A businessman from Amin's Kakewa tribe was assassinated by the army upon his return from exile. He had come back voluntarily to Arua, the capital of his home province, where he was arrested by the police. Ten days later, despite the efforts of the civil authorities and the police to save him, he was beaten to death by soldiers who had forced their way into his prison. This affair led the United Nations High Commissioner for Refugees (HCR), to suspend the voluntary repatriation in the Western Nile province of thousands of Ugandans who had found asylum in Zaïre.

The army's second target is the Karamojongs, whose region (Karamoja) has been the scene of veritable carnage, including helicopter raids, razing of villages and the murder of civilian populations.

The Luwero-Mpigi-Mubenda triangle to the northwest of Kampala, a stronghold of the Buganda tribe, is another target of the Ugandan army, claiming thousands of victims. This behaviour of the "forces of order" has greatly impeded the action of humanitarian organisations. One of the best-known examples occurred on 30 July 1984, when soldiers attacked a vehicle of the International Committee of the Red Cross (ICRC) with machine-guns, wounding an Irish nurse and two Ugandan Red Cross staff members, and stole drugs and medical equipment.

The question arises, why this wave of violence followed in the wake of such a despicable dictatorship as that of Idi Amin

Dada? We must first recall that in 1971 Milton Obote's government was overthrown by Idi Amin, who was to suffer the same fate in 1979 as a result of joint action by the Ugandan guerrillas and Tanzanian troops. A government was set up under the leadership of Professor Lule on 11 April 1979. On 20 June 1979, however, the National Consultative Council, composed of 30 members, announced that it had decided to replace Professor Lule as President of the National Executive Committee (i.e. of the government) and Chief of State and elected Mr Godfrey Lukongwa Binasa in his place. The reasons put forward by the Council were that Professor Lule had "ignored the democratic methods of making decisions of vital importance for the nation" and "personalised power by putting an end to the functions of certain ministers considered to be elements of ex-President Obote and the left". This decision gave rise to protests in Kampala, organized essentially by the Bugandas who were opposed to a possible return to power of ex-President Obote. Repression of these manifestations resulted in 3 deaths and some 50 injured. On 23 June, President Binasa announced that democratic elections would take place within 22 months. But violence and terror had already made their appearance, especially in Kampala. On 13 May 1980, President Binasa was divested of his functions by the Military Committee of the Ugandan National Liberation Front, which accused him of corruption, tribalism, and attacks on the morale of the Army and the respect due to the armed forces. The latter two accusations appear to be bound up both with the decision taken on 10 May by President Binasa to nominate General Oyite-Ojok as Ambassador in Algeria on the grounds that his absence might result in the improvement of the poor relations that existed between the army and the civilian population, and with the climate of insecurity which

was worsening daily.

The Military Commission that followed the provisional government postponed the elections planned for 30 September 1980 until 10 December of that year. These parliamentary elections were to be the first since the country's independence in 1962. The first parliament had been elected in April 1962, shortly before independence. At the proclamation of the results the declared distribution of seats among the parties was: Ugandan People's Congress (UPC) 72, Democratic Party (DP) 51, Ugandan Patriotic Movement (UPM) 1, and Conservative Party (CP) 0. In two districts that had been affected by acts of violence, Kabale and Iganga, the electoral commission ordered a new vote to be held. Dr Obote, the UPC candidate for President, was declared elected and was sworn in on 15 December 1980. In his inaugural speech, he declared that "democracy and the rule of law are once again proclaimed in Uganda". A month later, the curfew that had been in effect in Kampala since 1979 was officially cancelled, but in practice it remained owing to the acts of violence which continued in the capital, and then spread further afield. This violence was caused by "guerrilla groups" opposed to Obote's government, and by members of the Ugandan army. Indeed, even before Obote's accession to power it had been reported that soldiers belonging to the Acholi tribe had murdered members of the Lugbara and Kakwa tribes, considered to be the main supporters of ex-President Amin. In a report published by the *Uganda Times* of 11 March 1981, a Catholic missionary stated that government forces had assassinated hundreds of villagers, including old people, women and children.

President Obote issued directives concerning the army's behaviour, stating that officers and soldiers should never interfere with people, pillage their goods or commit

other crimes. He urged the army to seek the goodwill of the civilian population. And indeed, two days after the proclamation of these directives, General David Oyite-Ojok, Armed Forces Chief of Staff, announced that 50 soldiers had been discharged from the army and immediately arrested for misconduct. The situation did not improve for all that. Allegations of grave violations of human rights made both by politicians of the opposition and Amnesty International were denied by the government, which persisted in claiming that the lack of security and the assassinations were due to "guerrilla groups" wearing army uniforms. In addition to forbidding the appearance of several newspapers that had spoken of its actions in critical terms, the government expelled a number of foreign correspondents who had commented unfavourably on the state of security in Uganda, not to speak of the pressure exerted on the local press.

Towards the end of 1983, the situation appeared to be improving partly as a result of the decline of the guerrilla-group, the Uganda Freedom Movement (UFM), following the arrest of its leader, Mr Balaki K. Kirya, on the one hand, and difficulties encountered by the National Resistance Army (NRA), the main antigovernmental guerrilla movement, on the other. The principal reason, however, appears to be related to the efforts undertaken by the authorities to discipline the government forces. Unfortunately, the respite did not last long, for immediately after the death of General Oyite-Ojok in a helicopter accident in December 1983, the government army relapsed into characteristically undisciplined behaviour, a situation which was further aggravated by the ethnic rivalry between Acholis and Langis, who make up the great majority of the armed forces. Even today, it is the soldiers who, abusing their authority, perhaps out of a fear of losing control of the

situation in the face of the "guerrillas", and still enjoying virtual impunity, continue to contribute to the spread of terror in Uganda.

In a memorandum addressed to President Obote in 1982, the Ugandan religious leaders denounced the crimes committed by the army on the pretext of searching for arms. They said that road blocks had been turned into places of torture, especially when erected by soldiers who seemed to have no respect for anybody. Even clerics have been their victims. Women have been forced to undress at gunpoint, and the soldiers have robbed children and old people. In a word, the road blocks have been used to fleece the population rather than to uncover dangerous weapons.

In April 1984, the Anglican church of Uganda expressed its concern about the violations of human rights, declaring that the army had lost none of its violence and continued to perpetrate atrocities. It joined with the Ugandan Catholic church to appeal for a change of heart and a dialogue between the government and all segments of Ugandan society.

While certain atrocities can be attributed to either the army or "guerrilla groups", others, for example the detention of political prisoners in military camps, the use of torture there, disappearances in military prisons, and the use of the Security and Order Act, can be attributed to the army alone. The persistence of those abuses is all the more deplorable in that the Ugandan parliament adopted a law in June 1984 to remove the army's power to arrest civilians. Until that time, the army could arrest civilians but did not have the power to detain them. Despite this legislation, reports continue that thousands of Ugandans are arrested by Ugandan soldiers at home, in their villages or at road blocks and taken directly to military camps where they are detained without trial and subjected to tor-

ture and other forms of cruel, inhuman or degrading treatment. The Ugandan government denies these allegations, while refusing access to the military camps, even to the ICRC.

In August 1983 the International Commission of Jurists received a detailed account by a Ugandan torture victim who had succeeded in escaping and fleeing the country. He had been held for several weeks in a military camp where he was subjected to atrocious tortures for long periods. He had been beaten with metal cables and iron bars in addition to being kicked by the soldiers. His whole body still bore signs of this treatment. He was able to escape only by virtue of the fact that after a torture session he had been considered dead and had been put into a truck with the corpses of other victims. He said that many prisoners, men, women and children, had been beaten, shot or bayoneted. Others had been executed by a firing squad. He estimated that some 200 people were killed during the weeks he was in the camp.

Reliable reports speak of extremely precarious detention conditions in certain prisons. A case in point is that of Luzira, where deaths are said to have occurred for lack of medical care. On 27 July 1984, the Ugandan Minister of Internal Security announced the liberation of 700 inmates from Luzira prison. He stated that this measure was taken as part of "the national policy of reconciliation" under President Obote. Well before that date, another salutary measure was the obtention by the ICRC of the right to visit and provide aid to the thousands of people held in prisons and police stations under the control of the Ministry of the Interior. However, the authorities would gain in credibility if they also accorded the ICRC the right to visit the army camps.

The situation of people held indefinitely in police stations or prisons by virtue of the Security and Order Act without being

charged or tried is the object of considerable concern. This is so despite the fact that the Ugandan Constitution guarantees certain basic rights of persons held by virtue of a special detention law. These guarantees written into Article 10(5) of Chapter Three of the Constitution are:

- (1) they must be given a written statement within 28 days specifying the grounds of detention, and an opportunity to make representations in writing to the President or Minister responsible;
- (2) their cases shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice... within two months of detention and thereafter at intervals not exceeding six months;
- (3) they must be allowed to consult legal representatives of their choice who shall be permitted to make representations to the tribunal;
- (4) they may appear in person or through their legal representatives when the tribunal is hearing their case;
- (5) the tribunal may make recommendations on the necessity or expediency of the detention or conditions of detention.

In practice, however, the majority of

these constitutional guarantees are not respected.

There is no denying that the Ugandan government, under the leadership of President Obote, has inherited a delicate and difficult situation from the socio-political point of view, as well as a catastrophic economic one. The authorities in Kampala have made efforts to revive the national economy, and this has been marked by a slight improvement in the economic indicators. Efforts at development are continuing, but they are unfortunately impeded by the lack of security that is still prevalent in certain areas. According to an official report quoted in *Le Monde* of 21 June 1984, law and order activities accounted for a quarter of the budget in 1982-1983, as well as a "large proportion" of extra-budgetary expenses. A wide-ranging amnesty before the forthcoming parliamentary elections planned between now and the end of the year would help to improve the situation in the prisons, and would be seen as a sign of the goodwill of the Ugandan authorities. Putting aside old quarrels in the national interest would contribute to the establishment of a more peaceful climate, conducive to the respect for and realisation of human rights, which have been severely violated by both government forces and "guerrilla groups".

## Uruguay Encouraging Return to Democracy

The presidential and legislative elections of 25 November 1984 were a landmark on the road to the restoration of democracy,

completing the slow but sustained process of rejection of the military dictatorship. The overthrow of the dictatorship was due

partly to its abuses and excesses but above all to the growing strength of democratic organisations, including the political parties, trade unions, student associations and human rights organisations, professional bodies and many other associations which the people created or re-created in defence of their rights and freedoms.

The vigorous demands for the restoration of democracy and the return of the military to their barracks created the conditions in which political parties and social forces – despite all the obstacles and prohibitions imposed by the military regime – were able to unite on a common platform based on four aims: rights and freedoms, work, wages and amnesty. This union was later consolidated by the formation of a National Bureau, which agreed upon a number of economic and social measures needed to bring the country out of its state of crisis.

These developments forced the military regime to call general elections, albeit subject to severe restrictions imposed by the government. Some parties and many leading personalities, including the leaders of the National Party (Blanco) and of the Broad Front (Frente Amplio), were not allowed to take part in them.

The elections, which were the first to be held since 1971, took place in a calm atmosphere and with no suggestion of falsification. The election was won by the Colorado Party, with 38.6% of the votes, the lawyer and journalist, Dr. Julio Maria Sanguinetti thus becoming Head of State. The National Party (Blanco) gained 32.8% of the votes and the Frente Amplio 20.4%.

On 15 February 1985, both chambers of the National Parliament assembled, as well as the Mayors and legislatures of the 19 Departments. The President of the Republic took office on 1 March.

From the first day of the government,

amid immense popular rejoicing, the rights and freedoms that had been in abeyance began to be restored. No time was lost, and the new government did not allow itself to be intimidated by the armed forces remaining in the wings. The government and parliament worked tirelessly to invalidate and rescind repressive laws and decrees, and in a few weeks practically all the rights and freedoms had been restored.

## Human Rights During the Military Regime

During the dictatorship the ICJ *Review* reported on various occasions as to the status of human rights in Uruguay<sup>1</sup>. Consequently, we shall confine ourselves here to a brief summary that will help to throw light on the situation facing the new government.

During the years of dictatorship, which some prefer to call authoritarian rule, government was based on the "doctrine of national security". Human rights and even the functioning of the State itself were subordinated to this concept. "Security" was primordial. The armed forces established extremely tight control over the population which extended to the smallest aspects of national life. The methods used were many and various. The Constitution was disregarded and illegally amended by 19 'Institutional Acts' which changed the structure of the State.

The country had lived under a state of emergency (known as the application of the 'prompt security measures') for 16 years, i.e. from before the military coup. Originally imposed to counter the activities of the Tupermaro guerrilla forces, it was continued by the military authorities as an instrument of repression long after those

1) ICJ *Review* nos. 16 (July 1976), 24 (July 1980), 27 (December 1981) and 31 (December 1983).

forces had been overcome. From the time of the military coup in June 1973 the parliament was suspended and the military authorities concentrated in their hands all the constituent, elective and legislative, as well as many of the judicial powers. No elections were held. The authorities established by the Constitution or by popular election were replaced by officers of the armed forces or by civilians who supported the regime. The position of Head of State was assumed by the Lieutenant General designated by the armed forces.

All political parties, student organisations and trade unions were banned. The right to strike, which is recognised by the Constitution, was rescinded and the rights of assembly and association were strictly limited. Some 11,000 citizens had their political rights suspended for fifteen years. The press was under constant censorship, and more than 150 decrees were enacted closing newspapers and publications and cancelling broadcasts, without any recourse to the civilian courts. Roughly 10,000 State employees were dismissed for ideological, political or trade union reasons, including teachers and university staff. A government "intervenor" was placed in the University and other education bodies and the curricula were modified so as to comply with the doctrine of 'national security'. The repression was particularly severe in the field of culture, a ban being placed on the works of certain writers, artists and folk singers.

The judiciary was formally deprived of its independence by an Institutional Act, but already before the coup civilian courts began to be superseded in July 1972 by military tribunals for the purpose of trying civilians accused of violating or endangering State security. The military judges, who were subordinate to the government, were mainly officers in the armed forces, not lawyers, who failed to respect the defence rights of the accused. The function of coun-

sel for the defence became hazardous and several of these lawyers were imprisoned or driven into exile. More than 5,000 civilians in a country with only 2,800,000 inhabitants were sentenced to very long prison terms for having committed purely political offences. Other detainees awaiting trial for political offences – who were in their tens of thousands – were held incommunicado for long periods. *Habeas corpus* was not applicable in cases before military tribunals. There was also administrative detention without charge or trial, which lasted for an indefinite period.

Torture was practiced systematically, and many detainees died as a result of torture. In the jails for political prisoners, which were run by the armed forces, the treatment of the inmates was categorised by the United Nations Human Rights Committee as "cruel, inhuman and degrading". Political opponents "disappeared" or were assassinated.

