

For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

HUMAN RIGHTS IN THE WORLD

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Editor: Niall MacDermot

THE INTERNATIONAL COMMISSION OF JURISTS

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

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

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

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

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

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Human Rights in the World

Brazil

Suspension of Congress

On April 1, 1977, the President of Brazil, General Ernesto Geisel, ordered the recess or suspension of the National Congress (the Federal Legislature) under a so-called Supplementary Act. On April 14, by another Supplementary Act (No. 103) he ordered that Congress resume its functions. For both decisions the President relied on powers conferred by section two of the Institutional Act No. 5 of December 13, 1968, by virtue of which the Executive granted itself quasi-dictatorial powers to be exercised in emergency situations (See ICJ Reviews No. 1, March 1969 and No. 13, December 1974).

The purpose of these extraordinary proceedings was to enable the government to introduce by decree certain constitutional changes and judicial reforms for which it was unable to obtain the approval of the Congress. The constitutional changes were designed to ensure the maintenance of the supremacy of the government party at the forthcoming elections, in which there was a serious prospect that the opposition would gain substantial ground. As will be shown, these proceedings were unconstitutional and demonstrated the profound disrespect of the military-dominated government for the principles of the Rule of Law and of democratic government.

Judicial Reform

During the fortnight when Congress was in recess, the President imposed two constitutional amendments. First, by Constitutional Amendment No. 7 of April 13, 1977, he gave effect to the government's proposals for the reform of the Judiciary which had been rejected by Congress on the day before its recess. These proposals had been criticised as inadequate by the Federal Council of the Brazilian Bar. The need for judicial reform was widely recognised, and the legal profession had submitted to Congress a number of reasoned comments and draft amendments to the government's Bill. In particular they proposed

- that the various Institutional Acts and Supplementary laws which restricted civil freedoms and were no longer felt to be necessary should be repealed;
- the full restoration of the right to habeas corpus;
- guarantees for the security of office of the Judiciary;
- guarantees for the independence of the Judiciary;
- the reorganisation and an increase in the number of intermediate courts in order to expedite the administration of justice;
- improvements in the structure and an increase in the powers of the Federal Supreme Court; and
- special measures for the protection of human rights.

As none of these proposals nor the objections of Congress were

accepted by the Government, the government's Bill was rejected by Congress.

Political Reforms

The second constitutional amendment (No. 8 of April 14, 1977) introduced the so-called "political reforms", which were further elaborated in Legislative Decrees Nos. 1538-1543, all of April 14, 1977. The main features of the so-called "political reforms" are:

- the Governors and Vice-Governors of the States of the Federation will in future be elected indirectly through an Electoral College;
- a proportion of the members of the Federal Senate will also be elected indirectly by another Electoral College;
- the majority needed for the approval of constitutional amendments in Congress is reduced from two-thirds to a simple majority;
- the period of office of the present President and Vice-President of the Republic is extended to March 15, 1979 and in future their terms of office will last for six years;
- the opportunities for conducting election campaigns are severely restricted.

It is submitted that there was no legal basis for these constitutional amendments and legislative decrees imposed by the Executive during the suspension of Congress. In issuing them the President assumed powers which he did not possess and which were vested exclusively in the National Congress. If the Rule of Law is to prevail, it is indispensable that both the governors and the governed should be subject to the law. All legislative acts and instruments must derive their authority from the Constitution.

In the decrees containing the constitutional amendments, the Executive expressly refers to the "powers granted to it by sub-section (1) of Section (2) of Institutional Act No. 5 of December 13, 1968" and to the fact that the "recess" of the National Congress had been decreed. This Act gave the President the power to issue emergency legislation during periods of exception, but it does not empower the President to amend or alter the Constitution without recourse to the procedures laid down in the Constitution.

In face of these events, the Federal Council of the Brazilian Bar Association met to consider the situation. A plenary session of the Council on April 19, unanimously approved a statement containing severe criticisms of the Government's actions and a warning of the dangers involved. *Inter alia* they reiterated the lawyer's duty to defend the liberal professions, the Constitution and democratic institutions. They pointed to the ever-growing distortion of the Rule of Law by acts of constraint on the part of the Government. They protested against the imposed suspension of Congress and the approval of reforms without consulting the lawful representatives of the people. They further protested against the fact that the Constitution was subjected to emergency legislation which had been placed above the Constitution itself and was incompatible with it. Their final statement declares that "Brazil is at present going through an obscurantist period in its constitutional history, whose hallmark is an increasing divergence between the actions of the Government and the will of the Nation".

A significant recent development in Brazil was the well-attended demonstrations of students and workers which were allowed to take place in the main streets of several of the most important cities on May 19, 1977. They demanded an amnesty for political prisoners and a return to democracy. This is the first time such demonstrations have taken place since 1968, and they occurred without serious incident.

The relaxation was short-lived. Shortly after, severe repression of student activities followed. On June 14 another opposition M.P. was dismissed and his civic rights suspended for 10 years for quoting a communist newspaper in Parliament.

Indonesia

A letter written by an Indonesian political prisoner, dated January 1, 1977 and addressed to the International Committee of the Red Cross has been smuggled out of prison. A copy has come into the possession of the International Commission of Jurists (not through the Red Cross). The name of the author is known but for obvious reasons cannot be revealed. The ICJ is satisfied as to the genuineness of the letter and the general reliability of the information it contains. The letter presents a horrifying account of conditions in the prisons and prison camps.

The writer advises the Red Cross that at the time of their last series of visits, the Jalan Budi Utomo detention camp was used to hide prisoners who had been transferred from the Salemba, Nirbaya and other prisons, "because it is feared that these people will have the courage to reveal all the secrets of the inhuman and arbitrary treatment meted out to the tapols (political prisoners)". A list is included of 26 persons transferred from the heavy isolation cell block at Salemba Prison before the Red Cross visit. Salemba Prison, initially built to accommodate 500 prisoners, has been used since the 1965 attempted Communist coup to house 2,000. It contains "isolation Block N, where the prisoner is kept in a narrow cell 24 hours a day, without taking air . . . for years without knowing his crime". The length of detention of those listed ranged from two to twelve years, with an average term of ten years.

Immediately prior to the Red Cross visit pillows, pans, music, two television sets and sports equipment were provided to the prisoners at Salemba Prison. Detainees were told by authorities that if they were approached by the observation team "they should not speak about things that they had experienced in the past, but only about things as they now are". The author of the letter asked the Red Cross to ensure that interviews with prisoners be conducted in private, without supervision, saying that "if information given by a prisoner is considered to have been helpful, steps would certainly be taken against those tapols, as had happened in Tangerang Prison on a previous occasion".

It is the normal practice of the ICRC to interview prisoners alone. It would appear that they met with obstruction on this occasion. In its May 4, 1977 Bulletin, the ICRC reported that "its delegates' findings could not be regarded as an indication of the real conditions of

detention in Indonesia for two reasons; the limited number of places visited, and the difficulties encountered during the visit".

The letter states that little fundamental change has occurred in prison diet or calorie intake in twelve years, with the average daily intake between 800 and 1000 calories per day. (The required minimum calorie standard is 2500 per day). Only in rare cases are families of prisoners allowed to provide supplementary food for detainees.

As a result of deficient nourishment most prisoners contract a wide variety of diseases. The number of deaths caused by beri-beri and malnutrition has reached an average of two prisoners every day in the Salemba and Tangerang prisons. More than 15,000 prisoners have died in North Sumatra and Surabaya.

Prison medical facilities, meanwhile, were grossly inadequate. Acutely ill patients were not transferred to the Army hospital, but instead were admitted only to the Salemba Prison Polyclinic. Detained doctors who attended to prisoners were often disciplined for doing so. The writer names nine prisoners who died in the 24 hour isolation cell block at Salemba Prison.

He estimates that about ninety per cent of those detained experienced some form of torture or indiscriminate maltreatment during interrogation, regardless of the person's background or the presumed charge. Beatings with hard spiked objects, electric shock treatment, pulling out finger nails, crushing the hands under table legs, and placing the prisoner in an oil drum which is then beaten on the outside, were among the forms of torture listed. The letter also details the torture of close family members, including the rape and burning of the vagina of prisoners' wives.

Because the violation of internationally recognised human rights has become such an integral part of the Indonesian prison experience, the author asserts that the classification of political prisoners into separate categories is "pure nonsense", as individuals are compelled to confess, regardless of the nature of the alleged crime. Furthermore, the different categories do not necessarily imply different prison regimes.

The writer contends that the prisoner release figures announced by the government during 1975 were significantly exaggerated. The claimed release of 2,000 Category B prisoners in fact affected only 150 persons, who were released in batches of 30 and 40. Likewise, a 1976 figure of 2,500 individuals affected merely some 120 prisoners, many of them listed in the previous year's quota. In addition, families of released prisoners in the Jakarta area were often ordered to pay "administration costs" ranging from 25,000 rupiah (US\$1 = 375 Rp.) for a low ranking officer to 1 million rupiah for more prominent prisoners. Upon release political prisoners are held under house arrest for at least one year, with the possibility of being rearrested.

The writer also notes a widespread feeling in Indonesia that there is no legal integrity, that democracy is suppressed, and that there is no legal justice. Lower echelons of the State apparatus no longer pay any attention to the laws or the regulations made by their superiors. Instead, the authorities currently abridge civil rights guaranteed by law, "by arresting persons without cause and detaining them in excess of the period stipulated by law". The letter notes that many of those detained

in prisons are being held on the basis of insufficient evidence, merely on suspicion, in violation of the law. The rule of law, the author concludes, has been replaced by "the law of the rulers".

Nicaragua

In 1936 Anastasio Somoza García seized power in Nicaragua by a coup d'état and established an authoritarian and absolutist regime. Since then, for more than 40 years, the government has been in the hands of the same family who have exercised power through the National Liberal Party, a creature of their own making. With the passage of time, the aims, objectives and resources of the State have become progressively identified with those of the Somoza family, which now owns and controls numerous sectors of the national economy. To achieve this, they have had to suppress all opposition and to clamp down on any democratic ideas that might challenge the power structure. The procedure established in the political Constitution of 1974 for electing the President of this country of just over two million inhabitants has been amended on various occasions so as to enable a member of the Somoza family to become the Head of State.

Like a number of other countries in Latin America (see ICJ REVIEW No. 17), Nicaragua has introduced "measures or states of emergency" to concentrate as much power as possible in the Executive. A "state of siege" and "martial law" have been in force throughout the country since December 1974, when they were imposed after an armed attack by the Frente Sandinista de Liberación Nacional (the clandestine armed opposition). Individual rights have been suspended and the government is entitled to arrest people and hold them in administrative detention for an indefinite time without bringing them to trial. The exercise of these powers, which is not subject to any judicial or other supervision or control, has led to an increase in the torture of political prisoners, in the number of assassinations and, generally speaking, in the violation of basic human rights and fundamental freedoms.

The National Guard

The main instrument of this repression is the National Guard, whose Director-in-Chief is Anastasio Somoza Debayle, the son of the founder of the system and President of the Republic since 1967. The National Guard was originally a military corps created and trained by the US marine corps during the period of military occupation between the two world wars. Two units of the National Guard deserve special mention: the Special Anti-Terrorist Brigades (Brigadas Especiales contra la Acción Terrorista — BECAT) and the Security Bureau (Oficina de Seguridad). The unbridled official repression of these units is compounded by unofficial repressive action on the part of paramilitary groups such as AMROOS, which have attacked peaceful demonstrations held to protest against certain government measures as well as other embryonic attempts at organised opposition.

The members of the National Guard, and particularly its special services, can enter public and private places at any hour of the day or night without permission and without warrant. They can arrest people and keep them incommunicado in prison for long periods of time. It is while they are being held incommunicado and have no access to legal defence that the worst excesses take place. According to reliable sources, the usual practice is for black hoods to be put over the detainees' heads immediately after their arrest, so that they have no knowledge of what is happening around them. In this condition, they are interrogated, subjected to electric shocks and beaten, and, when they are women, they are often raped or sexually abused. Although several detainees who were taken before a War Council have denounced these practices and have given detailed descriptions of the treatment meted out to them, their complaints have been summarily rejected and in a few cases they were even charged with bringing false evidence and of insulting the National Guard. The worst cases of ill-treatment occur in the remoter rural areas where there are concentration camps for political prisoners.

Trade union rights.

The right to join an association or union and other trade union rights have been severely curtailed if not suppressed altogether. Several labour unions have been dissolved or, more frequently, have had their activities restricted to such an extent that they have been forced to disband or to continue in name only. One method used is to imprison their leading officials and hold them incommunicado for long periods of time, finally releasing them without their ever being brought to trial. An example of a repressive measure that clearly violates the conventions of the International Labour Office is the prohibition of organised union activity in the rural areas (1944 Labour Code). However, in spite of the repression, there is a strong labour movement in Nicaragua which the government has not succeeded in stamping out.

Freedom of opinion and expression

After December 1974, when the state of siege was introduced, the written press has been subjected to a system of prior censorship directed by the senior officers of the National Guard. The censors delete any news and commentaries that are regarded as prejudicial to the regime, such as information on shortcomings in the public services or on union activity. Apart from the censorship, the newspapers and radio are required to publicise all statements made by the Head of State. Broadcasting is subject to the same type of restrictions and censorship. Control of the television presents no problem as the Somoza family owns the whole network.

In the broader cultural aspects, there is a long list of books which cannot be imported or sold in the country, and any violation of this ban is followed by a fine or in some instances by imprisonment. A large

number of plays and artistic performances have been banned or left almost unrecognisable by the censors.

The System of Military Justice

A system of military justice has been set up under the state of siege. The civil courts established by the Constitution have been replaced by military tribunals, which try all persons suspected of having committed a political offence. Petitions for *habeas corpus* are quite ineffective in cases of the arrest and detention of suspects or opponents of the regime. The rights of the accused are severely curtailed, including the defence rights during the trial.

In the few cases in which prisoners have been brought to trial, the hearings are conducted on the basis of a variety of rules and regulations, namely: (a) Regulations for the Government and Discipline of the National Guard, (b) Orders concerning War Councils and Courts of Enquiry, (c) the Military Legal Code for the Government and Discipline of the National Guard, and (d) Guide to the Procedure for War Councils of the National Guard. Some of these are not laws in the formal sense but were instituted by order of Anastasio Somoza García, the father of the present President, who also was Director-in-Chief of the National Guard. They have not been submitted to or approved by the Congress, and being regarded as internal documents have not even been published. It is understood that they are largely a translation of the legal codes in force in the US Navy in the 1920's, and are thus derived from a different system of law to that in use in Nicaragua and other countries of Latin America.

The first stage in the military justice system consists of the Military Courts of Enquiry. They are responsible for preparing the cases to be heard by the Special War Councils (*Consejos de Guerra Extraordinarios*) to which they make recommendations regarding the sentences to be passed. The War Councils consist of four members, a prosecutor and a Judge Advocate, all of whom are military officers on active service but none of them have to be legally qualified or even to have had any legal training. This applies even to the Judge Advocate (*Auditor*). In the interior of the country and in rural areas the first stage of military justice is conducted not by Military Courts of Enquiry but by the departmental headquarters of the National Guard, i.e. the military garrisons stationed in each of the 16 Departments into which the country is divided.

At the beginning of 1977, after repeated appeals by defence lawyers and the families of the prisoners, a Special War Council was held to try persons who had been arrested since December 1974 on suspicion of having served in, collaborated with or supported the Frente Sandinista de Liberación Nacional (FSLN). The Council tried 111 persons of whom 110 were convicted. A number of prisoners complained during the trial of torture and ill-treatment by the security forces. The defence lawyer of some of these prisoners, Dr Mario Mejía Álvarez, has since been charged with "altering and falsifying documents which injure the dignity and prestige of institutions" by reason of his having authenticated affidavits of his clients making these complaints.

The Church

In January 1977, the Archbishop of Managua and six Bishops from various parts of the country issued a Pastoral Letter severely condemning the widespread abuses. While repudiating all forms of violence, whatever its origins or justification, the bishops claim that the Nicaraguan people are suffering from abuses "ranging from rape and torture to execution without trial, either in a civil or military court". They add that "the present state of terror has forced many of our peasants to flee in desperation from their homes and their farm lands to the mountains", and conclude by denouncing a number of abusive actions and attitudes on the part of the military which are a threat to religious freedom and to the right of the priesthood to exercise their vocation without restraint.

South Africa

The intensification of the racial struggle in South Africa following the disturbances in Soweto and other townships in 1976 has led to a sharp increase in the brutality and repression practised by the security and police forces and to a spate of new restrictive legislation.

Numerous reports have been received of the increasing and routine use of torture in the interrogation of suspects, both political and non-political, in South African and Namibia. A publication of the Christian Institute of South Africa in April 1977, *Torture in South Africa**, gives detailed information of the methods practised, including the regular use of electric shocks. A statement issued by the leaders of Evangelical, Catholic and Anglican churches in Namibia in May 1977 states that they are aware that "more and more people are being beaten and tortured while in custody, to the extent that such malpractices are now reaching horrifying proportions. Torture now seems to be standard practice in the interrogation of detainees". Among the most common methods are beating, hanging by the arms, electric shocks, burning with cigarettes, prolonged sleep deprivation, prolonged standing or squatting in uncomfortable positions, and solitary confinement lasting for months.

