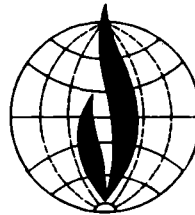


**For the Rule of Law**

# THE REVIEW



**INTERNATIONAL COMMISSION OF JURISTS**

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## HUMAN RIGHTS IN THE WORLD

Bulgaria / Turkey	1	Peru	9
Czechoslovakia	3	Philippines	12
Indonesia	4	Singapore	17
Paraguay	7	South Africa	19

---

## COMMENTARIES

Commission on Human Rights	22
ILO Inquiry's Findings on Discrimination in Public Employment in Fed. Rep. of Germany	26

---

## ARTICLE

Preliminary Report on South Africa by Geoffrey Bindman	31
---	----

---

## BASIC TEXTS

Declaration on the Right to Development	53
Council of Europe Recommendation on Conscientious Objection	57

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Editor: Niall MacDermot

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# Human Rights in the World

## Bulgaria/Turkey

Article 12 of the International Covenant on Civil and Political Rights states that:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of their group to enjoy their own culture, to profess and practise their own religion or to use their own language."

It is this disquieting to learn of concerted attempts to destroy the identity of certain ethnic minorities, in large measure by striking at one of the strongest cords binding them together – their common language. Such an attempt has been made upon the Turkish minority in Bulgaria which, based on figures published after the official census of 1965, numbers some 900,000 people or 10% of the total population. This minority is concentrated in two main areas – Deliorman, in the North-East and Kirdzhali province in the South-East. It was in this latter area that the offensive against the Turkish minority was initiated at the end of 1984. The campaign was sudden and intense. Military and police forces surrounded towns and villages in the province, forcing all those with Turkish names to hand over their identity cards and sign a document stating that they had "voluntarily" decided to change the Turkish name to a

Bulgarian one. Resistance to this policy met with violence and arrest. There were many reports of deaths and of large numbers of those who refused to cooperate being transported to prison on Belene Island which, according to one witness, is "filled with Turks, mud and mosquitoes."

The official action spread over the country and suddenly the Turkish language seemed to have been obliterated. Newspapers and radio broadcasts in Turkish were discontinued. It was forbidden to speak Turkish and no books in that language were to be found in bookshops. Mosques were closed and Turkish and Islamic practices were discouraged or actively forbidden. For example, the wearing of the shalvari, baggy trousers traditionally worn by Turks, was widely prohibited.

Such a campaign to destroy the ethnic roots of a people by striking at their traditions and, particularly, their language, is insidious and relentless because it affects every aspect of day-to-day life. For example, ethnic Turks bearing non-Bulgarian names reportedly cannot be married or withdraw money from a bank or receive a state pension or find employment.

It is ironic that the communists who took over in 1944 originally championed the cause of the Turkish minority which they claimed to have liberated from the 'terror and darkness' of the previous re-

gime. This was indeed true and at first Turkish literature flourished under the new regime along with all aspects of the culture of this ethnic group. Unfortunately this situation did not last, discrimination against the Turkish minority again began to increase and with the start of the period of heightened repression in 1984 the flame of freedom which had already started to gutter was snuffed out completely.

Turkey has continued to express its concern about the Turkish minority in Bulgaria and has stated its readiness to accept any Turkish Bulgarians who are allowed to emigrate by the authorities. This is a commendable attitude but somewhat ironic when one considers as that which the Kurdish ethnic group suffers similar treatment from the Turkish authorities that the ethnic Turks suffer at the hands of the Bulgarians.

Like the Turkish Bulgarians, the Kurds are a substantial ethnic minority which the authorities are trying to suppress inter alia by killing its linguistic roots.

The Kurdish names of thousands of villages, towns and geographical features are being changed to Turkish ones and parents are not allowed to give their children Kurdish names. In February 1981, a court case was brought against a parent who had registered Kurdish names for his children. The judge found that the names went "against the national culture, tradition and morals." He ordered them to be changed to Turkish ones which were chosen by the court. The entry in the Registry Office records was altered in line with the court ruling. No appeal was allowed.

In October 1983, Law Number 2832 was passed in an attempt, it would seem, to give some impression of legality to the violations that were taking

place. Article 3 of this law states:

"The mother tongue of the Turkish citizen is Turkish. It is forbidden

- a. to develop any form of activity in which a language other than Turkish is used and disseminated as the mother tongue; and
- b. at gatherings or demonstrations to carry posters, banners, signs, or other such objects written in another language, even if the language is not forbidden, or to broadcast records, tape or video-cassettes, or other objects of the media in another language without the consent of the highest official in the region."

Language offences under this law carry a penalty of six months to three years imprisonment and a minimum fine of 100,000 Turkish lira. Internal government and army orders have been issued stressing the importance of prohibiting the use of the Kurdish language. This has been carried to the extent of having the Minister for Education specifically forbidding songs in Kurdish as being "damaging to our national unity and integrity."

States of emergency and siege still exist in many areas and there is a strong military and police presence in the Kurdish-dominated areas of Turkey. There have been many reports inter alia in the Turkish newspaper Cumhuriyet of cases of torture and brutality against the Kurdish population by the security forces and of a disturbing number of deaths in custody and of disappearances. As in Bulgaria, movement to and within the areas in which the ethnic group is concentrated is strictly controlled by the authorities.

Questions of national unity can never justify destructive attempts to destroy

the ethnic identity of a people such as are happening in Bulgaria and Turkey.

On 26 August 1986, Cumhuriyet reported an interview with an inhabitant of a Kurdish village, 60 of whose fellow villagers had recently been arrested. He said: "Why do they treat us like an enemy? Why do the soldiers treat us so badly? Our only fault is that we speak

Kurdish. If it were possible I'd tear the Kurdish language that I speak from my mouth."

The peoples of this world, including the Turks of Bulgaria and the Kurds of Turkey, have a right to enjoy their ethnic heritage and not have it become a burden that is almost too heavy to bear.

## Czechoslovakia

When the Czechoslovakian authorities decided to dissolve the Jazz Section of the country's Musician's Union, the Section's chairman, Karol Srp, wrote over 130 letters requesting clarification of this action without receiving any reply. A representative of the Ministry of Culture justified this at the Jazz Section trial by saying that the Ministry 'did not answer letters from an organisation that does not exist! This is illustrative of the Orwellian shadow that was cast over the whole history of the Jazz Section and that encompasses the trial judge's statement that the Jazz Section work was 'commendable, but required a legal form because social values must be regulated' (emphasis added).

ICJ Review No 37 contained an article outlining the history of the Jazz Section case and the events leading to the Section's officers being charged under the Czechoslovak Criminal Code. The trial was in fact held in March 1987 and attended by many observers from Western countries who found they were unable to gain access to the court-room. The trial was, however, regarded as 'partially' open to the public, ie, observers were allowed to stand in the hall-way

outside the court-room and representatives of three press agencies - Reuters, Agence France-Presse and Voice of America - were actually allowed access to the court-room itself.

All the charges against the five accused had been dropped, except for that of 'unauthorized business activity' (article 118 of the Czechoslovak Criminal Code) which carries a possible sentence of eight years imprisonment.

The court found that the group had violated the provisions of article 118 by selling its publications and collecting dues from members until the arrest of its leaders last year. However, all five accused received sentences considerably lighter than those asked for by the prosecution. Karol Srp received a 16 month sentence, one of his deputies, Vladimir Kouril, received a 10 month sentence, two others were put on probation and the fifth defendant received a suspended sentence.

The relative leniency of the sentences and the partial 'openness' of the trial have been attributed to the widespread international concern expressed on behalf of the Jazz Section, with many world-famous musicians and writers sign-

ing petitions in support of the defendants. In addition, the strong national support for the Section plus the heralding by the USSR of an era of glasnost into which Eastern Europe is giving signs of entering, no doubt played a role in tempering the official attitude towards the defendants.

Despite these developments, the fact remains that all the accused were found guilty in a trial the prime motivation for which seems clearly to have been the restriction of artistic and cultural expression to an extent inconsistent with the provisions of the International Covenant on Civil and Political Rights; the Universal Declaration of Human Rights; the Helsinki Final Act and the Czechoslovak Constitution.

Other disquieting aspects are that only three reporters from among all the foreign journalists, political sympathizers and Western diplomats and observers were allowed to enter the courtroom; and that Dr. Joseph Prusa was ex-

cluded from giving evidence. Dr Prusa was the Jazz Section's principal lawyer until he was disbarred in 1986, evidently because of his work on behalf of the Section. He had previously been excluded from the court-room by the authorities on the grounds that he might be a witness at the trial. The defendants, indeed, relied on his evidence to show their lack of mens rea, as they had been acting on his legal advice. However, the court refused to allow Dr Prusa to give evidence on the grounds that his testimony had not been taken during the preliminary investigation.

As stated by the International Helsinki Federation for Human Rights, "That technicality begged the central question of why the investigating court had elected not to hear from such a key defence witness in the first place. This procedure shakes our confidence in the fairness of the trial."

The defendants have appealed their sentences.

## Indonesia: Law on Social Organizations

The International Commission of Jurists published in April 1987 a study on Indonesia entitled 'Indonesia and the Rule of Law: Twenty Years of New Order Government'. One of the recommendations of the study is that 'excessive use of regulatory discretion in the implementation of vaguely worded legislation should be reduced'. A good example of vaguely worded laws and regulations is Act No. 8 of 1985 concerning 'social organisations', and its implementing Regula-

tion 18 of 1986. The law on 'social organisations' was passed by the Parliament in June 1985 and is to be implemented from June 1987.

The term 'social organisation' would include, for example, women's organisations, development organisations and legal aid organisations. These organisations fear that this new law might further erode their independence and its vagueness might contribute to its misuse.

Articles 2 and 3 of the Act state that social organisations shall be based on Pancasila, the state philosophy. Pancasila comprises: 'Belief in the one supreme God, just and civilised humanity, unity of Indonesia, deliberative democracy, and social justice. Under the Regulation promulgated to implement the Act, all social organisations are to state in their statute 'Pancasila is the one and only principle'. Under Article 26 of the Act, the Government may dissolve any social organisation that does not modify its statute accordingly or that does not 'perceive, practise and safeguard Pancasila'. At the time the draft law was discussed in the Parliament the religious organisations in particular objected to the inclusion of Pancasila as the sole principle in their statutes. In spite of their objection, with the passing of the law all the religious and other organisations were asked to modify their statutes. For example, the Council of Indonesian Churches modified its statutes to include a new Article which reads: 'In the light of the confession as mentioned in Article 3, the Council of Indonesian Churches is based on the Pancasila in social, national and state life.' Similar modifications were made by the Catholic Church and the Islamic organisations. According to the religious organisations and other social organisations, they should not be threatened with dissolution for not 'perceiving', 'practising', and 'safeguarding' Pancasila which is so general and broad in scope. Particularly, in view of the fact that the implementing Regulation does not define what is meant by 'perceiving' etc. Justifiably, they fear that the Pancasila principle will be used as a way of controlling their activities. The ICJ study referred to earlier also concluded that 'Under the New Order Government of President Suharto,

Pancasila is transferred from its origin as state philosophy, expressing national Indonesian thinking, into a compulsory state ideology, with operative value for those who are in power'.

