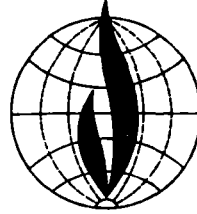


THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Human Rights in the World

French Court Finds an Argentine Officer Guilty of Serious Violations of Human Rights

The Astiz Case

On 16 March 1990, Captain Alfredo Astiz of the Argentine Navy was found guilty *in absentia* by a French Court of Justice and sentenced to life imprisonment for the illegal arrest, torture and kidnapping which had resulted in the involuntary and definitive disappearance of two French nuns, the Sisters of Charity Alice Domon and Leonie Renée Duquet. These crimes were committed in 1977 in Buenos Aires during the military dictatorship.

It was not possible for Captain Astiz to stand trial in his country and in the place where he committed these crimes because of the impunity guaranteed to military men and the police forces by the well-known law of "due obedience".¹

Alfredo Astiz, who held the rank of captain in the Argentine Navy, was responsible during the military government for what was known as "special tasks" in the Naval Intelligence Service. In Argentina at that time such tasks meant "dirty war" operations conducted by the military and police not only against their countrymen and women, but also against exiles from neighbouring countries. They

were, in fact, crimes of the kind classified as "crimes against humanity", and included illegal arrests, detention in military units and clandestine places; keeping detainees in cruel and inhuman conditions; torture, the assassination of prisoners; and the definitive disappearance of more than 15,000 people. During the government of Dr. Alfonsín, nine Commanders-in-Chief of the Armed Forces were tried and sentenced to long terms of imprisonment for some of these crimes. Nevertheless, they were pardoned by the current President, Dr. Carlos S. Menem, at the beginning of 1991.

Alfredo Astiz is, thus, in a sense the personification of the illegal actions of the special groups. Not because he was the worst criminal, or bore the main responsibility, but for two other reasons: a) he was identified as responsible for the abduction, torture and subsequent definitive disappearance of the two French nuns and also was singled out as directly responsible for the illegal detention, torture and execution of the 17-year-old Swedish girl, Dagmar Hagelin; and b) he was taken

1. Law No. 23.521 approved in 1987. It exempts members of the military and police forces for responsibility for crimes committed in order to obey, or in the course of obeying, higher orders.

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prisoner by the British during the Malvinas (Falklands) War, when he surrendered as commander of the Argentine troops on South Georgia Island on 25 April 1982 (see ICJ Review, No. 28, June 1982, p. 3). When photographs of him signing the Act of surrender were published by the international press, some of his victims, who had been kidnapped and held in the High School of Naval Engineering, a torture centre in Buenos Aires, recognized him. France and Sweden then asked the British to be allowed to interrogate him, but Astiz contested this on the grounds that he was a prisoner of war

and under the protection of the 1949 Geneva Conventions.

Although France has not signed an extradition treaty with Argentina there was nothing to prevent France from requesting his transfer to serve his sentence. In any case the French Judiciary has issued an international order for his capture.

But although the sentence passed in France has had no practical effect to date, it non-the-less constitutes a moral and ethical victory in the struggle against the impunity granted to violators of human rights. However, Astiz is safe only so long as he remains on Argentine territory.

Chile

Official Report on Violations of Human Rights During the Military Regime

Shortly after assuming the Presidency of the Republic, Mr. Patricio Aylwin established by decree of 25 April 1990, the National Commission For Truth And Reconciliation, with the supremely important mission of reporting on the most serious violations of human rights committed during the military regime, from 11 September 1973 to 11 March 1990. The term 'serious violations' was understood to mean only those that involved the death of a person, whether by involuntary disappearance, execution, assassination or death under torture, always provided that the responsibility of the State, of its agents or of persons who had acted with its consent could be shown to be implicated. Consequently, the report would cover no more than a part of the tragedy lived

through by the Chilean people during the military dictatorship and would exclude thousands of illegal arrests, cases of forced exile and, in general, violations of political, trade union, cultural and social rights. However, by decision of the President, it would include fatal attacks on persons that had been carried out by private individuals opposed to the military regime, provided that they had acted for political reasons.

The latter was an important innovation since it is possibly the first time - under a democratic government - that acts committed by individuals who are not invested with the authority of the State and whose actions do not have its consent or acquiescence are defined as "violations of human rights". Conduct of this kind has traditionally been classified by inter-

governmental organizations such the Organization of American States and the United Nations as a "violation of human rights" when it is committed by government agents or people acting under their aegis, and as a "crime or offence" when it is the work of persons opposing or fighting against the government.

Without disregarding the need for profound reflection on this subject, we would simply say that the Commission for Truth and Reconciliation, in faithfully adhering to its mandate, but without attempting to establish a theoretical position, adopted for practical reasons the broad criterion of considering all situations of that kind as a "violation of human rights" based on, in its own words, "the criterion which has been imposed by the consciousness of public opinion" (part I, chapter II, para 4 of the report).

The Commission was composed of persons of good standing in Chilean society who represented a broad spectrum of political and ideological beliefs, and included civilians who had been supporters of the military government. It was aided in its work by 60 officials of different professions. On 8 February the Commission's report was placed in the hands of President Aylwin, and he informed the country of this in his historic address of 4 March 1991.

The main purpose of the Commission was to give the country the full, though not officially sanctioned, truth, without detriment to subsequent action by the Administration of Justice in relation to specific offences and without claiming to replace it.

The Commission amassed an enormous amount of data, interrogated witnesses, relatives and survivors, and a few members of the Armed Forces who agreed to testify. It examined documents, reports of autopsies, hospital records, and judi-

cial files. No collaboration was forthcoming from the Armed Forces or the Security Forces, and their unwillingness was particularly evident when the army and the "Carabineros" met requests for information with the statement that all the documentation relating to that period had been "burnt". (It should be remembered that General Pinochet is still the commander-in-chief of the army). Nor did the army provide information concerning the National Information Centre (CNI), a political police body which had been directly answerable to General Pinochet (then Head of State), and which for years was the principal body accused of rights violations and the successor to the infamous DINA (Dirección de Información Nacional).

Subject matter of the report

The report first describes the historical, political, legal and institutional framework in which the acts in question took place, then gives an account of each case in which the Commission unanimously decided that a violation of human rights had occurred resulting in death or definitive disappearance. In the latter case the Commission concluded that the persons who had disappeared were dead and that their bodies had been disposed of in secret.

The Commission thus arrived at the conviction that *2,115 persons had been assassinated by government agents*, in 642 other cases it did not have the same conviction and considered that a further investigation should be made. It also concluded that *164 persons had been killed by armed opposition groups* (that figure included 132 members of the Armed Forces and Security Forces). Many other cases on which the Commission received information were excluded on the grounds that the deaths involved had not been

occasioned by a violation of human rights but by other means (e.g. genuine armed clashes).

The persons killed by government agents are classified for the purposes of the report as follows: 59 persons shot after irregular or illegal War Councils; 101 dead in so-called attempts to flee; 815 assassinated; 957 who disappeared for ever, after their arrest; 90 deaths in various types of attack committed under the protection of the government apparatus; and 93 dead owing to the undue use of force in repressing popular protests and demonstrations.

The report dwells at length on the omnipotence of the dictatorship; its unlimited powers of life or death; the activities of the DINA initially and then of its successor, the CNI; and those of the respective intelligence services of the three branches of the Armed Forces and the Carabineros.

The report describes "involuntary disappearance" as detention followed by the concealment of the victim and official denials of his or her arrest, and claims that the underlying intention was to liquidate the opposition.

It gives a painstaking account of the methods of torture used in questioning, which were practised systematically and as a daily routine; the presence of doctors at the torture sessions or nearby; the cruel, inhuman or degrading treatment meted out to the prisoners and political detainees; the fake attacks mounted to cover up murders; and the methods of executing the prisoners. It indicates the places that were used as interrogation, torture and murder centres and the clandestine prisons.

The victims are listed one by one and the circumstances and dates relevant to their death or disappearance are detailed in so far as they are known. The names of those guilty of such heinous crimes, however are NOT made public, although the Commission has transmitted them to the Administration of Justice. Nevertheless, the report does indicate the places where such acts occurred, the dates, and the branch of the police or Armed Forces to which the locations and agents belonged. This aspect of the report was criticized in Chile by the families of the victims and by some human rights organizations. When a press reporter asked one of the most active members of the Commission the reason for the omission, he was told that "if the Rule of Law is to be upheld, a Commission of the Executive Power cannot assume the responsibility for stating that such-and-such a person is a murderer, because that person has not been allowed the right of due process".¹

For President Aylwin, in his speech of 4 March 1991, the task of "attributing responsibility is one that in a Rule of Law devolves on the Courts of Justice...". "The Commission could not enter into this aspect because the very decree that established it denied it this power on the grounds of clear constitutional principles".

The judicial power during the military regime

In chapter IV (part II) of the report an analysis is made of the way in which the judicial power acted. The report concludes by strongly criticizing its performance as

1. Interview with the lawyer José Zalaquett, published in *Brecha*, Montevideo, 5 April 1991. Mr. Zalaquett is a member of the International Commission of Jurists.

regards the protection of human rights. It points out that, faced with serious and repeated violations of these rights, "the Judicial Power failed to act with the necessary vigour" and that this led to "the... intensification of the process of systematic violations of human rights, both in immediate terms by not safeguarding the persons detained in the cases denounced and also by giving the forces of repression an added certainty of their power to commit offences with impunity."

President Aylwin associated himself with this opinion in stating that he had sent the text of the report to the Supreme Court, requesting "that, in the exercise of its powers, it should instruct the relevant courts to expedite pending cases on violations of human rights as speedily as possible, as well as to institute proceedings in other cases on the basis of the information communicated to it by the Commission for Truth and Reconciliation". The President added that "the amnesty in force which the Government is honouring must not become an obstacle to the institution of judicial inquiries and the determination of responsibilities, especially in the cases of persons who have disappeared".

The report and the views expressed by the President discomfited several of the High Court judges who refused to acknowledge that they had neglected their duty during the dictatorship, and considered - according to certain versions in the Chilean press - that the President's words constituted an unwarranted interference by the executive power in jurisdictional matters.

It is surprising that the Supreme Court which, throughout the military regime, adopted a complaisant attitude - in the opinion of the ICJ - and failed to protect the rights that were being seriously violated day after day should now take ex-

ception to the President's words as offensive to its dignity. We need only recall two facts: out of 8,700 requests for amparo and habeas corpus that were submitted during that time by the Pro Peace Committee and then by the Vicariate of Solidarity, only ten were accepted by the courts. In the other cases - and it must be remembered that lives were at stake - they were either rejected forthwith or the proceedings were purely a formality and the petitions were halted and filed in view of the invariable reply from the military that they knew nothing about the arrest of the person in question or that the CNI could not furnish any information for "reasons of security". The second fact to remember is that the Supreme Court accepted as legal and constitutional the self-amnesty for which General Pinochet obtained approval in 1978, and then went even further in stating that such an amnesty implied not only immunity from punishment but also that there would be no investigation of the acts committed. Moreover, the Supreme Court obviously neglected to use the powers of "supervision over all courts" (including military tribunals) invested in it by the Chilean Constitution.

The report also describes the activities of the War Councils and the execution of prisoners, sometimes as the result of death sentences passed by the Councils, and sometimes as the result of sentences pronounced outside the competence of the Councils.

As the Commission for Truth and Reconciliation has sent all the background information to the judicial power, it will become clearer in the next few months what attitude the Supreme Court will adopt, what use it will make of the information and how far it will go to elucidate the truth and put the guilty parties on trial. Two lines of action can be envisaged:

1. The Judiciary should now - under a democratic regime - take a stand on the validity of the self-amnesty of 1978 and, in any case, on all that it implies and comprises punishment of the guilty parties, investigation of the facts or both.
2. As regards offences committed after 1978, in which the problem of self-amnesty does not arise, President Aylwin has spoken about the intervention of the parties called upon to prosecute on behalf of society and about the imperative need for the co-operation of the authorities in the investigations to be undertaken by the courts of justice, both in pending cases and in proceedings that should be instituted in the light of the information amassed by the Commission.

Other aspects of the report

The report analyses the attitude adopted towards the military regime at the time by the different social sectors in order to give a clearer picture of the context in which the events in question took place. It also examines the impact of the violations that occurred on the victims' families and on society in general; the constant state of anguish in which the families and relatives lived, the uncertainty as to the fate of the victims and the refusal of the authorities to give them any information, the mourning they were unable to exteriorize, and even the indifference and denigration they had to endure from the authorities for so many years.

Proposals

The Commission concludes by putting forward *proposals for reparations* by the

State (fourth part, chapter I). As a general policy, it recommends, among other things, that:

- the responsibility of the State towards those who died in such circumstances should be publicly acknowledged;
- the dignity and good name of the victims who were belittled by the accusations of crimes that were never proved or against which they were powerless to defend themselves, should be publicly restored.

With respect to the persons who disappeared:

- they should be presumed dead, and no further evidence demanded than the inclusion of their names in the report. When these were not included, their families would be given the possibility of proving their death. The presumption of death would have the usual legal consequences of such a declaration as regards questions of succession, civil status, martial status, etc;
- the State should grant the families a single pension for life as material recompense.

In order to prevent future violations of human rights, the Commission recommends ratifying or acceding to international agreements, covenants and conventions on human rights; bringing domestic legislation into line with the provisions of such human rights instruments; establishing adequate and effective mechanisms for safeguarding human rights; assuring the independence of the judicial power; and including the teaching of human rights in the training programmes of the Armed Forces and Security Forces.

In concluding, the National Commission for Truth and Reconciliation asserts

that: "strictly from the preventive point of view, the Commission considers that a indispensable element for achieving national reconciliation and thereby averting a repetition of the events that occurred would be the comprehensive exercise by the State of its punitive powers". We regard these words as a refutation of impunity as regards the most serious crimes and more particularly as regards the need to ascertain the truth.

President Aylwin, in his address to the country of 4 March 1991, asked the victims for their pardon in view of the guilt borne by the State whose agents had committed so many crimes. He called on the people to accept the truth which the report had brought to light and which, although not official - since an 'official version of the truth' could not be imposed - was the truth that had emerged from a far-reaching analysis of the facts "so that nothing of that kind may ever take place again in Chile".

In short, in its impressive report, the Commission for Truth and Reconciliation has presented a comprehensive picture of torture, killings, executions and disappearances carried out in a planned, systematic and continuing fashion by high-ranking dignitaries of the State, whose physical agents were also State officials performing military and police functions. The conclusion reached by the Commission was that the dictatorship had en-

forced nothing less than a veritable policy of extermination of its opponents.

The report is illuminating in showing that when a political regime loses the yardsticks that govern the life of a civilised nation and its rulers become obsessed by the existence of national and international enemies whom they see on all sides, anyone who defends justice and human rights may very soon come to be regarded as an enemy of the regime and as such liquidated.

In embarking upon a course of excessive and illegitimate repression, it is only too easy, as in the case of Chile, to cross the border line not only of legality but also of ethics and humanitarian conduct.

The report succeeds in conveying the terror to which the Chilean people were subjected, although this did not prevent them from democratically breaching the walls raised by the dictatorship and, at the first opportunity, rejecting the regime and its representatives through the ballot box.

It must be recognized, that the present transitional regime has obvious limitations, two of the most disquieting being the impunity from which the Armed Forces benefited and will probably continue to do so, and their success in imposing Augusto Pinochet as Commander-in-Chief of the Army. From that vantage point he may well continue to be a threat to democracy.

Guatemala

Massacre of Santiago Atitlan and Peace Talks

For some years the International Commission of Jurists (ICJ) has been closely following the development of the situation of human rights in this Central American country. It has publicly drawn attention to the numerous violations of these rights and has given precise and factual information on them to the international supervisory bodies - the United Nations and the Organisation of American States. Such violations have included assassinations; torture; involuntary disappearances; unlawful arrest; forced recruitment of the rural civil population, who are mainly of indigenous origin, to serve in civil self-Defence patrols (now known as "Voluntary Self-Defence Committees"); and population transfers to so-called "model villages".

