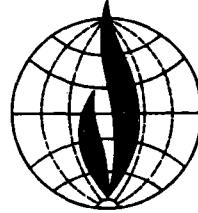


For the Rule of Law

MASTER

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

HUMAN RIGHTS IN THE WORLD

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Editor: Niall MacDermot

Human Rights in the World

The Recent Reform of Penal Legislation in Argentina

The Constitutional Government that came to power in Argentina in December 1983 has introduced a number of reforms in penal legislation. These reforms include the repeal of a number of repressive laws enacted during the military dictatorship. For example, Law 20840 of 1974, which established offences of opinion and made strikes illegal, was rescinded. The reforms also include a law passed in November 1984, under which torture practised by public officials or by private persons has become a crime punishable by up to 25 years imprisonment, or by life imprisonment if the victim died as a result of the torture. In addition, the habeas corpus procedure has been strengthened and the death penalty has been abolished.

Another important reform concerns the Code of Military Justice, which had extended military jurisdiction to try civilians.

The Code of Military Justice (CMJ) approved as far back as 1893 empowered military courts to try offences and misdemeanours committed by members of the armed forces when on military service, or in places subject exclusively to military authority. This was questioned by jurists who felt that the constitutional system in Argentina embodied the principle of a uniform system of justice and ruled out the existence of a multi-jurisdictional system.

A Constitutional reform in 1949 put an end to this controversy by giving constitutional status to the military jurisdiction,

extending this jurisdiction to include the power to try civilians for those offences classified as military offences in the code.

Following the 1949 Constitution, a new code of military justice was adopted in 1951. Article 109 of the new code enumerated cases in which civilians also were subjected to military jurisdiction such as carrying explosives and inflammable objects on to ships and planes, as well as a series of crimes connected with auxiliary civilian functions, like doctors and young people doing their military service. In 1957, when the constitutional text of 1949 was repealed, all reference to military jurisdiction was expunged from the Constitution, but the CMJ of 1951 remained in force.

In February 1984, the present government decided that "the competence of the military courts, established by articles 108 and 109 of the Code of Military Justice constitutes a veritable special jurisdiction contrary to article 16 of the National Constitution" and that "Military jurisdiction must be limited in the future to the trying of military offences, that is, those not covered by the Penal Code, and disciplinary misdemeanours."

Following this, military personnel accused of ordinary offences, are now subject to the ordinary courts, and individuals not forming part of the military establishment nor attached to it are in general outside the bounds of military jurisdiction. There are, however some exceptions.

Civilians can be tried by military tribunals for certain crimes, for instance, espionage, revealing military secrets and unauthorised clandestine entry to military premises. In addition, military jurisdiction has been maintained in respect of offences committed before the reform by members of the Armed Forces, members of the security forces, and police and prison staff who were placed under the operational control of the Armed Forces. There is a right of appeal to a civilian court – the Federal Chamber – and this court may also try the case itself in the event of unjustified delay or negligence in the handling of the case by the military court.

The Government stated that it was maintaining military jurisdiction in order

to respect the constitutional principle that persons must be tried by a judge appointed prior to the facts of the case being established. According to some human rights lawyers in Argentina, this was also a political decision by the government to give the Armed Forces the opportunity to purge themselves. These lawyers have also expressed concern about those articles of the Code of Military Justice extending military jurisdiction to civilians that the government has chosen to retain. In their opinion, even offences like espionage committed by civilians should be tried by civilian and not military courts. In view of this they consider that the reform of the Code of Military Justice is not complete.

Tribals in the Chittagong Hill Tracts of Bangladesh

The Chittagong Hill Tracts are situated in Bangladesh, bordering India and Burma. Twelve different ethnic tribal groups live in this region, constituting a population of nearly 600,000. The largest of these ethnic groups are the Chokma with 350,000, the Marmas with 140,000 and the Tripuras with 60,000. The majority of them are Buddhists and the rest are either Hindus, Christians or Animists.

For some time now there have been reports of large-scale violations of human rights of these tribals by the Bangladesh authorities. In particular, there have been reports of mass killings, arrests, forced displacement and settlement of non-tribal Bengali Muslims in the tribal areas as well as attacks on Buddhist temples and forced conversion to Islam.

The historical background to the present state of tension goes back to the days of the British rule in the sub-continent. Till the arrival of the British, the tribals in these hill areas lived in relative isolation with their own political structures and cultural ways. In 1860 the British officially annexed the area and established the "Chittagong Hill Tracts District". With the protection of the British, the non-tribal Bengali population in the plain sought to establish its control over the tribal economy and resources.

Under Regulations issued in 1982 and 1900, the administrative arrangements of 1860 were formalised by the British. However, they did try to prevent the large-scale incursion of non-tribals into these areas. For example, under the 1900 Regulations

the officer in charge of the Area had the authority to restrict all migration into the district. Anyone who was not a member of the tribal group but who wished to enter or reside in the district needed a permit. Migration within the district was also restricted with the aim of localising each tribe around its own chief, who was responsible to the British for the collection of taxes. Though the 1900 Regulations effectively destroyed the indigenous political system, it reaffirmed the separateness of the hills from the plain. This special status was reaffirmed by the Government of India Act of 1935 under which it was designated as a "Totally Excluded Area".

In 1974 when the British rule came to an end and resulted in the partition of India, the non-Muslim tribal area became part of the Islamic state of Pakistan. Despite the continuation of the special status, the encroachment of the tribal land by the non-tribals became more open. In 1958, with the military assuming power, the opening up of the area was accelerated. In 1963 at Kaptai, a large dam was constructed submerging 20,000 ha of land and displacing nearly 100,000 local tribals. The displaced tribals were not properly rehabilitated, nor were they given adequate compensation.

Following this, in 1964 the 'Special Status' of the district was abolished and administration by local officials and locally recruited police was replaced by non-local agents of law and order. The immigration restrictions which had been in force since 1900 were abolished.

With the emergence of Bangladesh in 1971, the tribals came directly under the domination of the non-tribal Bengali population. The new Constitution of Bangladesh upheld the 1964 repeal of the Special Status. The new government was keen to open up the area, to settle the growing population in the plain, and to use the

natural resources for development.

Threatened with this new policy, a delegation of Chittagong Hill Tracts representatives met Mujibur Rahman, the then Prime Minister, to discuss their four demands which were:

- autonomy of the Chittagong Hill Tracts with its own legislature;
- retention of the 1900 Regulations in the Bangladesh Constitution;
- restoration of the tribal chiefs' administrative role, and
- imposition of a ban on the influx of non-tribal people.

These demands were ignored by the government, and in fact police and army personnel were sent to help the non-tribal settlers. According to some reports, by 1982 between 300,000 and 400,000 Bengalis had been settled in the tribal areas.

The tribals have been traditionally following a slash-and-burn method of cultivation, or what is called a shifting cultivation. Under this system, cultivated land remains fallow for some years before being used again. Since all land was considered to be under the collective ownership of the tribes, there were no disputes about the possession of these unused lands. However, the Bengali settlers, used to the concepts of private property and possessory rights, claimed ownership of these unused lands on the basis that they were not in the direct possession of any particular tribal.

The government has supported and legalised these claims. The tribals, besides losing their land, are also deprived of the resources in the area, without any compensatory benefit to them. For example, timber from the forest is exported and the industries started with the power from the Kaptai hydro-electric plant mainly use raw materials from the area. The area is said to hold big reserves of minerals, gas and oil,

and exploration for these is already under way. Besides the depletion of their natural resources and livelihood, the tribals are also threatened with the destruction of their culture and lifestyle. The biggest threat seems to come from the spread of Islam, which the government is reported to be encouraging. For example, it has been reported that the present government is building in the area an Islamic Cultural Centre, with a separate Preaching Centre.

In 1972, after the government's failure to respond to the full demands, a militant organisation called the Chittagong Hill Tracts People's Coordination Association, with its military wing popularly known as Shanti Bahini (Peace Force), was formed. From that time a virtual war has been fought by both sides, with the government persisting in its policy of pursuing a military solution. In 1975, a second delegation of 67 representatives of the tribals met the then President of Bangladesh, Justice A.S. Sayem, and renewed their earlier demands. Again the government refused to consider their demands and instead army raids were increased in the hills.

The militant organisation, besides stressing the earlier demands, is also demanding restitution of all lands taken by Bengali immigrants since 1970, constitutional guarantees for preserving tribal culture and identity, and the establishment of a paramilitary force recruited from among the tribals.

To break the tribal insurgency, the government has deployed a large number of troops in the area and attacks by the tribals are met with violent reprisals by the army, at times even amounting to mass killings. A report prepared by the Danish-based International Work Group for Indigenous Affairs (IWGIA) has documented several

cases of large-scale killings by the army.* In addition, the report details several cases of torture and rape of women by army personnel. Strict controls have been imposed on the movement of tribals and large numbers of them have been relocated into so-called 'strategic villages', under military control.

The Bangladesh authorities totally deny all allegations of atrocities committed by the army personnel. As for the settling of non-tribals in the area, the government compares it to normal 'intra-regional migration' and considers it consistent with the basic human rights of all citizens of Bangladesh. This clearly indicates that the government of Bangladesh is unwilling to follow a separate policy of development for the tribals so as to safeguard their right to lands, culture, religion and way of life.

The policy followed by the government and the reports of human rights violations appear to be in contravention of ILO Convention 107 to which Bangladesh is a Party. This Convention on Indigenous and Tribal Populations states that the 'right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised'. In addition, the Convention stresses that due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change.

The ILO Committee of Experts on the Application of Conventions and Recommendations in their 1985 Report have stated that:

* *Genocide in the Chittagong Hill Tracts, Bangladesh*, Document no. 51, December 1984, available from IWGIA, Fiolstraede 10, 1171 Copenhagen K.

"the very brief information provided by the government in its reports does not enable the Committee to assess the degree to which the Convention is being applied, nor the activities which the government has undertaken . . . Finally, the Committee refers to the persistent

reports of violent conflicts in the Chittagong Hill Tracts following the settlement of non-tribals in these areas and the consequent displacement of the resident tribal groups. The committee expresses its concern over this situation."

Judicial Application of the Rule of Law Torture: Prosecution and Compensation in Colombia

After years of serious internal conflict and tension, characterised by serious human rights violations committed by members of the Armed Forces in an attempt to shore up the then-existing regime, Colombia has at last returned to democratic rule. This has been accompanied by a determination on the part of the judiciary and Bar to eliminate the practice of torture that had been a hallmark of the previous regime, to indemnify victims of torture and to punish its perpetrators.

In the course of this year, two judgments have been given in actions for damages brought by torture victims in the high courts.

The first concerned a claim by a student, Ernesto Sendoya Guzman, for compensation for injuries from torture carried out by army officers. In its decision of 8 April 1985, the Administrative Court of Cundinamarca found that Mr. Sendoya had been tortured in the Military Institute Brigade after his arrest in 1978. Both physical injury and mental pain and suffering had been established shortly after his arrest by forensic medical officers of the Institute of Legal Medicine in a report requested by Mr. Sendoya's defence counsel. However, neither this report nor Sendoya's own alle-

gations of torture were taken into account by the Council of War which ultimately tried Sendoya. (He was subsequently released during the 1982 amnesty.)

In deciding on the amount of compensation to be paid to Mr. Sendoya by the Ministry of Defence, the Administrative Court took into account the fact that he had suffered no economic damage and that during his arrest he had injured officials arresting him. This resulted in a somewhat token award being made, amounting to a sum equivalent to the value of 50 grams of gold.

In its judgment the court stated: "When, in order to extract a confession from a detainee or to punish him, the authorities of the State use coercive means which are not authorised by the Constitution or the law and which cause the detainee pain and suffering, these acts are in themselves a grave affront to the dignity of the human person and a denial of the most fundamental rights, and must be condemned and severely punished."

The second case resulted in compensation amounting to the monetary equivalent of 1,000 grams of gold being paid to Dr. Olga Lopez de Roldan, her young daughter and her father for the mental pain and suffering and the economic

damage suffered by them as a result of Dr Lopez' torture.

The case was heard by the Council of State, Courtroom of Administrative and Litigious Proceedings in Bogota on 27 June 1985. It found that Dr Lopez had been tortured in the Military Institutes Brigade and the Army Communications School by being held blindfolded for 14 days in the stables of the Brigade, amid excrement and without a bed or washing facilities, by being deprived of food for the first few days and by being repeatedly hit, hung from her arms with her hands tied and otherwise tortured.

Dr. Lopez was held for two years without being tried and was eventually released after a Council of War found that there were no good grounds to justify her detention. The Council of State hearing the Lopez compensation case underscored the procedural violations and the denial of the guarantee of due process that took place at that time. It referred to the "interminable

series of abuses and violations that took place under the guise of performing public functions."

In its judgment, the Council states that "Torture practiced by the authorities gives rise to state liability . . . It is inadmissible and contrary to the law that, in order to maintain democracy and the rule of law, the executive should resort to irrational and inhuman methods that are penalised by law, condemned by justice and banned throughout the world by all conventions on human rights and that no civilised conception of the exercise of power can allow or legitimise." It ended by requesting the criminal courts to intervene in order to enquire into and try the offences committed against Dr Lopez and punish those responsible.

It is to be hoped that the laudable attempts by the Colombian courts to suppress the practice of torture and compensate victims will continue and prove an example to other countries who could usefully follow its lead.

Paraguay: The Right to Leave and to Return

The regime of General Alfredo Stroessner who seized power in 1954 has been characterised by a continuous state of seige. Thousands of Paraguayan citizens who fled the country through fear of persecution and of the arbitrary actions of the authorities, were prevented from returning by threats of imprisonment or of administrative detention for unlimited periods. A number of individuals who were willing to take the personal risk involved in returning to Paraguay were prevented from doing so

by the government's blanket refusal to admit them. These individuals were seen as a threat to the government which, failing to dissuade them from returning by other means, was forced into the position of simply refusing them the right to enter Paraguay.

However, in December 1983, the Interior Minister announced that with the exception of two prominent opposition figures, all exiles would be permitted to return. Many in fact did return but have

reportedly been subjected to various forms of harassment and temporary detention by the government. One of the two exiles who were refused permission to return was Professor Domingo Laino, Vice-President of the Authentic Radical Party who has been exiled for many years and has been constantly refused entry to his country, the last time being at the end of 1984 when he was turned back at the Paraguayan border.

Under international law, every person has the right to leave and to return to his own country. This is clearly stated in the Universal Declaration of Human Rights which is generally regarded as having the status of international customary law and of thus being binding on all states.

The desire of the international community that such a right should exist and govern its behaviour can be illustrated by the fact that it is included in the International Covenant on Civil and Political Rights, the European Convention on Human Rights (4th Protocol), the American Convention on Human Rights as well as the African Charter on Human and Peoples' Rights.

Of these international instruments, it is the American Convention that could be said to concern Paraguay most closely.

Although Paraguay has not ratified the convention, it has signed it. In addition, there is a growing body of opinion within the Inter-American Commission on Human Rights that having been designed by the countries of the region as a means of protecting human rights in that region, the convention provides a set of minimum rules of conduct for the whole continent regardless of ratifications by particular countries.

The right is unambiguously stated in the convention in the following terms:

"2. Every person has the right to leave any country freely, including his own...

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it." (Article 22) This right is unqualified.

However, as with the International Covenant on Civil and Political Rights, the right to leave and to return is derogable in "time of war, public danger of other emergency that threatens the independence or security of a State Party" at which time it may take measures derogating from its obligations under the Convention "to the extent and for the period of time strictly required by the exigencies of the situation..."

Having established that the right to leave and to return exists in international law and in national law (it is specifically guaranteed by article 56 of the National Constitution of Paraguay), it remains to be seen whether the limitations on this right effected by the Paraguayan government are those envisaged in international law or whether they have been imposed purely to serve the political ends of the present regime.

There are two aspects to this question: is there a war, public danger of other emergency that threatens the independence or security of the country, and are the measures taken strictly required by the exigencies of the situation?

In a meeting in Siracusa in the Spring of 1984, co-sponsored by the ICJ, 31 distinguished experts in international law met to examine *inter alia*, the conditions necessary for valid derogation of certain rights which are derogable under the International Covenant on Civil and Political Rights. Their findings are pertinent to the question outlined above, with reference to the right to leave and to return.

The experts considered that a "public emergency which threatens the life of the nation" can be said to exist only when a country is faced with situation of excep-

tional and actual or imminent danger, which

- a) affects the whole of the population and either the whole or part of the territory of the state; and
- b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.

As there is no external aggression against Paraguay by another state and as the repressive regime of General Stroessner has been said to have achieved internal "political stability and economic development, but at considerable cost to political rights and individual liberties", no valid foundation for the imposition of a state of emergency is immediately apparent. It seems likely from an examination of the situation in Paraguay, that the government sees a danger that growing unrest and dissatisfaction with the current repressive regime would be exacerbated if the opponents of the government were allowed free reign to express their opinions within state boundaries. Accordingly, it attempts to muffle those whom it can by threats, detention and imprisonment. Those who are too well-known to be quietly interned and too brave to be intimidated, it simply refuses admission to the national territory. The experts who met at Siracusa have expressly stated that such a scenario does not constitute grounds for derogation: "internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations".