Articles 8 and 12 of the Act also have implications for the future independence of the social organisations. Article 8 states that, 'In order to better perform their functions, all social organisations shall unite in one similar fostering and developing body'. The social organisations are concerned that uniting of smaller organisations into one large umbrella organisation might stifle the autonomy of individual organisations. They cite as examples the existing umbrella organisations of youth and of farmers, the constituent units of which do not have freedom to take independent action.

Article 12 of the Act states that the government shall provide guidance to social organisations. The implementing Regulation states that guidance is given by advice, recommendation, direction, consultation, education and training or dissemination of information. The Regulation also states that the general guidance of social organisations is to be given by the Minister of Interior, raising fears that the guidance will be one of control and supervision, thereby extinguishing the creativity of social organisations.

As for financing, the Act states that social organisations may acquire funds by way of donations and other legitimate efforts. According to the Regulation, financial aid from outside the country may be obtained only with the agreement of the Central Government. The social organisations, particularly those which receive foreign aid, fear that the Government might apply pressure on them by withholding approval to receive foreign aid.

The Regulation also states that social

organisations which receive aid from foreign parties without the Government's consent and/or render assistance to foreign parties detrimental to the interests of the state and nation shall be suspended. The activities detrimental to the interests of the state and nation include 'those which may destroy the relations between Indonesia and other countries, which may give rise to threats, challenge, hindrance and disturbance against the safety of the state, or which may disturb national stability, and which are detrimental to foreign policy'.

In addition to suspending an organisation for the above reasons, the government also has powers to suspend an executive board of an organisation if it conducts activities 'disturbing law and order'. As *per* the Regulation, the activities that disturb the general security and law and order include: 'spreading of hostility among ethnic groups, religions, races and parties, destroying the unity and integrity of the nation, and undermining the dignity of or discrediting the Government'. As *per* the Regulation, before suspending the board of an organisation, the Government must give a written warning at least twice within a span of ten days. If the warning is not heeded within one month, the management has to be called for a hearing to give their account. Even after the hearing, if the organisation is found to continue activities that led to the warning, the government may resort to suspension of the management. Prior to suspension, the advice of the Supreme Court as to the legal aspects should be obtained for national organisations, and similar advice from the Minister of Interior in the case of provincial organisations. The Government may repeal the suspension if the organisation ceases the activities that re-

sulted in the suspension and admits its mistakes and pledges not to repeat them. If it continues to undertake activities that resulted in the suspension, the organisation may be dissolved by the Government.

The Government also has powers to dissolve an organisation if it adheres to communism or other ideologies, concepts or teachings contrary to Pancasila and the 1945 Constitution. The Regulation does not provide for any procedures for dissolving an organisation for these reasons. It merely states that the 'dissolution is done by paying attention to the advice and consideration of the authorised body in accordance with the existing laws'.

The basis on which the Government may suspend or dissolve social organisations is too vague and general. It is regrettable that neither the Act nor the Regulation provides for procedures by which the decisions or the Government can be challenged or reviewed by an independent court or tribunal.

Indeed, during the hearings in the Parliament on the draft law, the Indonesian Legal Aid Foundation submitted a written testimony in which it stated that the articles dealing with the suspension and dissolution are minefields for social organisations. The testimony further stated that, 'the growth of social organisations, with their diverse fields of activity that fulfil the needs of the society, constitute a social reality that cannot be ignored. The role of these organisations with their unique characteristics is increasingly felt as vehicles for popular participation and for creating alternatives in development. There is no need for this complex reality to be obstructed by regulations that create barriers for popular participation'.

# Paraguay

A state of siege had been almost continuously in force in Asuncion, Paraguay's capital city, since President Stroessner came to power in May 1954 in a coup d'etat deposing then President Chavez. Until it was lifted in April this year, the state of siege had been suspended only for 24 hours once every five years to permit elections to take place, in addition to a short period of a few months.

During 1986 the state of siege continued to provide the legal framework for repression in the areas where it was in force, namely the Central Department, including the capital city, to which it had been restricted since 1978.

The state of siege was renewed every 90 days by the government as a matter of routine, even though Paraguayan law provides that a state of siege is an exceptional measure to be used for a limited period of time, in specially defined cases, for the sole purpose of defending the Constitution and the constitutionally established authorities. The Constitution states that a state of siege shall be introduced only in the event of internal conflict or war, foreign invasion, internal disorder or grave threat of any of these.

The Constitution also established that a law shall regulate states of siege. Twenty years after the promulgation of the Constitution, and despite many proposals for such a law, none has been enacted. A state of siege is thus decreed, extended, limited, lengthened, used and applied at the sole discretion of the executive. Thus, there is nothing to curb the executive's arbitrary reimposition of the recently lifted state of siege at any time

in the future.

When a person is arrested under the provisions of article 79 of the Constitution (which regulates states of siege), no charges need to be made and he or she can be detained for an indefinite period of time. However, attempts have been made to use writs of habeas corpus (recognised and guaranteed in article 78 of the Constitution) to effect the release of such detainees.

Despite this Constitutional provision, writs of habeas corpus have been systematically rejected by the Supreme Court on the basis that it has no jurisdiction in cases of individuals detained under the special powers provided by the state of siege. It should be noted that article 79 regulating states of siege makes no reference to the suppression of habeas corpus during a state of siege and specifically states that

"the fact that a state of siege is in effect shall not interrupt the functions of the three branches of government, nor affect the exercise of their prerogatives."

It should be further noted that although article 199 of the Constitution duly recognises the principle of judicial independence, article 195 states that members of the Supreme Court and judges are to be appointed by the President every five years, coinciding with the presidential term of office. This system of judicial appointment facilitates the control of the judiciary by the President since the entire judiciary is selected by him and depends on his deci-

sion for reappointment.<sup>1</sup>

Although the state of siege was in force only in Asunción and the Central Department, people were reported to have been arrested in other parts of the country, brought to the area in which the state of siege was in effect and kept in prison without trial under the provisions of the state of siege.

Human rights violations in addition to those connected specifically with the state of siege continue to take place. This contributes to a climate of fear and uncertainty exacerbated by the enforcement of laws restricting individual freedoms, for example, law 294 of 1955 prohibiting the activity of any political group, in particular the Communist Party, which is perceived to support the notion of class struggle and law 209 which was incorporated into the penal code in September 1970 and which makes it a crime for more than three people to meet without prior authorization of the police. People have been reported to have been arrested under this law for holding even a prayer service at home in memory of a deceased relative.

It appears that the "Guardia urbana" (Urban Guard), a former militia force active during the 1940s and 50s was reconstituted at the beginning of 1987 as an auxiliary force of the conventional security forces. Since the beginning of 1986 violent incidents have been reported in rural areas, mainly due to land conflicts. Several agro-export transnational corporations have purchased large amounts of land in the last few years, which they later found out has been occupied for years by indigenous people who actually live there. During the subsequent evictions, serious human rights viola-

tions by the police and military have been reported, including deaths, the practice of torture, rape, beatings and tying people to trees.

Political activity continues to be subjected to repression through arbitrary arrest and other forms of harassment. For example, the parties forming the "National Accord" were declared illegal by the government, and their members subjected to persecution. On 25 and 26 January 1986, during the attempt of the MOPOCO (popular Colorado Movement) to hold a plenary meeting, the building was surrounded by 20 policemen to prevent anyone going in, and four members of the police investigations department entered the building and ordered the tenant of the apartment in which the meeting was to be held to leave it by noon. No warrant for his arrest or other order under the provisions of the state of siege were given by the police. At least 25 members of the MOPOCO were injured by beatings and two had to be taken to hospital for treatment, when plainclothes policemen broke up the MOPOCO plenary meeting.

Freedom of expression and information, even though they are guaranteed in the Constitution, have been continuously under attack by the government. ABC Color, Paraguay's largest selling newspaper remained closed, by official order, through 1986. On 30 June 1986 Rev. Javier Arancon, a Spanish priest and director of Radio Caritas of Asunción, was expelled from the country without trial or charges being brought against him. Radio Nanduti, an independent broadcasting station was ordered to suspend work for 15 days in January 1986, and has been subjected to violent persecution,

1) See "Judicial Independence in Paraguay" in CIJL Bulletin No. 14 Oct. 1984.

including two break-ins at its headquarters which human rights organisations have attributed to the Urban Guard. Wave interference of their spoken programmes have prevented them from broadcasting anything other than music for more than a year, with the exception of the period of a UN special rapporteur's visit. During the first months of 1987 the interference was such that they

were not even able to broadcast music.

It remains to be seen whether the lifting of the state of siege in April of this year indicates the start of an improvement in the human rights situation in Paraguay or whether it was a merely cosmetic move designed to draw attention away from the human rights abuses being perpetrated in that country.

## Peru

The out-break of guerilla activities in Peru in 1965 started one of the most complex and bloodiest conflicts in the Americas. This conflict has become more violent over the last six years due to the fighting between the government and the insurgency group, known as "Sendero Luminoso", or "Shining Path", which reportedly has caused more than 7,000 deaths since it proclaimed its existence in 1980.

In April 1985, Mr. Alan Garcia Pérez was elected President with a wide popular mandate and took office on 29 July 1985.

One of President Garcia's first efforts to combat human rights abuses and to initiate a dialogue with the insurgents was to establish a Peace Commission. This was set up in fulfillment of a promise made in his inaugural speech and also in response to a crisis over the armed forces' lack of cooperation in the investigation of a massacre of civilians which had taken place in Accomarco in August 1985.

The year after President Garcia's election, however, saw a further increase in

violence with 1,306 deaths being reported by the Center of Studies and Promotion of Development (DESCO) for the period of 1 January to 31 October 1986. This included 87 members of the armed forces or police, 418 civilians and 801 presumed members of the Shining Path.

One of the most disturbing of the human rights violations in this period was the killing, torture and disappearance of prisoners by the armed forces during the suppression of three prison riots that took place almost simultaneously on 18 June 1986. The authorities themselves have admitted the extra-judicial execution of 100 prisoners from Lurigancho prison after they had surrendered to the armed forces. They have also admitted two deaths in Santa Barbara's women's prison; but they have supplied no information about the fate of over 155 prisoners known to have been held in El Fronton Prison's Blue Pavilion cellblock. They remain unaccounted for and are considered "disappeared".

The background to the prison riots is as follows. According to Law No. 23414

of 1 June 1982 all prisoners held on charges of terrorism under the 1981 "Law Against Terrorism", which defines a broad range of crimes related to public order and national security as aspects of terrorism, are to be tried in the capital city, and to be transferred to the prisons in the area of Lima and its port Callao. Because of the difficulties caused by the transfer of detainees and their judicial files and by the fact that Lima and Callao are far from the places where most of the alleged crimes were committed, the trial investigations proceeded very slowly. Some of the accused were detained for over three years without any progress in the judicial investigation of their cases.

Lima and Callao, in whose jurisdiction the prisons are located, have been under a State of Emergency since 7 February 1986 in order to combat what President Garcia called a new type of terrorism. This apparently referred to a newly created group called "Sendero Verde" (Green Path), believed to be formed by former police officers who had been forced into retirement as a result of a "clean-up" campaign initiated by President Garcia against human rights abuses by the police force. On 10 February, a 1:00 a.m. to 5:00 a.m. curfew was also imposed for the same reason.