Violations of human rights continue to take place, mainly by the Armed Forces who have not complied with the efforts made by the Government of Guatemala to control the situation, and also because of the acknowledged ineffectualness of a judicial power that fails to carry out its duty to safeguard human rights and to investigate and punish those guilty of violating them, with the result that violators are confident that they can act with impunity.¹

Excesses have also been committed and innocent people killed by the opposi-

tion (insurgents), who are themselves armed when confronting the Armed Forces.

Events of this kind have obstructed and imperilled the peace-seeking agreements signed in Esquipulas by the five Central American Heads of State in 1987. In the Esquipulas II agreements, a "national dialogue" was envisaged for Guatemala in which the government, the Armed Forces, the business sectors, trade unions, religious groups, etc. would take part with the armed opposition, the Guatemalan National Revolutionary Unit (URNG); this dialogue would be centred around and promoted by a National Reconciliation Commission.

The dialogue for peace has been impeded from the outset by the Armed Forces. Nevertheless, progress has been made, and a new impetus was given to it in Oslo, Norway, in 1990. From the agreement reached in Oslo between the National Reconciliation Commission - which had a broad government mandate - and the URNG, a commitment emerged for a number of meetings to be held at which an observer for the Secretary-General of the United Nations would be present. Meetings were subsequently held between the political parties and the URNG in El Escorial, Spain; the business sectors and the URNG in Ottawa, Canada; reli-

1. General Juan J. Marroquín Siliézer, on 6 December 1989, in a graduation address to soldiers who had specialized in counter-insurgency methods (kaibiles), told them; "Kaibile soldiers are trained to lose all vestige of human feeling. This is why they will be called masters of the art of war and messengers of death". quoted by Americas Watch, Messengers of Death, 1989.

gious groups and the URNG in Quito, Ecuador; and the trade union movement and the URNG in Mexico. Efforts are now being made to reach the decisive stage of negotiations between the government and the Armed Forces on one side of the table and the URNG on the other side.

In this respect, too, advances have been made through "the Mexico agreement" signed in Mexico on 26 April 1991, which endorses such negotiations.

However, while the peace talks advance and retreat, the armed struggle is being pursued and extremely grave forms of repression continue to be carried out against the population.

On 3 December 1990, the Guatemalan Army carried out a new massacre of unarmed indigenous peasants in the village of Panabaj in the municipality of Santiago Atitlán. There were 24 deaths as a result (several people died in hospital from their bullet wounds) and 19 people were injured. Among those dead were three children and four children were injured.

The facts of and the responsibility for this event were established beyond doubt through the rapid, determined and courageous investigations carried out by the Ombudsman for Human Rights in Guatemala, Mr. Ramiro de León Carpio. This official, who was appointed by the legislative congress to a post created by Decrees 54/86 and 32/87, has, among other obligations, the duty of monitoring the observance of human rights and safeguarding them. He acts independently and has a role similar to that of the Scandinavian Ombudsman or the Defender of the Spanish People. His opinions are not binding, he is not endowed with authority but he carries great moral weight.

The outstanding part he played in the Santiago Atitlán case highlights the way in which the authorities, and more particularly the judicial power, should conduct

themselves in cases in which charges are made of serious violations of human rights. After the Ombudsman made his report, the subsequent proceedings were left in the hands of the judicial power even although there was a well-founded fear that a military tribunal would be considered competent to judge the case which would undoubtedly dash all hopes of obtaining justice.

Some passages from the report of the Ombudsman for Human Rights are quoted below, as they are thought to be particularly illuminating: "

"OMBUDSMAN FOR HUMAN RIGHTS: Guatemala, seven December of the year one thousand nine hundred and ninety.

CONSIDERING: That the Ombudsman for Human Rights, as has been pointed out on many occasions, is a Commissioner of the Congress of the Republic for the protection of the Human Rights established in the Political Constitution and international instruments relating to this subject; the relevant law establishes the rights safeguarded by the Ombudsman and instructs him to protect the individual, social, civic and political rights enshrined in the Political Constitution of the Republic, and, in particular, life, liberty, justice, peace, and the dignity and integrity of the human person, as well as the rights defined in the Universal Declaration of Human Rights, and international treaties and conventions signed and ratified by Guatemala.

The role of the Ombudsman is to defend and protect. It is clearly defined with powers and duties that have nothing in common with those of other State bodies. For the exercise of his functions the law itself lays down a procedure that is devoid of formalities, is both simple and effective, and differs from normal judicial procedures in that the Ombudsman's rulings are not

binding nor do they emanate from the power delegated by the State to the bodies concerned with the administration of justice. The Ombudsman's task, and his decisions, are intended to evoke a moral reaction which constitutes the true force of such rulings.

CONSIDERING: That, in the present instance, a case file was opened in view of the objective fact that on the first day of December of the present year, in the municipality of Santiago Atitlán, department of Sololá, at nine o'clock in the evening, an unspecified number of soldiers attempted unlawfully to take ANDRES SAPULU AJUCHAN into custody who, realising their intentions, began to shout for help and, on hearing his cries, all the neighbours began to come out of their houses whereupon the soldiers decided to withdraw but, before doing so, fired at a person giving him two bullet wounds; that, in view of these circumstances, several of the neighbours began to ring the church bells in order to gather the inhabitants together, and succeeded in doing so since a large number of people emerged into the street to discover what had happened; that they first went to the residence of the Mayor of the municipality, DELFINO RODAS TOBIAS, who, accompanied by a large group of neighbours, attempted to determine what had occurred by visiting the wounded man, and when the elected Mayor, SALVADOR RAMIREZ RAMIREZ, also arrived, both of them, together with other members of the municipality, accompanied thousands of neighbours to the military detachment stationed in the hamlet of PANABAJ, with the object of speaking to the Commandant of the detachment about the events of the night; that they had previously decided to carry white nylon flags in moving towards the said detachment; that, on reaching it, Mr. Ramirez Ramirez had at-

tempted to talk to the soldiers at the entrance but had received no answer, and that the Mayor himself had tried to do so, but at that moment the detachment began to fire indiscriminately on the crowd, which then turned to flee; that, as a result of this, eleven persons were killed and nineteen more were wounded, including children. This is a summary of the facts that motivated the opening of a case file.

CONSIDERING: That, in the present case, the Ombudsman for Human Rights confirmed from the beginning the way in which the events occurred, having gone personally for that purpose to the municipality of Santiago Atitlán on the second day of the current month approximately at midday. On that occasion he heard the testimony of the Mayor of the municipality, DELFINO RODAS TOBIAS, and of the elected Mayor, SALVADOR RAMIREZ RAMIREZ, as well as of a large number of neighbours who had gathered in the town square. All of them concurred in stating that the responsibility for the tragic deaths of their neighbours, and of the injuries caused, lay with the members of the national Army serving in the military detachment stationed in the hamlet of PANABAJ. He personally inspected the situation and the place where some bodies had been found in front of the military detachment, all with wounds caused by firearms, which had undoubtedly been fired by that detachment. He confirmed that the original action had taken place as a result of the illegal attempt, by soldiers of the Guatemalan Army, to take into custody an inhabitant of the locality, ANDRES SAPALU AJUCHAN, that all the inhabitants of the village had opposed this, had organized themselves and had gone peacefully towards the detachment in question to speak to the military authorities on the subject and, with that aim

in mind, had marched along peacefully carrying some white nylon flags; that the moon had been full that night, giving good visibility and that not only had they been prevented from speaking but had been met by a hail of bullets instead.

CONSIDERING: That, in this case, we are in the presence of an odious event, described as a massacre of indigenous peasants; in international law, this qualifies as GENOCIDE and is governed by the Convention for the Prevention and Punishment of the Crime of Genocide. In the present case, the Ombudsman, as indicated above, confirmed that there had been a massacre of indigenous inhabitants (belonging to the Tzutuhil ethnic group) in the municipality of Santiago Atitlán, that eleven people had originally been killed but that two of the wounded had also died, bringing the number of dead up to thirteen, with seventeen persons wounded; and that this action had occurred at close quarters with no justification whatsoever, since it was confirmed that it had not been preceded by any act of violence against the soldiers of the Guatemalan Army; this consequently defines and determines the gravity of the events. The neighbours all agreed in stating that the detachment mentioned above forced local inhabitants who passed by with a load of firewood to leave part of their load with them, that peasants going to the fields to work and taking food with them had part of it confiscated on the pretext that it might help to feed the guerrillas, and that the inhabitants were not allowed to go outside a predetermined territorial area to work the land, with the result that many of them had had to abandon their crops and sites.

CONSIDERING: That, although the military authorities have made statements concerning this affair in an attempt to minimize the facts by dismissing it as an

isolated action committed by soldiers in a drunken state, the investigations undertaken by the Ombudsman have totally disproved these explanations. Similarly the Army Department of Information and Publicity issued a press release in which the Army claimed that there had been an uprising by the local inhabitants against the military authorities, and that this had led to the events in question. Such arguments, as explained above, are false since what actually occurred was proven by the Ombudsman through his personal intervention and the investigation undertaken by the staff of his Institution.

CONSIDERING: That, under the Political Constitution of the Republic of Guatemala, the Army is an institution intended to maintain the independence, sovereignty and honour of Guatemala, its territorial integrity, and internal and external peace and security; that it is one and indivisible, is fundamentally professional and apolitical, obeys orders and is not a deliberative body; that it is organised hierarchically and is based on the principles of discipline and obedience; and that, because of its single and indivisible nature, responsibility for the violations of human rights indicated below cannot be attributed solely to the persons who actually committed the actions but that institutional responsibility clearly exists and this should therefore be placed on record.

Infantry Colonel (DEM) Gustavo Adolfo Méndez Herrera reported that the Commandant of the Military Detachment stationed at Panabaj is Lieutenant (Reserve) of Army Infantry JOSE ANTONIO ORTIZ RODRIGUEZ and that the officers of the detachment are Sub-Lieutenant of Engineers JUAN MANUEL HERRERA CHACON and Sub-Lieutenant (Reserve) of Army Infantry SERGIO JULIO MAAZ OCHOA. Given the structure and principles of the Army, there is no doubt that

the officers named above are also responsible for the facts related, either by action or omission, in that they were in command of the troops. Consequently a statement should also be made to this effect so that the competent tribunals may hear, judge and, in due course, rule on the charge against the person or persons found to have been directly implicated in the affair. An affair such as this compels the Ombudsman for Human Rights to be severe as regards its dimensions and consequences, because it is not simply a matter of various persons killed or wounded, but of the proven responsibility of the Guatemalan Army in the affair. For these reasons, an occurrence of this kind is qualified under international law as **CRIMES AGAINST HUMANITY**; this include **GENOCIDE**, which cannot be tolerated, minimized or covered up and much less cloaked in **IMPUNITY**. The right to life and to physical integrity are the human rights violated in the present case; the victims were all members of an indigenous community of the Tzutuhil race, and the perpetrators members of the Guatemalan Army.

CONSIDERING: That it is recognized that international law imposes duties and responsibilities on individuals as well as States, that crimes committed against international law are committed by human beings, and only by punishing the individuals who commit such crimes is it possible to enforce compliance with the provisions of international law. The United Nations General Assembly in its resolution 96 (I) has stated that genocide is a crime in international law, whose authors should be punished, be they statesmen, public officials or private persons.

CONSIDERING: That, in view of all the foregoing, it is also necessary to consider that the presence of the military detachment in the municipality of Santiago Ati-

tlán is far from signifying the possibility of establishing peace and security, as it is rejected by part of the population. The Ombudsman can do no less therefore than interpret the outcry of the people and rule on the specific petition addressed to him and signed by thousands of people for the immediate withdrawal of the detachment in question from the municipality of Santiago Atitlán, a matter on which decision to that effect must also be taken.

LEGAL INSTRUMENTS REFERRED TO: Articles, 1, 2, 3, 4, 5, 152, 153, 154, 244, 274 and 175 of the Political Constitution of the Republic; 8, 13, 14, 20, 21, 24, 27, 29(c), 30 and 31 of the Law on the Commission for Human Rights of the Congress of the Republic and on the Ombudsman for Human Rights; 1, 3, 7, 9, 13 and 29 of the Universal Declaration of Human Rights; and 1, 2 and 36 of the Convention on the Rights of the Child.

WHEREFORE, THE OMBUDSMAN FOR HUMAN RIGHTS, in ruling on the matter,

DECLARES: I. That, in the present case it has been found that the right to life of the inhabitants of Santiago Atitlán who died has been violated, and that the right to physical integrity of the persons who were wounded has been violated;

II. **INDICATES the GUATEMALAN ARMY AS AN INSTITUTION,** as well as the officers Lieutenant (Reserve) of the Army Infantry **JOSE ANTONIO ORTIZ RODRIGUEZ,** Commandant of the Military Detachment of the Panabaj canton, and the officers **JUAN MANUEL HERRERA CHACON,** Sub-Lieutenant of Engineers and **SERGIO JULIO MAAZ OCMOA,** Sub-Lieutenant (Reserve) of Army Infantry, as responsible for the violations mentioned above;

III. **ORDERS,** in view of the gravity of the violations, that the persons responsi-

ble indicated above, and the other members of the Army who may have been directly implicated in the events that occurred both on the first day and on the second day of the current month, should be immediately sent for trial in the competent courts;

IV. PUBLICLY CENSURES THE GUATEMALAN ARMY for the acts under consideration, in view of their serious nature;

V. RECOMMENDS the GUATEMA-

LAN ARMY to rectify its behaviour in such respects so that acts of that kind may not recur;

VI. REQUESTS the Army high command that the military detachment at Santiago Atitlán be withdrawn from that locality.

*Ombudsman for Human Rights
Ramiro de León Carpio
Guatemala, 7 December 1990."*

Philippines

The International Commission of Jurists (ICJ) sent a four-member delegation to the Philippines in September 1990 to assess the human rights developments in the country during the five years since President Aquino took office. This is the third report on the situation in the Philippines by the ICJ.¹

In 1977, the first delegation documented serious violations of human rights occurring under the state of martial law proclaimed by President Marcos. A second delegation was sent in 1984 to assess the human rights situation since the lifting of martial law. In February 1986, President Marcos was forced to leave the country by a non-violent revolution - the People's Power Revolution - which promised the restoration of human rights.

The third delegation concluded that President Aquino and her administration have restored institutional democracy and have repealed most of the repressive decrees and laws promulgated during the

rule of President Marcos. It, however, confirms that grave violations of human rights have continued in the Philippines, including torture, arbitrary and summary killings, disappearances and forced evacuation and displacement of civilians. The government has largely failed to fulfil its stated objective of curbing human rights abuses.

Economic and Social Conditions

Pervasive inequality and poverty are the major causes of social and political tensions faced by the country. The Philippines is unable to educate and house its population adequately. One of the causes is the country's foreign debt burden. The ICJ delegation recommends that, in view of the complexity and seriousness of its debt burden, the government should strive for maximum consensus at the national level and seek international assistance and co-operation to deal with the problem.

1. Copies of the report can be obtained from the ICJ Secretariat in Geneva

Employment and Labour

Trade union leaders and workers are targets of attack by the military and paramilitary forces and related vigilante groups and are among the main victims of abduction and disappearances. The delegation recommended that the government should amend existing provisions of the Labour Code that are inconsistent with standards set by the International Labour Organisation (ILO) and should take measures to prevent human rights violations against trade unionists.

Agriculture, Fisheries and Land Reform

Land rights and reform for farmers was one of the major mandates and promises of the Aquino administration. The government has enacted the Comprehensive Agrarian Reform Program (CARP) which is a breakthrough in comparison to the previous land reform programmes.

However, agrarian reform is proceeding too slowly; the procedures are too complex and real reform is easily sabotaged. The programme has also suffered from frequent changes in leadership. In addition, the strong resistance to the programme by powerful landowners has frustrated progress. The administration and Congress have failed to remedy these problems.

The delegation recommends an inquiry into the successes and failures of CARP led by a respected individual such as a Supreme Court judge.