In short, the comprehensive laws guaranteeing human rights were either annulled or existed only in theory. They were never enforced when the armed forces or police were responsible for violations, or when the violations related to matters viewed as affecting or threatening the security of the State. The absence of the parliament, the judiciary's lack of independence, the ban on activities by human rights bodies, the persecution of lawyers, all combined to leave the majority of the population defenceless. Many thousands of people were forced by the repression into exile.

From the economic standpoint, the military administration brought the country to the verge of ruin. The application of a super-liberal economic model, which encouraged capital accumulation and foreign investment and the abolition of all protection for the national industry, reduced the role of the State in the production of goods and services and cut back subsidies for the

poorer classes. The productive system was left partly paralysed, while the rate of unemployment was 16% according to the regime's figures and 20% according to the trade unions. Through inflation, the purchasing power of wages dropped 55% in ten years, and the external debt, largely used to maintain the machinery of repression, rose from 700 million dollars to over 5,000. To sum up, the result was the concentration of wealth in the hands of a few, benefits for transnational enterprises and for a few national companies, and a serious fall in the standard of living of most of the population.

The military government left behind a legacy of great confusion with regard to the Constitution. Under the dictatorship they had amended the 1967 Constitution by a series of Institutional Acts promulgated by Presidential decree, without being submitted to a popular plebiscite for ratification as required by the Constitution. The last of these Institutional Acts, no. 19, paved the way for the return to civilian rule. It provided that all laws and administrative acts since June 1983 are to remain in force unless and until amended, annulled or replaced by the new government. Some Institutional Acts have not been repealed but are to remain in force with a lower ranking, namely that of ordinary laws. Consequently, they remain valid in so far as they do not conflict with the 1967 Constitution. This leaves many constitutional matters in doubt.

### The First Measures Adopted by the New Government

The measures already adopted by the new government, as well as those under consideration, have surprised by their extent even the most optimistic. In a few weeks, all human rights and fundamental

freedoms were re-established and work is in hand to strengthen them even more.

The delegation of the new government at the United Nations Commission on Human Rights in Geneva made an important statement on 8 March 1985, saying that "The belief of all parties in Uruguay is that human rights cannot be considered as a matter of domestic jurisdiction and that the violation of human rights in one of the States Members endangered the health of the whole international community".

The following are the principle measures adopted:

#### (1) *Amnesty for political prisoners and persons persecuted for political reasons*

On 9 March 1985 an amnesty law, no. 15.737, was promulgated. The law enabled all political prisoners to be freed and the last one left prison on 13 March. It also implied the possibility of returning for nearly all the exiles, the ending of police surveillance of prisoners on parole, the dismissal of pending criminal proceedings and the cancellation of all warrants for arrest.

The political offences which were amnestied were defined in the law as offences "committed for political motives" and ordinary offences related to the political offences (i.e. those committed by accessories to a political offence or to enable the principal offenders to escape). The offences amnestied are those committed after January 1962, thus going back to the origins of the political violence in Uruguay. In consequence, members of the guerrilla organisations benefitted from the amnesty.

The following persons were nevertheless excluded from the amnesty:

- the perpetrators and co-perpetrators of a deliberate and consummated act of murder (this applies equally to members of



- the guerrilla forces and agents of the security services);
- members of the police and armed forces and those connected with them (such as medical personnel) who had participated in any way in the application of inhuman, cruel or degrading treatment to the detainees or in the detention of persons who subsequently disappeared, and to persons who covered up their conduct;
  - military personnel or civilians in the public service who had committed offences in the purported exercise of their official powers.

Thus, in order to achieve the aims of national pacification, and for the humanitarian reasons we have already mentioned, persons guilty of intentional and consummated homicide who were in prison will have their sentences formally reviewed (article 9). For this purpose, the Criminal Courts of Appeal (civil) will be given four months in which to determine the new sentences. If these condemn the person to imprisonment, each day served in prison shall count as three days of the sentence. This ratio of three for one has been established in view of the special hardships they endured in prison. Under the Amnesty Law, however, the Supreme Court had power to order the immediate release of political prisoners if, as a result of this ratio, they had served the maximum possible sentence. In fact, all the political prisoners were released under this provision.

## (2) Administration of justice

Institutional Acts nos. 8 and 12 (of 1 July 1977 and 10 November 1981 respectively) had put an end to the independence of the judiciary, of which Uruguay had been justly proud. Act no. 8 has already been repealed, but many of the provisions

of Act no. 12 remain in effect, although with the force not of constitutional but of ordinary law. Parliament is studying this matter with a view to repealing any provisions that affect the independence of the judiciary since the authorities have given priority to its full restoration. At the present time, all the articles of the Law on State Security and its supplementary laws that created so-called offences and gave military tribunals jurisdiction to try civilians, have already been repealed by article 17 of the Amnesty Law. Military tribunals will no longer try civilians, a practice which had been criticised both nationally and internationally.

As a consequence of exclusions of certain offenders from the amnesty law, any person who feels that his or her rights have been injured or affected by such offences may seek redress and justice in the ordinary courts. Many criminal charges have already been formally lodged, in which members of the armed forces and police force have been accused of such crimes. The President of the Republic has stated publicly that his government would not seek vengeance in any case whatsoever, but that it would not be legitimate to prevent persons injured in their rights from making a legal complaint to the courts. The victims are able to claim damages in the criminal proceedings.

Also repealed was a law authorising the confiscation of property in cases of political offences, and the return of such property to its rightful owner was ordered with the exception of the instruments used to commit it.

## (3) Re-establishment of freedom of expression

The laws which had restricted this were repealed, in particular those relating to the press, radio and television. The rights of meeting and assembly were also restored.

#### (4) *Restitution of political rights*

The government rescinded all laws restricting political activities whether of parties or of individuals. On 1 March 1985 there were still some 4,000 people subject to the ban. With regard to parties, the Communist Party and other left-wing parties, including the *Movimiento de Independientes 26 de Marzo*, the *Unión Popular* and the *Revolutionary Communist Party*, became lawful again.

#### (5) *Re-establishment of trade union rights*

The *National Workers Confederation (CNT)* and the *Plenario Intersindical de Trabajadores (PIT)*, the two trade union federations that had been outlawed by the dictatorship, were legalised. The effect of this was that all workers' organisations and unions recovered their rights. Moreover, the government returned to their legal owners the premises and union property which had been occupied and confiscated by the armed forces and the police. The right to strike was also restored.

#### (6) *Reinstatement of public officials*

The military regime's "purge" of the public service had resulted in some 10,000 dismissals, more than half of them in education. One of the most popular demands was for the restoration to their posts of all the public officials who had been dismissed on ideological, political or trade union grounds.

The amnesty law recognised the right of public officials who had been dismissed for the reasons indicated under Institutional Act no. 7 of 27 June 1977, to be restored to their posts. By this means several hundred officials were reinstated in their posts. Parliament also approved a general law, or-

dering the restoration to their posts of all officials dismissed on ideological, political or union grounds, but by other procedures than those in Institutional Act no. 7.

There is no easy solution to the problem of reinstating all these people in their former employments and grades when several years have gone by and new officials have been appointed to fill the posts. It is not the aim of the legislation to give rise to new dismissals, except for persons who had obviously been appointed in an illicit manner to fill posts that were far beyond their qualifications.

Parliament is also studying a solution for workers in the private sector who were dismissed for similar reasons since the regime approved a decree in July 1973 authorising employers to dismiss employees without the compensation required by the law when they were engaging in prohibited trade union activities such as strikes or the creation of a union.

#### (7) *Education*

The autonomy of the *University of the Republic* was restored, "interventions" ceased in all branches of education and educational authorities were appointed for schools and other establishments in accordance with the provisions of the Constitution and the relevant basic laws.

Since December 1973 the *University* had been "intervened" by the Executive and its rightful authorities had been imprisoned and replaced by supporters of the regime designated by the government, although the law specified that appointments should be made by the teaching staff, graduates and student body. Similar "interventions" took place in other branches of education (primary, secondary and technical). This period was characterised by open political persecution of teachers, officials and students through the medium of suspen-

sion, dismissal and prohibition of study, and the amendment of the curricula, all this with the aim of creating an educational system based on criteria laid down by the military regime. Fortunately, the regime failed to achieve its aim thanks to the resistance of the teaching staff and students, but there was nevertheless a definite deterioration in the quality of the education.

### (8) *Parliamentary Commissions of Inquiry*

The House of Representatives decided to create such Commissions, under article 120 of the Constitution, to throw light on a number of crimes that occurred during the military regime:

- a Commission to investigate the fate of 22 Uruguayan and 2 Argentine citizens who "disappeared" in Uruguay; in some cases there is evidence that the disappeared persons were being held in military units;
- a Commission to investigate the cause of death of political prisoners in military prisons and in police and military units (about 90 cases);
- a Commission to investigate the assassinations in Buenos Aires, Argentina, of the former Senator Zelmar Michelini and the President of the Chamber of Deputies of Uruguay, Héctor Gutiérrez Ruiz. Two other Uruguayans - Rosario Barredo and William Whitelaw - were assassinated with them. Although these murders took place in Buenos Aires, it is believed that they were carefully planned at a high level in Uruguay and that the actual killers were Uruguayans acting with the complicity and help of the Argentine security services.

These Commissions, which will be composed of parliamentarians from the differ-

ent parties, will not be called upon to sit in judgment but will gather information for transmission, when appropriate, to the competent judicial authorities for use in trials. This is a satisfactory solution, since parliament will have greater means than the ordinary legal authorities to undertake an inquiry that would bear on members of the former government and of the security forces. The last word will remain with the judiciary, after a trial with due process.

### (9) *Signature and ratification of international human rights instruments*

By the Amnesty Law the American Convention on Human Rights (Pact of San José, Costa Rica) of 22 November 1969, has been ratified and the jurisdiction of the Inter-American Commission on Human Rights and of the Inter-American Court on Human Rights has been accepted.

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of December 1984, was hardly open for signature when Uruguay signed it, and it is now being considered for ratification by parliament.

In terms of domestic legislation, the legislature is discussing a bill on the Defence of Democracy, which will establish new criminal offences and other measures intended to prevent another military coup d'état.

### (10) *Human rights organisations*

The Peace and Justice Service (SERPAJ) was rehabilitated after being outlawed, having played a leading role in denouncing the violation of human rights and in aiding victims during the dictatorship. The Uruguayan Commission for Human Rights, which had never been recognised by the regime, although it consisted of distinguished

persons of different political persuasions, was granted official recognition and authorisation. This Commission had also made a valuable contribution to the struggle for human rights.

(11) *Renewal of diplomatic relations with Venezuela*

Relations had been broken off in 1976 because of a serious incident which occurred in the Venezuelan Embassy in Montevideo. This involved the kidnapping, with violence, including attacks on Embassy officials, of the teacher Elena Quinteros, who subsequently disappeared. The democratic government of Uruguay has now undertaken to investigate this affair.

(12) *The return of the exiles*

A governmental Commission of Reparation set up the Amnesty Law, which is responsible for assisting the return to the country of all exiles who wish to do so. The Commission has already contacted the Office of the United Nations High Commissioner for Refugees (UNHCR), and the Inter-Governmental Committee for Migration

(ICM) in order to request financial assistance to enable many thousands of Uruguayans, mainly exiled in Europe, the Americas and Australia, to return home.

## Conclusion

A great deal has already been done by the new government in Uruguay, which has had the support of the population on the premise that the main national purpose at the present time is to strengthen democracy. But the magnitude of the task of overcoming the immense problems facing the country while restoring fundamental freedoms under the Rule of Law, and of eliminating all fear of another coup d'état, calls for the cooperation of everyone – the government, opposition parties, social forces, popular associations, churches and the general public.

To consolidate the renaissance of democracy in Uruguay as in Argentina, Bolivia and Brazil, entails the creation of a far more favourable climate for the development and observance of human rights throughout Latin America.

# COMMENTARIES

## UN Commission on Human Rights

The 41st Session of the UN Commission on Human Rights was held in Geneva from 4 February to 15 March 1985. As on previous occasions, the Commission began by discussing at length the situation in the Israeli occupied territories, the right to self-determination, and South Africa and apartheid.

### Israeli occupied territories

The resolution on Israel restated the Commission's position that the occupation itself constitutes a fundamental violation of the human rights of the population of the Palestinian and other occupied Arab territories, and strongly condemned the Israeli policies, practices and administrative and legislative measures to promote and expand its settlements in the occupied territories. A separate resolution deplored the inhuman treatment and terror applied to Syrian citizens in the Golan Heights.

### Self-determination

Resolutions were adopted concerning Afghanistan, Kampuchea, South Africa, Palestine and Western Sahara. That on Afghanistan called for a political settlement on the basis of the withdrawal of foreign troops and full respect for the independence, sovereignty, territorial integrity and non-aligned status of Afghanistan. On Kampuchea, the repeated military attacks between November 1984 and January 1985

by the occupying troops against civilians along the Thai-Kampuchea border were deplored, and the Secretary-General was requested to intensify his efforts to bring about a comprehensive political settlement. On South Africa, states were urged to provide all moral and material assistance to the oppressed people of South Africa and Namibia, and the continuation of the illegal occupation of Namibia and South Africa's attempts to dismember its territory were strongly condemned. The resolution on Palestine reaffirmed the inalienable right of the Palestinian people to self-determination and urged all states to extend their support to the Palestinian people through the Palestine Liberation Organisation. On Western Sahara, the Commission welcomed the efforts of the Organisation of African Unity and decided to follow the development of the situation.

### South Africa and apartheid

Under this item the ICJ Secretary-General urged the Commission to ask the General Assembly to consider Professor John Dugard's proposal that the World Court be asked for an advisory opinion on the legality under international law of the South African legislation depriving blacks of their citizenship. He summarised the arguments in Professor Dugard's article published in *ICJ Review* no. 33 in December 1984. There appeared to be considerable interest in the proposal, but the African group considered that further thought should be given to it

before taking any action. In consequence, no resolution was proposed.

There were in all five resolutions dealing with South Africa, Namibia, the Convention on the Crime of Apartheid and Racism and Racial Discrimination. The Commission denounced the fraudulent constitutional and political schemes through which the illegal racist regime of South Africa is attempting to perpetuate its colonial domination of Namibia, expressed its profound indignation at the continued violations in South Africa, particularly the intimidation and suppression of opponents of apartheid, indiscriminate arrest and torture of political activists and the use of violence in dealing with legitimate protests and demonstrations. In a separate resolution under the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination, it was decided to consider a particular theme each year. For 1987, it chose the theme of 'International assistance and support to peoples and movements struggling against colonialism, racism, racial discrimination and apartheid', and recommended to the ECOSOC that a seminar on this theme be held in Africa in 1986.