Shortly after dawn on 18 June some 350 prisoners charged with terrorism started almost simultaneous riots in the men's prisons of Lurigancho (now called San Pedro) and El Fronton (now called San Juan Bautista), an island prison near Lima, and the women's prison at Santa Barbara. Hostages were taken and some arms were seized by the prisoners who issued identical 26-point lists of demands in the three prisons. The prisoners' demands ranged from improvement of prison conditions to broad political demands. They also included claims that

the prisoners were to be the victims of a "genocide" plot by the military.

On the morning of 18 June an emergency cabinet meeting was called by the President to consider how to deal with the prison riots. The members of the Joint Command of the Armed Forces were present at the meeting, and were ordered to coordinate efforts to restore law and order. The limits within which the Armed Forces were to act, and the role of the judiciary, the public prosecutor's office and the civilian prison authorities in these efforts were not established.

The Peace Commission was given powers by the President to negotiate with the rioters but these were not given in writing, only orally. It received almost no cooperation from the military authorities to carry out negotiations, even though its members went to the prisons by helicopter provided by the President. The efforts by civilian, judicial and prison authorities to negotiate the release of hostages and end the riots were blocked by the Armed Forces in all three cases.

On Thursday 19 June in the early morning, the cabinet met again, after the army had stormed Lurigancho prison. Of the 126 rebel inmates in the Industrial Pavilion, at least 100 survived the first attack and surrendered. They were forced to lie flat on the ground, and were shot in the back of the head or in the mouth by soldiers and members of the Republican Guard.

At the same meeting, the Cabinet enacted decree 006-86-JUS, which formally declared the prisons to be under the "competence and jurisdiction" of the Joint Command. The prisons were, in fact, already technically under the control of the Armed Forces by virtue of the state of emergency which charged them

with maintaining internal order. The decree cited Law 24150 which regulates the role of and the jurisdiction applicable to the Armed Forces under states of emergency. Art. 10 of this law gives exclusive jurisdiction to military courts over "infractions set out by the Military Justice Code" committed by members of the Armed Forces in the execution of their duties. This Code does not however set out crimes such as murder (which would include extrajudicial executions) that are dealt with only in the Criminal Code. The 19 June Cabinet decision to designate the three prisons restricted areas as requested by the Joint Command, only ratified the restriction of access already imposed by the Armed Forces on the afternoon of the 18 June.

In view of the initial reports of 100% death toll at Lurigancho prison, President Garcia issued clear orders, in the morning of 19 June, that the naval commanders\* should moderate the intensity of their attack on El Fronton prison, demand the surrender of the rebels and see that the lives of those that did so be spared. The same day at about noon a group of civilians sent by President Garcia went to El Fronton prison for a brief inspection. The President also ordered the Navy Commander Vice-Admiral A.P. Victor Nicolini, to go to the island and take all precautions to ensure that the order was obeyed. Senator Armando Villanueva, Secretary General of APRA (the ruling party), also visited the prison by helicopter at about 3 p.m. the same day. The prison was reclaimed by the Armed Forces after the marines carried out an operation which resulted in the deaths of 140 prisoners out of a

total of 175 inmates, two marines and one hostage. The tactics and weapons used – artillery, explosives, bazookas and rockets – seem to be disproportionate to the threat posed by the prisoners and the arms they had. Common anti-riot techniques, such as cutting water and electricity supplies were never used.

The government has not responded to the compelling evidence that some of the inmates were summarily executed on the island and others taken to the mainland in secret. Many bodies have not yet been found. According to Jesus Mejia Huerta, one of the survivors, after the attack, the marines took many surviving prisoners outside to the beach where they interrogated and executed them. He alleges that many were shot by firing-squad next to the Blue Pavilion which was then demolished with explosives to conceal the bodies.

The fate of the prisoners from the three prisons, including both the killed and the wounded, was not communicated directly to their families. The bodies of the dead were rapidly and secretly buried. The names of those who died at El Fronton have not been confirmed. Their places of burial and their total number have not been made public.

Investigations have been systematically obstructed by the authorities. On 21 June 1986, President Garcia asked the office of public prosecutions to investigate the Lurigancho incident. The Attorney General promised to investigate the three prison revolts, but supported the thesis of the Armed Forces that the right to carry out judicial investigations was exclusive to the military courts and military prosecutors. The police services

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\* The three prisons had been divided among the Armed Forces – the army going to Lurigancho, the navy to El Fronton and the air force to Santa Barbara.

presented a confidential report to the Minister of the Interior and Congress, but this was not made public. On 26 August 1986, the Supreme Court ruled that the cases against the members of the Republican Guard acting under the orders of the Joint Command responsible for the killing were to be investigated only by the military courts. The Supreme Court held that they had no jurisdiction to receive habeas corpus petitions, as the matter was exclusive to the military courts.

Thirty members of the Republican Guard were kept for a few days at Canto Grande prison under the initial investigations. However, guards and junior officers were released by order of the highest military court in November 1986 after a ruling that the actions under investigation had been ordered by higher military authorities.

At the time of writing there are 32 accused (one from the Armed Forces, the others from the Republican Guard). Only nine are in detention; the rest continue in their posts.

Between 23 February and the end of March 1987, President Garcia convoked

three extraordinary legislative sessions to pass bills seen as fundamental by him. The third legislative session held in a period of political tension including rumours of a coup, approved a bill creating a Ministry of Defence unifying the army, navy and air forces, and authorized the executive branch of government to elaborate the necessary regulations within 180 days. However, no bill was proposed through which all trials of military and police personnel who commit abuses in the emergency zone would be brought before civil courts.

This is a very delicate issue for President Garcia's administration already facing many other serious problems such as the insurgency of the Shining Path, the great economic crisis and the many threats of a coup d'etat from the military. This poses yet another problem for Peruvian democracy, the fear being that judicial action against members of the military responsible for the prison massacres would risk a military take-over. But a choice has to be made if Peruvians are to regain their confidence in the judicial system, the police and the armed forces.

## **The New Constitution of the Philippines**

President Corazon Aquino, who came to power following the flight of ex-President Marcos in February 1986, appointed in the following May a fifty-member Commission to draft a new Constitution. The Constitutional Commission began its work on 2 June by electing a former Supreme Court Judge, Mrs. Cecilia Munoz Palma, as its chairperson. Justice

Roberto Concepcion, former Vice-President of the International Commission of Jurists, headed the Commission's 'Committee on the Judiciary'.

The Commission completed its work in October 1986 and on 2 February 1987 the draft Constitution was endorsed by the people in a plebiscite with an 85 per cent poll and a 75 per cent vote in favour

of the new Constitution.

This is the third Constitution the country has adopted since its independence in 1946. The first Constitution had a US-style bicameral legislature and a strong presidency. The second Constitution was adopted in 1973 during the martial law period imposed by ex-President Marcos. This Constitution made the President a symbolic head of state with the Prime Minister as the head of the executive. However, in reality ex-President Marcos wielded the real power and the Constitution was never fully adhered to.

The present Constitution follows the first Constitution by vesting the executive power in the President and the legislative power in the Congress, consisting of a Senate and a House of Representatives.

The other noteworthy changes from the 1973 Constitution are as follows:

The preamble to the new Constitution includes the new phrases 'to build a just and humane society' and 'establish... democracy under the rule of law'.

Under Article II, the Declaration of Principles and State Policies, the 1973 Constitution had stated that 'Philippines is a republican state', whereas the present Constitution describes it as a 'democratic and republican state'. The other additions under the state policies are:

- adoption of a policy of freedom from nuclear weapons in its territories;
- valuing the dignity of every human person and guaranteeing full respect for human rights;
- protecting the life of the mother and the life of the unborn from the moment of conception;
- recognizing the role of women in nation building and ensuring the fundamental equality before the law of

women and men;

- promotion and protection of the right to health and the right of the people to a balanced and a healthful ecology;
- development of a self-reliant and independent economy;
- recognition and promotion of the rights of indigenous cultural communities;
- encouragement of non-governmental community-based or sectoral organizations; and, finally
- subject to reasonable conditions presented by law, the adoption and implementation of a policy of full public disclosure of all its transactions involving public interest.

Under Article III dealing with the 'Bill of Rights', a notable section is Section 12 which expands Section 20 of the 1973 Constitution. Under the 1973 Constitution, any person under investigation had the 'right to remain silent and to counsel', whereas in the present Constitution he has a right to 'remain silent and to have competent and independent counsel preferably of his own choice'. Similarly, the 1973 Constitution, under Section 20, had stated that: 'no force, violence, threat, intimidation, or any other means which vitiates the free will shall be used against him'. The present Constitution explicitly adds torture and prohibits 'secret detention places, solitary, incommunicado, or other similar forms of detention'. Section 12(4) states that: 'the law shall provide for penal and civil sanctions for violation of this section as well as compensation to and rehabilitation of victims of torture or similar practices, and their families'.

Among other additions under the Bill of Rights are Section 18, which states that 'no person shall be detained solely by reason of his political beliefs and aspi-

rations'; and Section 19(1) and (2) which states that:

"(1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless for compelling reasons involving heinous crimes; the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.

(2) the employment of physical, psychological, or degrading punishment against any prisoner or detainee or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law."

Under Article VI, dealing with the 'Legislative Department', the present Constitution creates a 250-seat House of Representatives and a 24-member Senate.

The members of the House of Representatives are elected for a three-year term through a 'party-list system of registered national, regional and sectoral parties or organisations'. Out of the total number of the House of Representatives, 50 will be appointed by the President from lists submitted by political parties, and 'sectoral groups' such as women, tribal minorities and labour unions.

The members of the Senate are elected for six years in a nation-wide preference ranking poll.

Under Article VII dealing with the Executive Department, the executive power is vested in the President. The President and the Vice-President are to be elected in a direct vote for a term of six years. A transitory provision under

the Constitution extends the term of the incumbent President and Vice-President (who were elected in the February 1986 election) to 30 June 1992.

Interesting changes have been made in the section dealing with the powers of the President to impose martial law. Under the 1946 Constitution, the President, and under the 1973 Constitution, the Prime-Minister, could in 'case of invasion, insurrection or rebellion, or imminent danger thereof, ... suspend the privileges of the writ of habeas corpus, or place the Philippines under martial law'.

Under the present Constitution, the President 'in case of invasion or rebellion, when the public safety requires it (the words 'imminent danger thereof' are omitted) may, for a period not exceeding 60 days, suspend habeas corpus or impose martial law. Further, within 48 hours from the proclamation of martial law or suspension of habeas corpus, the President shall submit a report to the Congress which, sitting jointly and by a majority vote, may revoke such proclamation or suspension which shall not be set aside by the President. In the same manner, the Congress may extend such a proclamation for a period to be determined by the Congress.

In contrast to the earlier constitutions, the Supreme Court, in an appropriate proceeding filed by any citizen, may review the sufficiency of the factual basis of the proclamation of martial law or suspension of habeas corpus and give its decision within 30 days from the filing of the case. The Constitution further states that:

"A state of martial law does not suspend the operation of the Constitution, nor supplant the functioning of the civil courts or legislative assembly."

blies, nor authorize the conferment of jurisdiction on military courts and agencies over civilians where civil courts are able to function, nor automatically suspend the privilege of the writ.

"The suspension of the privilege of the writ shall apply only to persons judicially charged for rebellion or offences inherent in or directly connected with invasion.

"During the suspension of the privilege of the writ, any person thus arrested or detained shall be judicially charged within three days, otherwise he shall be released."

Under article VIII dealing with the Judicial Department, the judicial power is vested in one Supreme Court and in such lower courts as may be established by law, which is similar to the previous Constitutions.

