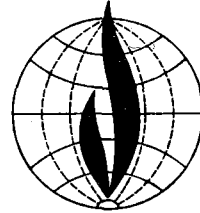


For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Human Rights in the World

Bolivia

In July 1980 the military government of General Garcia Meza took over power in Bolivia after invalidating the elections which had conferred the Presidency on Dr. Hernan Siles Suazo of the MNRI (National Revolutionary Movement). Just over two years later, in September 1982, the Electoral Court declared the 1980 elections valid and recognised the election of Dr. Siles who thereafter commenced his term of office which was scheduled to end in 1986. However, Dr. Siles was forced to hold elections a year early, in July 1985, after his administration came under attack from labour and business groups. These elections resulted in 28.11% of the vote going to the ADN (National Democratic Action) led by General Banzer, 26.66% going to the MNR (National Revolutionary Movement) led by Dr. Victor Paz Estenssoro and only 5% to the MNRI. According to article 90 of Bolivia's constitution, Congress must choose between the three leading candidates if none wins an absolute majority. On 5 May 1985, Congress elected Dr. Paz as President and he assumed office in August of that year.

On 12 September the new government placed all state enterprises under military control and declared a 90-day state of siege to counter public protests against military intervention in state enterprises and government economic policies. More than 1,500 people were arrested and some 460 sent into internal exile in Bolivia's subtropical north. Most of those arrested were released after 24 hours.

On 28 August 1986 the government again declared a nation-wide state of siege and arrested some 160 labour leaders, church workers, journalists, human rights activists, political opposition figures and the leading officers of the COB (Bolivian Central Labour Union). The government justified the declaration of the state of siege as an attempt to control the mounting social unrest and to stop an insurrection plan of extreme left-wing groups which allegedly planned to take advantage of a peaceful march from the mining town of Oruro to La Paz to make a bid to take over the government. Some 5,000 miners, with their families, marched in protest against government plans to restructure the state-owned mining company COMIBOL (Corporación Minera de Bolivia), close several tin mines and make redundant 8,000 workers. There had already been a prior 8,000 redundancies between May 1985 and May 1986. The miners were planning to walk to La Paz, the capital, but about 60 kms from the city were encircled by the army between the towns of Calamarca and San Antonio. Witnesses said that groups of workers, some of whom had walked 182 kms, were forced at machine-gun-point to get in army trucks to be taken, along with their families, to the mining districts of Potosi and Oruro. Some escaped and fled to Calamarca and San Antonio where they were besieged by the army who used brutal methods in their attempt to round them up. The situation was made all the worse

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by the initial refusal of the army to let food and medical assistance into the towns, though this was finally allowed thanks to the mediation of the Catholic Church.

While many of those detained under the provisions of the state of siege were released after several days in incommunicado detention, over 50 people were sent into internal exile in remote regions in the north of the country where they were held in detention camps; some until 18 September 1986.

Another matter of concern is the investigation of human rights abuses that occurred under previous governments. To a large extent the credibility of the system of guarantees and protection for human rights depends on the progress of this investigation. (See ICJ Review No. 30, p. 9). Attracting most attention is the trial of responsibilities (*juicio de responsabilidades*) of Gen. Luis Garcia Meza, President from 1980 to 1981, his Minister of the Interior, Col. Luis Arce Gomez, and at least 54 of his collaborators on charges of armed sedition, assassination of political opponents, genocide, organization of irregular armed groups, violation of constitutional guarantees, and misuse of private funds. Under article 68-12 of the Bolivian Constitution the initial stage of trial proceedings against former members of the government must be initiated by Congress, acting in accordance with the procedures established by two old laws from 31 October 1884 and 23 October 1944. The process was initiated in February 1984 when two political parties (MIR and PS-1) presented a petition to Congress. On 25 February 1986 Congress sent the case to the Supreme Court and the trial began on 7 April 1986 in Sucre, the federal legal capital and seat of the Supreme court, which is 1,000 kms from La Paz, the main political centre.

In the first year, the Court only completed half of the preliminary investiga-

tions (*diligencias preparatorias*). Up to the second week of September 1987, 30 of the accused have lodged their depositions and four have gone into hiding. They have been found guilty of contempt of court, and orders for their detention have been issued.

A civil action was also initiated, and heard concurrently with the criminal case. The plaintiffs of the civil action are COB (Bolivian Central Workers' Union), the National University System of Bolivia, and two non-governmental organisations, the Human Rights Assembly and the Association of Relatives of the Victims, which are represented by the lawyers Juan del Granado, Julio Cesar Sandoval and Freddy Padilla.

Similar cases have only occurred twice in the 162-year history of the republic of Bolivia – in 1877 and 1942. The files of these cases have disappeared from the Supreme Court Archives and the Court has been acting as if there were no precedents to the present case. In the previous cases the Court had acted in accordance with the Code of Criminal Procedure and no appeal was allowed.

All but two of the depositions received have denied responsibility and have alleged superior orders. Even Col. Garcia has tried to put full responsibility on the high-ranking army officials who backed his administration, alleging that he received superior orders from them. He also placed responsibility on his cabinet of Ministers and his advisors. In their turn, the Ministers denied their responsibility, claiming that they also had been following superior orders. The army officers Avelino Rivera and Carlos Morales were the only two to accept the majority of the charges against the dictatorship and to accept the collateral responsibility of the army in the events.

The COB, one of the civil parties, ap-

proved in its July 1987 General Assembly a petition to the Supreme Court for the detention of the accused, a request to Congress for the enactment of a procedural law for this type of trial, and agreed that every member of the Union should pay one boliviano (about half a U.S. dollar) towards the future expenses of the final stage of the trial.

The need for a procedural law for this type of trial is supported by lawyer del Granado on the grounds of the political implications, the large number of accused (56 in this particular case) and the multiple charges (for this case divided into seven different groups) which render the process endless and complicated if dealt with under the provisions of the existing procedural law. He hopes that such a new proce-

dural law would be operational before the final stages of the trial which is envisaged at the end of 1988.

There have been reports that lawyers acting on behalf of the plaintiffs had been threatened and intimidated in the course of their work by paramilitary groups reportedly linked to the Armed Forces. The reluctance and delay of members of the Executive, especially in the Ministry of the Interior and the Ministry of Defence, to following the orders of the judiciary is also a matter of concern. This includes the retention of evidence in their archives and even paying for space in the press to express their opposition to the lawyers of the plaintiffs and other Ministers who have released evidence to the Court from their offices.

Fiji

Between May and September 1987, there were two coups in Fiji both carried out by Lt. Colonel Sitiveni Rabuka. The first coup took place on 14 May and the second on 25 September. Fiji, the second most populated state in the South Pacific, has an ethnically diverse population. It consists of indigenous Fijians, Rotuman Islanders, people of Indian origin who are mainly descendants of indentured labourers, Europeans and Chinese. The people of Indian origin constitute 49%, the Fijians and Rotuman Islanders 47%, and the Europeans and Chinese constitute the remaining 4% of the population.

The fact that the indigenous Fijians are a minority in their own land has for long created anxiety among them that they would be politically and economically subjugated by the foreigners as has happened in New Caledonia or French Polynesia. The coup by Lt. Colonel Rabuka needs to be understood in this context and as stated by Professor Yash Ghai "There is no doubt that the coup violated principles of constitutional government and fairness but it is important to understand it from the point of the Fijians. A constructive solution must take into account their grievances and anxieties".

* "The Fijian Crisis: The Constitutional Dimension," by Professor Yash Ghai, *The Minority Rights Group Report No. 75*.

From 1874 to 1970 Fiji was a British colony after its sovereignty had been voluntarily ceded to Britain by the Fijian High Chiefs. The British introduced sugar plantations and brought Indian labourers to work in the plantations. The Fijians continued with their subsistence agriculture. The colonial administration sought to protect the Fijians by prohibiting alienation of their lands to others than Fijians and recognising the 'native' administration under the authority of the Chiefs. At the beginning of this century the Australian Sugar Refining Company, which had a complete monopoly over sugar production in Fiji, abandoned its own plantations and encouraged independent farmers (who were mostly Indians) to supply cane. To assure leaseholds for the Indian farmers the colonial administration introduced regulations culminating in the establishment of a Native Land Trust Board (NLTB) in 1941. However, the Fijian Chiefs continued to play an important role in mediating land relations between the Fijians and the Indians. The Indians accepted certain social and political prerogatives of the Fijians in return for sufficient and secure leaseholds. This arrangement was further strengthened under the Constitution negotiated between the two communities prior to independence from the British.

On 10 October, 1970, Fiji became independent but retained the Queen as head of State, represented by a Governor-General, and Fiji became a member of the Commonwealth. The Constitution guaranteed the continuation of the earlier Fijian Affairs Ordinance which had recognised the application of customary law to Fijians through their own courts, as well as the rights of the Great Council of Chiefs and the Fijian Affairs Board. Under the Constitution the Council of Chiefs may submit to the Governor-General recommendations and proposals of benefit to the Fijian peo-

ple. Similarly, the Fijian Affairs Board, an executive body, has to be consulted prior to any bill that affects the rights and interests of Fijians or which imposes a tax to be paid by them, and on any matter relating to the Chiefs.

The Constitution also recognised the National Lands Ordinance under which control of all 'native' land vested in the Fijian dominated Native Land Trust Board. The Board has powers to grant leases or licences over such land but it must be satisfied that the land in question is not occupied by its Fijian owners and is not likely to be required by them for their use, maintenance and support during the currency of the lease or licence.

The Constitution also created a 22-member Senate. Of the 22 members, eight are nominees of the Council of Chiefs, one is a nominee of the Rotuman Council, seven to be appointed by the Prime Minister and six by the leader of the opposition. The Senate acts as a guardian of the constitutional settlement and no constitutional changes of significance were to be made without two-thirds approval of the senators. In addition, any legislation that affects Fijian land, customs or customary interests needs the support of all the eight senators nominated by the Council of Chiefs.

The Fijians also succeeded in negotiating an electoral system based on three electoral rolls – one each for Fijians, Indians and the minorities (the 'general' roll). The Fijians and the Indians are each allotted 22 seats, twelve being filled by candidates elected by the community constituencies and ten by candidates belonging to the community but elected by all voters. The 'general' voters have eight MPs, three voted in on a community basis and five on a national basis.

Even before independence, Fijian parties had been dominated by the Alliance

Party representing the Fijians and the National Federation Party (NFP) representing the Indians. In 1985, a new Labour Party was formed led by a Fijian, Dr. Timoci Bavadra. The Labour Party is an outcome of the social changes that have taken place in Fiji and is the political expression of the newly emergent industrial working class, professionals and others who are disenchanted with the existing parties. The Labour Party is a genuinely non-racial party and eroded the support of both the Alliance and the NFP.

The emergence of the Labour Party was also perceived by the Great Council of Chiefs as a threat to their traditional powers.

In the fourth General Elections held in April 1987, the opposition coalitions of the NFP and the Labour Party won 28 seats of which 19 were represented by NFP. The Alliance Party secured only 24 seats. The opposition coalition was able to win mainly because of the shift in Fijians votes from the Alliance to the Labour Party.

On April 14, Dr. Bavadra, leader of the Labour Party, assumed office as the Prime Minister in accordance with an agreement of the two coalitions parties. The cabinet included seven Indians and four members of the Labour Party. The Prime Minister also holds the portfolios of Fijian Affairs, Home Affairs and Public Service.

Following the installation of the new government there were demonstrations against the Indian community, including against some of the new ministers. The demonstrations were said to be organised by the Taukei Movement, which has strong racist and anti-Indian overtones. The Taukei Movement is known for its demand for the exclusion of all groups except ethnic Fijians from the political system.

A month later, amid the growing tensions between the Fijian and Indian communities, Lt. Colonel Sitiveni Rabuka en-

tered the Parliament with ten other soldiers, arrested Dr. Bavadra and other members of the government, and suspended the Constitution.

Lt. Colonel Rabuka claimed that his action was essential for the maintenance of order and the prevention of racial violence.

The Governor-General, Sir Penaia Ganilau, refusing to recognise the coup, issued a statement condemning "the unlawful seizure of members of my government and some MPs". In the face of growing domestic opposition in the form of strikes and demonstrations by the supporters of Dr. Bavadra, Lt. Colonel Rabuka announced on May 16 the abolition of trade unions and banning of strikes, as well as increased penalties for those who "incited unrest and hatred".

On May 17, the Governor-General refused to swear in and thereby legitimize Rabuka's Council of Ministers. The Governor-General's stand was supported by the Chief Justice and by the seven Supreme Court judges who stated their "undivided and complete loyalty to the Constitution". On May 19, the Governor-General announced his intention to exercise executive authority in conjunction with an appointed Council of Advisors pending fresh elections. On the same day, Dr. Bavadra and his colleagues were released. The Governor-General also had extensive consultations with the Great Council of Chiefs and on May 21, the Chiefs agreed to support the Governor-General's interim government on the understanding that Lt. Colonel Rabuka be appointed as head of the advisory council. Following this, a 19-member Advisory Council was appointed, of which only two, including Dr. Bavadra, were from the deposed government. Dr. Bavadra, in fact, refused to participate in the Advisory Council. The dominance of Lt. Colonel Rabuka was reinforced by his promotion to full Colonel and his appoint-

ment as Commander of the Royal Fiji Military Forces.

In July, the Governor-General announced a five-stage plan to restore parliamentary democracy. As a first step, he convened a Constitutional Review Committee (CRC) to strengthen the political representation of indigenous Fijians. The plan also included the establishment of a National Reconciliation Council (NRC) to review the report of the CRC and decide on a slate of 52 candidates for an uncontested election to the Parliament; amendment of the Constitution as proposed by the NRC; dissolution of the Parliament and the holding of a freely contested election. Dr. Bavadra first refused but later joined the Constitutional Review Committee.

These plans of the Governor-General were progressing smoothly, even to the point where the establishment of a bipartisan government to be led jointly by Dr. Bavadra and Ratu Sir Mara, the previous Prime Minister, was announced. At this juncture Colonel Rabuka announced a second coup on 25 September. It is deplorable that Colonel Rabuka staged the second coup when there was a possibility of a settlement to the crisis created by the first coup. Colonel Rabuka stated that he staged the take-over because he had been unable to alter the Constitution to protect the rights of ethnic Fijians. The Colonel also declared Fiji to be a Republic, ending a 113-year tie to the British Crown. The Supreme Court judges, including the Chief Justice, in a letter to the Governor-General, stated that "we are, of course, determined to continue to discharge our duties as long as your Excellency continues to exercise your lawful authority as this country's Governor-General. On the other hand, we are resolved not to render serv-

ice as judges to any regime or organisation, by whatever name it may describe itself, which opposes your Excellency's lawful authority or attempts unlawfully to change the Constitution". On October 16, the Governor-General tendered his resignation to the Queen. The judges of the Supreme Court and the Ombudsman Sir Moti Tikaram (a member of the International Commission of Jurists) refused to subscribe to a new oath and resigned from office.