A sharp increase in the number of deaths of persons in custody, usually alleged by the authorities to be suicide, is itself striking confirmation of torture practices. Between March 1976 and February 1977 nineteen deaths in detention were reported. They included:-

Mapetla Mohapi. Died 15 July 1976, 2 weeks after arrest. Police say he hanged himself with a pair of denim jeans. Post mortem: "died from force applied to his neck".

Luke Mazwembe. Died 2 hours after arrest, 6 September 1976. Post mortem doctor could not exclude that he was killed first and then hanged to fake suicide.

George Botha. Died on 10 December 1976, 5 days after arrest. Police alleged he jumped down a six storey staircase.

Dr. Naoth Ntshuntsha. Police say he hanged himself on 8 January

* Available from Interchurch Aid, NHK, P.O. Box 14100, Utrecht, Netherlands, price Dfl. 5.

1977, 16 days after arrest. Unprecedented incisions made by a mortuary attendant made a proper post mortem examination impossible.

Mathew Mabilane, a student, allegedly fell 10 floors from police HQ in Johannesburg on 15 February 1977, 19 days after arrest.

R. L. Barber, the only white among the 19, died 16 February 1977, allegedly having fallen on his head in attempting to escape. He was arrested on a domestic maintenance charge.

Among the new legislation introduced have been:-

an Act which increased the penalties for violation of the pass laws; fines are doubled and imprisonment may be for three months;

the *Indemnity Act 1977*, which bars all civil or criminal proceedings against the State, or any person in the service of the State, or any person acting under the authority or approval of such a person, by reason of any "act, announcement, statement or information advised, commanded, ordered, directed, done, made or published" by such a person. In violation of universally accepted principles of law, the Act was made retroactive to 16 June 1976 and operated to terminate proceedings already instituted;

the *Defence Amendment Act 1977*, which gives power in periods of internal disorder to impose total censorship on newspapers and other mass media, to take possession of buildings, vehicles, aircraft, equipment or other materials, and to control all transport systems. (A Newspaper Bill, proposing a press code and a government controlled Press Council with power to close newspapers, met with vigours opposition from the press and in parliament and was later withdrawn);

the *Second Defence Amendment Act 1977*, which increased the period of national service from one to two years and the period for which reservists could be called up from 30 to 240 days;

the *Criminal Procedure Act 1977* which in section 185 provides for the detention of a witness in a criminal trial "for his own safety" for up to 180 days on the order of the Attorney-General. The Minister of Justice, Mr. Kruger, answered critics in parliament by saying that they opposed law and order in South Africa;

the *Prevention of Illegal Squatting Amendment Act, 1976* which gives increased powers to harass the thousands of squatters in areas and camps surrounding industrial towns. As an indication of the numbers, over 300,000 are squatting in the Cape Peninsula alone. The Act prohibits the erection or occupation of buildings without authority and provides for the demolition of unauthorised buildings or structures.

Namibia

The increase in the use of torture in Namibia has already been referred to.

On 17 March, the Appellate Division of the Supreme Court of South Africa, sitting in Bloemfontein, allowed the appeal of two Africans sentenced to death for alleged complicity in the murder of the Ovambo

Chief Minister, Filemon Elifas, in August 1975 (see ICJ Review No. 16, June 1976, p. 15). The basis for the appeal was the discovery after the trial that the BOSS security police had suborned a partner and employee of the defendants' attorneys to disclose the defence evidence in advance to the prosecution. In a powerful judgment the Chief Justice stated that "the Appellants' protection by privilege before and during the trial totally disappeared as a result of the conduct of the Security Police [and] as a result thereof the trial did not comply with what is required in this regard by justice and accordingly, justice was not done". The convictions and sentences were set aside. The Chief Justice opened his judgment by saying that "this case is fortunately unique in the history of South African law". It may be the first such case to come before the courts, but as the judgment later showed, this practice of the BOSS was of longer standing. One of the partners in the firm of attorneys had for some time acted as an informer for the Security Police, had 'generally conveyed information' and during 1975 had attempted to persuade a clerk in the firm to act as an informer in a case relating to the Ovambo elections. One wonders how many other lawyers' firms have been penetrated in this way. It is to the credit of this firm that they brought the matter to light and dismissed the offending partner and clerk.

After 18 months' discussion the Turnhalle Constitutional Conference produced in March 1975 proposals for an interim government supposedly to lead the country to independence. The proposals have already been denounced as inadequate and unacceptable by the SWAPO liberation movement, both internally and externally, and by the international community, including the Secretary-General of the UN, the European Community member states, and the governments of Canada, France, the German Federal Republic, the United Kingdom and the United States.

The proposal is for a 3-tier system, central, regional and municipal, perpetuating the existing Bantustan division of the country into tribal and racial areas called 'population groups'. The Ovambos, who constitute almost half the population, would have one-fifth of the seats in the National Assembly. Each population group, including the small white minority, would have a veto power. Even at the local level the basic principle of *apartheid* is to be maintained by recognition of what is called the 'factual reality' of white, brown and black townships, with the right to acquire property in those areas being restricted to those who at "present reside or are entitled to reside" in them. A window-dressing declaration on human rights is included, but would not be legally binding on the legislative authorities or enforceable by a court of law. During the interim period the South African government would retain control of defence, foreign affairs, transport, monetary affairs, posts and telecommunications and, above all, internal security, as well as the power to appoint and dismiss the so-called 'Head of State'. No provision is made for national elections, still less for the release of political prisoners before elections are held, or for elections under proper UN supervision. Equally, no provision is made for securing to the Namibian people the real wealth of the country, namely its massive mineral resources. Indeed, there is an express provision which would

entitle the interim central government "to transfer control and administration of any matter (over which it has power) to utility companies or other companies or bodies on such conditions as may be determined by legislation or agreement".

Southern Rhodesia/Zimbabwe

There have been a number of developments in the legal situation in Southern Rhodesia since the publication in May 1976 of the ICJ study, *Racial Discrimination and Repression in Southern Rhodesia*.

RGN No. 333 of April, 1976 contained regulations governing the creation of tribunals to hear cases against 'terrorists'. These tribunals possess some distinctive characteristics, including no requirement that any member other than the president have legal training; the power to suspend the rules of procedure and evidence; effective denial of the right to silence by making its exercise a corroboration of guilt; the duty to hear *in camera* any evidence the disclosure of which the prosecution considers not in the public interest; and the power to impose three year prison sentences for revealing any matter heard *in camera*. Under the Criminal Procedure and Evidence Amendment Act, 1976, section 46, the Minister has power to prohibit any witness in any criminal proceeding from testifying in regard to "any fact, matter, thing, communication, book or document" whose disclosure the Minister believes would "prejudicially affect the security of the State."

The Emergency Powers (Maintenance of Law and Order) Regulations, 1977, section 44, makes it an offence for anyone resident outside Rhodesia to aid, abet, incite or conspire to commit an act of terrorism or sabotage. Rhodesian courts are to have jurisdiction "irrespective of the circumstances in which the person concerned has entered Rhodesia or been apprehended", including presumably where he has been kidnapped in an illegal raid.

RGN No. 301A of April 1976 provides for news censorship through the creation of a "National Security Committee" appointed by the President. This Committee may issue "D" notices to the publisher of any newspaper or other periodical or to the radio or television companies prohibiting the publication or broadcast of "any particular information or class of information" which the Committee considers prejudicial to the national interest. Inspectors are authorized to enter the premises of the media at any time to ensure compliance and to examine documents, films, and other things on the premises, and to seize any newspapers, documents or other things containing prohibited information. Persons aggrieved may seek redress only through appeal to the Minister of Law and Order. No court of law has jurisdiction to review or otherwise question the validity of a "D" notice, and the Committee cannot be compelled to give reasons for its decisions. Publication or broadcast of prohibited information, or publicising the issue of a "D" notice, may bring a fine of up to R\$10,000 or five years imprisonment or both.

Potentially the most important new legislation is the amendment of the Land Tenure Act. Described by the Quenet Commission in 1975 as a source of "widespread discontent and deep-seated resentment" among non-whites, the Land Tenure Act of 1969 has been the foundation of

the "Rhodesian Way of Life". It divided the land surface of Rhodesia into approximately equal portions between what are now over six million Africans and 275,000 Whites, with the greater portion of the quality land in the white area. It is also the legal basis of some of the humiliating "petty apartheid" practices which exclude Africans from most hotels, restaurants, swimming baths, recreational, sporting and other public facilities in white areas. As part of the Smith regime's effort towards an "internal solution", this Act has been amended by the Land Tenure Amendment Act of 1977, which entered into force on 1 April.

The premise underlying the original Act was that an African could not own or lease any land in the European area, and could not occupy it without official permission. The amended Act maintains this restriction for the present at least in urban residential or commercial areas, but removes it from non-urban land, as well as from urban land zoned for industrial purposes. An African who finds a willing seller or landlord may now occupy non-urban land. However, where a seller or lessor refuses a buyer or lessee on grounds of race, no remedy exists. Whites enjoy the privilege, but not the obligation, of selling or leasing to Africans in non-urban and industrial areas. The amendment also empowers the government at its discretion (S. 14, 14A) to declare urban areas zoned for commercial or residential purposes to be "non-racial" (i.e. open to all races).

The practical effect of this legislation rests in the hands of the small white community. With a government determined to establish a multi-racial society, it could have far-reaching effects. With the present white minority government in power its effect is likely to be negligible. The vast majority of the whites live in the reserved residential areas, which will almost certainly remain unchanged. Very few Africans will be able to afford to acquire farms in the 'european' (i.e. white) rural areas, even if the owners were willing to sell to them. The discriminating pattern of settlement in the white areas is, therefore, likely to remain undisturbed. The chief practical effect of the legislation may well be to spare white farmers the burden of securing resident permits for their black labourers. In theory, it would now be possible again to start multi-racial farming ventures, but to do so would incur the risk that the government would declare them, as they did the famous Cold Comfort Farm, to be unlawful organisations suggesting that they are 'communist inspired' and subversive.

With regard to "petty apartheid" practices sanctioned by the original Act, non-urban and urban european areas are dealt with in essentially the same manner. Owners of schools, universities and medical institutions, and of licensed hotels, motels and clubs *may* admit Africans to their premises without governmental permission. Equally, however, they may refuse to do so. There is no law against discrimination and Africans do not enjoy a right to demand entrance. Swimming baths must in any event remain segregated. The Government has expressly reserved the right (Sec. 82) to maintain segregation in "any establishment owned or operated by the State", and has indicated that this power will be used to maintain the separation of the races in State operated schools and hospitals. The practical effect of these amendments to the Land Tenure Act is likely to remain largely cosmetic.

Tanzania

It is seldom that governments institute independent enquiries into allegations of torture and ill-treatment of prisoners and suspects, or take appropriate action when the allegations are shown to be well founded. When it occurs it deserves mention. In recent years the only examples which come to mind are the action taken by the British government in relation to the treatment of suspects in Northern Ireland, and the action taken by the Portuguese government in 1975 when torture practices were found to have re-commenced about a year after the revolution of 1974.

The most recent case is in Tanzania. Reports were received in early 1976 of torture and ill-treatment of suspects by the police when investigating a series of murders which had occurred in 1974 and 1975 in the Mwanza and Shinyanga areas. A Commission of Inquiry was appointed on President Nyerere's direction. When their findings were received, showing that maltreatment of prisoners had occurred, the resignations followed of two Cabinet Ministers, Mr. Peter Siyovelwa, Minister of State in the President's Office (responsible for security matters), and Mr. Ali Hassan Mwinyi, Minister for Home Affairs, as well as the Regional Commissioners of the two areas, Mr. Marco Mabawa and Mr. Peter Abdullah Kisumo. None of these four persons were in any way directly involved in the maltreatment of the suspects but their resignations were offered and accepted as they were ultimately responsible for the actions of junior police and other officials.

President Nyerere stated that he accepted the resignations "with a heavy heart" in order to establish the principle of political responsibility in Tanzania.

Turkey

The Bar Associations in Turkey have been taking a strong and courageous stand in support of the principles of the Rule of Law.

One-day boycott

On 4 March 1977 a nation-wide one-day boycott of the courts was organised by the profession to protest against the practice of the government authorities of failing to execute orders of the courts. The resolution of the General Assembly of the Turkish Bar Association referred to the obstruction of justice and constitutionally protected rights caused by this practice, as well as the indignity to the judiciary and the legal profession. The resolution declared that the right to seek justice in the courts loses all meaning if the executive is free to decide whether to enforce a judicial order, and this can lead to the moral bankruptcy of the state.

The boycott was well supported. For example, in Istanbul of the 1,300 cases listed for that day, only 8 were heard.

Law Reform Committees

There is considerable concern within the profession at the failure to repeal numerous laws which are opposed to all concepts of democracy. Reference was made to many of these laws in the ICJ study published in Review No. 10 (June 1973).

The Turkish Bar Association has set up 11 committees to carry out studies in depth of, respectively:

- unconstitutional amendments made to the 1961 Constitution;
- legislation concerning the investigation of criminal cases;
- legislation on administrative law;
- police legislation;
- legislative on freedom of association;
- social security provisions;
- press laws;
- laws relating to teaching and education;
- laws relating to professional associations;
- provisions relating to private law;
- provisions relating to tax law.

These committees are composed of both practicing and academic lawyers.

Attacks on lawyers

The increase in attacks, both physical and verbal, against advocates in Istanbul has made it necessary for the profession to take measures of self-defence. The Bar Association has set up Liaison Committees at the High Court in order to be able to make immediate on the spot investigations in the case of such attacks, to receive complaints and to refer the matters to the competent authorities. These committees have been in operation since the beginning of March.

Attacks on teachers

Similar attacks on members of the teaching profession has led the Istanbul Bar Association to create a Council to enquire into the causes of violence against teachers, and a public appeal for information has met with a considerable response.

Attacks on the press

Attacks, reminiscent of Nazi methods, have been made on the liberal press, including the public burning of newspapers and physical attacks on journalists. The Istanbul Bar Association has proposed joint action to the Turkish journalists' and authors' trade unions in defence of their constitutional rights.

Bringing torturers to trial

At a meeting organised jointly by a number of organisations, attention was drawn to the need to bring to trial all those who had tortured political prisoners and suspects. The representative of the Istanbul Bar Association, Mr Demir Ozlü, stressed the importance of enforcing the rule that suspects should not remain in police custody for longer than 24 hours, and stated that the responsibility for carrying out the preliminary investigation should no longer be left to the police authorities, but should be returned to investigating magistrates.

Commentaries

The Helsinki Accord

The Final Act of the Helsinki Conference on Security Cooperation in Europe is a comprehensive and varied code for the improvement of security and cooperation between East and West in Europe. The Parties to it are all the States of Europe, except Albania, and the United States and Canada. While it is still too early to assess what the results of the Final Act will be, it has already proved to be a powerful instrument for raising the subject of the observance of human rights to the forefront of foreign policy.

The legal effect

Some of the expectations raised about the implementation of human rights may be ill-founded. The term "Final Act" itself has no precise meaning in law. It is certainly not a treaty or pact with binding obligations placed on the States Parties. It is essentially a statement of principles for the guidance of inter-state relations, a statement of intent. Despite the argument that it is tantamount to a legal instrument or that it constitutes a "sui generis" set of legal standards, it is in truth a political rather than a legal document.

The text of the final act includes in the "first basket" a series of ten cardinal principles which the participating States have resolved to respect and observe; sovereign equality, the avoidance of force, the inviolability of frontiers, territorial integrity, the peaceful settlement of disputes, non-intervention in the internal affairs of others, respect for human rights and fundamental freedoms, equal rights and self-determination of peoples, cooperation among states and the fulfilment in good faith of obligations under international law. It should be noted that the formulation of the principle of non-intervention is in stronger terms than in Article 2(7) of the UN Charter. It states that the Parties shall refrain from all intervention, direct or indirect, individual or collective, in internal or external matters within the domestic jurisdiction of another state party. Unlike the Charter it is not confined to matters "essentially" within the domestic jurisdiction. Principle 7 constitutes the general expression of the intentions of the parties with regard to the observance of human rights. It specifies that "the participating states *will respect* human rights and fundamental freedoms, including the freedom of thought, conscience and religion or belief"; "*confirm* the right of the individual to know and act upon his rights and duties in this field"; and "*will promote and encourage* the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development". It further adds that the participating states will act in conformity with the purposes and principles of the UN Charter and the Universal Declaration of Human Rights, as well as reaffirming their obligations such as are pronounced in inter-

national agreements and declarations including international covenants relative to human rights by which they may be bound.