However, in the 1973 Constitution the Prime Minister appointed the members of the Supreme Court and the judges of the lower courts. In contrast to this, under the present Constitution the appointments are made by the President from a list of three nominees prepared for every vacancy by the 'Judicial and Bar Council'. This Council, newly created under the present Constitution, consists of seven members of whom three, the Chief Justice, the Secretary of Justice and a representative of the Congress, are ex officio members and the other four are a representative of the Integrated Bar, a professor of law, a retired Supreme Court judge and a representative of the private sector.

Another major addition to the present Constitution is the creation of autonomous regions in Muslim Mindanao and the Cordilleras (tribal areas).

The Constitution states that: "the

Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multi-sectoral bodies". The organic act shall define the basic structure of the government and provide for special courts with personal, family and property law jurisdiction consistent with the provisions of the Constitution and national laws.

The creation of an autonomous region will be effective when approved by a majority in a plebiscite and only those geographical areas whose electorate voted in favour will be included in the autonomous region.

The Constitution also states that the organic act of autonomous regions shall provide for legislative powers over:

- administrative organization,
- creation of sources of revenues,
- ancestral domain and natural resources,
- personal, family, and property relations,
- regional, urban and rural planning development,
- economic, social and tourism development,
- educational policies,
- preservation and development of the cultural heritage, and
- such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.

The organic act of the two autonomous regions is to be passed by the Congress within 18 months from the time of its first sitting.

Under article XI dealing with 'accountability of public officers', the office of

the Ombudsman is retained and his powers are set out in greater detail than in the 1973 Constitution. The Ombudsman has powers to investigate on his own or on complaint any act or omission of any public official, when such act or omission appears to be illegal, unjust, improper and inefficient. He also has powers to direct any public official to perform and expedite any act or duty required by law, or to stop, prevent, and correct any abuse or impropriety in the performance of duties, and to request any government agency for necessary assistance and information as well as to examine pertinent records and documents.

There is a new article (article XIII) on social justice and human rights. This deals with labour, agrarian and natural resources reform, urban land reform and housing, health, women, and the role and rights of peoples' organisations. Under the section dealing with peoples' organisations, the Constitution states that: 'the state shall respect the role of independent peoples' organisations to enable the people to pursue and protect, within the democratic framework their legitimate and collective interests and aspirations through peaceful and lawful means... The right of the people and their organisations to effective and reasonable participation at all levels of social, political and economic decision-making shall not be abridged. The state by law shall facilitate the establishment of adequate consultation mechanisms'.

Under article XIII a Commission of Human Rights is created. It consists of a Chairman and four members, the majority of whom shall be members of the Bar.

The Commission shall have the power to investigate, on its own initiative or on complaint by any party, all forms of human rights violations involving civil

and political rights; provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection. The Commission also has powers to visit jails, prisons, or detention facilities, and to establish a continuing programme to enhance respect for the primacy of human rights.

The Constitution has a new article XIV under which it sets out broad policies on education, language, science and technology, arts, culture, sports and the family. On education, it provides that 'the state shall protect and promote the right of all citizens to quality education at all levels and shall take appropriate steps to make such education accessible to all'. On language, it states that 'the national language of the Philippines is Filipino. As it evolves, it shall be further developed and enriched on the basis of existing Philippine and other languages'. As for science and technology, it states that 'science and technology are essential for national development and progress. The state shall support indigenous, appropriate and self-reliant scientific and technological capabilities and their application to the country's productive systems and national life'. On arts and culture, it says that the state 'shall foster the preservation, enrichment, and dynamic evolution of a Filipino national culture based on the principle of unity and diversity in a climate of free artistic and intellectual expression'. On sports, it states that 'the state shall promote physical education and encourage sports to foster self-discipline, team work and excellence for the development of a healthy and alert citizenry'. On the family, it

states that 'the state recognises the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its

solidarity and actively promote its total development'.

## Singapore

It is not a practice, nor will I allow subversives to get away by insisting, that I (have) got to prove everything against them in a court of law or (produce) evidence that will stand up to the strict rules of evidence.'

With these words, Prime Minister Lee Kuan Yew of Singapore revealed just how far from the rule of law the present government has travelled in its attempts to protect its own interests.

Prime Minister Lee was referring in his statement to the 16 church community leaders detained under the Internal Security Act (ISA) on 21 May 1987. Their detention illustrates several disturbing aspects of the human rights situation in Singapore.

One of these is the continuing existence and revived use of the ISA itself. Enacted in 1960, it allows persons suspected of acting in a way which is prejudicial to the security of Singapore to be detained indefinitely without any charge or trial by means of detention orders which are renewable every two years. Chia Thye Poh, a former member of the Singapore parliament, has been thus detained for over 20 years. The recent detentions have provoked widespread criticism, both of the ISA itself and of the facts of this particular case.

The 16 detainees include a lawyer, an accountant, a publisher, a business man

and three journalists as well as full time church workers.

After a week's silence, and a black-out on reporting the numerous international protests, the government issued a statement alleging that the 16 detainees were involved in a 'Marxist conspiracy to subvert the existing social and political system in Singapore.' The alleged 'mastermind' of the plot is Mr Tan Wah Piow now reading law at Balliol College, Oxford. He has denied any links with the detainees and says that if ever there were an attempt to establish a communist state, he would be the first to oppose it. His concern is to establish the rule of law as the basis for protecting and strengthening the guarantees of civil liberties in the Singapore Constitution. He was imprisoned in 1974 for his political activities in the University students' union and sought asylum in the UK when inducted into the army on his release from prison. The government has been trying to discredit him ever since.

The allegations against the 16 detainees as issued to the press are very vague, ranging from 'concealing their ideological inclinations and subversive intentions from (others) and holding themselves out as dedicated social workers fighting against alleged injustices and oppression' to presenting 'satirical plays which consistently presented the political and social system in Singapore

in a bad light' to forsaking 'well-paid careers to take up lowly-paid jobs of \$300 to \$400 per month which would allow them to influence others.'

Not only are the detainees not given the opportunity to answer these allegations in a court of law, but most of the allegations, as set out by the Ministry of Home Affairs, describe activities that amount to the exercise of the rights guaranteed in the Universal Declaration of Human Rights, notably the rights to freedom of expression and freedom of association. The government has not produced any convincing evidence of its allegations of intention to overthrow the government and establish a communist state.

As the Secretary-General of the ICJ stated in his letter to the Singapore Ambassador in Geneva concerning the detentions, the 'allegations are of a very general nature and it can best be left to a court to decide on their veracity'. He urged that 'these 16 persons be brought to trial at an early date or released' and requested the Ambassador to convey this urgently to his government.

Protests have also been made by church and student organisations in many Asian countries including Australia and New Zealand and international organisations such as Amnesty International, the International Federation of Human Rights and the World Council of Churches.

The following are brief particulars of the detainees:

Vincent Cheng	Aged 40; Masters' Degree in Theology; Executive Secretary of Justice and Peace Commission (a body established by the Catholic Church).
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Tay Hong Seng	Aged 36; BSc Hons (UK); Subtitling Editor.
William Yap	Aged 40; Diploma in Translation (UK); Subtitling Editor.
Chia Boon Tai	Aged 36; BSc Hons (UK); Businessman.
Kenneth Tsang	Aged 34; BA Hons (UK); Advertising Executive.
Jenny Chin Lai Ching	Aged 29; BA Hons (UK); Malaysian National and reporter of New Straits Times, Malaysia.
Teresa Lim Li Kok	Aged 32; Publisher.
Wong Souk Yee	Aged 28; Bachelor of Accountancy, Senior Research Executive.
Teo Soh Lung	Aged 38; LLB Hons; Lawyer; Council Member of the Singapore Law Society.
Tan Tee Seng	Aged 28; Sales Executive.
Low Yit Leng	Aged 28; Polytechnic graduate; Project Manager with a printing firm; wife of Tan Tee Seng.

Chung Lai Mei	Aged 22; Production Operator.
Ng Bee Leng	Aged 23; full-time paid social worker with Geylang Catholic Welfare Centre (GCWC).
Mah Lee Lin	Aged 22; Polytechnic graduate; full-time paid helper with Singapore Polytechnic Students Union.
Tang Lay Lee	Aged 33; LLB Hons; full-time paid staff at Young Christian Workers' Movement (YCWM).

Kevin de Souza	Aged 26; LLB Hons; full-time paid helper in Singapore Poly- technic Catholic Student's Society.
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[On 22 June 1987, it was reported that four of the 16 detainees have been released and six others arrested, among them a businessman, lawyer and university lecturer. The government statement announcing the new arrests also said that, of the twelve original detainees remaining, Vincent Cheng, allegedly a key figure in the supposed Marxist network, would be held in detention for two years. The eleven others would be held for up to one year for what the government called 'rehabilitation'.]

## South Africa

On 11 June 1987 the government of South Africa renewed its one year old State of Emergency, which covers the entire Republic as well as the so-called self-governing black national states. On the same day the government issued a new edition of the Emergency Regulations under which the government exercises its control over the population. The new regulations are more comprehensive and severe than the former ones. The preliminary report of the recent ICJ mission to South Africa, published in this issue, gives a general view of conditions under the previous emergency.

This note deals with the new provisions and regulations under the second state of emergency.

### Detentions and arrest

A member of the security forces – defined as the South African police, prisons service and defence force – has unbridled discretion to arrest and detain anyone without warrant or hearing. The new regulations increase from 14 to 30 days the maximum period of such detention. Once expired, this period may be ex-

tended by the Minister of Law and Order. The minister may direct that a detainee be removed from one place of detention to another for any purpose.

Separate regulations governing the treatment of detainees were issued this year, which, with one important exception, echo last year's regulations. Absent from the new regulations is any provision concerning detainees seeing visitors. Under last year's regulations, a detainee could be visited with the permission of the prison warden and the Commissioner of Police. A visit by the detainee's legal representative required the permission of the Minister of Law and Order. Under the new regulations, even the hope of this limited contact with the outside is removed.

Release of a detainee is at the discretion of the Minister of Law and Order. The new regulations provide that the Minister may place conditions, for an unspecified period of time, on the release of a detainee.

### **Meetings and gatherings (right of assembly)**

The terms of the new Regulations expand further the power of the Commissioner of Police to control or prohibit "gatherings" or activities in demarcated areas. It is now within the discretion of the Commissioner to control or prohibit any gathering, including the time, place, participants and activities of the gathering. These regulations also apply to funerals.

### **Freedom of speech**

The ability to criticize the government and apartheid is strictly controlled

under the Regulations by the definition of "subversive statement". The new Regulations expand the definition of a subversive statement in such detail that mere acknowledgement of, not to mention participation in, any protest action constitutes an offence. Under the new Regulations a statement is subversive if it has or is calculated to have the effect of inciting or encouraging participation in restricted activities. These include purchasing, or not purchasing, goods from a particular merchant, support of a strike or resisting or opposing any Minister, Cabinet Member, or any official of the republic, to mention only a few of the provisions of the new Regulations.

### **Press restrictions**

Restrictions on the press apply to all the different media and technologies. Press restrictions under last year's Regulations were issued after the imposition of the State of Emergency and were modified or expanded over the course of the year, sometimes in response to court cases over-ruling sections of the old regulations. The new Regulations now prohibit virtually all reporting of opposition or anti-apartheid activity in South Africa. Publications, which include print, television, film and sound recordings, may be seized without notice or hearing if they contain any mention or comment on subversive statements (as above), speeches of ex-detainees, restricted meetings or gatherings, unrest, boycotts or military activity. Publications are prohibited from carrying blank spaces to indicate censored material.