The Decree proclaiming Fiji as a Republic stated that the 'People of Fiji'

- require that a new Constitution replace the Constitution under which they attained independence;
- reaffirm that the indigenous Fijian race is endowed with their lands and the right to govern themselves for their advancement and welfare;
- reaffirm that the nation is founded upon principles that acknowledge the Deity and the teachings of the Lord Jesus Christ; and
- re-assert their recognition that the indigenous people of Fiji, in respecting the rights of their brethren to live in harmony, are entitled to due deference to their customs and traditional way of life.

Pursuant to the statement that the nation is founded on Christian beliefs, the regime banned, inter alia, Sunday sport, trading, public transport, entertainment, or any picnic and/or gathering in a public place." By another decree the regime dissolved the Courts and declared vacant all judicial appointments made before 25 September. The same Decree also created a Judicial Advisory Committee consisting

** See Fiji Military Government Decree No. 20, below.

of three persons, including the Attorney-General. The Judicial Advisory Committee was empowered to make appointments to judicial offices. Another decree prohibited the courts from questioning the validity of the decrees issued by the military government.

A decree issued on 14 October, entitled the 'Fundamental Freedoms Decree 1987' states that, "freedom of life, liberty, security of the person and protection of the law may be restricted by decree in the interests of public order and morality". The decree also permits detention without charge of any person for up to a month before being brought before an independent tribunal whose decisions do not bind the military authorities.

The regime carried out short-term detention of supporters of the deposed coalition government and also strictly enforced the ban on any form of entertainment on Sundays.

The Colonel appointed a 20-member Council of Ministers, all of whom, except for one part-European and two Indians, were Fijians. Among the Fijians there were seven former MPs belonging to the Alliance Party, as well as persons belonging to the extremist Taukei Movement. At the time of writing this article the Colonel, in keeping with his earlier statements, relinquished his office as head of government and appointed former Governor-General Ratu Sir Penaia Ganilau as President. Sir Penaia then named Ratu Sir Kamisese Mara as Prime-Minister returning him to the post he held for 17 years from Fijian independence in 1970 until his election defeat in April 1987. Prior to the appointment of the President and the Prime-Minister there were reports in the

press that the Colonel was planning to proclaim a Constitution in which Fijians will have 36 seats, Indians 22 seats, and Europeans eight seats; elections will be based on strictly communal rolls, and the Constitution will be reviewed every ten years. However, it is not clear what political arrangement will emerge and whether it would be acceptable to the Fijians as well as the Indians. In fact, even at the time of independence it was accepted that the 1970 Constitution was an interim measure and it would need to be reviewed by an Independent Royal Commission.

In 1975, a three member (all British) Commission was appointed to review the Constitution. In its report published in February 1976, it recommended changes designed to remove some of the racial distinctions in the present system while ensuring that no one racial group could gain overwhelming political advantage. The Commission recommended the retention of the 27 existing communal-roll seats but suggested that the 25 national-roll seats should be filled on an entirely non-racial basis under a single transferable vote system.

In the words of Professor Yash Ghai, "the Commission's report received little serious consideration as the Alliance government was unwilling to contemplate any change to the 1970 system. Yet it shows the way out of the institutionalised racism of the electoral system and opens further the path of cross racial parties. It would encourage the leaders from different racial groups to cooperate on national goals and policies, establish a more relevant agenda for national debates, and help to dispel racial suspicions and mistrust."

Fiji Military Government Decree No. 20

Sunday Observance Decree, 1987 (No. 20)

In exercise of the powers vested in me as Commander and Head of the Fiji Military Government, I hereby make the following Decree:

1. This Decree may be cited as the Sunday Observance Decree, 1987.

2. 1) Sunday shall be observed in the Republic of Fiji as a sacred day and a day of worship and thanksgiving to Christ the Lord and such observation shall be without prejudice to section 3(2) and section 10 of the Fundamental Freedoms Decree.

2) For the purpose of this Decree Sunday commences at midnight on the preceding Saturday and ends at midnight on Sunday.

3. All persons irrespective of whether or not they profess the Christian faith shall respect Sunday and shall subject to section (4) of this Decree neither do or omit to do any act that may undermine the significance of Sunday to the Christians in the Republic of Fiji.

4. The following activities may be undertaken on Sunday:

- a) performance of essential services as set out in the Schedule to this Decree;
- b) carriage of persons from one place to another in a private motor vehicle;
- c) transport to and participation in worship; religious discussions and activities;
- d) preparation of food outside a dwelling house by way of a 'lovo' or barbecue;
- e) tendering of essential services in relation to domestic animals;

Provided that the performance of any of the above is not in relation to the conduct or furtherance of any trade, business or gainful employment, and, in respect of (d) above it shall be an essential precondition that all the food and materials required are gathered prior to Sunday.

5. 1) Subject to sections 2 and 3 of this Decree all other activities not normally carried out on Sunday are prohibited and as such are unlawful.

2) For the avoidance of any doubt it shall be unlawful for a person to do any of the following on Sunday:

- a) attend picnic and/or any gathering in a public place or participation in any sporting activities anywhere;
- b) engage in commerce or trade for profit and performance of professional services wherever for a fee or levy;
- c) operate buses, taxis or other means of public transport;
- d) operate a hotel, restaurant, cinema or nightclub and related activities or businesses.

Provided that *bona fide* tourists (whenever any of the above is relevant) shall not be affected by any of such prohibitions and are exempted therefrom and such tourists shall be entitled to be served as normal without any repercussions on the person providing the service required by them.

6. Any other activities sought to be carried out on Sunday and for whatever reason and/or purpose it is sought to be carried out shall only be carried out following the obtainment of a permit from the nearest police station, and, such permit shall only be issued by officers holding the rank of Inspectors and above and for rural stations by station officers or their assistants from time to time.

7. Any person who is in breach of any of the provisions of this Decree shall be guilty of an offence and upon conviction shall be liable to a fine of not exceeding \$100,00 or to 1 month's imprisonment or liable to both such fine and term of imprisonment.

8. This Decree shall come into force on 29th October 1987.

Dated this 11th day of November 1987.

*Colonel Sitiveni Ligamamada Rabuka O.B.E. (Mil.)
Commander and Head of the Fiji Military Government*

Haiti

On 7 February 1986, when "President for Life" Jean-Claude Duvalier was spirited out of the country aboard a U.S. Air Force jet, many Haitians believed that they had earned the right to the democratic government which had been denied them for most of their history. A growing popular rebellion had forced the dictator to abdicate and change was in the air.

Nevertheless, the military-civilian junta (CNG) which Duvalier left behind has shown little more inclination to respect human rights and democratic principles than had the departed dictator.

Human Rights

A report by the Caribbean Council of Churches (CCC) of an August 1987 Mission to Haiti analyzed the human rights situ-

ation in the period leading up to the scheduled November 1987 elections. The Mission, led by Samuel J. Carter, the Catholic Archbishop of Kingston, Jamaica, found "a serious deterioration in the rule of law". The report notes that, "[a] climate of terror has been created by the murder of peasant leaders, church, human rights and political activists. This atmosphere is inhibiting the administration of justice and creating a breakdown in the laws governing detention and trial". In the capital city of Port-au-Prince, "gangs dressed in military uniform are roaming the streets of the city shooting people and leaving a toll of bodies to be collected in the morning".

Indeed, according to Haitian human rights organisations, the number of deaths in July and August 1987 alone was over 500. The worst incident occurred on 23 and

24 July in the commune of Jean Rabel when members of the Catholic peasant organisation *Tet Ansamn* (Heads Together) were massacred along with their families by armed civilians operating, according to the Mission, "with the cooperation and complicity of local police and military authorities". As many as 200 died. In addition, the Mission found that the army has been waging "a veritable war" against the peasant population in the Grand Anse region, including "torturing, killing and ransacking [property]."

The wave of violence which preceded the CCC's visit began in June when the junta shut down the CATH, the country's leading trade union confederation, after it had called a general strike. (The ICJ questioned this action in a letter to the CNG which has remained unanswered.) The next day the government did away with the Provisional Electoral Council created by the constitution to oversee national elections scheduled for November 1987. Popular protests erupted immediately, forcing the government to reverse these decisions, but not before violence by security forces against anti-government protesters set off a chain reaction throughout the country.

The Mission points an accusing finger at the United States for its role in the events of the past two years. "With the advantage of hindsight, there is a ... widely shared view among Haitians that the United States' 'intervention' of February 1986, in combination with the Haitian army which finally helped to oust Duvalier, served to 'avoid the full victory of the people and to slow down the process of change'". Indeed, Duvalier's last Foreign Minister claims that the members of the CNG were chosen by the United States. Since 1986, U.S. provision of finance, equipment (including gas masks, shields and tear gas) and advisors to Haitian security

forces "is viewed by many as U.S. complicity in an increasingly repressive climate".

United States economic programmes are also blamed for contributing to the political violence and the destabilisation of the country. To make its point, the report quotes from USAID documents proposing transformation of Haiti into the "Taiwan of the Caribbean". This transformation has included flooding Haiti with cheap goods such as rice and sugar, displacing the Haitians who produce these goods for a living and forcing them to seek manufacturing jobs in the capital. According to USAID, "the result will be a historic change towards deeper market interdependence with the United States." The report points out, however, that "the cost would be that the Haitian peasants, as a sector of the population would be rendered superfluous". In addition, small rice producers have increasingly clashed with security forces protecting convoys of cheap "Miami rice".

The report sounds an optimistic note as well, however. "The Haitian masses, notorious for their passivity in the face of prolonged tyrannical oppression have suddenly achieved an active political reawakening". In a long and valuable section on the "Role of Religion in Haiti", the report attributes this rebirth in large part to the work of the *Ti Legliz* (Little Church) movement of basic ecclesial communities. Noting that "the priests and religious leaders who are publicly identified as leaders of this movement in the Church are targeted for assassination", the report singles out the case of Père Jean-Bertrand Aristide, a young priest "revered by a wide cross-section of the poor and by organisations (such as CATH) working in the popular sector." The day before the mission arrived, Aristide and four other priests were wounded by gunmen within sight of a

military post.

The report also notes the flourishing of human rights groups, peasant organisations and women's groups as a hopeful sign. In addition, despite "the frightful atmosphere of violence and insecurity pervading the country", the mission found "relative freedom" of the printed word, the electronic media and political party propaganda.

Election disaster

"The obvious conclusion" from the CCC's visit was that the successful implementation of free and fair elections...is the essential and crucial event upon which Haiti's transformation to democracy depends". The report noted, however, that many sectors, including CATH and Père Aristide, believed that fair elections were impossible as long as the CNG was in power. The Mission's own scepticism with regard to the CNG's intentions was borne out by subsequent events.

The period preceding the scheduled 29 November vote was one of unprecedented terror. On 13 October, plainclothes police assassinated Yves Volel, a presidential candidate, in front of the Port-au-Prince police station. Then, on 2 and 4 November the offices of the Provisional Electoral Council, offices of its members and of the Christian Democratic Party and a printing plant, where 9 million ballots were kept, were destroyed in a series of attacks and incidents of arson.

In the week preceding the election, violence took at least 26 lives. Finally, on the eve and morning of the 29 November vote, the whole country came under siege. In operations "supervised" or "actively aided" by the army, according to the *Washington Post*, gunmen attacked the five leading independent radio stations, union headquarters and polling stations in the capital and carried out similar operations in several provincial cities.

Uniformed soldiers were directly responsible, for instance, for attacks on Radio Soleil and on the home of electoral council member Alain Rocourt. Persons waiting to vote were mowed down by automatic rifle-fire. Several foreign journalists were killed or injured – apparently deliberately, according to Peter Collins of the American network ABC. Eyewitnesses report that 46 prisoners were shot and killed at point-blank range in Fort-Dimanche prison.

The Junta, which had promised the day before to "guarantee the safety of the elections" responded to the violence of its own army by cancelling the elections as voting was getting underway, and dissolving the independent electoral council, most of whose members sought exile in foreign embassies.

While the junta chief, General Henri Namphy, went on television to promise that elections would be held shortly and a new president sworn in by 7 February 1988, few believe any longer that free elections are possible as long as the junta remains in power.

Kenya

Until recently, Kenya has enjoyed the reputation of being stable and one of the more democratic countries in Africa, respecting the Rule of Law.

Kenya had been one of the few African States allowing its citizens relative freedom of expression. This was especially true for the press and even though some risk was involved, Kenyan newspapers often criticized the government. This criticism is no longer permitted. Just how far freedom of the press has been restricted is seen in the case of freelance journalist Paul Amina, who contributed to many foreign newspapers and radio services. On 4 August 1986, he was arrested; the eleventh person since 1986 known to have been detained without trial for political reasons.

Church leaders who previously had not openly criticized the government of President Moi are now publicly denouncing the corruption in his government and his new policy of "lining up" at the parliamentary primaries to elect local leaders of KANU, the sole political party in Kenya. Voters are asked to form a line behind the candidate of their choice, challenging the supporters of the leaders most critical of the authorities to support their choice in public. This new procedure intimidates the electors into voting for the candidates who are sympathetic to the authorities. Abolishing the secret ballot at the primaries, constitutes a serious restriction on the right of the electors to choose freely their Parliamentary representatives. The National Christian Council of Kenya, which denounced this change, has finally persuaded the government to allow church leaders to vote by secret ballot as

in the past.

Roman Catholic bishops expressed their dissatisfaction with the growing concentration of power in the hands of KANU. They stated that KANU was taking on totalitarian powers which constituted a fundamental change in the Kenyan political system. Relations between the church and the government continue to be strained.

A leader of the Presbyterian church, who had been critical of the government, was forced to leave his church in Nairobi to work in a rural area.

Recent events have shown that KANU members who are overly critical of the party may be expelled, and are then unable to undertake any further political activity, as in the cases of three government officials: Charles Rubia, Kamani wa Nyoike, and Abuya Abuya.

A constitutional amendment was adopted on 9 December 1986 enabling President Moi to dismiss the Attorney General and the Auditor general, which in fact he did. When the vote took place on this amendment, only a former minister, Charles Rubia, the member for a constituency in the centre of the capital, voted against the change. Rubia was reportedly taken from his home on 29 January 1987. A number of people suggested that this "disappearance" was a warning by the authorities to discourage any opposition within KANU, continuing the internal "purges". In a similar case, the deputy Minister of Labour, Kamani wa Nyoike, was dismissed as a result of proposing a meeting between the Party and the National Christian Council of Kenya in the hope of overcoming their differences

regarding the constitutional amendment. Another member of Parliament, Abuya Abuya, who had a reputation for being outspoken, has also disappeared following a visit by the Special Branch Police.

Arrests and Detentions Without Trial

Although the authorities have sought to discourage any opposition within the KANU by harassing members of parliament, real repression has fallen upon persons suspected of belonging to, or sympathising with the Union for the Liberation of Kenya, a clandestine organisation claiming to be Marxist and known as Mwakenya. Although set up in 1982, immediately after the constitutional change that made Kenya a one-party state, it was during the course of 1986 that the wave of arrests of its members, sympathisers or suspected sympathisers, took on serious dimensions. Some reports put the number of arrests higher than 100. The government has also recently taken measures to restrict the freedom of local journalists to report on these arrests. At present, at least 60 persons have been brought to trial and convicted of belonging to a "subversive" organisation or of possessing a "seditious" newspaper, namely the "Mpatanishi" (the Mediator), regarded as reflecting the policies of Mwakenya.