"Basket Three"

The celebrated "third basket" on "Cooperation in humanitarian and other fields" is not a general statement of principles. It deals with some particular aspects of human rights, notably the free circulation of persons and the free diffusion of information. It contains provisions relating to contacts and regular meetings on the basis of family ties, reunification of families, marriage between citizens of different states, travel for personal or professional reasons; improvement of the circulation of, access to and exchange of information; cooperation in the field of information, and improvement of working conditions for journalists. The actual terms of these provisions are not particularly far-reaching. The provision regarding contacts on the basis of family ties declares that the participating states will "favourably consider" applications for travel for the purpose of allowing persons to enter or leave their territory temporarily, or on a regular basis if desired, in order to visit members of their families. It also provides that the processing of documents and visas in urgent cases such as a serious illness or death will be given priority. Regarding the reunification of families, the provision is that the participating states will deal in a "positive and humanitarian spirit" with applications of persons who wish to be reunited with members of their families, with special attention being given to requests of an urgent character. In both cases, the states confirm that the presentation of an application for a visa will not affect the rights and obligations of the applicant or of members of his family. The States Parties have not accepted an obligation to fulfil these provisions; they have merely declared themselves ready to take measures "which they consider appropriate".

Reactions in Eastern Europe

It is from this rather limited and cautious text, legally unenforceable, that the 'spirit of Helsinki' has arisen as a watch-word of the respect for human rights. In the Eastern European view, any observance of or cooperation regarding Principle 7 or the Third Basket provisions must take place within the framework of the laws and administrative regulations of each participating state. Above all, the principle of non-intervention in other countries' domestic affairs is considered to be of primary importance.

The official publication of the full text of the Final Act on a wide scale in Eastern Europe (far wider than that in the west) has resulted in a wave of human rights activity in Eastern Europe. Monitoring committees have been organised in the Soviet Union (all of whose members have been arrested), in Poland (as a sequel to the Workers' Defence Committee) and in Czechoslovakia, and sympathy has been expressed for their aims in Yugoslavia and Rumania. A rise in the number of

applications for emigration, and an increasing number of appeals for the observance of the principles of Helsinki in Eastern and Western Europe have resulted in increased pressure on the eastern european governments as they prepare to come to the review conference in Belgrade.

Of these human right groups in Eastern Europe calling for implementation of the Helsinki accord, the one which has made the biggest impact both internally and internationally is Charter 77, in Czechoslovakia. The Charter refers to the texts signed by the Czechoslovak government and now incorporated into Czechoslovak domestic law, specifically to portions of the International Covenants on Civil and Political and on Economic, Social and Cultural Rights. In restrained language the Charter calls for the observance of Czechoslovak law by the government, particularly in the areas of freedom of information and non-discrimination against those who have expressed their religious belief or political opinion. Its more than five hundred signatories include the late Dr Jan Patocka, Dr Vaclav Havel, Prof. Jiri Hajek, Pavel Kohout, Jiri Lederer, Frantisek Pavlicek, Ludvik Vaculik, Otto Ornest and many others who, as a result of their support for the Charter have been subjected to arrest, repeated searches and questioning, loss of employment, and various forms of official harassment, including an official press campaign in which they were denounced as "traitors and renegades" acting on the orders of anti-communist and Zionist headquarters.

The Czechoslovak view of Charter 77

A press release issued by Czechoslovak embassies abroad commenting upon Charter 77 is revealing in showing the gulf between eastern and western concepts of human rights. The comments begin by chiding the authors of Charter 77 with not having mentioned the right to work and the right to free medical care and security in old age and disability, which it suggests do not exist in capitalist countries. This seems ironic when 80 of those who signed Charter 77 are reported to have been dismissed from their work on that account. Later in the press release it is said that allegations of discrimination against scientific and cultural workers are "lies". It claims that those who parted politically with the Party can hold normal civil jobs, and says "a different thing, of course, is when someone breaks Czechoslovak laws and organises anti state activity". None of the Charter 77 signatories have been charged with any offence, or if charged have been brought to trial.

On the issue of freedom of speech it is said that every day in hundreds of thousand of meetings, citizens meet to express their views on various questions of social life. But, it is added, "Ours is a class concept of freedom, and we shall not permit free speech to be abused against the interests of the working people, for denigrating and disrupting our society, as is being done by the authors of Charter 77".

On freedom of movement, figures of 6.7 million trips abroad and 13 million foreign visitors are given. On emigration of citizens to capitalist countries it is claimed that "we also observe international conventions.

Just as any other country we, too, do not want specialists whom the state has enabled to obtain education free of charge, to be leaving the country". It would be interesting to know under what international convention this restriction is justified. Article 12 of the International Covenant on Civil and Political Rights proclaims that "every one shall be free to leave any country, including his own". The only restrictions recognised are those provided by law and necessary to protect "national security, *ordre public*, public health or morals or the rights and freedoms of others".

Finally, the statement complains that the authors of Charter 77 "demagogically manipulate quotations from international pacts . . . keeping silent on the fact that these pacts presuppose respect for internal legislation and the sovereign rights of every state concerned". The suggestion here is that the rights in the International Covenant on Civil and Political Rights are to be available to citizens only in so far as they do not come into conflict with national legislation or the sovereign rights of the state. In fact, the contrary is the case. Under Article 2 (2) each State Party "undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such legislative or other measure as may be necessary to give effect to the rights recognised in the present covenant".

All of this has resulted in a great deal of publicity throughout Europe, not only on the treatment of dissidents, but on the content of the Helsinki accord. The Final Act has consequently proved to be a focus of human rights activity in Europe more effective than the recent entry into force of the Covenants.

Forced adoptions

Very many individual cases have been taken up with the Soviet authorities by parliamentarians and organisations in the west, particularly in relation to freedom of travel to visit relatives and to the reunification of families. It is clear from an examination of these cases that there is as yet no agreement about the scope of the phrase 'reunification of families'. How far does the concept extend? Even 'reunification' raises questions, as when engaged couples are kept separated.

Many of these cases have been brought to the attention of the International Commission of Jurists and some of them have been taken up with the authorities concerned. One practice which has developed in the German Democratic Republic seems to be indefensible on any basis, and it is to be hoped that it will be raised at Belgrade. This is the forced adoption of the children of parents who have attempted to flee to the west.

Diplomatic Conference on Territorial Asylum

The Universal Declaration of Human Rights states that "everyone has the right to seek and to enjoy in other countries asylum from persecution". An earlier draft provided for a right to "seek and be granted" asylum, but this was amended to make clear that the grant of asylum was the sovereign right of the state to be exercised at its discretion, not a subjective right of the individual. States were unwilling to accept an obligation to open their borders in advance to an unascertainable and possibly large number of refugees, some of whom might pose dangers to their national security.

Since then a number of states have created in their domestic legislation a right for certain classes of refugees to be granted asylum. In international law, however, asylum remains a matter of discretion, though greater protection of refugees has developed through widespread acceptance of the principle of *non-refoulement*.

The 1951 Convention relating to the Status of Refugees contains a provision stating that

No Contracting State will expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It is to be noted that the Contracting State is not required to grant the refugee asylum in these cases. It may require him to move on to another country. This country in turn may refuse him asylum, resulting in the problem known as "refugees in orbit".

The 1951 Convention has been ratified by 70 States, but subject in many cases to geographical limitations restricting its effect to refugees from Europe. There is also a serious ambiguity as to the effect of the *non-refoulement* article. Some states interpret "in any manner whatsoever" to include a duty to admit at the frontier a refugee facing persecution; others do not, applying the principle only to those who have already gained admission to their territory, either lawfully or unlawfully. This has produced the curious situation that a refugee entering a state illegally is sometimes treated more favourably than one who has presented himself at the frontier asking for lawful admission.

As the attempts in the early 1950's to include an article on asylum in the International Covenants on Human Rights were unsuccessful, René Cassin in 1957 introduced a Draft Declaration on the Right of Asylum to the UN Human Rights Commission, which contained a resolution of the *non-refoulement* controversy in favour of non-rejection at the frontier. This Draft formed the basis of the General Assembly Declaration on Territorial Asylum, unanimously adopted in 1967, which states:

No person shall be subjected to measures such as rejection at the frontier or if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.

Similar formulations are to be found in resolutions of the Asian-African Consultative Committee in 1966 and of the 1968 Teheran Conference on Human Rights; in the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa, 1969; and in the Inter-American Convention on Human Rights.

In spite of this widespread support for the principle, there was no universal legally binding instrument containing an unambiguous statement of *non-refoulement* which included the right to admission at the frontier. Accordingly, an initiative developed, having the support of the UN High Commissioner for Refugees, to prepare such a convention. A group of independent experts, convened at Bellagio in Italy in 1971 under the auspices of the Carnegie Endowment for Peace, prepared a Draft Convention (known as the Bellagio Draft) which was completed at a meeting in Geneva in 1972. A conference of governmental experts reviewed the Bellagio Draft in 1975, and made a substantial number of changes which resulted in the text known as the Experts' Draft. Following this, the General Assembly decided that a Conference of Plenipotentiaries should be convened to "consider and adopt" a convention on territorial asylum. This met in Geneva from 10 January to 4 February 1977. Although the Conference failed to complete its mandate, a brief description of its work may be of some interest.

If the Conference was to complete its work in the four weeks allotted to it, despatch and cooperation were called for. Unfortunately the 92 participating nations spent almost a week discussing the rules of procedure, the composition of the drafting committee and the election of vice-presidents. Disagreements, accompanied by some sharp exchanges, arose between delegations before discussion of any substantive matters. When the question arose of admitting non-governmental organisations (NGO's) as Observers, some delegations sought to exclude them altogether. Eventually a somewhat unsatisfactory compromise was reached, by which NGO's were allowed to attend the meetings, to receive and submit documentation, but not to address the Conference and not to be recognized officially as "participants". In view of the very great contribution made by NGO's in this field, including their active participation in previous diplomatic conferences on the subject, this decision was a further indication of the unhappy atmosphere which prevailed. A large number of NGO's had, in fact, prepared a detailed and expert memorandum commenting upon the Bellagio and Experts' Drafts and putting forward another draft containing many new suggestions for strengthening the draft convention. This NGO Draft was circulated to governments and, as will be seen, some of its proposals were adopted by the Conference.

The Conference examined the Experts' Draft in a Committee of the Whole. The Committee approved and forwarded to the Drafting Committee five articles. Three of them, of paramount importance, relate to the grant of asylum, the category of persons eligible for protection, and *non-refoulement*. While many decisions on important amendments were taken by very narrow majorities, at times with almost a third of the Committee abstaining, the articles as finally approved generally enjoyed broad support. The text of the five articles is as follows

Article 1

Grant of Asylum

Each Contracting State, acting in the exercise of its sovereign rights, shall endeavour in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention.

Asylum should not be refused by a Contracting State solely on the ground that it could be sought from another State. Where it appears that a person before requesting asylum from a Contracting State has established a connection or already has close links with another State, the Contracting State may, if it appears fair and reasonable, require him first to request asylum from that State.

Article 2

Application

1. Each Contracting State may grant the benefits of this Convention to a person seeking asylum, if he, being faced with a definite possibility of:

- (a) Persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and *apartheid*, foreign occupation, alien domination and all forms of racism; or
- (b) Prosecution or punishment for reasons directly related to the persecution as set forth in (a);

is unable or unwilling to return to the country of his nationality, or, if, he has no nationality, the country of his former domicile or habitual residence.

2. The provisions of paragraph 1 of this article shall not apply to any person with respect to whom there are serious reasons for considering that he is still liable to prosecution or punishment for:

- (a) A crime against peace, a war crime, or a crime against humanity as defined in the international instruments drawn up to make provision in respect of such crimes; or
- (a *bis*) Other grave crimes as defined in multilateral conventions to which a Contracting State in which he is seeking asylum is a party; or
- (b) An offence which would be a serious criminal offence if committed in the Contracting State from which asylum is requested;
- (c) Acts contrary to the Purposes and Principles of the United Nations.

3. The provisions of paragraph 1 of this article shall also not apply to any person requesting territorial asylum for purely economic reasons.

3 bis. The provisions of paragraph 1 of this article shall not apply to any person whom there are serious reasons for regarding as a threat or danger to the security of the country in which he is seeking asylum.

Article 3

Non-refoulement

1. No person eligible for the benefits of this Convention in accordance with article 2, paragraph 1, sub-paragraphs (a) and (b), who is at the frontier seeking asylum or in the territory of a Contracting State shall be subjected by such a Contracting State to measures such as rejection at the frontier, return or expulsion, which would compel him to remain in or return to a territory with respect to which he has a well-founded fear of persecution, prosecution or punishment for any of the reasons stated in Article 2.

2. The benefit of the present provision, however, may not be claimed by a person whom there are reasons for regarding as a danger to the security of the country in which he is, or who, being still liable to prosecution or punishment for, or having been convicted by a final judgement of, a particularly serious crime, constitutes a danger to the community in that country or in exceptional

cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State.

3. Where a Contracting State decides that an exception should be made on the basis of the preceding paragraph, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity of going to another State.

New Article (untitled)

1. A person enjoying the benefits of this Convention shall comply with the laws and regulations of the country granting asylum.

2. To the extent to which it is possible under their law, Contracting States granting asylum shall not permit persons enjoying the benefits of this Convention to engage in activities contrary to the Purposes and Principles of the United Nations as set forth in the Charter.

Family Reunification

Each Contracting State shall, in the interest of family reunification and for humanitarian reasons, facilitate the admission to its territory of the spouse and the minor or dependent children of any person to whom it has granted the benefits of this Convention.

These Members of the family should, save in exceptional circumstances, be given the same benefits under this Convention as that person.

Article 1 in the Experts Draft proposed that "each Contracting State . . . shall use its best endeavours in a humanitarian spirit to grant asylum . . .". An amendment by the German Federal Republic to create a subjective right to be granted asylum was rejected by 53 votes to 4 with 21 abstentions. This was the major proposal in the NGO Draft. By contrast, the Committee by a narrow majority (31-29 with 18 abstentions) adopted a Jordanian amendment changing the words "shall use its best endeavours" to "shall endeavour". Views differed as to whether this amendment made any real difference and, if so, whether it weakened or, as some suggested, even strengthened the duty upon the States.

The second paragraph providing that "asylum shall not be refused . . . solely on the ground that it could be sought from another State", was adopted upon the understanding that its final place in the Convention would be left to the Drafting Committee. This paragraph is derived, with little alteration, from the NGO Draft. It is designed to meet the problem of the refugee "in orbit", and is a most important addition to the text. It goes beyond a purely negative duty of *non-refoulement* and recognises that a concerted effort should be made to end the distressing cases of refugees in orbit. To this end, a higher obligation, albeit still a moral one, is recognised to lie with the country with which the refugee has already established a connection or close links. Failing a grant of asylum there, this obligation then falls upon the state in whose territory he is.

The text of article 2 is confusing. Numerous amendments were introduced designed, it would seem, to meet the sensibilities of states rather than the need to give protection to refugees. Some of them call into question the whole future of this Convention.

The opening words, as amended, disregard the purpose of the article, which is to deal with "application", i.e. to define the class of persons

eligible for the benefits of the Convention. Instead, the opening words now assert the discretionary nature of the grant of *all* benefits under the Convention (not merely the grant of asylum) in such a way as to produce a text which appears to create no binding obligation at all upon the State Parties.

The replacement of the Experts' words "if he, owing to a well-founded fear of" persecution, by the words "being faced with a definite possibility of" is clearly intended to be more restrictive, and throws a heavier burden of proof on the asylum seeker.

Paragraph 2 (b) resolves the difficult problem of the political offender who has committed a serious criminal offence for political motives, and does so entirely to the disadvantage of the asylum seeker. It would seem, for example, that a person who as a political offender would not be eligible for extradition, may nevertheless be disentitled to the benefit of *non-refoulement*.

Paragraph 3 seems unnecessary as a person seeking asylum "for purely economic reasons" is not a person fleeing from persecution.

Paragraph 3 bis again reduces severely the possible protection of the Convention. A refugee who for geographical reasons is compelled to flee to a country which is generally sympathetic to the regime from which he is fleeing, is often able in practice, owing to the principle of *non-refoulement*, to obtain transit to a third country where he will not be regarded as a danger to security. The words of this paragraph could well be used to deprive a refugee of this protection.

One of the amendments to Article 2 derives from the NGO Draft. This is the insertion of the word 'kinship' in paragraph 1(a). It is of some importance, as the practice is increasing of persecuting persons simply because they belong to the family of a security suspect.

The text of Article 3 (*non-refoulement*) is more promising and marks an advance on the Experts' Draft on the crucial issue of non-rejection at the frontier. The governmental experts had proposed a duty upon states not to return a person within their territory to a country where he might face persecution, but required the states only "to use their best endeavours" not to reject such refugees at the frontier. At the Conference a Soviet proposal to delete any reference to frontier situations was rapidly rejected, as was the formulation in the Experts' draft. The wording then adopted in paragraph 1 followed closely the 1967 declaration. It also restored the wording "a well-founded fear" of persecution, prosecution or punishment, which had been deleted from Article 2. These changes go a long way towards the NGO proposals.