## The Sub-Commission

The resolution on the Sub-Commission contained a number of implied criticisms. The Commission again stressed that States should nominate as members and alternates persons meeting the criteria of independent experts, who are not subject to government instructions. It emphasised that alternates are elected to cover situations in which a member is unavoidably absent and that this should be taken into account in the participation of alternates. It also invited the Sub-Commission to seek the widest possible measure of agreement on its draft resolutions and to bear in mind that resolutions

should reflect thorough discussions and should be consistent with the role of the Sub-Commission as a body of independent experts. It endorsed the Sub-Commission's suggestion that its election procedures should be changed to provide for greater continuity and requested the Secretary-General to submit a report on how to achieve this.

Based on the Sub-Commission's report, the Commission adopted resolutions which:

- authorised the Sub-Commission to appoint a Special Rapporteur to prepare on an annual basis a report on the respect for rules governing the declaration of a state of exception, and to prepare a list of countries that have declared or terminated a state of exception;
- authorised the Sub-Commission to entrust Mr. M. Bossuyt with preparing an analysis of the proposal to elaborate a second optional protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty;
- requested the ECOSOC to consider the Sub-Commission's proposal for the establishment of a voluntary fund for indigenous populations;
- endorsed the recommendation to the ECOSOC to print the Conclusions and Recommendations of Mr. Martinez Cobo's report on discrimination against indigenous populations, and to issue the full report in a consolidated form for wide dissemination.

On the request of the Sub-Commission for special rapporteurs on unlawful human experimentation and on the human rights implications of recent advances in computer and micro-computer technology, the Commission requested the Sub-Commission to integrate them in the work already being undertaken under the agenda item 'Human

Rights and Scientific and Technological Developments'.

### **The administration of justice and the human rights of detainees**

Speaking under this item, the ICJ Secretary-General brought to the attention of the Commission the widespread use and abuse of administrative detention without charge or trial. He stated that in at least 85 countries there are laws permitting this practice and in 43 of these countries it is for an indefinite period. In practice it often lasts for years and even decades. In addition, abuses frequently accompany this form of detention and detainees are held in conditions far worse than those of convicted criminals.

The Commission adopted a resolution requesting the Sub-Commission to analyse available information about the practice of administrative detention without charge or trial and to make recommendations regarding its use.

Under the same agenda item the Commission welcomed the adoption of the Convention Against Torture and decided to appoint for one year a special rapporteur to examine questions relevant to torture.

In a separate resolution the Commission strongly condemned Israel for its policies of ill-treatment and torture of Palestinian detainees in Israeli prisons, and urged Israel to release all civilians arbitrarily detained in the Lebanon and to treat all captured combatants as prisoners of war.

### **Missing and disappeared persons**

The Working Group on Disappearances reported that it has decided to retransmit

to governments summaries of all the cases transmitted since the establishment of the Working Group with a request for specific information, and to send written reminders between sessions. Further, it has decided to continue the urgent action procedure by which communications are cabled to governments by the Chairman of the Working Group. A higher percentage of cases had been clarified under this procedure. One of the Working Group's meetings in 1984 was held in San José, Costa Rica, facilitating greater exchange with NGOs in the region, and two members of the Group went to Bolivia at the request of the government to assist the National Commission of Investigation of Disappeared Persons.

Based on this experience the Working Group asked for adequate resources to hold two of its three meetings outside Geneva and for up to three missions by two members of the Group but no decision was taken on this request. It also asked for extension of its mandate for two years. The Commission extended the mandate for one year and decided to consider next year the possibility of extending it for two years.

### **Chile**

The Commission once again expressed its dismay at the suppression of Chile's traditional democratic legal order and institutions and called on the Chilean authorities to put an end to the regime of exception with its intimidation and persecution.

Professor Fernando Volio Jimenez of Costa Rica was appointed Special Rapporteur in place of Justice Rafsoomer Lallah who resigned due to his other commitments.

## Gross violations

The Chairman announced that situations relating to Albania, Haiti, Paraguay, Philippines, Turkey and Zaire were under consideration under the Confidential Resolution 1503 procedure and that the Commission had decided to discontinue the consideration of Benin, Indonesia (East Timor) and Pakistan under this procedure.

The Commission also decided to discontinue the consideration of Uruguay which had been under consideration for the past seven years. As requested by the new democratic government, the Commission decided to make public the material relating to Uruguay which has been before the Commission under the 1503 procedure.

Speaking on the general debate under this item, the Netherlands delegate commented that the confidentiality requirement in ECOSOC Resolution 1503 does not preclude public discussions of a situation under consideration provided that it is based on information other than the communications received by the UN from private sources. Giving the example of Paraguay, he stated that it was entirely correct for the Sub-Commission to propose and for the Commission to adopt a resolution concerning the state of siege in Paraguay, notwithstanding the confidential consideration, since knowledge of the state of siege was not derived from a private communication but was a matter of common knowledge based on the official legislation in force in Paraguay.

In the public discussion under this agenda item, the Commission had before it reports by Special Rapporteurs on Afghanistan, El Salvador, Guatemala and Iran.

### Afghanistan

In his final report on Afghanistan the

Special Rapporteur, Mr. Ermacora, concluded that:

"With the advent of the current regime, in December 1979, three significant factors appeared which have had and continue to have serious consequences for the human rights situation in the country. In the first place, the regime which was installed in December 1979, like its immediate predecessors, was a regime which was not elected by the people and which had never submitted to a free expression of will by the population and was therefore unrepresentative. In the second place, the regime instituted a series of reforms of which the least that can be said is that they proceeded at a pace that was apparently unacceptable to the population at large and were stoutly resisted by large segments of the Afghan people. Thirdly, the regime not only applied its reforms with severity, but requested and accepted that foreign armed forces join in their imposition, thus creating a situation of conflict.

...

"As a result of this situation, which is to be considered as a situation of gross violations of human rights, some 4 million Afghans have fled the country and sought refuge abroad in several countries, particularly Pakistan, the Islamic Republic of Iran and India."

In its resolution, the Commission deplored the refusal of the Afghan authorities to cooperate with the Special Rapporteur and expressed its distress at the widespread violations of the right to life, liberty and security of person, including the commonplace practice of torture against the regime's opponents, indiscriminate bombing of the civilian population and the deliberate destruction of crops. It urged the Afghan authorities to put a stop to the



grave and massive violations of human rights and in particular the military suppression being conducted against the civilian population.

### *El Salvador*

The Special Representative, Mr. José A. Pastor Ridruego, noted that in comparison with earlier years the number of political murders, detentions and disappearances of individuals had declined. Nevertheless, most human rights violations have still not been investigated, and the capacity of the judicial system to investigate violations continues to be patently inadequate.

The Commission, while extending the mandate of the Special Representative, expressed its deep concern that, despite the sharp drop in numbers, many violations continue to be committed, and urged the parties concerned to continue to hold a serious and realistic dialogue with a view to achieving a negotiated solution.

### *Guatemala*

Once again this year many NGO representatives considered that the report on Guatemala by the Special Rapporteur, Lord Colville, failed to reflect the real situation. Explaining his approach, the Special Rapporteur stated that: ". . . It is, however, impossible to confirm or deny allegations, and the Special Rapporteur considers it unlikely that his mandate requires him to pursue every such case to a firm conclusion, or that the Guatemalan authorities would welcome wide ranging inquiries by the United Nations Rapporteur. These are tasks for the police or government department in any country." This is a curious approach when it is above all the conduct of the armed forces, police and para-military organisations which is in question.

The Commission expressed its alarm at

the continuation of politically motivated violence, particularly killings, kidnappings and disappearances. It urged the government of Guatemala to ensure that all its authorities and agencies, including its security forces, fully respect human rights and fundamental freedoms.

### *Iran*

In his first report on Iran, the Special Representative, Mr. Andres Aguilar, noted that he had received several communications concerning allegations of violations but, for lack of direct contact with the government, he is not yet in a position to evaluate the information received. In his general observations, Mr. Aguilar, who is an extremely distinguished international lawyer, made an important statement on the principles of international law relating to serious violations of human rights. The text of his statement is reproduced at the end of this commentary.

The Commission endorsed the general observations of the Special Representative, expressed its deep concern at the number and gravity of the alleged violations of human rights, and urged the government of Iran to extend its cooperation to the Special Representative of the Commission.

Under this item on gross violations, a resolution was adopted on Southern Lebanon, in which the Commission strongly condemned Israel for "its human rights violations, assassinations, mass arrests of the civilian population, abductions, demolition of houses, desecration of places of worship and other inhuman acts" and called on Israel to put an immediate end to such repressive practices and release persons detained and abducted.

### **Summary and Arbitrary Executions**

In his third report, Mr. Amos Wako, the

Special Rapporteur, defined the scope of his mandate as being concerned with allegations relating to actual or imminent executions without trial, or with a trial but without due process, and deaths resulting from torture or lethal force by police, military or other governmental or quasi-governmental forces. He reported on his visit to Surinam in June 1984, to enquire into the death of 15 opposition leaders within hours of their arrest in December 1982. The Rapporteur sets out the various accounts of their death given respectively by the government and by others and came to the conclusion that they were victims of summary and arbitrary executions.

The Commission once again strongly deplored the large number of summary or arbitrary executions that continue to take place in various parts of the world.

### Economic, social and cultural rights

A vote was taken this year on the resolution on the right to development. The draft tabled by Senegal, requesting continuation of the Working Group of the Governmental Experts was amended by the vote. The Commission decided to transmit to the General Assembly the report of the Working Group and other documentation, so as to enable the Assembly to adopt a declaration on the right to development. It also decided to reconvene the Working Group for three weeks in January 1986 to study the measures necessary to promote the right to development and requested the Working Group to report on proposals concerning concrete measures to promote the right to development.

In another resolution the Commission invited the Directors-General of FAO, WHO, UNESCO and ILO to draw up and submit to the Commission at its next session a concise report on the state of

implementation of the rights to food, health, education and work, in order to undertake a global assessment of the progress being made and the problems being encountered in the implementation of these human rights. It also requested the Sub-Commission to examine the conclusions and recommendations of the 1973 report entitled: "The Realisation of Economic, Social and Cultural Rights: Problems, Policies, Progress", and to submit to the Commission an updated version of these conclusions and recommendations.

Under the item on the status of the International Covenants the Commission had before it a document (E/CN. 4/1985/4) circulated at the request of the Netherlands government, containing: "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights". These principles were adopted at a meeting of leading international lawyers in Siracusa, Sicily, in 1984, organised by the International Commission of Jurists. Professor Kooijmans, the head of the Netherlands delegation and former President of the Commission, warmly praised the Siracusa principles and spoke at some length on the contribution they made to the interpretation of the Covenant. His speech was summarised in the Summary Records as follows:

"The adoption in 1984, by human rights experts from all over the world, of the so-called Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights (E/CN. 4/1985/4) was of particular importance. The finding in principle 10 that whenever a limitation was applied it had to pursue a legitimate aim and had to be proportional to that aim was of great significance. With regard to specific limitation

clauses it was worth mentioning that "public order" (principle 22) was defined as the sum of the rules which ensured the functioning of society; consequently respect for human rights was itself part of public order. Principle 32 stated that the systematic violation of human rights undermined national security and that, consequently, a State responsible for such violations should not invoke national security as a justification for measures aimed at suppressing opposition to such violation. His delegation suggested that the Centre for Human Rights should bring those principles to the attention of the members of the Human Rights Committee and the Sub-Commission."

Under another item, the Commission requested the Secretary-General to collect relevant material on human rights already prepared by specialised agencies, regional bodies, NGOs and individuals in order to prepare in the six official languages a basic human rights teaching booklet and to include this project as a priority item in a future biennial budget.

In another resolution on the fortieth anniversary of the end of the second world war, the Commission paid tribute to the people whose great efforts and sufferings led to the end of the second world war and to the establishment of the United Nations.

Under the item on Advisory Services, the Commission requested the Secretary-General to invite governments to provide assistance to the government of Bolivia to support projects for teaching human rights at all levels of education, for reforming the national prison system and training specialised personnel for giving technical assistance in the matter of disappearances and for improving the basic economic conditions. In another resolution, it requested the government of Equatorial Guinea to consider implementing the plan of action prepared by the UN Expert, particularly the new proposals concerning amendments to the Fundamental Law of that country.

The Commission's Working Groups on the Draft Convention on the Rights of the Child and on the Draft Declaration on the Rights of National, Ethnic, Religious and Linguistic Minorities made further progress and will continue their work next year.

### Extract from the General Observations in the Report on Iran of the Special Representative, Mr. Andres Aguilar

"14. The Universal Declaration of Human Rights gave expression to the human rights principles contained in the Charter of the United Nations. The Universal Declaration is thus an emanation of the Charter providing as it does common standards of achievement for all peoples and all nations. Through practice over the years, the basic provisions of the Universal Declaration of Human Rights can be regarded as having attained the status of international customary law and in many instances they have the character of *jus cogens*. This is, for example, the cause with the right to life, freedom from torture, freedom of thought, conscience and religion and the right to a fair trial.

"15. Such fundamental guarantees of the Universal Declaration of Human Rights cannot be open to challenge by any State as they are indispensable for the functioning of an international community based on the rule of law and respect for human rights and fundamental freedoms.

"16. States of all political, economic, social, cultural and religious persuasions participated in the drafting of the Charter, the Universal Declaration of Human Rights and the International Covenants on Human Rights. The Universal Declaration of Human Rights and the International Covenants thus contain norms which, distilled from the collective experience and the common heritage of the world's peoples, represent universal standards of conduct for all peoples and all nations.

"17. Within the framework of the International Covenants on Human Rights, States of all religious, cultural or ideological persuasions co-operate in the implementation of universal standards of human rights in their respective countries. The General Assembly has repeatedly emphasized the importance of the strictest compliance by States parties with their obligations under the International Covenants and has further stressed the importance of uniform standards of implementation of the International Covenants.<sup>3)</sup>

"18. Therefore, it must be concluded that no State can claim to be allowed to disrespect basic, entrenched rights such as the right to life, freedom from torture, freedom of thought, conscience and religion, and the right to a fair trial which are provided for under the Universal Declaration and the International Covenants on Human Rights, on the ground that departure from these standards might be permitted under national or religious law.

"19. It is the firm conviction of the Special Representative that the following fundamental principles are applicable to the situation in the Islamic Republic of Iran as indeed to the situation, present or future, in any other country:

(a) States members of the United Nations are bound to abide by universally accepted standards of conduct insofar as the treatment of their population is concerned, particularly as regards the protection of human life, freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom of thought, conscience and religion and the right to a fair trial;

(b) Insofar as the basic rights and freedom of the individual are concerned, the Universal Declaration of Human Rights gives expression to the human rights principles of the Charter of the United Nations and essential provisions such as those referred to above represent not only rules of international customary law but rules which also have the character of *jus cogens*;

(c) The International Covenants on Human Rights give added conventional force to those provisions of the Universal Declaration of Human Rights which already reflect international customary law. Since the Islamic Republic of Iran is a party to the International Covenants on Human Rights, the latter's provisions in their entirety are legally binding upon the Government of the Islamic Republic of Iran. They must be complied with in good faith.