Even supposing that the state of emergency was justified, it is suggested that the derogation from the right to leave and to return is not such as could possibly be "strictly required by the exigencies of the

situation. This phrase has been interpreted by the Siracusa experts as meaning *inter alia* that a derogation must be directed to an actual, clear, present or imminent danger may not be introduced merely because of an apprehension of potential danger; that effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation; and that in determining whether derogation measures are so required the judgment of the national authorities cannot be accepted as conclusive:

With regard to the first point, it is difficult to see how a country can exist on the brink of actual, clear, present or imminent danger for over 30 years, it is therefore submitted that the Paraguayan government is reacting to what it feels is a potential danger and that not to the country and its people but rather to the continuation of its own repressive rule.

With regard to the second point, there is no means of recourse available in Paraguay to persons affected by derogation measures such as the denial of the right to leave and to return. The exile of Prof. Laino, for example, continues purely on an arbitrary administrative decision, unreviewable by any legal or judicial means, not founded on any legal principles and for which no reasons have been given to Prof. Laino whose whole life is so drastically affected by it.

As for the third point, it goes without saying that the government of Paraguay accepts only its own decision as to the legality of the derogation measures it has imposed in the country. Despite repeated remonstrations from the international community, other governments as well as the relevant organs of the United Nations and the Inter-American Commission on Human Rights, it continues to violate in fact and spirit the fundamental precepts of international law.

The case of Paraguay and the right to leave and to return is a prime example of derogations from basic human rights recognised in international law being used in a

self-serving way, not to protect the fabric of the country and preserve the integrity of its inhabitants, but to further the political ends of the ruling elite.

South Africa

This year has seen increasing and widespread civil unrest in South Africa, which, although originally centred in the Black townships, is now spreading to other areas. The constitutional changes effected in 1984 which reaffirmed the government's commitment to the policy of apartheid, fuelled the anger of the Black community, heightened their sense of grievance and accentuated the seeming hopelessness of their situation. Local rent increases, the poor standard of facilities available to Blacks and the paltry changes in legislation vaunted by the government as sincere attempts to end discrimination have added to the tension that is becoming more and more evident in the country. This tension is a direct result of government policy, as summed up by President Botha in an interview on British television (26 May 1985) in which he stated "we believe in the principal of one person one vote, as long as it is not in a unitary state". It is thus evident that the South African government has no intention of recinding its bantustanisation policy, designed to eventually exile all those who they do not need as labourers to one of the so-called independent homelands created for that purpose.

The methods which the government is using to combat this internal unrest and conceal it from the eyes of the rest of the world are in fact having the opposite effect, contributing to the escalating spiral of vio-

lence and making the international community more acutely aware of the true nature of apartheid and the other violations of human rights that inevitably accompany it.

Among these methods has been the steadily increasing use of the provisions of ss28 and 29 of the Internal Security Act, which has included an increasing use of administrative detention. Faced with growing international disapproval of this practice the Botha government introduced a state of emergency in 36 magisterial districts on 20 July 1985 in an attempt to justify it. The detentions continued thereafter but were given a spurious air of legality by the emergency provisions. *The Star* reported on 20 November 1985 a sevenfold increase in the number of detentions in the first 10 months of 1985 over the number of detentions for the whole of 1984.

From an examination of the practice of detention and also of the prosecutions brought against certain individuals that seem to have little, if any, foundation in fact, it would seem that the government is trying to silence politically vociferous members of the community. A prime example of this policy is the trial in Pietermaritzburg of 16 top black political and trade union leaders members of the United Democratic Front (UDF), an alliance of some 700 anti-apartheid movements dedicated to non-violent change. They were arrested in December 1984 and the terms of

their bail forbade them from engaging in any form of political activity for the duration of the trial. On 9 December 1985, charges were finally dropped against 12 of the defendants. *The International Herald Tribune* (12 December 1985) noted that "critics have accused the government of using political trials such as this one as an extension of its detention system, bringing poorly based charges against political opponents in order to tie them up in long, complicated cases that put them out of action for months or even years." Indeed, bearing in mind the number of such trials and considering such cases as that of Dr Allan Boesak, President of the World Alliance of Reformed Churches and a founder member of the UDF, who is presently facing charges of subversion and has had his passport taken by the authorities, it is hard to find any other explanation for the government's actions.

Following the first arrests and accusations against members of the UDF, the UDF National Executive came to the conclusion that, *inter alia*:

- treason trials are a means of reducing the effectiveness of the UDF and its affiliates by depriving them of the day to day work of its competent leaders;
- the state avoids openly repressive measures such as prohibitions and banning orders, but makes anti-apartheid activities into criminal offences in order to give the international community the false impression that only persons breaking the law are punished;
- the trial will be used to give the UDF the image of a subversive and violent organisation in an attempt to isolate it from the South African people;
- arbitrary arrest and violent attacks upon the houses of members of the UDF are intended to intimidate people so as to prevent them from joining the UDF.

In addition to the increase in detentions and what amounts to wrongful arrest, the imposition of the state of emergency has also seen a massive increase in violence by the police and military against unarmed Black demonstrators. This violence was foreshadowed by the killing of (on official estimates) 20 Blacks at Uitenhage only a few months before the imposition of the state of emergency. The police, who opened fire on a funeral procession, were exonerated by an official enquiry, even though at least 15 of those killed were found to have been shot in the back.

Other incidents of this nature include the killing of 30 people in Langa in the south of the country on 21 March (the UDF puts the figure as high as 70) and of 15 people at Mamelodi near Pretoria on 21 November. The 15 were taking part in a demonstration against a rent increase, the restrictions on funeral ceremonies and the presence of the police and the army in the Black townships. A banner at the head of the procession said, "Don't fire! Peaceful march!"

Police estimates have put the number of deaths since the imposition of the state of emergency at 264 but it is impossible to calculate the real total, in large part because of a media ban denying the press and other media free access to the areas which are under a state of emergency. It is thus that the deaths in Mamelodi passed almost unnoticed by the international community.

The ICJ has already expressed its grave concern at the imposition of the state of emergency which is currently in operation in 30 districts. In addition, it has released to the press a letter sent by the Secretary-General to President Botha on 25 September protesting against the "repeated practice of shooting unarmed demonstrators with lethal firearms, which has caused the death of hundreds of such demonstrators this year in South Africa.

Even when demonstrators are throwing stones at the security forces, the practice in other countries shows that it is neither necessary nor permissible to use lethal weapons against them. All violence used in self-defence must be proportionate to the violence used or the threat of violence. Stone-throwing rioters can be quelled by the use of water-hoses and other non-lethal weapons, and the security forces can be protected with helmets and shields. To cause death, especially that of women and children, by the use of disproportionate force is an act of homicide.

Statements such as that of Brigadier-General Blackie Swart in Cape Town that the police would react "with all the force at our disposal" are an incitement to use unlawful force."

The ICJ also protested against the immunity from civil action granted to all security forces under the state of emergency. This immunity was initially restricted to action in the areas affected by the state of emergency but on 1 November 1985, it was extended to the whole country. Such a

provision is tantamount to an invitation to the security forces to commit torture.

The South African Supreme Court has already granted an injunction ordering the police not to use torture, and a similar case is to be heard early in 1986. Among the affidavits on which the case is based are those of Wendy Orr, a doctor involved in the examination of detainees, who has claimed to have seen numerous examples of the results of torture and ill-treatment. The South African government's reaction to the growing determination of the Black community no longer to tolerate the indignity and discrimination of *apartheid* has been to begin a recruitment campaign for 11,000 extra policemen in a drive to bring the total force in March 1987 to 56,000.

Rather than tackling the root of the problem and dismantling its *apartheid* policy, the South African government is exacerbating the situation, seemingly unaware that for every demonstration of discontent it brutally crushes, several more will break out in its place.

COMMENTARIES

UN Sub-Commission on Discrimination and Minorities

The Sub-Commission met in Geneva in August 1985 for its 38th Session.

Genocide

Under the Item Review of further developments in fields with which the Sub-Commission has been concerned, it discussed the revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by the Special Rapporteur, Mr. Whitaker.

Besides referring to the Nazi holocaust in Europe, he also cited as cases of genocide the German massacre of Hereros in 1904, the Ottoman massacre of Armenians in 1915-1916, the Ukrainian program of Jews in 1919, the Tutsi massacre of Hutu in Burundi in 1965 and 1972, the Paraguayan massacre of Ache Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975-78 and the contemporary killings of Bahai'is in Iran. This passage in the report was criticised by many members of the Sub-Commission.

After analysing the Convention on Genocide, he has made the following recommendations:

- the definition should be extended to include a sexual group, such as women, men or homosexuals;
- the inclusion of cultural genocide or ethnocide, meaning the physical de-

- struction of indigenous communities, and also ecocide in terms of irreparable damage to the environment;
- an additional protocol to include the killings of political and other groups;
- addition to Article II of the Convention of words such as "in any of the above conduct, a conscious act or acts of advertent omission may be as culpable as an act of commission";
- to include specific wording in the Convention to the effect that in judging culpability a plea of obeying superior orders shall not be a defence;
- to include State responsibility for genocide, together with reparations;
- to make genocide a matter of universal jurisdiction and include in the Convention a provision similar to that of Article 8 of the Convention against torture;
- renewed efforts by the UN to persuade the remaining Member States to ratify the Convention;
- conducting interdisciplinary research into the psychological character and motivation of individuals and groups who commit genocide or acts of racism;
- developing an effective early warning system to monitor impending genocidal conflict and taking timely action on receiving such a warning; and
- establishment of a new impartial and respected international body to deal with genocide.

Speaking under this item, the Secretary-General of the International Commission of Jurists suggested that rather than seek to amend the Convention to include the 'acts of omission', the International Law Commission might be asked to express an opinion on whether the words in Article II include acts of conscious and deliberate omission with that intent. He also suggested that the Commission on Human Rights could establish a working group to deal with alleged cases of genocide, as well as to consider the proposals for universal jurisdiction and/or for an international penal tribunal and other additions and amendments to the Convention recommended by the Special Rapporteur.

The Sub-Commission, in a resolution, took note of the revised and updated study and recommended that the UN renew its efforts to make ratification of the Convention by State Members universal as soon as possible.

Elimination of Racial Discrimination

The Sub-Commission authorised its Chairman to send an urgent communication to the Chairman of the Commission on Human Rights, requesting him to send a cable to the government of South Africa urging the release of liberation leaders, in particular Nelson Mandela and Zephania Motupeng, and that they be allowed to come to Geneva to participate in the sessions of the Sub-Commission.

In another resolution, it requested the Chairman of the Commission on Human Rights to convey to the UN Secretary-General and the Presidents of the General Assembly and the ECOSOC, the deep concern of the Sub-Commission at the continuing failure to bring about the independence of Namibia and the latest efforts of

the Pretoria regime to impose an 'internal settlement'.

Human Rights Violations

Under this item the Sub-Commission, believing deeply that the United Nations must react in a timely and effective manner to the most urgent violations of human rights, recommended to the Commission on Human Rights that it should authorise the Bureau of the Sub-Commission to hold two intersessional meetings per year. These would enable the Bureau to review developments and ensure timely collection of appropriate information needed to bring to the attention of the Commission situations that reveal a consistent pattern of violations. The quorum for such a meeting of the Bureau would be three members, either in person or contacted by telephone.

The Sub-Commission adopted resolutions on the human rights situation in Afghanistan, Albania, El Salvador, Guatemala, Iran, Pakistan and in Arab territories occupied by Israel.

On Afghanistan, it expressed its alarm at the continuing reports of human rights violations and the suffering of civilian populations, and its concern and anxiety at the continuing presence of foreign forces in Afghanistan. In particular it requested the Commission on Human Rights to ask the Special Rapporteur to look into the fate of women and children as a consequence of the conflict.

On Albania, it requested the Commission on Human Rights to urge the government of Albania to ensure in a concrete manner freedom of religion or belief and to proscribe discrimination based on religion or belief, as well as to provide adequate safeguards and remedies against such discrimination.

On El Salvador, it expressed deep concern at the fact that though the number of human rights violations has decreased, the Salvadorian government continues to commit serious and massive violations by non-observance of the Geneva Conventions. It urged all States to refrain from intervening in the internal situation and, instead of supplying arms, to encourage a just and lasting political settlement.

On Guatemala, it observed with concern that historic discrimination against the indigenous population (who constitute the majority of the population of the country) has been made worse by a series of restrictive measures imposed by the government which violate human rights and fundamental freedoms of the predominantly indigenous rural and peasant populations, and by this sector of the population's insufficient access to the country's political processes. It also observed with concern that the cases of forced disappearances and extra-judicial executions have increased, as well as the fact that the relatives of the disappeared people associated with the Mutual Support Group have been subjected to tendentious accusations, harassments and threats which have recently culminated in the assassination of two of the leaders of this group and the exile of several of its members, including two of the leaders.

Once again, it urged the government of Guatemala to take effective measures to ensure that all its authorities and agencies, including its security forces, observe full respect of the human rights and fundamental freedoms of its citizens and that those responsible for the violation of human rights, including members of the army, its para-military groups and the security forces, are immediately and effectively brought to trial and punished accordingly.

On Iran, it expressed its alarm at the continuing, well-attested reports of gross

violations of the right to life, the right to freedom from torture, to liberty and security of the person, to freedom from arbitrary arrest or detention, to a fair trial, to freedom of thought, conscience and religion, as well as the right of religious minorities to profess and practice their own religion.

On Pakistan, the Sub-Commission expressed its grave concern at the promulgation of Ordinance XX of April 1984, with regard to the Ahmadi religious community which *prima facie* violates the right to liberty and security of the person, the right to freedom from arbitrary arrest or detention, the right to freedom of thought, expression, conscience and religion, and the right of religious minorities to profess and practice their own religion. It requested the Commission on Human Rights to call on the government of Pakistan to repeal the Ordinance and warned that the situation in Pakistan has the potential to cause a mass exodus, especially of members of the Ahmadi community.

On the situation in the Arab territories occupied by Israel, it strongly condemned the Israeli policies and practices of terrorist actions perpetrated against the Palestinian inhabitants of the occupied territories, such as killing, detention and torture, deportation, confiscation and annexation of land, and called upon Israel to withdraw immediately from the occupied Palestinian territories, including Jerusalem.

On the subject of the effects of gross violations of human rights on international peace and security, it requested the UN Secretary-General to submit at its next session a report based on the views expressed by Member States, UN agencies and NGOs on the contribution of the Sub-Commission to the strengthening of international peace and security and the achievement of the objectives and tasks of the international year of peace.

In another resolution on the same subject, it requested the UN Secretary-General to provide at its 40th session a report on the inter-relationship between human rights and international peace in all its aspects and dimensions, including the adverse impact of the military expenditure of the nuclear weapon States on the international social and economic situation and the right to development, as well as to examine the adverse consequences of the extension and dissemination of nuclear arms in non-nuclear regions for international peace and security and for the protection of human rights.

The administration of justice and the human rights of detainees

Study on amnesty laws

Mr. Louis Joinet, the Special Rapporteur, submitted his final report on the question of 'Amnesty laws and their role in the safeguard and promotion of Human rights'.

According to the study, which dealt only with amnesty for political offences, "an amnesty is considered to be the juridical expression of a political act whose expected effects directly concern the promotion or protection of human rights and, in some instances, the return to, or consolidation of, democracy:

- because the amnesty encourages national consensus in the wake of a political change brought about in a democratic framework (elections . . .);
- because it is the first act in the initiation of a democratic process or marks a return to democracy; or
- because it is intended to block an internal crisis (non-international armed conflict) or to mark the end of an inter-

national armed conflict."

After analysing the amnesty laws and experience of different countries, the Special Rapporteur concluded that:

- an amnesty deals only with the effects and not with the causes of national dissension, especially when the foundations of a democratic regime are not respected and a state of emergency is instituted;
- in such situations, the amnesty process can only be effective if it is coupled with social, economic and political measures to deal with the causes. These include, in the short term, the release of political prisoners and the repeal of emergency laws; in the medium term, holding elections; and, in the long term, implementation of economic and social measures attacking the root cause of national dissension.

Independence of judges and lawyers

The Special Rapporteur, Mr. L. M. Singhvi, submitted his final report on the study of 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers'.

The Sub-Commission, for lack of time, decided to postpone consideration of the study to its next session, and requested the Secretary-General to circulate the study to the Members of the Sub-Commission by December 1985 and to invite the Members to transmit their written comments to Mr. Singhvi.