Cultural Minorities

The creation of autonomous regions in Muslim Mindanao and the Cordilleras represents a positive measure indicating that the present government is concerned with and serious about dealing with the

problem of minorities. Human rights violations, however, continue in areas where indigenous peoples are found. They are particularly affected by forced evacuations and indiscriminate logging and mining of their areas. The ICJ delegation recommends that the government should evolve a comprehensive policy for dealing with the rights of indigenous Filipinos to land and natural resources and should also re-evaluate its present development policies in tribal areas.

Women

The Philippine Development Plan for Women for the period 1989 to 1992 formulated by various government agencies and non-governmental organisations was approved and adopted by the President. It provides comprehensive information on the status of Filipino women and deals with violence against women and other relevant issues. The ICJ delegation welcomed the preparation of the plan and urged its full and prompt implementation, with the participation of women's organisations.

Urban Poor

In the Philippines the urban poor normally live in ramshackle structures and comprise about 4 million households. They are subject to numerous human rights violations. In particular, the demolition and dislocation of squatter settlements continue unabated.

The policy of the Marcos' government was to demolish and dislocate the squatter settlements rather than deal with the genuine problems of the people. As a result, the urban poor were vehement opponents of Marcos and, thus, supporters of Mrs Aquino.

Initially, President Aquino created the

Presidential Commission for the Urban Poor to co-ordinate various activities and services rendered to the urban poor by governmental and non-governmental organisations. The 1987 Constitution also contained provisions protecting the rights of the urban poor.

Despite such categorical commitment to protecting the rights of the urban poor, no major changes in their conditions seemed to have occurred. The ICJ delegation had an opportunity to hear from representatives of a settlement that was demolished on 14 and 15 September 1990 in Quezon City. The demolition was carried out without a court order, without any notice to the residents and without any plans for relocation.

The ICJ delegation recommends that the practice of demolishing urban poor settlements and evicting the inhabitants should be discontinued and compensation and proper alternative sites be provided for the victims. The government should also repeal Presidential Decree 772 which makes squatting a criminal offence and should enact a new law to take into account the genuine problems of shelterless urban poor communities.

Children

During the 14 years of martial law under President Marcos, approximately 4.5 million children were directly or indirectly affected adversely by internal armed conflict. The increasing militarisation under the five years of the Aquino government has already produced an additional 2 million child victims of the conflict. Violations of international human rights and humanitarian law by military and paramilitary groups against children include massacres, severe woundings when parents were killed, arrests and torture, sexual

molestation, indiscriminate firing and forced displacement.

The Philippines has ratified the United Nations Convention on the Rights of the Child. All of the current abuses being suffered by children contravene the Convention as well as Article 24 of the Fourth Geneva Convention and Article 77 of the First Additional Protocol to the Geneva Conventions.

The delegation recommends that reports of child abuse be investigated by relevant governmental, non-governmental and international agencies.

Insurgency and Counter-Insurgency

Under President Marcos, the Philippines was faced with two major insurgencies; one waged by the New People's Army (NPA), the armed wing of the Communist Party of the Philippines (CPP) and another in Mindanao spearheaded by the Muslim Moro National Liberation Front (MNLF). At present, the MNLF threat seems to be dormant and the CPP-NPA insurgency dominates the country's political environment.

The nature of the continuing struggle between the NPA and the Armed Forces of the Philippines (AFP) is an armed conflict to which the Geneva Conventions apply. Though forbidden by Common Article 3 of the Geneva Conventions, the NPA has subjected civilians and persons "hors de combat" to "violence to life and person." The NPA has also taken civilian hostages, passed sentences on civilians and executed them without fair trial procedures. Furthermore, the NPA has often endangered civilians, thus violating Article 13 of Protocol II, which provides that the civilian population be given protection against attack.

The NPA sometimes conducts trials in

"people's courts" of suspected spies, informers and those charged by the NPA with having exploited their communities. These "courts" have been criticised for lack of "judicial guarantees which are recognised as indispensable" by the community of nations in the form of Common Article 3.

The Militarisation of Philippine Society

President Marcos used the military as his private army and as a tool of oppression as a result of which the military gradually became a politicised institution. The People's Power Revolution raised the hope that the military would revert to its role during pre-martial law days and that militarisation would end.

The developments in the last four years show that human rights violations by the military and paramilitary continue. Moreover, several coup attempts by some sections of the armed forces have threatened the very democratic framework reinstated after the February 1986 Revolution.

The Philippine army has always included paramilitary forces. President Marcos created the Civilian Home Defence Force (CHDF) which was notorious for human rights abuses. Opponents of President Marcos, including Mrs Aquino, demanded the dismantling of the CHDF.

Subsequently, the drafters of the 1987 Constitution included a provision specifically banning the use of private armies and paramilitary forces. On 15 July 1987, President Aquino issued Executive Order No. 275 stating " all paramilitary units including the CHDF, shall be dissolved within one hundred and eighty days from the effectivity of this Executive Order," even after which the CHDF was not immediately dismantled.

On 25 July 1987, a mere ten days after

issuing Executive Order No. 275, President Aquino issued another executive order creating a "Citizens' Armed Force". To implement this executive order, a separate order was issued in June 1988. Under this order, the Citizens' Armed Force Geographical Unit (CAFGU) is a reserve unit organised within a locality and consisting of officers and soldiers in the active force and qualified reservists residing in the locality. The CAFGUs maintained in an inactive state are called CAFGU Inactive Category. The CAFGU Active Auxiliary (CAA) are those who are called upon to assist the regular forces of the Philippine army. Unlike the inactive CAFGUs who receive small food allowances from the AFP, members of the Special CAFGU Active Auxiliaries (SCAAs) are paid by private employers.

Private armed groups known commonly as "vigilantes" have been actively associated with the military in its counter-insurgency operations. In April 1988, the Senate Committee on Justice and Human Rights conducted an inquiry into vigilante groups which documented vigilante abuses and called for the dismantling of all such groups. Responding to the Senate Committee findings and the international outcry on vigilante abuses, President Aquino announced that she had instructed the Army Chief of Staff to begin disbanding all vigilante groups. The ICJ delegation found that the groups still exist and continue to operate with the knowledge and active involvement of local military units. There is ample evidence that vigilante groups are responsible for widespread human rights violations.

The ICJ delegation recommends that the government should implement the recommendations of the Senate Committee on Justice and Human Rights that SCAAs and vigilante groups be disarmed and disbanded.

Violations of International Human Rights and Humanitarian Law

The 1987 Constitution provides that the Philippines "adopts the generally accepted principles of international law as part of the law of the land".

Although the Philippines has ratified the four Geneva Conventions of 1949 and the additional Protocol II of 1977, the Philippine Government has not been willing to recognise the application of Common Article 3 of the four Geneva Conventions or the application of additional Protocol II to the non-international armed conflict which has been occurring in the country.

The ICJ delegation recommends that Common Article 3 of the Geneva Conventions and Additional Protocol II should be declared applicable to the current armed conflict in the Philippines.

Torture

Interviews conducted by the ICJ delegation revealed a consistent pattern of torture and ill-treatment by military and particularly intelligence personnel. The pattern indicated that the lower the social status of the accused, the greater the chance and severity of ill-treatment. It appeared to be the custom of military personnel to obtain a statement by whatever force was required.

The ICJ delegation recommends that the government should comply with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and should ensure that all those responsible for torture or ill-treatment are brought to prompt and effective justice.

Disappearances, Abductions and Killings

There have been a significant number of abductions and kidnappings under the

Aquino administration. Many of the victims have disappeared altogether and must be presumed dead. Seeking information about such people is futile. The police regularly refuse to investigate disappearances and the Commission on Human Rights (see below) rarely does so.

Summary and Arbitrary Executions

Despite the obligations of the Philippines under the human rights treaties, interviews conducted by the ICJ delegation reflected a widespread practice of summary and arbitrary executions.

Forced Evacuation and Displacement of Civilian Population

Forced displacements continue under the present administration as they did under that of Marcos. It appears that the evacuating of the civilian population is a deliberate strategy of the military designed to deny the insurgents a mass base. The Department of Social Welfare and Development has admitted that military offensives are the main cause of evacuations. Conditions in the evacuation facilities are overcrowded and there is not adequate food, sanitation or health care. One report about the evacuation camps attributed the death of more than 300 children to measles, diarrhoea, poor sanitation and lack of medical care. The military reportedly tortured some evacuees to force them to identify NPA suspects among the evacuees. There were also reports that church workers and representatives of non-governmental organisations were denied access to the camps and harassed by the military on the basis that any help provided to the evacuees is support for the NPA.

The forced evacuation and displacement of people is considered a counter-

productive strategy, as the government is spending millions of pesos to remedy the damage caused by its own military. More importantly, forced evacuations and displacements violate the basic human rights of the displaced persons. Used as a deliberate strategy of war, forced evacuations and displacements also violate the laws of war.

Criminal Law and Procedure including Right to Fair Trial Habeas Corpus Petitions

While illegally detaining a person, the police or military may sometimes coerce confessions and collect information which will retroactively justify the arrest. If a detained individual retains an attorney to file a *habeas corpus* petition, the prosecutor ordinarily responds by filing criminal charges against the detainee without further investigation (the so-called "inquest"). Upon the filing of a criminal charge the courts deny relief through *habeas corpus*, even if the accused has been held for a prolonged period.²

Existing Filipino jurisprudence thus generally renders habeas corpus petitions ineffective in dealing with illegal arrests and detention. Consequently, there is virtually no sanction against many human rights violations of this type.

Investigation and Prosecution

Under the Rules on Criminal Procedure the so-called "fiscal" prosecutor is expected to investigate an offence before issuing an arrest warrant.³ Since a pre-arrest investigation is a rarity, the prosecutor usually begins the investigation (in-

quest) after the arrest. Close co-ordination between the military and the prosecutors exists and is now institutionalised by the creation of Regional Legal Action Committees (RELAC). Each RELAC is composed of prosecutors and local military officials and its purpose is to increase co-ordination between the two departments concerning prosecution of cases. There can thus be no expectation that the fiscals will demonstrate independence and impartiality.

When the prosecutor commences the inquest after the arrest, he relies principally upon affidavits to justify the arrest and support a criminal charge. This dependence on affidavits has resulted in several problems, inter alia, the affidavits can be and are often faked. Since affidavits need not be produced before an arrest warrant is issued, law enforcement personnel have a strong motivation to justify the arrest by producing affidavits to strengthen the case against the accused.

Law enforcement affidavits are often found to be without support when tested at trial. The ICJ delegation found no indication that the authors of falsified affidavits are subjected to prosecution for perjury.

Independence of the Judiciary and the Legal Profession

In one of her earliest actions, President Aquino restored the independence of the judiciary. The 1987 Constitution reaffirmed the separation of powers and contains some additional safeguards to protect the independence of the judiciary.

The 1987 Constitution has also strengthened the independence of the ju-

2. *Cruz v. Director of NBI*, 136 SCRA 511 (1985)).

3. Rule 112, Sections 3 and 6 of the 1989 Rules in Criminal Procedure.

diciary by establishing a Judicial and Bar Council to recommend to the President suitable candidates for appointment to the Supreme Court and lower courts. This move is considered very important since under the previous government only President Marcos and his close associates chose the appointees. As a result, there were improper appointments to the judiciary which led to further erosion of confidence in the judiciary.

Delays, Corruption and Inefficiency

The salaries of Philippine judges are not attractive enough for successful lawyers to join the bench. Consequently, the filling of vacancies is believed to be a major problem. There are 762 vacancies in courts, excluding the Supreme Court.

The problem of delay is recognised and measures have been taken by the Supreme Court and the Department of Justice but nevertheless, delays continue. In cases involving criminal offences, innocent individuals can be, and have been, detained without justification for prolonged periods of time.

The Supreme Court's Recent Judgments

Some of the cases decided by the Supreme Court in the last year or so seem to have created much public debate and concern as to its commitment to human rights. Many NGOs and lawyers expressed concern to the ICJ delegation about some of these judgments, in particular, the Supreme Court's ruling on warrantless arrests in *Umil v. Ramos*.⁴

In this case the principal accused, Rolando Dural, was arrested without war-

rant for the killing of two Capital Regional Command (CAPCOM) soldiers. The Supreme Court held that the arrest of Rolando Dural without warrant was justified. The Court reasoned that as subversion was a continuing offence and as Duval was arrested for being a member of the NPA it could be said that he was committing an offence when arrested.

Human rights lawyers and activists expressed to the delegation the fear that the decision of the Supreme Court in *Umil v. Ramos* and other related cases would pave the way for further abuse by the military. Some of the cases brought to the attention of the ICJ delegation seem to justify these concerns.

The ICJ delegation recommends that a Criminal Law and Justice Inquiry, headed by a respected individual such as a former Supreme Court Judge, should be urgently established to examine all aspects of the criminal justice system. The inquiry should focus on the way in which legal procedures, the legal profession and the courts are failing to provide equality before the law, and fair, impartial, speedy and independent justice and should be required to report within a brief period, for example, six months.

The Legal Profession

Imposition of martial law by Marcos and the repression that followed led to the emergence of a group of committed human rights lawyers and several human rights lawyers organisations were established.

Many human rights victims are considered by the military to be identified with the CPP-NPA. Since even trade unions and other peoples' organisations are

4. GR No. 81567, July 19, 1990).

branded as communist fronts, lawyers who defend members of legal organisations have found themselves also labelled communist sympathisers.

The consequences of identifying lawyers with their clients has been tragic. Killing and intimidation of lawyers increased to an unprecedented level as compared with the Marcos period. The ICJ delegation understands that complaints of harassment and even serious threats against lawyers are normally not investigated by law enforcement agencies and that the Integrated Bar of the Philippines (IBP) has not taken any major steps to protect the security of its members or to care for the widows and families of those killed. The delegation recommends that the government should ensure that all persons who kill, threaten or harass judges and human rights lawyers are vigorously investigated and prosecuted. The delegation also recommends that the IBP and all bar associations should have a functioning committee for human rights and defence to receive, examine and report promptly on all complaints by lawyers of violations of their human rights by military, paramilitary and police forces. The violations should be immediately prosecuted at the initiative of bar associations where a prima facie case is found.

Presidential Decree N° 1850

Under Presidential Decree N° 1850 (P.D. 1850) promulgated by Marcos and still not repealed by Mrs Aquino, members of the armed forces and Integrated National Police (INP) must be tried only by military courts regardless of the offences for which they are accused. Under President Marcos, there was not a single prosecution or conviction of military personnel for the violation of human rights. P.D. 1850 was

considered by human rights activists as an indication of the official protection given to members of the armed forces who had committed human rights violations. Therefore, when Mrs Aquino came to power, there was a strong demand for the repeal of P.D. 1850.

It is widely believed that Mrs Aquino has been pressured by at least some of the military to retain P.D. 1850. The Senate and House agreed on a Consolidated Bill repealing P.D. 1850 and restoring jurisdiction to civilian courts to try members of the armed forces when civilians are either co-accused or victims, unless the offence is "service-connected". In the wake of the December 1989 coup attempt, however, President Aquino vetoed the Bill, justifying her action by citing the state of emergency imposed after that coup attempt.

The government's failure to repeal or significantly amend P.D. 1850 is at variance with its claim that it will not tolerate human rights violations by members of the security forces. The continued existence of P.D. 1850 remains a blot on the newly restored institutions of democracy.

Presidential Waiver

P.D. 1850 as amended by P.D. 1952 empowers the President to waive the decree to enable civil courts to try military defendants. President Aquino has exercised this power in only a few celebrated cases.

Human rights lawyers contend that the administration has not evolved a policy concerning the exercise of presidential waiver and has not been consistent in establishing accountability of security forces. This view was also confirmed by lawyers of the Commission on Human Rights.

The ICJ delegation recommended that P.D. 1850 be repealed.⁵

Commission and Committees on Human Rights

The 1987 Constitution⁶ provided for the establishment of a Commission on Human Rights (CHR). It consists of a Chairperson and four Commissioners. Ms. Mary Concepcion Bautista has been the Chairperson since the Commission's inception in May 1987.