<sup>3)</sup> See General Assembly resolutions 32/66, 33/51, 34/45, 35/132, 36/58, 37/191, 38/116 and 39/136.

"20. The Islamic Republic of Iran has certainly passed through a difficult period. Its people and its leaders, like the people and the leaders of any other nation, share the universal aspiration for justice to which the Charter of the United Nations gives such eloquent expression. In a revolutionary or post-revolutionary situation there are understandably debates about the philosophies, principles and doctrines which should guide the reconstruction of society in a spirit of justice and equity. These are issues which require reflection and discussion, but the community of nations cannot accept that one State should isolate itself to the extent of denying the validity of a system of law which has developed through universal acceptance and remains one of the most important elements in the relationship between States, forming the backbone of the community of nations as it exists in the world today. International law in general and human rights law in particular are certainly not static notions. They are evolving and the Commission on Human Rights itself has, over the years, initiated many new developments, some of which are still in an embryonic stage. However, it has to be borne in mind that it is the community of nations, through its organs and through concurrent practice, which develops international law. A single State cannot disassociate itself from this process and deny the validity of the norms created by common understanding."

## Academic Freedom Under Israeli Military Occupation

On 24 October 1984, the International Commission of Jurists and the World University Service (UK), published a 87-page report on the above subject of a mission sent by the two organisations to the occupied West Bank and Gaza Strip. The members of the mission were Adam Roberts, Reader in International Relations at St. Antony's College, Oxford; Boel Joergensen, President of the University of Roskilde; and Frank Newman, Ralston Professor of International Law at the University of California, Berkeley, and a former justice of the California Supreme Court.

The report contains (*inter alia*) a scholarly discussion of the concept of academic freedom, the juridical status of the occupied territories, the international law applicable to them, and an account of the various universities and the restrictions applicable to them.

The conclusions and recommendations of the mission are here reproduced in full, together with an extract from a letter to the Secretary-General of the ICJ commenting on the report and written by Haim Cohn, a Commission Member of the ICJ and a former Justice of the Supreme Court of Israel.

## Conclusions and Recommendations

The problems which we examined are undeniably complex and difficult. Honest people on both sides can and do disagree about them. It was our strong impression that the universities on the one hand and the occupation authorities on the other were caught in a drama whose tragic direction would not easily be changed. However, we did arrive not only at some conclusions about the issues, but also at some suggestions for changes. These are naturally tentative in character, intended to start rather than to end a discussion.

### A. *The development of the universities*

#### 1. *Some Credit Due to Israel*

When Israel occupied the West Bank and Gaza in June 1967, the existing provision for higher education actually within these areas was modest: little more than a nucleus for what has grown up subsequently. Although there are many arguments about Israel's precise role regarding the various local attempts to set up institutions of high education from 1971 onwards, it is ultimately to Israel's credit that such an expansion of higher education was in the end tolerated. The emergence of the six main institutions in their present form between 1973 and 1980 is good for the teachers and students concerned and for the West Bank and Gaza as a whole.

#### 2. *The Nature of the Problem*

There is an undeniable conflict of interest between these institutions and the Israeli authorities. The universities reflect the widespread desire of Palestinians for some kind of statehood; the Israeli authorities oppose that aspiration. In the resulting collisions, the only point of convergence between the two positions that is really

easy to imagine is that the Israelis might have an interest in stunting the growth of these universities at the same time as the universities might have an interest in appearing to be persecuted. A better basis for the relationship must be found.

#### 3. *The Character of the Institutions*

There is no way in which these six institutions can be said to have yet reached the level of the better universities around the world. However, they were founded for good educational and other reasons, and we saw much evidence of serious educational purpose. We are in no doubt that there is a large and serious demand for higher education in the West Bank and Gaza, and that these institutions go a long way towards meeting this demand.

There is no disagreement about the fact these institutions reflect the turbulent politics of the area. Often they have been characterised as pro-PLO, and although this may be correct it is not the whole truth: there is a variety of financial, political, cultural and religious influences, local, Jordanian, Egyptian, European, US, Muslim, and others. The facts that these universities see themselves as having a part to play in nation-building, that some students sometimes demonstrate or throw stones, and that there is some PLO influence, does not in itself prove that these are not academic institutions. Indeed, the university which has been viewed as the most 'political', Birzeit, also happens to be one which is widely viewed as having achieved respectable academic standards. By contrast, an institution which has been involved in less really serious trouble, Gaza, still has a good way to go if it is to catch up academically with the northern universities.

While we accept that the universities need to do more to establish their academic credentials, we reject completely any argument that the universities are not

academic institutions and therefore, by implication, not entitled at all to academic freedoms.

## B. *International Standards*

### 4. *The Relevance of International Law*

Granted that there is an inherent conflict of allegiance and interest between these universities and the Israeli occupation authorities, there is an obvious need for a framework of rules to cope with the situation. Some rules may be uncodified and informal, or derive from the ethical systems of the parties. However, some more fully codified rules are relevant to the situation in the West Bank and Gaza.

In their relations with the universities, the Israeli authorities have a very proper wish to observe the relevant rules of international law, and to be seen to be doing so. Only rarely have they conceded any illegality in Israeli conduct. More commonly, when under pressure from critics they have raised legitimate questions as to whether a particular international legal instrument is formally applicable to the occupied territories, or they have interpreted its terms differently, or they have suggested that the facts of the case are different from what critics have asserted. Because of these problems, it is worth going to some lengths to work out what rules are applicable and what the facts of the matter are.

### 5. *Applicable International Legal Instruments*

As regards the laws of war, we are in no doubt that such key instruments as the 1907 Hague Regulations and the 1949 Geneva Convention IV are *de jure* applicable to the Israeli occupation of the West Bank and Gaza, and we are not wholly satisfied with Israel's contention that its *de facto* application of the Geneva Convention's 'humanitarian provisions' amounts

to the same thing.

As regards human rights law, we have listed seven international instruments in that field which are relevant to the problems we faced. Although some of them present some problems of applicability, and contain extensive derogation and limitation clauses, we have concluded that they ought to be implemented to the maximum possible extent in the occupied territories. We have commented on a very misleading statement in the Co-ordinator's *Sixteen-Year Survey* on the applicability of human rights provisions. Our specific enquiries of the Israeli authorities regarding the applicability of some of these human rights instruments produced an answer (see Appendix 1) which still leaves unresolved certain questions, including the applicability of the Universal Declaration of Human Rights. We are unconvinced by arguments to the effect that, because the humanitarian provision of the laws of war are applicable, therefore certain human rights instruments are not.

### 6. *Means of Clarifying Legal Questions*

It is very unsatisfactory that, seventeen years after this occupation began, there is still basic disagreement about what parts of international law are formally applicable to the situation in the occupied territories. If the legal position is not rapidly clarified we would suggest that an authoritative legal ruling be sought. Bearing in mind the frequency with which the members of the United Nations have expressed interest in the events in the occupied territories, we would suggest that an appropriate organ of the UN (e.g. the General Assembly) seek an Advisory Opinion of the International Court of Justice at The Hague on these legal questions in accord with Article 96 of the UN Charter and Article 65 of the Court's Statute.

The legal questions to be put to the Court could include whether 1949 Geneva

Convention IV is applicable in the occupied territories on a *de jure* basis and in its entirety; whether international human rights instruments, including the seven we have listed in this report, are applicable in the occupied territories, and if so to what extent; and whether settlements by nationals of the occupying power are in accord with international law.

### 7. *Specific Content of the Law*

The international law we have examined, including conventions, custom, court decisions, and legal writings, does not prohibit all interference by an occupant in matters pertaining to higher education, undesirable as such interference may be. But it does suggest that there is a presumption against such activities except when they are necessitated by genuine and urgent considerations, for example relating to security. It also prohibits discriminatory practices which have the purpose of limiting a group to education of an inferior standard; and places a clear obligation on educational institutions to promote understanding, tolerance and friendship among all nations, racial or religious groups.

Although it is common ground that international law does not say a great deal directly on the subject of higher education, many provisions of the laws of war and the law of human rights have a bearing on the position of the universities in the West Bank and Gaza. Examples are provisions which relate to the import of educational materials; censorship of objectionable publications; protection of the inhabitants of occupied territories; humane treatment of detainees; and so on. Thus its lack of much specific reference to higher education does not mean that international law is irrelevant to the problems addressed in this report.

### 8. *The Idea of Academic Freedom*

The idea of academic freedom does not

appear to be spelt out anywhere in a comprehensive legal form, but it is nonetheless widely understood. As our terms of reference say, it is generally taken to comprise those traditional educational, research and administrative functions which an institution of higher education may expect to carry out without hindrance, interference or pressure. Since universities play a role within their communities, academic freedom also encompasses political discussion and involvement.

We recognise that academic freedom is easily undermined in some situations, especially where there are fundamental disagreements between occupants and inhabitants, in circumstances where such disagreements can and do sometimes spill over into violence. Nevertheless, academic freedom needs to be constantly borne in mind as a principal criterion by which to judge the Israeli authorities' treatment of the universities.

Israeli official statements have shown a proper recognition of the value attached to academic freedom. As one official briefing put it: 'Academic freedom is one of the hallmarks of the Israeli culture and way of life, and it is given full scope — in the Israeli-administered areas as throughout the country.'

### C. *The Problems Faced By the Institutions*

#### 9. *The Crisis Since 1979*

All the evidence we received suggests that Israel's relations with the universities worsened in about 1979 or 1980, and have yet to recover. Closures have been a persistent feature of the life of some universities since 1979. The years-long crisis over Military Order 854 started in July 1980, and the 14-month crisis over the 'anti-PLO pledge' started in August 1982. The shooting which caused three deaths at Hebron



University was in July 1983. Although some issues have been resolved, the atmosphere of crisis continues. In 1984 there have already been two major university closures, at Birzeit and An Najah. The underlying reasons for this crisis atmosphere have included:

- the rapid expansion of the six institutions, which had less than 3,000 students altogether in 1977-78, compared to over 11,000 in 1983-84;
- the growing presence in the environs of these institutions of Israeli settlers, whose total numbers in the West Bank tripled from 10,000 in 1979 to about 30,000 in 1984;
- the imposition of a relatively harsh policy towards the institutions, especially after the resignation of Ezer Weizmann as Defence Minister in June 1980;
- the growth of student militance of various kinds, including pro-PLO, in response to various events and pressures, including Israeli actions in the occupied territories, and the invasion of Lebanon in June 1982.

#### 10. *An Aggravating Factor: PLO Policies*

Two aspects of PLO policy, at least as perceived by Israelis, seem to us to have had the effect of making the position of the universities more vulnerable. First, the formal commitment to the destruction of the State of Israel. (This policy has been heavily modified in many statements, but is still in the Palestinian National Covenant.) Secondly, the support for violent attacks against more or less random civilian targets. (One such attack, upon a bus in Jerusalem, occurred while we were there, killing four people, two of them children, and wounding 43. A PLO agency "claimed responsibility" for this act.) The combined effect of these two approaches is to make the Palestinians seem a particularly dan-

gerous threat in the eyes of Israelis, to make Palestinian demands seem unrealistic and therefore not worth negotiating about, and even to make the universities (being perceived as symbols of an undifferentiated Palestinian nationalism) seem like suitable candidates for punishment. The events at Bethlehem University in October 1983, discussed in part VI, are a particularly clear example of this effect.

These two aspects of PLO policy are part of a wider tendency of the more extreme forces in each community to deny the national or even human rights of the other. It is not for us to suggest exactly what Palestinians should do about this problem, but should it not be addressed openly and realistically both in the universities and outside, especially bearing in mind the obligation on universities to promote understanding between nations?

#### 11. *Summary of Specific Findings on Israeli Policies*

There has been a large number of Israeli military interventions inside university premises, and closures of universities on a long-term or day-to-day basis. While we do not claim that all such actions are necessarily beyond Israel's rights as an occupying power, they are serious violations of academic freedom. Their frequency has been such as to impede the work of these institutions, and we are not satisfied that in every case they were either necessary or adequately explained.

The 'anti-PLO pledge', required of foreign passport-holders in 1982, represented a clumsy attempt to force workers from outside the territories, especially university teachers, to make an overtly political statement. Eventually, due to their own non-cooperation and to help from outside, the universities won a victory of sorts on this issue, but only after it had caused serious losses and divisions. If the Israeli intention

in introducing the pledge was really to destroy PLO influence, we doubt whether this was or could have been achieved by this ill-judged means.

Censorship of foreign books is within Israel's rights in international law, for example insofar as it relates to such publications as incite to national, racial or religious hatred. Israel's censorship is mostly of Arabic books and some of it does not appear to be justifiable on grounds such as these. The policy is an inconvenience to the institutions, but not a serious impediment to scholarship. It should be reconsidered, especially as it affects the universities, mainly because it contains so many built-in absurdities.

On the importing of books and educational equipment, administrative procedures have been followed, and charges levied, which have been questionable in international law. For example, the authorities have imposed high charges for the import of such items as computers. Some such charges appear to be contrary to the 1950 Agreement on the Importation of Educational, Scientific and Cultural Materials.

Israel has not for the most part intervened directly in academic matters, but it has on occasion sought to use its administrative powers to affect academic decisions. In 1979 and 1980, it turned down some proposed financial support for particular universities on some remarkable grounds: 'We prefer that . . . resources be allocated to upgarding the Administration local officials.' Another reason given was: 'There are enough teachers in the areas.'

General administrative constraints on the universities have been remarkable in their number and extent. They relate particularly to the wide range of activities, including transferring funds from abroad and starting building works, which require an official permit. It appears that such per-

mits are often refused without explanation and often without justification. Some measures, such as the freezing of university bank accounts, are very extreme.

Arrests and detentions of students, and raids on university hostels, have occurred with disturbing frequency, and harsh sentences have been imposed for seemingly minor offences. In June 1983 about 35 pre-university students were arrested at the time of their Tawjihi (matriculation) examination: such arrests appear to be contrary to specific provisions of a number of international agreements, including the 1949 Geneva Convention IV and the 1960 Convention Against Discrimination in Education.

## *12. Overview of Israel's Policies*

The universities present Israel with some genuinely difficult dilemmas. Aspects of Israel's position have not always been properly understood in some criticisms of its policies towards these institutions. The statements made by Israeli officials in defence of their actions are serious and deserve sympathetic consideration. However, taking all the evidence into account, we conclude that the pattern of Israeli treatment of these universities over the past five years has been one of harassment going beyond what might be reasonably justified on grounds of public order or security. This harassment has not been so extreme as to prevent the dramatic growth of the universities in this period, but it has sapped their energies and hindered the much-needed raising of academic standards. It has also contributed to student militance. We do not agree with those who think that Israel has a consistent aim of preventing the emergence of strong universities, but we cannot deny that some of the evidence is alarmingly consistent with that interpretation.