However, in paragraph 2 the Committee went on to repeat the exclusions which had been written into Article 2 of persons regarded as a danger to security, or persons liable to punishment for or convicted of a 'particularly serious crime' who constitute a danger to the receiving state, as well as an exclusion in the case of a massive influx of refugees who represent a serious problem to its security.

In this Article the harshness of these provisions, and the serious derogations to the principle of *non-refoulement* which they entail, is recognised in the third paragraph. This says that where a Contracting State considers that the benefit of the article should be denied under

paragraph 2, "it shall consider the possibility" of giving the person the opportunity of going to another state. This is some improvement on Article 2, but it is a confusing formulation; if a person is allowed to go to a third state, he is not denied the benefit of *non-refoulement* under paragraph 2.

There then follow two new articles. The first, which is untitled, provides that persons enjoying the benefits of the Convention shall comply with the laws and regulations of the country granting asylum and shall not be permitted to engage in activities contrary to the purposes and principles of the Charter.

The second is derived from a new article proposed in the NGO Draft. It says that the Contracting States shall assist family reunification by granting admission to the spouse and children of a person granted asylum or other benefits under the Convention, and that, in general, the spouse and children should enjoy the same benefits. When introduced by the Vatican and Colombia, this article was heavily attacked by East European delegates, and a threat was even made by the Soviet Union to leave the Conference if it was persisted in. After some amendment it was, however, adopted by 53 to 23 votes with 5 abstentions.

Articles in the Experts Draft which still remain to be considered include those dealing with provisional stay pending consideration of request, international solidarity, voluntary repatriation, cooperation with the UN, the peaceful character of asylum, and the right of qualification. The Conference has asked the General Assembly to "consider the question of convening at an appropriate time a further session of the Conference". Views differed as to when would be an appropriate time. Some hoped for an early second session; others felt a longer interval might result in the delegates meeting under more favourable auspices.

When the text has been approved in the Committee of the Whole, it will be considered again in plenary session. As a two-thirds majority of those present and voting will be required at that stage, the successful conclusion of this Conference of Plenipotentiaries cannot be taken for granted. Indeed, unless there is a substantial improvement in the atmosphere at a renewed session, it is doubtful whether the humanitarian purpose of aiding refugees would really be furthered by the conclusion of a Convention at this time.

UN Commission on Human Rights

The UN Commission on Human Rights met in Geneva for its 33rd session from 7 February to 11 March 1977. This 5-week session was notable for the amount of time spent in discussing matters of implementation, i.e. in considering situations where gross violations of human rights are alleged.

These matters are dealt with by the Commission in two ways, which will be familiar to regular readers of this Review. First, there are situations which are discussed openly and publicly following a decision of the Commission to set up a Committee or Working Group to study a particular situation. There have for some years been three such studies which are reported on annually to the Commission, namely those on the racist regimes of Southern Africa, the occupied territories in the Middle East, and Chile. Secondly, there are situations which are referred to the Commission under the confidential Resolution 1503 procedure by the Sub-Commission, after it has, with the help of its working group, examined the thousands of 'communications' received each year by the Secretary-General complaining of violations of human rights.

The discussions under these two procedures occupied about two-thirds of the time of the Commission, with the result that several other items on the Agenda received either no or scant attention this year. This raises again a question discussed in ICJ Review No. 16, June 1976, which will surely have to be faced before long, namely how the work of the Commission should be organised, possibly with two sessions a year, so as to enable it to meet more fully the demands made upon it.

Resolution 1503 procedure

It had been expected that an attack would be made this year against the Resolution 1503 procedure particularly by the Eastern European countries. The Soviet Union has always been opposed to this procedure. It accepts that "situations of gross violations of human rights" are proper matters of international concern, but argues that such situations, where they exist, are self-evident, and that no communications procedure is required in order to identify them. Now it seeks to reinforce this argument alleging that there is duplication between the Resolution 1503 procedure and the new procedure for referring 'communications' to the Human Rights Committee established under the International Covenant on Civil and Political Rights. This argument comes strangely from the Soviet delegates, since none of the Soviet Socialist countries has ratified the Optional Protocol which makes a country subject to this new procedure. In any event, the argument is fallacious, since there is a clear distinction between the two procedures. The new Human Rights Committee is able to consider only individual complaints by victims. The Human Rights Commission is not concerned with individual complaints. It can only consider *situations* of gross violations of human rights, whether revealed in communications from individuals or, as tends to happen more often, in communications

from non-governmental organisations (NGOs) containing detailed and systematic studies of particular situations. The delegate of the USSR did raise this issue at an early stage in the Commission's discussions and called for a review of the 1503 procedure and the establishment of a "unified, standard procedure" for examination of human rights violations. Apart from other East European delegates, no-one responded to the suggestion and nothing further was heard of it.

A number of encouraging procedural advances were made this year when the Resolution 1503 cases were considered. The Commission agreed to the request made by the Sub-Commission that the Chairman of the Sub-Commission's Working Group on Communications, Mr. Kofi Sekyiamah (Ghana), should be allowed to attend the confidential sessions of the Commission. This should ensure a better understanding and cooperation between the Commission and Sub-Commission, and it is to be hoped that it will become a regular practice. It is understood that this year the Commission also decided to receive and consider recent communications relating to situations referred by the Sub-Commission, so that the most up-to-date information is available to them. This made it unnecessary to raise again last year's United States resolution on this point (see ICJ Review No. 16, June 1976, at p. 26).

The Sub-Commission was criticised by East European delegates for having raised in a public resolution the Uganda situation which it had also referred under the 1503 procedure, and suggested that this was an abuse of the confidentiality of that procedure. This protest, incidentally, confirmed the fact that the Uganda situation had been referred to the Commission. This was based on a communication from the International Commission of Jurists*. The Uganda situation occupied a very substantial part of the time devoted to communications, which seems to indicate that the Commission came nearer than they have done on any previous issue to ordering a "thorough study". In the event, as was disclosed by the British Foreign Secretary to the House of Commons, the Commission eventually decided to "keep the matter under review", i.e. to defer it to next year. It appears that the same decision was reached with regard to the other situations referred to it. It is perhaps noteworthy that the Ugandan Minister of Justice, who represented his government at the Commission for this item, has not returned to Uganda and is reported to have applied for and been granted asylum in the United Kingdom, as has the Minister of Health after attending a meeting of the World Health Organisation.

Middle East

The violation of human rights in the occupied territories of the Middle East was again vigorously, and at times bitterly, debated (the Syrian delegate at one point referred to atrocity as "congenital to the Jewish mind"). A telegram was sent to the government of Israel expressing concern as to prison conditions and the fate of Arab detainees in the occupied territories. On the strength of the report of the

* This and the four previous communications on Uganda submitted by the ICJ to the United Nations were published in May 1977 (see back cover).

Ad-Hoc Working Group, a resolution was passed denouncing practices in the occupied territories, particularly the destruction of homes, the shifting of populations, the founding of new settlements, mass arrests and the torture and ill-treatment of detainees. The resolution further called for the application of the Fourth Geneva Convention to the civilian population and the accordance of prisoner of war status to political prisoners. The UN Secretary-General was requested to collect all relevant information concerning detainees, to make a list of political detainees and to make this information available to the Commission next year. The Commission also decided to amend the title of the item by adding the words "including Palestine", though no definition was given to this term.

Southern Africa

In the light of developments in US foreign policy the Commission was able this year to reach agreement on the question of South Africa. One resolution was adopted unanimously and another with no votes against. Of particular interest was a request to the Working Group to make inquiries about individuals guilty of the crime of *apartheid* or other serious violations of human rights in Namibia, and a request to the Sub-Commission to prepare a provisional list of individuals, public and private institutions, and representatives of states whose activities constitute assistance to the colonial and racist regimes of Southern Africa. The Commission also denounced arms sales, nuclear cooperation agreements and the economic activities of national and multi-national companies in Southern Africa as 'blatant acts of complicity in the crime of *apartheid* (a crime against humanity)'.

Chile

The discussion on Chile centred on the well-documented report of the *ad hoc* Working Group. This report, like that of the Working Group on Southern Africa, relied heavily upon evidence submitted by various NGOs, including the International Commission of Jurists. Major points of the report were the continued maintenance of a state of siege and a government based on emergency powers, the responsibility of the judiciary for the lack of protection of human rights with particular reference to such legal remedies as *amparo*, and the disappearance of arrested persons. The last appeared to the Working Group to be the result of a move by the DINA to frustrate attempts to supervise their interrogation procedures. During the discussion, reference was made to the similarity of certain features of the Chilean regime (torture, disappearances and assassination) to those of other regimes in the region. The Commission requested the Sub-Commission to study the consequences for the enjoyment of human rights of the various forms of aid extended to Chile.

In the general debate on gross violations of human rights a number of NGOs presented in their names some distinguished witnesses to make oral interventions concerning violations alleged to be occurring in their

countries, in particular in Chile and Argentina. This led to a protest by Argentina at the Social Committee of the United Nations in New York that such interventions lacked the objectivity which is to be expected from NGO interventions. This practice arose some years ago when Mrs Allende made a well-received intervention before the Commission in New York. However, on this occasion, the Argentine protest received support, in particular from Eastern European and Latin American delegates, and there would appear to be some force in the objection.

Economic, Social and Cultural Rights

Among other subjects discussed were economic, social and cultural rights, during which the ICJ Secretary-General made an intervention on the inter-dependence of these and civil and political rights, and further promotion and encouragement of human rights, in which it was decided that the 30th Anniversary of the Universal Declaration in 1978 should be the occasion of special efforts in the field of education.

Some small progress was made on the Draft Declaration on Religious Intolerance, and a UK resolution was adopted requesting the Sub-Commission to study, with a view to formulating guidelines, the question of the protection of those detained on grounds of mental health. This makes it probable that this important question will be excluded from the Sub-Commission's Draft Body of Principles for the Protection of Persons in *All* Forms of Detention and Imprisonment. Unfortunately there was not time to discuss the Sub-Commission's request for authority to establish a Working Group to examine material submitted on the violations of human rights of detainees. Other items postponed included conscientious objection to military service, the legal rights of aliens, and terrorism.

New USSR Draft Constitution

After sixteen years of preparation, the draft of a new Constitution for the USSR was published in June 1977. When approved next autumn by the Supreme Soviet, it will replace the Stalin Constitution of 1936. A long document containing 173 articles, it defines the structure and distribution of State authority, providing for a significantly strengthened role of the Communist Party of the Soviet Union (CPSU). It also sets out general statements of the political, social and economic goals of the "developed socialist society" which it proclaims. It is thus a political manifesto stating the aims and principles of the socialist state, as well as a constitutional text defining the powers of the different state organs.

The fact that it has taken so long to reach agreement on its terms is an indication of the intensive debates which must have taken place within the Party in its formulation. The significance of the document lies not so much in the legal rights and divisions of power which it proclaims, since they are ultimately dependent for their realisation on the attitude and consent of the Party. Rather it lies in the developments and changes it indicates in the thinking within the Party.

An increased recognition in the Constitution of this primacy of the Party is found in the new Article 6 which says that "the CPSU is the leading and guiding force of the Soviet Union and the nucleus of its political system". (The formulation in the previous constitution was "the most active and politically conscious citizens unite in the CPSU which is the vanguard of the working people . . . and the leading core of all organisations"). The responsibility of the Party for determining policy is clearly laid down in the same article: "the Communist Party shall determine the general perspective of society's development, and the guidelines of the internal and external policy of the USSR". The Party itself remains an elitist party. It is not a mass party open to all those who state their support for its principles. It is perhaps of interest that the phrase "the dictatorship of the proletariat" has been dropped, presumably on the grounds that it has "fulfilled its tasks". The new preamble declares that "the Soviet State has become a state of the whole people".

After the preamble, the first section describes the principles underlying the social, political and economic structure. The state is to function in accordance with "the principle of democratic centralism: electivity of all organs of the state power from top to bottom (and) their accountability to the people". It is to "function on the basis of socialist legality and assure the protection of law and order, the interests of society and the rights of citizens".

The second section is called "the State and the Individual", a term which is not to be found in the former Constitution. It proclaims equality before the law, without discrimination of any kind, and sets out in 35 articles the basic rights, freedoms and duties of citizens. The economic, social and cultural rights are set out first, including "the right to work, that is, the guaranteed employment and remuneration for their work in accordance with its quantity and quality", the right to health protection and security in old age and sickness, and two new rights, the right to housing with "low rent", and protection of the family by

community services, allowances and benefits. Among the civil and political rights proclaimed are freedom of conscience, speech, press, assembly, meetings, street processions and demonstrations. "Exercise of these political freedoms shall be ensured by putting at the disposal of *the working people and their organisations* public buildings, streets and squares, by broad dissemination of information, and the opportunity for using the press, television and radio" (emphasis added). Thus, in spite of the heading "the State and the Individual", these political rights are seen as group rights rather than as individual rights.

All these rights are subject to the catch-all qualification in article 39 that "Exercise by citizens of rights and freedoms must not injure the interests of society and the state and the rights of other citizens". The interests of society and the state, as determined by the Party and, under its guidance, by the courts, remain supreme. This is the answer to those individuals or groups who seek to demonstrate against what they consider oppressive policies or to distribute non-conformist ideas in *Samizdat* literature.

Citizens of other countries and stateless persons are guaranteed "the rights and freedoms provided by law, including the rights to initiate proceedings in law courts and other state organs in protection of their rights" (Article 37). Article 38 states that the USSR "shall afford the right of asylum to foreign nationalities persecuted for upholding the interests of the working people and the cause of peace, or for participating in a revolutionary or national liberation movement, or for progressive social, political, scientific or some other creative activity".

A duty of "respect for the individual, protection of the rights and freedoms of Soviet citizens" is imposed on all state organs, public organisations and individuals (Article 57). Among the duties of citizens are the duty to work conscientiously and to observe labour and production discipline, to combat theft and dissipation of state and public property, to safeguard the interests of the state, to defend the motherland, including by military service, to respect the rights and lawful interests of others, to be intolerant of anti-social behaviour and to contribute in every way to the maintenance of public order, to bring up their children to be worthy members of the socialist society, and to protect nature and its riches, as well as historical monuments and other cultural values.

Perhaps one of the more significant additions appears in articles 49 and 58. Article 49 grants to every citizen the right to "submit to state organs and public organisations proposals for improving their activity, to criticise shortcomings in their work" and to have their proposals and requests examined by officials and replied to. "Persecution for criticisms shall be prohibited". Article 58 says that citizens shall have the right to lodge complaints against actions of officials in state and public organisations. These complaints are to be examined and actions by officials in violation of the law and in excess of their powers "may be referred to a court of law in the manner defined by law". This appears to give the right to bring proceedings, as before, to the Prosecutor-General of the USSR or his assistants rather than to the complainant. If the complainant has suffered damage from such violations, he is to be compensated.

The third section deals with "the State and National Structure of the USSR". It defines the Soviet Union as "an integral, federal, multinational state formed on the basis of the free self-determination of nations and the voluntary union of equal Soviet socialist republics", a definition which perpetuates much of the soviet mythology. Once again the supposed right of every union republic "freely to secede from the USSR" is solemnly proclaimed, notwithstanding that anyone who dared to suggest that this right should be exercised would receive a severe sentence for anti-soviet activities. Indeed, most of the estimated 12,000 political prisoners in the USSR are believed to be activists of the various national minorities. This 'right to secede' is presumably retained because its removal would impliedly call into question the voluntary nature of the Soviet Union.

In this section the powers of the Union and of the constituent soviet socialist republics and autonomous regions and areas are defined. The Soviet Union is not, of course, a federal state as that term is understood under other legal systems. Laws are never challenged in the courts on the grounds that they are outside the law making powers of the Supreme Soviet. All powers lies with the Union. The Union republics enjoy only such powers as are granted to them by the Union. This is made clear in Article 72 which states that "the jurisdiction of the Soviet Union . . . shall extend to . . . (3) Definition of general principles of the organisation and functioning of republican and local organs of state power and administration: (4) Establishment of uniformity of legislative regulations throughout the territory of the USSR and definition of the principles of legislation of the Union . . . and the Union republics". If there is any conflict between Union laws and republic laws, the laws of the Union are to prevail (Article 73). There is also a striking provision in Article 119 defining the powers of the Presidium of the Supreme Soviet of the Union. This is the power in paragraph (4) to "interpret the laws of the USSR", a function usually left under other systems to the courts or a council of state.

The supremacy of the Party in the matter of elections to the Supreme Soviet (i.e. the Parliament) of the Union is maintained. Although much emphasis is laid on the elections being by "universal, equal and direct suffrage by secret ballot" (Articles 94-98), the electorate in practice is offered no choice. Only one candidate is nominated for each constituency and the right to nominate candidates is confined to the Communist Party and other public organisations such as trade unions, the young communist league and the cooperatives of which, as article 6 states, the communist party is the leading and guiding force and nucleus. The effect of this is that the right to vote is effectively restricted to members of the Communist Party and the other organisations which it "guides". This contrasts with the practice in other one-party states, such as Tanzania and Zambia, where several candidates, locally nominated and receiving the approval of the Party, are offered to the electorate.