In most cases, suspects have been detained *incommunicado* for long periods at the headquarters of the Special Branch Police, "Nyati House". A number of suspects have been held for more than two months without access to a lawyer and unable to contact their families, actions which violate the Kenyan law which requires suspects to be brought before a judge and charged within 24 hours. The

families' reluctance to apply for writs of *habeas corpus* is attributed to their fear of aggravating the authorities.

A number of suspects have stated that they were tortured on police or special branch police premises. One suspect stated before the court, in January 1987, that he had been detained for several days in a cell flooded with water, a form of torture known as the "swimming pool treatment". As a result of torture and maltreatment, most suspects have been forced to make confessions, true or false, of their sympathy for Mwakenya. In one case, that of Doctor Ngotho wa Kasinki, he had been so severely tortured that he was unable to appear before the court in the *habeas corpus* proceedings.

Some people have questioned whether it is possible to combat torture at a time when the independence of the judiciary is threatened. These problems stem not only from the powers now exercised by President Moi, but also from his dismissal of the Chief Justice of the Supreme Court, C.P. Madan.

According to the Lawyers' Committee for Human Rights, Mr. Madan had criticised the current practices of corruption and governmental interference in judicial affairs. A similar example is found in the case of Gibson Kamau Kuria.

The Case of Gibson Kamau Kuria

This case is curiously reminiscent of the John Khaminwa case which dates from 1982. The International Commission of Jurists and its Centre for the Independence of Judges and Lawyers appealed for his release, which finally took place in October 1983. Like John Khaminwa, Gibson Kamau Kuria had established himself as a human rights advocate because of his willingness to take up sensitive

political cases. In addition to his professional activities as a lawyer, Kuria taught law at the University of Nairobi, and had gained respect for his articles on the juridical aspects of controversial national questions. A few weeks before his arrest, he had published articles on the disciplinary procedures applicable to members of KANU, the method of election at the primaries, and land law.

Kuria was arrested on 26 February 1987 after his home and his office and been searched without a warrant. He had just applied for a writ of *habeas corpus* on behalf of detainees who alleged that they had been tortured. He had also represented three political detainees who were contesting the legality of their detention and were alleging that they had been maltreated and tortured. Kuria's arrest produced an immediate reaction from the Law Society of Kenya. They demanded in a statement signed by their Secretary, Miss C.W. Cathara, that the Police Commissioner give assurances that Kuria's constitutional rights had been respected. They deplored the fact that Kuria was being held *incommunicado* and demanded that every effort be made to find him if he was not on police premises. Kuria's lawyer attempted to obtain an explanation by applying for a writ of *habeas corpus*. The Law Society also expressed its concern over Kuria's "disappearance". All these actions have met with no success. Mr. Kuria's case is a measure aimed at intimidating human rights activists and threatens the independence of all lawyers in Kenya.'

Another example of intimidation by the government is seen in the student riots of November 1987 at the University of Nairobi. On 14 November 1987, seven student leaders of the Students Organization of Nairobi were arrested at gunpoint. These arrests incited mass student riots on the campus. On 15 November, four Western journalists covering the riots were beaten and held without medical treatment at police headquarters for at least three hours. One journalist was reported to have suffered a perforated eardrum and broken nose cartilage and another was severely bruised. No reason was given for their detention other than that they had been trespassing.

All those who had invested hopes for the Rule of Law in Kenya are becoming more and more concerned at the escalating repression, including such incidents as the entry of the police into the premises of the High Commissioner for Refugees in order to expel a Ugandan national, the withdrawal of the passport of a woman who, together with her child, was preparing to board an airplane and rejoin her husband who is a Kenyan political refugee in Norway, and the expulsion of foreigners.

The harassment and persecution of Ugandan citizens by Kenyan authorities have increased. An example is the case of the Ugandan teacher, Gregory Byaruhanga. He was arrested on 13 March 1987 and charged with residing illegally in Kenya and with illegal possession of Ugandan currency. On 23 March, he was taken to hospital in need of urgent medical treatment and died the same day. In-

* As this report went to press, it was reported that Gibson Kamau Kuria had been freed and that, according to *The International Herald Tribune*, he believed his release was forced by foreign press coverage and by objections raised by international human rights organisations.

quiries into his death have shown that he died of septicaemia as a result of "sustained widespread soft tissue injury and deep wounds". Gregory Byaruhanga's death led to increased aggravation of relations with the Ugandan authorities.

There is still time for the Moi government to halt this erosion of the Rule of Law and to silence the bell tolling for the passing of democracy in Kenya. A positive first step would be for Kenya to en-

sure its compliance with its obligations under international human rights instruments, notably the Covenants on civil and political and economic, social and cultural rights, to both of which Kenya is a party, and to ratify the regional African Charter on Human and Peoples' Rights, which was agreed unanimously by the OAU in Nairobi under the presidency of President Arap Moi, and which entered into force on 21 October 1986.

Detentions in Malaysia

Since 27 October 1987 the Malaysian government has detained without trial or charge 103 persons under the Internal Security Act (ISA). Under Section 73 of the ISA anyone may be arrested without a warrant who is deemed by the authorities "to act or is likely to act in any manner prejudicial to the security of Malaysia". The persons arrested under the Act may be detained for 60 days without charge or be brought before a court, and may thereafter be given detention orders of up to two years at a time, which may be renewed indefinitely. Even though the ISA has been used in the past, the number arrested this time is said to be the largest in a decade.

The persons arrested under the ISA included members of the Youth Wing of the United Malays National Organisation (UMNO) (the dominant partner in the ruling coalition), as well as opposition party members and representatives of social, consumer, environmental, religious and other organisations working with the poor and the disadvantaged. The Prime Minis-

ter Mr. Mahathir Mohamad, who is also Minister for Home Affairs, stated in a televised speech made the day after the arrests, that they were necessary to prevent racial violence. At the same time, the government banned all public meetings and rallies as well as the publication of three newspapers: *The Star*, an English language daily, *Watan*, a Malay language bi-weekly, and *Sin Chew Jit Poh*, a Chinese daily. Of the three papers banned, *The Star* is well known for its critical and independent views and coverage of news.

Following the arrests, several individuals and organisations in Malaysia have jointly formed a 'Support Group of the ISA Detainees' to protest against the arrests. This group has identified several issues that led to the crackdown. Among them are an internal crisis within the UMNO, a scandal over a major road building contract, and a controversy over the appointment of non-Mandarin speaking persons to head the Chinese vernacular schools.

The crisis within the UMNO party is related to the organisation's elections held

in April 1987 to elect the President of the party. In the elections there was a bitter fight between the group led by the Prime Minister and his opponents, in which the Prime Minister retained his post as leader of the party by a margin of only 40 votes when 1,479 votes were polled. The internal opposition alleged foul play in the elections and eleven of the members filed a case questioning the validity of the election results. Attempts to reach an out-of-court settlement failed and the case was scheduled to be heard in November. The seriousness of the charges and the fact that they came from within the ranks of the UMNO created political tensions as well as public debate about the party and its leadership.

The North-South Highway contract scandal is also linked to the UMNO and the government. The government selected United Engineers Malaysia, a company owned by an UMNO trust whose trustees include the Prime Minister and the Finance Minister, for the construction of a 500 km highway running North-South in the mainland peninsula. The propriety of giving such a large scale contract to a company owned by UMNO was questioned by the opposition parties and also by several public interest groups. Their particular concern was that the company was given the rights to collect toll charges over a 50-year period to defray the costs, which meant that it would collect up to M\$ 62 billion for an investment of M\$ 3.42 billion. The opposition leader and Secretary-General of the Democratic Action Party (DAP), Mr. Lim Kit Siang, and his lawyer Mr. Kripal Singh (also a DAP member of Parliament) sought a court order to quash the government directive that gave the contract to the UMNO Company. The public debate and the filing of the case over the contract was a political embarrassment to the UMNO and the

government.

The recent and most explosive issue was the controversy over the appointment to senior posts in the Chinese schools of persons who could not speak Mandarin, the prevailing Chinese language. In the beginning of October the government promoted 100 non-Mandarin trained teachers to senior posts in Chinese schools. As a result the Chinese Education Groups protested and threatened a Chinese school boycott if the Education Ministry did not withdraw the promotions by 14 October. The Chinese Education Groups had the backing and support of many political parties including the Malaysian Chinese Association (MCA) which is part of the ruling coalition.

The UMNO members strongly criticised the MCA for joining with the opposition parties while being a member of the ruling coalition. The UMNO Youth Organisation organised a 30,000 strong rally in the capital to denounce the actions of the Chinese parties. The rally raised racial slogans such as 'Long Live Malays' and added to the existing tensions over the schools issue between the two communities.

Reporting on the rally the *Far Eastern Economic Review* (29 October) stated that "... the schools issue also reflected the extent to which ethnic relations have deteriorated in recent years. Each race appears to think that every small concession will be seen by the other as a sign of weakness, and worse, will trigger more demands, leading to further concessions. In this case, 'Malay dignity must be preserved', proclaimed a banner at the UMNO Youth rally." The UMNO Youth Organisation also announced that it would hold on 1 November another 500,000 strong Malay rally to show Malay unity.

The arrests on 27 October under the Internal Security Act came amidst the ten-

sion created by the schools controversy and the proposed Malay Youth rally. In this respect the arrests came at a time when there was tension between the Malays and the Chinese, and the tension eased with the banning of the rally. It is also true that the Chinese schools controversy had generated extremist statements. The President of the Bar Council of Malaysia had stated that 'this use of the ISA should be opposed even though some of the arrested had been 'voicing extremist views'."

However, what is of great concern is that a number of the detainees are not racially oriented politicians but leaders or members of social organisations and academics who are involved in consumer, environmental and labour rights, and in the problems of the poor and the disadvantaged. For example, those detained include

- Dr. Chandra Muzaffar, President of Aliran, a multi-ethnic social group which has been very active in raising issues relating to human rights and corruption and abuses of power by politicians and officials;
- Ms. Meenakshi Raman, a woman lawyer belonging to the Consumer Association of Penang who has provided legal assistance to several disadvantaged groups;
- Mr. Arokia Dass, the General Secretary of the Transport Equipment Union and an active organiser of labour education programmes; and
- Mr. Harrison Ngau, of the Friends of the Earth Malaysia, who has helped the tribal communities in the State of Sarawak to prevent large scale logging by the timber companies.

These are examples of persons who had been arrested who had nothing to do with the racial tension. There are many

more like them among the detainees, in particular those connected with women's organisations, research institutes and church related organisations.

The government has also arrested Mr. Lim Kit Siang and Mr. Kripal Singh who filed the case against the government in the Highway contract scandal. These arrests strengthen the claim of the groups in Malaysia that the powers under the Internal Security Act are being abused and that the government is using the racial tension to silence its critics and to overcome its internal party problems

It is deplorable that the government choose to use the Internal Security Act in this way and to detain people without trial or charge, instead of arresting them under the normal laws and bringing them to trial if they are thought to have acted illegally.

The arrests have been criticised widely within Malaysia. The pro-government newspaper *New Straits' Times* stated in its editorial "... Malaysian men and women - some prominent, other unknown - had been swept into detention under the Internal Security Act. They represented the full spectrum of the nation's most persistent critics and activists; from the government's own benches as well as from the opposition, public interest groups and social organisations... We deplore this. We lament the mismanagement of issues that has led to such extreme action by the government."

The arrests were also strongly criticised by the first Prime Minister of Malaysia and elder statesman Tunku Abdul Rahman who said that "This is undemocratic and I deplore the attitude of the Prime Minister... It portends ill for the future of the country... I cannot see how parliamentary democracy can be maintained." He also stated that the crackdown has put the nation "on the road to dictatorship".

Cambodians Living In Thailand

In July 1987, OXFAM published a report entitled "Just waiting to die? - Cambodian refugees in Thailand", which dealt with the human rights and other problems of nearly 260,000 Cambodians living in camps in the border areas of Thailand. These people had originally fled to Thailand following the Vietnamese intervention in Cambodia in December 1978. At first the Thai authorities refused to allow any Cambodians to enter the country but later, in October 1979, they agreed to establish holding centres for Cambodians pending their resettlement in third countries. The best known holding centre is Khao I Dang which opened in November 1979 and was closed to new arrivals in January 1980. The Cambodians living in such centres were classified as displaced people and came under UNHCR's assistance and protection. As a result of UNHCR's role more than 200,000 Cambodians have been resettled in third countries.

Unfortunately the 260,000 Cambodians about whom the OXFAM report deals were never considered as refugees but as illegal immigrants. In fact till 1984, these people lived straddling the Cambodian border and the Thai authorities did not allow them to settle inside the country. However the Thai authorities allowed assistance to be provided to the Cambodians living in the camps through UNICEF, the International Committee of the Red Cross and a number of voluntary agencies. In January 1982, the UN Border Relief Operation (UNBRO) was created to provide assistance to the people living in the camps within Cambodia. In 1984, the Vietnamese launched a major offensive

against all the camps in the border and drove all those living in them into Thailand.

According to the OXFAM report there were over 260,000 Cambodians in November 1986 living in eight camps strung out over a 400 mile stretch just inside Thailand. The whole Thai border area is under martial law and the camps are subject to the authority of the Thai army, even though nominally they are controlled by the three political groupings that make up the UN recognised Coalition Government of Democratic Kampuchea (CGDK). The Coalition includes Khmer Rouge led by Pol Pot which ruled Cambodia immediately before the occupation of Vietnam and which is infamous for its atrocities committed against its own people. Of the eight camps five are administered by the Khmer Rouge, two by the Khmer Peoples Liberation Front (KPLNF) and one by the followers of Prince Sihanouk.

According to the OXFAM report the camps are closed areas guarded by the Thai rangers. Those camps under the Khmer Rouge, are virtually out of bounds even for the UNBRO staff who provide the aid to the camps. The population in these camps are in fact held captive. There have been reports that those who try to escape and sneak into the Khao I Dang or other holding centres run by UNHCR are often shot by the Thai rangers who guard the camps. Such movement usually takes place at night during curfew hours, and there is no international presence to prevent such killings. The refugees in the camps, particularly the younger ones, are forced to join the resistance army. Those

who refuse to fight are said to be punished severely and there have been reports of disappearances of such people.

The OXFAM report gives an example of how in early 1986, the UNBRO was forced to suspend its tuberculosis programme in one of the camps since the Khmer Rouge would not guarantee that patients would remain in camps during the period of treatment. In effect, there is no clear demarcation between the civilians and the resistance army, thereby increasing the danger of these camps being shelled by the Vietnamese. Since the camps are situated within six miles of the volatile border, the people in the camps live in constant fear of shelling. The other major problem faced by the people in the camps is the abuses by the Thai rangers who are assigned to guard the camps. The Thai rangers are a paramilitary unit, which was originally founded in the 70s to deal with the Communist insurgency in Thailand. The rangers are usually young with little training and poor discipline. They have committed violent crimes, including robbery and even rape. In the nights when there is no international presence the population is said to be at the mercy of the rangers and other criminal elements within the camps.

Though UNBRO provides efficient assistance and coordinates the work of several voluntary agencies its task is to provide assistance and not protection. According to the OXFAM report, providing security and protection to the people living in the camps is considered as the pressing problem by all the voluntary agencies involved in providing assistance to the people in the camps. The UNHCR, the only agency equipped and mandated to deal with protection of refugees is not involved either in providing assistance or in protecting these people.