Despite the CHR's constitutional status and relatively substantial finances, many Filipino human rights lawyers and advocates and many other leaders of thought and opinion in the country, including people in the Commission itself, told the ICJ delegation that they considered the CHR's performance to be dismal.

It is the conclusion of the ICJ delegation that the CHR's leadership itself does not possess adequate clarity concerning the mandate or the priorities of the Commission.

The CHR has failed to generate confidence among victims, their families and human rights activists. It has not used its powers to protect human rights and seems to have become formal, bureaucratic and marginal. Most importantly, the Commission - and particularly its leadership - has failed to establish its independence from the military and to secure its status as an impartial agency.

New Presidential Committee on Human Rights

President Aquino issued Administrative Order N^o 101 on 13 December 1989,

creating the Presidential Committee on Human Rights. This new Committee functions as a forum for representatives of various government departments and NGOs to meet and formulate steps to deal with human rights problems. The Committee does not have a secretariat and is serviced by the Department of Justice. The Secretary of Justice chairs the Committee and the other members are the Chairperson of the Commission on Human Rights, the Presidential Legal Counsel, a representative of the Department of Defence, representatives from both Houses of Congress and two representatives from private human rights organisations.

The Committee assesses and monitors the Philippine human rights situation, advises the President on measures to be taken and assists relatives of disappeared persons to locate the disappeared and those believed to be detained illegally.

Senate Committee on Justice and Human Rights

Under the 1987 Constitution⁷, committees of the Senate or the House of Representatives are allowed to conduct enquiries. Pursuant to this authority, the Senate Committee on Justice and Human Rights under the Chairmanship of Senator Wigberto E. Tañada has conducted two major hearings concerning human rights. The Committee issued its first report in April 1988, after holding hearings on the issues of vigilantes. The second set of hearings was on the general Philippine human rights situation, and the Committee issued its report in March 1990.

The Senate Committee on Justice and Human Rights, unlike the Commission on

5. P.D. 1850 was repealed on 20 June 1991 through Republic Act No. 7055.

6. Article XIII, Section 17.

7. Article VI, Section 21

Human Rights, appears to have contributed to regaining the confidence of Philippine non-governmental organisations.

Human Rights Organisations

A remarkable feature of Philippine society is the existence of a wide range of non-governmental organisations (NGOs). With the advent of the "People's Revolution", NGOs expected that their role would be recognised and that they would become more effective in pursuing their goals. President Aquino's initial appointments to her administration and to the Constitutional Commission indicated her faith in NGOs and other people's organisations. The 1987 Constitution also acknowledged the "Role and Rights of People's Organisations" - a provision which did not exist in the previous two constitutions. However, the collaborative relationship between NGOs and President Aquino's administration did not last long. Organisations that took up the cause of different disadvantaged sectors of society were suspected of supporting the CPP-NPA. Human rights organisations documenting violations by the military, and human rights lawyers who defended the rights of victims, became the most suspect. Church organisations are also suspected of being CPP-NPA fronts.

Evidence received by the ICJ delegation indicates that NGOs and trade unions are facing frequent threats and are functioning under pressure. The attacks against NGOs and church workers, however, totally contradict the views of various government departments that they need the assistance of NGOs to implement their programmes.

Freedom of Religion and Expression in the Philippines

The 1986 Philippine Constitution provides for the free exercise of religion and prohibits discrimination on the basis of religion. When members of any denomination encourage community development projects or protect human rights, however, they become potential victims of human rights violations. Layworkers are also targets of abuse.

Freedom of Expression

According to the Philippine Movement for Press Freedom, the average number of slain journalists has risen from 2.3 per year in 14 years of President Marcos' administration to six in the first four and a half years of President Aquino's administration. Journalists have also reported cases of abduction, torture, physical and verbal harassment and threats by members of the military.⁸

Philippine journalists contend that a policy of self-censorship is maintained and encouraged. Internal memoranda within newspaper offices request media personnel to "tone down" or "play safe".⁹ The existence of self-censorship would seem to explain why major newspapers often tend to report counter-insurgency efforts without mentioning related human rights abuses. Many media reports appear to contain little more than government press releases and do not reflect independent investigation of the events or the contrary views of human rights, church and other informed organisations.

8. Article 19 World Report, Philippines (1990)

9. Article 19, World Report, Philippines (1990)

COMMENTARIES

The UN Commission on Human Rights and the new Working Group on Arbitrary Detention

The United Nations Commission on Human Rights, which met from 28 January to 8 March in the shadow of the on-going Gulf War, nevertheless completed what many observers considered its most productive session in recent history. The Commission took action on a record 19 country situations, began plans for a 1993 World Conference on Human Rights and set up an inter-sessional working group to finalize a draft declaration on disappearances. The most important long-term accomplishment of the Commission was the creation of a five-member working group to investigate cases of arbitrary detention throughout the world.

Mr. Enrique Bernales Ballesteros (Peru), the Commission's special rapporteur on mercenaries, was elected Chairman of the session. Mr. Kojo Amoo-Gottfried (Ghana), Mr. Goetz-Alexander Martius (Germany), and Mr. Vladimir A. Vasilenko (Ukrainian SSR) were elected as Vice-Chairmen and Mr. Masahiro Tauchi (Japan) was rapporteur. The Commission adopted 82 resolutions and 8 decisions, of which 65 resolutions and 7 decisions were adopted by consensus.

The ICJ intervened on four issues on: (a) the question of impunity for human rights violators (citing the pre-war international silence on Iraqi abuses and the pardons of the generals in Argentina); (b) the legal and administrative barriers to

family reunification in the Israeli-Occupied Territories; (c) the violence in the townships in South Africa; and (d) the working group on arbitrary detention, the draft declaration on disappearances and the Sub-Commission's special rapporteur on judges and lawyers. More importantly, the ICJ lobbied for the creation of the new working group and confirmation of the rapporteur on judges and lawyers and carried forward the resolution on Iraq.

Country Situations

The Gulf conflict resulted in the appointment of a new special rapporteur to monitor and report back on the human rights situation in Iraq and another to assess violations by Iraqi forces in occupied Kuwait. Other special rapporteurs will continue to follow the situations in *Afghanistan*, *Myanmar (Burma)* (under the confidential "1503" procedure), *El Salvador*, *Iran*, and *Romania*. A six-member team will again report on *South Africa*. Of these latter resolutions, only the one on Iran created controversy as Pakistan introduced a draft resolution proposing the termination of the mandate of the special representative. Austria then introduced a resolution to prolong the mandate. As voting on the competing resolutions was about to begin, negotiations resumed, and

the next day a compromise text was introduced extending the mandate for another year and stating that, "the Commission will consider the report with a view to its discontinuing the mandate if there is further progress achieved regarding its recommendations...."¹ The resolution on Myanmar (Burma) followed the visit by rapporteur Mrs Sadako Ogata (Japan), (who has since become UN High Commissioner for Refugees), during which she was unable to travel freely, visit places of detention or meet with opponents of the military government. As a result, last year's resolution was strengthened to call on the government of Myanmar (Burma) to grant such access to the expert and to allow prison visits by the ICRC. The Commission also called on the government to accelerate the transition to democracy. The South Africa resolution was, for the first time, adopted by consensus, reflecting the encouraging developments taking place there.

The Secretary-General will appoint a representative to pursue questions left open from the Commission's 1988 visit to Cuba and to report back to the Commission under its agenda item on human rights violations. The narrow vote (21 for; 18 against; and 4 abstentions) approving this US proposal was achieved only after an eleventh-hour telephone call from President Bush to President Menem and resulted in the recall of the Argentine Ambassador who had co-sponsored a competing Latin American group resolution. Argentina reversed its position, the United States withdrew from negotiations on a compromise text and several countries switched votes at the last minute. Latin American governments prevailed when it came to Guatemala, however, and

by a vote (of 21 for; 16 against; and 5 abstentions) the Commission decided to consider the situation in that country under the agenda item on "advisory services" rather than that on "violations." Following the return to democracy in Haiti, its status was downgraded by consensus from the agenda item on "violations" to that on "advisory services," despite misgivings by NGOs who would rather, in such fragile situations, have a high level of scrutiny rest in place during transitional periods. Equatorial Guinea, which for so long has ignored the recommendations of the Commission and its expert appointed under the advisory services programme, was taken to task for its record, while remaining under the programme.

The Commission also kept the situations in Chad, Somalia and the Sudan "pending" under review in the "1503" procedure. The action on the Sudan - quite mild for a country considered by many to have one of the worst human rights records in the world - was nevertheless reportedly taken in the face of opposition of China, Ghana, Indonesia, Iraq, Mauritania and Somalia, while Bangladesh, Cuba, Madagascar, Morocco, Pakistan and Senegal abstained. Finally, the Commission expressed concern regarding the situation in Albania, the Israeli-Occupied Territories, Lebanon and the Baltic Republics. The carefully negotiated text on the Baltic Republics, presented in the form of a statement by the Chairman, marked the first time the Commission had spoken about abuses in one of the five permanent Member States of the Security Council. It "expressed grave concern over the recent tragic acts of violence involving violations of human rights including the right to life, to freedom of information and

1. C.H.R. Res. 1991/82, U.N. Doc. E/CN.4/1991/L.11/Add.6, at 3 (1991).

to take part in the conduct of public affairs."

The resolution on Iraq constituted a bittersweet victory for human rights groups, including Amnesty International and the International Commission of Jurists, which had prioritized the abuses in Iraq since the government's 1988 gassing of Kurdish villages. It was obviously Iraq's invasion of Kuwait - and not its systematic torture of political prisoners, mass killings, nerve gas attacks and forced relocation of up to 500,000 Kurds - which altered the political balance and finally, after three years, made a condemnation possible.

In 1989, for instance, at the first meeting of the Commission following heavy Iraqi use of chemical weapons, 15 Western countries, at the urging of human rights groups, introduced a resolution to condemn this and other violations. The Commission's Asian and Muslim states, however, joined with most of those buying oil or selling weapons to Iraq to block the action. The low priority accorded to Iraqi abuses by some Western countries contributed to this failure. The United States, busy twisting arms in a single-minded attempt to condemn Cuba and France, which was arming Saddam, refused even to co-sponsor the resolution. Efforts in 1990 to call attention to the continuing atrocities in Iraq were no more successful.

Human rights groups suggested to the Commission at its 1991 session that its failure to react to Iraq's flagrant abuses helped persuade Saddam Hussein that he could get away with other violations of international law, including the invasion of Kuwait.

Despite the Commission's new-found courage on Iraq, other violations were still too politically hot to handle. China, which in 1990 narrowly escaped condemnation for the Tiananmen crackdown, was never

challenged this time for continuing abuses in both Tibet and China proper. Nor was powerful, oil-rich and Muslim Indonesia, whose brutal occupation of East Timor strikingly parallels Iraq's rape of Kuwait - except for the world's inattention. The situations in Colombia, Ethiopia, Peru, Sri Lanka and Zaire were raised by human rights groups but ignored by governments.

Perhaps the most insightful report on a country situation came, not from a country rapporteur, but from the Working Group on Disappearances following its visit to the Philippines. The Group recounted a familiar pattern:

"A much-observed sequence of developments leads up to the occurrence of disappearances, starting with poverty and social injustice. The persistence of those conditions sooner or later induces structured opposition. Sustained inequality breeds insurgence, just as subversion leads to militarization and repression. Counterinsurgency, as a rule, is conducive to human rights violations, provoking even more terror from armed opponents. Soon, an entire country is swept into a spiral of violence, from which escape is invariably difficult. The Philippines is no exception."

After an analysis of Philippine legislation and a thorough evaluation of the root causes of the problem, the Group's conclusions were stinging:

"The question arises of why disappearances continue to occur... at least three contributing, and mutually reinforcing, factors may be identified. First, powers of arrest have been widened: the armed forces, the national police, the civil defence forces (CAFGUs) as well as civil volunteers can all apprehend a suspect. Secondly, arrests in general have been facilitated by recent Supreme Court rulings that, understandably, have provoked the ire of many human rights observers

within and outside the Philippines. The Court has in effect stated that rebellion, subversion and related offences are so-called 'continuing crimes' - meaning that their perpetrators are constantly *in flagrante delicto* - and that no judicial warrant is needed for arresting persons suspected of them, mere suspicion being enough. Thirdly, the circle of potential victims of arrest has widened through a practice favoured in military circles and popularly known as 'red-labelling': lists circulated describing non-governmental organizations of different orientation - including trade unions - as 'front organizations' for the outlawed Communist Party of the Philippines. In addition, the same suspicion is raised against anybody critical towards government policy, or, more to the point, towards the armed forces".

The Group also criticized "the almost autonomous power of the military," the "impunity" enjoyed by those responsible for human rights abuses, and the ineffectiveness of *habeas corpus*.

The Philippine representative lashed out at the Group in his response. The report, he said, "turns the truth on its head" by blaming the government, when it is the opposition whose recourse to violence has "transformed this social conflict into an armed one." Similarly, the report allegedly failed to examine the effects of the insurgents' violence. The delegate compared the Group's report with that issued by the special rapporteur on torture following his almost simultaneous visit and which issued similar conclusions and recommendations but which was said to "reveal a better understanding of the complexities" of the Philippine situation. In particular, the special rapporteur on torture was said to give greater credit to the government's attempts to redress the situation, including its two invitations as well as its previous efforts to implement

many of the recommendations suggested in both reports, and never "cast any doubt on the sincerity and genuine commitment" of the government to protect human rights.

Under the item on self-determination, the Commission again adopted resolutions on the situations in Afghanistan, Cambodia, Palestine and the Western Sahara.

Working Group on Arbitrary Detention

Human rights advocates have long maintained that after the country-specific rapporteurs, the Commission's "thematic" mechanisms - particularly the Working Group on Enforced or Involuntary Disappearances, and the special rapporteurs on torture and on summary or arbitrary executions - are its most important tools in human rights protection. These mechanisms allow the Commission to receive information and report on, and to "respond effectively" to these phenomena on a world-wide and non-political basis. NGOs have suggested for several years that a thematic mechanism on the wrongful deprivation of liberty could complement the present mechanisms by covering the most widespread violation of individual civil rights. In the past, however, creation of such a mechanism has never seemed politically possible.

The issue was once again on the Commission's agenda because its Sub-Commission had forwarded to it the suggestion of Louis Joinet (France), Sub-Commission rapporteur on administrative detention, that the Commission set up a body to look at different aspects of detention. Joinet proposed four different options: (a) the appointment of a special rapporteur with a mandate covering administrative detention alone; (b) the appointment of a

special rapporteur with a mandate covering detention both by an administrative authority and by a judicial authority; (c) the appointment of a special rapporteur with a specific mandate for situations of arbitrary or unauthorized detention of any kind; or (d) a five-member working group with the same mandate as in option (c), and with the possibility that each member would specialize in one aspect of detention (judicial, administrative, juveniles, asylum-seekers, other categories).

During the Commission, the French delegation incorporated this suggestion into a draft resolution calling for a three-year mandate for a rapporteur or working group with the task of "investigating situations of arbitrary or wrongful detention in all their forms, including administrative detention." The prospects for the adoption of the resolution seemed slim.

Before the text was even circulated, however, it received a major boost when Commission Chairman Enrique Bernales Ballesteros of Peru indicated to the ICJ not only that he would support the idea but that, if general consensus were reached, he would take on the project as his own and present it as a "Chairman's draft," to be adopted without a vote. This ensured that the proposal would not be seen as a purely "Western" idea - something which would have harmed the initiative. Because of the popularity of the Chairman, his backing also gave the French important leverage as they took the proposal to other delegations.

At the same time, however, the United

States was putting forward a proposal to create a special rapporteur on "political imprisonment and arbitrary arrest, detention, and exile." A similar effort by the United Kingdom in 1989 had been blocked by developing countries², and it was feared that the US proposal would not only meet a similar fate but jeopardize the French proposal. Additionally, NGOs pointed out that the term "arbitrary" already included the concept of unjustified political detention. Eventually, the US delegation was persuaded to give its backing to the French proposal. Like the NGOs, however, the United States suggested that the mandate be interpreted to include all those wrongfully deprived of their liberty, and not just pre-trial detainees.