The existing machinery of government remains, with a division of functions between the Presidium of the Supreme Soviet, responsible for major policy decisions, and the Council of Ministers, described as "The Government of the USSR", which is "the highest executive and administrative organ of state power".

There is a significant change in the composition of the Presidium by the addition of a First Vice-President taking precedence over the 15 Vice-Presidents from the Union Republics. This was to pave the way for the election of Mr. Brezhnev, Secretary-General of the Party, as President of the Presidium, and thereby head of state. A deputy would then be required to assist him in carrying out some of the functions of this office. This change is a further indication of the consolidation of the role of the Party.

The last section deals with Justice, Arbitration and Prosecutor's Supervision. Justice is to be administered exclusively by courts of law. All judges and people's assessors are to be elected, those of district (city) people's courts by 'universal, equal and direct suffrage by secret ballot', those of higher courts by the people's deputies. On the all-important question of the right to nominate them, the constitution is silent. As they are elected for periods of $2\frac{1}{2}$ years (district courts) or 5 years (higher courts), the right to nominate implies also the right to dismiss. All proceedings are to be held in public save in cases 'defined by law'. The defendant is guaranteed the right of defence, and 'in cases provided for by law' legal counsel to citizens shall be free of charge.

Economic disputes between organisations, institutions and enterprises are to be entrusted to state organs of arbitration.

"Supreme supervisory power over the precise and uniform exercise of laws" by all officials and citizens is exercised by the Prosecutor-General of the USSR and prosecutors subordinate to him. He is appointed by and accountable to the Supreme Soviet and he appoints not only his assistants, but also the Prosecutors-General of the republics, autonomous republics and regions. The functions of the Prosecutor-General include not only the conduct of criminal prosecutions but a general supervision of the execution of laws by all state and administrative organs. He is thus a kind of Ombudsman as well as a public prosecutor.

Taken as a whole the new Constitution is an impressive document, striking in the amplitude of the rights it proclaims. It is to be hoped that it will lead in practice to an increased enjoyment and protection of those rights.

HUMAN RIGHTS AND DEVELOPMENT AID

BY

J. P. PRONK, Netherlands Minister
for Development Cooperation*

Two hundred years ago, in 1776, the United States proclaimed its independence. The Declaration of Independence contains these stirring words: "We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new Government . . ."

The story goes that an American journalist once set out to discover how well known or otherwise this passage from the Declaration of Independence was. When it was read to a meeting of young people in the United States, 28 per cent of them thought it had been written by Lenin. The journalist then re-wrote the text in the form of a petition and asked 500 inhabitants of the state of Florida to sign it. Their reactions were revealing: some refused to put their names to what they considered a Communist pamphlet; others would have nothing to do with quasi-religious nonsense; yet others said that the police or the security service should be called in.

This story shows how the revolutionary enthusiasm contained in a document concerned with freedom or liberation quickly comes to be regarded as suspicious or dangerous. Similar considerations apply to the texts of the French Revolution, which proclaimed the ideals of liberty, equality and fraternity. And is it not a fact that the human rights documents of the United Nations, such as the Universal Declaration of Human Rights, grew out of a desire for a new and fairer society, in which individuals and peoples would not be enslaved and exploited, but instead develop in freedom and with responsibility and realise their just aspirations? There are clear parallels between the desire of peoples and individuals to achieve their freedom and independence two hundred years ago and today.

* This article is based on a speech to the Congress of Young People's Organisation for Freedom and Democracy in Rotterdam on April 3, 1976.

The ideals of freedom, and the statement in the American Declaration of Independence that "All men are created equal" did not prevent slavery continuing to exist for some considerable time: human rights evidently did not extend to black humans. And the French Revolutionary slogan, "liberty, equality, fraternity", applied only to a limited group of people. Even Chapter XI of the United Nations Charter of 1945, which concerned non-self-governing or colonial areas, contained no provision relating specifically to human rights: this omission was not made good until 1960, when the United Nations adopted the Declaration on the Granting of Independence to Colonial Peoples and Countries.

Universal Applicability

For many years — and one wonders to what extent this still applies — human rights were felt to be exclusive, the property of privileged groups of people, who were pleased to call themselves "civilised". We are living in times when more and more individuals and peoples are laying just claim to the fundamental human rights, which since the Second World War have been proclaimed as universally applicable, as inclusive rather than exclusive, as a demand from and a responsibility to the have-nots, the deprived and those who are discriminated against. These claims are made by individuals and groups within our own society; they are also made, vigorously, in the forums of the world community, by the countries, peoples and individuals of the third world.

In the declarations and treaties of the United Nations on human rights we now have available to us widely accepted definitions both of civil and political rights and of economic, social and cultural rights. The principle is universally endorsed that these rights extend to everyone, irrespective of race, language, religion, sex, age, social status, political views and so on. At the same time we must remember that in different countries and societies these rights may have a different emphasis and significance. The universality of human rights need not entail a process of mutual assimilation among societies — the people of developing countries, for example, are under no obligation to conform to our ideas: — but it is important that a situation should be created to enable individuals, groups and peoples to retain their own political, economic and social identity as they develop: we must bear in mind the socio-economic conditions and international political status of countries and peoples. Article 55 of the Charter of the United Nations places human rights in the framework of international economic and social cooperation: the achievement of these rights cannot be divorced from the social and economic context.

This means that these rights will differ in stress and substance depending on the stage of social and economic development reached. This can be illustrated if we look at one of the most fundamental rights, the right to life. In western societies this right is linked principally to such vital questions as the death penalty, abortion and euthanasia. In poor countries, whose economic situation is almost always critical, the right to life entails above all meeting minimum requirements for food, housing, health care, education and training. In the industrialised

countries we are — quite rightly — concerned about threats affecting the individual (such as threats to privacy) and humanity as a whole resulting from the unchecked development of science and technology; the poor countries — with equal justice — express a desire to share in the development of science and technology in order to ensure their social and economic well being.

We should also ask ourselves to what extent our western concepts of democracy and the rights of man may be helping to perpetuate unjust situations to the further advantage of the privileged and the further disadvantage of the deprived.

Underprivileged Groups

That we should work together to ensure that the underprivileged and those who are discriminated against should achieve their rightful place is one of the great challenges of our time. Progress has been made in the matter both in political awareness and in the ideas put forward at the United Nations. But there remains a great gap between the ideal and the reality. Deprivation is often associated with membership of a particular group, defined by race, religion, sex, nationality and so on, and it is from these groups that the call comes for liberation, equal rights, participation. Against this background, we can see a need for greater stress on the collective aspects of human rights, expressed particularly in the struggles against racial discrimination, for equality for women, and for equal rights for foreign workers.

I do not think it right that this collective aspect of human rights should be contrasted with the more individual approach, but I do believe that, for a long time, many have had little regard for the collective side of human rights. It would be dangerous to create a hierarchy of rights, or to contrast civil and political rights on the one hand with economic, social and cultural rights on the other. Differing social and economic conditions will produce differing emphases, but all human rights — the traditional liberties and the fundamental socio-economic rights — nonetheless form an indissoluble whole. The International Covenants of the United Nations on human rights clearly express in their preambles the close links between civil and political rights and social, economic and cultural rights by stating that: "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings . . . can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights". In other words, political freedom must go hand in hand with social justice. For this reason the International Labour Organisation constantly stresses that for the achievement of social aims, and especially fair employment conditions, the exercise of political freedoms is of great importance. This applies particularly in relation to the rights of trade unions. This link between socio-economic rights and political freedoms is to be found in a number of other fields.

In Latin America and elsewhere we see in a dramatic way how people set about achieving social justice, how they need to exercise political freedoms to do this, and how they are oppressed and become

the victims of inhuman tortures. The link between the different categories is shown clearly not only in the preambles to treaties but also in the practical exercise of human rights.

Underlying Injustices

Serious violations of human rights disturb us greatly, and we often feel powerless to fight them. The world community, and the United Nations in particular, often lacks either the political will or the power to remedy the situation. In this connection we must realise that violations of human rights are often the visible signs of underlying structural injustices. These hidden injustices must be exposed and tackled in a radical manner. At its Fifth Assembly, held in Nairobi at the end of 1975, the World Council of Churches expressed it thus: "In our work for human rights we often tend to tackle the symptoms rather than the basic causes. While we must endeavour to put an end to particular violations of human rights, such as torture, we must bear in mind that inequitable social structures — as manifested in, for example, economic exploitation, political manipulation, the exercise of military power, domination by one class — create the conditions under which human rights are violated. Work for human rights must therefore entail laying the foundations of a society free of unjust structures".

The link between human rights and development aid is to be found in the first place in the priority and support that we give to a policy of promoting structural change for the benefit of the underprivileged (in particular the poorest members of society) and of the racially oppressed and women (who are also often underprivileged). As regards women, much of value was said at the United Nations Conference of the International Women's Year held in Mexico City in 1975 and at the International Tribunal on Crimes against Women in March 1976 in Brussels. Important matters discussed were the strong desire of women to be liberated from relationships of oppression and dependence and the deliberate efforts they are making to achieve their rightful place in the development process and in the various forms of political and social participation. Development aid means working for fairer social structures — a matter of fundamental importance as regards human rights; it also means giving direct aid to the victims of violations of human rights, among them political prisoners and refugees. The basic approach — common endeavours to achieve fairer social structures — is sought in Dutch development aid in the emphasis that is placed on the human rights criterion for the selection of target countries and in the support given to groups and organisations actively promoting equal rights and justice in political and socio-economic matters. This support is exemplified in the help given to the programme of the World Council of Churches to combat racism and to trade union projects, and in the humanitarian aid provided to independence movements in colonial territories. Direct aid to the victims of violations of human rights — including refugees and political prisoners — is given by way of contributions to United Nations programmes (in particular to the work of the High Commissioner for Refugees), and to non-governmental

organisations such as the International Red Cross, church bodies and other humanitarian organisations.

The Selection of Target Countries

Dutch development policy aims, implicitly if not always explicitly, to give effect to human rights. This aim is stated explicitly in the criteria for the selection of target countries. As the Explanatory Memorandum accompanying the 1975 Development Cooperation Budget stated, we are guided, *inter alia*, by "the degree of poverty" and by the "extent to which a social and political structure is present which will make possible a policy truly designed to improve the situation within the country and will provide a guarantee that the aid will benefit the whole community". To this we added, "Particular attention will also be paid to the policy being pursued with regard to human rights". This last makes explicit the aim implied in the previous sentence. As I indicated earlier, human rights must be understood in their totality, and in the relation between political freedom and social justice. I consider it only right and proper that development aid should be linked with respect for human rights in this broader sense. Thinking in some circles of the United States Congress is proceeding on similar lines, particularly in the Subcommittee on International Organisations and Movements of the House of Representatives Foreign Affairs Committee. Among the methods recommended by the Subcommittee for bringing pressure to bear on governments guilty of gross violations of human rights was the threat to end certain economic aid programmes. I feel I should add the point that this recommendation, however important, seems to be based on a limited view, being concerned only with violations of civil and political rights. In my view attention must also be paid to the requirement of social justice.

Intervention

It will be clear that I do not believe that development aid can be neutral in character. Development aid must set in motion processes through which the poor and the oppressed can achieve freedom and the right to a say in their own affairs. This means in turn that development aid must benefit people, and not be geared to powerful interests: it must also help reform the world community in the interests of the poor countries and the poor people in those countries. Working for human rights involves people within societies, and may affect the foundations of those societies. Working for human rights very often means encroaching upon vested interests. Development aid is not identical with work for human rights, but the two overlap — and both imply a form of intervention. I realise that all kinds of tensions are involved here: tensions connected with national sovereignty and the independence of countries and peoples, tensions connected with the political and economic self-determination of nations. I believe that the major political principles — of national sovereignty, independence and self-determination — are of significance primarily because they must be

at the service of individuals and peoples: they must not be allowed to stand in the way of the promotion and protection of human rights. In this connection I also believe that human rights, and concepts such as democracy and freedom, must not be used as a cloak to cover the maintenance and expansion of concentrations of power. When we try to use development aid to promote greater liberty, equality and fraternity, we must always bear in mind what other individuals and peoples may understand by human rights: it is not a matter of simply exporting our own values to other societies, but rather of ensuring that other individuals and peoples obtain the right political, social and economic conditions to develop themselves to the maximum in the light of the standards formulated and approved by the United Nations.

Development aid should be concerned with the rights of peoples and individuals, and not with the interests of states. We must try to use channels which reach the people directly, and for this reason we attach great importance in our policies on human rights and development aid to national and international non-governmental organisations active in the promotion of justice and reform. The view is gaining ground, and it is supported by practical experience, that in situations of oppression, exploitation and persecution, the dominant political, economic and military powers are not suitable instruments for bringing about reform. Reform can be brought about primarily by the oppressed and those who are discriminated against themselves. UNESCO statements on racial discrimination and UN resolutions on apartheid and colonialism support this view. The World Council of Churches, meeting recently in Nairobi, put it thus: "We realize that those who operate the structures of oppression are dependent on the people they oppress and that both are equally in need of liberation and God's forgiving love. In this fallen world, however, it is far more likely that the will and strength to end oppression comes from those who bear the brunt of it in their own lives rather than from the privileged persons, groups and nations".

The New Economic Order

If we are to give effect to human rights, we must create, nationally and internationally, equitable political and economic structures. The countries of the third world continuously and emphatically remind us of the need to reform economic relationships, a need which is reflected in the declaration and action programme, adopted by the United Nations, for a New International Economic Order and in the Charter of the Economic Rights and Duties of States. The implementation of the provisions of these documents by countries in their relations with one another is a precondition for the achievement of social justice within those countries.

The New International Economic Order cannot fully achieve its goal unless the necessary structural changes in international economic relations are accompanied by radical social reform. This reform must include the redistribution of wealth and a fair distribution of income, an end to discrimination against underprivileged groups, the improvement of health care, food supplies, housing and especially education, and the creation of sufficient and useful employment. These radical social

reforms also involve political rights and principles, and particularly the participation of all strata of society in the processes of development and decision-making: the exercise, in fact, of political and socio-economic rights. In other words, the New International Economic Order and the declarations and treaties of the United Nations on human rights must be seen as essential complements one of the other.

Responsibility

I have several times stressed the direct relation that I see between development aid and individuals, groups and peoples. Our international legal order includes principles which state that it is the collective responsibility and concern of every organ of the community, national and international, to protect and promote human rights. In the Netherlands we try to take this responsibility seriously. It is a responsibility which has added importance in cases where we have special links with other countries. These links may take the form of development cooperation, and may entail a duty, on a basis of international solidarity and the responsibility imposed by international law concerning fundamental human principles and values, publicly or privately to stand up for the victims of violations of human rights. Violations of human rights disturb us most in acute situations, and sometimes we can and must state our position unequivocally. But there are many other situations of distress, less immediately moving perhaps, but equally glaring and of an enduring nature, where human rights are at stake. These demand radical political and economic solutions, and it is our responsibility, partly through our development aid work, to do what we can to increase and improve political freedom and social justice in the world community of peoples and nations.

INTERNATIONAL FACT-FINDING PROCESSES AND THE RULE OF LAW

by
Haim H. Cohn*

The failures and frustrations of UN organs in the human rights field is to no small degree due to the lack of credible and creditable fact-finding agencies and procedures. Not only are *ad hoc* enquiry committees and special rapporteurs dependent for their work on the voluntary cooperation of the state concerned (which is not forthcoming in the vast majority of cases), but their composition and qualifications are, more often than not, political rather than judicial, and their very appointment already reflects a preconceived notion of guilt. They are expected not so much to find *whether* the alleged facts are true, as rather to find *that* the alleged facts are true — a task which is rather easy to perform where the accused state anyway does not cooperate and the accusers have just to reiterate and perhaps particularise their allegations. But facts so found can have little evidentiary weight — hence the disdain and disregard in which those fact-finding reports are generally held, especially by the states concerned. And as the result of faulty and inept fact-finding procedures, human rights violations, where they occur, will continue to be denied but to be actually perpetrated, while where they did not occur, will continue to be alleged and decried.

In order that states may reasonably be required to cooperate with international fact-finding agencies, the cardinal rule — known in English law as one of the “principles of natural justice” — must first be observed, that the state accused be given prior notice of the enquiry and the reasons therefor, and reasonable opportunity to be heard to the necessity and propriety thereof. Resolutions to set up enquiry tribunals because of allegations of misconduct already contain an element of identification with, or endorsement of, such allegations, as if at least a *prima facie* case had been established to warrant international action. As far as UN organs are concerned, it requires only a majority of the member states present and voting to pass any such resolution, and the necessary majority will always be at hand if the state complained of has no political backing. (On the other hand, no notice will usually be taken of allegations of misconduct made against a state which “belongs” or

* Justice of the Supreme Court of Israel and Member of the International Commission of Jurists.

which is powerful enough to be able to enlist votes in its favour if need be). Such high-handed resolutions, however, are in reality self-defeating, if only because the states against which they are directed cannot lawfully or reasonably be expected or required to cooperate.