Journalists, including photographers and their assistants, must have prior consent from the Commissioner of Police or a commissioned officer to be present in

unrest areas, restricted areas or restricted gatherings. They must have prior consent to photograph or otherwise record any incident, damaged property, injured or dead person or other evidence of violence. However, if a journalist "happens to be on the scene" or "happens to arrive on the scene" he will not have contravened any provision of the regulations so long as he leaves the scene immediately to a place where the activity is "out of sight".

The Minister of Law and Order may also prohibit the importation of any publications.

## **Education**

Whereas last year's Regulations contained no specific mention of them, separate Regulations governing schools and education were issued with the renewal of the Emergency. Under these Regulations the Director-General of Education and Training may without notice or hearing ban any particular educational materials or prohibit access of any pupil to school grounds. The Director-General has complete control over the distribution of any other material and the display of any article, including stickers, flyers or "other writing" on school grounds.

Contravention of any such prohibitions or orders issued by the Director-General carries a possible penalty of a 4,000 Rand fine or two years imprisonment.

## **Limitation of liability**

The new Regulations, as did the old Regulations, exclude from civil and criminal liability all those enforcing these regulations who act in good faith. Good faith acts include advising, commanding or ordering a person and carrying out duties, exercising powers or performing functions according to the terms of the Regulations. The Regulations instruct the courts to presume that an act was carried out in good faith, thus placing the burden of proof on the victim of any illegal action by the security forces.

## **Conclusion**

These Regulations pose the most serious threat yet to basic human rights and the rule of law in South Africa. This threat comes in the form of unchecked discretion of government officials and their potential for abuse. In their entirety, they constitute a frontal attack on all unofficial opposition in South Africa.

# COMMENTARIES

## Commission on Human Rights

The 43rd session of the United Nations' Commission on Human Rights met in Geneva from 2 February to 13 March 1987. The 43 member states elected as chairman Mr. Leonid F. Evmenov of the Byelorussian S.S.R. The Commission heard debate on most of its 25 agenda items. It adopted 61 resolutions. Outstanding among them was one recognising the rights of conscientious objectors to military service, another condemning the adverse effects of the use of mercenaries on human rights and thirdly a resolution on the situation in Sri Lanka adopted by consensus. Speakers of world renown addressed the Commission on a variety of issues. This year the Commission also witnessed a more conciliatory position of the U.S.S.R. reflecting the new policy of "glasnost," whereas the U.S. delegation failed to achieve a number of its objectives.

### Resolutions

The Commission, as it did last year, adopted seven resolutions condemning South Africa and apartheid. While, both this year and last, the United States joined in the consensus on the resolution supporting the second decade to combat racism, it voted against the resolution condemning South Africa this year rather than abstaining as it did last year. It abstained once again on the resolution

supporting the Namibian people's right to self determination, and voted against the other four.

An important resolution on religious intolerance was adopted without a vote. The Soviet Union sponsored an amendment, calling for the possible establishment of a *sessional working group* to draft an international instrument on the topic of religious intolerance. Many governments and NGOs believe that this proposal is premature. Such a working group would be time consuming, and would take many years to reach a conclusion. Moreover there is a risk that any instrument produced by a working group is more likely to weaken, rather than strengthen, the excellent UN declaration which already exists. What is needed is international cooperation rather than legal condemnation in this sensitive field.

The resolution condemning the use of mercenaries proposes the appointment for one year of a special rapporteur to investigate this phenomenon.

The Commission marked a watershed when it adopted its resolution protecting the rights of conscientious objectors to military service. Owing to lack of time, the Commission heard no debate on this resolution. It is remarkable that the Soviet Union after its years of ardent opposition, decided to abstain. The resolution calls on states to recognise conscientious objection as an exercise of the right to freedom of thought and con-

science as protected by the Universal Declaration and the Covenant on Civil and Political Rights. The voting on this resolution was 26 for, 2 against and 14 abstentions.

The debate on economic, social and cultural rights was more fruitful than in other years due in part to the General Assembly's approval of the Yugoslav draft Declaration on the Right to Development (see Basic Texts, *infra*), the contemporary first meeting of the new ECOSOC Committee on Economic, Social and Cultural rights, and the ICJ's Limburg Principles. The Yugoslav Declaration is remarkable for the fact that agreement was reached in only two years while the Commission's working group, which has been meeting on this subject for many years had not reached agreement upon a single paragraph. The Limburg Principles on the implementation of the Covenant on Economic, Social and Cultural Rights which had been circulated to the third Committee of the General Assembly at the request of the UK Government, were circulated to the Commission at the request of the Netherlands. The Principles, which were published in the last issue of this Review received favourable comments from the representatives of the Netherlands, Yugoslavia, Cyprus, Ireland and Australia as being an authoritative statement on the Covenant and a bridge between theory and practice.

The resolution on the Right to Development was adopted without a vote, but the United States did not participate in the consensus. The U.S. delegate explained that his government could not support the normative nature ascribed to the right to development and was opposed to its recognition in international law. He questioned whether 1) states have any more than a moral obligation to

contribute to development, 2) it is sensible to link disarmament with development, and 3) it is necessary to elevate economic, social and cultural rights above or at the cost of civil and political rights. In its intervention the United States spokesman said it had provided \$300 billion in development aid and that Western countries contribute 98% of the UN budget.

A resolution on Chile was adopted by consensus after the withdrawal of a draft resolution sponsored by the United States. Continued violations of human rights by Chile were condemned and the government was called upon to conform to the Universal Declaration. The mandate of the special rapporteur was extended for another year.

As in other years, debate and consideration of resolutions under item 12, which deals with gross violations of human rights, generated considerable controversy. For example, two draft resolutions significant for their failure, were the U.S. condemnation of Cuba and Cuba's condemnation of the United States. Both of these were defeated by India's successful motions under Rule 65(2) that the Commission should not consider the draft resolutions. A Rule 65(2) motion was also made by Belgium to defeat the Soviet Union's draft resolution on Afghanistan. Another draft resolution on Afghanistan, submitted by the Byelorussian S.S.R., was withdrawn.

Pakistan's Rule 65(2) motion not to consider the resolution on the human rights situation in the Islamic Republic of Iran failed. The resolution was adopted by a vote of 18 to 5 with 16 abstentions.

Despite the rash of Rule 65(2) motions which had defeated other emotionally and politically charged draft resolutions, consensus was obtained on the

last resolution considered by the Commission, the situation in Sri Lanka. The draft resolution was originally proposed unofficially by a group of NGOs. The negotiations became intergovernmental when the Argentine delegation agreed to sponsor the resolution and was later joined by India. Much credit for the success of these negotiations was given to Ambassador Sene of Senegal who, as chairman of the non-aligned group, helped greatly to achieve the consensus. In its final form the resolution calls upon Sri Lanka to cooperate with the International Committee of the Red Cross in delivering humanitarian aid and to continue to supply information to the Commission. Consensus notwithstanding, Sri Lanka and India surprisingly engaged in a lengthy and sour exchange in their explanations of vote.

Although the Commission ended its consideration of resolutions on the note of consensus, one lingering concern voiced by several delegations was that, by the use of Rule 65(2), the Commission should address the merits of the issues placed before it and not shy away from its mandate. The question remains whether it is a stronger statement to vote not to consider a draft resolution than to vote against the resolution.

## Speakers and Speeches

Governments and NGOs alike used the forum of the Commission to bring together a wealth of speakers. Notable speakers on various issues concerning the Soviet Union included the Minister of Justice of the Soviet Union, Boris Kratsov, and Minister of Justice of the Russian S.S.R., Alexander Sukharev, both of whom spoke on democratisation in their country. Also speaking on behalf of

the Soviet Union was Rabbi Shayevitch of the Moscow Synagogue. He addressed the subject of social and cultural rights in the Soviet Union. Some days later, however, Natan Scharansky and Yuri Orlov both condemned the Soviet Union's human rights record. During their speeches, the Soviet delegation left their seats for the back of the hall.

On South Africa, Audrey Coleman of the Detainees Parents Support Committee spoke about children in detention and Archie Gumede spoke impressively about the efforts of the United Democratic Front to bring about change in that country.

Sam Nujoma, the SWAPO leader, spoke on the situation in Namibia.

Carmen Gloria Quintana, scarred and still bandaged from being set aflame by the Chilean police in the summer of 1986, made a moving and poignant appeal to the Commission. The Commission decided to leave Chile as a separate agenda item, despite contrary efforts of the United States.

Speaking on behalf of their governments were the Zaire Minister of Rights and Liberties of Peoples, Mayidika Nimy, and the French Minister for Human Rights, Dr. Claude Malhuret. The Minister of Foreign Affairs of Guatemala, Mario Amezquita, argued that there was an improved human rights situation in his country. Mr. Vernon Walters, U.S. Permanent Representative to the UN in New York, delivered his government's condemnation of Cuba's human rights record. Mr. Walters was accompanied by five Cuban "witnesses". The poet Arnaldo Valladares, an ex-prisoner in Cuban jails and now a U.S. citizen, told the Commission about prison conditions and the use of arbitrary authority in Cuba.

The ICJ made oral interventions on religious intolerance, the right to devel-

opment, the Sub-Commission and Chile. In another ICJ intervention, attention was drawn to the official campaign in Bulgaria to prevent the Turkish minority from speaking their language and expressing their culture. In the same intervention it was pointed out that the Kurds in Turkey suffer the same restrictions.

## Working Groups

The ICJ attended two pre-sessional working groups. The working group drafting a declaration on "human rights defenders", meeting for the second year, produced a draft preambular chapter to a declaration which is ultimately aimed at defining the rights of NGOs in their promotion and protection of human rights. The other working group, which is drafting a convention on the rights of children, neared completion of its draft convention after some seven years. Recognition has been given by the Chairman of the working group to the contribution made by NGOs.

The Ad Hoc Working Group of Experts' report on South Africa and Namibia prompted a response from the South African government which disputed the findings on children in detention as "unsubstantiated allegations". They have, however, been supported by the findings of the recent ICJ mission to South Africa.

The working group on enforced or involuntary disappearances concluded that the question demands the continued attention of the Commission, as the practice persists in as many as 39 countries. It noted with concern the increase in disappearances of defence lawyers and human rights advocates. While the practice is on the decline in some countries, in others, for example Peru, disap-

pearances continue "on an appreciable scale".

## Special Rapporteurs

Reports were submitted to the Commission by the three special rapporteurs on Summary or Arbitrary Executions, Torture and Religious Intolerance. In addition to Mr. Ribero's report on Religious Intolerance, the Commission had before it the report of Mrs. Odio Benito, Special Rapporteur to the Sub-Commission, which is broader in scope. A more balanced and objective picture emerges when the reports are read together.

Country reports were submitted on Chile, El Salvador, Afghanistan, Iran and Guatemala. Although the mandate for the expert to continue his investigation on Guatemala was renewed, efforts to remove Guatemala from consideration under item 12 next year were not fully realised. A compromise was reached whereby Guatemala would be considered under another agenda item next year "... it being understood that the report referenced to may be considered under item 12 should it be determined pertinent to do so".