Declaration against unacknowledged detention of persons

The Working Group on Detention proposed a declaration against unacknowledged detention, which the Sub-Com-

mission recommended to the Commission on Human Rights, for eventual adoption by the UN General Assembly. The proposed declaration is as follows:

"Declares that Governments shall, (a) disclose the identity, location and condition of all persons detained by members of their police, military or security authorities or others acting with their knowledge, together with the cause of such detention, and (b) seek to locate all other persons who have disappeared. In countries where legislation does not exist to this effect, steps shall be taken to enact such legislation as soon as possible."

Administrative detention

The Working Group on Detention also considered the question of administrative detention without charge or trial. The International Commission of Jurists had drawn attention to the practice of administrative detention in several countries of the world. The Sub-Commission appointed Mr. Joinet to prepare a paper for its next session suggesting procedures to deal with the question of administrative detention without charge of trial.

States of exception

The Special Rapporteur, Mr. L. Despouy, appointed to prepare an annual report on the respect for rules governing the declaration of a state of exception, submitted his explanatory paper on the best way to prepare such a report. He stated that he would follow the definition and principles expounded by Mrs. Questiaux in her study on states of exception (E/C. N.4/Sub.2/1985/15), and would attempt to evaluate the effects of states of emergency on practical observance of

human rights.

The Sub-Commission adopted a separate resolution concerning the state of siege in Paraguay, observing that the systematic renewal of the state of siege every three months since 1954 is at variance with the Constitution of Paraguay.

Indigenous populations

As in previous years, the pre-session Working Group on Indigenous Populations was attended by a large number of representatives of indigenous peoples organisations.

The Chairman/Rapporteur reiterated that it was outside the mandate of the Working Group to hear allegations of violations and the Working Group was not empowered to act as a chamber of complaints. The representatives of indigenous peoples organisations were, of course, entitled to draw attention to different types of violations when preparing standards on indigenous rights. However, few of them were skilful in presenting their concerns in this way, and nearly all of them were stopped by the Chair when trying to elaborate upon violations.

In its report the Working Group stated that the standards to be drafted by it should, in the first instance, be in the form of a Declaration, with a view to its adoption by the General Assembly. It would take due account of the existing instruments and proceed on the basis of opinions advanced by both governments and indigenous organisations. It adopted the following Plan of Action for 1986 onwards:

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- (a) Consideration of the right to autonomy, self-government and self-determination, including political representation and institutions;

- (b) Consideration of the right and responsibility of indigenous populations, as of all others, to respect universally recognised human rights and fundamental freedoms;
- (c) Consideration of the right to health, medical care, other social services and adequate housing.

List of preliminary priorities for subsequent Working Group sessions

- (a) Consideration of principles of equality and non-discrimination;
- (b) Consideration of the right to legal assistance and protection in administrative and judicial affairs;
- (c) Consideration of the right to traditional productive activities, work, free choice of employment, just and favourable conditions of work, and protection against unemployment, as well as the right to form and join trade unions for the protection of their interests;
- (d) Consideration of the right to freedom of peaceful assembly and association;
- (e) Consideration of the right to social security;
- (f) Consideration of the right to trade and to maintain economic, technological, cultural and social relations."

The Sub-Commission recommended to the Commission on Human Rights that the pre-session meeting of the Working Group on Indigenous Populations should be increased to eight working days. In another resolution it endorsed the Plan of Action adopted by the Working Group as well as its decision to concentrate on standard setting activities with the aim of providing a draft declaration.

Slavery and slavery-like practices

The Sub-Commission strongly urged all

states as well as relevant organs of the UN system and NGOs to submit broader, fresh information to the Working Group on Slavery, and to participate more actively in it.

In another resolution it expressed the hope that the United Nations Development Programme and other UN agencies would consider undertaking an additional and specific effort to assist the government of Mauritania in eliminating the consequence of slavery.

Human rights and scientific and technological developments

The Sub-Commission noted with concern the occurrence in all countries, particularly in developing countries, of industrial accidents involving loss of lives, and a lack of adequate information regarding the hazards of the processes, products and technologies. It requested the UN Secretary-General to place before the Sub-Commission information regarding existing practices followed by transnational corporations and enterprises regarding disclosure by them to governments, employees, consumers and the general public of the information at their disposal concerning the actual and potential hazards of their processes, products and technologies.

Definition of the term 'minorities'

The Sub-Commission, noting that the definition of the term 'minorities' prepared by Mr. Deschênes did not command general approval by its members, decided to transmit it to the Commission on Human Rights. The definition proposed by Mr. Deschênes is as follows:

"A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State,

endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law."

Human rights and youth

The Sub-Commission requested Mr. Dumitru Mazilu to prepare a report on 'Human Rights and Youth', analysing the efforts and measures for securing the implementation and enjoyment by youth of human rights, particularly the right to life, education and work.

In another resolution, it requested the

UN Secretary-General to invite governments, UN agencies, the International Committee of the Red Cross and NGOs to submit information concerning the incarceration of children under the age of 18 with adult prisoners and to solicit their views on the ways and means of preventing this practice.

Human rights instruments

The Sub-Commission decided to suspend the work of the Working Group on the Encouragement of Universal Acceptance of Human Rights Instruments, and appointed Mr. Bossuyt to process the information received and to consider this item at alternate sessions of the Sub-Commission.

Human Rights Committee

States Parties to the Covenant

A matter of concern to the Human Rights Committee, human rights organs of the UN and the general Assembly is the lack of new ratifications of the Covenant on Civil and Political Rights. The number of ratifying states remains at 81. The Committee has previously discussed this issue and referred to the need to have the Secretary-General more effectively publicise the work of the Committee and to expand the advisory services programme in order to undertake training programmes for government officials, explaining the obligations

imposed by the Covenant, including the reporting requirement under article 40 and the method of work of the Committee.

A training programme on the preparation and submission of reports was organised by the United Nations Institute for Training and Research (UNITAR) at the suggestion of the Centre for Human Rights. It was held in Barbados from 29 April to 10 May 1985; invitations were extended to the governments of the Caribbean region, and 18 government officials, Attorney-Generals, Solicitor-Generals and senior ministry members, attended. The programme was warmly received by the par-

ticipants and UNITAR is exploring the possibility of organising this type of training course in the African and Asian region. It is respectfully suggested that, if additional courses are offered, representatives from states not having ratified the Covenant be invited to attend and that the agenda be expanded to include a discussion of the obligations a state would undertake in ratifying the Convention, that the Committee's role in monitoring the implementation of the Covenant be fully and adequately explained and that states be made aware of the UN advisory services programme and the availability of that programme to assist them in carrying out their obligations under the Covenant, for example, in working with them to conduct a review of their legislation to determine whether it is in conformance with the Covenant.

One additional state, Spain, has recognized the Committee's competence to consider individual complaints under the optional protocol, bringing the number to 35, and two more states, Spain and Ecuador, have made the declaration under article 41 bringing this total to 18 states.

Reports Under Article 40

During its twenty-third, twenty-fourth and twenty-fifth sessions¹, the Committee considered the initial reports of Trinidad and Tobago, the Dominican Republic, New Zealand (Cook Islands) and Afghanistan, supplementary reports from Venezuela and Canada, and the second periodic reports of Chile, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic, Spain, the United Kingdom and the Ukrainian Soviet Socialist Republic.

At the conclusion of the dialogue be-

tween the states parties and the Committee, members of the Committee sometimes make observations about the information presented to them, their perception of the State Parties compliance with the Covenant and measures that might be considered by the state party. Many members chose to make such observations following the consideration of Chile's second periodic report. They indicated that many of the Committee's questions remained unanswered by the government representatives, and that the report had failed to address such basic issues as the effect of the emergency legislation in force on the rights protected by the Covenant and that no justification was given for the many violations of the Covenant that had occurred. It was noted that serious violations of human rights continued to occur within the country, and that the rights guaranteed by the provisional constitution adopted in 1980 are restricted or suspended by the transitional provisions of the constitution. The members pointed to the arrest of thousands of people following public demonstrations and the trial of civilians by military courts. They also questioned the need to wait until 1989 to put into effect measures designed to restore democratic government. They then observed that the underlying cause of the problems of the country seemed to be the discontent aroused by the existing regime among the people, who were prevented from exercising their political rights in accordance with the Covenant. Members of the Committee also expressed the hope that the human rights situation in the country would improve and that the Committee would be presented with a comprehensive report that accurately reflected the situation in the country. The government representatives indicated that all the Committee's

1) These sessions are covered in the Committee's annual report to the General Assembly contained in General Assembly Official Records, 40th session, Supplement No. 40 (A/40/40).

observations would be brought to the attention of the competent authorities.

Overdue reports continue to be of concern to the Committee. It decided to include in its annual report to the General Assembly references to the following countries as not having submitted the required reports: Zaire, the Central African Republic, Saint Vincent and the Grenadines, Libyan Arab Jamahirya, Iran (Islam Republic of) and Uruguay. Special requests went to the governments of El Salvador and Guinea to supply the requested reports by specific dates. In the case of El Salvador the Committee indicated that it intended to continue consideration of that States' initial report, begun during October and November 1983, at its 27th session to be held from 24 March to 11 April 1986 and requested the government to submit its supplementary report by 31 December 1985. Guinea was also requested to submit its report by December 1985. This request followed a visit of one of the members of the Committee, Mr. Birame N'diaye, to Guinea from 11 to 14 March 1985 at the request of the government.

The article on the Committee in ICJ Review No 33 noted the creation of a working group to suggest methods of considering second periodic reports. A procedure was established on a trial basis whereby the State Party would be given in advance a list of issues which it should address. After the State Party's conclusion of its remarks, members would be permitted to pose questions about matters they felt remained unclear or which were not addressed sufficiently by the State Party. This practice has been continued by the Committee and the role of the working group has been expanded to include making recommendations as to how, in general, supplementary reports should be treated and more specifically how those already submitted should be dealt with. The group is

also to continue to review the Committee's method of treating second periodic reports. In addition, it is to prepare a programme for the Committee's further work on the drafting of general comments and consider the texts of any draft general comments that might be put before the Committee.

Forthcoming reports

The next session of the Committee will be held in New York during March 1986 when the second periodic reports of Tunisia, Mongolia and the Federal Republic of Germany will be examined.

General Comments

During this period the Committee adopted general comments on article 6 (the right to life), and considered drafts of general comments on the position of aliens and article 27 (minorities).

The general comment recalls the Committee's previous observations on article 6 in which it stated that the right to life is the supreme right and is basic to all human rights. It is a right from which no derogation is permitted. The Committee had also noted in those previous observations that states had a supreme duty to prevent wars which, along with other acts of mass violence continue to be a scourge on humanity.

While stating that it remained deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, it noted that growing concern had been expressed by representatives from all geographical regions at the development and proliferation of "increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for

vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all, and associated itself with this concern.

The Committee then went on to state: "It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

Furthermore, the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

The Committee accordingly, in the interest of mankind, calls upon all States, whether parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace."

Statement of Views Under the Optional Protocol

Five final views were adopted by the Committee during this period. Two concerned Madagascar, the others concerned Finland, Suriname and Uruguay.

The case against Suriname, *Baboeram, et al v. Suriname*, 146/1983 and 148 to 154/1983 involved the deaths on 8 December 1982 of 15 prominent citizens,

while in the custody of the army. They included four journalists, four lawyers, amongst whom was the Dean of the Bar Association, two university professors, one trade union leader, two businessmen and two army officers. Most were members of the recently formed Suriname Association for Democracy which had, in an open letter to the head of state, called for a constructive dialogue with a view to return to constitutional rule, parliamentary elections and the Rule of Law. Communications were submitted on behalf of seven of the victims, alleging violation of articles 6 (right to life), 7 (prohibition against torture), 9 (right to liberty and security of the person), 10 (treatment of those deprived of their liberty), 14 (due process of law), 17 (right to be free from arbitrary or unlawful interference with privacy) and 19 (right to hold opinions without interference).

One of the authors submitted the ICJ report on Human Rights in Suriname based on a mission undertaken during February/March 1983. The Committee found that the report confirmed the author's contention that there were no effective legal remedies. The author had stated that no recourse was made to the courts in Suriname because "it became obvious from different sources that the highest military authority... was involved in the killing," because the official judicial investigation required in such a case of violent death had not taken place, and "because of the atmosphere of fear one would find no lawyer prepared to (plead) such a case, considering the fact that three lawyers have been killed, apparently because of their concern with human rights and democratic principles". The State Party did not contest the author's allegations that there were no legal remedies to exhaust.

The State Party had objected to the admissibility of the complaint under article 5 of the Optional Protocol on the ground

that the same matter had been submitted to and was being examined under other procedures of international investigation or settlement, referring specifically to international organisations dealing with human rights such as the Inter-American Commission on Human Rights, the International Committee of the Red Cross, the International Labour Organisation, the International Commission of Jurists, Amnesty International and the forthcoming visit of the UN Special Rapporteur on summary or arbitrary executions. The Committee rejected this argument stating that investigations by intergovernmental organisations concerning the human rights situation in a country could not be seen as the same matter as the examination of individual cases within the meaning of article 5, nor could procedures established by nongovernmental organisations such as the ICJ, Amnesty International or the ICRC constitute a procedure of international investigation or settlement.

In rendering its decision the Committee took note of the state party's failure to provide the information and clarifications requested by the Committee.

The Committee then went on to conclude that the 15 prominent persons lost their lives as a result of the deliberate action of the military police, that the deprivation of life was intentional and therefore the victims had been arbitrarily deprived of their lives contrary to article 6(1) of the International Covenant on Civil and Political Rights. In the circumstances, it did not find it necessary to consider assertions that other provisions of the Covenant were violated.

On *Hiber Conteris v. Uruguay*, 139/1983 the Committee found that numerous violations of the Covenant existed, in particular:

- of article 7, because of the severe ill-treatment which Hiber Conteris suffered during the first three months of deten-

tion and the harsh and, at times, degrading conditions of his detention since then;

- of article 9, paragraph 1, because the manner in which he was arrested and detained, without a warrant, constitutes an arbitrary arrest and detention, irrespective of the charges which were subsequently laid against him;
- of article 9, paragraph 2, because he was not informed of the charges against him for over two years;
- of article 9, paragraph 3, because he was not brought promptly before a judge and because he was not tried within a reasonable time;
- of article 9, paragraph 4, because he had no opportunity to challenge his detention;
- of article 10, paragraph 1, because he was held incommunicado for over three months;
- of article 14, paragraph 1, because he had no fair and public hearing;
- of article 14, paragraph 3 (b), because he had no effective access to legal counsel for the preparation of his defence;
- of article 14, paragraph 3 (c), because he was not tried without undue delay;
- of article 14, paragraph 3 (d), because he was not tried in his presence and could not defend himself in person or through legal counsel of his own choosing;
- of article 14, paragraph 3 (g), because he was forced by means of torture to confess guilt.

After making its finding the Committee noted that the new government of Uruguay had provided it with a list of the persons released between August 84 and 1 March 1985 when the new government came to power, and that it had been informed that pursuant to an amnesty law enacted on 8 March 1985 all political prisoners had been released and all forms of political banish-

ment had been lifted. The Committee expressed its satisfaction at the measures taken by the State Party towards observance of the Covenant and co-operation with the Committee.

The first case against Madagascar, *Wight v. Madagascar* 15/1982, involved facts similar to the Marias case in which views had been adopted on 24 March 1983. The victim was represented by the same lawyer. The victim was a pilot for South African Airways and was forced to make an emergency landing in Madagascar where upon he was arrested, tried before a military court on charges of unlawfully overflying Malagasy territory, convicted and sentenced to five years imprisonment with a fine. Wight made an escape attempt, was caught and was sentenced to an additional two years imprisonment. In reaching its decision the Committee concluded that the following facts were uncontradicted, that after Wight's recapture he was kept in a solitary room at the political police prison at Ambohibao, chained to a bed spring on the floor, with minimal clothing and severe rationing of food, for a period of 3 1/2 months; during this period and until July 1979 (10 months) he was held incommunicado. Then again in November 1981 he was held incommunicado in a basement cell measuring 2m by 1 1/2m under inhuman conditions. For the remainder of the time the conditions were better.

The Committee concluded that violations had taken place of articles 7 and 10, paragraph 1, because of the inhuman conditions in which Wight was sometimes held and article 14, paragraph 3 (b) because, for a 10-month period, while criminal charges were being determined, he was held incommunicado without access to legal counsel.

The second case, *Monja Jaona v. Madagascar*, 132/1982, involved a 77-year-old Malagasy national who had been a candidate in the presidential elections of 1982

and is at present a member of the National People's Assembly. The Committee concluded that the facts disclosed violations of article 9, paragraph (1), because the victim was arrested on account of his political opinions; of article 9, paragraph 2, because he was not informed of the reasons for his arrest or of any charges against him and of article 19, paragraph (2) because he suffered persecution on account of his political opinions.