The standing procedure of the UN Human Rights Commission with regard to so-called communications, i.e. individual complaints of violations of human rights, has been to forward a copy of the complaint to the state concerned for its comments. No communication is brought even to the notice of the Commission unless the state concerned was first given opportunity to react thereto. If only very few states deign to react, it is because the Commission lacks real authority; and the non-reaction of the state concerned is by general consensus taken to be a manifestation of sovereignty and not a tacit admission of guilt. But the rule that no complaint may be considered at all without prior notice thereof to the state accused, is too self-evident to have ever been questioned.

Where it is desired or contemplated to embark upon an enquiry into alleged human rights violations, notice ought first to be given to the state concerned not only of the complaint lodged against it but also of the intention or possibility to have such an enquiry conducted. The state ought to be placed in a position not just to deny or rebut the charges, but to show that any such international enquiry is not, or not yet, warranted: there may, for instance, be a valid argument, especially on the part of a state with an independent judiciary, that local remedies ought first to be exhausted. Or, it may be shown that an independent enquiry has already been held and that there is no sufficient reason to discredit its findings. Or again, in cases where the state is at the same time accuser and accused, the principles of equality of states and of the mutuality of their international obligations may well warrant the objection that no enquiry ought to be held into the charges made against it unless and until a similar enquiry is held into the charges made by it.

The necessity and propriety of embarking upon international fact-finding processes against a state is a matter of quasi-judicial discretion which should be exercised with due regard to any objections which that state may raise — the more so as such fact-finding process may, in the eyes of the state (or others), amount to an "intervention" in its domestic affairs. The quasi-judicial character of the discretion is not affected by the anti-judicial and eminently political considerations upon which it is in actual fact, more often than not, exercised: this is one more instance of a rule the proof of which lies in its breach.

A state which shows cause why the contemplated international enquiry ought not or not yet to be conducted may, it is true, be overruled; but it should at least have the assurance that the decision to set up an investigating body has been taken after due consideration of all its contentions. There may, however, conceivably be a good many instances in which the state concerned admits all or some of the violations with which it was charged and shows that these violations have meanwhile been remedied or punished; or that they were due to emergency situations and would not normally re-occur; or some other such "confession and avoidance" which would render any further

international enquiry superfluous. Or, the state may show that local remedies have not been exhausted, or that internal enquiries are still pending, with the possible result that the international enquiry will for the time being be postponed. In these and similar cases not only will the outside "intervention" in the state's domestic concerns be likely to be avoided, but the state's cooperation will be much more likely to be forthcoming if and when such enquiry still proves to be necessary.

It must be stressed that these — and most of the following — considerations apply only to allegations of particular violations of individual human rights, as distinguished from general policies or actions involving mass human rights violations. Where a state officially, e.g. according to its own laws or proclamations, pursues a policy of racial or religious discrimination, or abolishes or denies fundamental freedoms to minorities, it may be held to have by its own public admission given notice to the international community of its human rights practices. But the cases of these states do not directly come within the ambit of our enquiry, because normally no necessity would arise to investigate into the facts of particular events: the declarations and practices of those states speak for themselves and are matters of public record. It is only where individual human rights violations are alleged which transcend the area of such state policy that these states may, notwithstanding their discredit, be said to be in the same position as all well-reputed states. Again, if a simile from municipal law be in order, the situation is analogous to that of a recidivist criminal whose notoriety for crimes of a certain kind can never raise a presumption against him that he also committed other crimes.

Apart from the right to previous notice and to the opportunity of being heard before a decision is taken to appoint international fact-finders, the state concerned has, in my submission, the right to be protected against bias and prejudice in the conduct of any such enquiry. The Universal Declaration of Human Rights recognises this fundamental right, as far as individuals are concerned, by laying down that everyone is entitled "to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him" (Article 10). States accused of human rights violations are likewise entitled to have those charges probed into by an independent and impartial tribunal — independent in the sense that as finders of facts they are not subject to instructions or directions, either from their own governments or from the international agency which has appointed them; and impartial in the sense that they do not have, nor can they reasonably be presumed or suspected to have, any preconceived notion, political or otherwise, of the merits or demerits of the state accused or of the allegations against it. Remarkable as it is, the right to an independent and impartial fact-finding tribunal, which is one of the main bulwarks of the Rule of Law, has not been generally recognised as a matter of course to be due to states in international law. But independence and impartiality are by no means unknown or foreign to international law: the International Court is, according to Article 2 of its Statute, to be composed of a "body of independent judges"; and the Committee on the Elimination of Racial Discrimination is, according to Article 8 of the Convention, to consist

of experts of "high moral standing and acknowledged impartiality" (to give just two examples). It is self-evident that no international tribunal could command any moral or legal authority unless the independence and impartiality of its members were first assured; and independence and impartiality of fact-finding — and, *a fortiori*, sanction-imposing — tribunals are required for the protection of states no less than for the protection of individuals.

In most systems of municipal law, the impartiality and independence of tribunals is sought to be assured by appropriate modes of appointing judges, their tenure, their remuneration, their immunity, and the prohibition of any interference with them. None of these or the like assurances are available for members of fact-finding tribunals appointed *ad hoc* by international agencies. As far as UN organs are concerned, such tribunals are usually composed of such members as the states elected thereto appoint for that purpose; and the states so elected to compose a tribunal are often chosen without regard to the wishes or sensibilities of the state accused and without heed to its objections (if, indeed, it is given opportunity to object).

If the rule of independence and impartiality of tribunals is to be observed, there are states which must *a priori* be regarded as disqualified to compose them — namely, those states which are hostile to the state accused. Hostility, and hence lack of impartiality, must be inferred, by way of *praesumptio iuris et de iure*, from a state of war or belligerency between the states concerned; but it also can — and ought to — be inferred from the fact that the states concerned do not entertain diplomatic relations with each other. The fact that a state has refused or failed to establish such relations with the state accused, or *a fortiori*, the fact that a state has severed relations with the state accused, is *prima facie* indication of a lack of neutrality, nay even of political bias, towards the state accused. Diplomatic relations are the expression in international law of normal intercourse with, and recognition of the rights of, the state concerned, and the lack of diplomatic relations are the expression of refusal to recognise its equality of rights and standing. The state accused is automatically and unavoidably in a position of inferiority and inequality, if a state charged with composing the tribunal of enquiry has refused to accept it as a normal partner in international relations. Such refusal disqualifies, therefore, the refusing state as biased and partial; and any person appointed by such a state as its representative must be suspected, and may be presumed, to be infected by such bias and partiality — unless, perhaps, he is not a citizen of that state and owes no loyalty to it and possesses the qualifications of independence and impartiality in his own right.

Here again, it is not only the fundamentals of the Rule of Law which are at stake: it is eminently practical (or tactical) considerations that render an insistence on the observation of the Rule of Law desirable. No state will willingly cooperate with other states or their emissaries that are not "on speaking terms" with it — not only that state cannot be expected to have any confidence in their objectivity, but also because in human (and hence also in inter-state) relations it is no longer or not yet common usage to turn to him that has smitten thee on thy right cheek the left cheek also.

On the other hand, there appears no merit in the apprehension that friendly states or their emissaries might be biased in favour of the state accused. Firstly, even among states entertaining diplomatic relations with each other, there may be found states of wholly divergent outlooks and orientations, and the "friendship" between many of them can be said to be formal only. Secondly, even truly friendly states will have no difficulty in nominating from among their citizens men of high personal standing whose integrity and impartiality nobody would doubt. And thirdly, where a state is so closely associated with, dominating over, dependent upon, or subjugated to, the state accused, as to be manifestly disqualified, the international community must be trusted not to place any fact-finding responsibility in its hands — even though that state itself cannot always be trusted to muster the fairness to disqualify itself.

Where a truly independent and impartial fact-finding tribunal is appointed after the state accused was given due notice and reasonable opportunity to be heard, it is submitted that the human rights obligations undertaken by member states of the UN impose upon the state accused the duty to cooperate with the tribunal, notwithstanding any immunity from outside "intervention" in its domestic affairs. It does not matter whether, in legal theory, that immunity is then to be regarded as ousted by the human rights obligations, or whether it must be deemed to have been waived, or whether the fact-finding process is no longer to be regarded as an "intervention" to which the immunity applies. Each of these constructions appears possible and legitimate, and would require for its adoption only some continuous and uniform practice from which the rule could then be inferred.

The cooperation required of the state accused is not confined to merely admitting the members of the tribunal into its territory: in order to be able to perform its functions, the tribunal must be given facilities to collect and verify evidence. For that purpose, not only should subpoena procedures of the regular courts be made available to the tribunal, but the state accused should, without being formally subpoenaed, have to place its own officials at the disposal of the tribunal for interrogation and other supply of information. Where a state refuses so to cooperate, or where its officials refuse to divulge information, whether claiming a privilege of state secrecy or being under orders not to testify — the tribunal may legitimately draw conclusions from such refusal on the merits of the accusations. Non-cooperation as such would already have to be regarded as a breach of the state's human rights obligations.

But the Rule of Law also requires that, even in mere fact-finding tribunals, such officials or other persons as are accused or suspected of having been instrumental in committing human rights violations, should not be compelled to submit to interrogation unless they are given opportunity to obtain independent legal advice and to be represented by counsel. In countries in which the privilege against self-incrimination is recognised, they should be warned that they need not give any information incriminating themselves. In order to ensure proper advice and representation, the law officers of the state should be requested to assist the tribunal and attend its hearings. These cautions must be taken even though neither the fact-finding tribunal nor the international

agency which appointed it may have any power of incrimination or punishment: the possibility suffices that any statement by a witness testifying before the fact-finding tribunal may be admissible in evidence against him in the courts of his country. Moreover, where human rights violations are alleged by witnesses testifying before the the tribunal, it would, under the Rule of Law, be the right of the persons accused to have been instrumental in the commission of these violations to confront the witnesses and have them testify in their presence; and in countries where the right to cross-examine any such witness by or on behalf of the accused is regarded as fundamental this right must be accorded even in an international fact-finding tribunal.

The duty of the state to cooperate with the fact-finding tribunal may thus be said to be contingent upon, and complementary to, the duty of the tribunal to proceed in observance of the Rule of Law; and it is a condition precedent to any duty of cooperation arising on the part of the state that the Rule of Law was duly observed in setting up that tribunal.

The sad realities, however, of contemporary international relations are that, whether or not the Rule of Law is being observed from the international angle, most states will refuse to cooperate with any tribunal set up to establish their own human rights violations. In the face of such refusal the question will become pertinent whether, and how, the international community could procure such findings of fact as would, under the Rule of Law, be legitimate and reliable.

Proceeding by way of elimination, I would submit that privately controlled media of information, such as newspapers and books, in non-totalitarian regimes, ought not to be relied upon as sole or main sources of fact-finding. It is not only that they are in the nature of hearsay the source of which cannot, by virtue of press ethics, normally be verified; but they often are necessarily — and at times avowedly — tendentious, serving the political or other purpose for which that particular medium is being published. Freedom of the press signifies a discretion to choose or discard factual material to be published or withheld from publication, as well as to determine the form, context and emphasis of the publication — a discretion which need be neither judicial nor judicious, nor is it subject to independent and objective control, either before or after the event of publication. However important the freedom of the press may be as in itself a manifestation of the Rule of Law — its very characteristics disqualify press reports from serving as evidence, under the Rule of Law, of human rights violations. The prevailing general tendency of ascribing to well-reputed newspapers of long standing a credence which is not readily ascribed to smaller and newer papers must, in our context, be strongly disparaged: it opens the doors to inequalities and discriminations, and, what is worse, it invests facts reported in such well-reputed media with a credibility which need not objectively be justified or warranted. (To avoid misunderstandings: the disqualification of press reports relates only to ultimate findings of fact, but not necessarily to the support of charges and accusations eventually leading to the initiation of fact-finding processes).

Contrariwise, in countries where all mass media are subject to government control, press reports may well serve as evidence against

the state concerned. This exception to the rule appears rather academic, however, as no human rights violations are ever reported or admitted in the media of those countries.

The official publications of its government are always reliable — indeed, the best — evidence against a state. Laws and proclamations by which human rights are suspended or infringed may safely be regarded as conclusive, the presumption being justified that laws and official policies are implemented in practice. The same applies to statements made on behalf of the state by its duly authorised spokesmen — as distinguished from statements made by officials or citizens of the state without due authorisation.

Evidence may also legitimately be gathered from law reports: although courts of justice are not agents of the government but ought to be independent of it, findings of fact by the competent courts of a state may be taken as true and, if the judgment is final, as conclusive against the state, even though the state may not have been a party to the proceedings. In this later respect, the position of the state in international law may differ from that in municipal law, where (at least in some systems) the state is not necessarily bound by findings of fact in proceedings to which it had not been a party: as far as human rights violations are concerned, in an international forum no state ought to be heard to maintain that its own competent finders of fact are not to be trusted.

Courts of justice provide yet another type of evidence. In respect of human rights violations in the administration of justice, the actual conduct of the courts will be self-probative. Where, for instance, courts conduct their hearings behind closed doors, the very fact that would-be “observers” were not admitted may prove the violation (cf Article 10 of the Universal Declaration of Human Rights). Reports by “observers” and the testimony by reliable witnesses as to what happened during court proceedings will always be admissible in evidence. Where the court tried human rights violations or had evidence of them adduced before it, all evidence admitted by it may serve as legitimate source of fact-findings also for international purposes. But where the court itself made no findings on the strength of such evidence, it can hardly be conclusive as against the state accused, but must be rebuttable by it. The same applies to petitions, pleadings, appeals and other forensic documents filed with the courts, as well as to any interlocutory or other decisions admitting or rejecting them. (For press reports of courts proceedings, however, as distinguished from official or professional law reports, the same considerations and cautions must apply as to factual press reports in general).

“Observers” may be despatched not only to observe courts in action, but to visit also other institutions which may have been the *loci acti* or which may be expected to contain or yield other sources of evidence, such as prisons. The reliability and credibility as evidence of observers’ reports depend, of course, to a large extent on the standing and qualifications of the particular observer; but once his impartiality and independence are vouched for, a state will have to show very cogent reasons indeed before the evidence of his report can be doubted.

Of some importance and value may often be internationally accredited sources, such as the International Red Cross, the World Health Organisation, or the High Commissioner for Refugees. While their reports are in no way conclusive but always open to rebuttal by the state accused, the evidentiary weight to be ascribed to them is due, on the one hand, to the neutral and wholly beneficial purpose for which they were made, and, on the other hand, to the cooperation (or, at least, the acquiescence) of the state in their activities and reports, where the state has not at the time expressly protested against them.

No less than in municipal law where the accused person is presumed to be innocent until proven guilty, care must be taken in international relations, too, not to find a state guilty unless the finding of guilt can be based on lawful and reliable evidence. But unlike in municipal law where the rules of evidence are codified or otherwise predetermined and the admission or rejection of evidence is entrusted to courts of justice, in international relations, especially where a state refuses to cooperate with and submit to a tribunal of enquiry, the admission and rejection of evidence is a matter of discretion which, at the most, is quasi-judicial only, and the organs collecting and sifting the evidence are not bound by any hard-and-fast rules. The more important it is that states must have the right to be protected against conviction without proof of guilt.

It goes without saying that no such proof of guilt is afforded by resolutions passed by political organs, from political motives, and for political ends. Any evidence admitted or rejected there is not considered on its probative merits but solely on its political usefulness. And findings based on evidence so considered cannot command, either on the part of the state accused or at all, any moral or legal relevancy. Where, on the other hand, evidence is sifted and weighed on its merits by a body of experts "of high moral standard and acknowledged impartiality" who have no political axes to grind, and who guide themselves by such rules of fairness and propriety as would ensure the exclusion of anything unreliable or uncreditible, their findings of fact would surely be accepted by the international community at large as fair and just, and therefore as binding. It is such like findings of fact which could be regarded as binding also on the state accused, and hence as properly supporting a finding of guilt.

Fairness and justice require one additional safeguard, before a state can be found guilty: on some of the types of evidence discussed above we observed that they were not conclusive but rebuttable. Before they can legitimately be used in proof of guilt, the state accused must be given reasonable opportunity to rebut them. In the same vein, fairness and justice would require that before any findings based on such evidence are finalised and made public, they must first be submitted to the state accused, for its comments and reactions: here again it may well happen that the state will take action to remedy or punish any violations found against it, and the fact that such action has been or is being taken would then, in fairness again, have to be made public simultaneously with the findings against that state.