One of the main reasons for UNHCR's non involvement is that under its statute the services of the High Commissioner shall not extend to a person who continues to receive from other organs or agencies of the UN protection or assistance. Since UNBRO is involved in providing assistance, the UNHCR cannot get involved. However, the anomaly is that originally in 1979 about 200,000 belonging to the same group were considered refugees and were given assistance by the UNHCR, but the same services are not extended to the present population.

The Thai authorities are reluctant to afford refugee status to the population. The Thai authorities claim that the people in the camps are under the control of the Coalition Government and hence they cannot be classified as refugees. This might have been true before 1984 when the camps were straddled along the Cambodian border but not at present when the camps are in the Thai territory and are subject to the authority of the Thai army. The refugee donor countries also prefer the present arrangement so that they do not have to take in more Cambodian refugees in their countries. However, what is not being taken into consideration are the views of the people in the camps who cannot be heard. Since most of the people in the camps are held in captivity, particularly by the Khmer Rouge, only an independent and impartial screening would indicate whether the people in the camps are willing to be under the control of the Coalition Government.

But such a screening would be opposed by the Coalition Government since it obtains benefits from the camps. In the words of the OXFAM report, "the presence of such a large population gives credence to the claims of the Coalition Government to have people to represent. If they were moved away and declared as

refugees, not only would Coalition claims to govern be severely weakened but the source of their armies be removed. It is in the Coalition interest, then, for the situation to stay as it is."

A former official of the UNHCR and an expert in international law, Dr. Hanne Sophie Greve from Norway, has identified three categories of Cambodians living in the camps in Thailand. The first group comprises those who work or support the resistance; the second group, who are the majority in the camps, are those who meet the internationally recognised criteria for refugee status, and the last group are those who never wanted to flee the country and who wish to return to their homeland. According to this expert, Thailand is unwilling to negotiate voluntary repatriation of the refugees with the PRK government that is at present ruling in Cambodia under the protection of Vietnam. By implication this means that the Thai authorities will have to take responsibility for the safety of the people in the camps or have them resettled in third countries. She is also of the opinion that the donor countries who provide aid through UNBRO share responsibility for detaining unwilling Cambodians in the camps.

According to OXFAM, ICRC and other

NGOs, including the International Council of Voluntary Agencies, the urgent steps needed to be taken to protect the people in the camps are: transfer of civilians to sites further removed from the combat zone; preservation of the civilian nature of the camp and aid to be provided where and when it can be monitored properly; disciplining of the Thai rangers deployed around the camps; and, importantly, to provide refugee status to the people in the camps and offer security and protection accorded to those under UNHCR mandated care. However, the legal status and the protection of the Cambodians in the camps in the short term and their eventual return to their home land is linked to the political settlement of Vietnam's presence in Cambodia. As succinctly stated in the OXFAM report, "in the long term, the sheer helplessness of the refugee's situation is of the greatest concern. Unless some international action is taken to break the political stalemate, they could still be in the camps many years from now. The refugees are pawns in the middle of a super power and regional conflict. Ultimately, diplomatic negotiations at the highest UN and government levels are needed to resolve the problem."

Togo

On 9 June 1987, General Gnassingbe Eyadéma, President of the Republic of Togo, promulgated Law n° 87-09 creating a national Human Rights Commission, an autonomous executive body.

It was officially installed on 21 October

1987 - a symbolic date marking the first anniversary of the entry into force of the African Charter of Human and Peoples' Rights. The purpose of the Commission is to: "ensure the protection of human rights in the Republic of Togo; promote

human rights by all available means, in particular to examine and submit to the government any proposals for documents bearing on human rights, organize seminars and colloquia dealing with human rights, and give advice in the field of human rights.

The Commission has 13 members elected for a period of four years, which is renewable. It comprises two judges elected by their peers, two lawyers elected by the Bar association, a member of Parliament elected by his peers, one representative of, and elected by, the Economic and Social Council, the youth, the workers, women, the traditional chiefs, the Togo Red Cross, and the Medical association, and finally a teacher from the law school of the University of Benin (Togo) elected by his peers. At their first meeting, the members elected as their president Me Y. Agboyibor, President of the Bar Association, who saw his election as a tribute to the Bar, which, with the magistrates, has been and will continue to be entrusted with the defence of human rights. Mr. Agboyibor also hopes that his election reflects the wishes of both the people and the authorities and will confer on the Commission a real autonomy, indispensable for its credibility and effectiveness.

In fact, the success of the Commission depends not only on the independence and courage of its members, but also on the willingness of the Togo authorities to observe the Rule of Law.

The Commission functions as follows. Article 11 of Law 87-09 provides that "all persons believing themselves to be victims of a violation of human rights, in particular a civil or political right, following an act or omission by the government, may petition the Commission." The law also provides that the petition may be made by a third person or a non-govern-

mental organisation. However, where a case is before the courts, the Commission should not consider it, except in the case of a manifest denial of justice.

Article 12 provides that "To be admissible... the request should not concern a violation which has already ceased." A literal reading of this provision would prevent the Commission from examining any alleged violation, such as torture, which has occurred at a given time. Presumably the drafters intended, by this provision, to limit admissibility to those alleged violations about which no final decision on the merits has been made. Thus, a violation may well have ceased (the act of torture may have been an isolated incident), but the victim's claim to redress survives the incident, and does not "cease" until an authoritative body, legally constituted, has made a final determination on any liability, civil or criminal, for the alleged violation.

Three days after the receipt of the petition, the Executive Committee of the Commission must meet to examine it, and, if it is admissible, designate a special rapporteur to investigate the case. In his investigations, the special rapporteur may have access to, *inter alia*, any reports, registers and other documents, as well as to any object or locality having a bearing on the inquiry. He acts as a sort of ombudsman who determines whether the appropriate government agency has undertaken to remedy the violations complained of in the petition. He has 15 days to deposit the findings of his investigations with the Commission and to provide, if necessary, advice and recommendations.

If the violations persist, the Commission immediately reconvenes to examine the report and take any measures necessary to put an end to the violations, in particular by having recourse to the

courts, to the Parliament or to the Head of State. Moreover, although the law provides for confidentiality in investigating violations, it authorises the Commission to decide otherwise and without prejudice to its right, guarding the anonymity of the parties, to publish a case in its periodic reports.

The drafters of the law, bearing in mind the delicate role of the Commission in bringing an end to violations resulting from actions or omissions of the authorities, formulated two measures, the effective application of which will allow the Commission members to accomplish their tasks without interference. Article 22 grants immunity to the Commission members and article 23 authorises the punishment of anyone impeding or attempting to impede the fulfillment of the Commission's mandate. For example, a police or security officer who prevents a special rapporteur from examining the condition of a detainee (whether Togolese or foreign) may be prosecuted and punished by imprisonment from three months to two years or fined from 50,000 to 100,000 francs.

Compared with the French Consultative Commission of Human Rights and the Senegalese Committee of Human Rights, both created by Executive decree, the Togo National Commission of Human Rights is a unique national institution. Nevertheless, it will be judged in the light of its practice which should be guided by the words of Mr. Atsu-Koffi Amega, President of the Supreme Court of Togo, who, addressing the Commission members said: "You should not be the victims of complacency or blackmail... You should be concerned only with the objective reality of the violation without being prejudiced by the status of the victim." With this support it is to be hoped that the Commission will be able to carry out its

mandate fearlessly and effectively.

The innovation of Togo in establishing a permanent institution dedicated to the promotion and protection of human rights is an application of the provisions of articles 1, 25 and 26 of the African Charter of Human and Peoples' Rights, which was ratified by the Togo Parliament on 5 November 1982. These provisions state:

Article 1

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

Article 25

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

Article 26

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

President Eyadema also marked the first anniversary of the entry into force of the African Charter by reducing by 1/6 the sentences imposed on common criminals, a measure permitting the release of approximately 230 detainees. He also commuted the death sentences of those

convicted in the so-called "Terrorist trial" of 23 September 1986.

These actions, together with the accession of Togo to the UN Convention Against Torture and Other Cruel, Inhumane and Degrading Punishments, as

well as to the Protocol to the International Covenant on Civil and Political Rights, are a remarkable demonstration of a new era in the promotion and protection of human rights in Togo.

COMMENTARIES

Treatment of Detainees in South Africa

"The medical profession has a responsibility to denounce and expose torture in all its forms.

Silence is collusion.

The lesson of Nuremberg is that the iniquity in our midst is the responsibility of us all."

Thus ends the paper delivered by Professor Selma Browde, on behalf of NAMDA (the National Medical and Dental Association of South Africa), to the NAMDA National Conference in Cape Town on 4 April 1987.

The paper stressed that NAMDA believed it important to "clarify the situation with regard to the duties and functions of doctors which apply in all situations" and it also presented the results of a study by a group of NAMDA doctors of the medical and psychological problems demonstrated by 131 detainees on their release from detention in South Africa.

This article summarises the paper and the results of the NAMDA study presented by Professor Browde.

Torture in detention is being reported from many countries in many parts of the world - not only in South Africa - and it is the duty of doctors everywhere to bring these facts to the attention of the public, and to highlight the ethical code according to which doctors should practice.

It is important to clarify the situation with regard to these duties and functions of doctors which apply in all situations. In

simple terms it can be said that it is a doctor's duty to treat anyone who requires medical assistance, be they friend or enemy, innocent or guilty. It is not for a doctor to judge, but to treat, whenever treatment is indicated.

The World Medical Association, since its formation in 1947 has adopted a number of codes of clinical practice, which have been endorsed by the Medical Association of South Africa. Among them are the following provisions:

- "The fulfillment of medical duties and responsibilities shall in no circumstances be considered an offence. The physician must never be prosecuted for observing professional secrecy."
- "The World Medical Association will support and should encourage the international community, the national medical associations and fellow doctors to support the doctor and his or her family in the face of threats of reprisals resulting from a refusal to condone the use of torture or other forms of cruel, inhuman or degrading treatment."

In addition, the British Medical Association has specifically stated that "the medical profession has a responsibility to support any practitioner who refuses to keep silent about abuses of human rights" and, indeed, that doctors have a positive

obligation to make such activities publicly known.

With this in mind, NAMDA presented the results of a study by a group of NAMDA doctors on the medical and psychological problems demonstrated by 131 detainees in their release from detention by the South African authorities.

The detainees' service of which these doctors form part developed from concern at the steady increase in the number of people opposed to apartheid being detained for varying reasons. In 1985, NAMDA organised a service of doctors with special skills to meet the needs of those released from such detention. More recently, the service has been boosted by the availability of psychiatrists, psychologists and counsellors who work in conjunction with the doctors.

The study includes all 131 detainees referred to NAMDA from 1 December 1985 to 11 June 1986 and who were detained for 24 hours or more. They were seen by doctors who performed a detailed medical interview standardised by the protocol established for the examination of detainees. Over three-quarters of the group of detainees in the study were seen by the NAMDA team within 19 days of their release. It was found that almost a quarter of the group, of whom 40% were under 18 years of age, had spent 140 days or more in detention (with a maximum of 490 days) and 46% had spent between one and 19 days.

Allegations of having been beaten were made by 89% of the detainees. "Beatings" include assaults with fists, hands or being kicked, as well as blows with a sjambok, baton or other blunt instrument or object. Other allegations included:

- suffocation (25%)
- being forced into specific postures or

being made to do physical exercises (15.2%)

- electric shocks (14.1%)
- losing consciousness (21.7%).

Evidence of assault was found on 69 individuals and 67 of them were found by the NAMDA examiner to have injuries consistent with the alleged assault:

- 46% had bruises
- 45% had lacerations
- 49% had tram-track lesions consistent with sjambok beating
- 49% had five wounds or less
- 46% had more than five wounds
- 6% had ear-drum perforation
- 7% had evidence of electric shock
- 9% had evidence of gunshot wounds.

Reports of mental abuse were made by 103 of the 131 detainees, of whom 43.7% said they had experienced solitary confinement. "Mental abuse" includes exaggerated interrogation techniques, threats and humiliation, for example, being stripped naked. Of the 103 detainees involved, 83 were assessed as having psychological symptoms such as recurrent and intrusive recollections, recurrent dreams relating to their experience, sleep disturbances, effects on memory and concentration, anxiety symptoms, depression and suicidal feelings.

Only 45% of the total group were able to give any information regarding medical care in detention; and 22.1% said they had never seen a district surgeon during their entire detention period.

Of the 35 persons who had specifically requested to see a doctor, 62.9% alleged that this request was refused. Some 12.2% of the group were admitted to hospital, of whom three had asked to see a doctor, either prior to or after their hospital admission, and had been refused. This is con-

trary to the stated regulations pertaining to detainees.

Recommendations and Conclusions of the NAMDA Study

- Detention without trial is detrimental to the health of detainees, and as such can only be condemned by the medical profession;
- Released detainees have special mental and physical needs that must be catered for by the doctor treating them.

Doctors involved in the treatment of detainees must develop skills in their care and rehabilitation;

- Existing legislation in the form of Acts and associated Regulations is insufficient to safeguard the health of detainees in detention*;
- The care of detainees can no longer be restricted to a small number of concerned individuals, but will have to become an issue for a growing number of professionals.

UN Sub-Commission on Discrimination and Minorities

In 1986, the scheduled session of the UN Sub-Commission on the Prevention of Discrimination and Protection of minorities was cancelled because of the financial crisis in the UN. It was thus after a one-year delay that the 39th session met in Geneva from 10 August to 4 September 1987.

The outgoing Chairperson, Mrs. Erica Irene Daes (Greece), thanked the Geneva NGO Special Committee which had spon-

sored a Seminar on Human Rights in the United Nations in September 1986, bringing together a majority of the Sub-Commission members, as well as numerous NGOs and governmental observers (see Review No 37). She noted that the Seminar had adopted several important recommendations, allowed the work of the pre-session working groups on slavery and indigenous populations to continue uninterrupted, and focused the distress of the

* In 1983, the Medical Association of South Africa produced a report on the medical care of prisoners and released detainees. In this report MASA made specific recommendations regarding conditions of, and medical care in, detention, aimed at safeguarding the health of detainees. The NAMDA study would suggest that these recommendations have not been implemented.
NAMDA has urged MASA to reaffirm its statement on its position with regard to the responsibility of the medical profession towards detainees.

human rights community over the drastic cut. In the debates to follow, many Sub-Commission members and observers would emphasize the special role which the Sub-Commission, as a body of independent experts accessible to NGOs and able to take on complex problems, plays within the UN system. While there is disagreement among members on the Sub-Commission's exact mandate, there was unanimity that any further cancellations would be disastrous for the UN human rights programme as a whole.

After a tribute to the late Justice Abu Sayed Chowdhury, expert from Bangladesh, who died days before the session, the Sub-Commission elected Mr. Leandro Despouy (Argentina) as its Chairman, Murlidhar Chandrakant Bhandaré (India), Kwesi B.S. Simpson (Ghana) and Danilo Turk (Yugoslavia) as Vice-Chairmen and Louis Joinet (France) as Rapporteur. Some 40 resolutions were adopted at the session.