In *Paavo Muhonen v. Finland* 89/1981, the victim alleged that his rights under article 18, paragraph (1) (the right to freedom of thought, conscience and religion) had been violated because the government had not respected his ethical convictions and his right to be a conscientious objector to military service. Initially the government had rejected the victim's position that he was a conscientious objector, and had ordered him to perform armed service. His refusal to do so led to a criminal conviction and jail sentence. At a second rehearing before the Military Service Examining Board, at which the victim personally appeared, his claim was accepted. Shortly after, he was pardoned by the President. After reviewing the facts the Committee decided that the final review of the Examining Board which recognized Mr. Muhonen's status as a conscientious objector alleviated the necessity to determine whether article 18 guaranteed a right to conscientious objection to military service. However there was a question as to whether the victim was entitled to compensation under article 14, paragraph (6) (right exists when a conviction has been reversed or person has been pardoned on the grounds of a miscarriage of justice). After presentation of information by both parties the Committee determined that the conviction of Mr Muhonen had never been reversed and that the pardon had not been given on grounds of a miscarriage of justice, but rather on considerations of equity,

therefore no claim to compensation existed under article 14.

Decisions on Admissibility

Ten decisions finding complaints inadmissible were made public by the Committee, two concerning Norway, two concerning the Netherlands, three concerning Canada, two concerning Sweden and one concerning Finland. In the course of its decision in *L.T.K. v. Finland* 185/1984, the Committee had to face the question of whether the Covenant protected the right to conscientious objection to military service. It concluded that the Covenant did not, stating that neither article 18 (freedom of thought, conscience and religion) nor article 19 (right to hold opinions without interference), particularly in light of article 8, paragraph (c)(ii) (service in the armed forces can not be considered forced or compulsory labour), could be construed as implying that right.

In the first Norwegian case, *O.F. v. Norway* 158/1983, the author alleged that he had not been given an opportunity adequately to prepare his defence, to be assisted by legal counsel without cost to him or to examine witnesses against him. The state court case against the victim involved a traffic offence and failure to furnish information on a business he operated. The Committee found that on the facts before it no violation of the Covenant was revealed as the information necessary to prepare his defence was made available for examination by the victim at the police station, that the charges against him were not of the type where the interests of justice required that a lawyer be appointed, nor was he denied an opportunity to examine the witnesses against him.

In the second case declared inadmissible against Norway, *V.Ø. v. Norway* 168/1984,

the author alleged that his rights under the Covenant had been violated because of custody decisions rendered in that country's courts. The author had submitted an application to the European Commission of Human Rights and the Committee found that as a result it lacked competence under article 5 to consider the case.

In *M.F. v. the Netherlands* 173/1984, the case of Chilean national seeking political asylum in the Netherlands was reviewed by the Committee. The author claimed breaches of various rights under the Covenant. The Committee concluded that no violations were revealed, stating that "it emerges from the author's own submission that he was given ample opportunity, in formal proceedings including oral hearings to present his case for sojourn in the Netherlands.

The author in *J.D.B. v the Netherlands*, 178/1984, claimed that the State Party was violating his right not to be discriminated against because although trained as a radio and TV repairman he did not have a licence, and after a prolonged period of unemployment he was prosecuted when he undertook such work on an occasional basis. He states that Dutch legislation prevents him from gainful employment and punishes him for seeking an alternative to being unemployed. The Committee found that the facts submitted did not reveal any violation of the Covenant.

In *J.K. v. Canada*, 174/1984, the Committee reiterated its position that it is not within its competence to review findings of fact made by national tribunals or to determine whether national tribunals properly evaluated new evidence submitted on appeal. The author alleged that he was unjustly convicted of a crime in 1971 and although the event took place prior to the coming into force of the Covenant, he alleged that the stigma of the conviction and the social and legal consequences made him today a victim of violations of the rights in

the Covenant. As the Committee could not review the findings of fact of the original tribunal, the consequences described by the author did not themselves raise issues under the Covenant.

The availability of an action for a declaratory judgment was found to be an effective domestic remedy within the meaning of the article 5 of the Optional Protocol, and therefore precluded the Committee's consideration of the complaint, in *C.F. et al v. Canada*, 113/1981. The authors, Canadian citizens, were in detention at the time of the submission and alleged violations of articles 25(b) (the right to vote) and article 2, paragraphs 1 and 3(b) (obligation to extend all rights to individuals within territory without discrimination and to insure a competent tribunal to determine remedies for violations).

The claim in *J.H. v. Canada* 187/1985 was rejected because the author had not alleged any facts to indicate that he himself had been a victim. The author alleged that the promotional policies of the Canadian Armed Forces as they apply to English-speaking Canadians were discriminatory and constitute a violation of article 2, paragraph 1 (rights protected by the Covenant are to be guaranteed without distinction of any kind).

The author of the claim in *D.F. v. Sweden*, 183/1984, purported to bring a claim on behalf of Arabs and Muslims who have allegedly been the continual targets of discrimination and abuse in Sweden. Numerous violations of the Covenant were alleged. In declaring the case inadmissible the Committee found that the matter was being examined before another procedure of international investigation, that the author had not demonstrated that he personally was the victim of any discrimination or that he had authority to speak on behalf of the other persons for whom he initiated the claim.

The author's failure to exhaust domestic remedies precluded the Committee from hearing the claim in *N.B. v. Sweden*, 175/1984, which involved the effects of a custody decision made in the Swedish courts.

Statement by Uruguay to the Committee

During the twenty-fourth session of the Committee (March/April 1985) a representative of the government of Uruguay appeared before the Committee to convey a message from the Ministry of Foreign Affairs. The message referred to the government's solemn announcement that it intended to abide by the provisions of the Universal Declaration of Human Rights as well as all other human rights instruments. It listed a number of measures which had already been taken in that regard, including approval of a law of amnesty; restoration of judicial independence and freedom of the press; repeal of regulations prohibiting or limiting trade-union rights, including the right to strike; ratification of the American Convention on Human Rights 1969; restoration of academic freedom; removal of the prohibition on the activities of political parties; establishment of a National Repatriation Commission to promote the return of exiled Uruguayans; and the reinstatement of all civil servants dismissed for ideological, political and trade-union beliefs. The government representative also expressed the appreciation of his people for the demonstrations of international solidarity that had been made during a time when their rights were being systematically violated and their appreciation for the close attention the Committee had given to communications coming from Uruguay. The message was warmly welcomed by the Committee.

Action Subsequent to Adoption of Committee's Views

When the Committee forwards its views to the State Party it invites it to inform the Committee of actions taken pursuant to those views. By notes dated 11 October 1984, 4 February 1985 and 25 March 1985 the government of Uruguay furnished the Committee with lists of persons who had been released from prison; included in the lists were persons whose cases had been decided by the Committee or were pending before it. Some of the pending cases were discontinued at the request of the authors.

Canada informed the Committee on 5 July 1985 that a new Canadian law amending the Indian Act had received royal approval and that the amendments, which alleviated the discrimination found in *Love-lace v. Canada*, 24/1977, had entered into force on 17 April 1985.

On 19 July 1985 the government of Madagascar submitted further information to the Committee in the case of *Monja Jaona v. Madagascar*, 132/1982. It repeated its position that the case was inadmissible because of non-exhaustion of domestic remedies and submitted documentation showing that a case against Mr Jaona was pending at the time the Committee declared the communication admissible. It also gave factual details of the circumstances leading to Mr Jaona's arrest and the conditions of his detention. The State Party indicated its regret at not having made the information available to the Committee at an earlier date and stated its intention to cooperate more fully with the Committee in the future.

Publicity for the Covenant and the work of the Committee

The members of the Committee continued to stress the need to publicise the text

of the Covenant as well as the work of the Committee, which the members regard as significant in promoting the observance and enjoyment of the rights contained in the Covenant. The Committee has also continued to stress to the States Parties the importance of bringing the Covenant to the attention of administrative and judicial authorities and of translating the Covenant into the main local languages.

The first set of the annual bound volumes of the Committee's work, covering the period 1977 to 1978, are due to be published in autumn 1985. The work on the second set of volumes had started and it was hoped that it would progress rapidly.

At the Committee's request work was undertaken on a volume entitled *Selected Decisions under the Optional Protocol (second to sixteenth session)*. That volume has now been published.

Consideration of the Committee's Report by the General Assembly

The General Assembly also expressed the view that more publicity needed to be given to the work of the Committee and in resolution 39/136 urged the Secretary-General to do so and also requested the Secretary-General to keep the Committee informed of the relevant activities of the General Assembly, the Economic and Social Council and the various human rights bodies.

The Committee's general comment on article 6 (No. 14(23)) received much attention from the Third Committee of the General Assembly. Opinions varied as to the Committee's competence to issue a general comment on the subject matter (discussed *supra*). The Committee expressed satisfaction at the attention its work had received and expressed the view that the right to life as enunciated in article 6 could not be in-

terpreted narrowly, and that the Committee was well within its mandate in appealing to states for a ban on nuclear weapons in order to protect the right to life.

There was also a considerable debate on the amount of time allowed to States Par-

ties for commenting on the admissibility of complaints, and the amount of time spent in considering second periodic reports. The Committee took note of these comments and decided to address them at future meetings.

Amnesty Laws

The potential of amnesty laws as a tool capable of reconciling and pacifying nations formerly at war, of resolving internal conflicts, led the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities to appoint Mr Louis Joinet, a French magistrate, as Special Rapporteur on the subject. His final report, "a general study of a technical nature on amnesty laws and their role in the safeguard and promotion of human rights", was presented to the Sub-Commission at this year's session.

The report is based on amnesty laws in 37 countries which responded to a request by the Special Rapporteur for information, as well as on documents provided by inter-governmental organisations, including the ICJ. The Special Rapporteur endeavoured in his report "to set out the practices followed by the states dealing with amnesty" and "to compare these experiences with a view to deducing a number of rules or constants which might serve as a framework for authorities proposing to initiate an amnesty, as well as to jurists responsible for drafting legislation." He notes that "there

are few if any bibliographic references to comparative law studies on the subject."

The report traces the evolution both of amnesty laws and the situations to which they are applied, the control of tensions, the transition to democracy, the neutralization of opposition and guerrilla groups and the return of exiles. It also examines the effects of amnesty laws such as the release of political prisoners, the return of exiles, the dropping of penal and disciplinary proceedings, the restoration of civil and political rights, the reinstatement of persons deprived of employment and the question of repatriation.

Background

Amnesty was originally an imperial privilege, stemming from, *inter alia*, the divine right of kings, by which the conduct of those amnestied is deemed not to have "constituted an offence and the penalty is considered never to have been enforced." It should not be confused with pardon or indulgence which are granted specifically

to certain individuals; amnesty in effect, concerns the acts themselves which are thereby deemed not to have been illegal and any guilt attaching to those who committed them is expunged.

At the conclusion of hostilities (external or internal) necessity has often led the victor to put aside thoughts of revenge and give priority to placating inflamed passions and bringing back peace and stability. The granting of amnesty has been part of this process, as can be seen in numerous treaties from the Peace of Westphalia of 1648, which ended the Thirty Years's War, to the French amnesty law of 1951, which stated that "amnesty, full and complete, is granted to all the acts committed after 10 June 1940 and before 1 January 1946 with the intention of serving the cause of the liberation of the territory or contributing to the definite liberation of France." These and countless other examples can be cited testifying to a common desire among nations to consign certain acts to oblivion as a means of restoring order.

However, not every peace treaty contains a blanket amnesty for every act committed during hostilities. Sometimes an amnesty is not granted at all, while at other times it is subject to certain exceptions. For example, the amnesty proclaimed in England on the restoration of Charles II did not extend to those who had taken part in the execution of his father. Amnesty was not even included in the 1919 Peace Treaty of Versailles; on the contrary, the Allies demanded the punishment of the Kaiser William II for crimes against humanity. At the end of World War II, personal, criminal liability was expressly provided for in the Charter of the International Military Tribunals of Nuremberg and Tokyo.

Transgressions of the laws of war were examined in the Hague Conventions of 1899 and 1907 but personal criminal liability was not mentioned, although compen-

sation, to be borne by states and not by individuals was dealt with. Later on, the Geneva Conventions specifically excluded war criminals and persons accused of committing gross violations of the Conventions from benefitting from amnesty by providing that "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches of the present Convention," and that "each High Contracting Party shall be under the obligation to search for persons alleged to have committed or ordered to be committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts."

This was followed by UN General Assembly Resolution 95(I) of December 1946, affirming the principles of Nuremberg and the Convention on Non-Applicability of Statutory Limitations for War Crimes Against Humanity. Thus, it was established in international law that states would not at any cost tolerate war crimes amounting to crimes against humanity and perpetrators of such crimes would be excluded from any amnesty agreement.

Amnesty in Internal Conflict

The concept of amnesty becomes more complex when related to internal conflicts and tensions and it is in this area that its use is becoming increasingly developed.

Amnesty has been turned into a tool to reconcile conflicting elements in society and provide a remedy to resolve grave situations varying from civil war to public demonstrations, strikes and states of emergency. Although sometimes used in other ways, for example, to commemorate special dates such as the anniversary of the king or president or the visit of foreign

dignitaries; to cope with practical problems such as prison overcrowding as has been done in Britain and Portugal; and on humanitarian grounds, for example, when Zaire declared an amnesty in 1981 for disabled persons and when Syria declared one in 1978 for the chronically ill and incurable; it is in a political context that amnesty is most often used – as a means of national pacification and reconciliation, signalling a return to normality.

This has been seen lately in the return to democratic rule of several Latin American countries which until recently had been under dictatorial regimes. Such dictatorships routinely repress any form of opposition on the grounds of so-called 'national security'. This repression, often called 'state terrorism', results in grave violations of human rights, for example, extra-judicial executions, illegal detentions, forced or involuntary disappearances, expulsions, and the proscription of unions and political parties.

Such regimes have also regularly been charged with corruption, misappropriation of public resources and neglect of the education and development needs of the population. This provokes a reaction within society leading to confrontation which can involve rioting, strikes, demonstrations, rebellion and sedition.

Sometimes the internal conflict is so deep-rooted that an amnesty, by itself, is of little help. Indeed, if it is applied in a self-serving way, to benefit only those in power, an amnesty can exacerbate a situation and entrench feelings of hostility. Such was the case with the amnesty in Chile in April 1978. It was unilateral and aimed to amnesty "those responsible for assassinations, torture and other offences committed during the administration of the Junta rather than a genuine amnesty for political opponents."^{*} The violations of human

rights referred to were, of course, and still are, those committed by the security forces of the military government.

Later, Argentina followed the Chilean example. Defeated and disheartened by the Malvinas war and pressured by the population to disclose the whereabouts of thousands of victims of the repression, the military proposed to a demoralised Congress an amnesty law which was promulgated on 25 September 1983, at the end of the regime's period of office. It was called a "law of national pacification" but was, in fact, a 'self-amnesty' designed to avoid criminal and civil proceedings being brought against those who had been involved in carrying out the repressive policies of the Junta, once democracy had been restored.

However, the newly elected Argentinian parliament withdrew this unilateral amnesty, denying the benefits of amnesty to those who had committed grave violations of human rights under the previous regimes. Now, members of all three military juntas have been tried by the Argentinian civilian courts.

A similar amnesty which enjoys widespread approval but does not extend to those who have committed the gravest violations of human rights, can be seen in the amnesty law introduced in Uruguay in March 1985. All political prisoners were released, political trials were cancelled and exiles allowed to return to the country, but the amnesty was not extended to these persons charged with killings, torture and disappearances under the previous regime. The International Secretariat of Jurists for Amnesty in Uruguay (SIJAU) played an important role in the campaign for an amnesty in favour of the exiles from Uruguay. It has published a number of articles on this subject several of which stemmed from its Colloquium on the legal basis for a

* UN Special Report on Chile, A/33/331 p. 68, + Annex XXVIII.

return to democracy in Uruguay. It included articles by Mr Louis Joinet, the UN Special Rapporteur, and by the ICJ Legal Officer for Latin America, Alejandro Artucio together with his wife, Mercedes Artucio.

Spain provides another illustration of the use of amnesty to smoothe a political transition, in this case the return to a democratic regime after 41 years under the dictatorship of General Franco.

This amnesty law was enacted in July 1976 and covered rebellion, sedition and other activities of opposition groups.

Conclusion

International conflicts are resolved by diplomacy leading to treaties or through the medium of the UN or other third parties.

However, internal conflicts are rarely subject to such mediating influences and other methods of resolving tensions such as political amnesty therefore become increasingly important. Its usefulness is illustrated in examples such as those described above. Its terms, incorporated in national legislation, should be in line with international practice and, in accordance with natural justice, it should exclude those who have committed the gravest violations of human rights especially those internationally considered as crimes against humanity.

A political amnesty, genuinely motivated

by a need to forestall a critical situation, or to encourage national reconciliation and signal a move towards democracy, should provide for the release of all those charged with policial crimes against the state, for the lifting of all political restrictions such as those imposed on trade unions and political parties; for special consideration being given to victims of forced or involuntary disappearances; and for those who are to be tried being charged promptly and brought before regular civilian courts.