Finally, it is submitted that proof of guilt based on such fact-findings as have here been postulated, should be recognised as a condition precedent and *sine qua non* to any international action, by way of

sanctions or otherwise, against the state accused. In an international legal climate in which warlike and aggressive initiatives of individual states are to be outlawed, any hostile or punitive action by the community of states, or by inter-state or international organisations, must conform to the Rule of Law or else cannot claim to be justifiable. The application on the international plane of *nulla poena sine lege* presupposes only that in finding a state guilty of misconduct and imposing sanctions upon it, the Rule of Law is being faithfully and painstakingly observed.

The International Commission of Jurists has, ever since its inception twenty-five years ago, assumed the task of proclaiming and defining the Rule of Law. But it has generally concentrated its efforts on specifying and clarifying the rights which the Rule of Law bestows on the individual human being, and the corresponding duties it imposes on states vis-à-vis their citizens. It is fitting now to devote attention also to the rights which the Rule of Law bestows on individual states — and the submissions made in this paper as to the applicability of the Rule of Law to international fact-finding processes may show its acute relevancy in international relations.

NUCLEAR POWER AND HUMAN RIGHTS

Paul Sieghart*

"There is no dilemma today more difficult to resolve than that connected with the use of nuclear power." — President Carter; April 7, 1977

Public opinion has been conscious for many years of what may be called the "obvious" dangers which the manipulation of nuclear fission holds for the world's inhabitants — human and other. These include the deliberate detonation of nuclear weapons by governments or terrorists; the consequences of accidents, or sabotage, at nuclear power stations; and the long-term pollution of the environment by radioactive materials which escape from detonated weapons, or from power stations, or from their waste products.

But there is another danger which is less obvious, and which has therefore not yet reached the foreground of public consciousness. This is the prospect that, even if adequate safeguards could be devised against the "obvious" dangers, those very safeguards might lead to an insidious, gradual and deleterious change in the nature of free societies. Over a period of years, and without having made any deliberate choice to that end, nations which adopted one kind of large-scale nuclear power programme could be faced with security problems which their governments could only seek to avert by means indistinguishable from those employed in the classical "police state". In short, the price of "safe" nuclear power could prove to include a slow but inexorable erosion of civil liberties, human rights and the rule of law.

To follow the argument, it is first necessary to list the essential facts about nuclear fission, and in particular the properties of the fissile materials concerned.

The basic facts

1. The primary fuel for nuclear power reactors is uranium. Found in several parts of the world, the ore is treated at the mine to increase the

* Joint Chairman of the Executive Committee of *Justice*, the British Section of the ICI; a Governor, British Institute of Human Rights; Vice-Chairman, Council for Science and Society.

concentration of uranium. The concentrates are further purified after shipment to the user country. The final product will be composed of about 99.3 per cent of uranium-238, and about 0.7 per cent of uranium-235. These two "isotopes" of uranium are identical in almost all respects, but only the uranium-235 is fissile. Some older types of reactor can be fuelled with elements fabricated from this "natural" mixture. Others need "enriched" uranium, in which the proportion of fissile uranium-235 is increased to 2-4 per cent. That can only be done in a very large and expensive enrichment plant.

2. When the fuel elements have given out their energy in the reactor, they will still contain some uranium, together with a variety of highly radioactive "waste" fission products. They will now also contain some plutonium, which is another fissile element.

3. These "spent" fuel elements can be reprocessed in order to recover both the unused uranium and the plutonium, and to separate these from the unusable waste products. This too requires a very large and expensive plant.

4. If uranium and plutonium, in the right proportions, are used to fuel a new kind of reactor — the "fast breeder" — some of the non-fissile uranium-238 will itself be converted into plutonium. In effect, the plutonium in such a reactor reproduces itself, and in optimum conditions it is even possible to end up with more plutonium than was originally put in. In these conditions — that is, with fast breeder reactors and appropriate reprocessing — up to 60 times as much energy can be extracted from the original uranium as in reactors which are fuelled with uranium alone.

5. "Reactor grade" uranium cannot be used to make nuclear bombs: these require "weapons grade" material, enriched to the point where the uranium-235 content is 90 per cent or more. The minimum amount needed is about 50 kilograms.

6. On the other hand, "reactor grade" plutonium *can* be used to make nuclear bombs, albeit not very efficient ones. A plutonium bomb using "weapons grade" material could be made from as little as four kilograms of plutonium — say the size of an orange — and have a yield equivalent to some thousands of tons of conventional high explosive. Using reactor grade material, the minimum amount of plutonium needed might be six to ten kilograms — say the size of a grapefruit — and the explosive yield would be substantially lower. In either case, a great deal of highly dangerous radioactive material would be dispersed.

7. The radioactivity emitted by plutonium in its normal state has a very short range. Plutonium can therefore be safely handled with rubber gloves. But that radioactivity is intensely damaging to human tissue which does come into direct contact with it: for example, even a microscopic particle of plutonium dust can cause cancer of the lung if it is inhaled and remains there.

The special hazards of plutonium

It will be clear from this summary that there are many hazards associated with the use of fissile materials, but that there is a striking

difference between those associated with uranium and those associated with plutonium. The use of uranium for nuclear power needs plants and installations which are necessarily very large and very expensive: mines and their associated refineries, separation plants, power stations, and spent fuel reprocessing plants. None of these can be constructed or used without a huge financial investment, or without the knowledge and approval of national governments. Moreover, the different forms of uranium which are transported between them cannot be used as nuclear explosives, nor does uranium in any of these forms present any great radioactive hazard.

But plutonium is in quite another class. Not only is it the world's most powerful single explosive, but its carcinogenicity ranks among the highest known. The combination of these two properties makes it quite the most dangerous substance so far known on this planet. It is not found in nature in any measurable quantities. Without nuclear reactors, it would virtually not exist at all. But every such reactor necessarily creates some in its spent fuel elements, intimately mixed with fission products so highly radioactive that it would be lethal to approach them if they were not heavily shielded. It is not until the plutonium is separated from those products in a reprocessing plant that its potential dangers could become realisable — if it were ever allowed to reach the hands of anyone of sufficiently malevolent disposition.

It is here that the problem begins. As a fuel for power station reactors, one kilogram of plutonium can produce as much energy as 1700 tonnes of oil. At current prices, that puts a value on the material of around £80,000 per kilogram — say 40 times as much as gold. To a government wishing to increase its military power by fabricating nuclear weapons but lacking access to the necessary fissile materials, or to the technology and the vast sums of money needed to refine them, the value could be much higher still. To the terrorist, the possession of a few kilograms of plutonium could be priceless: its mere dispersion as a fine powder (which is the form taken by plutonium oxide) could make substantial tracts of urban or rural land uninhabitable because of its carcinogenicity, and the threat of detonating it in a nuclear weapon could give him an immense power to blackmail governments to make political concessions.

Security measures

Clearly, any responsible government must take the most stringent precautions to ensure that plutonium, in any useable or easily recoverable form, can never get into the wrong hands. But this proves to be more difficult than might be concluded from a casual consideration of the problem.

The first obvious precaution would be to account meticulously for every gram of plutonium produced. Such accounting is possible for small laboratory quantities which never leave the premises, but it cannot be done at industrial scales, or where substantial quantities of the material are in transit between different locations where it is made, stored and used. For example, when spent fuel elements arrive at the reprocessing plant from a power station, no one can be sure precisely

how much plutonium they contain until it has been extracted. There are losses in the extraction process itself. Then there are the problems of weighing-out and weighing-in consignments in transit: even with the best technology it is never possible to calibrate different scales at different locations to give identical readings, especially if the quantities are large. For all these reasons, therefore, a certain minimum amount of material will always be "unaccounted for", and the total of this will increase cumulatively as time goes on. How much plutonium is already "unaccounted for" in those countries which presently recover it is not public knowledge.¹ But it is easy to calculate that if plutonium production were to increase greatly because commercial fast breeder reactors are brought into service, it will not be long before the new material unaccounted for will total hundreds, and ultimately thousands, of kilograms.

Another essential precaution will be the physical security of all sites where plutonium is made or stored, i.e. reprocessing plants and power stations. That is perhaps the most tractable of the problems, since such sites can be surrounded by virtually impregnable perimeter fences, and protected by armed guards against attack. There are, after all, several thousand military nuclear weapons deployed in the USA, the USSR, Europe and probably elsewhere, and so far as is known none has ever been abstracted.

Yet here again the problem is more difficult than it looks at first sight. A complete nuclear weapon is a large object and cannot be carried about, as can a few hundred grams of plutonium, in one's pocket. Physical security measures for plutonium cannot therefore be confined to perimeter fences, but must pervade the whole of the establishments inside them. That, above all, means constant surveillance of everyone who handles plutonium, or has any possible access route to it. Nor can such surveillance end with the persons directly concerned: to be effective, it must necessarily extend to their families, their friends and their other associates — not least the casual ones, who may be seeking to bribe, seduce, blackmail or intimidate them, or to extract information from them. All this is quite separate from the surveillance which would need to take place to detect the activities — or even the presence — of any economically or politically motivated groups, or individuals, who might have a concern to abstract plutonium.

Apart from surreptitious abstraction at the sites, the other major risk is the diversion of plutonium in transit between them. This creates yet another set of problems. It is one thing to have armed guards within a perimeter fence, perhaps trained to shoot at intruders on sight. It is quite another matter to release such guards into the open community to accompany consignments of plutonium on trains or trucks. Accidents can, and do, happen to vehicles, and if security is to be effective the guards must be trained to assume that any accident may have been staged by an imminent attacker.

Then there is the problem of how to react to a terrorist threat if and when one is made. The first question would be whether the threat was an obvious hoax, or was possibly credible. If, by then, the quantity of accumulated material unaccounted for exceeded a few kilograms, any responsible government would have no option but to treat the threat as

credible. In such circumstances, the government concerned could do nothing less than mount a ruthless and total search for the hidden weapon, taking from its legislature (which could hardly refuse) all necessary powers needed for general search, seizure and arrest, and probably also for the suspension of rights of movement and assembly and of *habeas corpus*. In the course of the exercise of these powers, there would doubtless come to light all sorts of stolen property, prohibited drugs, illegal immigrants and other evidence of non-nuclear crime, and it seems unlikely that these would benefit from a general amnesty after the emergency was over. And if someone were apprehended and thought to have information about the whereabouts of the hidden weapon or those who planted it, it is inherently unlikely that his interrogation would take the leisurely and humane form that the law requires.²

Moreover, once one group of terrorists had succeeded by such means in mobilising world-wide publicity to draw attention to their cause, others might wish to try the experiment for themselves. There could therefore be a good prospect that such emergencies would become a regular feature of life in countries that produced or used plutonium — and ultimately also in those that did neither, since the necessary quantities of the material are so small that it would be easy to smuggle them across frontiers without any great risk of detection.

Is the scenario realistic?

That then is the scenario. Two immediate questions arise. Is it unrealistically melodramatic? And if it is not, are there technological answers to the problems it raises?

As for the first question, there is no reason to believe that the scenario is other than realistic in any material respect. Indeed its substance is taken from the Sixth Report of the British Royal Commission on Environmental Pollution, written under the chairmanship of Sir Brian Flowers, FRS.³ Neither Royal Commissions in general, nor the distinguished members of this one in particular, are given to hysteria or exaggeration. On the contrary, the usual criticism of such reports is that they are too cautious, too bland, and display insufficient imagination. In addition, two of the officers of *Justice* have had the benefit of a meeting on this subject with the UK Secretary of State for Energy, Mr Tony Benn, and his advisors, and nothing that was said on that occasion led us to believe that the scenario outlined here was in any way fanciful.⁴

One point which merits special attention is whether, given the necessary plutonium, it would be possible for a terrorist group to fabricate an amateur nuclear weapon. Here the Flowers Commission expressed the following views:

"The equipment required would not be significantly more elaborate than that already used by criminal groups engaged in the illicit manufacture of heroin. . . . A substantial knowledge would be needed of the physical and chemical processes involved, of the properties of high explosives and of the principles of bomb construction. We have been impressed and disturbed by the extent to which information on

all these topics is now available in open technical literature. . . . We have concluded therefore that it is entirely credible that plutonium in the requisite amounts could be made into a crude but very effective weapon that would be transportable in a small vehicle. The threat to explode such a weapon unless certain conditions were met would constitute nuclear blackmail, and would present any government with an appalling dilemma. We are by no means convinced that the British government has realised the full implications of this issue."⁵

The second question has received some public debate in the correspondence columns of the London *Times* during April and May 1977, following an initial letter from *Justice* drawing public attention to the possible consequences on civil liberties from a large-scale nuclear power programme in Great Britain. Several suggestions have been put forward.

One was the use of thorium (an element lacking the pernicious properties of plutonium) in breeder reactors. However, the Flowers Commission reported that thorium technology was hardly developed as yet, and that at best such a technology could only increase the energy to be derived from uranium by a factor of five, rather than the factor of 60 which can be obtained with plutonium.⁶

Another suggestion, advanced by the UK Atomic Energy Authority, was that reprocessing plants could be sited together with fast breeder reactors, so avoiding the need to transport plutonium outside secure premises. While that is doubtless possible in theory, it would be extremely expensive. It is hardly worth constructing a reprocessing plant unless it can handle very large quantities of spent nuclear fuel, enough for many power stations. These, on the other hand, need very large quantities of cooling water, and must therefore be sited on the coastline or near great rivers. They should also be near the centres where the electricity they generate will be consumed. (The present 11 nuclear generating stations in the UK are distributed all round the coast, separated by up to 300 miles from the single experimental reprocessing plant.⁷) In any event, even "co-siting" would avoid only the danger of abstraction of plutonium in transit, and not from the plants themselves. That danger can only increase with the number of reprocessing plants.

A further suggestion was that the reprocessing plant could itself have a small nuclear reactor, in which all plutonium could be irradiated before despatch, making it sufficiently radioactive to be lethal to handle except with remotely-controlled equipment. The Flowers Report mentions this possibility, without however evaluating it.⁸ On any view, it would involve substantial expense, since the irradiated material would then have to be kept in heavily-shielded storage at the reprocessing plant before despatch, during transit, and again at the power station before being loaded into the reactor. All handling at all stages would have to be by remote control, and would increase the risk to the personnel, and to the public at large if an accident occurred to the container in transit. In any event, the irradiation could only take place after the new fuel elements had been fabricated, and the plutonium would still be vulnerable to abstraction in small quantities before that stage. This solution has not so far been publicly proposed by the UK AEA.

The "plutonium economy"

All nations today face at least the probability of a future "energy gap". Those with their own reserves of fossil fuels and a high level of industrialisation know that their resources are being depleted and that, if they are to maintain their present standards of living, they must make provision for other sources of future energy. Those who have no fossil fuels of their own seek such other sources so that they may themselves become "developed" by industrialisation. Those who have oil but little industry are concerned to increase their export revenues and prolong the time before their oil reserves run out.

For all these nations, nuclear power offers an apparent solution to the energy problem. But even uranium is not inexhaustible, and the technology of recycling plutonium through fast breeder reactors, so increasing 60-fold the energy that can be extracted from every ton of uranium ore, therefore has immense economic attractions.

All forms of nuclear power production carry risks: above all that of the disposal of the waste products, with their high potential for radioactive pollution. There is also the risk of nuclear weapons proliferation to nations that do not already have them, and the engineering problems of safety in reactors.

But it is the possible use of plutonium in fast breeder reactors — none of which has yet been constructed on a commercial scale — which carries the additional hazards described here. These are not technological risks for which there might be technological solutions: they are social risks. In connection with the secret surveillance of members of the public, for instance, the Flowers Commission had this to say:

"The activities might include the use of informers, infiltrators, wiretapping, checking on bank accounts and the opening of mail, and they would be practised on members or suspected members of extremist or terrorist groups or agents of foreign powers who it was thought might plan an attack on, or theft from, a plutonium plant. We regard such activities as highly likely, and indeed inevitable... The real question is the extent of the surveillance that might become necessary in the future if there were to be great reliance on plutonium. If there were a significant number of factions or individuals who might be prepared to use plutonium in threats against society, then widespread surveillance could scarcely be avoided. We find it hard to believe that such an intolerable situation could arise in this country, though it might do so in countries with repressive regimes... What is most to be feared is an insidious growth in surveillance in response to a growing threat as the amount of plutonium in existence, and familiarity with its properties, increases; and the possibility that a single serious incident in the future might bring a realisation of the need to increase security measures and surveillance to a degree that would be regarded as wholly unacceptable, but which could not then be avoided because of the extent of our dependence on plutonium for energy supplies. The unquantifiable effects of the security measures that might become necessary in the plutonium economy of the future should be a major consideration in any decision concerning a substantial increase in the

nuclear power programme".⁹

If one adds to that the prospect of armed guards not merely guarding nuclear installations, but travelling across the country with plutonium consignments and — like the armed special constabulary of the UKAEA¹⁰ — not answerable to any elected police authority, and the prospects of what could happen if a credible terrorist threat were ever made, it is difficult to resist the conclusion that the easiest path towards a police state, in any modern society which is not one already, would be for that society to opt for a plutonium economy.