Elimination of Racial Discrimination

The Sub-Committee discussed reports submitted on the First Decade to Combat Racism and on the Consequences of Assistance to South Africa. The latter report, which lists companies and the nature of their business in South Africa, generated a range of views. Commenting on the report, Mr. Carey (U.S.A.), for instance, suggested that companies disinvesting have a moral obligation to ensure that their assets are transferred to Blacks.

Mr. Mubanga-Chipoya (Zambia) noted the increasing incapacity of the South African judiciary to uphold "natural justice". He hoped that an explanation of why some governments allow racist groups to exist would be included in the next report

on Combatting Racism. He urged re-examination of legal doctrines such as freedom of speech, which are used to allow these groups to exist.

The ICJ brought to the attention of the Sub-Commission the preliminary conclusions of its mission to South Africa (see ICJ Review No. 38). It highlighted abuses of human rights as exercised through unchecked executive power, such as the promulgation of Emergency Regulations and the emergence of local security groups known as Joint Management Committees. Against this background it pointed out a crisis in confidence in the South African judiciary and legal system and the difficulties of redressing violations of human rights in the courts.

National liberation movements pointed out that the crime of apartheid was not restricted to the borders of South Africa. They also asserted that multinationals are not divesting out of any sense of duty, but rather because of pressure to do so and that such pressure must therefore continue

Resolutions under this item requested the Economic and Social Council to allow the Special Rapporteurs to continue their work. Another resolution requested the Secretary-General to ensure that rights of indigenous peoples will be included in the future work of the UN Programme to Combat Racism. With the fifth centennial of Columbus' arrival in America approaching, the resolution also called on states to promote national celebrations which "reflect an accurate interpretation of history and do not perpetuate or justify theories of racial superiority or the subjugation of indigenous or other peoples." A resolution on Namibia reaffirmed its people's right to self-determination and independence and called for the granting of prisoner of war status to all captured freedom fighters.

Indigenous Populations

It was in this area that the Sub-Commission made some of its greatest progress. For several years, the pre-session Working Group on Indigenous Populations has been drafting principles with the aim of producing a draft declaration of indigenous rights which may be proclaimed by the General Assembly. This year, the Working Group submitted to the Sub-Commission three more principles, addressing the collective rights to maintenance and development of ethnic characteristics and identity, the collective right to self-protection, and to economic, social and political participation. In addition, the group submitted three principles which had been considered at the September 1986 NGO Workshop. The Sub-Commission asked that the Working Group Chairperson be authorised to prepare a complete set of principles for next year's Working Group to consider.

Following the recommendations set forth in the landmark report of Mr. Martinez Cobo on indigenous populations, the Working Group proposed and the Sub-Commission adopted, resolutions calling for 1992 to be declared "International Year of the World's Indigenous Populations" by the General Assembly and for a study of treaties between indigenous peoples and states. The Sub-Commission also voted to send two of its members to U.S. Congressional hearings on the relocation of Navajo and Hopi Indians.

In addition to moving forward in its standard-setting task and generating important resolutions which were adopted by the Sub-Commission, the Working Group was again an invaluable forum for indigenous people who came from all over the world to discuss their problems and help the Working Group fulfill its mandate. In all, 370 participants, including the rep-

resentatives of indigenous peoples, attended the session.

The Administration of Justice and the Human Rights of Detainees

The ICJ, together with some members of the Sub-Commission, believes that this item deserves more attention than it has received on the Sub-Commission's crowded schedule. Nevertheless, given the time available, much progress was made at this session, in large part due to the diligence of the Working Group on Detention and to its chairman, Carey (U.S.A.).

Among other action taken:

The Sub-Commission recommended a declaration to the effect that arbitrary or abusive use of force by law enforcement personnel in any country should be punished as a criminal offence and asked the Working Group to examine the feasibility of a booklet on the restraints on the use of force by law enforcement personnel.

On the basis of a proposal by the ICJ and Amnesty International, the Sub-Commission expressed its concern that the Working Group of the Sixth Committee of the General Assembly, which is reviewing the Draft Body of Principles for the Protection of Persons Under Any Form of Detention or Imprisonment, had limited the scope of the principles to those persons charged with a criminal offence without protecting the more vulnerable class of persons detained without charge or trial. It asked that its concern on this and other matters be referred to the Sixth Committee's Working Group by the Secretary-General, which in due course agreed to make the necessary amendments to the text.

Mr. Louis Joinet (France) submitted an explanatory paper regarding the practice

of administrative detention without trial. He was requested by the Sub-Commission to draft and circulate a questionnaire with a view to presenting a further analysis to the Sub-Commission.

The Sub-Commission also heard Special Rapporteur L.M. Singvi present his Draft Universal Declaration on the Independence of Justice, which the ICJ and its Centre for the Independence of Judges and Lawyers have helped to elaborate through a series of expert meetings over the past six years. A few members sought the Draft's immediate adoption while others felt that a fuller discussion, either in a working group or in the plenary, was necessary. Still others commented that many of the Draft's provisions were too specific to be considered "universal". The Sub-Commission finally agreed to send the Draft to governments for their comments and to consider it at its next session as a separate agenda item on a priority basis.

The Sub-Commission also decided to monitor the situation of disappeared Argentinian children recently located in Paraguay and Professor van Boven (Netherlands) was later appointed to visit the region to establish contact with the competent authorities.

On the question of states derogating from their obligations under the Covenant on Civil and Political Rights during states of emergency, the Sub-Commission considered the first report by Chairman Despouy. The report contains information on states of emergency in 28 countries since January 1985 and includes the rights affected by the duration of and the reasons for the states of emergency.

Death Penalty

A major disappointment was the failure of the Sub-Commission to act on a

proposal to elaborate a second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

The theme was introduced by Special Rapporteur Marc Bossuyt who presented a study of evolving approaches to the death penalty. Numerous NGOs, including the ICJ, Amnesty International, the Friends World Committee for Consultation (Quakers), Human Rights Advocates and Pax Christi, spoke in favour of the protocol. While experts from Islamic states noted that abolition was not an option for them, the ICJ supported the Special Rapporteur's observation that there is no valid reason for states not yet in a position to abolish capital punishment to put obstacles in the path of those states desirous of undertaking an international commitment to abolition.

A draft resolution which would have transmitted the report to the Commission on Human Rights was tabled with seven co-sponsors. Nevertheless when Mr. Sofinsky (USSR) moved that no decision be taken because the report had not been translated into Russian and the matter had not been fully discussed, none of the co-sponsors spoke against the motion which passed with 6 in favour, 4 against and 3 abstentions.

Human Rights Violations

The Sub-Commission examined violations of human rights in various countries under this item. Ethnic Kurds in Turkey, Greek Cypriots under Turkish occupation, Ahmadis in Pakistan, Turks in Bulgaria, the situation of East Timor, actions of the "contras" in Nicaragua, and the situations in Bangladesh, Romania and Iran received significant attention.

Debate under this item, often highly charged, occasionally led to gratuitous

political exchanges marked especially by Mr. Carey and Mr. Sofinsky. Earlier criticisms of the lack of independence of experts seemed borne out during such exchanges. Nevertheless, many experts and government observers contributed constructively to the debate.

Mr. Carey objected generally to the practice of condemning specific abuses, arguing that the Sub-Commission should not comment upon information it supplied to the Commission on Human Rights. Mr. Whitaker (U.K.) stressed, however, that the Sub-Commission's failure to analyse human rights situations would diminish the role of the Sub-Commission as a body of independent experts. Arguments over the propriety of Mr. Carey's objection, found in amendments to draft resolutions on Iran, El Salvador and Chile as well as Israel, touched on the issue of the role of the Sub-Commission in investigating and protecting human rights in accordance with Resolution 8 (XXIII).

A resolution on the Israeli occupied territories reaffirmed past condemnations of human rights abuses there. The resolution on Iran noted with grave concern the violations of human rights of ethnic and religious minorities, torture and executions. The resolution on East Timor asked the Secretary-General to continue his efforts in facilitating a "durable solution" and requested the Commission on Human Rights to "study carefully" the situation.

On Romania, the ICJ, among others, raised the question of Mr. Liviu Bota, a Rumanian national who has been refused permission by his government to return to his post as Director of the UN Institute for Disarmament Research. The Romanian government asserted that Mr. Bota did not return because his contract had expired. Mr. Whitaker offered to withdraw a draft resolution if the Romanian government would give its assurance that Mr. Bota

could return. No assurance was given and a resolution was adopted requesting the Commission on Human Rights to urge the government of Romania to allow Bota to return and requesting the Secretary-General to submit a detailed report on detained or retained international civil servants.

A resolution on El Salvador expressed concern, among other things, over the continued abuses of human rights, forced recruitment by the army and attacks on civilians sympathetic to the guerillas. The resolution also expressed the hope that effect would be given to the Central American Peace Agreement.

A resolution on Chile also expressed concern over the persistence of human rights abuses, including torture, and urged the Commission on Human Rights to "continue to study, as a matter of priority, the situation in Chile."

A resolution on Cyprus expressed concern over "gross and systematic violations of human rights" and the settling of Turks in the occupied territories of Cyprus, which it described as "colonialism".

Under this item, a resolution was passed recommending that all governments, particularly the United States and Switzerland, aid the speedy recovery of assets removed by Dictators Marcos and Duvalier.

No decision was taken on draft resolutions on the situation of ethnic Kurds in Turkey and human rights in Iraq, and in Guatemala. A draft resolution on Afghanistan was withdrawn by its author, Mr. Sofinsky.

Slavery and Slavery Like Practices

The Sub-Commission's discussion focused on the pre-sessional working group

on Slavery and on the final follow-up report of Mr. Marc Bossuyt on his 1984 Mission to Mauritania.

The report of the 12th meeting of the working group discussed the sale of children, child labour, debt bondage and prostitution. The Chairman of the Working Group, citing overlap with the working group on indigenous populations, appealed for greater attendance at the working group. A resolution reflecting his appeal encouraged governments, NGOs and UN agencies to attend the working group. The same resolution called on the Commission on Human Rights to change the name of the working group to "Contemporary Forms of Slavery" in order to reflect more accurately its current work.

The Sub-Commission expressed its appreciation for Mauritania's cooperation and gave it further encouragement in implementing measures against slavery.

Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief

The Special Rapporteur, Mrs. Odio Benito, presented her study on the problems of intolerance and discrimination based on religious belief. Notwithstanding the brief time allotted to this question, Mr. van Boven (Netherlands) led a discussion on whether to establish a Working Group charged with elaborating a convention on religious intolerance pursuant to Commission on Human Rights resolution 1987/15 (see ICJ Review No. 38, p. 22). He emphasized that any convention must be precise and provide for machinery for implementation of standards and reporting. It would have to be prepared cautiously and prudently by experts in order to develop standards reflecting, and which do not fall below, existing norms

and minimum standards of international law. The general consensus was that it would be premature to begin drafting such a convention until more studies had been carried out. The Sub-Commission adopted a resolution praising the Special Rapporteur, and welcoming her recommendation to study the need for a binding international instrument. The resolution also asked the Chairman to appoint a member to consider which aspects of the question need to be studied in greater detail.

Promotion and Protection of Human Rights

Unfortunately, because of the overcharged agenda, this item was not discussed at the 39th session, nor, consequently, were the reports on Human Rights and Youth and the Right to Leave and Return to Any Country. The latter will be taken up, in its completed form, at the 40th session.

Working Group on Mental Health

This Working Group met during the session of the Sub-Commission and continued its review of a draft body of Principles, Guidelines and Guarantees of the Rights of the Mentally Ill. The Working Group discussed the standard of medical care available at institutions, the rights of patients with respect to receiving treatment and measures ensuring the proper administration of medication. The ICJ, which has long taken an active interest in this question, expressed concern over the brief amount of time allotted to this Working Group and the consequent slow progress in its work. In its resolution, the Sub-Commission recommended that the Commission on Human Rights attach greater

emphasis, as a matter of urgency, to the completion of the work of this working group.

Communications under Resolution 1503

Over the years the ICJ has registered its dissatisfaction with the slowness and confidential nature of the "1503" individual complaint procedure. During the item dealing with Violations of Human Rights, the Sub-Commission debated the compatibility of its public and private procedures. The debate continued during the consideration of a draft resolution, submitted by Mr. Sofinsky, directed at reviewing the continuing necessity of the 1503 proce-

dures now that the International Covenants and other procedures are in place. An amendment proposed by Mr. Whitaker would have made clear that the review would be directed "to reform the procedure to strengthen it and make it even more effective." Eventually, Sofinsky withdrew his resolution and asked that it be considered at the next session.

The New International Economic Order

The Special Rapporteur Mr. Eide presented a report on the right to adequate food which was warmly received by members of the Sub-Commission and by NGOs.

ARTICLES

Human Rights in Arab Countries*

by
A. Youssoufi**

The Arab Lawyers Union, an association grouping together the Bars of 16 of the 22 Arab countries, celebrated the 20th anniversary of the adoption of the International Covenants on Human Rights (ratified by 9 Arab states) by dedicating the December 1986 meeting of its Permanent Committee to the examination of human rights in Arab countries. Its 16th Congress held in Kuwait in April 1987, discussed the right to self-determination, human rights and international peace. Two principal conclusions were drawn from these meetings: 1) that from the Atlantic to the Persian Gulf the human rights situation is deteriorating more and more, given the increase in, and gravity of, violations perpetrated by the authorities, 2) that at the same time an important sector of Arab opinion has shown a growing interest in the protection of human rights.

The violations begin at the constitutional and legislative level. Many constitutions entrust to the law the protection of liberties and the guarantee of rights. Others invest exceptional powers in the executive. Certain countries, such as Bahrain, have suspended their consti-

tutions. Others, such as Kuwait, have reversed certain provisions for proceeding to new legislative elections after the dissolution of Parliament. Still others live under states of emergency which empty the constitutions of their content, as is the case in Egypt, Jordan, Iraq and Syria. Emergency regulations invest the authorities with significant powers to the detriment of human rights. For example, in Egypt the chief of state is empowered to criminalise certain actions and omissions which become punishable by forced labour. Emergency provisions in Arab legislation, have flourished, particularly over the last few years, to the point of becoming the norm rather than the exception.

Another factor common to a number of Arab states, for example Egypt, Sudan, Iraq, Kuwait and Libya, are preventative measures with respect to suspects. These allow suspects to be imprisoned or placed under police control, measures which are normally imposed only as penalties for criminal offences.

The laws concerning freedom of opinion and expression are, apart from some minor exceptions, restricted in most Arab

* This article is taken from an intervention delivered by Mr. Youssoufi at the 39th session of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in September 1987.

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countries. Information agencies are generally the property of the state or strictly controlled by it. Freedom of association does not exist in a number of Arab countries. The structure of the judiciary naturally allows the emergency court and military tribunals to enlarge their jurisdiction. This is the case in Jordan, Sudan, Egypt, Iraq, Lebanon, Syria, Algeria and Libya.