This useful function of amnesty laws was recognised by José Zalaquett in his article "From Dictatorship to Democracy" in *The New Republic* (16 December 1985) where he talks of the "need for restraint particularly when national unity and reconciliation are needed to consolidate democracy."

However, he goes on to emphasise that "those presumed responsible for human rights violations [can] not amnesty themselves or their accomplices or subordinates... crimes against humanity must be tried and those found guilty punished. Only society, having learned the full truth can decide, through its elected representatives or other democratic means, the extent to which an amnesty or other measures of magnanimity might be granted."

He was speaking in the context of Argentina but the principles he expresses are of universal validity.

ARTICLES

Administrative Detention in The Israeli-Occupied West Bank

by
Emma Playfair

On 4 August 1985 the Israeli cabinet announced that it was reintroducing administrative detention as well as deportation and other strong measures in the occupied West Bank in order "to clamp down on terrorism and incitement". Within a week, five six-month administrative detention orders had been imposed and confirmed, and by the first week in September a total of 62 people from the West Bank and Gaza were reported to have been administratively detained.

Administrative detention, sometimes called preventative detention or internment, is the detention of individuals by the executive without charge or trial using administrative procedures. Under the Israeli military occupation of the West Bank the executive power is in the hands of the military authorities, and it is thus the military authorities who exercise this power.

Israel made use of administrative detention, from the first years of the occupation, which began in 1967. For many years this practice was a major topic of discussion amongst those concerned with Israel's policies in the West Bank and in Israel itself. Little has been written in recent years on the subject however, because, in response to strong international and internal pressure, Israel began to phase out the use of administrative detention in 1980. The last administrative detainee was released in 1982, and it thus became a closed issue. With the rein-

roduction of administrative detention, it once again becomes a live issue and of the utmost importance, involving as it does a serious infringement of the individual's liberty and right to due process.

Although the scope of this report is limited to the West Bank, frequent reference will be made to Israeli law and precedents, since the law is very similar, and many of the references made in cases and opinions in relation to Israeli law are also applicable to the West Bank.

The historical background

Israel enacted its own laws authorising administrative detention in 1979. Until that time in both the West Bank and Israel, the law under which orders of administrative detention were made was still essentially that used by the British Mandate against both Jews and Arabs before 1948. In introducing the bill and explaining the necessity for the law to the Knesset in 1979, the then Minister of Justice Shmuel Tamir described Israel as "a state under siege",¹ although this was 31 years after the establishment of the State of Israel, 12 years since the start of the occupation of the West Bank, and 6 years after the last war in which Israel was involved.

Except for the first years of the occupa-

tion, Israel has not made extensive use of administrative detention to effect mass arrests but has applied it on an individual basis. This is doubtless due in part to the fact that provision exists in the military orders relating to the West Bank for the holding of detainees for a period of up to 18 days, 14 of them incommunicado, without bringing the detainee before a judge and up to six months in total without charge.² It is this provision that is generally used to round up and detain large numbers of Palestinians after disturbances.

During the late 1970s and early 1980s, Israel came under increasing public pressure both internally and from abroad to abandon the use of administrative detention, from such varied sources as Amnesty International, the United Nations and Israeli lawyers, journalists and others,³ and in the early 1980s it began to phase out use of the measure. The last administrative detainee in the West Bank at that time, Ali Awwad al-Jammal, was released on 2 March 1982 after spending 6 years and 9 months in prison without charge or trial.

The phasing out of administrative detention, however, coincided with an increase in the use of 'restriction orders' by which a person is confined to his or her town, village, or house, generally confined to home after dark, and required to report at regular intervals at a police station. These orders themselves have come under similar criticism, since they, too, are used as an extra-judicial method of control and restrict the individual's right to freedom of movement.⁴ By the end of 1982, 81 such orders had been issued, no reasons being given except for the vague term "security reasons". At the time of writing, there are some 34 such orders in force, in addition to the 62 administrative detention orders.⁵

The reintroduction of administrative detention orders in 1985 in the West Bank

seems to be in response to intensified pressure on the government in the preceding months from Israeli settlers and other extremists for harsh measures to be taken against Palestinians in the Occupied Territories. These calls were made partly in response to a series of attacks on Israelis in the West Bank and bordering areas of Israel, and partly from anger at the action of the Israeli authorities in releasing 1150 Palestinian political prisoners in May 1985 as part of an exchange agreement.⁶ Mounting demands were made for the reintroduction of the death penalty, deportations and administrative detention, and a few days later the last two measures were introduced. Reintroduction of the death penalty is still under consideration.

The first order of administrative detention made since its use was phased out was made on 31 July 1985 and confirmed on 2 August, even before the Israeli cabinet's announcement of its decision to reintroduce the measure. Between 29 August and 4 September, 57 more administrative detention orders were made, bringing the total number to 62.

The law

International law

Detention without charge or trial constitutes a serious infringement on the individual's rights to due process and to protection from arbitrary arrest. It also contravenes international law: Article 9 of the Universal Declaration of Human Rights (UDHR) and Article 9(1) of the International Convention on Civil and Political Rights (ICCPR) both state that "No one shall be subjected to arbitrary arrest or detention . . .", and the right to due process is protected in Article 10 of the UDHR.

Despite these provisions administrative detention is widely used in many parts of the world, especially in times of national emergency – according to the International Commission of Jurists' information, at least 85 countries in the world have legislation permitting this practice and have used it within the last 3 or 4 years⁷ – and its use in times of war or occupation is sanctioned by international law, albeit in strictly limited circumstances.

The Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War⁸ contains provisions regulating the powers and conduct of an occupying power towards the civilians of the occupied territories. When challenged on the legality of administrative detention procedures under international law, Israel customarily refers to Article 78 of this Convention, which provides that:

“If the occupying power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”

However, Article 6 of the same Convention states that, with the exception of a number of specified provisions, mainly humanitarian in nature and not including Article 78, the provisions of the Convention in the case of occupied territories shall cease to apply “one year after the general close of military operations”. The reason for this appears to be that it is expected that by the end of one year the occupying power will have had the opportunity to establish its authority well enough not to need the stringent methods of control provided for by the articles concerned, and that life will to a substantial extent have returned to normal.

Israel's occupation of the West Bank is

now in its 19th year. With few exceptions the violent acts of resistance by the occupied population are minor and isolated incidents. Such acts of resistance cannot be described as military operations in the meaning of a convention on warfare, and it is submitted that the relevant articles in the convention should have ceased to apply some considerable time ago, and that administrative detention therefore cannot be justified under this section.

Even when administrative detention is permitted by the Convention, it is authorised only if considered ‘*necessary for imperative reasons of security*’ (emphases added). Jean Pictet states in his commentary to the Convention that “In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict . . . such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.” Pictet comments further that Article 78 relates only to those not charged with any offence so that precautions taken against them cannot be in the nature of a punishment, only preventative.⁹

Other criteria were proposed for the use of administrative detention by the International Commission of Jurists as long ago as 1962 at an International Conference in Bangkok. One of the principles that it considered should govern the use of administrative detention was that it “should be lawful only during a period of public emergency threatening the life of the nation.”¹⁰ Although equivalent principles have not yet been adopted by other international bodies, it is submitted that the principle quoted presents a reasonable limitation on such a drastic deprivation of individual liberty.

It is recognised that Israel does have a security problem within the Occupied Territories and that this is likely to continue as long as the occupation continues.

Attacks by Palestinians should not be minimised. Nevertheless, it should be recognised that they occur partly as a direct result of the confrontational situation created by Israel's policy of settling its own citizens in the occupied Palestinian territories, contrary to international law, and by the extremist and racist attitudes of those settlers towards the Arab population.

As to the present extent of the security problem, Vice-Premier Yitzhak Shamir acknowledged in a recent interview, when questioned about the reintroduction of administrative detention, that the present rash of attacks is by no means the worst in the history of the state, "but the more we get used to conditions of normalcy and security, the more such incidents anger and aggravate people. Moreover, the pattern of sporadic murders of individuals is particularly disruptive to normal life and emotionally affects so many people."¹¹ Disruption of normal life and the causing of anger, aggravation and emotion to people, however numerous, cannot amount to imperative reasons of security, nor be a threat to the area as a whole. The level of resistance within the Territories does not justify the claim that Israel is "under siege" from the Territories. Indeed, in 1982 when the level of resistance was much greater following the invasion of Lebanon, the military authorities apparently saw no need to introduce the severe measure of administrative detention.

Extensive powers are available to the military government to prosecute in the military courts those responsible for actual attacks or for incitement and these powers are widely used. It is clear from Article 78 of the Fourth Geneva Convention that administrative detention is justifiable only when it is absolutely necessary for security reasons. This precludes its use either as a substitute for criminal proceedings or as a palliative for the public.

The local law

The law governing administrative detention in the West Bank is to be found in Article 84A and Article 87 of Military Order 378 of 1970, an Order Concerning Security Provisions, as amended by Military Orders 815 and 876 of 1980.

Article 87, before amendment, authorised a military commander to issue an order of administrative detention on essentially the same basis and using the same procedure as under the British Mandate law, thus mirroring the practice in Israel where the Mandate emergency regulations still applied.

Substantial changes were made to the law in Israel in 1979 when a new law was enacted entitled the Emergency Powers (Detention) Law 5739-1979. On 11 January 1980, Military Order 815 was issued relating to the West Bank, which amended Article 87 of Military Order 378 to bring it broadly into line with the new Israeli law. These new provisions specified grounds on which administrative detention orders could be made, introduced a new judicial review procedure, restricted delegation of powers and made other refinements to the law. There are differences between the law in Israel and the Military Orders in the West Bank, but wherever the Israeli law is mentioned below without comment it can be assumed that the provisions in the law applicable to the West Bank are equivalent.

(i) *The issuing of the administrative detention order*

Military Order 378 as initially drafted in 1970 contained essentially the same provisions relating to administrative detention as the Defence (Emergency) Regulations 1945, which gave very wide powers to the commander. However, the amendments introduced in 1980 by Military Order 815 restricted these powers considerably.

By Article 87(a) of Military Order 378 as amended, an Area Commander of the Israeli Army can order the detention of any person for not longer than six months

"... if he has reasonable cause to believe that reasons of the security of the area or public security require that (that) person should be held in custody..."

and by Article 84A

"No Military Commander may exercise (this) authority unless he believes it to be necessary for definitive security reasons".

The amendments thus provide for an objective standard for the decision to detain, since the belief that the order is necessary must be a reasonable one in contrast to the subjective opinion required before.

Although the duration of the original order cannot exceed 6 months, Article 87(b) provides that the order can then be renewed for successive periods of six months. In practice, therefore, the detention can continue indefinitely.

The Area Commander is not authorised to delegate his power, but by Article 87(c) a District Commander is empowered to order a person to be detained if he believes that the Area Commander would have had reason to make the order. A detention order issued by the District Commander may not be for a period exceeding 96 hours, and he has no power to renew the order. This prohibition of delegation leaves ultimate responsibility with one individual only.

Various attempts have been made by Israeli officials closely concerned with issuing administrative detention orders to define the circumstances in which the orders can be made.

According to Colonel Hadar, a former Military Advocate-General, the measure is employed only when

"... no other legal measure exists which could prevent the detainee's dangerous activity... (and) the extent of the danger of the detainee remaining free is so great that the only appropriate measure against him is administrative detention."¹²

More recently in 1982 the then Israeli Attorney-General, Itzhak Zamir, issued guidelines concerning the new laws introduced, saying:

"Administrative detention is meant not as a punitive but only as a preventative measure. In other words, a person may not be administratively detained as a punishment for an act prejudicial to state security or public security. A punishment for such an act may only be imposed by a court in ordinary judicial proceedings. Where there is sufficient good evidence for a conviction in such proceedings, this will not by itself justify administrative detention.

"Administrative detention is justified only to avert a danger to state security or public security. But even where such a danger exists, administrative detention should not be resorted to if more effective and less severe means of defence against the danger are available, e.g. a criminal action... or a restricting order...

"At the same time, the expression of an opinion, even an extreme opinion inconsistent with the ordinary concepts of state security or public security, is not in itself a sufficient ground for administrative detention..."¹³

The assurance that a person will not be detained simply because of an act committed in the past should, however, be considered in the light of Colonel Hadar's statement that "commission of an offence by the detainee in the past is *proof* of his inclination to commit such acts again" (emphasis added)¹⁴. In practice, again according to Colonel Hadar, the basis for by far the majority of administrative detention orders is the actual commission of a security offence by the detainee where the government is unable to prove the case under the normal rules of evidence. This may be, for instance, because the information is inadmissible, such as hearsay, or because the witness is involved in espionage and would be endangered if his identity were to be revealed, or because the witness is abroad.

Further clarification of the grounds on which the power to detain administratively may be exercised has been made by the courts. As will be seen below the courts reviewing administrative detention orders have been reluctant to substitute their own considerations for those of the issuing officer. The courts have, however, interpreted the grounds on which the Area Commander is entitled to issue administrative detention orders strictly, and have discharged such orders where it is apparent on the face of the order or the request for extension of the order that grounds other than the security of the state or area or the security of the public were paramount.

In the case of *Qawasma v. Minister of Defence* (1982)¹⁵, the Israeli Supreme Court held that an order of administrative detention had been issued for a reason other than the security of the state or public safety, namely to detain Qawasma pending the prosecution's appeal against his acquittal in criminal proceedings, and it discharged the order.

In the case of *Gemayel Bathish v.*

*Minister of Defence*¹⁶, the District Court refused to confirm the Minister's order of administrative detention on the ground that it had not been made on objective grounds of public security. Bathish was strongly opposed to the annexation of the Golan Heights and became a leader of the opposition to it, but was not personally involved in violence. The court held that

"... obviously, the outlook and nationalistic opinions of the detainee do not constitute a reason for the imposition of an administrative detention order".

However, since this decision was from a District Court and not from the Israeli High Court of Justice, it does not constitute a precedent for other decisions.

From the various statements above it is clear that administrative detention is only intended to be used as a preventative, not as a punitive measure, and only when no alternative exists and the detainee's freedom poses a serious threat to state and public security. In order to assess whether this is so in practice, it may be helpful to consider briefly the first orders of administrative detention imposed since its reintroduction. At the time of writing, full details of those most recently placed under administrative detention are not available, and so it is not yet possible to draw clear conclusions as to the general principles upon which the current wave of arrests are being made.

The first order made was against Ziad Abu 'Ein, a 26-year-old Palestinian from al-Bireh in the West Bank, who became known worldwide following his extradition from the USA to Israel in 1979 to stand trial for a bomb attack in Tiberias. He has always denied any involvement in the attack, but he was convicted on the basis of another person's confession, later retracted, and sentenced to life imprisonment. Ziad

Abu 'Ein was freed in the prisoner exchange in May 1985.¹⁷ He chose to remain in al-Bireh, and like many of the freed prisoners, threats were made against his life and safety by Israeli settlers. Due to his notoriety and the act of which he was accused, his release was one of the most unacceptable to the settlers. Under the terms of the prisoner exchange agreement, which was negotiated through the auspices of the International Red Cross, Israel is unable to rearrest any of the prisoners to whom amnesty was granted for the same alleged activities for which they were imprisoned. There must be a strong suggestion that the measure of administrative detention is here being used to imprison and punish Ziad Abu 'Ein for previous acts in order to satisfy public opinion rather than for preventative reasons.

The four students from Al-Najah University in Nablus who were placed in administrative detention on 5 and 6 August 1985 are each alleged to have headed student factions aligned with three different Palestinian parties outlawed in the Occupied Territories. It is a strange coincidence that leaders of different opposing factions should all simultaneously be found to pose such a serious threat to Israel's security or public safety that their custody is imperative, and yet that it is not possible for the authorities to charge and bring even one of them to trial in the normal way for an offence under the security legislation, such as incitement or membership of an illegal organization.¹⁸ Again there appears more reason to believe that the four are being held for their political beliefs and because they are local leaders, and as such, 'inconvenient' to the military authorities.

In view of the secrecy imposed on the court procedures, it is not possible to conclude with certainty the motives behind the orders, but certainly there must exist a serious doubt as to whether the orders

are not being used to satisfy public demand in the first case and to silence political opposition in other cases rather than for genuine reasons of state or public security.

(ii) *Judicial review of the administrative detention order*

The amendments made to Military Order 378 section 87 by Military Order 815 in 1980 introduced a more extensive review and appeal procedure. Any administrative detainee must be brought before a military judge for review of the detention order within 96 hours of the initial detention. The detention order must be reviewed again by the judge not later than three months from the decision, even if the duration of the order itself is for a longer period, and thereafter at least every three months. The detainee must be released if either review does not start within the time specified. (Articles 87C and 87B (a)).

The decision of the military judge can be appealed within 30 days to the President of the Military Courts, or to a judge appointed by him.¹⁹ The judge of this court has the same powers as the military judge. A final appeal lies to the Israeli Supreme Court, since the actions involved are administrative.