## Meetings with NGOs

During the session the heads of delegations from the United States and the Soviet Union each invited NGOs to meet with them in order to outline their policies for the session and to answer questions. They each held second meetings. At its second meeting, the United States held an interfaith prayer breakfast. At the second meeting with the Soviet delegation, Minister of Justice of the Russian S.S.R., Mr. Sukharev, outlined some

changes taking place in the Soviet Union. In reply to a question whether NGO representatives would be allowed to attend one of the trials for anti-Soviet propaganda or defaming the Soviet state, he twice predicted that there would be no further trials for these offences.

## Conclusion

Among the many serious debates, there was a lighter moment on March 6, in recognition of the International Women's Day. While the representative of the Soviet delegation was congratulating the

women on this occasion, other members of their delegation gave a tulip to each woman in the hall.

Exercising a 'right of reply' a representative of the United Kingdom thanked the Soviet representative warmly on behalf of her fellow women. She added that women were practical people who attached more importance to deeds than to words. She expressed the hope that one day the Soviet leadership, as well as that of other member states, would find it possible to find a few women among the 53% of their population, worthy of representing them at the Commission.

## ILO Inquiry's Findings on Discrimination in Public Employment in Fed. Rep. of Germany

The exclusion of "radicals" or "extremists" from public employment in the Federal Republic of Germany has been the subject of considerable controversy and litigation in the past fifteen years. To some, these measures have constituted "Berufsverbote" (occupational bans) in violation of constitutional guarantees of freedom of expression and equality. For others, they found justification as defensive action taken by a "militant democracy" to protect democratic institutions and individual freedoms. The question has also occupied a variety of international bodies, including the UN Human Rights Committee, the organs of the European Convention on Human

Rights, and the Committee of Independent Experts established under the European Social Charter. In the ILO, where the matter had been under examination since the mid-seventies, there has recently been an exhaustive investigation by a Commission of Inquiry.

A representation alleging failure by the Federal Republic to respect the ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111) was submitted to the ILO Governing Body in June 1984 by the World Federation of Trade Unions. A tripartite committee of the Governing Body, in a report of February 1985, considered that the situation was not consistent with the require-

ments of the Convention. Following a statement by the representative of the Federal Republic, indicating his Government's disagreement with that conclusion, the Governing Body decided to refer the matter to a Commission of Inquiry for fuller examination. In November 1985, the Governing Body appointed the following to constitute the commission: Mr. Voitto Saario, former President of the Helsinki Court of Appeal (Chairman), Professor Dietrich Schindler, Professor of International Law and Constitutional and Administrative Law at the University of Zurich, and Professor Gonzalo Parra-Aranguren, Professor of Private International Law at the Central University of Venezuela.

The Commission received extensive written information from the Government of the Federal Republic and the WFTU, as well as from trade unions, non-governmental organisations, lawyers and individuals directly affected in the Federal Republic. It held hearings of witnesses in Geneva in April 1986, and visited the Federal Republic in August 1986. The Commission issued its report in February 1987.<sup>1</sup>

The inquiry centred on measures taken in application of provisions laying down the duty of faithfulness to the free democratic basic order for public servants. That duty applies, without distinction as to the functions performed, not only in the civil service responsible for the administration of the State, but also to employment in public services such as the Federal Railways, posts and telecommunications, public education, public health services, and local administra-

tion. It has resulted in refusal of admission to the public service or dismissals of persons engaged in or associated with political activities which, though lawful, are considered to have aims hostile to the free democratic basic order. Mainly affected have been members and supporters of the German Communist Party (DKP) and of other parties and organisations with Marxist-Leninist orientations. Exclusions have also applied to persons pursuing extreme right-wing causes, particularly within the National Democratic Party (NPD). Some cases have concerned persons active in socialist student associations and in pacifist causes.

The ILO Commission examined particularly whether the measures taken were justified under two provisions of the Discrimination (Employment and Occupation) Convention: Article 1(2) – according to which any distinction, exclusion or preference based on the inherent requirements of a particular job is not to be deemed discrimination – and Article 4, relating to measures affecting individuals justifiably suspected of, or engaged in, activities prejudicial to the security of the State.

The Commission found considerable differences of policy and practice among authorities in the Federal Republic in applying the provisions on the duty of faithfulness of public servants. One group of Länder (Bremen, Hamburg, Hessen, North Rhine-Westphalia, Saarland) – which account for 26 million of the country's total population of 61 million – start from a presumption of faithfulness to the basic order, do not regard activity within a lawful political party to be incompat-

1) Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) by the Federal Republic of Germany, ILO Official Bulletin, Vol. LXXX, 1987, Series B, Supplement I.

ible with the duty of faithfulness, and judge a person's suitability for a position in the public service in the light of his own specific actions. That approach was found largely to have eliminated conflict. Former cases of refusal of appointment had also been reconsidered. Another group of Länder (Baden-Württemberg, Bavaria, Lower Saxony, Rhineland-Palatinate, Schleswig-Holstein) apply more stringent tests, placing the burden upon applicants for public employment to establish that they would at all times act to uphold the free democratic basic order, and requiring both applicants and persons already in service to distance themselves from parties or organisations considered to have aims hostile to the basic order. As a result, political activities and affiliations which in one part of the country do not constitute a bar to public employment are a basis for exclusion from the public service in another part of the country. The more stringent approach has also been applied in certain federal services, particularly the postal and telecommunications service.

The Commission inquired systematically whether any difficulties in the functioning of public services had been observed as a result of the application of the less restrictive policy followed in parts of the country. No evidence of any adverse effects was forthcoming. The Commission concluded that the more stringent test adopted by other authorities went further than was necessary for the functioning of the public service.

Referring to the substantial number of individual cases brought to its attention, the Commission found that, except in some instances of misconduct mentioned by the Government or its witnesses, the activities on the basis of which it had been sought to remove persons from the public service appeared

not to have had any adverse effect on the performance of their duties or on the functioning of the services in question, and it had not been established that continuing service by those concerned would have such adverse effects.

Dealing with the Government's argument that the measures were nevertheless necessary to ensure the functioning of the public service in times of crisis or conflict, the Commission observed that that consideration would justify regarding political reliability as an inherent job requirement in certain positions, according to the nature of the functions involved, but such a condition should not be extended to employment in the public service generally. The undifferentiated application of the duty of faithfulness to all officials, without regard to the effect which their political attitude or activities might have on the exercise of the functions assigned to them, did not appear to the Commission to correspond to the inherent requirements of all kinds of work in public administration at different levels and the wide range of other public services.

From an examination of the cases brought to its attention concerning teachers, the main occupational group affected by measures based on the duty of faithfulness, the Commission concluded that in most cases the justification for their exclusion from the public service had not been established. It observed that, while teachers had special responsibilities, both in and outside the service, there could be no justification to assume that, because a teacher was active in a particular party or organisation, he would behave in a manner incompatible with his obligations. It noted that one was dealing with lawful organisations entitled to participate in the political and constitutional processes of the country.

In the light of the foregoing considerations, the Commission concluded that the measures taken in application of the duty of faithfulness to the free democratic basic order had in various respects not remained within the limits of the restrictions authorised by Article 1(2) of the Discrimination (Employment and Occupation) Convention on the basis of the inherent requirements of particular jobs.

The Commission also considered that the measures taken, as exemplified by the cases brought to its attention, did not fall within the exception provided for in Article 4 of the Convention. It noted that in none of these cases had any allegation been made that the individuals concerned had engaged in activities prejudicial to the security of the State. Nor, in those cases, had it been sought to justify the decisions on the ground of the security sensitive nature of available employment. The Commission observed that it was particularly evident that considerations of this kind had played no part in the many cases concerning teachers.

By its terms of reference, the Commission was required to formulate recommendations on the steps to be taken to correct the shortcomings in the observance of the Convention found by it. The Commission emphasised that, in considering those recommendations, it had fully recognised the value and importance of the provisions in the Basic Law of the Federal Republic which guaranteed individual rights and freedoms and laid the foundations for a democratic State based on the rule of law. Nor did it wish to call into question the authorities' desire to protect and maintain these essential features of the country's constitutional order. What was at stake was how to circumscribe the measures

taken so as to ensure a proper balance between the rights and freedoms of the individual and the interests of the community at large.

The Commission recommended that only such restrictions on employment in the public service be maintained as corresponded to the inherent requirements of particular jobs, within the meaning of Article 1(2) of the ILO Convention, or could be justified under the terms of Article 4 of the Convention. The essential issue should be fitness for employment. In judging that question, the principle of proportionality should be observed. That principle implied that public servants should be subject to no greater limitations in the enjoyment of the rights and freedoms accorded to citizens in general than could be shown to be necessary to ensure the functioning of the institutions of the State and of public services. It also followed that whether an applicant for a position in the public service or a public servant was fit for admission to employment or for continued employment must, in each instance, be judged by reference to the functions of the specific post concerned and the implications of the actual conduct of the individual for his ability to assume and exercise those functions.

The Commission set out a series of considerations to be borne in mind in the re-examination of the situation by the authorities. It would be for the Federal Government and the authorities of the Länder to consider the exact nature of the measures to ensure the full observance of the Convention. Unless the requisite changes could be brought about by other means, legislative action would have to be taken. The Commission pointed out that, in accordance with the Convention, trade unions representing persons employed in the public service should be

consulted on the measures to be taken. It also called upon the authorities to examine the implications of its recommendations for the disposal of currently pending individual cases.

One member of the Commission – Professor Parra-Aranguren – dissented from its findings, conclusions and recommendations. He considered that every treaty had to respect peremptory rules of general international law, in this case those declaring fundamental human rights, and that ILO Convention No. 111 could not be interpreted to protect individuals advocating, even by peaceful means, ideas that were against those fundamental rights. In the opinion of the other members, one could not read into the Convention exceptions other than those provided for in the instrument itself, which sufficiently took into account the security needs of States. They also considered that there was no justification for placing wholly outside the protection of the Convention persons who had behaved lawfully and were in full enjoyment of their civic rights.

In a letter to the Director-General of the ILO dated 7 May 1987, the Government of the Federal Republic, while proclaiming its continued support for ILO supervisory procedures, indicated that it maintained its earlier position that existing law and practice were in conformity with Convention No. 111 and that it did not consider the Commission's recommendations to be justified. In view of

that position, the Government did not intend to refer the matter to the International Court of Justice (a possibility provided for in the ILO Constitution).

The Government's negative reaction does not affect the validity of the Commission's conclusions and recommendations. Further developments will be examined by the ILO's regular supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations, and could also be brought before the ILO Governing Body. Under the ILO Constitution, in the event of failure to carry out the recommendations of a Commission of Inquiry, the Governing Body may recommend to the International Labour Conference such action as it may deem wise and expedient to secure compliance with them.

It is to be regretted that a country which is so committed to the rule of law, and which by its Constitution is a notable *rechtstaat*, should feel that this important issue of international law should be decided unilaterally by the government involved rather than by a judicial instance. Article 37 of the ILO Constitution states that any question or dispute relating to the interpretation of an ILO convention 'Shall be referred for decision to the International Court of Justice.' It remains to be seen whether, in due course, the ILO will itself refer the issue to the Court.