In general it can be said:

- that the Gulf countries tend to forbid the formation of political and social organisations, limit cultural activity, control the conditions of women and discriminate against Arab migrant workers. The violations vary from country to country; Saudi Arabia being the most and Kuwait the least restrictive.
- that the similarities between Syria and Iraq are remarkable in the severity of their behaviour towards political opponents, notably their practice of detention without trial, the use of torture and the imposition of the death penalty by emergency courts.
- that in the other Arab states of the Middle East the dominant feature is the absence of political organisations. Jordan is characterised by lack of academic freedom; the tragedy of Lebanon is well known, as is the tragedy following the bloody events in South Yemen of January 1986. The situation in North Yemen is similar to that in the other Gulf countries.
- that Egypt and Sudan are characterised by the volume of emergency laws which endanger the existence of human rights.
- that difficulties in the freedom of association of trade unions is common to

the Maghreb countries, with the added problem in Algeria and Libya of the prohibition of political organisations. Mauritania is ridding itself of the after effects of slavery which is gradually disappearing.

- that Morocco has drawn the attention of world opinion many times because of its political prisoners. It should end quickly the deplorable case of the detention of the children of a dead general in the well known circumstances of 1972.¹
- that many of the phenomena that characterise the different groups of Arab countries, can be found in Somalia.
- that the reports of the special rapporteurs of the last session of the Commission on Human Rights revealed the implication of a certain number of Arab states in practices of torture, forced and involuntary disappearances and summary executions.
- that the 16th Congress of the Union of Arab Lawyers examined the situation of Palestinians living in Arab countries and reminded Arab states of the resolution concerning the status of Palestinians adopted by the Arab Council of Ministers of the Interior in Casablanca in December 1982 concerning the problems affecting the protection and establishment of Palestinians and the reunion of Palestinian families.
- that concerning the situation of detainees and prisoners, if no Arab state takes advantage of the opening for signature of the Standard Minimum Rules for the Treatment of Prisoners, the Union of Arab Lawyers is of the opinion that the only party to profit from this would be the Israel in its occupation of Palestinian territories.

1. Ed. The detention of the children of General Oufkir ended at the beginning of November 1987.

The hunger strike heroically observed by Palestinian detainees was proof of the cruelty and inhumanity of the occupying Israeli forces responsible for other mass and systematic violations already presented to the UN Sub-Commission on Minorities.

Space does not permit a detailed account of these violations. But there is one that confirms all the others and underlines the gravity of the human rights situation in Arab countries.

In 1983, the Arab Organisation of Human Rights was formed in Cyprus. It is a non-governmental organisation (NGO) whose objectives are the promotion and protection of human rights. Following the practice of other NGOs, it is apolitical and chose dialogue with Arab governments as its method of action. In fact, seven governments had responded to action it had taken concerning certain allegations. But as soon as it was known that the first report on human rights in Arab countries of the organisation was to appear in 1987, the government of Egypt, where the headquarters of the organisation is located, decided to prohibit the 1st General Assembly, scheduled for November 1986 and which should have adopted that report before its publication. According to certain official "leaks", this prohibition had been requested by certain Arab governments concerned about the contents of the report. If it were not for the new regime established in Sudan after the fall of Nimeiri, who was responsible for many human rights violations, it would probably have been difficult to find some other Arab country in which to hold this General Assembly. It met in Khartoum at the end of January 1987.

Two weeks later, the ECOSOC com-

mittee in charge of NGOs meeting in New York should have examined the candidature of the organisation for consultative status for the second consecutive time. But to the surprise of the Organisation a "holy alliance" of Arab states, progressive and conservative states allied together with their fraternal enemies, was set up under the direction of Algeria to attack the Organisation and oppose its candidature. It is regrettable that the delegation of an influential country lent its approval to this coalition. The result was that the question of the candidature has been postponed for the second time, to the meeting in 1989!

This hostility with regard to an NGO concerned with human rights is not an isolated incident. Since 1985, one Maghreb country has persecuted the leaders of the League of Human Rights in that country. Another bordering republic arrested the Secretary General of that country's ten year-old League of Human Rights in the spring of 1987. Thanks to international pressure, Mr. Chamari was freed and his trial put back till October 1987.²

We are in the presence of a phenomenon peculiar to the Arab world - the overt opposition of Arab governments to national and international NGOs concerned with human rights.

This is a human rights violation *par excellence* and one which tacitly admits the existence of human rights abuses in the offending countries. Thus, it is of critical importance that the Sub-Commission do everything it can to ensure the realisation of rights and responsibilities of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.

2. *Ed.* In October his trial was postponed again until January 1988.

Human Rights and Legal Services for the Rural Poor*

by
Clarence J. Dias**

Inhuman and Dehumanizing Developments

In virtually every country in Asia (and indeed most of the Third World) to a greater or lesser extent we witness today several alarming and intolerable trends:

- the growing impoverishment, exploitation and powerlessness of a majority of the rural and urban population: the poor;
- the growing incidence of malnutrition, hunger and starvation and growing permanent degradation of the physical environment for the production of food and the meeting of survival needs;
- the worsening of already intolerable conditions of those subject to multiple oppression and exploitation such as women, children and religious or ethnic minorities;
- the routinized debasement of human beings leading to the devaluation of even human life itself;
- the increasing adoption by the elites in such countries of a lifestyle aping Western models of conspicuous consumption whose affluence can only be sustained by the impoverishment and exploitation of others;
- the growth of fundamentalist trends in

religious revivalism making religion a divisive rather than a cohesive force;

- the increasing incidence of ethnic violence and cultural genocide;
- the growth of material and moral corruption among the bureaucracy and their virtually total lack of accountability;
- the increasingly authoritarian nature of political institutions despite their moral democratic facade, and the growing trend towards governmental (especially executive) lawlessness and abuse of power, authority and position;
- the growing militarization of developing countries achieved through governmental expenditure on arms at the expense of programmes to alleviate poverty; and
- the imposition of hazards and harms upon powerless workers and communities through indiscriminate industrialization employing hazardous technologies.

Development, Poverty and Powerlessness

Most of the above trends flourish in an atmosphere of extreme poverty and the powerlessness generated by such pov-

* Extract of a paper presented to a seminar on Legal Services in Rural Areas, organised by the Swedish International Development Authority in Stockholm on 19 and 20 September 1987.

** Dr. Clarence J. Dias is the President of the International Center for Law in Development, a Third World NGO working to develop legal resources for and within communities of the rural poor in the Third World.

erty. It is indeed a damning indictment of those responsible that, despite several decades of development efforts, the condition of the poor in Asia has deteriorated, not just in terms relative to the rest of the population but in absolute terms. This has happened despite massive national and international spending on development, and growing state control over the resources needed for development. The paradigm of development underlay such development failures, namely the modernization-industrialization-growth-trickle-down model of development, has long since been discredited. It is now increasingly accepted that there is an urgent need to move away from purely economic conceptions of development, which inevitably result in disregard of human rights and towards humanistic conceptions of development which reaffirm the realization of the rights of all, especially the poor and disadvantaged.

Poverty, however, persists and impoverishment is on the increase. This is because, of course, poverty is not a product of happenstance. The continued impoverishment of the peoples of the Third World is the product of an intricately structured and ruthlessly maintained set of political, economic and social power relationships, often deliberately entrenched in law.

In developing countries, human impoverishment and degradation or depletion of natural resources (which exacerbates such impoverishment) often result from the feeding of several international (usually developed country) hungers:

- hunger for developing country *natural resources*. Historically, this hunger was for the primary commodities and primary products of developing countries. Today the hunger is also for developing country lands on which transnational

agri-business plantations are producing cheaply (for global markets) – bananas and pineapples in the Philippines, strawberries in Mexico, horticultural products in Kenya, palm oil in Malaysia. More recently there is a new hunger for developing country lands as pollution havens for ultrahazardous industry and even as dump sites for toxic wastes! Ruling elites in developing countries are willing accomplices in the feeding of such international hungers bargaining away long-term pauperization of the human and natural environments for short-term profits and wealth.

- hunger for developing country *labour*. This hunger is both for cheap unskilled labour (in export processing zones or as "guest workers") and for skilled labour (creating a perpetual brain drain). All this takes place in the name of a so-called international division of labour. But the link between feeding international hungers for developing country labour and the pauperization of the human environment and degradation of the physical environment in developing countries is rarely made.
- hunger for developing country *markets* stems from their use, both as a dumping ground for surplus production as well as to sustain levels of economic growth in industrialized countries. The feeding of this international hunger also takes a heavy toll on the human and natural environment of developing countries.
- hunger for ways (including development projects) to *recycle* developed country *capital surpluses* can result in the export of debt and inflation to the developing countries with very real costs in terms of human suffering.
- hunger for superpower *spheres of influence* has led to the unfortunate militarization of the developing world with,

once again, heavy costs to the human and natural environment.

These international hungers are not without their national counterparts. For example, the growing incidence of bonded labour and slavery-like practices are the product of models of development which are primarily oriented to serving the needs of minorities of urban-industrial populations. There is, thus, a vested interest in keeping a large sector of the population unorganized and depoliticized, so that the poor can be a source of perennial, cheap and docile labour. Similarly, policies of rural development have tended to make only such inputs into the rural economy as are necessary to ensure outputs needed by the urban-industrial sector. Development, for most countries, has been geared towards perpetuating a colonial-type exploitation by a small urban-industrial elite (and its client class of dependent rural elite) of the primary producers who comprise the vast majority of the population of landless labourers, small-scale and marginal farmers, rural artisans and tribals in the forest economy.

In most developing countries, examples abound of government development policies and projects which bring benefits to a privileged few but displacement, starvation, and exploitation to the many. Such projects include:

- industrialization projects which unquestioningly embrace hazardous (so-called "high") technologies and sacrifice or imperil the lives of workers and communities.
- agricultural development projects which are intended to achieve "food self-sufficiency," or export earnings but which end up financing unequal urban developments while causing rural hunger, exploitation, and im-

poverishment;

- large-scale infrastructure or dam building projects which displace thousands and ruin ecology for survival to provide energy and water for a privileged few.

Thus, development has often produced and reproduced conditions of impoverishment and powerlessness which have fostered systemic disregard for and violations of human rights of the vast majority of the poor.

The Need for and Importance of Human Rights Activism in the Third World Today

From time to time, in the recent past, it has become fashionable to express concern about human rights. The World Bank has, for nearly a decade now, co-opted the rhetoric of human rights to forestall vitally needed structural reforms of the international development assistance system. Succeeding administrations in the United States have used the rhetoric of human rights to attempt to intimidate developing countries into adopting an "acceptable" political ideology. However, current concern in Asia about human rights stems from quite different motivation. Such concern springs mostly from non-governmental levels and does not originate from the conventional liberal and legalistic approach to human rights. Rather, it emanates from an approach that turns to human rights as a *source of empowerment* and as a *means for securing public and social accountability*.

Human rights can play a significant role in the empowerment of the impoverished. The oppressed can become more self-reliant through an understanding of their rights and indeed the right to organize and rights of association are vital to impover-

ished groups seeking to mobilize and organize themselves and thus develop countervailing power. Moreover, such impoverished groups become more empowered as they develop their capacities to assert rights through collective action. An awareness of rights helps diminish dependency and builds up confident self-reliance when "have nots" appreciate that they are entitled to resources as a matter of entitlement and not just benign charity. Moreover, rights safeguarding the dignity of the human being are of considerable psychological importance in the struggle to break out of the culture of dependency and to establish self-esteem and a sense of self-worth.

Human rights can also play a significant role in securing the accountability of those who wield power and control resources essential to the satisfaction of basic human needs. Rights to secure mandamus or prohibition are important checks on abuse of power. Rights of access to information, rights to a public hearing and freedom of speech and of the press are crucial in checking governmental lawlessness and abuse of discretion or powers by bureaucratic and government officials.

Human rights are also important as a means for securing participation. Perhaps, more importantly, human rights represent a vital expression of values.

There is a real sense of urgency underlying the present-day human rights activism in the Third World. There, both social action groups and grassroots organizations of the rural poor are increasingly turning to human rights as a means to:

- achieve empowerment through organizing;
- secure accountability of power wielders;
- secure a more equitable distribution of the benefits and burdens resulting

from development projects and a more equitable distribution of the risks attendant to such development projects;

- participate in key decisions as to technology choice and resource allocation;
- express and reinforce social values and ethical principles which should underlie the much needed restructuring of social orders;
- survive, and survive with the dignity that befits humankind.

Some Concrete Examples of the Need for Human Rights in Asia

The Narmada Project in India. The government of the State of Gujarat (acting through various ministries) in collaboration with agencies of the government of India, and agencies of the World Bank and other international assistance agencies, has decided to build a dam to generate power for various urban industrial centres and to develop irrigated farming. The dam site, and the great lake it will produce, will destroy many square miles of forest areas, parts of which are inhabited by many thousands of "tribal" people who have lived in (and in harmony with) forest environments for centuries: these environments are the source of their culture and way of life, as well as their subsistence.

Obviously these people, and many others as well, are opposed to the dam. Their many reasons for opposing the project raise difficult issues. They believe the dam will prove to be (as others in India have) a technological disaster which will produce other disasters: the river and the ecology of the region will produce silting which will fill up the dam basin, causing further flooding and ultimate failure of the project. They believe that while the dam will bring benefits to some - e.g., trees for

industries, irrigation for large-scale farmers and power for urban consumers who can afford it – the project will inflict costs on many others which far outweigh the benefits predicted by planners. Moreover, they believe it is wrong to resolve these issues through convoluted processes of decision making which exclude participation of people most directly affected (i.e. the tribal people); and therefore the government has no power to proceed with the project. They believe, as one spokesman for the thousands threatened has written: "The case of the Narmada project is not an isolated extreme example; it is but part of a pattern [of "development"] which is very rapidly stabilizing itself in our country and perhaps others where the rulers are by and large not accountable to the people at large."

At this point hopes for halting the project altogether are dim, but a second set of concerns relates to the failure of those responsible for financing and "implementing" the project to provide compensatory justice to the many who will be seriously injured by it. The many deeply-felt grievances of many people recently led to a rally of 3000 "victims" at the dam site headquarters – an event "unprecedented" in this region.

Underlying the protests were demands for assurances – "law" – which will enable families ousted from their historic homelands:

- to secure fair compensation for lands expropriated from them;
- to secure (through purchase, at affordable prices, and not coerced exchange) at least five acres per family of similar forest land for resettlement – and to secure stable titles to these new lands;
- to secure protection from outside land speculators who are already trying to exploit the prospect of landless people

seeking new home sites;

- to secure fair compensation for other costs inevitably inflicted on each ousted family as it seeks to move to and re-settle in a new environment;
- to secure recognition of formulas which will enable calculation with some certainty (for each family) of all of these costs, and thus formulas which will generate adequate budget allocations in advance to meet these costs. (At present only 250 million rupees have been appropriated for rehabilitation of all of the potential victims (and the total number of them has never, apparently, been officially estimated). By way of contrast, 450 million rupees have been appropriated for the housing of several hundred staff at the dam site headquarters).

These are only some grievances. Underlying them is a deeper concern. *There is no law* – at least none yet known to the Narmada victims and those helping them – which is explicitly recognized by the agencies building the dam and which *addresses the concerns of the victims*. Nor are there any known (i.e., published) processes for making such legal guarantees and applying them with the efficiency and fairness necessary to prevent countless other hardships to those who must bear the heaviest cost of the project.