Military Order 815 also introduced a number of provisions as to the procedure to be followed in the review and appeal hearings, the most important of which are the following:

Article 87D (a & b): When reviewing the administrative detention order, the judge is not bound to observe the usual rules of evidence if he is satisfied that this will help reveal the facts and reach the truth, but any deviation from the rules must be recorded.

Article 87D (c): The judge may examine evidence in the absence of the detainee and his counsel and need not disclose the evidence to them if he is satisfied that such

disclosure could impair state security or public safety.

Article 87F: The review proceedings are to be held in secret.

Extensive though the provisions made for judicial review appear to be, the ability of the detainee to challenge the order effectively is severely limited both by procedural rules and by limitations placed on the courts' powers.

At the review, the military judge must set aside the detention order:

"...if it is proved to him that the reasons for which it was issued were not objective reasons of state security or public security or that it was made in bad faith or from irrelevant considerations." (Article 87B (b)).

The burden of proof is thus on the detainee to prove that the order was based on improper grounds, and not on the area commander to show justification for the order. However, in almost every case neither the detainee nor his lawyer will be shown the evidence.

As explained in a book published by the Israeli Section of the International Commission of Jurists ('the IICJ'):

"... detention orders are in virtually all cases issued on the basis of intelligence information submitted to the regional commander. Such information, by its very nature, is either inadmissible in court under the strict rules of evidence pertaining to hearsay, or consists of classified material, the disclosure of which could lead to exposure of sources of intelligence and endanger the lives of such sources or Israeli operatives."²⁰

The reasons which precluded the production of the evidence in the regular military court will also preclude its presenta-

tion to the administrative detainee in the review sessions. The review judge will thus in virtually every case exercise the right not to disclose the evidence and to vary the rules of evidence to accept evidence that could not be relied on in court and may also exclude the detainee from the hearing.

The detainee and his lawyer are thus set the almost impossible task of having to prove to the judge that the order is not required for security reasons, without knowing any details of the evidence on which the order is based.

The recording of deviations from the rules of evidence on the court record does little to protect the detainee against abuse, since those records themselves are secret. There is no requirement that such deviations must be recorded in the decision given to the detainee.

The protection afforded to the detainee is weakened further still by the fact that the proceedings are not open to the public since all review procedures are required to be held in closed session. It should be noted that this is compulsory in all cases of administrative detention, not merely where special reasons of state security require the hearing to be secret. Only the detainee and his lawyer may attend the hearings, if not themselves excluded under the above provisions, and they are forbidden from revealing anything that transpires during the session, even the reasoning of the decision.

As required by the military order, all 62 orders of administrative detention recently imposed have been reviewed and confirmed in secret session. There is thus no means of determining whether the review and appeal procedure have any value at all because the basis on which the judge decides whether or not to reveal the evidence on which he bases his final decision is not known. This is so both to the external world and to the detainee's own lawyer, who is not shown the evidence and is excluded from much of

the argument. In this way the criteria on which the judge reaches his decision are closed to scrutiny both by the public and by the detainee's lawyer.

In addition, limitations placed by the Supreme Court on its own powers of review and thus on the review and appeal bodies' powers, also severely limit the effectiveness of the review procedures.

In the case of *Rabbi Kahane et al, v. Minister of Defence* (1981)²¹, the Supreme Court ruled that a review court could not substitute its own considerations for those of the Minister, saying that this is an administrative action even though reviewable by the court, and that the order will only be set aside if the reasons for which it was made were not objective reasons of state security or public security or if the order was made in bad faith or from irrelevant considerations.

In an article by Professor Klinghoffer of the Hebrew University in Jerusalem²², it is argued that this is an incorrect interpretation of the powers of the court. In his view the act of issuing an administrative detention order is not complete until reviewed and confirmed by the court and it is thus not an administrative act but a joint administrative/judicial act. The fact that the President of the District Court is authorised to 'confirm' the order implies, he argues, the use of the President's own discretion. Furthermore, the use of the term 'require' in section 2(a)* implies an estimation by the Minister of Defence, not merely a factual finding, with which the President is entitled to disagree, for instance, by finding that a restriction or supervision order would be more appropriate and that an administrative detention order was not required. This article was

considered and referred to in the appeal decision by the President of the District Court in the case of *Gemayel Bathish v. Minister of Defence* (1982).²³ The President stated that he was bound by the precedent of the Supreme Court in the Kahane case but that had he not been he would have accepted Professor Klinghoffer's interpretation of the law. In this case, however, as mentioned above, the President was still able to set aside the order, since he found that the Minister had used his power to issue a detention order on grounds not justified in law.

Courts in Israel are bound to follow precedents of the Supreme Court, and in practice (although not in theory) military judges in the Occupied Territories treat the High Court precedents as highly persuasive, and it is thus unlikely they would depart from the High Court's decision. This presents another problem for the Palestinian detainee. Since decisions of the Israeli Supreme Court, even those relating to the Occupied Territories, are published only in Hebrew, and not in Arabic or English, many West Bank lawyers appearing before the review or appeal courts will not be aware of those decisions.

So long as the review judges consider themselves bound by the decision in the Kahane case and refuse to substitute their own views for those of the issuing authority, the review is little more than a rubber stamp to the decision of the military commander issuing the order. It can do little to safeguard the rights of the individual detainee.

More generally, it is only very rarely that the Supreme Court will accept any opinion other than that of the military authorities as to what is required by

* Section 2(a) and s. 4(c) of the Emergency Powers (Detention) Law 5739-1979 contain provisions in relation to Israel equivalent to Articles 87(a) and 87B (b) of Military Order 378 in relation to the West Bank.

'security', even in the regular military court system in the occupied territories. In the case of *Amira et al v. Minister of Defence et al*²⁴, the court held that

"In a dispute . . . involving questions of a military-professional character . . . the Court . . . will presume that the professional arguments of those actually responsible for security in the occupied territories . . . are valid. This presumption may only be rebutted by very convincing evidence to the contrary".

All administrative detention cases are by definition related to 'security', and for the administrative detainee with minimal rights of defence the difficulty of overcoming this obstacle will be greatly magnified.

In summary, as indicated above, there have in the past been cases where an administrative detention order has been revoked at the review or on appeal, but these are cases where an improper reason can be shown on the face of the order or the request for confirmation of the order. On the substantive issues, it is effectively impossible for the detainee to challenge the evidence on the basis of which he is detained or to argue against the Area Commander's view as to what is required for security reasons.

(iv) Conditions of Detention

It has been declared by Itzhak Zamir that administrative detention is used for preventative and not punitive reasons, and that it regrettably involves the infringement of the freedom of the individual for the benefit of the security of the state and the public. It is therefore reasonable to expect that all possible measures will be taken to ensure that the detainee, convicted of no offence, is subjected to minimal discomfort and kept in conditions as unlike prison as possible. This would be

expected all the more when the number of detainees is small since it would present few practical problems. Jean Pictet in his Commentary to the Fourth Geneva Convention of 1949 says:

"It is a humanitarian duty to alleviate to the greatest possible extent the effect of internment on the mind and spirits of the internees".²⁵

With this point in mind, the Fourth Geneva Convention contains extensive provisions in Articles 79-131 relating to the treatment of internees. These provisions relate to such matters as clothing, bedding, light, correspondence, visits, medical care, disciplinary offences, internal organization and transfer of detainees.

The Regulations Concerning Administrative Detention (Terms of Confinement in Administrative Detention) issued by the Israeli military authorities pursuant to Military Order 378 Article 87(g) on 31 January 1982, set out detailed provisions concerning the conditions of administrative detainees covering many of the same points as the Convention. If fully implemented, these provide for quite different treatment for administrative detainees from other detainees and prisoners. *Inter alia*: they shall not be placed with other prisoners detained or sentenced in the normal criminal process, and the regulations confer numerous privileges not shared by prisoners.

While some of the provisions are subject to the discretion of the Prison Commander and others can be suspended for security reasons, many are mandatory under all circumstances.

Article 19 provides that the detainee must be informed of these regulations as soon as possible after his internment and he is entitled to see and take a copy of them.

Since the regulations were issued only as administrative detention was being phased out in 1982, it is too early to assess fully their effect. Initial indications were that many provisions were not being implemented, as the case of Ziad Abu 'Ein illustrates.

The detainee Ziad Abu 'Ein's lawyer, Jonathan Kuttab, visited him in Hebron prison where he was being held, seven days after his initial detention. He reports that when he spoke of the regulations he found that Abu 'Ein had no knowledge of them, and on going into further detail it was clear that few of the regulations concerned with differentiating between administrative detainees and ordinary prisoners were being observed, other than his being kept isolated from other such prisoners.

Mr. Kuttab states that he asked the prison guards why these provisions had not been complied with and was told that it was "for security reasons". When he pointed out that many of these provisions are mandatory and cannot be suspended, they referred him to the Prison Commander. When he asked the Prison Commander, he was told to write to the Prison Services Authorities, the central body in charge of prison conditions. This he did, and at the time of writing he is still awaiting a reply.

Initial failure to implement the new conditions may, however, be in part due to bureaucratic failure to communicate the new regulations to the prison authorities. Some of those more recently detained report that their conditions are now better than those of other detainees.

Some provisions specified in the military regulations remain to be implemented, however, and at least one detainee, and possibly more, are effectively suffering the punitive measure of solitary confinement, possibly over a long period of time, and that in a situation where the detainee

knows of no limit to the duration of his imprisonment.

Conclusion

Administrative detention was described by the then Attorney-General, Itzhak Zamir, as "an exceptional measure of great severity because of its harsh impact on the freedom of the person". He added that the decision to implement it was arrived at as a result of balancing "the need to defend state and public security and the need to respect the freedom of the individual person".²⁶

In this report an attempt has been made to assess whether the reintroduction of administrative detention to the West Bank is justified in the light of that balance, and whether, in view of the admitted severity of the measure, the detainee's interests are adequately safeguarded by the military orders in force in the West Bank. These questions were considered in the light of local and international law.

Although Article 78 of the Fourth Geneva Convention authorises the use of administrative detention in limited circumstances, Article 6 of the Convention provides that this article shall cease to apply one year after the general close of military operations. It is argued that this article cannot therefore be used to justify the use of administrative detention in the West Bank where the occupation is in its 19th year.

Even where the Fourth Geneva Convention permits administrative detention it can only be imposed for 'imperative reasons of security', and this is echoed in the Military Orders in force in the West Bank, which authorise it only when required 'for reason of the security of the area or public security'. In addition, both courts and Israeli sources concerned with implementing the law have repeatedly stated that it is to be

used only as a preventative, not as a punitive measure.

Israel does undoubtedly have a security problem arising out of its occupation of the West Bank, but, as admitted by the Israeli Vice-Premier, the present level of unrest is by no means the worst in Israel's history. Acts of resistance during the 1982 invasion of Lebanon were much greater but far from making use of such stringent measures, the use of administrative detention was actually phased out. On the other hand, the pressure on the Israeli government from settlers to take repressive measures against the Palestinian inhabitants of the territories is ever-increasing. It seems likely that it is at least partly in response to these demands that administrative detention has been reintroduced, and not to satisfy immediate imperative security needs. If this is so, however expedient a measure it be, it is not justifiable in international law.

The review procedure provided by the military orders appears on the face of it to provide considerable opportunity for the detainee to challenge the order, but there are many features which together combine to render the review in most cases little more than a formality.

The detainee is faced throughout the proceedings by 'security reasons' behind which he cannot look, and which he is effectively unable to challenge. Security reasons justify his initial detention; it is security reasons which justify the refusal to allow him to see the evidence, and which justify also the refusal to allow him to examine the informant or even to know what the evidence against him is; it is also security reasons which allow the judge to vary the rules of evidence, and security reasons allow the detainee's exclusion from the court. Finally, it is presumably security reasons that dictate the inevitable secrecy of the session and of the proceedings so

that the need for security cannot be assessed by others.

Despite the difficulties under which the detainee suffers, the burden of proof is on him to prove that the order is not required for reasons of public security or the security of the area, both in the review session and on appeal. The Area Commander is not required to prove that the order is justified. The detainee and his lawyer are thus set the task of shadow-boxing, arguing against an order while knowing only rudimentary details of the information which is before the judge and on which he will base his decision.

The judges charged with reviewing the order and hearing any appeal are not only not independent, being military officers themselves, but are actually officers of a lower rank than the Area Commander who issues the orders. They are thus placed in the unenviable position of having to assess the actions of their military superiors; it can be surmised that many an officer would wish to avoid having to say that his superior officer had misjudged the security situation, and indeed it is indicative that to date not one of the 62 orders of administrative detention made since its reintroduction has been reversed on review.

In any case, as explained above, decisions of the High Court have strictly limited the scope of the review, most importantly by stating that the review court may not substitute its own considerations for those of the issuing authority. The review judge is thus limited in effect to considering whether there is a technical flaw in the order or whether the reasons for which it was issued are *prima facie* improper, and the power is left substantially in the hands of one individual, the Area Commander.

Finally, there is no public scrutiny of the proceedings since all hearings must be held in closed session. Such lack of public

accountability, especially as a routine measure, gives dangerous opportunity for abuse of the process. The lawyer himself is forced to choose between participating in lending an appearance of judicial respectability to these proceedings and leaving his client without representation; the path which is not open to him is to criticise in public the procedures followed by the court in any one case, since this would violate the secrecy imposed on him by the court.

Because of the secrecy of the proceedings, it is generally impossible to say

whether justice is done or not in any one case, but what is very clear is firstly that there exists considerable potential for abuse of the process by any one of the individuals involved at each stage, and secondly that justice is most certainly not seen to be done.

Israel is jealous of its claim to be a democratic country, observant of the rule of law. The reintroduction of administrative detention and the inadequacy of the legal safeguards for those subject to these draconian orders makes this claim difficult to substantiate.

References

- 1) See explanatory memorandum issued on the tabling of the Emergency Powers (Detention) Law 5739-1979 before the Knesset: (1977/78) Hatzoot Hok (Bills of the State of Israel) (no. 1360) 294.
- 2) Military Order 378 Article 78.
- 3) See, for example, Amnesty International Report 1980 p. 339, the National Lawyers Guild, 'Treatment of Palestinians in the Israeli-Occupied West Bank and Gaza,' New York, 1978, p. 79-82, UN General Assembly Resolution 36/147 C7(g) of 16.12.81 and UN Commission on Human Rights Resolution No. 1A, B, (XXXVII) of 11.2.81, as well as Israeli individuals such as the journalist and writer Amos Kenan and the lawyer Felicia Langer.
- 4) In October 1984 Amnesty International published a report entitled 'Town Arrest Orders in Israel and the Occupied Territories' in which they concluded that "Although town arrest orders may only be issued when they are deemed by the military authorities to be essential for reasons of security, Amnesty International believes that the curtailment of these people's freedom of movement is in many cases a punishment for their non-violent political activity. Amnesty International is also concerned that they are restricted without being formally charged or brought before a court of law."
- 5) Law in the Service of Man maintains a regularly updated list of all those subject to such restriction orders. See also a report by Amnesty International 'Town Arrest Orders in Israel and the Occupied Territories', (London, 1984).
- 6) On 20 May 1985 Israel released 1,150 political prisoners in exchange for the release of 3 Israelis captured in Lebanon by the DFLP-GC.
- 7) MacDermot, Niall (Secretary-General of the International Commission of Jurists), Intervention on Administrative Detention to the UN Commission on Human Rights, ICJ Newsletter No. 24, Jan/March 1985, p. 53.
- 8) The General Assembly of the United Nations and most governments in the world, including that of the United States, hold that the Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War is applicable to the occupation of the West Bank. Israel, however, maintains that the Convention is not applicable to the occupation, but declares that it voluntarily observes the humanitarian provisions of the Convention.

- 9) Pictet, Jean, 'Commentary to the Fourth Geneva Convention', (ICRC, Geneva, 1958), p. 367.
- 10) MacDermot, Niall, *op. cit.* p. 52.
- 11) The Jerusalem Post, 6 September 1985.
- 12) Hadar, Col. Zvi, 'Administrative Detention Employed by Israel', *IYHR* 1 (1971) p. 285.
- 13) Zamir, *op. cit.* p. 158-9.
- 14) Hadar, *op. cit.* p. 285.
- 15) A.A.D. (Appeal Against Administrative Detention) 1/82, 36 (1) P.D. 666.
- 16) A.A.D. 18/82.
- 17) *supra*, note 6.
- 18) Article 85(1) (a) of the Emergency (Defence) Regulations 1945 makes it an offense to be a member of an illegal organization and Military Order 101 Article 7A makes incitement an offence. Both provisions are freely used by the military authorities to imprison youths in the occupied territories.
- 19) Regulations concerning Administrative Detention (Rules of Legal Trials and Dates for Presenting Appeals), 1981.
- 20) Israeli Section of the International Commission of Jurists, 'The Rule of Law in the Areas Administered by Israel', (Jerusalem 1981), p. 73.
- 21) A.A.D. 1/80 35(2) P.D. 253.
- 22) Klinghoffer, Prof. Y.H., 'Preventative Detention for Security Reasons' 11(2) *Mishpatim* (The Hebrew University of Jerusalem Law Review) 286 (Hebrew 1981).
- 23) *supra*, note 11.
- 24) HC 258/79, 34(1) PD 90.
- 25) Pictet, Jean, *op. cit.* p.380.
- 26) Zamir, Itzhak (Israeli Attorney-General), Opinion on Administrative Detention, *Israel Law Review*, Vol. 18, No 1, Winter 1983, pp. 158-9.