Are Israel's policies taken as a whole

contrary to international law? We do not think it useful to rush to any general allegations of illegality in a situation as complex as this, but there are questions in our minds concerning the observance of particular agreements, as we have indicated at various points in the text. The most fundamental question is whether the net effect of all the problems has been to limit the inhabitants of the occupied territories to 'education of an inferior standard', contrary to the 1960 Convention Against Discrimination in Education, Article I. Certainly some action is needed by all parties to prevent such an outcome.

### *D. Some Recommendations*

#### *13. Military Order 854*

We recommend that Military Order 854, issued in July 1980, and the equivalent law in Gaza, be rescinded. The extraordinary powers over academic life for which it provides naturally led to a storm of protest, and in October 1982 its operations were suspended 'for a while'. That is not enough. The potential threat to academic life which it represents creates distrust and prevents sensible coexistence. There are grounds for doubting whether special legislation for the universities is needed. If it really is, then, as we have indicated, a better basis could be found than a 1964 Jordanian law never meant to apply to universities. If there are to be future efforts at legislation, a greater degree of consultation than was evident in 1980 is needed.

#### *14. Interventions Only as a Last Resort*

We recommend that the military authorities be very much more discriminate in their use of military interventions, closures, and the vast array of other measures against the universities and the students. In cases where measures do have to be taken this should be an absolute last resort, and

should be properly explained, wherever possible in writing. Such interventions are bound to be viewed very critically both on international legal grounds and because of their serious implications for academic freedom.

#### *15. The Duty of Protection*

The duty of protection which Israel owes to the inhabitants needs to be reaffirmed, and assurances are needed that the problems of law enforcement *vis-à-vis* the settlers in the occupied territories, as identified in the Karp Report, have been tackled.

Israeli authorities should be more cautious about using 'security' in a one-sided way. The record suggests that for the most part any actual security threat which student activities have posed has been low-level, whereas some security threats that students and staff have faced – most particularly at Hebron in 1983 – have been extreme. Israel's duty of protection was not performed by the delay in publishing and acting upon the Karp Report, a delay which may have contributed to the deaths of the Hebron students.

#### *16. Reconsideration of Administrative Measures*

There is a clear and urgent need to reconsider the wide range of administrative measures and practices affecting the universities, including particularly:

- measures restricting the import of foreign funds, which are vital to these six institutions;
- the imposition of customs and other charges on imports for educational purposes;
- refusals of planning and other permits;
- administrative measures preventing students in prison from receiving books and other educational assistance.

### 17. *Need for More Positive Overall Approach by Israel*

Above all, there is a need for a more positive policy towards these institutions. It is not enough to take some of the credit for their emergence. There is also a need to recognise more positively the role they can play in the economic, intellectual, cultural and political development of the area. At some future date, in one form or another, whether it involves a state, a federation, a confederation or whatever, a *modus vivendi* to enable the Israelis and the inhabitants of the West Bank and Gaza to live as neighbours will have to be worked out. The universities have a small but significant role to play in that large process.

### 18. *The Need for Academic Development and Improvement of Facilities*

One prerequisite of academic freedom is a strong academic centre. Further development of the academic standards of these institutions is needed for its own sake, and should help to strengthen their position in the society they serve as well as *vis-à-vis* the Israelis. We particularly favour supporting the already existing faculty development programmes, aimed at giving advanced training in European and North American universities to young academics at these institutions. We also favour schemes enabling highly qualified foreign staff to teach at these institutions, or to act as assessors, visiting examiners, academic visitors, etc. Anything assisting scholarly research output is to be welcomed. The libraries at all the institutions need to be strengthened, and the general level of equipment and physical conditions for teaching and study improved. We incline to agree with the view that was represented to us that it is more important to strengthen the existing institutions than to create more new ones. However, some important subjects may need to be developed or expanded, for

example medicine, agriculture and business studies; and the whole vocational training sector needs strengthening.

The local facilities which have a strong bearing on the conditions in which students work clearly need to be improved. In particular, in view of the fact that many students live far from the campus or have difficulties in reaching it, a considerable strengthening of municipal libraries in the area is needed.

### 19. *Contact With Israeli Universities*

Some of the universities, but not all, have at times had quite extensive contacts with the Israeli ones. We heard reports of some student pressure to reduce such contacts. That is unfortunate, and university officials should encourage the elimination of barriers. Social, political and cultural tolerance will hardly be enhanced if the exchange of ideas is in any way inhibited. Contacts may indeed be beneficial to both sides and should be continued.

### 29. *Outside Educational Bodies and Contacts*

The interest of outside educational bodies in the universities has been of much assistance to them in recent years and should be extended. Foreign agencies of an educational character and with small offices serving the area, such as AMID-EAST (which has a substantial budget for scholarship and faculty development programmes) should continue and if possible expand their work, which is vital in the process of maintaining international academic contacts and raising academic standards. The British Council's work in the area has also been useful, for example in assisting academic development, and in getting the position of the institutions known and publicised, especially at times when they were under heavy pressure. This role will go on being needed. Non-governmental

organisations of various kinds are in many cases the most appropriate bodies to assist universities.

A more general effort should be made to increase practical assistance to the universities. This would be in accord with various UN General Assembly resolutions on the matter which have received near-unanimous voting support. For example, Resolution 37/120 of 16 December 1982, with the support of over 140 states, bemoaned UNRWA's recurring financial difficulties, which have compelled it to reduce its special allocations for grants and scholarships. It also called on states, specialised agencies and non-governmental organisations to augment their allocations for grants and scholarships in respect of higher education of Palestine refugees; for graduate and post-doctoral fellowships; and for contributions to the Palestinian universities.

#### *21. Procedures for Resolving Disputes*

Governments and individuals directly involved might usefully devote further thought to suitable procedures for dealing with at least some of the issues which have arisen between the universities and the Israeli authorities. We have mentioned some particular issues – disputes over censorship of books, and over restrictions on the importation of educational materials – where internationally agreed mechanisms for resolving disputes already exist and could be invoked by agreement between the parties in the event that local attempts to resolve the issues fail.

On some other issues, too, there may be scope for negotiation, arbitration, or mediation. Possibilities of involving universities or individual academics from outside the occupied territories in such processes should be considered. There may also be issues on which petitions to the Israeli Supreme Court would be justified despite the existence of certain reservations we

have reported about adopting this course. In general it is desirable that the parties involved should not merely nurture complaints, but should go to great lengths to document them in full and to exhaust reasonable remedies in trying to resolve them.

For various reasons we do not think it right for us at this stage to propose that the overall question of possible discrimination be tackled by the Conciliation and Good Offices Commission in accord with the 1962 UNESCO Protocol mentioned above in Part IV. However, as a last resort, if concern about discrimination in the field of higher education is considered to be well-substantiated and serious, and if all bilateral attempts to resolve the problem should fail, one possibility open to a state would be to pursue the matter in accord with Article 12 of the 1962 Protocol.

#### *22. Some Issues for Governments*

Above all, outside governments, particularly that of the USA but also those of many other countries, are in a position to influence Israeli policy in a more positive direction if they choose to do so. Considerations relating to the universities will be only a minor factor in their policy-making on the Middle East. However, outside influence has sometimes modified Israeli policies. One instance was when US Secretary of State George Shultz blew the whistle over the 'anti-PLO pledge' in November 1982. Quieter diplomatic pressure may also have been effective at times, for example assisting the re-opening of Bethlehem University in December 1983. Governments have an interest in the observance of international norms, and in the amelioration of the Middle Eastern problem. Clearer and more consistent policies regarding what is actually happening in the West Bank and Gaza, including in the institutions of higher education,

could contribute to these ends. The international community, both in the United Nations and in other ways, must act to ensure that a basically defenceless people, faced with a foreign occupation and the presence of armed settlers, is not the victim of discriminatory treatment in higher education or in other matters of such a kind as to lead to a status of educational disadvantage and permanent inferiority.

### Comments by Haim Cohn

"Let me say first that your reporters distinguished themselves by fairness and objectivity – commodities to which, from some prejudice or other, Israel is not normally treated on the part of foreign observers. Needless to say that the more objective such a report is, the better are the prospects of its conclusions and recommendations being taken seriously to heart.

As far as Military Order 854 is concerned, I do not think that the authorities will be prepared to consider its rescission. As the report indicates, its practical application has since October 1982 been suspended, and it is to be hoped that it will not in future have to be resurrected. I personally much prefer a "sword of Damocles" (p. 62) hanging somewhere in the air, to new military legislation that will inescapably again engender conflict, whatever it may provide. The reporters seem to suggest that the Order be rescinded without being replaced; but while I agree that the powers vested in the military administration by existing legislation are wide enough to cover all conceivable exigencies also within university campuses, I am afraid that the explicit and deliberate creation of a lacuna in the law might be interpreted by some of those concerned as an "invitation to dance".

The reporters' alternative suggestion to

enact legislation modelled on the Israeli universities law (i.e. the Council for Higher Education Law, 1958) is wholly impracticable for the simple reason that the existing Council for Higher Education (p. 44) would not cooperate with the military authorities and on its part strongly opposes such legislation. The position might be quite different if that Council would take the initiative to have Order 854 replaced by an order modelled on the Israeli law; but a prerequisite for any such initiative would be a drastic change in its membership and orientation. (The same is, of course, true in general: so long as the occupation continues, security hardships can be avoided or mitigated only by cooperation of a responsible and peaceable Palestinian leadership.)

I fully agree that closures of universities and other such grave interferences with academic life should take place only "when there are very strong reasons, when the reasons are made public, and when there is a serious prospect that the closure may improve or at least not exacerbate the situation" (p. 57). The military authorities maintain that this is indeed their declared policy. That your reporters were "far from satisfied" that these conditions have in fact always been fulfilled, may indicate that there have in the past been deviations and excesses: I can only hope that they will not occur in future. On the other hand, I also agree with the reporters that such closures are non-violent sanctions much to be preferred to other imaginable military action.

I agree with everything your reporters have to say about the censorship of books. (It is indeed your obedient servant who is anonymously quoted at the top of p. 66.) The abolition of censorship is and remains one of the main concerns of the Israel Civil Rights Association.

Your reporters are also quite right with regard to the obstacles caused to academic

activities by much too burdensome import regulations and customs duties. As they rightly observe, universities in Israel are in this respect in the same or a very similar situation as are those in the territories. There is a widespread and long-standing resentment in Israel against the non-exemption of teaching and research material from customs and VAT duties. (My wife who heads the Jerusalem Academy of Music had to decline the other day a huge and most generous and beneficial gift of musical instruments, only because of the customs duties due thereon.) In view of the present economic situation there seems to be no prospect whatever of having any revenue laws liberalized.

I had no knowledge of the 1979 interference with the channelling of funds as reported on p. 68, and can only regret that if it occurred as reported, the interested

parties did not petition the Court: this was in my view a *prima facie* excess of powers. In these and similar cases the aggrieved institutions have only themselves to blame if they abstain from seeking their judicial remedies.

What your reporters call a "more positive overall approach of Israel" (p. 77) as well as closer contacts with Israeli universities (p. 78) can neither be reasonably demanded nor be practically achieved unilaterally: if and when the institutions concerned comply with their obligation under international law "to promote understanding, tolerance and friendship among all nations, racial or religious groups" (including Israel, Jews, Zionists) – the response on the part of Israel will be forthcoming eagerly enough.

Please convey to your reporters my appreciation and my warm regards.

## Democracy in Korea

The following is reproduced from an interview given to a journalist of the *Washington Post* in February 1985. It was given by William J. Butler, chairman of the ICJ's Executive Committee and President of the American Association for the International Commission of Jurists, who had with others, accompanied the South Korean opposition figure Kim Dae Jung back to Seoul.

The first part of the interview described how the members of the mission were forcibly separated on arrival from Kim Dae Jung, contrary to an agreement made previously between the US Ambassador and South Korean authorities. The interview continues from the point where Mr Butler gained access to him shortly afterwards in his home.

Q: Was he upset? Had he been hurt?

A: Not a bit. The first thing that I asked him was, "How are you, Kim? What happened?" He said, "Well, they pushed me into an elevator." I said, "There's a lot of allegations that you were punched, kicked, beaten up." "Oh," he said, "no, that didn't happen." He said he was pushed, and they were a little rough, and he was forced into this elevator and they put him through an immigration process where he refused to cooperate because they weren't treating him as an ordinary Korean. After 45 minutes, they gave up.

I asked his wife, Mrs. Kim, whom I've known for years — a frail little person, a lovely person — if she was punched or hit or beaten up in any way, and she said no. And then I asked the two Korean Americans — this is all in the presence of Bob White — if they were hurt, and they said absolutely no, that there was a lot of jostling and pushing and shoving, but they weren't hurt.

Q: What is Kim's political status now? Because surely you didn't go to all this trouble just to stow him away in house arrest or to leave him exposed to further danger.

A: House arrest in Korea is a funny institution. There's no such thing as house arrest under Korean law. Kim certainly is detained, prevented from leaving his house. But he's allowed to receive visitors. He has two telephones and can contact his various political associates. One of the first things he did while I was there was to call Kim Young Sam, who's one of the chief opposition figures and who's also under house arrest, if you want to call it that, and exchange political strategies and information.

So it's a kind of Korean thing. He's been in this condition, off and on, for many years. He is physically contained, but he's allowed to see reporters, give interviews, make political comments, call his compa-

trients in the fight for democracy in Korea, and he does all that.

Q: What is Korea's, the country's, political status now? A police state? Something becoming better? What about those assembly elections last Tuesday in which the party that Kim is hooked up with won 50 seats? Does that show an improving trend or is that a mirage?

A: When you dig through all the charades of the constitution and the laws and assembly, Korea is being governed by a military dictatorship. It hides behind a constitution rigged in such a way that the ruling party cannot lose power. If you look at the recent elections, you'll see that they've only lost one seat from the last election.

But I don't think there's ever been a freer political debate in contemporary Korean history. More candidates ran, the debate was wide open, they criticized their government, a lot of people who were banned were allowed to get back into politics. A new political party was formed, and it received an unbelievable number of seats.

Now where is that going to lead? Does that mean democracy's going to come back to Korea tomorrow? I don't think so.

Q: What limits the possibility that debate will become a democracy?

A: The constitution prevents it. It is rigged in such a way that it's impossible to have a democratic state.

Q: Even though you can have a lot of fancy debate.

A: All the debate you want but the ruling party cannot fall below 57 percent of the deputies.

Q: How does that line get crossed?