In response to these grievances, these victims (like countless others in similar situations) have received *verbal* assurances by various high-ranking officials (e.g., Gujarat's Minister of Irrigation) that their claims (or many of them) will be met, justice will be done. Any lawyer worth his/her salt could readily know that none of these officials have the "jurisdiction" to make, let alone deliver on these promises – assuming the officials will still be around when that time comes.

Palm Oil Plantations in Mindanao. Two Philippines state corporations have developed large plantations to produce palm oil in Mindanao. These corporations were in turn created by a consortium of companies: the National Development Company (NDC), a Philippines parastatal; the Guthrie Company, a British multinational and Guthrie Overseas Ltd., a subsidiary of Guthrie most of whose stock is now owned by a Malaysian parastatal; and, more recently, the Commonwealth Development Corporation (CDC) (a British parastatal created by Parliament to serve as an agency to fund "development" projects through soft loans) has made big loans to NDC/Guthrie on the theory that the palm oil projects will bring "development" to Mindanao.

Recently, many people and "grass-roots" groups voiced complaints about the plantations, and ultimately these came to the attention of the British Parliamentary Human Rights Group. Two MP members of the Parliamentary Human Rights Groups (a quasi-official body) investigated, and their report – revealing a rather shocking history of the project – provides, in itself, provocative reading for lawyers and others concerned with human rights and alternative development.

This report, and other evidence, reveals that many people in the region concerned are unalterably opposed to "plantationizing" and "transnationalizing" their homelands. These groups claim the plantations are, in effect, "expropriating" the lands of hundreds of small-scale farmers, notably tribal people living on ancestral lands; that they are creating a new class of landless wage workers (allegedly underpaid) who are now dependent on foreign actors (notably Guthrie and NDC) for their future economic security; that the long-term future of palm oil production as a basis for "development" is

bleak because chemical substitutes will, perhaps soon, displace already competitive markets for the product; that in any event the major "profits" from the enterprises are going to foreign investors who have no long-term interest in Mindanao, notably its people. It is further claimed that the plantations are destroying valuable lands used for food production necessary to support local populations and that this monoculture will eventually destroy the productivity of the land consumed by it. Finally, these "victim" groups claim that the consortium has used unlawful means to exercise lawless powers; and, further, the projects must be stopped because the people victimized by them presently have no basis for participating in the design, management and accountability of these development projects: the present structuring of the enterprise means that no one need even entertain, let alone be held accountable, for the grievances of affected people.

That issue – lack of participation – takes on even more colour when the history of the project is revealed. The British MPs (in their report) were shocked to find that the plantations had condoned the use of criminal methods (and crimes) to secure many of their present estates. The managers had contracted with a para-military force of ex-policemen (called "The Lost Command") to provide security against their allegedly hostile small-scale farmer neighbours. The Lost Command had in turn killed, tortured or intimidated many people who protested the plantation; they had systematically intimidated farmers to sell their lands to "dummies" who in turn sold (at a profit) to the companies. Further, the companies collaborated in a "nominee" system of employment: by contract it empowered various local figures to "nominate" others to become plantation workers – a process which enabled the nomina-

tors, in turn, to demand a share of the nominees' wages. The companies had refused to recognize the workers' union claims, and The Lost Command had killed union and other organizers. These were some of the findings of the MPs after several weeks' investigation in Mindanao. Their remedy? A stern admonition to CDC to do something to prevent such "grave errors in judgment" in the future, and to urge the plantation companies to live in greater harmony with the "host" communities and their workers.

The cases described above illustrate the kinds of harms that are inflicted upon the rural poor as a result of human rights violations. These harms include the imposition of landlessness and indebtedness, displacement, exploitation, exclusion and repression. An emerging body of human rights law – notably covenants, declarations and resolutions within the U.N. system – which proclaim the existence of "universal" human rights are very important legal resources for organizations of victim peoples in fighting back against such harms. Three categories of rights are of particular importance:

The Rights of the Rural to Form Self-Reliant, Self-Managed Organizations and Use Them to Pursue Lawful Objectives. These rights are guaranteed by the UN Declaration and the UN Covenants on Human Rights, and they are set out in detail and unequivocally guaranteed by several very important ILO Conventions, notably Convention 141 (promulgated in 1975). These rights are essential to the realization of meaningful participation by the rural poor in development processes. They are also crucial to the processes of asserting and securing recognition of other guaranteed human rights. Without participatory organizations of their own, people are left ignorant of their rights, bereft of means to protect them.

Rights to Food and Freedom from Hunger. These "universal" rights are set out in the UN Covenant on Social, Economic and Cultural Rights as *rights of people*, not simply moral obligations imposed on governments. Accordingly, the task is to make these rights both meaningful to and enforceable by people who need such rights. The task is to begin to identify (working with affected groups) the various, particular component rights which provide specific content to the general declarations of human rights to food and which provide the bases for popular enforcement of these rights in specific settings.

It is notorious that rural communities are the first and major victims of food shortages; and it is equally notorious (e.g., through a vast amount of FAO documentation) that these shortages are produced – over time – by some combination of man-made practices such as:

- changes in land tenure and land use which produce increasing numbers of landless poor in rural areas;
- degradation of physical environments often accompanied by withdrawal of the most productive land from food production;
- unfair terms of trade to producers (notably small-scale ones) and other interventions which enable government agencies (acting like feudal landlords) to siphon off surplus food to other areas;
- lack of facilities for local storage of crops, and for transport and marketing within rural areas;
- lack of credit, extension and inputs to small-scale farmer producers; and
- lack of research directed towards their needs.

These kinds of practices restrict or neglect the food needs of the rural poor. If

attention is given to these needs and to the food rights of the rural poor, these practices can (and must) be challenged and remedied by corrective measures. Human rights to food can provide both the bases for such challenges and the bases for remedial corrective action. The "right to food" can be seen as a general right which includes rights of people to protect (and demand governmental protection of) the sources of their food supply and the means of producing, storing and distributing food.

The Human Right to Development. This is a new right emerging within the UN system. We believe it is important for groups and agencies working with and for organizations of the rural poor to participate in efforts to articulate the content of this right – to represent the victims of underdevelopment and maldevelopment in these processes. We believe that the Human Right to Development (like the Human Right to Food) should be viewed as a bundle of rights – a new kind of Magna Carta for the Third World's poor – geared to the needs of those people who are most in need of the benefits of "development," notably the rural poor.

In a sense, this effort to develop a human right to development represents an effort by action groups to counter the trade-off approach of their governments. Their governments reiterate the need to sacrifice certain human rights in order to achieve development. The effort to develop a human right to development reiterates the importance of human rights as an evaluative criterium of development. Policies and programmes of government undertaken to bring about development would be evaluated in terms of their impact on human rights. Thus, at a minimum, human rights criteria would be used in determining whether a specific development project (e.g., to build a large dam or

highway) should be undertaken and if such a project would result in human rights violations, then the extent of such violations would determine whether the project should proceed or not. Ideally, the right to development could provide an even more effective criterium. Development projects could be assessed in terms of their impact on helping to realize the human rights of the poorest and most disadvantaged in the area of the project. Development needs to be redefined so that greater realization of the human rights of the poorest and most disadvantaged members of the community be made the prime evaluative criteria of projects and programmes undertaken in the name of development.

Some Limitations of the Conventional Liberal Approach to Human Rights

It is important, from the point of view of Third World human rights activist groups, to make a careful appraisal of the limitations inherent in the conventional liberal approach to human rights.

In the first place, existing human rights law tends to reflect its Eurocentric origins. It tends to be largely individualistic and assumes a level of equality in terms of capacity to assert one's rights. Not surprisingly, therefore, in practice the strong have been much more successful in asserting their rights against the weak. Thus, for example, programmes of land redistribution in India have been slowed down by a series of court cases brought to enforce the right to property of the landowner. Differential capacity to enforce rights has prompted the cynics to remark that in most developing countries human rights mean little more than the right to exploit, impoverish and perpetuate dependency rela-

tionships.

Other problems arise because of the fact that human rights has become largely the preserve of lawyers. This has led to too legalistic an approach and too much reliance on the lawyer as an intermediary to enforce one's rights. Moreover, under national law, rights enforcement is usually through an adversarial process which vindicates rights only after identifying violators. This leaves little room for mediation and conciliation. Human rights suffer from a lack of adequate sanctions both at international and national levels. All too often, the redress and relief available is inadequate or inappropriate as compared with the loss or suffering associated with the human rights violation.

Problems have also arisen because of the inappropriateness of certain legal concepts on which the rights are founded. For example, tribal communities have experienced difficulty in the Philippines in establishing their rights to land because under customary law no individual owns land. The land belongs to the tribe in perpetuity. Migrant labour and tenant farmers have experienced difficulties in enforcing their rights under labour welfare legislation because of difficulty in proving an employee-employer relationship. Nomadic communities have been unable to secure redress when displaced by large-scale development projects, such as the construction of a dam, because the law providing rights emphasizes ownership, possession and title and therefore cannot cope with the problems of a migratory group.

The above illustrations are meant to demonstrate inappropriateness or inadequacy of certain jurisprudential concepts underlying Western human rights law. Other limitations stem from the fact that the liberal human rights approach assumes equality of strength among inde-

pendent individuals. The need is for a human rights approach geared to collective self-reliance and mutual interdependence and better suited to conditions in Asia.

Human rights activists in Asia have faced other dilemmas when seeking to adopt a liberal human rights approach. Social action groups working with the impoverished in Asia have, at times, faced hard dilemmas:

- In certain instances, human rights activism might prove counterproductive. For example, in India the legal rights movements in support of child labour, female labour, and bonded labour resulted in the enactment of beneficial legislation. But the rights created by such legislation could be enjoyed by only a few. Female labour ended up getting pushed into the unorganized, informal sector. Child labour ended up in industries unregulated by child welfare law, such as match factories and fireworks factories where they became exposed to new hazards. Bonded labour became free only in name.
- In other instances, human rights activism has proved ineffective. Much of the social action litigation undertaken in India (e.g., that relating to bonded labour and to the rights of those pending trial) has resulted in victory. But this victory has proved pyrrhic. Remedies and reliefs ordered by the court have proved to be illusory since those ordered by the court to provide such relief have ignored the decree of the court. The Supreme Court, lacking an effective enforcement mechanism, has stood by powerless, watching its decrees being flouted with impunity. Human rights organizations, thus, have a vital role to play in ensuring that hard-won victories in court result in more

than cosmetic changes and illusory remedies.

- Balancing the rights of collectivities and groups over those of individuals has also created cruel dilemmas for human rights activists.
- The relationship between ethnicity and survival struggles can also pose cruel dilemmas for human rights activists. Curtailing of the rights of a tribal minority for the greater good of all (e.g., by displacing a tribal community to build a multipurpose dam) has led to

virtual cultural genocide. In times of economic hardships for all, defense of the rights of a minority becomes a most unpopular task. Yet, lasting relationships of trust between ethnic groups can perhaps only be forged through the active defence of the rights of the minority in times of such crisis.

- In some instances, a significant increase in the level of human rights activism has resulted, in the short term, in a closure of the political space for social action.

Biotechnology and the Law*

by

The Hon. Justice M. D. Kirby, CMG**

The problems presented to the legal system by developments of biotechnology are troublesome for they touch fundamental questions of morality and raise the very nature of human life itself.

The cases which, so far, have come most frequently before the courts are those which concern the response of the law to the grossly deformed or retarded neonates. The law tended against distinctions based upon respect for human life having a minimum quality. Before the courts intervened, however, "compassionate infanticide" was a common practice in many hospitals. In recent years, there has been a series of cases in England¹, Canada², the United States³ and Australia⁴ in which orders have been made requiring operations to be performed on neonates or young children, despite the disinclination of medical staff and the parents. Perhaps more significant than these orders were the words, in the leading English authority on this subject, which suggest that if the child's life is demonstrated to be "so demonstrably awful" and "filled with pain", the court might desist from ordering its preservation.⁵

The problems that have been presented to the courts in the case of severely deformed and grossly retarded neonates have arisen from advances in technology. Formerly, such babies would have died by

the course of nature. The issue is now posed whether sophisticated surgery and heroic medical efforts (which would, of course, be used in the case of a normal child), should be denied to abnormal children. If they are to be denied, the question is when and by whom such decisions will be made.

Another series of cases presenting bioethical problems has arisen out of so called sex change operations which, until recently, would have been impossible. Perhaps the most celebrated is that of April Ashley.⁶ By operation, she underwent the removal of a scrotum and penis and construction of a vagina. She lived exclusively as a woman. She married a Mr. Corbett. The relationship broke down and it fell to Ormrod, Jr to determine whether the marriage had been initially valid. By reference to a number of criteria, chromosomal, gonadal and genital tests, his Lordship concluded that April Ashley was not a woman and so could not marry. There have been a number of similar cases in Australian courts.⁷ In 1984 a medical case in Toronto shows what may now be achieved. Siamese twins, both genetically male were joined at the pelvis. They were separated and one was left with male genital organs. An artificial vagina was used for the other. Her male gonads were removed. But if the tests pronounced in April Ashley's case and Australian cases

* This article is extracted from a public lecture given at the Victoria University of Wellington on 1 April 1987.

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were applied by the Canadian courts, the "female" twin will be condemned by the law to the prospect of a life without a valid marriage as an additional burden to the physical disabilities which nature has inflicted but which medical technology has struggled to overcome.⁸

To these issues must now be added the exotic questions posed by the actuality of in vitro fertilization and foetal experimentation and the prospect of cloning of the human species and still further experiments with artificial conception.⁹ In the case of in vitro fertilisation, an acute question was posed by a recent case in Australia. The genetic parents of a fertilised human ovum held in a hospital refrigerator in Melbourne were killed in a plane crash in North America. The parents were very wealthy. The question arose as to whether the fertilised ovum, which had a contingent potentiality for a human life, had "rights", which if necessary the law would enforce, to find a surrogate womb and, to be brought into this world in order to inherit the property. This is just one of many such problems which may be presented by this remarkable new technique. So far as surrogacy is concerned cases have already come before the English courts and legislation has been enacted or proposed.¹⁰

The Role of the Law: Drug Addiction and Artificial Human Conception

Two circumstances, one public and one private, have lately caused me to reflect upon the role of the law in reaction to what may generally be described as bioethical concerns. The private one was a letter received from a prisoner. He is in a gaol in New South Wales. He is there for a number of minor offences of larceny. His has been a life of recurring imprisonment. His larcenies he attributes to his need to raise the

\$300 a day he needs to satisfy his physical and psychological addiction to heroin. He is about to be released. He wrote to me to enquire whether there would be any reform of the law to permit his addiction to be treated as a health problem. If not, he declared, he would be condemned by the law and by society to a never ending spiral of crime, re-conviction, re-imprisonment and ultimately destruction. He asked society, through me, how a humane and generally tolerant community could sanction a punitive approach to what is a physical addiction. Imprisonment, and even methadone treatment, may temporarily provide relief. But the physical addiction, and the desire for the stimulus and peace provided by the drug, are such that laws and stern judicial instructions to "pull your socks up" are regarded as irrelevant, thoughtless and – dare I say it – as cruel as the judicial pronouncements which accompanied many a convict on his way to Australia at the beginning of its settlement.