So far, no society has exercised that option. The USA came very close to it until President Carter reversed Administration policy in a major speech on April 7, 1977. The UK is currently hovering on the brink. France, Germany, Japan and the USSR are probably the only other countries which have, or could soon develop, the necessary reprocessing and fast breeder technology. But many other countries, such as Brazil, present lucrative export markets for those who can supply them.

So far, plutonium has only been manufactured in the high-security establishments of a few governments for military purposes, and to fuel a very few experimental fast breeder reactors. The amount put into circulation so far should not be large.¹¹ But once any nation opts for a plutonium economy, the picture changes. For that event, the UKAEA estimates a total production of plutonium by the year 2000, in the UK alone, of 250,000 kilograms, growing to more than ten times this quantity in the following 30 years.¹² These should be taken as conservative estimates: others have arrived at higher quantities.¹³ But even on those figures, the standard rate of "material unaccounted for"¹⁴ would allow for 500 potential amateur plutonium bombs by 2000 AD, and 5,000 by 2030 AD, for the UK alone.

Perhaps the last word can be left to the Flowers Commission:

"We believe that we should not rely for something as basic as energy on a process that produces such hazardous substances as plutonium unless we are convinced that there is no reasonably certain economic alternative."¹⁵

References

¹ According to a leading article in the *London Times* of May 4, 1977, the allowance made for "material unaccounted for" in the international safeguards procedures of Euratom and the International Atomic Energy Agency is 2-3 per cent. The article also refers to the hitherto unexplained disappearance of 200 tonnes of uranium ore in shipment between Antwerp and Genoa in 1968; to "thousands of pounds of enriched uranium and plutonium" of which commercial nuclear fuel plants in the USA have lost track over the years; and to "thousands of pounds of fissile material [which] have been wiped from the inventories of [US] Government nuclear installations." The source quoted for the last two of these statements is a report to Congress by the US Government General Accounting Office.

² "To the extent that we have civil liberties at all today, it is because we have not had to ask questions like whether it is better to torture a suspected terrorist than to let a city go up in flames."

— Russell W. Ayres, author of the article cited in reference (4) below.

³ Cmnd.6618, H.M. Stationery Office, September 1976.

⁴ The bibliography in which the scenario is discussed is now increasing. Before the Flowers Report, the major sources were Ayres, R.W., *Policing Plutonium: The Civil Liberties Fallout* (1975) Harvard C.R.C.L.L.R. Vol.10, No.2; and Flood, M. and Grove-White, R., *Nuclear Prospects* (London, 1976). Since then, there has been the Australian *Report on the Ranger Uranium Environmental Enquiry* (the "Fox Report") and, in the USA, *Nuclear Power Issues and*

Choices (the "Keeny Report"). All these studies agree on the essential realism of the "plutonium scenario" outlined in this article, and warn of the serious long-term threats which it holds for civil liberties. That was also the major conclusion of a report commissioned by the US Nuclear Regulatory Commission from a firm of Washington lawyers in 1975, and of a Conference — sponsored by that Commission — on the impact of intensified nuclear safeguards on civil liberties held at Stanford Law School in October of that year.

⁵ *Loc. cit.*, paras. 323-325

⁶ *Ibid.*, para. 111

⁷ *Ibid.*, Figure 1, p. 9

⁸ *Ibid.*, para. 318

⁹ *Ibid.*, para. 332

¹⁰ See the Atomic Energy Authority (Special Constables) Act 1976

¹¹ The Flowers Commission (para. 161) estimated about 10 tonnes for the UK, and perhaps ten times that amount for the whole world.

¹² Flowers Report, para. 317. By the year 2020, the Commission reports an estimated 30,000 tonnes of plutonium in the USA (para. 160).

¹³ See, e.g., *Nuclear Prospects* (reference (4) above)

¹⁴ See reference (1) above

¹⁵ *Loc. cit.*, para. 186

ICJ News

25th Anniversary Commission Meeting — Conclusions

The International Commission of Jurists held its 25th Anniversary Commission Meeting in Vienna in April 1977. For this occasion National Sections were invited to send representatives. There were 58 participants from 29 countries.

Following a general review of the policy and activities of the ICJ, the Meeting divided into three committees. The conclusions of these committees were approved, with amendments, in the final plenary session. The topics discussed and the conclusions and resolutions adopted were as follows:

International Implementation of Human Rights

A number of resolutions were approved containing proposals for the improved international implementation of human rights. These included proposals

- to preserve, extend and strengthen the UN Human Rights Commission's Resolution 1503 procedure for considering communications alleging gross violations of human rights;
- for expanding the right of individual petition within the United Nations so as to ensure that prisoners can communicate with the UN Secretary-General without censorship, and to give complainants the same rights as States to appear at hearings where their complaints are examined;
- to develop a code of procedure for collecting, sifting, presenting and preserving evidence before international fact-finding bodies, whether inter-governmental or non-governmental;
- for a renewed initiative to establish a UN High Commissioner for Human Rights;
- for the wider use of proceedings before domestic tribunals 'to enforce in a transnational way international human rights law';
- to establish an international secretariat to work in cooperation with lawyers' professional organisations for the independence of the judiciary and the legal profession, in particular where judges or lawyers are harassed or victimised for carrying out their professional duties;
- for drawing attention to the dangers to human rights created by nuclear weapons and materials and nuclear power programmes and calling upon governments to take them into account before formulating their nuclear policies and to do so with full public participation;
- to press for ratification of all human rights conventions, in particular the International Covenant on Civil and Political Rights, the Optional Protocol with declarations under article 41 (on interstate communications); the Inter-American Convention; and the Convention on the Elimination of Racial Discrimination

- with declarations under Article 14 (right of individual petition);
- to establish machinery, in conjunction with other organisations, for protecting scholarly freedom;
- to have torture recognised as an international crime, with universal jurisdiction before national or international tribunals wherever the crime is committed;
- to promote education in human rights at primary school, secondary school and university levels in cooperation with UNESCO;
- to promote east-west dialogue between lawyers and lawyers' organisations;
- to intensify links with religious bodies to ensure better recognition and protection of human rights;
- to study the possible extension of the jurisdiction of the International Court of Justice in the field of human rights, including a right for accredited non-governmental organisations to file *amici curiae* briefs.

The Rule of Law in Emerging Forms of Society One-Party States

The Commission discussed the problems of the Rule of Law in the One-Party State with particular reference to the seminar on that theme held in Dar es Salaam in September 1976, which was attended by participants from six countries of East and Central Africa. The Commission welcomed the initiative taken by the Secretariat and the Executive Committee in providing for the discussion of the complex and important issues involved, and urged that future meetings of this kind should be arranged.

The Commission was of the view that there were dangers of abuse of power inherent in one-party systems which were less likely to arise if there existed an effective multi-party system. Human rights could, however, be endangered by ineffective attempts to duplicate multi-party systems without due regard to cultural traditions and the historical development of particular countries.

The Commission was pleased to note the real concern shown by all delegates at the seminar that the Rule of Law and human rights should be preserved in the countries from which they had come and agreed that the achievement of this goal would be facilitated if the following principles propounded at the seminar were actually observed.

1. Electoral freedom of choice is essential to any democratic form of society. The party should guarantee genuine popular choice among alternative candidates.
2. Everyone should be free to join the party or to abstain from party membership or membership in any other organisation without penalty or deprivation of his or her civil rights.
3. The party must maintain effective channels of popular criticism, review, and consultation. The party must be responsive to the people and make it clear to them that this is party policy.
4. In a one-party state it is particularly important that
 - (a) the policy-forming bodies of the party utilise all sources of information and advice, and

- (b) that within the party members should be completely free to discuss all aspects of party policy.
5. The independence of the judiciary in the exercise of its judicial functions and its security of tenure is essential to any society which has a respect for the Rule of Law. Members of the judiciary at all levels should be free to dispense impartial justice without fear in conformity with the Rule of Law.
 6. The independence of the legal profession being essential to the administration of justice, the duty of lawyers to be ready to represent fearlessly any client, however unpopular, should be understood and guaranteed. They should enjoy complete immunity for actions taken within the law in defence of their clients.
 7. Facilities for speedy legal redress of grievances against administrative action in both party and government should be readily available to the individual.
 8. The absence of an opposition makes it essential to provide mechanisms for continuous, impartial, and independent review and investigation of administrative activities and procedures. In this respect such institutions as the ombudsman and *médiateur* with powers to initiate action can be usefully adopted.
 9. In a one-party state, criticism and freedom of access to information should be permitted and encouraged.
 10. The right to organise special interest associations such as trade unions, professional, social, religious or other organisations, should be encouraged and protected. Such organisations should be free to affiliate or not with established political parties.
 11. All members of the society must be made aware of their human rights to ensure their effective exercise and for that reason education in human rights at all levels should be a matter of high priority. In particular, officials of the party and government should be made to understand the limits on the exercise of power which derive from the recognition of fundamental human rights and the Rule of Law.

Limited-Party States

The Commission also noted with interest the constitutional innovation of the limited-party state, as in Senegal and Egypt where three parties of defined political tendencies are permitted. Fears were expressed that the attempt to limit political thinking and freedom of expression and association into arbitrary prescribed channels might create difficulties. The Commission noted the argument that such an innovation should permit greater freedom of choice than was offered in one-party states and even in some nominally multi-party states. In the absence of in depth discussion and study the Commission considered it best to defer reaching a conclusion. In due course the Executive Committee could arrange a seminar for an evaluation of the working of this new system.

The Rule of Law under Military Regimes

The Commission agreed that:-

1. Human Rights can only be enjoyed and protected in a society in which the Rule of Law is observed.

2. Inherent in the Rule of Law is the subordination of the civil authority to the constitution and of the military establishment to the civilian authority.

3. Where a military establishment overthrows a legally constituted government acting within the constitution and assumes total control of the State, the Rule of Law is necessarily destroyed and human rights are as a result unprotected.

4. The situation is in nearly all respects similar where civilian authority, though ostensibly remaining in control, has by its actions subverted the constitution relying on the military authorities for the necessary power to perpetuate itself in office. The almost inevitable consequence of this is the eventual total takeover by the military establishment.

5. There may be unusual circumstances, as for example in Portugal, where the military establishment intervened to restore constitutionality, but generally the Commission concluded that the overthrow of legally constituted governments by military governments should be condemned.

6. In circumstances where the civil government is clearly acting to subvert the constitution, the military, as any other sector of the society, may refrain from lending its support in order to bring pressures to bear on the civil authority to return to constitutionality.

7. In the event that such acts lead to the fall of the civil power without its immediate replacement, the exigencies of the situation might demand that the military carry out the functions of maintaining law and order through the normal constitutional mechanisms of the civil police and the courts. This should be for a period strictly required to restore constitutionality and the Rule of Law.

8. Where a state of siege or martial law is declared to deal with the exceptional situation the following basic safeguards should be strictly observed:

- (a) Arrests and detentions, particularly administrative detentions, must be subject to judicial control, and remedies such as *habeas corpus* or *amparo* must always be available to test the legality of any arrest or detention. Any other forms of review prescribed by the law of the country in cases of emergency should also be available. The right of every detainee to legal assistance by a lawyer of his choice must at all times be recognised. The holding of suspects *incommunicado* should be strictly limited to a very short period predetermined by law.
- (b) Effective steps must be taken to prevent torture and ill-treatment of detainees. When it occurs, those responsible must be brought to justice. All detention centres, prisons and camps for internment of detainees must be subject to judicial control. Delegates of accredited international organisations should be granted the right to visit them.
- (c) Illegal or unofficial forms of repression practised by paramilitary or parapolice groups must be ended and their members brought to justice.
- (d) The jurisdiction of military tribunals should be strictly limited to offences by the armed forces. Civilians should not be tried in military tribunals.
- (e) The independence of the judiciary and of the legal profession

should be fully respected. The right and duty of lawyers to act in the defence of, and to have access to, political and other prisoners, and their immunity for action taken within the law in defence of their clients should be fully recognised and respected.

Minority Rights

The Commission agreed the following statement of principles concerning minority rights:-

In this statement of principles the term "rights of minorities" refers to the rights of non-dominant groups. The gross violation of human rights involved in the domination of a people by a minority group, such as occurs in South Africa, Zimbabwe/Southern Rhodesia and Burundi has no place in the subject of minority rights.

1. The right of an ethnic minority to enjoy its own culture, of a religious minority to profess and practise its religion, and of a linguistic minority to use its language is now recognised in international law under Article 27 of the International Covenant on Civil and Political Rights. Serious or persistent violations of these rights are, therefore, a proper matter of international concern.
2. While the problems of minorities have certain common elements, the analysis of and solution to any particular minority issue must take into account the political, economic, geographical, social and historical context in which it arises.
3. Preservation of minority cultures is important to the happiness and well-being of the individuals who belong to the minorities and may contribute to the enrichment of the life of the nation as a whole.
4. Cultural diversity and the freedom of the individual are inter-related. Opportunities for free expression of minority languages, religions and cultures may contribute to the freedom of the individual.
5. The elimination of all forms of discrimination against minorities promotes social stability and economic development of the whole community.
6. An ethnic minority within a state has a right to a feasible opportunity to pursue its economic, social, and cultural development, subject to the interests of the whole community.
7. Any claim of a minority to autonomy within or secession from a state should be advanced by peaceful means, considered, and dealt with in accordance with the principles of international law.
8. Members of minorities who are citizens should enjoy the same rights and be subject to the same duties as other citizens without prejudice however to any special rights provided for their protection. Members of minorities who are residents but not citizens, including migrant workers, should as far as possible have the same rights and duties as citizens.
9. Lawyers have a responsibility to promote and implement measures which guarantee the equality of status and other rights of minorities.
10. Parallel to constitutional and legislative measures, there must be appropriate administrative action, especially in the field of education as indicated in the UNESCO Convention on Discrimination in Education of 1960, to make effective the enjoyment of minority rights.
11. As a general principle, minorities should benefit equitably from

national expenditures for economic, social and cultural development. In some circumstances, they may require special programmes to promote their economic, social, and cultural development.

12. When disagreements arise out of a minority's economic, social and cultural claims and the interests of the whole state community, such conflicts should whenever possible, be settled by negotiation with the representatives of the minority.

13. Where minorities live or move across national boundaries, such as nomads, stateless persons, and refugees, the international co-ordination of policies towards them by the states concerned is desirable.

14. In a case where a public authority seriously or persistently violates a minority's rights, some international protection should be developed through existing or strengthened UN human rights machinery or otherwise. It is recommended that in such cases minorities should be given the opportunity to present their grievances before an impartial international forum, and that such a forum should be able where necessary to investigate and to make recommendations.

New ICJ Member

Professor Telford Georges (West Indies) has been elected a member of the Commission. Born in Dominica in 1923, he was called to the bar in London and practiced in Trinidad, 1949-62. He served as a High Court Judge in Trinidad & Tobago, 1962-65, and then with great distinction as Chief Justice of Tanzania, 1965-1971. He is now a Professor of Law at the University of the West Indies, Barbados, and is also a member of the Appeal Court of Belize, the Bahamas and Bermuda.

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Uganda and Human Rights Reports of the ICJ to the United Nations

Published by the International Commission of Jurists, Geneva, May 1977, 180 pp,
15 SwFr., US\$ 6 or £3.50, plus postage.

Contains the five 'communications' on violations of human rights in Uganda submitted by the ICJ to the UN Commission on Human Rights between 1974 and 1976. They cover the first 5 years of President Amin's rule, and describe in detail, with many eye-witness accounts, the atrocities which have occurred under the military reign of terror, as well as the 'total breakdown in the rule of law'. An Introduction by the Secretary-General explains the procedure under which they were considered, together with an account of further violations since the submission of the last report in June 1976.

Racial Discrimination and Repression in Southern Rhodesia

Staff Study by the ICJ, published by the Catholic Institute for International Relations, London, and the International Commission of Jurists, Geneva, May 1976, 125 pp,
£1.30 postage included.

A legal study of the system of racial discrimination and repression in Rhodesia and of the violations of human rights including the detention, torture and killing of suspects by the security authorities. It shows how the minority government's policies, rather than moving towards racial equality, are "the intensification of the repression and the growing adoption by Southern Rhodesia of the laws and values of the apartheid system in South Africa".

Available from ICJ at Sw.Fr.6.—, postage by surface mail free.

Human Rights and the Legal System in Iran

Two reports by ICJ Observers, William J. Butler, New York attorney, and Professor Georges Levasseur, of Paris University, published by the International Commission of Jurists, May 1976, 80 pp, Sw.Fr. 6.—, postage by surface mail free.

Mr. Butler's report describes the evolution of the one-party state under the Shah, the series of political trials between 1963-1975, the situation concerning human rights and fundamental freedoms, the restrictions on civil and political rights and the system of internal security. Professor Levasseur describes the organisation of the judicial system, covering both the ordinary courts and the military tribunals and other special courts. He also outlines developments in Iranian criminal law, including the "special criminal law" dealing with offences against the state, public security and public order.

International Commission of Jurists
P. O. Box 120, 109, route de Chêne
1224 Geneva, Switzerland
(Tel: 49 35 45)