A: I don't know. There are two ways. The peaceful process and a violent process. One of the most important things in the peaceful process that addresses itself to change is the provision of the constitution that says the president can only serve one term. That term expires in 1988. And if



[President Chun Doo Hwan] steps down and if Kim Dae Jung and Kim Young Sam and the opposition get a fair shot – that's what they're all aiming for – the chances for the democratic process will be improved immeasurably.

Q: *Kim is in for the long game.*

A: Either he's in for the long game or he wants to be the elder statesman who unifies the opposition and the forces of democracy.

Q: *Should we Americans just observe and watch these internal processes churning in Korea and in other hard places? Where does the United States fit in?*

A: The United States is extremely important: It maintains 45,000 troops in the peninsula of Korea, and it's a strategic part of the world for our anti-communist or anti-Russian containment policy, Seoul is 700 miles from Peking, 700 from Tokyo, 700 from Vladivostock, and it's considered by military experts to be extremely strategic for the defense of the United States. That's where our defense perimeter starts. Korea is an anchor of our defense line, and it has a lot to do with whether or not the Japanese should be armed, or not armed. So the strategic interests of the United States dominate.

Hopefully, if the democratic process survives, that would strengthen the stability of the country and add to the strength and stability of our defense there.

Q: *It's argued that the strategic importance of Korea to the United States prevents us from using too much influence there for liberalization.*

A: Some look at the insertion of the democratic process as a stabilizing factor – by removing confrontation and certain elements of instability from the society. In that way it would strengthen the strategic interests of the United States. That's the way I prefer to look at it.

Q: *How do the people who run Korea*

*look at it?*

A: The present ruling party would be 100 percent against this thesis because they feel that traditionally in Korea the people have to be governed by authoritarian methods.

Q: *We're talking here about some form of American political intervention to deal with human rights.*

A: To the extent that it's gone ahead so far, you can give credit to United States intervention. The embassy there and the State Department have been working hard for a long time to help bring about democratization. I think they feel the way I do: that little by little they're gaining. How far the governing Koreans will allow this to proceed before they react, for instance, with a military coup is something we can't tell. Twice before they've had coups.

Q: *You're suggesting that the Reagan administration is not, as its critics say, a part of the problem, but an active part of the solution.*

A: I would think so, yes. I know for a fact that a great deal has been done on behalf of democracy in Korea even by the Reagan administration. I criticize them on occasion. For instance, in the Kim Dae Jung return, they made a mistake trying to talk Kim out of going back at this time. I don't think that was strategically a good move. I don't know why they tried to convince him to stay here until at least after the elections and after the [scheduled visit to Washington in April] of Chun. It probably results from some kind of negotiations with the Korean government. But Kim refused to go along with that offer, and he was back on the day he wanted, two days before the elections.

Q: *The Reagan policy is sometimes called quiet diplomacy. Is that a fair description?*

A: Somebody said quiet diplomacy is no diplomacy at all.

Q: *What do you think?*

A: I think there's plenty of room for quiet diplomacy. I've used it myself on many occasions and sometimes it works, but when it doesn't you have to go public.

Q: *Are you suggesting that if the Reagan administration keeps on its present course that it's going to turn Korea even more toward democracy and to move it along without provoking a coup?*

A: I don't know. We have found out after years of heartache that there's very little in the final analysis that the United States can do to bring about institutional change in a foreign country. That change, if it is to come, has to come from within, from people who are committed and who build their own institutions in line with their own culture and value system. The imposition of U.S. will abroad has severe limitations, and although we get symbolic concessions by getting people out of jail or better prison conditions or saving lives sometimes, we have never been able to bring about institutional change anywhere in the world. That has to come from people who live and die there.

Q: *So if we're serious about democracy in Korea, we've got to be very patient.*

A: We have to be patient, and we have to support local institutions that are fighting for that result. That's true everywhere in the world.

Q: *Do some administrations do this better? What about Jimmy Carter as against Ronald Reagan?*

A: Carter didn't invent human rights. Human rights have been part of the American fabric for an awful long time. In the early '70s, when Don Fraser [then a representative] of Minnesota held hearings on making human rights part of U.S. foreign policy, that was a legislative initiative. We've had to push our human rights policy through law and not to rely on chief executives.

When Carter became president, an awful

lot had been done in the legislative field making human rights part of foreign policy. The assistant secretary of state for human rights was created by legislation. The whole prohibition against giving aid to egregious violators of human rights was legislation long before Carter. To give him credit, he put human rights on the international agenda. I often say, though, that what started with a historical bang ended with an embarrassed whimper. Things changed during the last years of the Carter administration.

Q: *Is human rights still on the international agenda in the Reagan administration?*

A: Yes, yes, thank goodness. Some of the pluses coming out of Reagan are that in the beginning they wanted to repeal the legislation and take out the assistant secretary of state for human rights. But after the Lefever defeat [Ernest Lefever's nomination as assistant secretary was rejected by the Senate Foreign Relations Committee] and before Elliott Abrams became assistant secretary, they made a decision to stick with it, to interpret it in accordance with their own views. I don't think that's as strong as during the Carter administration, but human rights is still institutionally part of our fabric, and it will be there forever, I think. It's a question of how it's to be applied and implemented.

Q: *Could we help apply human rights better in Korea by, for instance, holding up the Chun visit or suspending our support for the Olympics in South Korea in 1988?*

A: Experience in prior situations has revealed that boycotts and sanctions of that kind don't work. If push comes to shove in the Korean peninsula, the Koreans will have to tell the United States they cannot cooperate with us any further. I don't think that any country, especially strong countries — Korea today is very strong, a 700,000-man army, a good economy; if you pushed them too far, they would react by not dealing with us. You'd have to weigh that against

the security and trade interests of the United States, which are always part of the human rights equation.

Human rights is not something you look at in a vacuum. It has to be balanced out.

Tradeoffs happen all the time. The fabric of human rights is very delicate.

Q: *But worth trying to strengthen.*

A: In my mind, yes.

# ARTICLES

## New Human Rights: The Need to Devise Procedural Due Process Requirements\*

by  
Philip Alston

On the basis of present trends, it is clear that various UN organs will, in the course of the next few years, be under pressure to succumb to the temptation to proclaim new human rights without first having given adequate consideration to the desirability, viability, form or scope of such rights. The haphazard manner in which several new rights have emerged in recent years, as well as the extent of existing pressures to recognize new claims, gives a degree of urgency to this concern. Indeed, as the perceived usefulness of attaching the label "human right" to a given goal or value increases, it can be expected that an even greater effort will be made by special interest groups of all varieties to locate their cause under the banner of human rights.

Such a proliferation of new rights would be much more likely to contribute to a serious devaluation of the human rights currency rather than to enrich significantly the overall coverage provided by existing rights. It is thoroughly unnecessary to impugn or even question the motivation of the proponents of those rights which have recently been proclaimed or proposed in order to conclude that a more orderly and

considered procedure should be followed before the UN accords the highly-prized status of a human right to any additional claims.

While the establishment of substantive due process requirements would seem to constitute, at least in some respects, a theoretically attractive means by which to filter new candidates for addition to the list of rights, it is, in practical terms, a totally unworkable approach. To be useful it would imply a degree of rationality and objectivity in the selection of rights that simply does not and could not characterize the approach of a body such as the UN. In other words, the normative validity of rights which are recognized by the General Assembly can not be made dependent upon their validity in terms of philosophical or any other supposedly 'objective' criteria. Hence the appropriateness of Bilder's pragmatic conclusion that a claim is an international human rights if the General Assembly says it is.

What would, however, be workable is the establishment of a set procedure to be followed in all cases involving a proposal that a given claim should be recognized as a right.

\* Extracted from an article published in *The American Journal of International Law*, vol. 78 (1984), pp 607-621.

## Procedural due process

The approach which was followed in drafting the Universal Declaration of Human Rights provided an indication of some of the procedural steps which would seem to be appropriate in the elaboration and proclamation of new human rights. To begin with, it was agreed at the Commission's preliminary ("nuclear") session in 1946 "that the fullest possible documentation and information concerning the whole field of human rights was of the utmost importance . . . for the drafting of an international bill of rights . . ." On the basis of the various drafts available at the time, the Secretariat was requested to prepare an 'Outline' which was then taken as the starting point for the drafting undertaken by the Commission. The text was further refined by the General Assembly before its adoption in December 1948.

A similar approach, but with an additional element involving the solicitation of written comments on particular draft proposals from Governments and non-governmental organizations, has been followed in the elaboration of a variety of Conventions prior to their adoption by the General Assembly. There would seem to be no valid reason why an equally cautious and painstaking approach should not be followed in the proclamation of entirely new rights as in the elaboration of binding instruments dealing with existing rights.

The responsibility for ensuring compliance with some form of procedural due process clearly belongs (for historical as well as hierarchical reasons) to the General Assembly, as the organ vested with the authority to proclaim new human rights. In the past, the Assembly has acquiesced in the partial erosion of its authority by permitting other bodies to take it upon themselves to proclaim the existence of new rights without at any stage seeking

the Assembly's imprimatur. But although the Assembly must be the final arbiter in such matters the views of the Commission on Human Rights should also be taken into account whenever possible. The extension of the latter's terms of reference in 1979 so as to include responsibility for assisting the Economic and Social Council "in the co-ordination of activities concerning human rights in the United Nations system" provides a strong basis for such an advisory role. Moreover, experience in recent years points to the need for greater co-ordination in order to avoid the duplication of effort which is involved when different organs deliberate on the same, or at least similar, issues, and to ensure that incompatible or even contradictory standards are not adopted.

On this basis the General Assembly could consider mandating a precise *modus operandi* to be followed in situations where the proclamation of a new human right has been proposed:

*Step 1:* the process would be activated by a decision by a UN organ that a study should be undertaken on the desirability of recognizing a particular claim as a new human right;

*Step 2:* at the same time, the Secretary-General would be requested to solicit comments on the proposal from Governments and non-governmental organizations;

*Step 3:* a study would then be prepared by the Secretary-General, based in part on the comments received under step 2, and dealing with all relevant aspects of the proposal;

*Step 4:* the Commission on Human Rights would be required to consider the merits and demerits of the proposal and, on that basis, to make a recommendation to the General Assembly (through the Economic and Social Council);

Step 5: the matter would be considered by the General Assembly, and the process would culminate in the proclamation of a new human right or in a decision to defer action on the proposal (either indefinitely or for a given period of time).

The due process procedure would have a number of advantages:

- it would eliminate the possibility of new rights being proclaimed without any scrutiny whatsoever;
- it would enhance the likelihood that the

merits and demerits of proclaiming a given new right will be carefully debated, by imposing an enforced period of reflection;

- it would reduce the likelihood of organs subordinate to the General Assembly unilaterally proclaiming new human rights, thereby undermining the authority vested in the Assembly; and
- by facilitating a degree of coordination, it would provide a limited safeguard against the adoption of new rights which are inconsistent with, or even in contradiction of, existing standards.

# Legal Instruments of Political Repression in Chile

by  
Roland Bersier\*

The establishment of an authoritarian political regime does not necessarily imply adoption of new legal provisions: the Rule of Law is not the main concern of such regimes, be they of east or west, and they may simply implement – or indeed, violate – pre-existing law. The Constitution of the Republic of Chile, of 18 September 1925, established the armed forces as being “essentially professional, hierarchical, disciplined, obedient, non-deliberative institutions” (article 22), stipulating that “even on account of extraordinary circumstances” none may assume “authority or rights other than those explicitly conferred upon him by law”; the Constitution even specified that any act in breach of that provision would be null and void (article 4).

The military coup of 11 September 1973 was, therefore, by no means a response to juridical concerns, even though the military junta which seized the authority of the State immediately issued a number of decree-laws which cannot be said to enrich that country’s jurisprudence. The object of this article is not to examine how the Chilean military and their agents went about superimposing a vast arsenal of repressive texts on the existing legal order. This article will rather be confined to the

presentation of certain key innovations in this regard, which the armed forces and, in particular, their Commander-in-Chief, turned President of the Republic, used to anchor their authoritarian and repressive practices, that is the Constitution of 1980 and the “anti-terrorist law” of 1984 (no. 18.314).

## Pre-existing law

Even before 1973, the Republic of Chile had legislation enabling the authorities to maintain law and order effectively and to put down disturbances with due rigour.

The Constitution of 1925 provided for a republican, representative, democratic state with a bi-cameral parliament whose members, like the President of the Republic were elected by the people. In the event of domestic disturbances, constitutional states of emergency could be decreed only by the national Congress for a period not exceeding six months and with only limited restrictions of public freedoms. The President of the Republic had this power only during Congressional recesses, subject to this latter’s decision (articles 44 ch.12 and 72 ch.17).

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\* *Docteur en droit*, Cantonal Court Judge, Lausanne, Switzerland, member of the Association Internationale contre la Torture.

## The new constitutional framework

On 11 September, 1980, the Chilean governmental junta put a new political Constitution to a referendum for endorsement. This paper will not go into the matter of its questionable legitimacy, nor will it examine its content. In addition to a transitional provision "maintaining" General Pinochet as President of the Republic (no. 14), this Constitution contains permanent regulations providing for a seemingly republican state, while including certain provisions such as to restrict the constitutional rights it listed; it also lays down certain transitional provisions, rather long-term in scope as they are effective until 1989 and even 1990, which suspend all democratic organisations and all participation by the people, while granting extremely broad powers to the "President of the Republic".

The twenty-fourth transitional provision is at the heart of this text. Quite apart from the constitutional states of emergency enshrined in the permanent provisions of this new Constitution – these provisions are already partially applicable, though they have not been approved by Parliament – the President may, on the grounds of "acts of violence designed to disrupt public order", or in the face of "a danger that internal peace might be disturbed", on his sole responsibility, declare a special state of emergency for up to six months renewable, enabling him to impose the following restrictions on constitutional freedoms:

- a) detentions of up to five days – this period may be extended by fifteen days if terrorist acts with serious consequences occur – at the home of the detainee or elsewhere than in prisons;
- b) restrictions of the right of assembly and of freedom of information;

- c) refusal of entry into the country, or expulsion from it, of persons designated as follows: those propagating "doctrines which are antagonistic to the family or which advocate violence or a concept of society, the state or the legal order that is of a totalitarian character or based on class struggle" (article 8 of the Constitution); those who are, or are reputed to be, active supporters of such doctrines; and those who commit acts contrary to the interest of Chile or who constitute a threat to internal peace;
- d) ordering particular persons to reside in a specific urban locality within the country for a period not exceeding three months.

The provision referred to in paragraph (a) above therefore permits detention for up to twenty days in a place which does not even offer the relative publicity of incarceration in a prison which is officially designated and supervised as such. Anyone detained under these exceptional powers is wholly in the hands of the authorities, in some cases for almost three weeks without any form of control.

It is in fact explicitly stipulated that measures adopted pursuant to this provision "shall not be subject to any recourse other than reconsideration by the authority which ordered them".