France introduced the proposal within the Western group, while Peru did the same in the Latin American group, both of which gave their approval in principle. Soundings were also made in the other groups. French co-ordinator Stéphane Gompertz then convened the first of two meetings with key representatives from each regional group, Amnesty International and the ICJ, to discuss the mechanism and its mandate. As the discussion unfolded, it became clear that no one in the meeting questioned the essence of the idea - probably because the proposal had the strong backing of the Chairman. During the two meetings, and then in a series of informal discussions involving principally France, China, Cuba, India, Peru, the United States and the ICJ, the

2. In 1988, on the initiative of the United Kingdom, the Commission for the first time adopted a resolution calling for the release of "political prisoners." Commission on Human Rights Resolution (hereinafter "CHR Res.") 1988/39, UN Doc. E/CN.4/1988/88 at 98-99. In 1989, the UK went further and proposed the appointment of a special rapporteur to examine the question. China, India, Rwanda and the Ukrainian SSR tabled amendments to the draft, deferring consideration of appointing a rapporteur and introducing restrictive language. The United Kingdom thereupon withdrew its resolution and submitted one virtually identical to the previous year's. (CHR Res. 1989/56, UN Doc. E/CN.4/1989/86, at 136 and 220-221).

exact terms of reference were worked out.

A first question was whether to include within the mandate all persons wrongfully deprived of their liberty or only those held without a trial. The NGOs, Czechoslovakia, Senegal, the United States and some other Western countries argued strongly against excluding those sentenced after unfair trials or under laws in violation of international norms. Others, however, principally from developing countries but also including the Netherlands, objected to a UN body questioning the fairness of their judicial procedures, and worried about the number of prisoners who would seek to seize the UN complaining that their trials had been unfair. No consensus was thus possible and the ambiguous word "detention" was retained. It was agreed, however, that the mechanism would not be limited to administrative detention only, as some had suggested, but would include all forms of detention, including judicially ordered detention.

A second question, and one which would not be resolved until minutes before the deadline for the resolution's submission, concerned the substantive legal criteria for cases to be considered. There was little objection to the term "arbitrary," found in both the Universal Declaration and the International Covenant on Civil and Political Rights (ICCPR). Several delegations, however, believed the term "wrongful" to be imprecise³. Most agreed that some reference should be made to international standards, though there was

disagreement on whether these should include treaties only, or General Assembly declarations and General Assembly-approved standards as well. China, Cuba and India, in particular, insisted that any extension from "arbitrary" be limited to binding instruments. After lengthy negotiations, the precise terms of reference of the group were set as "investigating cases of detention which are imposed arbitrarily or otherwise inconsistently with the international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned." (The word "imposed" was included to make clear that the mandate was concerned with the fact of detention, not its conditions - the latter falling within the province of the special rapporteur on torture.)

Agreement was also only reached at the last minute on who could petition the group. The original formulation mandated the group to receive information from governments, intergovernmental institutions, non-governmental organizations, "and other reliable sources." Objections by Cuba that this phrase could include media reports led to the final formula "the individuals concerned, their families or their representatives."

Finally, at the request of the developing countries, who maintained that the mechanism should reflect regional balance, it was agreed that the task be entrusted to a working group rather than a single rapporteur⁴. Western countries and

3. The original French text reads "*détentions arbitraires ou abusives*"

4. In the 1990 debate over the "enhancement" of the Commission's procedures, the Group of Non-Aligned States suggested that: "The practice in respect of the appointment of Special Rapporteurs on thematic issues should be re-examined. On thematic issues of global interest, Working Groups of five persons from different regions should be formed. These Working Groups could also include members from various Permanent Missions in Geneva, which would result in reduction of expenditure. Such working groups would provide additional advantages of transparency, credibility and democracy." UN Doc. E/CN.4/1990/WG.3/WP.6.

NGOs had sought the latter on the grounds of flexibility and cost. As a working group, however, the mechanism may enjoy a broader political base than a single rapporteur would have.

Presented by Chairman Bernales, the proposal was adopted without a vote. In his closing speech, Bernales hailed the creation of the working group (hereinafter the "Group") as one of the session's major achievements. US Ambassador Morris Abram did likewise. Once approved by the Economic and Social Council, the Chairman will appoint one expert from each region to serve on the Group.

Creation of the Group represents a great leap forward in the Commission's protection work. Its mandate to "investigate" gives it an unprecedented means of action while the expansive term "arbitrary" ensures that it will have a heavy case load. At the outset, the Group will have to decide how to fulfil this daunting mandate.

'Arbitrary'

The term 'arbitrary,' found in both the Universal Declaration of Human Rights and the ICCPR, has consistently been given a broad definition. The most authoritative definition of the term was provided by the Committee appointed by the UN Commission on Human Rights to study

the right of everyone to be free from arbitrary arrest, detention and exile. After examining the *travaux préparatoires* on article 9 of the Universal Declaration, as well as article 9 of the, then, draft ICCPR, the Committee concluded in its revised 1964 study that:

"'Arbitrary' is not synonymous with 'illegal' and that the former signifies more than the latter. It seems clear that, while an illegal arrest, or detention is almost always arbitrary, an arrest or detention which is in accordance with law may nevertheless be arbitrary. The Committee, therefore... has adopted the following definition: an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of persons"⁵.

The UN Human Rights Committee has thus included within the prohibition against arbitrary deprivation of liberty: detention without judicial warrant;⁶ the kidnapping of nationals resident abroad and their forced return to national territory;⁷ the arrest and detention of a person never charged with a crime but from whom information was sought;⁸ the prolongation of detention after completion of sentence,⁹ or after a judicially-ordered release,¹⁰ or after an amnesty¹¹. Most

5. Study of the right of everyone to be free from arbitrary arrest, detention and exile, UN Doc. E/CN.4/826/Rev.1, para. 27.
6. *Conteris v Uruguay*, Communication 139/1983, Selected Decisions of the Human Rights Committee under the Optional Protocol - Volume 2, UN Doc. CCPR/C/OP/2 Selected Decisions at 168.
7. *Celiberti v Uruguay*, Communication 56/1979, Human Rights Committee - Selected Decisions under the Optional Protocol, UN Doc. CCPR/C/OP/1 ("Selected Decisions 1"), at 92; *López v Uruguay*, Communication 52/1979, Selected Decisions 1, at 88.
8. *Monguya Mbenge v Zaire*, Communication 16/1977, Selected Decisions 2, at 76.
9. *Lanza v Uruguay*, Communication 8/1977, Selected Decisions 1, at 45; *Améndola v Uruguay*, Communication 25/1978, Selected Decisions 1, at 136.
10. *Torres Ramirez v Uruguay*, Communication 4/1977, Selected Decisions 1, at 49; *Améndola v Uruguay*, Communication 25/1978, Selected Decisions 1, at 136; *Buffo Carbajal v Uruguay* 33/1978, Selected Decisions 1, at 63; *Soriano de Bouton v Uruguay*, Communication 37/1978, Selected Decisions 1, at 72.
11. *Nagalula Mpandanjila v Zaire*, Communication 138/1983, Selected Decisions 2, at 164.

importantly, it has specifically held that ICCPR article 9(1) is violated when a person is detained on account of his political opinions¹². The Committee, too, has noted that the term 'arbitrary' "is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability."¹³

Given the range of situations covered by the term 'arbitrary,' it is impossible to predict at the present time how many cases will be submitted to the Group. Even if the figure was limited to those detained for their opinions, the number could well be in the hundreds, if not thousands¹⁴.

"Investigate"

The Group was charged with the "task of investigating cases" of arbitrary detention. This request, which represents a major innovation in thematic mandates, should open the way for a more activist approach than that used by the other mechanisms. The Working Group on Enforced or Involuntary Disappearances, and the special rapporteurs on torture and on summary or arbitrary executions were all initially asked only "to examine questions relevant to" the phenomenon under scrutiny and to "respond effectively" to infor-

mation received¹⁵. Modifications to their mandates introduced or ratified the "urgent action" procedure and the practice of taking up invitations to visit countries. In terms of actual cases submitted, however, these mechanisms (as important as they are for recording and thus publicizing abuses) do little more than receive information from complainants, transmit the information to governments and report on the complaint and the reply. Indeed, with the exception of the Working Group on Enforced or Involuntary Disappearances, the current thematic mechanisms do not even transmit government responses to complainants for their rebuttal - a procedure which NGOs have long requested and which would permit the mechanisms to transcend a government's flawed response.

"Investigation," however, at least implies reaching some form of conclusion. Whether or not the Group will reach a formal decision on each case submitted to it, it should, in its yearly report, be able to present more analysis of the cases than is the current practice of the other theme mechanisms. While the Group will certainly not have the resources to conduct genuine fact-finding for each of the thousands of cases with which it will be presented, other formulae could be envis-

12. See, e.g., Communication 132/1982 *Jaona v Madagascar*, Selected Decisions 2, at 161 (Committee finds violation of ICCPR 9(1) "because Monja Jaona was arrested...and detained...on account of his political opinions"); *Martinez Portorreal v Dominican Republic*, Communication 188/1984, Selected Decisions 2, at 214 (Committee finds violation of ICCPR 9(1) where the victim was allegedly arrested "because of his activities as a leader of a human rights association").
13. *van Alpen v the Netherlands*, Communication 305/1988, UN Doc. CCPR/C/39/D/305/1988.
14. In 1989, Amnesty International took up 3,376 cases of possible "prisoners of conscience" - persons detained for their beliefs, race or religion who have not used or advocated violence. Amnesty International, *1990 Report*, p. 298.
15. CHR Res. 20 (XXXVI), UN Doc. E/CN.4/1408, at 180 (1980) (disappearances); CHR Res. 1982/29, UN Doc. E/CN.4/1982/30, at 147 (summary or arbitrary executions); CHR Res. 1985/33, UN Doc. E/CN.4/1985/66, at 71 (torture). Only the rapporteur on summary or arbitrary executions was not initially mandated to "respond effectively" to information received. This was rectified in CHR Res. 1984/50, UN Doc. E/CN.4/1984/77, at 86. See, Weissbrodt, *supra* note 2. In the case of the new Group, it was assumed that the mandate to "investigate" subsumed the mandate to "respond effectively," obviating the need to specify the latter.

aged.

Using the two-pronged definition of "arbitrary" suggested in the 1964 UN study, the Group might adopt one approach where the detention was allegedly carried out by means "other than those established by law" and a different approach where the detention was said to be ordered "under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person." In the former approach (which would essentially pose factual and individual questions), the Group could draw on the procedures employed by the Human Rights Committee in individual cases submitted under the First Optional Protocol to the ICCPR. Given the number of cases which will come before it, however, a strict quasi-judicial investigation of each case would be impracticable, and a more flexible formula should be devised. In the latter approach (which would largely pose legal questions affecting entire classes of persons), the Group could go further and give an opinion on the compatibility of the law with respect for the right to liberty and security of person.

The Group was purposely not charged, as the other mechanisms had been, with *studying* the phenomenon of arbitrary detention. Rather, it was intended to be an action-oriented mechanism. While the Group will no doubt have occasion to look at the theoretical aspects of the question, it should be sure not to duplicate the work of the UN Committee on Crime Prevention and Control, which was asked by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders "to examine the question of pre-trial detention," nor the study now being undertaken by two experts of the Sub-Commission on the right to freedom of opinion and expression, and the permissible limitations on that right.

Other Developments

The Commission considered the *Draft Declaration on Disappearances* adopted by the Sub-Commission last year. The Latin American group voted to approve the text and send it forward to ECOSOC. Several countries, however, particularly within the Western group, believed that it was not appropriate for the Commission simply to pass along a Sub-Commission text without studying it. Others, particularly the United States, were known to have problems with specific articles of the draft. At the same time, all delegations who took the floor agreed that it was a priority to move the declaration forward as quickly as possible. The Commission therefore decided to create an open-ended working group which would meet for two weeks before the next session to finalize consideration of the draft and transmit it to the Commission for adoption at its next session.

The Commission also:

- decided by a vote of 23 for; 4 against; and 5 abstentions to propose to ECOSOC an amendment of the Sub-Commission's procedures permitting the use of a secret ballot whenever a majority so decides; and
- postponed consideration of a draft *optional protocol to the Convention Against Torture*, which would create a sub-committee to carry out preventive visits to places of detention along the lines of the European Convention against Torture, to allow states time to study the proposal.

In 1990, the General Assembly decided to convene a *World Conference on Human Rights* in 1993. A Preparatory Committee will meet in Geneva in September 1991. NGOs are hoping that the Conference will be more than window-dressing

for the UN and the host countries.

Over several objections, and after several amendments, the United States won approval for a resolution calling for an expert to prepare a study on the right of everyone to own property, alone as well as in association with others.

Conclusions

The general satisfaction with the results of the session should not hide some longer-term problems within the Commission, which remains an intensely political body.

The turn-around on Iraq was a manifestly political decision, but so too was the compromise on Iran, whose geopolitical standing has improved more than its human rights performance. Similarly, placing Cuba but not Guatemala under the item on "violations" reflects more on their relative positions in the "new world order" than on the dignity afforded their citizens. African countries (other than South Africa), once again were exempt from public criticism, with the minor exception of Equatorial Guinea. For the first time, three European countries were subject to comment: Albania, Romania and the Baltic Republics.

With the creation of a major new working group, new rapporteur-ships on Iraq and Kuwait, inter-sessional working groups drafting declarations on minorities, human rights defenders and disappearances, and an expert on private property, the already insufficient resources of the UN Human Rights Centre secretariat will be strained to breaking point. It is there-

fore imperative that the UN budget - to be decided at the 5th Committee of the General Assembly - provides increased funding for the Centre. Alternatively, such an initiative could come from the 1993 Conference.

Chairman Bernales won praise from all sides for his handling of numerous sensitive issues. His commitment led directly to the creation of the new working group on arbitrary detention. In addition, shortly after the session, he issued a public statement calling on the Iraqi government to halt the post-war abuses against its own population. This statement, made after consultations with the Commission's Bureau, is believed to mark the first time that the Commission Chairman has taken on such an inter-sessional role and is a hopeful precedent.

For his work in guiding the resolution on the new working group to a successful conclusion France's Stéphane Gompertz received the NGO "Ruth Pearce Award" as the diplomat who had done the most to advance the cause of human rights at that session of the Commission. Named after an Australian diplomat, the award has previously gone to: Ana Martins Gomes (Portugal) in 1989 and Mikael Dahl (Sweden) in 1990.

Next year, a new era begins as membership of the Commission will be expanded from 43 to 53 in order to partially remedy the under-representation of developing countries. It is hoped that this will lead the Commission to take greater account of the preoccupations of developing countries, particularly concerning the realization of economic rights and the right to development.

ARTICLES

The Draft Declaration of the United Nations on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities

*Bokatola Isse Omanga**

Public opinion today has been stirred, and rightly so, by the plight of the Kurds in Iraq. Yet, this situation is certainly not the only conflict or inter-ethnic strife in the world. There are many other instances, including the Corsicans in France, the Irish Catholics in Ulster, the French Canadians in Quebec, the Albanians in Kosovo, Yugoslavia, the Tamils in Sri Lanka, the Islamic separatists in the Philippines, and the Animist and Christian minorities in southern Sudan. The issue of minorities has exploded onto the world scene. The problems of discrimination and minority protection are clearly no longer confined to the traditional multi-national hot spots of Central and Eastern Europe. Nowadays, nations with ethnic, racial and linguistic diversity are the rule rather than the exception. Nearly all the nations of the world harbor certain minorities even though the exact problem of these minorities may not always and everywhere be identical. It is true that the legal, political, social, cultural and even economic factors which come into play may vary with the time and place.