Human Rights and Non-Intervention in Domestic Matters

by
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The Final Act of the Conference on Security and Co-operation in Europe was adopted at Helsinki on 1 August 1975 by the representatives of all European States (with the exception of Albania), Canada and the United States of America. From a formal view point the Final Act is not a legally binding instrument, because the signatories made it clear that this was not their intention. This intention expressed in several declarations made on the occasion of the signature of the Final Act can also be inferred from one of its final provisions which states that:

"The Government of the Republic of Finland is requested to transmit to the Secretary-General of the United Nations the text of this Final Act, *which is not eligible for registration under Article 102 of the Charter of the United Nations*, with a view to its circulation to all members of the Organization as an official document of the United Nations."

If the Final Act were a "treaty" or an "international agreement", it should, according to Article 102 of the Charter of the United Nations, "as soon as possible be registered with the Secretariat".

However, while the Final Act is not a treaty, it can nevertheless have considerable legal significance. The legal significance of legally non-binding instruments depends upon a) the circumstances in which the instrument has been adopted; b) the existence of a review mechanism; and c) the content of the instrument (Cf. *Abi-Saab, G., Les résolutions dans la formation du droit international du développement*, Genève, IUHEI, 1971, p. 9).

The signature of the Final Act was preceded by extensive and careful negotiations carried out by duly accredited representatives during more than two years. All decisions of the Conference were taken by "consensus", which was defined as "the absence of any objection expressed by a Representative and submitted by him as constituting an obstacle to the taking of the decision in question". The Final Act was signed by the Heads of State or of Government of all participating States. Such a high level of agreement cannot be without legal relevance.

Furthermore the participating States declared in the Final Act their resolve to continue the multilateral process initiated by the Conference by proceeding to "a thorough exchange of views both on the imple-

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mentation of the provisions of the Final Act and of the tasks defined by the Conference" and by organizing to these ends "meetings among their representatives". A first such follow-up conference was held at Belgrade from 4 October 1977 to 9 March 1978 and a second follow-up conference was held at Madrid from 11 November 1980 to 9 September 1983. The third follow-up conference will be held in Vienna from 4 November 1986 on. It is also legally relevant that, unlike usual practice with respect to legally non-binding instruments, an elaborate review mechanism has been set up with respect to the Final Act of Helsinki.

Most important is, however, the content of the Final Act. The legal relevance of the Final Act depends mainly on the normative character of its provisions. The present examination will be confined to the provisions related to human rights and to the principle of non-intervention in internal affairs.

I. The Principle of respect for human rights and fundamental freedoms

Principle VII of the Final Act ("Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief") is, with Principle III ("Inviolability of frontiers") and Principle IV ("Territorial integrity of States"), one of the three principles which are specific for the Final Act, in the sense that they are not mentioned separately in the "Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations", adopted by the General Assembly of the United Nations in its resolution 2625 (XXV) on 24 October 1970. This resolution adopted on the occasion of the 25th anni-

versary of the United Nations gives an authoritative interpretation of the purposes and principles of the Charter of the United Nations (see Arangio-Ruiz, G., *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, R.C.A. D.I., 1971, vol. 137, pp. 431-628; Rosenstock, R., *The Declaration of International Law concerning Friendly Relations: A Survey*", A.J.I.L., 1971, 713-735).

Principle VII (Respect for Human Rights) of the Final Act is composed of 8 paragraphs:

— para. 1: by using the terms "respect [for] human rights and [for] fundamental freedoms, ..., for all without distinction as to race, sex, language or religion" the same wording is used as in Articles 1, 55 and 76 of the Charter of the United Nations. There is, however, a difference on two points: a) contrary to the UN Charter which speaks about "promoting" and "encouraging" respect, the obligation is made even more stringent in prescribing straightforwardly the obligation to "respect human rights and fundamental freedoms"; b) special emphasis is given to one of the most traditional fundamental freedoms mentioned in articles 18 of the Universal Declaration and of the International Covenant on Civil and Political Rights: "freedom of thought, conscience, religion or belief";

— para. 2: the participating States will "promote and encourage *the effective exercise*" of all categories of rights ("civil, political, economic, social, cultural"). Inspiration is also found in the preamble of the International Covenant on Civil and Political Rights when reference is made to the "rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development";

– para. 3: by giving emphasis to the “freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience”, it is clear that not only an internal conviction but also the exteriorisation of that conviction has to be respected;

– para. 4: a specific provision is concerned with the rights of persons belonging to national minorities;

– para. 5: a link is made between respect for human rights on the one hand and peace, justice and well being on the other hand. This link provides the justification for the presence of provisions with respect to human rights in the Final Act of the Conference on Security and Co-operation in Europe;

– para. 6: the obligation in international law to respect human rights, incorporated in Articles 55 and 56 of the Charter of the United Nations, is explicitly confirmed;

– para. 7: the special importance of the right to information is recognized by confirming the right of the individual to know and act upon his rights and duties in this field;

– para. 8: reference is made to the provisions with respect to human rights in the Charter of the United Nations, the Universal Declaration and the International Covenants on Human Rights.

It should be noted that Principle VII uses generally strong terms such as “to respect”, “to recognize”, “to confirm”, “to act” and “to fulfil”, instead of the softer terms such as “to promote” and “to encourage” frequently used in the so-called three baskets of the Final Act.

The human rights provisions of the third basket entitled “Co-operation in humanitarian and other fields” are divided into 4 sections: 1. Human Contacts; 2. Information; 3. Co-operation and Exchanges in the Field of Culture; and 4. Co-operation and Exchanges in the Field of Education. The participating States express “their intention now to proceed to the implementation” of those provisions. The common goal of those provisions is to promote a better understanding among people and among peoples and a lasting understanding among States.

In general the wording used in the third basket is not creative of precise obligations. In a few instances, however, the readiness of the participating States to undertake real commitments is greater. This is particularly true in the first section when

“They confirm that religious faiths, institutions and organizations, practising within the constitutional framework of the participating States, and their representatives can, in the field of their activities, have contacts and meetings among themselves and exchange information.”

As a matter of fact, most provisions of the first section express a promise rather than an intention. In those matters which more than the others concern directly the individual (reunification of families, marriages, etc.), the participating States promise to eliminate some administrative obstacles to the exercise of fundamental rights and freedoms. Those provisions provide further clarification of the “freedom of movement” and the “right to leave any country, including his own, and to return to his country” recognized in article 13 of the Universal Declaration and in article 12 of the International Covenant on Civil and Political Rights. Not to fulfil this promise would be contrary not only to the Final

Act, but would also be a violation of a fundamental right and freedom guaranteed by other legally binding instruments.

The practical value of human rights instruments depends not necessarily on their legal value. In some countries individuals actively engaged in defending the cause of human rights invoke more frequently the Universal Declaration and the Final Act, despite the fact that the formal legal value of those instruments is inferior to that of the Covenant to which their countries are parties. It is probably the greater publicity given to the one rather than to the other instrument which explains this phenomenon.

II. The principle of non-intervention in internal affairs

At the outset it should be stated that the principle of non-intervention in internal affairs has always been an area of great confusion (Friedmann, W., *The Changing Structure of International Law*, London, 1964, p. 267). According to Winfield (*The History of Intervention in International Law, B.Y.I.L.*, 1932-1933, p. 130) "intervention may be anything, from a speech of Lord Palmerston's in the House of Commons to the partition of Poland".

According to Arangio-Ruiz (*op. cit.*, 547-549), the principle of non-intervention originated in the Latin-American state practice. The Latin-American countries had a constant fear of intervention from European or North-American powers. Interventions were forms of force just short of war. As a matter of fact, the Latin-American countries were generally too weak and too isolated, so that an intervention was sufficient to obtain the objective sought without waging war. In order to protect themselves against such interventions, the principle of non-intervention in internal affairs

was enshrined in the Charter of the Organisation of American States adopted at Bogota in 1948:

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."

The Charter of the United Nations does not contain a principle prohibiting interventions of States in the internal affairs of other States. However, according to its Article 2, paragraph 7: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state" (See Fawcett, J.E.S., "Human Rights and Domestic Jurisdiction" in Luard, Evans (Ed.) *The International Protection of Human Rights*, London, 1967, 286-303; Ermacora, Felix, "Human Rights and Domestic Jurisdiction (Article 2, paragraph 7, of the Charter)", *R.C.A.D.I.*, 1968, vol. 124, 371-451).

The UN Declaration on "friendly relations" of 1970 contains a principle concerning "the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter" (See Rosenstock, *loc. cit.*, 726-729), according to which:

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, any armed intervention and all other forms of interference or attempted threats against the personality

of the State or against its political, economic and cultural elements, are in violation of international law."

For the understanding of this principle, whose wording is close to that of the OAS Charter, it is interesting to refer to a declaration made by the United Kingdom representative who stated that:

"In considering the scope of 'intervention', it should be recognized that in an interdependent world, it is inevitable and desirable that States will be concerned with and will seek to influence the actions and policies of other States, and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality of States and self-determination of their peoples" (A/AC.125/SR.114).

The Final Act of the Helsinki Conference contains a principle VI according to which

"The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations."

As appears from paragraphs 2 and 3 of this principle VI¹ a link is made between the principle of non-intervention and the principle of refraining from the threat or use of force (principle II) (See Russell, Harold, *The Helsinki Declaration: Brob-*

dingnag or Lilliput?, A.J.I.L., 1976, 267-268).

Moreover, in accordance with principle X, paragraph 4 ("All the principles set forth above are of primary significance and, accordingly, they will be equally and unre-servedly applied, each of them being interpreted taking into account the others."), this principle VI has to be interpreted in context with the other principles, including principle VII on the respect for human rights and fundamental freedoms.

III. Exchanges of views are not "interventions" prohibited by international law

Clearly prohibited by international law are "interventions" which imply the use of armed force. According to Hersch Lauterpacht (Oppenheim's *International Law*, 1955, p. 305), "Intervention is *dictatorial interference* by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things." Decisive for its illegal character is the "coercive nature" of the intervention, which demands as well the absence of agreement of the State concerned as a certain measure of force (Cf. Van Dijk, P. & Bloed, A., "Madrid 1980: Mensenrechten en niet in-menging", *Internationale Spectator*, 1980, 549-557, at 551).

Even in applying less strict standards, expressions of concern for disrespect of human rights which take the form of diplomatic statements, letters, discussions, speeches, etc. cannot be legally qualified as "intervention prohibited by international

1) "They will *accordingly* refrain from any form of armed intervention or threat of such intervention against any other participating State.

They will *likewise* in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the right inherent in its sovereignty and thus to secure advantages of any kind."

law". As pointed out by Louis Henkin ("Human Rights and 'Domestic Jurisdiction'", in Buergenthal, Thomas (Ed.), *Human Rights, International Law and the Helsinki Accord*, New York, 1977, 21-40, at 36:

"Scrutiny, criticism, or even encouragement or support to victims of human rights violations is not intervention (and would not be intervention even if human rights had remained a matter of domestic jurisdiction) even if it is designed to modify the target government's behavior in regard to human rights."

Exchanges of views at the follow-up meetings to the Conference in Belgrade (1977-1978) and Madrid (1980-1983) and coming in Vienna (1986) are even expressly provided for in the Final Act of the Helsinki Conference:

"The participating States [...] declare [...] furthermore their resolve to continue the multilateral process initiated by the Conference (a) by proceeding to a thorough exchange of views both on the implementation of the provisions of the Final Act and of the tasks defined by the Conference, [...]; (b) by organizing to these ends meetings among their representatives, [...]."

Moreover, in the Concluding Document of the Belgrade Meeting in follow-up to the Conference adopted by consensus on 8 March 1977 "It was recognized that the exchange of views constitutes in itself a valuable contribution towards the achievement of the aims set by the CSCE, although different views were expressed as to the degree of implementation of the Final Act reached so far". Similar wording was used in the Concluding Document of the Madrid

Meeting adopted by consensus on 6 September 1983.

IV. Human Rights and Domestic Jurisdiction

As far as the human rights provisions of the final act are concerned, it should be stressed that exchanges of view on this matter can never be considered to be "interventions prohibited by international law" because respect for human rights no longer belongs exclusively to the domestic jurisdiction of the participating States.

In its advisory opinion of 7 February 1933 (p. 24) in the *Tunis-Morocco Nationality Decrees Case* the Permanent Court of International Justice stated:

"The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. [...] It may well happen that, in a matter which, [...], is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States."

In the same vein the Institute of International Law stated in its resolution adopted on 26 April 1954:

Art. 1: "The 'reserved domain' is the domain of State activities where the jurisdiction of the State is not bound by International Law.

The extent of this domain depends on International Law and varies according to its development."

Art. 3: "The conclusion of an international agreement regarding a matter per-

taining to the 'reserved domain' precludes a party to the agreement from raising the plea of domestic jurisdiction in respect of any question relating to the interpretation or application of the agreement."

As summarized by Henkin, *loc. cit.*, p. 22): "That which is governed by international law or agreement is ipso facto and by definition not a matter of domestic jurisdiction." More in particular, respect for human rights does not belong anymore exclusively to the domestic jurisdiction since it became the subject of international legal obligations.

This is clearly the case for the (now 159) States who in order to become Members of the United Nations accepted the obligations contained in the Charter, including the obligation enshrined in its Article 55 and 56 "to take joint and separate action in co-operation with the Organization for the achievement of ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (See the opinions expressed by Spiropoulos, Jessup, Wright, Guggenheim and Brierly in "Reply of the Governments of Ethiopia and Liberia", *I.C.J., Pleadings South West Africa*, 1966, vol. IV. pp. 498-500).

In 1949 the International Law Commission stated in its draft declaration on rights and duties of States:

Art. 6: "Every State has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion" (See also the views expressed by Alfaro, Brierly, Cordova and Scelle, in *Yearbook of the International Law Commission*, 1949, pp. 148 and 168-170).

This view was confirmed by the International Court of Justice in its advisory opinion of 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 176 (1970)* (§ 131):

"Under the Charter of the United Nations, [... any Member State has] pledged itself to observe and respect, [...], human rights and fundamental freedoms for all [...]. [...] a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."

The obligations of the Charter of the United Nations have been further clarified first by the Universal Declaration of Human Rights adopted by the General Assembly in its resolution 217 A (III) on 10 December 1948 and even more by the International Covenants on Human Rights adopted by the General Assembly in its resolution 2200 A (XXI) on 16 December 1966 and to which 83 and 81 States are parties (to the International Covenants on economic, social and cultural rights and on civil and political rights respectively).

The importance of those Covenants increased considerably after the adoption of the Final Act. Indeed, at that moment only 11 participating States (5 from Western participating States - Cyprus, Denmark, Federal Republic of Germany, Norway, Sweden - and 6 from Eastern European participating States - Bulgaria, German Democratic Republic, Hungary, Romania, USSR, Yugoslavia) were contracting States to the Covenants, which had not yet entered into force. Shortly after, on 3 January 1976, the International Covenant on Economic, Social and Cultural Rights entered into force and the International Covenant on Civil and Political Rights on 23 March

1976. On 1 July 1985 not less than 25 States (17 Western – including Austria, Belgium, Canada, Finland, France, Iceland, Italy, Luxembourg, Netherlands, Portugal, Spain and the United Kingdom, and 8 East-European – including Poland and Czechoslovakia) were parties to both Covenants.

Accordingly it is in general not necessary to invoke international customary law or general principles of law recognized by civilized nations in order to provide a basis for the obligation in international law to respect human rights and fundamental freedoms, because in most instances there is a solid legal obligation in international treaty law.

V. Subsidiary role of international protection of human rights

The international protection of human rights fulfils a subsidiary role. As far as the European Convention on Human Rights is concerned, for instance, the Court of Strasbourg stated in its judgment of 23 July 1968 in the *Belgian Linguistic Case* (§ 10):

“[...] the Court] cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.”

While it is up to the national authorities to take the necessary measures for the respect of human rights, the international supervisory organs, if any, are competent within their attributions to verify whether the State concerned is faithful to its inter-

national obligations in the matter.

In any case, and in particular if there are no particular international organs competent in the matter, the States which – by becoming parties together with other States to international human rights instruments – have accepted the obligation towards those other States to respect human rights, have the right, in case such a State does not abide with its obligations, to seek a solution to this dispute by resorting to peaceful means of their own choice (Cf. Art. 33 of the UN Charter). The first and most natural of those means is undoubtedly the conduct of diplomatic negotiations on the matter.