We will not dwell on the extraordinary possibility of applying harsh measures to someone who is merely reputed to hold an opinion (paragraph (c)). Even in a text characterised by its marked authoritarian nature, this provision (no. 24) is exceptional. A restrictive interpretation of this text might have been expected, taking into account the basic principles of law as enshrined in some of the provisions of the Constitution, as well as the basic rights which Chile is internationally committed to observing.



This, however, was not the case. The competent section of the Supreme Court on 9 July 1984, in a majority ruling reversing that of an Appeal Court, declared that implementation of the twenty-fourth transitional provision did not in any way admit of the remedy of *amparo*, that is, judicial protection, as the inadmissibility of all remedies applied to judicial as well as administrative remedies.

The 1980 Constitution provides for a number of constitutional states of exception. To a foreign jurist, articles 39 to 41 do not establish a clear distinction as to the conditions under which they may be declared and as to their repercussions for all or a part of the country: state of general alert, state of siege, state of emergency, state of catastrophe. The twenty-fourth transitional provision, however, departs from the Constitution in that the President is solely responsible for declaring a state of emergency without subsequent referral to anyone. Furthermore, he may renew it indefinitely every six months and his decision is not subject to any form of control. The continued use of this provision since 1980 confirms that this exception has become the rule.

### Anti-terrorist legislation

A sensitive point in the legal apparatus used to maintain the regime in power is the repression of "terrorism", which a constitutional provision declares to be "contrary in essence to human rights" (article 9). The constitution left it to a subsequent law to define terrorist conduct and to establish penalties for such offences, but itself stipulated that such persons may not hold elective public office – non-existent in Chile for some time – nor may they hold posts in education, the press, political or trade union organizations; no amnesty nor par-

don may be granted for such offences. The fact of establishing the effects of certain offences in the Constitution itself rather than in a law, in addition to being a questionable legal technique, also serves to stress the importance which those behind the 1980 Constitution accorded to suppressing and excluding those they seek to identify as terrorists.

Law no. 18.314 of 15 May 1984 sets out what is meant by terrorist conduct and the relevant penalties. It is doubtful whether this law emanating from the governmental junta (the heads of the armed forces) – which is given legislative powers during the constitutional transition from 1981 to 1989 (twenty-first transitional provision) – meets the requirement laid down explicitly and specifically by the Constitution to the effect that it must be adopted by a qualified majority, that is by an absolute majority of the Members of Parliament and Senators in office (article 63 paragraph 2) – as is well-known, there are no Members of Parliament and no Senators in office in Chile. The question of the validity of this law is, however, more academic than practical, as it was adopted by those who hold at least *de facto* power and who are in a position to impose its application.

#### a) *Material provisions*

It is not easy to give a general definition of terrorism. The organisation of the campaign against terrorism, particularly in Europe, has led to controversy over this concept. However, we would venture to propose an outline of such a definition: terrorist action is the action of individuals, groups of persons or even organs or agents of the State, aimed at dominating the society illegally, and eliminating fundamental freedoms by creating a climate of terror with attacks on the life, physical

integrity or freedom of a number of people or by a serious threat to carry out such attacks, at random in some instances. Terrorism is characterized by the use or threat of violence, but also by resort to specific procedures such as endangering aircraft or use of particular instruments such as bombs or other explosive devices.

The Chilean Penal Code of 1874 gives a long list of crimes and offences against the external and internal security of the State, against public order and security and against persons (articles 106 ss, 121 ss, 261 ss and 390 ss). In these specific areas it is supplemented by law no. 12.927 on State security, updated in 1975, which defines offences against national sovereignty and the external and internal security of the State, as well as against public order or "normal national activities" (art. 11), resulting in an extremely vast arsenal of charges as well as definitions which are vague enough to allow for broad interpretation. Nonetheless, the anti-terrorist law of 1984 (no. 18.314) contains a new enumeration of offences considered as terrorist, which comprise 16 more or less detailed categories.

It lists a number of acts which undisputably are qualified as criminal in any legal system (art. 1): attacks on the Head of State, members of the government, magistrates, clergymen, diplomats, the military and the police (though the protection accorded to the families of all the latter is unusual); use of certain weapons; attacks on aircraft; placing of bombs and explosive devices; sending letters and parcel bombs; maliciously causing anxiety or serious fear among the population through fallacious information or the preparation or implementation of terrorist acts, etc. Acts, however, which are *per se* only preparatory in nature such as, in particular, the fact of receiving instructions to commit such acts, or publicly inciting the commission of such

offences, or excusing them or anyone who appears to participate in them are also described as terrorist offences. Thus, acts which are not such as to cause actual harm to anyone's life or physical integrity are deemed to be terrorist offences, whereas, at most, they border on mere unlawful expressions of opinion (*délits d'opinion*), not to mention the risks of overly wide interpretations of the imprecise concepts used.

The gravity of the penalties established is considerably greater than those provided under ordinary law: the penalty of imprisonment with hard labour for a period not exceeding twenty years is applicable to many charges, and the death penalty is applicable if the offence has resulted in death or grave bodily injury (art. 2). We should recall also that article 94 of the Constitution itself disqualifies those responsible for carrying out such offences from holding certain positions.

Furthermore, failure to report to the authorities on the plans and activities of third parties – with the exception of close relatives – intending to commit terrorist offences is punishable by imprisonment, with or without hard labour, for up to five years. The law provides that the authorities shall not reveal the identity of the informer.

Also, those who actively support doctrines which defend the use of violence, or who are suspected of so doing, may be placed under the surveillance of the authorities, a penalty which allows for restrictions on freedom of movement.

As this is a law intended to maintain law and order, its omissions are even more glaring than is the vague scope of the charges; there is no provision punishing as terrorist offences the execution of actual or alleged political opponents, "disappearances" of persons arrested, detention of political dissidents in secret prisons, wide-scale use of torture or attacks on families in their homes. However, the successive reports of

the Special Rapporteur of the United Nations on the situation of Human Rights in Chile, well-documented information supplied by Amnesty International, the detailed testimonies gathered by the Chilean Commission on Human Rights or the Chilean church, and even that country's daily press indicate that over the years and in terms of importance, it is above all acts of this type committed by agents of the authorities or with their complicity, which are behind the climate of fear in the country, to the extent that one is compelled to denounce the existence in Chile of a largely unpunished State terrorism.

### *b) Procedure*

There is no specific jurisdiction for the implementation of the anti-terrorist law; the competent court is designated by pre-existing provisions, in particular the law on State security (no. 12.927), and given the nature of the subject matter this is more often than not a military tribunal (art. 10).

However, in addition to the ordinary rules of the 1944 Code of Penal Procedure or of the 1925 Code of Military Justice, the relevant procedure is governed by specific provisions on some particular points.

The rule extending the period for the administration or police authorities to bring an arrested person to justice is crucial: this period may be increased to up to ten days (art. 11) – and we are aware that the twenty-fourth transitional provision of the Constitution already leaves the person arrested in the hands of the police for a maximum of twenty days. By law this extension is subject to the exigencies of the investigation; one is perplexed as to the requirements which would serve to justify delaying the appearance of the defendant before the judge who is in charge of the investigation. Thus, the anti-terrorist law

extends the period during which a detainee may be held without being subject to the direct supervision of a judge to thirty and even thirty-two days, if one includes the forty-eight hours which the police have to advise the court of the arrest, which they are authorized to make without a warrant (article 13). During this period the detainee may be held incommunicado (art. 11). Finally, in such cases, there is no possibility of obtaining provisional release from custody (article 17).

The anti-terrorist law explicitly empowers the National Information Agency (CNI) to carry out all aspects of the investigation when the case falls within the jurisdiction of the military tribunals (art. 12). By virtue of decree-law no. 1.878, of 1977, this body is responsible for dealing with all information necessary to the government, particularly in national security matters; it succeeded the DINA and had no formal powers of investigation or arrest. It now does, and these have been reinforced by the introduction, on 14 June 1984, of a rule enabling the CNI to make arrests under the twenty-fourth transitional provision and to keep those arrested in detention in its specified premises (law no. 18.315).

Situations leading to countless complaints of ill-treatment and even torture have thus been "legitimized."

Furthermore, security agents on an administrative order and with no judicial warrant may thus check and confiscate objects which may bear some relation to the offences in question and may proceed to search, open or check private communications and documents; such decisions are made without the knowledge of the person concerned and no remedies are available (articles 13 and 14).

Another peculiarity is the court's power to keep the statements and identities of witnesses and informers secret, notably at the request of such persons. This informa-

tion is placed in a separate, confidential file which is not revealed to the defendant until the charge is brought, and then only if it is intended to use it against him (art. 15).

## Conclusions

This legislative arsenal, only a few elements of which are highlighted in this article, is couched in far from exemplary legal form. This question of form, however, is not the main point at issue.

Chile in 1972 ratified the International Covenant on Civil and Political Rights of the United Nations; President Pinochet promulgated on 30 November 1976 that it should be applied as law of the republic.

However, it is clear from the above that several essential provisions of this Covenant are not being observed: non-discrimination on grounds of opinion in the exercise of recognized rights and the guarantee of a remedy in case of violation of these rights (articles 2 and 26), the right of any person arrested to be brought promptly before a judge (art. 9), the right to a fair hearing and to all facilities necessary for the preparation of his defence (art. 14) and the right of anyone sentenced to death to seek pardon or the benefit of an amnesty (art. 6).

Also, there is no doubt that prolonged application of the twenty-fourth transitional provision – not to mention the constant extension of constitutional states of emergency or states of siege, even since the

entry into force of the 1980 Constitution – is subject to the non-derogability of fundamental rights except to the extent strictly required by the exigencies of an exceptional public danger threatening the existence of the nation (art. 4).

The same observations could be made and stressed with regard to the American Declaration on the Rights and Duties of Man approved by the Organization of American States in 1948 and accepted as establishing the international norms of the region.

There is no question that every State is entitled to organize the defence of its institutions and agents against trouble-makers who use violence or other means such as to cause major disruption of public law and order and security. However, it is important that these means of defence remain proportionate to their objective, and they should not, as in Chile today, become a means of eradicating the exercise of fundamental human rights. This, however, is precisely the effect of the texts examined above, which were elaborated without any participation by the people and confer unlimited, uncontrolled prerogatives on the agents of the State. In truth, they have led more to a reign of terror than to public peace.

This unbridled legislation and the determination – though condemned in a recent decision – to refer to 'Councils of War'\* those suspected of certain offences, pursuant to decree-law no. 3655 of 17 May 1981, seem to be in keeping with the same design. Furthermore, they bear out those

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\* The Councils of War are military tribunals intended to be used only in time of war, which afford only those defence rights that are practiced on the field of battle, cf. articles 81 and 180 of the code of Military Justice. The recent decision was in the case of five persons charged with the murder of General Urzúa and two of his body guards. A Council of War had been convened to try the case by the summary procedure applicable in time of war. It was eventually decided, however, that they should be tried by a military tribunal, but in accordance with the peace-time procedure.

who assert that the political regime falsely sets up one section of Chilean society as the enemy of the other, in conformity with the suppositions of those responsible for

the pernicious "ideology of national security", which serves as a pretext for atrocious violation of human rights in so many Latin American States.

# Who's in Charge in Turkey?

by  
Bülent Tanör

The military regime, following the bloodless coup of 12 September 1980, lasted until the general elections of 6 November 1983, or rather until the formation of the Bureau of the Grand National Assembly.

This article gives a general description of the legal and political changes that occurred after the general elections with regard to the exercise of power. It complements two previous articles in the *ICJ Review*, the first of which dealt with the legal and political aspects of the military regime<sup>1</sup>, and the second with the 1982 Constitution drafted by this regime<sup>2</sup>.

The changes that have occurred in the legislative and executive powers, as well as the development of relations between the civilian and military authorities will be examined.

## Parliament

All political activity was prohibited in Turkey after the military intervention and the political parties were dissolved. A consultative assembly was established whose task was to participate in drafting a new Constitution and new laws, including those

relating to the political parties and elections.

In May 1983, the National Security Council (NSC), the central institution of the military regime, authorised the creation of political parties while retaining control over them and over the elections.

The NSC granted itself the power to "screen" the founders of the new political parties, by way of laws and decisions that it had itself enacted.

Thus, the Political Parties Act provided that a party could be created only by a minimum of 30 founder members (Art. 8), who were to be approved by the NSC (provisional Art. 4).

Further, the NSC decreed that a political party that was unable to bring together the minimum number of approved founders would not be permitted to participate in the legislative elections of 6 November 1983<sup>3</sup>; and it proceeded to examine and screen the lists of founder members that had been submitted to it by the new political parties.

The High Electoral Council, the constitutional body commissioned to ensure the smooth operation of the elections (Art. 79 of the Constitution), declared on 27 August 1983 that only three political parties had

1) "The Legal Situation in Turkey", *ICJ Review*, No. 26, June 1981, pp. 24-40.

2) Bülent Tanör, "Restructuring Democracy in Turkey", *ICJ Review*, No. 31, December 1983, pp. 75-86.

3) Decision No. 99 of 26 July 1983.

satisfied the conditions required for presentation at the elections: the Nationalist Democracy Party (centre right), with, at its head, ex-General Sunalp, the Motherland Party (right-wing liberal conservative) of Mr Özal (former Minister of the Economy in the military regime), and the Populist Party (centre left) of Mr Calp (former Under-secretary of State in the office of the Prime Minister of the military regime). The Social Democratic Party and the True Path Party were excluded on the grounds that their 30 founder members had not had the NSC's approval. In the meantime, the Grand Turkey Party, accused of being a continuation of the Justice Party of Mr Demirel, had been dissolved by the NSC.

The NSC also intervened in the selection of election candidates, giving itself the right to screen them also (Electoral Act No. 2839). It vetoed several of the candidates of the three parties that were authorised to take part in the elections. The Nationalist Democracy Party had 74 of its candidates rejected, the Motherland Party 81 and the Populist Party 89, that is a total of some 20% of the candidates presented by these three approved parties. The selection process was even harder on the independent candidates of whom 90% were rejected<sup>4</sup>. In all, 672 of 1,683 candidates were prevented from standing for election.

Subsequently, the High Electoral Council ratified the definitive electoral lists.

The election campaign took place in the climate of a military regime. It was short (three weeks) and restrained. *In extremis*, President Evren intervened against Özal in favour of ex-General Sunalp's party in his speech broadcast on radio and television on 5 November 1983, the eve of the elections. However, his intervention did not prevent the electors from repudiating the Nationalist Democracy Party, which suffered a

heavy defeat in contrast with the landslide victory of Mr Özal, who with more than 45% of the votes obtained an absolute majority in Parliament.