What is the United Nations to do about this problem? For quite a long period (at least 20 years) following the end of the Second World War, the issue of international protection for minorities was eclipsed from the public eye. With the failure of the League of Nations to protect minorities still very much in mind, the United Nations Organisation skirted the issue for many years. The very first texts of the new international body proclaimed and guaranteed respect for the basic rights of all men without any distinction whatsoever. Therefore, it was believed that there was no need for special protection of minority rights since elimination of oppression of the individual was thought adequate to bring a halt to oppression as a whole.

This assumption proved to be quite mistaken. In the last few years, the United Nations has recognised that its protection of human rights falls short in the area of the protection of minorities. Although it is a thorny and complex issue, which is at times plagued by opposition from some Member States, the United Nations has

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set up standards (which, however, are not always effective) to protect minorities. This does not mean that the United Nations has reverted to the conventional notion of minority protection. One idea has not displaced another; rather, there has been a harnessing of two notions: one, on human rights and non-discrimination; and the other on the specific protection of minorities.

The efforts of various UN bodies and those made by certain countries including Denmark, the Soviet Union and Yugoslavia, resulted in the insertion of Article 27 into the International Covenant on Civil and Political Rights (1966), which states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

Article 27 of the International Covenant on Civil and Political Rights is believed to constitute, at the least, a foundation. It needs to be supplemented by a clearer statement on minority rights and the corresponding State duties. Therefore, the Sub-Committee on the Fight against Discrimination and Minority Protection decided in 1967 "to include in its programme and future tasks to undertake a study as soon as possible on the application of the principles set forth in Article

27 of the International Covenant on Civil and Political Rights. The purpose of this study was to analyse the notion of minority, taking into account ethnic, religious and linguistic factors in multi-national societies"¹. This task was entrusted in 1971 to Professor Francesco Capotorti, who was appointed Special Rapporteur for the "Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities." In the conclusions of his final report, published in 1977, Professor Capotorti recommended the preparation of a draft Declaration on the Rights of Members of Minority Groups in accordance with the principles articulated in Article 27 of the Covenant². To perform this task, the Human Rights Commission created a Working Group in 1978, which was unrestricted in its make-up, whose task since that date has been to prepare a "Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities", on the basis of a draft submitted by Yugoslavia.

The object of this article is to analyse the text of the proposed Declaration as adopted at its first reading in 1990 by the Working Group of the Human Rights Commission³.

The draft Declaration of 1990 does not define the term "minority". It has always been maintained that the Declaration could very well fulfil its role even if it did not contain an exact definition of the term since the conventional meaning of the ex-

1. United Nations, Doc. E/CN.4/Sub.2/384/Rev.1. Appendix 1, p.111.

2. *Ibid.* p. 109

3. See United Nations, Doc. E/CN.4/1990/41, pp. 12-16. The draft Declaration has been designated here simply as "draft Declaration of 1990". The Working Group started its second reading of the text of the Draft Declaration in 1991. Only the preamble and Articles 1 and 2 have been adopted. We will not review these articles because, owing to a lack of consensus and of time, the Working Group decided to leave several questions pending and to examine them at a later session. See United Nations, Doc. E/CN.4/1991/53, pp. 4 and onwards.

pression clearly indicates the groups concerned in practical circumstances.⁴

In addition to the obstacle of defining the persons referred to in the Declaration, which has been a long-standing problem, there are associated complications such as determining both the substance and means of implementation for the protection of minorities.

A. The substance of measures for the protection of minorities

The Working Group has striven to spell out clearly the recognised rights of minorities. It also has set their limits.

1. Recognised rights

Minorities are recognised as holding rights divided into two main types: firstly, collective rights ; and secondly, individual rights.

a) *Collective rights*

The draft Declaration of 1990 reaffirms the three categories of rights set out by Article 27 of the Covenant. Article 3, paragraph 1 of the draft Declaration stipulates: "Persons belonging to minorities have the right, individually or in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion

and use their own language freely and without any interference or discrimination whatsoever."

The draft Declaration of 1990 also proposed three new collective rights for minorities.

The first of these is the right to the respect and development of their ethnic, cultural, linguistic and religious identity without any discrimination (Article 1, paragraph 1). This right is fundamental. It establishes the minority group in its collective identity, based on its specific characteristics. It is the group as such which holds rights and no longer only the individuals who make it up. This right means that the minority group should be able to preserve itself regardless of the political shifts in the government. It also means that the minority should be able to procure the means it needs to develop in and adapt to an everchanging world.

The second new right is the right to protection from all actions, including propaganda, which can threaten the existence or the identity of the minority and hinder the development of its own special characteristics (Article 2, paragraph 1). This collective right of minorities resembles similar rights which have already been granted to them, in their definition as groups, by the Convention for Prevention and Repression of the Crime of Genocide⁵, the International Convention on the Elimination of All Forms of Racial Discrimination⁶ and the Declaration on the

4. The Working Group decided that throughout the draft Declaration, the term "minorities" would be followed by the adjectives "national, ethnic, religious and linguistic". Wording that includes all these aspects was adopted in order to avoid confusion between different national jurisdictions. Not wanting the hardships involved in defining the term "minority" to delay their work, the Working Group preferred to postpone this issue and to go forward with their task, keeping in mind the need to draft a flexible text that would be applicable in practice. On all these matters, see United Nations, Doc. E/CN.4/1991/53, pp. 3-6, in addition to Doc. E/CN.4/1987/WG.5/WP.1 entitled "Recapitulation of the proposals concerning the definition of the term minority".

5. Articles 2 and 3 of the Convention.

6. Article 4 of the Convention.

Elimination of All Forms of Intolerance and Discrimination Based on Religion or Faith⁷. This right is perfectly justified since minorities need to be protected not only against their physical destruction, but also against their cultural and ethnic eradication. Thus, the draft Declaration finally makes provisions to fill in the gaps of the 1948 Convention for the Prevention and the Repression of the Crime of Genocide, which prohibits "physical and biological" genocide but overlooks "cultural or ethnic" genocide.

The third new collective right is the right of minorities to participate truly in government affairs and in the decisions affecting the areas where they live (by means of national and, where possible, of regional bodies) (Article 7, paragraph 1). It is unfortunate that the ideas of specifically minority bodies was abandoned because the right of minorities to have their own representative bodies is an important one, especially as far as recognising minorities' legal existence is concerned. Nevertheless, Article 7, paragraph 2 maintains the provision which states that all political and national programmes, in addition to programmes of international cooperation and assistance (meaning in the economic and financial spheres) should be designed and implemented after taking into proper account the legitimate interests of the minorities in the areas concerned.

b) Individual rights

Three articles in the draft Declaration of 1990 deal with the individual rights of minorities.

Article 1, paragraph 2 states the general principle of non-discrimination, ac-

ording to which persons belonging to minorities are entitled to life, liberty and personal safety in addition to all the other human rights and freedoms without discrimination. This article emphasises that discrimination is forbidden, which is a principle widely-acknowledged by the United Nations, and calls for no special remarks. It might be mentioned that in the general discussion on this article, it was agreed that a distinction should be made between citizens and non-citizens because in most countries certain rights are not extended to non-citizens, such as the right to participate in the government or to hold real estate.

Article 3 paragraph 2 recognises the right of persons belonging to a minority to participate equitably in the cultural, religious, social, economic and political life of the country they live in. This is an individual right granted to those belonging to minorities to enable them to take part in public life equally with the other nationals of the country.

Article 3 paragraph 3 grants members of minorities the right to maintain contacts with other members of their group (and with other minorities) without discrimination, by setting out their rights to association, to freedom of movement and residence within the territory of each State and also the right to leave any country, including their own, and to return to their own country. This article seeks to fulfil the need for contact between those belonging to minorities (and between minorities as groups) within their countries and beyond national boundaries. When this article was examined, however, objections were raised as to the wisdom of such a clause. This illustrates the on-going resistance to recognising the rights of mi-

7. Article 4 of the Declaration.

norities and explains the restrictions attached to these rights.

2. The limits of recognised rights

The States' jurisdiction limits the rights recognised for minorities. However, international law limits the notion of this "very exclusive jurisdiction" itself.

a) *The problem of "exclusive jurisdiction"*

The progress so far achieved in winning recognition of minorities' rights has been hampered by the restrictions tied to these rights. Note that Article 5, paragraph 3 of the draft Declaration of 1990 states that "none of the provisions of this Declaration will be interpreted as authorising any action which is contrary to the purposes and principles of the United Nations, in particular regarding the sovereignty, territorial integrity and political independence of the States.

This clause signifies that the protection and development of minority rights may be severely curtailed in the name of the sovereignty, territorial integrity and political independence of the State in which a minority group lives. Shielded by the grand principles of the United Nations, this provision reintroduces concretely the State's right to use at will diverse means to limit the scope of minorities' rights. It is certainly natural for States to want to prevent minority rights from being used to foment revolutionary struggles or to spark ethnic and other hostilities. However, the modern-day State is master of its own sovereignty; it alone can judge what constitutes a threat to its sovereignty or territorial integrity. This is the dilemma posed by the concept of "exclusive jurisdiction" and of State freedom to determine the questions that are within its competence.

Thus, the act of reaffirming the States' sovereignty demonstrates that despite progress in the domain of "general international law for minorities", the fundamental rights of the States still take precedence over the rights of minorities.

b) *"Exclusive jurisdiction" and international law*

Another article of the draft Declaration of 1990 aims to provide a solution to the problem of the States' exclusive jurisdiction. Article 5 paragraph 1 declares "Nothing in the present Declaration will impede the performance of the States' international obligation towards minorities. In particular, States must in good faith carry out the obligations and commitments that they have assumed by means of treaties or international agreements that they are party to."

The purpose of this provision is to underline that respect for the principles of sovereignty and others must not prevent the States from honouring their international obligations to minorities. It can be reasoned then that should a State fail to perform its international obligations to minorities in good faith, it forfeits its "higher" powers, and the minorities' rights are no longer restricted by respect for the aforementioned principles.

The requirement to perform in good faith the obligations assumed through international instruments seems to be an inadequate answer to the dilemma of "exclusive jurisdiction". Another, less ambiguous formula, would have been preferable, such as altering Article 5 paragraph 1 to read: "None of the provisions of the present Declaration will be interpreted as authorising any action contrary to the purposes and principles of the United Nations, in particular as regards to sovereignty, territorial integrity and

political independence of the States, provided that the latter are conducted in keeping with all the principles and rights set forth in the present Declaration."

This negative turn of phrase cannot be misunderstood : sovereignty, territorial integrity and political independence can only be respected if the State in turn respects the rights of minorities; if such were not the case, the threat contained in our proposed draft of Article 5, paragraph 1 would be carried out. The State would be outlawed by the international community and sanctioned by the minorities' non-respect for the aforementioned principles. The advantage of this version would be to align our Article 5, paragraph 1 with provisions in other international instruments. By presenting this balanced solution between the aforementioned principles and minority rights, this provision would resemble paragraph 7, which sets out the principle of self-determination, in the "Declaration Relative to the Principles of International Law Concerning Amicable Relations and Co-operation Between the States in Keeping With the United Nations Charter".⁸

Finally, it must be admitted that the mere existence of provisions on "exclusive jurisdiction" cannot alone invalidate an international instrument. In other words, enumerating and extending the rights protected in the draft Declaration do not alone lend validity to this instrument; its validity depends also on the set of measures devised to ensure its application. Hence, the importance of the means envisaged to enforce the proposed Declaration.

B. Machinery to implement the protection of minorities

Implementing the protection of minorities raises two major questions. The first has to do with the type of obligations imposed on the States, i.e. how the provisions of the instrument operate to compel the States. The second deals with the means that will ensure the actual respect of the principles set forth.

1. The Types of Obligations of the States

The draft Declaration of 1990 attempts to define the types of obligations placed on the States.

a) Details of the draft Declaration of 1990

Article 2 paragraph 2 specifies that all States undertake to adopt the legislative or other means necessary to prevent and combat actions, including that of propaganda, which threaten the existence or identity of minorities and hinder the development of their own characteristics. Article 3, paragraph 2 uses a similar phrasing, stipulating that all the States must strive to ensure that minorities are free to express their own specificity and to participate equitably in the life of the nation. A similar expression appears in Article 6, which states that the States will endeavour, according to their specific situation, to foster conditions that are conducive to the protection and promotion of minority rights.

8. This declaration 2625 (XXV), adopted unanimously by the General Assembly on 24 October 1970, is considered the most recent, most important and most precise phase in the gradual development by the United Nations of the principles of international law in keeping with the Charter.

All these formulas refer only to the obligatory means under the States' responsibility: their sole duty is to do everything in their power to protect and develop minority rights, but they are not forced to succeed in this endeavour, nor are the exact steps to be taken specified. So, after having arrived at a narrow definition of minority rights, the States also allow themselves free rein in choosing which means to use, which goals to pursue and which results to achieve. This negative presentation of minority rights, as revealed in the draft Declaration of 1990, is to be regretted.

In the end, the draft Declaration of 1990 contains only general principles which, to be operational, will need to be rounded out with methods of implementation which the States are required to adopt. Until such measures are forthcoming, the Declaration will lack the power to yield any results for minorities or their members, and it can not be invoked in the national courts. From the standpoint of minority protection, which should be the sole priority in this Declaration, the Document falls short of expectations as it now stands.

b) The need for greater detail

To prevent the draft Declaration of 1990 from remaining a hollow shell, an additional article should be proposed, which would spell out practical measures that the States should adopt to ensure that minorities will reap the full benefit of their recognised rights. This proposal could be worded as follows: "The measures that the States will adopt in order to ensure

the actual enjoyment of minority rights should include those necessary to guarantee the preservation, development and defence of minorities' ethnic, cultural, linguistic and religious identity, The States will enable minorities to create, as needed, thanks to government subsidies, their own educational and cultural institutions, such as libraries, schools, museums, etc."⁹

This proposal would thereby place upon the States the obligation to achieve results in addition to handing down instructions on the choice of means. These specifications, entailing such obligations, would make it possible to verify if a State is applying faithfully the provisions of the agreement.

2. Means of verification

The effectiveness of any plan of protection depends greatly on the means of verification that it puts into place. The principle of the need for these means of verification has won acceptance in the realm of human rights even if, in practice, difficulties still persist. In its present form, the draft Declaration of 1990 provides for only scant measures of international verification.

a) Recourse in the domestic sphere

The draft Declaration of 1990 would need to include means of domestic verification for the implementation of its provisions. States could undertake to ensure that minorities and members of these groups are granted protection and a true path of recourse in the national courts and before other competent State bodies

9. See also the Soviet proposal submitted in 1952 at the time of the drafting of Article 27 of the Convention. United Nations Doc. A/2929, p. 197, E/CN.4/SR.368. p. 4.

against all acts which violate their recognised collective and individual rights.¹⁰ The rights of fair and adequate redress and reparation for any damage suffered by the victims of rights violations, stemming from any such acts, could also be included.¹¹ Moreover, legal provisions should be supplemented by administrative and political measures. Taking into consideration the traditions of each country, it should be asked if the draft Declaration could allow for the creation of a body such as a "Parliamentary Commission" or an "Ombudsman", in charge of finding solutions for reconciliation before resorting to legal proceedings; and, if these avenues of persuasion prove inadequate, to take the case before the Parliament or even to make use of the law.

b) The proposed international means of verification

In order to ensure that the Declaration is applied as effectively as possible within the institutions of the United Nations and in the bodies dealing with human rights, the Working Group adopted Article 8, which is worded as follows: "The bodies and specialised institutions of the United Nations System will contribute to the full achievement of the rights and principles set forth in the present Declaration within their respective spheres of competence."

Furthermore, it can be supposed that in the second stage of the establishment of regulations in favour of minorities - that of setting up a Convention - other international methods, such as, periodic re-

ports from the States parties, inter-State communications and individual communications¹², would be put to use to enable verification of the Convention by the United Nations. These means of control could prove to be very effective if, among other things, the action of the bodies created for this purpose attracted wide public attention and if many States became parties to the Convention. Publicity and universality can thus make an important contribution to attracting an audience and, thus, to the action of international bodies or control.