The *International Covenant on Civil and Political Rights* has set up the Human Rights Committee to study reports submitted by the States parties. The States parties to the Covenant may also, by making a declaration under article 41, or by becoming parties to the Optional Protocol to the Covenant, recognize the competence of the Committee to receive and to examine interstate or individual communications respectively. The absence of such a special recognition does exclude the competence of the Committee in the matter concerned, but does not diminish in any way the right of any State party to insist on the fulfilment of the common obligations, in case another State party does not do so.

The purpose of special human rights procedures is to supplement the traditional – and often ineffective – means of settlement of disputes, not to exclude the operation of those traditional means, *a fortiori* with respect to States which do not accept – or do not entirely accept – those special procedures (See also Henkin, *loc. cit.*, 25: “Unless the agreement provides otherwise, any special machinery provided for implementing its human rights obligations does not replace but merely supplements the usual remedies for breach of international agreement”).

BOOK REVIEW

The United Nations and Human Rights: Minimum Flying Speed

A Review of

**"Human Rights and the United Nations:
A Great Adventure"***

by

John P. Humphrey

John P. Humphrey, a Professor and former Dean of the Law School at McGill University, Canada, was the first Director of the United Nations Division of Human Rights. He served in that capacity from the summer of 1946 to the spring of 1966. During his period in office the United Nations adopted the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and completed a series of other instruments dealing with various aspects of human rights. The two international covenants were adopted a few months after he left office. In addition to such *standard-setting* activities the United Nations also set about the task of *promoting* human rights through a programme of periodic reports, global studies and international seminars which proved to be quite valuable to the human rights programme in the long term.

The first seeds of *implementation* activities were also planted during this time. Early on Humphrey "already thought that

the real test of the United Nations as an international organization dedicated to the promotion of respect for human rights and fundamental freedoms, would be its ability to agree on effective measures of implementation".¹ He was, however, to be disappointed in this, for almost throughout the period that he was Director of the Division the United Nations hardly sought to deal with violations of human rights. In 1947, for example, "specific instances of violations of human rights, real or alleged, were rarely mentioned".² "It was a rare thing" he added "all the time I was at the United Nations for either the Human Rights Commission or the Sub-Commission to discuss, much less adopt, any resolution relating to a concrete case of alleged violations of human rights".³ He does refer though to a resolution adopted by the General Assembly in 1948 in which it held that measures adopted by one State were not in conformity with the Charter and called on the country concerned to withdraw them. "This" he confirms "was the first of many

* Transnational Publications, Inc., Dobbs Ferry, N.Y. (1984), 339 pp. Index.

1) P. 49.

2) P. 24.

3) P. 263.

times that the General Assembly would use the [Universal] Declaration to interpret the Charter".⁴ In one instance, in 1960, when the International League for the Rights of Man "drew attention to an outbreak of manifestations of racial and religious hostility... in a number of countries... The Sub-Commission universally condemned such practices as violations of the Charter and the Universal Declaration of Human Rights. The resolution... was later followed up by similar resolutions in the Human Rights Commission and the General Assembly..."⁵ In another instance, Humphrey tells us that Dag Hammarskjold made a speech in the Security Council in which he referred to "flagrant violations of human rights in the Congo".⁶ During this period also the United Nations sent an expert to observe the presidential elections in Costa Rica while a fact-finding mission was undertaken into the situation of human rights in South Vietnam.

Thus some skeletal "implementation" activities can be found during his tenure but, as Humphrey relates on several occasions, the period was essentially one of the drafting of the two covenants and the implementation of the programme of periodic reporting, studies and advisory services. He explains this himself as follows: "The truth was... that in those years there wasn't very much the secretariat could do to further the human rights programme apart from preparing 'studies' and organizing seminars".⁷ The covenants had been bogged down because of the opposition of the United States and the reluctance of western States to accept the right to self-determination.

The story which Humphrey tells is quite fascinating. It is true that often he takes you through the details of his travels and

his impressions of persons he met, but the labour in reading through this book is indeed very worthwhile for, to the discerning eye, there are valuable insights to be discovered. He recounts, for example, that none of the Secretaries-General under whom he served had any real interest in human rights. This was the case of Lie,⁸ Hammarskjold,⁹ and U Thant.¹⁰ Hammarskjold, according to Humphrey, even wanted to abolish the Division of Human Rights entirely and did drastically reduce its personnel at one stage: "There is a flying speed below which an airplane will not remain in the air. I want you to keep the programme at that speed and no greater".¹¹ This, according to Humphrey, was Hammarskjold's attitude towards the human rights programme. One may well ask whether anything has changed in this regard since Hammarskjold.

Not only was there little interest on the part of the Secretaries-General but there were greater difficulties with their principal aides, with those who were the powerbrokers. Humphrey recounts at some length his difficulties with people such as Andrew Cordier¹² and Philippe de Seynes.¹³ With the exception of Henri Laugier, he said he got practically no assistance whatsoever from the Assistant or Under-Secretary-General in charge of the Human Rights Programme. Henri Laugier was fully supportive and wanted to move faster than even the United Nations organs were prepared to go. At one stage he courageously expressed his views publicly and was scolded by members of the Commission on Human Rights. In this regard he was a precursor of van Boven. Laugier's feeling for human rights is well brought out in a remark which he made to Humphrey, commenting on an

4) P. 58.

5) Pp. 263 and 264.

6) P. 270.

7) P. 269.

8) P. 3.

9) P. 270.

10) P. 316.

11) P. 205.

12) P. 131.

13) P. 200.

invitation to the annual Human Rights Day concert which had specified "Black tie": "Les droits de l'homme en 'black tie', c'est une honte".¹⁴ After Laugier's departure from the secretariat he was succeeded first by Mr. Georges Picot who had little interest in human rights, according to Humphrey,¹⁵ then by Philippe de Seynes¹⁶ whom he considered distinctly unhelpful. Then there was Narasiman¹⁷ who was supportive at first but became bureaucratic finally.

He not only had to fight to keep his Division and his programme and to stave off cuts in his personnel but he had to deal with repeated threats to transfer his Division to Geneva and he had to fight constantly to obtain grudging recognition that the human rights programme was worth anything at all. He recounts his "in-fighting with the Bureaus of personnel and finance over the needs of the Division" and relates that "there was a disposition in the secretariat to treat the human rights programme as something of minor importance and, even exotic, in an international organization".¹⁸

On the transfer of the Division of Human Rights to Geneva, something that was eventually accomplished in 1974, Humphrey had this to say: "... I realized right away that to move the Division away from the political centre of human rights would not be a good thing for the human rights programme".¹⁹

Humphrey also had to face practical difficulties which are very much in evidence even today. When he sought to appoint the devoted Egon Schwelb as his deputy he encountered the following difficulties: "When it became known that a Jew with a social democratic background would be the Assistant Director of the Division of Human Rights some of the Czechoslovak members of the

secretariat raised a great outcry; even the Czech Delegation became involved".²⁰ Nevertheless, with the support of his immediate superior, Laugier, Humphrey stuck to his guns and Schwelb was appointed to the post where he stayed on to render sterling service to the United Nations.

The politics of the human rights programme which Humphrey relates is quite revealing. Great powers such as the United Kingdom demonstrated very little interest in the effective implementation of human rights.²¹ The United States turned its back on the covenants, declaring publicly that it would never sign or ratify them and proposed an alternative programme of reports, studies and seminars. The United States sought to influence Humphrey against the participation of Communist invitees to the United Nations seminars. The covenants were bogged down because western countries would not accept the right to self-determination; this gave the Communist countries, which were opposed to measures of implementation, the opportunity to pose as champions of the covenants. And — this is worth emphasizing — it was the developing countries which were to save the covenants and to enable the United Nations to move on to deal with gross violations of human rights. Writing about events in the year 1959, for example, Humphrey reports that at that stage "The main support for the human rights programme was now coming from the developing countries...".²²

There are interesting glimpses into the functioning of the human rights organs. Humphrey did not find the Economic and Social Council to be very useful and its deliberations did not appear to have contributed much to the human rights debates during this period. This is a story which has

14) P. 59.

15) P. 157.

16) P. 198.

17) P. 255.

18) P. 79.

19) P. 282.

20) P. 34.

21) P. 38.

22) P. 255.

changed little since Humphrey's time. Of the Third Committee he complained that, already in his time, there was a need to get Governments to send more experienced representatives. An observer of the Third Committee today would recognize some of his comments: "... There was a general debate on nearly every item. In what national parliament I asked could a member make a half-dozen general statements at a single session?... The Committee met too often, with the result that the speeches were long and badly prepared".²³ He does report however that, in the early years, the quality of membership on the Commission on Human Rights was outstanding and there were persons of the highest calibre attending the Commission. The early seminars of the United Nations were similarly attended by experts of such high calibre. One cannot, alas, say the same thing of the Commission on Human Rights, or of the seminars, today.

Humphrey says he did not find the specialized agencies very helpful during the drafting of the covenants or in his efforts to promote the implementation of human rights. He is particularly critical of the role of the International Labour Organisation and of Wilfred Jenks. "I was... struck by the negative attitude of the International Labour Organisation" he complains. With regard to economic, social and cultural rights, he "was mistaken in thinking that the ILO would co-operate in defining economic and social rights. What they wanted, and this soon became obvious was that these rights should be defined in the vaguest and most general terms possible."²⁴ Of UNESCO, he had a wish that is still to be realized to this day: "I wanted UNESCO to put more effort into making the Universal Declaration of Human Rights known every

where in the world".²⁵

Also, he had to struggle with other departments within the bureaucracy of the United Nations itself. Trying to get the United Nations and the specialized agencies to undertake a world-wide educational programme for the programme of human rights he had entered into discussions with UNESCO. However, when he raised this matter with the Department of Public Information in the United Nations secretariat, he says that this department was "unhappy about what I had done and later when I wanted to send one of my people to Paris to work out details of the programme they tried to prevent him from going".²⁶

Humphrey provides first-hand accounts of his idea to have a United Nations High Commissioner for Human Rights designated within the United Nations, as well of the strong objection to which this gave rise. The Indian delegation characterized this proposal, which Humphrey says he fathered, as "a hive of wasps".²⁷ He also relates his efforts to provide for a system of individual petitions within the United Nations and the success which he had at least in inserting a partial version of this into the International Convention on the Elimination of All Forms of Racial Discrimination.²⁸ He recounts the efforts of President Kennedy and his administration to launch some ideas in the direction of the implementation of human rights. They considered, for example, the possibility of prolonging the mandate of the chairman of the Human Rights Commission so that he could act between sessions. The idea was that "there should be a full-time, paid chairman of the Commission who would report to it annually on the observance of human rights in the world".²⁹

23) P. 197.

24) P. 143.

25) P. 125.

26) P. 126.

27) P. 331.

28) P. 333.

29) P. 296.

The account of the fact-finding mission to South Vietnam is useful and Humphrey considers that "It would have been far better from the point of view of both the United Nations and the Vietnamese Government had that investigation been conducted by an independent officer of the General Assembly rather than by a politically-oriented mission of ambassadors, some of whom were representing countries which in the General Assembly had already accused the Diem Government of violating the rights of the Buddhists"³⁰

There are many other fascinating insights and pieces of information to be derived from this useful book. For the present reader one of the most lasting impressions is the constructive and dynamic role which was played by the secretariat. Repeatedly Humphrey reports that had it not been for the preparedness of the secretariat or for its willingness to come up with thoughts and ideas, the human rights programme would not have had the results which it obtained during this period and, indeed, would have been lacking in a sense of direction.³¹ We can see the secretariat contributing to the drafting of the International Bill of Human Rights, something of which Humphrey himself is very proud; seeking over and over again, in a difficult political climate,

to "keeping the human rights flag flying"; Humphrey's quest for the effective implementation of human rights; his quest to place the United Nations in situations in which it could be helpful as, for example in the observance of the presidential elections in Costa Rica.

Alas, however, many of the difficulties which he faced still continue in our times: lack of interest on the part of the Secretary-General and his principal aides; the deliberate politicization of the human rights programme; inter-agency battles and bureaucratic struggles; continuous efforts to downgrade the programme by cutting staff and resources and by eventually transferring it from United Nations headquarters. All of these, alas, are problems which the contemporary observer and practitioner can continue to recognize today, sometimes even in a heightened form. They remind us of the difficulties which Humphrey encountered, of the strategic plans in his thinking, and of the valuable contribution which his Division made during the period 1946-1966. Humphrey deserves the eternal gratitude of the human rights community and of members of the United Nations secretariat. Even if he was kept at minimum flying speed, he piloted well.

B.G. Ramcharan*
16 October 1986

30) P. 297.

31) P. 178.

* The views expressed are in the author's personal capacity.

BASIC TEXTS

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

(Adopted by the General Assembly on 10 December 1984)

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,¹

Having regard to article 5 of the Universal Declaration of Human Rights¹ and article 7 of the International Covenant on Civil and Political Rights,² both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,³

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article I

1. For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

* A/RES/39/46.

1) Resolution 217 A (III).

2) Resolution 2200 A (XXI), annex.

3) Resolution 3452 (XXX), annex.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State;
 - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations

within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:
 - (a) Six members shall constitute a quorum;
 - (b) Decisions of the Committee shall be made by a majority vote of the members present.
3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.
4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedures:

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an *ad hoc* conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

- (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the *ad hoc* conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.⁴

4) Resolution 22 A (I).

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.
3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties

shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;
- (b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;
- (c) Denunciations under article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

MORALS

Which lover's embrace
under which bower
threatened which nation?
Whose cheongsam-slit
started a war?
Who was felled by a kiss?
Who was hit by a caress?
Was anyone blitzed by a wink?

Which farmer lost his house?
Which soldier lost his eye?
Which river lost its fish?

Talk about immorality
and i will show you
disruptive condominiums
like giant phalluses
thrusting into our sky;
factories like brazen
exhibitionists spouting
their slime into our sea;
i will show you
ruttish bulldozers
debauching virgin forests.

Which Court of Morals
will check the lubricity
of developers & politicians?

Which Statute will
cover the pollution
of language & culture?

Who will legislate
against the degradation
of poverty & hunger?

Which Moral Code
will protect our children
from the obscenity of missiles?

Talk about immorality...

Cecil Rajendra

from *Hour of Assassins and other Poems*
(Bogle – L'Ouverture Publications,
141 Coldershaw Road, Ealing London W13 9DU)

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Human Rights in Ghana

Report of a Mission to Ghana in June/July 1984 by Prof. C. Flinterman for the ICJ and the Netherlands Committee for Human Rights.
Published by SIM, Utrecht, 1985. Available in English. ISBN 92 9037 025 4.
Swiss Francs 12, plus postage.

The first part of this report deals with the administration of justice, in particular the government-inspired system of Public Tribunals and their potential for abuse. The second part considers the general human rights situation, regretting that the government's attempts to cure the country's economic ills are resulting in disquieting curtailment of the free exercise of civil and political rights. Prof. Flinterman ends his report with recommendations addressed to the government.

★ ★ ★

Torture and Intimidation at Al-Fara'a Prison in the West Bank

A Report by Law in the Service of Man (ICJ's West Bank affiliate).
Published by the ICJ, Geneva, 1985. Available in English. ISBN 92 9037 0246.
Swiss Francs 10, plus postage.

This report contains 20 affidavits by victims to illustrate the torture and ill-treatment carried out at Al-Fara'a prison in the Occupied West Bank. The practices include harassment, humiliation and indignity, inadequate food, hygiene and toilet facilities, brutal physical and mental punishment and lack of medical care.

★ ★ ★

Academic Freedom Under Israeli Military Occupation

A Report by A. Roberts, B. Joergensen and F. Newman.
Published by the ICJ and the World University Service (UK), Geneva and London, 1984.
Available in English. ISBN 0 906405 20 3. Swiss Francs 10, plus postage.

This 88-page report by three distinguished academics from Great Britain, Denmark and the United States, written after visiting the region and meeting both Palestinians and Israelis, calls for a fundamental reappraisal of the relationship between the Israeli military authorities and the Palestinian institutions of higher education in the West Bank and Gaza Strip.

★ ★ ★

The Philippines: Human Rights After Martial Law

Report of a Mission by Prof. V. Leary, Mr. A.A. Ellis, Q.C., and Dr. K. Madlener.
Published by the ICJ, Geneva, 1984. Available in English. ISBN 92 9037 023 8.
Swiss Francs 12, plus postage.

This report by an American professor of international law, a leading New Zealand lawyer, and a distinguished German specialist in comparative law is published seven years after "The Decline of Democracy in the Philippines", the original ICJ report on violations of human rights under martial law. In 1981 martial law was nominally lifted but many of its worst aspects have been retained, including indefinite detention without charge or trial by Presidential order. The report describes the widespread human rights abuses by the military and police forces, analyses the relevant legal provisions as well as describing the policies and practices in various fields of economic and social rights. It contains 40 recommendations for remedial action.

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