This prisoner sees himself as the sacrificial lamb offered up on an altar dedicated to the prevention of the spread of his drug addiction. To stop others, we punish him most severely. Moreover, the prisoner calls attention to the hypocrisy which is involved in our current approach to laws on drugs. More than 80% of the 16,000 people who died from drug related causes in Australia last year could have attributed their deaths to the perfectly legal addiction to tobacco. Nearly 20% of such deaths could be attributed to the equally legal addiction to alcohol. We restrict some advertising of the former. We license outlets of the latter. But our societies condone and even encourage both. Only 1% of drug deaths could be attributed to illegal narcotic drugs. This disproportion in the impact of these drugs and in our laws and our approach to drugs raise the question of the

role of the law in the enforcement of society's perception of morality. Where does the State's right end to intervene to stop people harming themselves? If we claim that right for heroin – but waive it for drugs which do far more widespread damage, can we look a heroin addict in the eye and justify our legislative disproportion? Can we justify laws and law enforcement which turn a blind eye to a "window box" of marijuana for personal use but punish drastically the cultivation and supply of that drug to people who do not have a window box or gardening instincts?

The question of the limits of State power was even more vividly posed by the publication on 11 March 1987 of the Roman Catholic Church's "Instruction on Respect for Human Life in Its Origin and On the Dignity of Procreation". Published by the Vatican, this instruction not only purports to lay down a moral and ethical regime for adherents of the Roman Catholic Church. It also calls for laws prohibiting the practices which that Church regarded as illicit. Some of the practices so proscribed by the Vatican's teachings are (or shortly will be) not only legal but widespread and commonly thought of in our countries to be beneficial. The conduct forbidden by the Vatican document includes:

- Prenatal diagnosis including amniocentesis and ultra sound when used for the object of eliminating defective fetuses.
- All experimentation on living embryos not directly therapeutic to that embryo.
- Keeping alive human embryos for experimental or commercial purposes.
- Utilisation of dead fetuses for commercial purposes.
- Voluntary destruction of human embryos obtained in vitro whether for research or procreation.
- Freezing an embryo, even when carried

out to preserve its life.

- Efforts to influence chromosomal or genetic inheritance.
- Any artificial fertilisation involving persons who are not married.
- Test tube fertilisation and embryo transfer involving even married couples.
- The artificial insemination of an unmarried woman or even of a widow with sperm donated by her husband.
- Surrogate motherhood.
- The collection of sperm through masturbation.

Tens of thousands of babies are conceived every year through artificial insemination, whether by sperm donated by husbands or by other donors. A growing number of children are born from the procedures of in vitro fertilisation. This is usually (although not exclusively) adopted to help the 15% of married couples unable to achieve conception by normal means. They endure many pains on the road to conception.

The prohibition on the use of foetal tissue – and the growing of human foetuses for short periods would, if carried into legal prohibition, prevent experiments which, evidence suggests, promise the best hope of cures for people who have suffered brain tumours or for the victims of Parkinson's disease and Alzheimer's disease (senility). Whilst ordinary citizens who are free of these conditions naturally react with distaste at the idea of experimentation with human foetal tissue, their attitudes tend to change overnight when they (or their loved ones) become at risk to conditions which science might cure. The remarkable properties of embryos and foetuses which would otherwise be discarded present potential sources of scientific experiment and beneficial cure which society may not wish to forfeit. They pose

the issue of when the law may be justified to intrude to prevent things being done which some people (possibly a vocal minority) find offensive to them when considered in abstract but away from the relief of pain and delay of death which may be possible.

Immediately on the publication of the Vatican statement, the Catholic Archbishop of Sydney (Archbishop Clancy) expressed the hope that Australian legislators would take the principles of the Vatican "instruction" and formulate compatible laws to regulate *in vitro* fertilisation. Spokesmen for other churches praised the report. Only from the United States did reports come of sharp dissent on the part of some Roman Catholic theologians.

Appeals to the logic that human life begins at conception are not persuasive. Life might so begin in one sense. But nature is profligate with life as the millions of sperm cells wasted every day demonstrate. The question is rather when the law will intervene to protect life by the authority of the State. Abortion law apart, our common law took its stance that human life began at birth. It will be a major reversal of that approach to push all legal protections back to the very first moment of conception. Such absolutism ought perhaps logically to be pushed back even earlier to protect sperm and punish masturbation in boys. But no one nowadays proposes laws on that subject. Calls for legal rules must be weighed against the mischief of premature or excessive regulation and the positive harm done when that regulation could prevent life saving scientific experiments for the benefit of the living.

For present purposes, it is sufficient simply to call attention to the suggestion that the Vatican moral instruction should be translated into secular law. We have passed the time when particular churches

(or even an aggregation of the leaders of the Christian religion) can expect to impose their perception of morality upon our secular politics. The history of the perceptions of morality on the part of the churches has not been an unblemished one. The history of the tension between the Christian church and science does not always redound to the credit of the former. The church's initial insistence that the earth was flat and the centre of the universe should never be forgotten. Nor should the resistance to Darwin's thesis of evolution when it was first propounded be overlooked. Sadly, all too often, the leaders of the Churches, like leaders of the law, look backwards. One suspects with *Nature* magazine, that once again the Churches are leading adherents down a blind alley from which, one day, they will have to make another humiliating retreat. Appeals to abstinence and to the merit of Christian suffering tend to fall on deaf ears. Nowhere is this more so than when a childless couple is confronted by the prospect of overcoming a purely physical impediment and fulfilling the natural desire to have children. The idea that, out of deference to the opinions of theologians, we should bend our secular laws to forbid practices – many of which are now widespread and generally accepted – is also unconvincing.

It is plain that our social response to drugs and to the many issues of artificial conception present dilemmas to society. They raise the question of the principle by which an organised community has a right to penalise the conduct of individuals within it. The Vatican document declares that "science without conscience can only lead to man's ruin". But the response comes that insistence on conscience, agony and suffering where science can offer relief and hope, may be needlessly cruel. I very much doubt the wisdom (or the effi-

cacy) of premature legislative regulation of the remarkable advances in the field of biology. Although scientists must ultimately submit to the community's views of right and wrong, the dangers of prema-

ture legal regulation, before the widest community debate, could involve a serious overreach by the law. In the course of it, many ill considered injustices might be done.

FOOTNOTES

1. *In Re B (a Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421 (CA).
2. *Re Superintendent of Family and Child Service and Dawson et al* (1983) 145 DLR (3d) 610 (SCBC).
3. Discussed G.J. Samuels, "Should We Strive Officially To Keep Alive?" 1984, Proceedings of the Medico-Legal Society of NSW 213, 220. See also discussion G.P. Smith and J.B. Hickie, "Life or Death - Who Decides?", *ibid*, 190, 197.
4. On 5 July, 1986 Vincent, J in the Supreme Court of Victoria granted an injunction directed at a Melbourne hospital on the request of a grandfather, designed to preserve the life of a neonate born with severe spina bifida.
5. See discussion G. Williams, "The Right To Die" (1984) 134 New LJ 73. See also Z. Lipman, "The Criminal Liability of Medical Practitioners for Withholding Treatment from Severely Defective NewBorn Infants" (1986) 60 ALJ 286.
6. *Corbett v Corbett* [1971] P 83. For discussion see D. Pannick, "Homosexuals, Transsexuals and the Sex Discrimination Act" [1983] Public Law 279.
7. *In Re C & D* (1979) FLC 90-636; noted (1979) 53 ALJ 659.
8. R. Wilson, "Life and Death: The Impact of Human Rights on Experimenting with Life" (1985) 17 Aust J Forensic Sciences, 61, 80. Note the recent case in the European Court of Human Rights concerning a transsexual's right to marry: *Van Oosterwijck v Belgium* (1981) 3 EHRR 557.
9. New South Wales, Law Reform Commission, Artificial Conception: Human Artificial Insemination, LRC 49, 1986. See also G.P. Smith, "Australia's Frozen 'Orphan' Embryos: A Medical, Legal and Ethical Dilemma", 24 Journal of Family Law 27, (1985-6). See also I.R. Hill, Liability and In Vitro Fertilisation" (1985) 25 Med Sci Law 270.
10. *In Re A Baby*, Times Law Report, 15 January, 1985, p 8, Decision of Latey, J. Legislation is beginning to flow. See Infertility (Medical Procedures) Act 1984 (Vic); Human Embryo Experimentation Bill, 1985 (Aust); Surrogacy Arrangements Bill 1985 (UK).

BASIC TEXTS

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The member States of the Council of Europe, signatory hereto,

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Recalling that, under Article 3 of the same Convention, "no one shall be subjected to inhuman or degrading treatment or punishment",

Noting that the machinery provided for in that Convention operates in relation to persons who allege that they are victims of violations of Article 3;

Convinced that the protection of persons deprived of their liberty against torture and inhuman or degrading treatment or punishment could be strengthened by non-judicial means of a preventive character based on visits;

Have agreed as follows:

CHAPTER I

Article 1

There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Committee"). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.

Article 2

Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority.

Article 3

In the application of this Convention, the Committee and the competent national authorities of the Party concerned shall co-operate with each other.

CHAPTER II

Article 4

1. The Committee shall consist of a number of members equal to that of the Parties.
2. The members of the Committee shall be chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention.
3. No two members of the Committee may be nationals of the same State.
4. The members shall serve in their individual capacity, shall be independent and impartial, and shall be available to serve the Committee effectively.

Article 5

1. The members of the Committee shall be elected by the Committee of Ministers of the Council of Europe by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly of the Council of Europe; each national delegation of the Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.
2. The same procedure shall be followed in filling casual vacancies.
3. The members of the Committee shall be elected for a period of four years. They may only be re-elected once. However, among the members elected at the first election, the terms of three members shall expire at the end of two years. The members whose terms are to expire at the end of the initial period of two years shall be chosen by lot by the Secretary General of the Council of Europe immediately after the first election has been completed.

Article 6

1. The Committee shall meet in camera. A quorum shall be equal to the majority of its members. The decisions of the Committee shall be taken by a majority of the members present, subject to the provisions of Article 10, paragraph 2.
2. The Committee shall draw up its own rules of procedure.
3. The Secretariat of the Committee shall be provided by the Secretary General of the Council of Europe.

CHAPTER III

Article 7

1. The Committee shall organise visits to places referred to in Article 2. Apart from periodic visits, the Committee may organise such other visits as appear to it to be required in the circumstances.
2. As a general rule, the visits shall be carried out by at least two members of the Committee. The Committee may, if it considers it necessary, be assisted by experts and interpreters.

Article 8

1. The Committee shall notify the Government of the Party concerned of its intention to carry out a visit. After such notification, it may at any time visit any place referred to in Article 2.
2. A Party shall provide the Committee with the following facilities to carry out its task:
 - a. access to its territory and the right to travel without restriction;
 - b. full information on the places where persons deprived of their liberty are being held;

c. unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction;

d. other information available to the Party which is necessary for the Committee to carry out its task. In seeking such information, the Committee shall have regard to applicable rules of national law and professional ethics.

3. The Committee may interview in private persons deprived of their liberty.

4. The Committee may communicate freely with any person whom it believes can supply relevant information.

5. If necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned.

Article 9

1. In exceptional circumstances, the competent authorities of the Party concerned may make representations to the Committee against a visit at the time or to the particular place proposed by the Committee. Such representations may only be made on grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress.

2. Following such representations, the Committee and the Party shall immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Committee to exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Committee proposed to visit. Until the visit takes place, the Party shall provide information to the Committee about any person concerned.

Article 10

1. After each visit, the Committee shall draw up a report on the facts found during the visit, taking account of any observations which may have been submitted by the Party concerned. It shall transmit to the latter its report containing any recommendations it considers necessary. The Committee may consult with the Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty.

2. If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter.

Article 11

1. The information gathered by the Committee in relation to a visit, its report and its consultations with the Party concerned shall be confidential.

2. The Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party.

3. However, no personal data shall be published without the express consent of the person concerned.

Article 12

Subject to the rules of confidentiality in Article 11, the Committee shall every year submit to the Committee of Ministers a general report on its activities which shall be transmitted to the Consultative Assembly and made public.

Article 13

The members of the Committee, experts and other persons assisting the Committee are

required, during and after their terms of office, to maintain the confidentiality of the facts or information of which they have become aware during the discharge of their functions.

Article 14

1. The names of persons assisting the Committee shall be specified in the notification under Article 8, paragraph 1.

2. Experts shall act on the instructions and under the authority of the Committee. They shall have particular knowledge and experience in the areas covered by this Convention and shall be bound by the same duties of independence, impartiality and availability as the members of the Committee.

3. A Party may exceptionally declare that an expert or other person assisting the Committee may not be allowed to take part in a visit to a place within its jurisdiction.

CHAPTER IV

Article 15

Each Party shall inform the Committee of the name and address of the authority competent to receive notifications to its Government, and of any liaison officer it may appoint.

Article 16

The Committee, its members and experts referred to in Article 7, paragraph 2 shall enjoy the privileges and immunities set out in the Annex to this Convention.

Article 17

1. This Convention shall not prejudice the provisions of domestic law or any international agreement which provide greater protection for persons deprived of their liberty.

2. Nothing in this Convention shall be construed as limiting or derogating from the competence of the organs of the European Convention on Human Rights or from the obligations assumed by the Parties under that Convention.

3. The Committee shall not visit places which representatives or delegates of Protecting Powers or the International Committee of the Red Cross effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 8 June 1977 thereto.

CHAPTER V

Article 18

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 19

1. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions

of Article 18.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 20

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Convention shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 21

No reservation may be made in respect of the provisions of this Convention.

Article 22

1. Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of receipt of the notification by the Secretary General.

Article 23

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Convention in accordance with Articles 19 and 20;
- d. any other act, notification or communication relating to this Convention, except for action taken in pursuance of Articles 8 and 10.

ANNEX

Privileges and immunities

Article 16

1. For the purpose of this annex, references to members of the Committee shall be deemed to include references to experts mentioned in Article 7, paragraph 2.

2. The members of the Committee shall, while exercising their functions and during journeys made in the exercise of their functions, enjoy the following privileges and immunities:

a. immunity from personal arrest or detention and from seizure of their personal baggage and, in respect of words spoken or written and all acts done by them in their official capacity, immunity from legal process of every kind;

b. exemption from any restrictions on their freedom of movement on exit from and return to their country of residence, and entry into and exit from the country in which they exercise their functions, and from alien registration in the country which they are visiting or through which they are passing in the exercise of their functions.

3. In the course of journeys undertaken in the exercise of their functions, the members of the Committee shall, in the matter of customs and exchange control, be accorded:

a. by their own Government, the same facilities as those accorded to senior officials travelling abroad on temporary official duty;

b. by the Governments of other Parties, the same facilities as those accorded to representatives of foreign Governments on temporary official duty.

4. Documents and papers of the Committee, in so far as they relate to the business of the Committee, shall be inviolable.

The official correspondence and other official communications of the Committee may not be held up or subjected to censorship.

5. In order to secure for the members of the Committee complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.

6. Privileges and immunities are accorded to the members of the Committee, not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions. The Committee alone shall be competent to waive the immunity of its members; it has not only the right, but is under a duty, to waive the immunity of one of its members in any case where, in its opinion, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.

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