Conclusion

A solemn Declaration by the United Nations on the rights of minorities will have a significant political and moral impact and contribute to the creation of customary law based on its provisions. It will, in addition, provide legitimacy to persons belonging to minorities and minority communities who will invoke it. It can be extended by a Convention on the rights of minorities which would exert binding force on the State Parties. However, such a development must not be achieved at the cost of enshrining a negative concept of minority rights. In its present form, the draft "Declaration on the rights of persons belonging to national, ethnic, religious and linguistic minorities" is not very satisfactory in its recognising of rights.

To avoid dashing the hopes of minorities, any text for their benefit should rec-

10. See Article 7 of the United Nations Declaration and Article 6 of the International Convention on the Elimination of All forms of Racial Discrimination.

11. *Ibid.*

12. These are the three methods used which are intended to enable the bodies created by international instruments on human rights to verify application of the agreement by the States Parties to these Conventions.

ognise, inter alia, their existence as a community and affirm their rights as community entities. Measures for their protection should comprise effective means of verifying and applying the recognised rights in addition to flexible procedures enabling minorities as individuals or groups to demand redress for the violation of their rights.

For more than 40 years now, the United Nations Organization has been trying to draft an instrument for the global protection of minorities. The first decision was taken in 1948¹³; then followed a 30-year wait for the naming of a Working Group and another 12 years for completion of the first reading of the draft Declaration. It is time for the discussion to bear fruit.

13. Resolution 217 c (III) of the General Assembly of 10 December 1948, entitled "The Fate of Minorities". See United Nations, Doc. A/784.

Towards a New System of Supervision for the European Social Charter*

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I. Introduction

It is a well-known fact that the European Social Charter (ESC) of the Council of Europe¹ has not been as successful a human rights instrument as has its counterpart dealing with civil and political rights, the European Convention on Human Rights. This holds true in particular for the effectiveness of the system of supervision.

For many years the Charter's supervisory machinery has been criticized by both academics and the Parliamentary Assembly of the Council of Europe. So far, however, these criticisms appear to have produced few results. It is, therefore, most welcome that the conclusions of the Chairman of the Ministerial Conference on Human Rights (Rome, November 1990) acknowledge that a fresh impetus to the ESC is needed and invite the Committee of Ministers of the Council of Europe to

take the necessary measures for a detailed study of the role, the content and the operation of the ESC. The conclusions further require that this study be carried out "resolutely and diligently" so that it may be completed in October 1991 on the occasion of the 30th anniversary of the signing of the Charter.

The ICJ welcomes the present consideration of possible improvements to the ESC and stresses the urgent need for concrete step towards an effective European system for the protection of social and economic rights, worthy of being the counterpart of the European Convention on Human Rights.

The ICJ considers that, at this stage, attention should be focussed on the reinforcement of the supervisory system rather than on amendments to the substantive rights. Although attempts to rephrase the rights of the Charter so as to make them more precise or more justiciable may be

* This article is an abbreviated and adapted version of a paper which was submitted to the ad hoc Committee for the European Social Charter by the International Commission of Jurists in May 1991. To the original text, which has now been adopted officially by the Council of Europe (Doc. CHARTE/REL (91) 14), was added a list of proposed amendments to the Charter.

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1. See, for instance, David Harris, *The system of supervision of the European Social Charter - problems and options for the future* in: Lammy Betten, David Harris, Teun Jaspers (eds.), *The future of the European Social Policy, views and comments expressed at the conference on the future of European social policy* (Utrecht, 25 and 26 April 1989). See also, among other statements by the Parliamentary Assembly, Recommendation 649 (1977).

desirable, it would appear, however, that the restructuring of the supervisory system may be less difficult to achieve. More importantly, as will be shown below, the major flaws in the ESC lie in the latter and not so much in its substantive provisions. The ICJ therefore contends that priority should be given to reshaping the supervisory machinery. The following paragraphs will deal with this aspect only.

The ICJ has not endeavored to present an exhaustive study of all possible shortcomings of the present system and all conceivable remedies. It simply aims at offering some ideas and proposals on selected issues it believes to lie at the heart of the matter.

The paper has two parts. In the first (chapter II), proposals are made to modify the position of the Committee of Independent Experts, to introduce an application procedure for NGOs, and to improve the NGO input in the system of supervision. The institutional measures proposed there all require amendments of the Charter. The second part (chapter III) focuses on concrete and practical measures designed to improve the reporting system under the ESC. They could be implemented without restructuring the present system. They are not, however, to be regarded as substitutes for the necessary fundamental changes proposed in chapter II, but as improvements which could also play a part in a revised system.

II. Reshaping the system of supervision

General

Effective implementation of the obligations incorporated in the European Social Charter is influenced by the structure and functioning of the organs of supervi-

sion. The Contracting States report at two-year intervals on the application of such provisions of Part II of the Charter as they have accepted (Article 21 ESC). These reports are examined by a Committee of Experts (Article 25). The reports of the Contracting Parties and the conclusions of this Committee of Experts are submitted for examination to a Sub-committee of the Governmental Social Committee of the Council of Europe (Article 27). The Parliamentary Assembly communicates its views on the Conclusions of the Committee of Experts to the Committee of Ministers (Article 28). Finally, by a majority of two-thirds of the members entitled to sit on the Committee, the Committee of Ministers may, on the basis of the report of the Sub-Committee, and after consultation with the Parliamentary Assembly, make any necessary recommendation to the relevant Contracting Party (Article 29).

This process of supervision is complicated and generally does not lead to clear results. The major flaws in the functioning and organization of the supervisory machinery are:

- (a) despite the fact that failure to comply with the Charter has frequently been noted, in particular by the Committee of Experts, the Committee of Ministers has never ventured to make a recommendation to any of the Contracting Parties concerned;
- (b) the relationship between the four organs of the supervisory machinery is not very clear; the Conclusions of the Committee of Experts certainly are authoritative, but they can be disputed, set aside or even ignored by the Sub-Committee or by the Committee of Ministers. There is no body competent to give a final ruling on the meaning of any provision of the Charter. The two major organs in the sys-

tem of supervision (the Committee of Experts and the Sub-Committee) disagree on the interpretation of many Articles;

- (c) the contribution from trade unions or organizations of employers has been scarce. In the ESC machinery, the institutional framework for input from these and other NGOs has not been such as to stimulate contributions from these sectors (in contrast to, for instance, the tripartite ILO structure);
- (d) the reporting procedure is extremely time-consuming, to the extent even that the Contracting Parties have to send in their new two-yearly report before the previous cycle has been completed.

In this chapter some proposals will be made to remedy the aforementioned shortcomings of the Charter.

1. Committee of Experts

The desirability of an objective and authoritative interpretation of the ESC is uncontested. The Committee of Experts consists of independent experts and, as David Harris has remarked, "the Committee of Experts is, as it claims, the best qualified body to make the sort of objective, juridical judgement that is required".² Although the ESC deals partly with political desiderata, it is important to note that the Conclusions of the Committee of Experts show that a legal interpretation of the ESC standards in what may be called a refining case-law is very well possible. The Committee of Experts already plays an important role with re-

gard to the interpretation and development of the ESC. New proposals should be linked to this state of affairs and aim at strengthening this "legal" function of the Committee of Experts.

The authority of the Charter as an instrument for the protection of human rights will certainly be enhanced by emphasizing the legal focus of the work of the Committee of Experts. It should be the competence of this Committee to establish the exact standards and obligations contained in the Charter and to clarify in what and to what extent the Charter leaves a discretionary margin to the Contracting Parties. The strengthening of the position of the Committee of Experts should concern both its composition and its powers.

At present, the Committee consists of seven members (Article 25, section 1, ESC). In view of its work-load and of the desirability of expanding its duties under the Charter, the Committee is rather small. A possibility might be to link the composition of the Committee to the number of States having ratified the Charter.³

Clearly, the Parliamentary Assembly should be involved in the election of the members of the Committee. The Parliamentary Assembly actually played a very stimulating role in the development of the Charter, and undertook many efforts to enlarge its impact. The election procedure also serves to underline the independence of the members of the Committee; it is therefore proposed that the Assembly be given the power to elect the members of the Committee of Experts from a list of persons nominated by the Contracting Parties.⁴

2. David Harris, *The European Social Charter*, 1984, p. 231.

3. Cf. Article 20 ECHR with regard to the composition of the European Commission of Human Rights.

4. Cf. Article 39 ECHR on the election procedure with regard to the members of the European Court of Human Rights.

As has been argued before, it is also necessary to enlarge the powers of the Committee of Experts. An efficient restructuring of the supervisory mechanism requires the strengthening of one organ (i.e. the Committee of Experts) vis-à-vis the other organs of the Charter, and further requires shortening and simplifying the procedure. The present procedure, involving the Committee of Experts, the Subcommittee, the Parliamentary Assembly and the Committee of Ministers, is long and unnecessarily complicated and gives rise to conflicts and disagreements between the organs. The procedure itself is not clear, and even worse, its outcome frequently is hazy because of contradictory opinions of the various organs. These organs differ on the interpretation of the Charter and on the questions of observance of the Charter.

It is submitted that the Committee of Experts should be entrusted with the sole power to interpret and explain the provisions of the ESC, and to construe the Charter's rules into sub-rules and concepts. This legal function should be distinguished from the more political role of stimulating the Contracting Parties progressively to implement the ESC. In this respect the States enjoy a margin of discretion in choosing means and selecting short-term goals. To deal with this political, programmatic function of the Charter falls within the competence of the (the Sub-Committee)⁵ the Committee of Ministers and the Parliamentary Assembly. Indeed, the Conclusions of the Committee of Experts already show a more restrained approach with regard to these programmatic articles with a "dynamic

character" (e.g. Article 1 section 1, Article 2 section 2, Article 12 section 3 and Article 18 section 2.) In these cases the Committee does not prescribe precise criteria but requests the Contracting States to indicate whether "progress" has been made. It appears therefore to be possible and workable to leave to the Committee of Experts the quasi-legal function of interpreting the Charter (including the identification of the "hard" rules and minimum obligations on the one hand, and the programmatic provisions on the other) and to the other organs the task of urging the progressive implementation of the Charter.

The ESC organs, other than the Committee of Experts, will have to take as a starting point for their deliberations not only the text of the Charter but also the Conclusions of the Committee of Experts, which, as is suggested, will be binding insofar as they constitute an interpretation of the Charter and/or an expression of whether its provisions have been complied with. The Charter should provide for these Conclusions to be binding within its supervisory mechanism.

2. Introduction of an application system

The proposals made above to strengthen the Charter and its system of supervision will probably not be sufficient to revive the Charter and the implementation of its social rights. It is therefore proposed that the parallel with the ECHR be taken one step further and a complaints mechanism be introduced. The idea of a

5. In view of the proposal to abolish the Sub-Committee in order to streamline the supervision system (option three, Chapter II, paragraph 3 in fine), its name has been put between brackets throughout this text

mechanism to deal with individual complaints is in itself not new. It was already proposed in 1978 by the Parliamentary Assembly,⁶ but has never come even close to introduction.

One of the possible reasons for the disregard of this Recommendation may have been the idea that the Charter's provisions are not well-suited for individual complaints and legal proceedings. They are often supposed to lack legal enforceability. Many articles in the Charter do indeed seem less adapted for individual complaints, albeit because they frequently deal with general circumstances and "rights" of groups. On the other hand it must be recognized that a complaints mechanism could give an enormous impetus to the protection offered by the Charter and to its authority. Our proposal intends to reconcile the advantages of a complaints procedure with the special character of the ESC guarantees.

We propose that non-governmental organizations (NGOs) be given the possibility of communicating complaints on the ground that the Contracting Party against which the communication is brought systematically violates a provision of the Charter. The right to submit communications should be limited to NGOs which are particularly qualified in a matter regulated in the Charter. The Committee will be exclusively competent to rule on the admissibility (is the complainant a NGO? is this NGO particularly qualified? is it qualified with regard to the ESC Article which it claims is violated? is the respondent state a contracting party which has also ratified the particular Article invoked by the NGO?), to establish the facts and to give an opinion as to whether the

facts disclose a breach by the State concerned of its obligations under the ESC.

The views of the Committee of Experts on the facts and on the (non)compliance with the Charter are not explicitly binding upon the two Parties involved (i.e. the NGO and the State concerned), nor upon the (other) Contracting Parties. But it may be expected that the views of the Committee of Experts will be considered as an authoritative interpretation of the Charter, and will therefore have a legal impact. In accordance with the proposed binding character of the Conclusions of the Committee of Experts (see chapter II, 1) it must be stipulated in the Charter that the views of the Committee bind the other organs of the ESC.

The tasks of (the Sub-Committee) the Parliamentary Assembly and the Committee of Ministers will be limited to urging the Contracting Parties to strive towards a progressive implementation of the ESC. Further, the Committee of Ministers will promote the effective observance of the views given by the Committee of Experts with regard to NGO complaints.

This procedure would give NGOs, in particular trade unions and organizations of employers, an explicit role in the supervisory mechanism. It may also stimulate their interest in and their contribution to an effective implementation of the Charter.

3. Role of NGOs in the reporting system; three options for improvement

Another major flaw in the ESC supervision procedure is insufficient NGO in-

6. Recommendation 839, Texts Adopted, September 1978

volvement. Three options to remedy this are proposed.

The first option consists of a restructuring of the Sub-Committee, which is at present exclusively composed of government representatives. In view of the tripartite ILO structure which seems to be functioning satisfactorily and of the fact that governments also have a seat in the Committee of Ministers, it could well be argued that the Sub-Committee be transformed into a tripartite organ (like the ILO Conference Committee). Its composition would then be, four members for each Contracting State, including two government representatives, one trade union representative, and one representative of the organizations of employers.⁷ This composition provides ample guarantees for an effective contribution from the NGOs most interested in the Charter; it enhances the impact and authority of the ESC and it also facilitates fact-finding by the ESC organs and will therefore better ensure that the decisions of the supervisory organs rest upon relevant and up-to-date facts.

The second option leaves the composition of the Sub-Committee intact (and therefore also the overlap between the Sub-Committee and the Committee of Ministers). The involvement of NGOs, and their important task in evaluating governmental policies and in providing (contra)information, would then be secured by strengthening and widening the consultative NGO status. At present the possibilities for consulting NGOs are limited (see Article 27 paragraph 2 of the Charter).

In this second option, the Sub-Committee would be given wider possibilities

for consulting international and national NGOs which are particularly qualified in a matter regulated in the Charter and which have shown an interest in the examination of the relevant national report (e.g. by having submitted a commentary on the national report). In this respect, it is also desirable to enlarge the scope of Article 23 ESC. Under this provision, national organizations which are members of the international organizations of employers or trade unions shall receive copies of the national reports; their comments shall be forwarded by the Contracting Party involved to the Secretary-General. To create a greater involvement with the Charter on the national level, it seems appropriate to give qualified national organizations the opportunity of being informed and of communicating comments. However, this would maintain the present complicated structure of the supervisory system.

The third, more far-reaching, but more attractive option would be to abolish the Sub-Committee and to create consultative status for NGOs with the Committee of Experts along the lines set out above, under option two. This third option would avoid the present overlap of functions between the Sub-Committee and the Committee of Ministers and thus streamline the reporting procedure. It allows for an input of information by qualified NGOs at the first stage of the supervisory cycle. In our view, this will not only be advantageous for the NGOs themselves, but also for the supervision system as a whole, whose "procedural economy" is best served by NGO input already at the first stage.

7. In recommendation 839 the Parliamentary Assembly also proposed such a change in 1978

III. Improvements to the reporting system: changes of practice

1. General

As it stands, the supervisory system of the Charter is exclusively based on national reports submitted by the States Parties to the ESC.⁸ In the case of economic and social rights, it is particularly important that the reporting procedure is strong and efficient. The major advantage of the reporting procedure is that the periodicity of the system allows for a regular discussion of the implementation of the instrument.