# ARTICLE

## Preliminary Report on South Africa

by  
Geoffrey Bindman\*

### Introduction

The International Commission of Jurists decided to send a mission to South Africa in the middle of 1986. They informed the Government of their intention through its ambassador in Geneva. He replied that a mission would be inappropriate at that time because of the State of Emergency which had just been proclaimed by the State President on June 12, 1986. The mission was accordingly postponed. In December 1986 – the State of Emergency still being in force with no sign of being lifted – the Commission decided to send a mission early in the new year. The mission left for South Africa on February 6, 1987 without further notice to the government.

The decision to send a mission reflected increasing international concern at reports of human rights violations and a breakdown of the Rule of Law. The suppression of dissent by harsh measures has been a feature of government policy in South Africa since the nationalists first took power in 1948, and severe condemnation of it has been regularly expressed by the International Com-

mission of Jurists over that period. Recently, however, alongside and perhaps in response to increasingly united and determined opposition to the apartheid system both inside and outside South Africa, it appeared that the Government was mounting a more co-ordinated and ruthless assault on its perceived enemies than ever before, and was doing so by methods which flouted international human rights standards even more flagrantly.

The mission consisted of four lawyers from both practical and academic backgrounds: Geoffrey Bindman, a solicitor practising in London; Jean-Marie Cretaz, an advocate in Geneva; Henry Downing, a Dublin barrister, and Guenter Witzsch, professor of public law in the University College of Munster, West Germany.

The terms of reference of the mission were general: to examine the degree of compliance in South Africa with the principles of international human rights law, as embodied in the Universal Declaration of Human Rights and other relevant instruments. The mission was asked to pay particular attention to a number of spe-

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cific topics, including human rights in the homelands, trade unions, the repeal of the pass laws and other discriminatory legislation, the security situation, legal services in rural areas and the independence of judges and lawyers. In addition they decided to investigate the treatment of children under the legal system, the state of education and the suppression of free speech and political activity.

A programme of meetings and visits was arranged. The team began with a series of meetings in Johannesburg and then divided into two pairs. One travelled to Bophuthatswana and then to Port Elizabeth and Ciskei. The other to Durban and Cape Town where they were later joined by the other pair. The whole team then went to Bloemfontein and spent a final few days in Pretoria and Johannesburg. They met a wide range of practising and academic lawyers, judges, community workers, political and trade union leaders, human rights activists and ordinary residents of townships. At the end of their stay they met Government officials and the deputy minister of Law and Order.

The team had secretarial assistance throughout which enabled them to record and transcribe virtually all their interviews. They obtained copies of many affidavits, court documents, reports and publications relevant to their enquiry. They wish to express their deep gratitude to all those who devoted so much time and effort to helping the mission in its task. A detailed report of the findings of the mission will be published as soon as possible. The present article may be regarded as an interim report.

The South African government is unique in its continuing adherence to a policy of legally enforced racial segregation. This policy has been employed to

maintain the concentration of political power in the hands of a small minority of the population, largely consisting of white persons of Afrikaner descent. The result of recent moral and economic pressure from within South Africa and from abroad has been to force a degree of relaxation in the formal structure of apartheid but the will of the ruling minority to retain power seems undiminished. This has posed a dilemma for the Government: a strategy of political suppression, in which the rule of law and respect for human rights have a low priority, seems necessary to achieve the suppression of the huge disenfranchised majority; yet the acknowledgement of such a strategy undermines the credibility of the Government and weakens its pretensions to legitimacy within the Western liberal tradition. It has a more practical disadvantage as well: it threatens the commercial and cultural relationships with other countries, especially the Western democracies, on which the cherished lifestyle of the white minority depends.

We have concluded that the Government has resolved its dilemma in favour of an uncompromising assault on what it perceives to be the organised extra-parliamentary opposition. Plainly it is attempting as best it can to disguise and soften its strategy within a framework of legalism, aided by the imposition of restrictions on the publication of information about what it labels as 'unrest'. The latter is claimed to be the work of subversive forces operating often through ostensibly peaceful and lawful organisations. The paramount state interest in defeating the enemy is held to justify secrecy and the wholesale abrogation of human rights. We, however, remain unconvinced that the scale of the danger matches the Government's claims. Nor

could the measures taken be justified even if those claims were valid.

## **1. Legitimacy of the Government**

The whites, who alone vote for membership of the House of Assembly, constitute some 18% of the population. The House of Assembly has 178 members, the House of Representatives ('coloured') has 85 members, and the House of Delegates ('Indian') has 45. The last two were created under the 1983 constitution which also established the President's Council. In the event of disagreement between the houses of Parliament about any legislation, the President's Council, which is heavily weighted in favour of the ruling National Party, decides which point of view should prevail. When, in 1986, the Government wished to strengthen its security legislation, the Representatives and the Delegates rejected the Bills passed by the Assembly. The Bills were thereupon enacted by decree of the President's Council.

Apart from certain domestic and uncontroversial matters which are left to the 'coloured' and Indian houses, the white House of Assembly is the only effective legislative body. While it is not uncommon for governments to be formed in democratic countries by parties for whom less than half the electorate has voted, the unique feature of South Africa is the exclusion from any participation in government of the great majority of its citizens. This is so even if one were to regard as valid the 'homelands' policy which led the government unilaterally to replace for some 8,000,000 people their South African citizenship with a dubious homeland citizenship. The denial of the franchise has led some black defen-

dants in treason and other trials to reject the jurisdiction of the courts and we have considerable sympathy with their attitude. However, while we believe the legitimacy of the South African government to be seriously in question, it is plainly in de facto control of the country. In whatever form, the government cannot escape responsibility for meeting the requirements of international law in relation to human rights.

## **2. The legal structures of apartheid**

We acknowledge that there has been some relaxation in the legal regulation of apartheid in recent years. This is especially so for what has been termed "petit apartheid". The Reservation of Separate Amenities Act of 1953 legalised the provision of separate buildings, services, and conveniences for different racial groups. It did not compel segregation but permitted it to be enforced by local or state ordinance. Since 1979 there has been a policy of granting blanket exemptions to legalise multi-racial use of facilities. The Government has in recent years discouraged what Prime Minister Vorster described as 'unnecessary and purely irritating race discriminatory measures not essential to separate development'. But during our visit four young girls were prosecuted in Durban accused of unlawfully bathing from a beach reserved for whites and – a well-publicised case – a black schoolboy was refused participation in a national sporting event by the governors of the white host school.

The Immorality Amendment Act of 1957 and the Mixed Marriages Act of 1949 have been repealed but the Group Areas Act still prevents couples living

together across the colour line without Government permission. The reluctance of the Government to waive the requirements of that Act is illustrated by its refusal even to allow its own Ambassador to the EEC, Professor Ranchod, to reside in a neighbourhood designated for whites. The abolition of the pass laws which affected black people only has been hailed by the Government as signalling the demise of apartheid but it is a limited advance. Influx control is just as effectively imposed by the enforcement of other laws. The Illegal Squatting Act criminalises residence in an unauthorised area and empowers the authorities to remove a person to any other land which the Minister may designate. The enforced deprivation of South African citizenship for those consigned to the 'independent' homelands makes their presence outside those homelands illegal unless they can establish permanent residence to the satisfaction of a hostile bureaucracy. Those who still have South African citizenship cannot move without home and job to go to - a virtual impossibility in present circumstances.

The Restoration of Citizenship Act has also been hailed as a progressive change and undoubtedly it marks a turning point from the policy which sought to exclude every black person from South African citizenship. The Government has evidently recognised that this policy cannot be fully implemented - the people in the non-independent homelands are refusing independence because they can see that conditions in those homelands that have opted for independence are even worse than in South Africa itself. But citizens of the independent homelands who now see the possibility of reclaiming South African citizenship will often be disappointed. Only those already permanently resident with

home and job outside the homeland will qualify, and they will also be at the mercy of bureaucratic discretion which will rarely be sympathetically exercised.

Experienced observers to whom we spoke saw the abolition of the pass laws as part of a new Government strategy to by-pass the courts: instead of prosecuting offenders publicly in the courts, an administrative discretion is substituted which the judges cannot easily supervise, for example to decide whether a person without a new identity document shall be returned to his 'homeland'. Another illustration of that strategy is the substitution of 'voluntary' for forced removals. In reality, the scale of forced removals remains considerable. Some 64,000 were moved from their homes in 1986, although the Government had claimed in 1985 that there would be no more forced removals. The Group Areas Act ensures that black people will not be allowed to remain in areas coveted by white people, or where white people object to their proximity. Removals have recently been threatened at Brits in Transvaal and at Lawaai-kamp in the Eastern Cape. Both were deferred in the face of public protest but there is no reason to suppose that they will not be carried out when outside interest flags. In the Brits case the removal is alleged to be justified by insanitary living conditions, but these were plainly the fault of Government neglect and the real reason is the desire of the neighbouring white suburb to expand its boundaries. At Lawaai-kamp it is again the initiative of the neighbouring white town of George which owns the site and relies on its proprietary rights to seek the eviction of a whole township.

The structure of apartheid remains untouched by the cosmetic changes which the Government has so far made.

No changes are proposed in the segregated public school system. Even the Group Areas Act could be repealed without threatening white domination. Perhaps even the Population Registration Act, on which the segregated franchise depends, could be sacrificed in the last resort, but so long as it remains, the Government's claim that it is dismantling apartheid will be a hollow one.

### 3. Education

Another major area of policy in which there is no sign of the abandonment of apartheid is education. Segregation in schools is a cornerstone of the doctrine of white domination and the policy of the National Party has been to ensure a separate and inferior education system for black people. Verwoerd was responsible for introducing 'Bantu education' in 1953. It was designed to equip black children for the menial role which the apartheid system imposed on them.

The schools provided for black children have meagre resources compared with the schools for whites, and the curriculum has excluded subjects necessary to prepare them for higher education and admission to skilled and professional occupations. There is gross discrimination in the funds provided by the State for black and white children. Per capita expenditure is six times greater for white children than for black. Those black children who have gained admission to universities either belong to the very small minority who have been accepted in church or private schools or they have succeeded by exceptional ability and hard work to overcome the huge disadvantages of the public education system. Black students have in recent years protested vigorously against the

discrimination inflicted on them and have been in the forefront of anti-apartheid activity. Boycotts of schools have taken place across the whole country. In consequence children have been the target of violent repression by the State. Police and soldiers have carried out arrests on school premises and have, by their constant presence, provoked resistance which is then held to justify arrests, detentions and violent assaults including many killings of children by the security forces. We consider the powers and conduct of the security forces in more detail later.

In an attempt to persuade the Government to change their education policy and to involve the parents and the community in decision-making, a National Education Crisis Committee (NECC) was established in early 1986. Its consultative conference in Durban in April was attacked by busloads of Inkatha vigilantes. The conference nevertheless concluded its business and decided that the national schools boycott should be ended and the children should return to school notwithstanding the failure of the Government to meet its demands for reforms in the system. On their return to school it was intended that the students should implement 'people's education' rejecting the inferior structure provided by the authorities.

The Soweto uprising of 1976 was a protest against education policies. It was the planned commemoration of the anniversary of Soweto on June 16, 1986 which led the Government to declare a State of Emergency on June 12. The NECC has been severely hampered since then by the detention of many of its leaders. Those who were not arrested have had to go into hiding to avoid arrest. Many schoolchildren have been detained and are still in detention. We were told

that children who have been released from detention have great difficulty in being re-admitted to school. They are excluded on the instructions of the security police.