The new Parliament formed as a result of the elections of 6 November was limited to those parties and candidates approved by the military regime. This "made to measure" Parliament was composed of a relatively new political class, which was very passive in its attitude to the military circles. But it did demonstrate a relative independence when electing its president, for it chose a candidate of civilian origin, thus foiling a plan to have a military man elected.

The Parliament is extremely docile in its relations with the government, both in political and legislative matters. In fact, up to the present, it has shown little zeal for putting pressure on the government and keeping it in check by the means available to it through the Constitution. Two specific factors contribute to this relative apathy: first, the government has an absolute majority in Parliament, and second, the famous principle of party discipline weighs on the majority party.

There are, however, signs indicating that the mechanisms of parliamentary checks are not a completely dead letter and activity in this direction is gradually increasing: for example, a vote of censure was proposed by the Nationalist Democracy Party (although it was rejected by the majority) and the Assembly has recently referred a minister accused of having accepted bribes to the Constitutional Court, which will sit as a High Court in judgment of the accused.

In matters of legislation, the most characteristic attitude of the Parliament is to make broad use of Article 91 of the Constitution, which authorises it to empower the Council of Ministers, on the latter's request, to legislate by decree. This practice

4) *Le Monde* of 24 September 1983.

is becoming more frequent. It may be said that the areas governed by decrees are growing to the detriment of those governed by laws.

But the real problem of the Turkish Parliament lies elsewhere. We have already seen that the Parliament that resulted from the very uncompetitive general election is far from a true reflection of the will of the people. Now a new event has come to aggravate the already delicate situation: the local elections of 25 March 1984, or rather their repercussions on representative democracy.

These elections did indeed mark a second serious step along the road to a democratic and participatory regime. All the political parties, including those excluded from the general elections of 6 November 1983, took part, with the embarrassing result that the political parties that had been prevented from running previously succeeded in collecting 43% of the votes in these local elections. This called into question the representativity of the Parliament deriving from the general election.

The situation is still far from constituting a crisis of legitimacy that could damage the credibility of the present Parliament. But the discrepancies between the present political trends in the country and a Parliament whose composition prohibits it from reflecting them would appear to contain the seeds of such a crisis.

We may draw two general conclusions from what has been stated:

- (a) The new Turkish democracy is not yet a fully parliamentary, i.e. representative, one.
- (b) The form and substance that the military regime has tried to impose on certain political institutions and forces (Parliament, the political parties, etc.) have shown them to be at odds with the real tendencies of the country, and

they have already been discounted in practice. In other words: the artificial has once again yielded to the natural: "the organism rejects the graft".

In short, after two years of strong-arm democracy, the situation does not appear too positive for its founders.

## The Executive

"Finally, the new powers given to the President of the Republic, contrary to Turkish republican tradition, can create misunderstandings between him and the Parliament in such a way as to have an adverse effect on its relations with the Government. This conflict is in danger of becoming graver if the President and Parliament are not of the same political outlook."

Thus concluded my 1983 article on "Restructuring Democracy in Turkey".

It is true that the misunderstandings referred to in the text just quoted exist only at a very secondary level in the present constitutional practice. Indeed, one can even find a harmony in the relations between President on the one hand and the Parliament and the Government on the other. He makes wide use of the powers afforded him by the Constitution, and on occasion even exceeds the limits set, without encountering any resistance on the part of the two constitutional bodies.

For example:

- President Evren presides, when he considers it necessary, over the Council of Ministers, especially when it takes decisions on the maintenance of public order or national security.
- He sends back bills to the Grand National Assembly for a second reading, as was the case for the Local Elections Bill, the Bill of 28 March amending the Order



of Advocates Act, and a Bill providing for increases in the salary of members of Parliament. It may be noted in passing that the presidential vetoes in the first and third of these cases were motivated by more democratic considerations than those that had prevailed in Parliament.

- The President sends back decrees to the Council of Ministers for a second reading<sup>5</sup>. He also intervenes, by way of letters of notice addressed to the Government, in relation to nominations made by ministers and requests revision of the decisions in question<sup>6</sup>.
- The President also takes a very active position in almost all political matters, with the exception of those relating to the economy. Frequently addressing the public through the mass media, he opposes, for example, the immediate lifting of the state of siege<sup>7</sup> in all provinces, or abrogation of the death penalty, and he categorically rejects allegations of torture, violations of human rights, or criticism of the university system set up by the military regime. He does not fail to cast aspersions in public on former politicians deprived of their political rights, including even their rights of expression

enshrined in the Constitution and laws of exception, and is opposed to their re-integration into political life.

- President Evren further presents himself as the sole guarantor of the Constitution. He takes a harsh stand against criticism of the new Constitution and proposals for even minor constitutional reforms, qualifying revisionists as being "traitors of the homeland", nostalgic for the past, or simply naïve<sup>8</sup>.

Such reactions can be explained by different factors.

First, from the legal point of view, a large number of these activities are authorised and protected by the Constitution, which provides for a semi-presidential regime. The reader needs only to glance at Articles 104, 105, 108 and 175 and the provisional articles of the Constitution in order to appreciate the scope of the prerogatives and powers vested in the President in legislative and judicial matters and with respect to the executive. Article 104, for example, gives the President the power to "ensure that the Constitution is applied and that the state bodies function regularly and harmoniously".

5) See the daily newspaper *Cumhuriyet* of 20 November 1984.

6) See the weekly *Nokta* of 7-13 May 1984, No. 11, p. 23.

7) When a 'state of siege' is declared in a province, it results in the imposition of martial law under which civilians are tried before military tribunals for security offences. A declaration of a 'state of emergency' leaves the civilian authority in power. It may impose restrictions on constitutional freedoms, but security offences are tried before civilian courts. The number of provinces under a state of siege or a state of emergency has been reduced steadily during the last year. On 26 May 1985, the Council of National Security (see *infra* pp. 66-67) recommended that, from 19 July 1985, the state of siege should be lifted in six provinces and replaced by a state of emergency; that the state of siege should be prolonged for four months in 17 provinces; and that the state of emergency should be lifted in six provinces and prolonged for four months in six others. Thus, as from 19 July 1985, out of 67 provinces, 17 will be under a state of siege, six under a state of emergency and 44 will be functioning normally.

It should be noted that the military tribunals will continue to function after the lifting of the state of siege until the completion of all cases they are in the process of trying (Art. 23 of the Law on States of Siege, as modified by Law No. 2301 of 19 September 1980).

8) Speech given on the occasion of the 22nd anniversary of the foundation of the Constitutional Court (*Cumhuriyet* of 26 April 1984); speech at Manisa (*Milliyet* of 29 May 1984).

The second factor is historical. Barely two years ago, President Evren was Chief of Staff, leader of a military coup, president of the NSC, i.e. the major component of a regime of exception which has lasted for three years. The weight of this background helps to reinforce the positions taken by the present President.

To this may be added a psychological factor. President Evren still enjoys great popularity and support from the people. These last two factors, historical and psychological, allow him to act, not only as "constitutional tutor", or "leader-arbitrator", but also as "father of the nation". Whence the number of presidential interventions, which take various forms, such as radio and television appearances, drop-in visits to public establishments and systematic trips across the country.

The "repression" factor also plays an important role. Any criticism or tendentious opposition to the system established by the military regime is repressed by way of laws drafted by the NSC and punished by military tribunals. It is sufficient to mention here the latest law promulgated by the NSC, just before handing over power, which forbids the expression of ideas liable to "recreate the political hostilities existing before the military intervention", or such as to "discredit the decisions taken by the NSC or declarations made by its members"<sup>9</sup>. It is thus evident that the new Turkish democracy is not yet completely liberal or pluralistic.

Finally, there is the political aspect of the question: the Parliament and Government resulting from the elections of 6 November are of a kind to avoid any conflict with the President of the Republic. In addition, the results of the local elections have shown that the two parliamentary opposi-

tion parties, like all artificial formations, are in the process of losing their electoral authority and are fading from the political scene. Further, the political parties that appear to be the most firmly established are outside Parliament and parliamentary game. They have no effective legal instrument available to them check the presidential omnipresence.

Thus, in the absence of real and representative political institutions, and under the weight of the recent past, a certain division of tasks at the top echelons of the State is operative. But since this division corresponds in a large measure to the situation governing the relations between the civilian power and the military authority, it must be discussed under another, final heading.

### Civilian-military relations

As a French journalist had clearly foreseen<sup>10</sup>, in the running of Turkish affairs there is a separation of tasks at the summit of the State, between the President of the Republic, the armed forces, and the Government.

Özal and his government deal essentially with the running of the economy, and the military authorities with maintaining public order and with questions of national security and defence. As for the President of the Republic, placed in the position of arbitrator between the civilian and military powers and vested with wide powers by virtue of the Constitution, his role is more than that of arbitrator between the two authorities. For, as was emphasised above, he is very active and influential in all political affairs, and especially in fields relating to national security and public order, two

9) Act No. 2969 of 6 December 1983.

10) Articles by Jean-Pierre Clerc appearing in *Le Monde* of 8 and 10 November 1983.

terms which have acquired the most extraordinary scope in Turkish political life over the last few years. The weight of the military authority is thus exercised above all through President Evren. Whence the very instructive title of an article that appeared in a Turkish newspaper: "An ideal division of tasks at the summit of the State: The economy to Özal, security to Evren"<sup>11</sup>, or, as we would prefer to put it, "The economy to Özal, the rest to Evren".

But that is not all. The military authority has a certain autonomy in relation to the civilian power, which enables it to play an active role in State and public activities. These instruments of autonomy and pressure consist of certain legal mechanisms and institutions and other phenomena, such as a broadening of the powers and functions of the military tribunals and expansion of the realm of military justice at the expense of that of civil justice or of the "civilian State".

Two of these mechanisms, involving changes in the system of responsibility of the military power towards the political power, are described below.

(a) Until 1960, when the first military intervention in the political life of the Republic took place, the Chief of the General Staff was placed under the administrative hierarchy of the Defence Ministry. From that time on, and by means of new laws and constitutions or constitutional amendments, the Chief of the General Staff has been answerable to the Prime Minister<sup>12</sup>. This is tantamount to a promotion of the military establishment in the State hierarchy. It is clear that this is not

merely a matter of protocol.

(b) The changes made in the system of responsibility of the commanders of the state of siege are also revealing. The system which existed until 1980 empowered the Prime Minister to ensure coordination between the commanders of the state of siege of different regions. Similarly, the latter were responsible to the Prime Minister who in turn is responsible to Parliament. The new system established by the legislation created by the military regime replaces the Prime Minister by the Chief of the Staff, both in matters of coordination and responsibility<sup>13</sup>. This change is confirmed and established as a constitutional rule in the 1982 Constitution: "The commanders of the state of siege exercise their functions under the authority of the Chief of the Staff" (Art. 122).

As for the constitutional bodies, two in particular are worthy of mention: the Council of the Presidency of the Republic and the Council of National Security (not to be confused with the National Security Council, the central body of the military regime).

After the convocation and entering into force of the Grand National Assembly, the National Security Council was transformed, for a period of six years, into the Council of the Presidency of the Republic. The task of the Council is to examine the laws adopted by Parliament and transmitted to the President of the Republic, to undertake studies and inquiries on subjects related to national security and other matters as deemed necessary by the President of the

11) The daily newspaper *Milliyet* of 15 October 1984.

12) Article 110 of the 1961 Constitution; Article 117 of the Constitution of 1982.

13) Articles 2 and 3 of Act No. 2342 of 14 November 1980 (Official Journal of 15 November 1980 - 17161).

Republic, and to submit its conclusions to him<sup>14</sup>.

The members of the Council of the Presidency of the Republic also participate in the activities of the Council of National Security. As a communiqué issued by the latter states, they are invited to be present at the sessions of the Council of National Security, having regard to the tasks assigned to them by the Constitution<sup>15</sup>.

Thus, these former military men or dignitaries of the armed forces act as intermediaries between the civilian and the military powers for the term of this legislature which, according to the picture given by the provisional articles of the Constitution, constitutes, so to speak, a transition period.

The Council of National Security is a constitutional institution created after the coup d'état of 1960 and confirmed by the Constitution of 1961 (Art. 111). Its composition has recently been modified and its role in the decision-making process strengthened by the Constitution of 1982 (Art. 118).

First, the military is assured an absolute majority within this body, apart from the presence of a President of the Republic of military origin: "The Council of National Security shall be composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defence, Internal Affairs, and Foreign Affairs, the Commander of the Gendarmerie, under the chairmanship of the President of the Republic."

Next, the tasks and prerogatives of the Council are defined, in this case in more ambiguous terms, such as "the protection (*inter alia*) of the peace and security of society". These terms have taken on a very

particular connotation in the official Turkish vocabulary over the past few years. They are generally used as synonyms of or equivalent to a "political and social truce", that is, the avoidance of political and social demands considered excessive by those on high in political life, who are not only civilians.

Finally, the "opinions" of the Council of National Security appear to have undergone a change. The Council participates in the framing of the "national security policy" and, to this end, communicates its opinions to the Council of Ministers. These opinions, qualified as "consultative" in the old Constitution, have, in the present text, become, if not completely obligatory, at least worthy of "being given priority consideration" by the Council of Ministers.

## Conclusion

The facts presented in this article allow us to affirm that the process of normalisation or return to democracy in Turkey does not correspond completely to a process of demilitarisation. The decision-making mechanisms described above show that the influence of the military authorities in this respect remains decisive and sometimes even exceeds the limits set by the Constitution which is, nevertheless, the product of a military regime. Despite the privileged position that the constitutional institutions and mechanisms ensure for the armed forces, the latter continue to demonstrate their presence by way of proceedings that are hardly compatible with the Constitution. A recent event provides a most interesting example.

14) Provisional Article 2 of the Constitution of 1982.

15) Communiqué of the Council of National Security (*Cumhuriyet* of 30 August 1984). The members of the Council of the Presidency of the Republic were also present at other sessions of the Council of National Security, such as that of 26 October 1984, but not that of 15 February 1985.

A seminar on questions of national security, organised by the Commander in Chief of the General Staff and attended by the Prime Minister and a number of ministers and magistrates, has now been announced to the public by headquarters as a "collaboration seminar between the Government and the Armed Forces"<sup>16</sup>.

This formula, apart from the way it reveals the real power relationship existing between the civilian and the military authorities, merits a brief examination in strictly legal terms.

"Collaboration" implies a kind of rela-

tionship or connection between two separate, distinct and independent bodies or entities, which are, in principle, on an equal footing.

Yet, as Article 117 of the Constitution of 1982 states, "the Chief of General Staff is responsible to the Prime Minister in the exercise of his prerogatives and powers", and "the Council of Ministers is responsible before the Grand National Assembly of Turkey for the maintenance of national security and the preparation of the Armed Forces for the defence of the country".

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16) Communiqué of the General Secretariat of the Commander in Chief of General Staff (Cumhuriyet of 18 February 1985).

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