However, it is inherent in this system that the reports submitted by governments, are not of a fully objective nature. States Parties are, generally speaking, not naturally inclined to submit information which would shed an unfavorable light on the state of their affairs. This situation can only be improved if the supervisory organs have the opportunity of receiving and taking into account information from other sources, such as non-governmental organizations or experts, or results of inquiries by (members of) the supervisory organs. These possibilities should be included in the ESC. The problem discussed here is not specific to the ESC, but has arisen in other fora as well, particularly in the United Nations supervisory mechanisms. Within the framework of the UN reporting system, discussions are taking

place on how to overcome it.⁹ Although the problems encountered by the UN supervisory bodies are of somewhat different nature, it may be useful to keep the solutions proposed there in mind when revising the ESC mechanism.

2. Form and content of the reports

(i) Guidelines for reporting

Some reports, when submitted, do not contain information in respect of all relevant provisions or responses to all requests made by the experts in the previous cycle. Various improvements are suggested to remedy this. A preliminary basic requirement which should be met is the strengthening of the Secretariat, in terms of both its budget and its number of staff. It is obvious that the current situation does not enable the Secretariat to carry out all of its present tasks. Assigning more tasks will be impossible if working conditions do not improve.

Within the UN system, the supervisory bodies have established guidelines regarding the form and content of reports submitted by States Parties. This may seem only a formal matter, but such guidelines are of great help both to the States Parties drawing up reports and to the supervisory bodies discussing them. It is recommended that the Committee of Experts review the existing guidelines and adapt them to the changing needs and

8. Articles 21 and 22.

9. The meeting of chairpersons recommended that a study be carried out on the problems faced by the UN. The recommendation was endorsed by the General Assembly (paragraph 15 (a) of resolution 43/115 and by the Commission on Human Rights (paragraph 5 of resolution 1989/47). The study resulted in the report: Effective implementation of international instruments of human rights, including reporting obligations under international instruments of human rights. UN Doc. A/44/668, 8 November 1989. The study was carried out by Philip Alston and currently discussions are taking place on how to implement the recommendations.

circumstances, and make them as detailed as possible.

The guidelines should state explicitly that states are not only to report on the positive results achieved in the period reported, but also on the difficulties encountered in complying with the ESC and on the measures the state is undertaking to overcome them. In reviewing the guidelines, the Committee may seek guidance from the revised guidelines recently adopted by the UN Committee on Economic, Social and Cultural Rights.¹⁰

It is important that governments' representatives are present during the discussion of the reports, but obviously this will only be effective if the representatives are well prepared in advance.

A practice evolved in the Human Rights Committee might also be used by the experts supervising the ESC. A Working Group of the Committee prepares a list of questions, which is sent to the government concerned prior to the consideration of its report. The effect of this procedure is that the government's representatives are well prepared during the discussions, which enables a constructive dialogue to be held.

(ii) *Establishing a Centre for the Documentation of Social and Economic Data*

In order to improve the level and the amount of information available to the supervisory organs, we suggest that consideration be given to the setting-up of a database containing up-to-date statistical

information on economic, social and cultural rights. Although such computerization calls for a considerable initial investment, we think that such a source of information is indispensable for both the Secretariat and the experts. Since such a documentation centre would be useful not only within the ESC framework but also to the Council of Europe and its Member States in general, it would seem appropriate to give it the status of a separate unit within the Council of Europe's Secretariat. The database should be established and kept up to date in co-operation with the appropriate national institutions collecting and storing social and economical data. An endeavour should be made to create a common standard for these national institutions for submitting information, in order to achieve compatibility and facilitate comparisons between the reporting States.

3. Consideration of reports

Under the UN reporting system for the Human Rights Committee, governments are represented before the supervisory organs, so that members can ask questions and immediately receive an answer. The aim of the direct contact is to establish a constructive dialogue between government representatives and the Committee. In our opinion, this practice could also be useful under the ESC.

The UN committees cannot make general recommendations addressed to one single State Party.¹¹ The ESC system is, in theory at least, stronger in this respect.

10. Implementation of the Covenant on Economic, Social and Cultural Rights, Revised Guidelines adopted by the Committee on Economic, Social and Cultural Rights at its fifth session (26 November - 14 December 1990)

11. Although most UN treaties provide for "general comments" this power of the committees is not interpreted in such a way. In most cases, they only give interpretations of the treaty provisions on the basis of all reports submitted.

The possibility for the supervisory organ to make recommendations to a specific State should therefore be maintained, but it is clear that the Committee of Ministers should give up its present reluctance to take this avenue of action. Such recommendations do not necessarily amount to censure, but are primarily a means of assistance to the States Parties in that they help to clarify the obligations undertaken. A strengthening of this feature may be considered, by providing for a means of follow-up to the recommendations made. Experts should have the opportunity of inquiring, in the period between the submission of reports, how the state concerned is implementing the recommendations made and, possibly, what difficulties it is encountering. This ongoing dialogue could be achieved by appointing a rapporteur who remains in contact with the State concerned.¹² It is important that the experts draw up their recommendations in such a way that it is clear which measures the States Parties are to take, or which concrete results have to be achieved within a specified time.

As to the periodicity of the reporting, it is clear that the procedure should be speeded up. The present procedure results in the Committee of Ministers addressing

the recommendation closing the supervision cycle almost four years after the supervision period. We do not, however, favour extending the reporting period to three or four years. A two-year period must be maintained in view of the rapidly and often considerably changing situation of social rights in the States Parties.

IV. Concluding remarks

It will be clear that the functioning of the Charter's system of supervision leaves much to be desired and that substantial changes are needed to increase its effectiveness.

We stress, however, that, for any clear improvement to be achieved, it is imperative that the States Parties live up to the commitment expressed during the Ministerial Conference in Rome. Anything short of a genuine and substantial improvement to the Charter would amount to a serious blow to the cause of the protection of social rights at the pan-European level. The debate on the shortcomings of the present system may not be new, the real opportunity to remedy them is. We hope that the Charter's 30th anniversary in October 1991 will indeed be a cause for celebration.

12. Consideration may also be given to empowering the Committee of Experts to send a direct contact mission to a State Party (similar to the ILO missions).

BASIC TEXT

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”*

Preamble

The States Parties to the American Convention on Human Rights “Pact of San José, Costa Rica”.

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States;

Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified;

Recognizing the benefits that stem from the promotion and development of cooperation among states and international relations;

Recalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights;

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources, and

Considering that the American Convention on Human rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof,

* Adopted on 17 November 1988 at San Salvador, Rep. of El Salvador, by the General Assembly of the OAS.

Have agreed upon the following Additional Protocol of the American Convention on Human Rights "Protocol of San Salvador":

Article 1
Obligation to adopt measures

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through cooperation among the States, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Article 2
Obligation to enact domestic legislation

If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.

Article 3
Obligation of nondiscrimination

The States Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Article 4
Inadmissibility of restrictions

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

Article 5
Scope of restrictions and limitations

The States Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

Article 6
Right to work

1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.
2. The States Parties undertake to adopt measures that will make the right to work fully

effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

Article 7

Just, equitable and satisfactory conditions of work

The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;

b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;

c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;

d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;

e. Safety and hygiene at work;

f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;

g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;

h. Rest, leisure and paid vacations as well as remuneration for national holidays.

Article 8

Trade union rights

1. The States Parties shall ensure:

a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

b. The right to strike.

2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

3. No one may be compelled to belong to a trade union.

Article 9
Right to social security

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.

2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

Article 10
Right to health

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:

- a. Primary health care, that is, essential health care made available to all individuals and families in the community;
- b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
- c. Universal immunization against the principal infectious diseases;
- d. Prevention and treatment of endemic, occupational and other diseases;
- e. Education of the population on the prevention and treatment of health problems, and
- f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

Article 11
Right to a healthy environment

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation and improvement of the environment.

Article 12
Right to food

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.

2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

Article 13
Right to education

1. Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further

agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

- a. Primary education should be compulsory and accessible to all without cost;
- b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
- c. Higher education should be made equally accessible to all on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
- d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
- e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

Article 14

Right to the benefit of culture

1. The States Parties to this Protocol recognize the right of everyone:
 - a. To take part in the cultural and artistic life of the community;
 - b. To enjoy the benefits of scientific and technological progress;
 - c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.
3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

Article 15

Right to the formation and the protection of families

1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.
2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.
3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:
 - a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;

- b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years;
- c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;
- d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.

Article 16 **Rights of children**

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

Article 17 **Protection of the elderly**

Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:

- a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;
- b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;
- c. Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

Article 18 **Protection of the handicapped**

Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to:

- a. Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be;
- b. Provide special training to the families of the handicapped in order to help them solve the problems of coexistence and convert them into active agents in the physical, mental and emotional development of the latter;
- c. Include the consideration of solutions to specific requirements arising from needs of this group as a priority component of their urban development plans;
- d. Encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

Article 19 **Means of protection**

- 1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States

Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the Inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the Inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol.

Article 20 **Reservations**

The States Parties may, at the time of approval, signature, ratification or accession, make reservations to one or more specific provisions of this Protocol, provided that such reservations are not incompatible with the object and purpose of the Protocol.

Article 21 **Signature, ratification or accession.** **Entry into effect**

1. This Protocol shall remain open to signature and ratification or accession by any State Party to the American Convention on Human Rights.

2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the General Secretariat of the Organization of American States.

3. The Protocol shall enter into effect when eleven States have deposited their respective instruments of ratification or accession.

4. The Secretary General shall notify all the member States of the Organization of American States of the entry of the Protocol into effect.

Article 22

Inclusion of other rights and expansion of those recognized

1. Any State Party and the Inter-American Commission on Human Rights may submit for the consideration of the States Parties meeting on the occasion of the General Assembly proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognized in this Protocol.

2. Such Amendments shall enter into effect for the States that ratify them on the date of deposit of the instrument of ratification corresponding to the number representing two thirds of the States Parties to this Protocol. For all other States Parties they shall enter into effect on the date on which they deposit their respective instrument of ratification.

BOOK REVIEW

Behind the Disappearances: Argentina's Dirty War Against Human Rights and the United Nations

by Iain Guest

Philadelphia: University of Pennsylvania Press 1990. Pp. xvi, 407.
Appendixes. Index. Bibliography.

On 29 December 1990, the President of Argentina, Carlos Saúl Menem, granted pardons to the generals who planned and supervised the "dirty war" in which at least 8,960 persons "disappeared." Argentina's ambassador to the United Nations Human Rights Commission in Geneva, Julio Emilio Strassera, the prosecutor in the generals' trial, immediately resigned his post in protest. Six weeks later, at the annual session of the Commission, the ICJ and Nobel Peace Prize winner Adolfo Pérez Esquivel led human rights groups in taking the floor to condemn the pardons.

Iain Guest's book, which reached Geneva on the eve of the Commission session, could not have been more timely. Oscillating between the grimy torture cells of Buenos Aires and the antiseptic meeting rooms of the Palais des Nations, it tells how Argentina's military government stymied the Commission from taking action against its policy of disappearances.

Guest, perhaps the most talented journalist to cover the United Nations human rights scene, chronicles how relatives of some of the "disappeared" aided by international NGOs, a receptive Carter Administration and a sympathetic UN Secretariat, brought the Commission to the

brink of condemning Argentina for its violations. He then shows us how a shrewd Argentine ambassador and a complicit Reagan administration turned the tide - engineering, for example, the sacking of the activist Director of the UN Division of Human Rights, Theo van Boven, weakening the newborn UN working group on disappearances and preventing any outright condemnation. It is the author's well-supported thesis that the Commission's human rights machinery was forever damaged in the fray.

The book covers 1976 to 1983, a period of renewed activity for the UN Human Rights Commission. The overthrow of the Allende government in Chile and the brutal repression that followed had broken the Soviet bloc's resolve to prevent public discussion of violations occurring outside the Israel/South Africa context. While the Soviet Union was hostile to Pinochet, however, it was "cozy" with the Argentine generals, who also had the support of other Latin American dictators and many in the non-aligned bloc. The confrontation came to a head in 1980, when the European countries, which did not have the political strength to obtain a direct condemnation of Argentina, never-

theless forced the creation of a working group to examine the phenomenon of disappearances on a world-wide scale. The following year, however, the working group, and the UN machinery in general, began to back off.

Within the larger story, the book tells a myriad of smaller ones. (Indeed, at times one feels that it is trying to tell too many stories at once; details of abuses in El Salvador and Guatemala, and the UN response thereto, drag the book out needlessly). US foreign policy is under examination throughout. Under Carter, the activist, Patt Derian championed the cause of human rights in Argentina. Upon the election of Ronald Reagan, the Jeane Kirkpatrick thesis of friendly authoritarian governments prevailed, however, and the US did an abrupt volteface on Argentina. President-designate Roberto Viola received an early invitation to the White House and, as Secretary of State Alexander Haig put it, "we told Argentina that it had heard its last public lecture from the United States on human rights."

Guest's hero is Theo van Boven. The book shows how, through his commitment and identification with the victims, van Boven goaded the UN into action against the Latin American dictatorships, only to expose himself to the plotting of Argentine Ambassador Gabriel Martinez. When Jeane Kirkpatrick expressed her "displeasure" with van Boven to new Secretary-General Pérez de Cuellar, who was receiving the same message from numerous Latin American military regimes, the Dutchman's fate was sealed.

Guest argues persuasively that "to be a successful human rights advocate, the UN must confront governments." Yet he shows how time and again the UN abandoned its mandate to promote human rights standards and take the side of victims in favour of diplomacy and dialogue.

In an observation as relevant today as ever, the author notes that " 'keeping the dialogue going' became an end in itself and far more important than the actual violations." Guest points to Working Group Chairman Viscount Colville of Colross, whose sympathy to the plight of governments ostensibly seeking to emerge from dictatorships led Guatemala's Rios Montt to propose that Colville become special rapporteur on Guatemala. Colville "saw himself as a political mediator instead of a human rights rapporteur." The Working Group's surrender to Argentina, writes Guest, "set a precedent that tainted the entire UN human rights fact-finding apparatus. Between 1983 and 1986, rapporteurs investigated El Salvador, Suriname, Guatemala, Equatorial Guinea, Haiti, Chile and Uruguay for the Human Rights Commission. All these nations had been labeled "gross violators" by the Commission, yet almost without exception these rapporteurs saw their task as mediation rather than criticism - as the re-establishment of democracy rather than support for embattled relatives and other victims."

In the same vein, the author illustrates how future UN Secretary-General Javier Pérez de Cuellar, assigned to prepare a confidential report on abuses under Uruguay's military dictators, submitted a "majestically misleading" whitewash for the Commission (excerpted at length in an appendix, side-by-side with a contemporary ICRC account). "No one is being detained on account of his ideas," reported Pérez de Cuellar, who also found prison conditions excellent. Only when the report was leaked could the recently-liberated pianist Miguel Angel Estrella deny that Pérez de Cuellar met him in prison, as the latter claimed.

Guest picks apart the often Byzantine UN processes, designed more to reassure

states than to expose violations. One of his targets is the confidential "1503" procedure by which certain cases of violations are discussed in private session only. Both governments and NGOs know, however, that the only credible international deterrent to human rights violations is the glare of publicity and denunciation. Guest illustrates how the Argentines even manipulated their own confidential censure by the Sub-Commission in an attempt to avoid having their case discussed in public session. (Iraq would successfully use the same tactic after its gassing of Kurdish villages in 1988.)

In his frustration over the meagre results of the episode, Guest does not give it due credit for two sea changes in the Commission's history - empowering NGOs to use the Commission for what it is worth and creating the working group on disappearances. While once looked on as "a

nice forgotten place with a sleepy press corps and no spectator interest" (to quote the 1976 US Ambassador), the Commission now receives human rights activists who come from around the world to state their case. Creation of the disappearances group opened the way to other thematic mechanisms, where individual violations could be recorded even where the perpetrating governments were too politically powerful to challenge directly. The Commission went on to create special rapporteurs on torture, summary or arbitrary executions, religious intolerance and mercenaries. In 1991, it set up a working group to "investigate cases of detention which are imposed arbitrarily or otherwise inconsistently with...the Universal Declaration on Human Rights." This is no small achievement in an inter-governmental body where respect for national sovereignty remains paramount.

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