We paid special attention to the problems of black people in gaining access to the legal profession. The number of black lawyers is – obviously – far less than the proportion of black people in the population. Those who come from government schools have the extremely difficult task of passing examinations in latin, a subject which is not normally taught in black schools. We were told that at the University of Cape Town, for example, black students may have to extend their studies by up to two years to achieve the minimum latin qualification, which the Government has recently made more stringent.

Those black students who succeed in passing the professional examinations still have to surmount the hurdle of gaining acceptance by a firm of attorneys as an articled clerck or as a pupil in advocate's chambers. We heard strong criticisms of the failure of the professional organisations to make adequate provision for the admission of black lawyers and the Chairman of the Bar acknowledged that his branch of the legal profession had failed to come to grips with the problem. For example, we were told that there were only two black advocates in regular practice at the Johannesburg Bar. We were assured that the Bar was now fully aware of its responsibilities and was urgently seeking ways of fulfilling them. In particular the financial difficulties facing many advocates starting practice were more likely to affect young black advocates because they were less likely to have sources of funding. For this reason more scholarships were being given.

#### 4. Trade Unions

Trade union law is one area in which the industrial bargaining power of black workers, coupled with the desire of the Government to make South Africa attractive to overseas investment, has led it paradoxically to increase the rights of black people. In 1981, discrimination in industrial relations law was removed in the amended Labour Relations Act of that year. Shortly afterwards the mainly black but in principle non-racial Congress of South African Trade Unions was formed.

COSATU has been seen by the Government as a political danger because of its uncompromising opposition to apartheid and its collaboration with the opposition United Democratic Front. The UDF is an umbrella organisation covering some 640 religious, sports, labour, business, community and other groups. COSATU's members have been subjected to gross harassment during the State of Emergency including the arrest and detention without charge of many of its leaders. We were informed that several unions had been threatened within a short period of time with eviction from their offices. It seemed that this must have been a co-ordinated tactic and it was strongly believed to have been orchestrated by the security police.

When industrial action takes place, albeit resulting from purely industrial grievances, it has become common practice for employers to call the police who then arrest the strikers and thereby put them under pressure to end their action. The limitations on the legal right to strike in the Labour Relations Act make it easy enough to justify arrests even if the police do not choose to rely on their powers under the Emergency regulations. In some cases the police have

urged strikers to return to work and have even sought to address strike meetings. Such partiality by the agents of Government is plainly inconsistent with the policy of free collective bargaining embodied in the legislation.

## 5. The Security Laws

The official policy of separate development, begun after the election of the Verwoerd government in 1948, was accompanied by the introduction and refinement of a body of legislation designed to suppress extra-parliamentary opposition – supposed by the Government to be the work of communists. Hence the Suppression of Communism Act of 1950, in which communism was defined in such wide terms as to make it illegal even to advocate any form of socialism. When the government wished after Sharpeville in 1960 to outlaw the African National Congress, which had become a widely popular and dangerous thorn in the side of the Government, even their notion of communism could not be stretched to cover all opposition to apartheid. The Unlawful Organisations Act of 1960 therefore authorised the banning of any organisation which in the opinion of the Minister threatened public safety or the maintenance of public order. This Act was used to ban the ANC and the Pan-African Congress, and a number of other organisations subsequently. The Appellate Division held (in South African Defence and Aid Fund v. Minister of Justice, 1967) that a banned organisation had not even the right to be heard in order to challenge the making of such an order.

Individuals regarded by the authorities as subversive could also be the subject of banning and restriction orders

which could impose huge and infinitely variable limitations on their freedom, including: prohibiting attendance at gatherings; confinement to a particular place or area or exclusion from a place or area; house arrest; prohibiting communication with any person (even a spouse living in the same home); and regular reporting to a police station. Any 'listed' person is excluded from practising as a lawyer. The Suppression of Communism Act gave the State President power to ban any publication if satisfied that it furthered the objects of communism.

The Publications Act of 1974 has become the main instrument of censorship now in South Africa. A committee appointed by the Minister of Home Affairs may declare any publication 'undesirable'. The criteria are very wide, including any material harmful to the relations between any sections of the inhabitants of the country or prejudicial to the safety of the state, the general welfare or peace and good order. There is a right of appeal to a Publications Appeal Board whose members are also appointed by the Government.

Except when questions of statutory interpretation arose, the jurisdiction of the courts was virtually excluded under the security and censorship legislation just described. Until after 1980, the willingness of the courts to interfere even when they might have been able to do so was rare. For example, statutory provisions which left important decisions affecting personal liberty to the opinion or discretion of a Minister were treated as if they excluded the jurisdiction of the courts totally. A bolder attitude has begun to emerge more recently.

Since 1963, legislation has permitted detention without charge or trial on the authority of the Government or even a single commissioned police officer. The

law permitting detention is now consolidated in the Internal Security Act, 1982. The Act defines the powers of Government in relation to the banning of organisations, gatherings and individuals, search and seizure and detention powers.

It also creates or confirms a series of security offences of which the principal ones are terrorism, subversion, sabotage and advancing the objects of communism. Terrorism, like the common law offence of treason, carries the death penalty. Its essence is the commission of violence with the intention of overthrowing the State. It is so widely defined, however, that it includes the mere encouragement of the threat of violence 'to achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the Republic' or 'to induce the Government ... to do or to abstain from doing any act or to adopt or to abandon any particular standpoint.'

There are many other criminal offences, both at common law and created by statute, which may be used in security or political situations. Murder and treason, both of which carry the death penalty, are the most obvious, but charges of sedition and intimidation are not unknown. Most frequently used is the common law offence of public violence with which very large numbers of people, especially young people and children, have been charged in connection with 'unrest' in black townships.

Detention under the Internal Security Act without charge is permitted both for the purpose of preventing wrongdoing and in preparation for trial on a criminal charge. Section 28 permits preventive detention of those who, in the opinion of the Minister, are likely to commit security offences or otherwise to engage in activities which endanger the security of

the state. The courts have up to the present held that the merits of the Minister's decision are not reviewable. In 1985, however, the Supreme Court in *Natal* held that the Minister must give reasons for his decision and these reasons must be sufficiently specific to give the detainee a fair opportunity to make representations against his detention. However, the Minister is under no obligation to pay any heed to those representations, save that if he rejects them he must submit his decision to a review board. Unfortunately the Government appointed review board functions in secret, no legal representation is allowed before it and its deliberations and recommendations are not disclosed. It falls far short of an effective safeguard.

Section 50 of the Act gives another power of preventive detention which enables any police officer to detain a person for a period of 48 hours, which can be extended by a magistrate for up to 14 days. An amendment in June 1986 has added s.50A, which allows detention for 180 days, renewable, without even the safeguards of s.28. The object of this amendment, which was eventually forced through by the President's Council after the Houses of Delegates and Representatives rejected it, appears to be intended to supply the extended powers of detention on a permanent basis which would otherwise only be available in a State of Emergency. Had the measure not been delayed by the other Houses the Government might not have felt the need to declare a State of Emergency on June 12, 1986.

Section 29 permits detention for the purpose of interrogation of any person whom any senior police officer has reason to believe has committed or intends to commit any security offence; such persons may be held incommunicado for

what is in effect an indefinite period; the Act allows detention until the Commissioner of Police is satisfied that the detainee has satisfactorily replied to all questions or that no useful purpose will be served by any further detention. The court has asserted jurisdiction to adjudicate to a certain degree on the merits of a detention under s.29 because the statute requires that the officer making the decision to detain has 'reason to believe' the facts which are the basis of his right to do so. Judge Leon in Natal, following the celebrated dissenting judgement of Lord Atkin in the second world war British House of Lords case of Liversidge v. Anderson, held that this was an objective requirement which the court was entitled to review by reference to the evidence. The Appellate Division upheld the decision (Hurley v. Minister of Law and Order) by which the release of the detainees – a church worker whom we met in Durban – was ordered. However, it is important to note that the court's jurisdiction only goes to the validity of the initial decision to detain. It does not allow the court to question the continuing justification for detention. Evidence of illegal conduct, such as torture, which might be challenged before the court can rarely be obtained because s.29 detainees may be held incommunicado, without access by legal advisers or even members of their families. Nor hitherto have the courts believed that they have jurisdiction to order a s.29 detainee to be brought to court to give evidence on his own behalf or otherwise. (Schermerbrucker v. Klindt, 1965). There are, however, indications that some judges would be prepared to over-rule that decision.

Provision is made for regular visits by a magistrate and by the district surgeon (both government employees) and for a review after six months detention by a

review board appointed by the State President. These safeguards have proved inadequate. Detainees are at the mercy of security policemen whose function is to extract information or confessions. Since 1963 at least 60 detainees have died in custody in suspicious circumstances. The cases of Steve Biko and Neil Aggett are among the few which have become widely known. Nor have the judges recognised sufficiently the unreliability of confessions obtained under the inevitable stress of this situation. The routine rejection of all such confessions might bring an end to this form of detention.

A further form of pre-trial detention arises from the power granted by s.30 of the Act to the Attorney-General (a Government prosecutor, not an elected politician as in Britain) to veto the grant of bail to those charged with security offences, over-ruling the decision of the judge. In the Pietermaritzburg treason trial of 16 UDF leaders the court found a procedural defect in the Attorney-General's attempted exercise of his veto which resulted in bail being in fact granted (though subject to stringent conditions) (S.v. Ramgobin). Apart from such fortuitous loopholes, this power, which usurps an essentially judicial function, is absolute and unchallengeable.

The most remarkable and Draconian power of pre-trial detention is the power to detain witnesses. Section 31 permits the detention of 'any person likely to give material evidence for the State in any criminal proceedings' for a security offence. Such persons may be detained for up to six months before the relevant trial takes place and thereafter for as long as the trial takes. No information is made public about the identity of such detainees.

In the Delmas treason trial several de-

tained witnesses have already given evidence who have almost certainly been held since well before the beginning of the trial in January 1986. One of our members was told by the Attorney-General of the Transvaal that it is the practice to keep potential witnesses incommunicado to avoid their being influenced by family or lawyers. The evidence of such witnesses is inherently unreliable, yet the judges usually accept it. Its unreliability is demonstrated by the fact that, occasionally, courageous witnesses who have been detained in these circumstances (including one at the Delmas trial) have subsequently denounced the police when brought to court and have refused to give evidence supporting the prosecution case.

## 6. The State of Emergency

It may be wondered why the Government should wish to seek even greater powers than those described above which are part of the permanent law of the land. As the leading South African authority on security laws (and one of the Government's sternest critics), Professor Anthony Mathews of the University of Natal, has said: "'Ordinary' and permanent legislation has already brought about a ninety-per-cent destruction of the rule of law and put the country into a permanent state of emergency. When, on top of this, an emergency is declared under the Public Safety Act of 1953, the tattered remnants of the rule of law are stripped away for the duration of the crisis."

The 1953 Act empowers the State President to declare by proclamation that a state of emergency exists within the Republic or any area thereof. A proclamation is not subject to legal chal-

lenge. Having proclaimed an emergency he has power to proclaim such regulations as appear to him to be necessary or expedient for maintaining public safety or public order and terminating the emergency or dealing with circumstances pertaining to the emergency. The Act empowers him to make different regulations for different areas and classes of person, and, importantly, to delegate authority to make orders, rules and by-laws. Before 1985 these powers had been used only once: after Sharpeville in 1960. On July 21, 1985 they were used to declare a state of emergency in certain areas. It was lifted on March 7, 1986 but on June 12, 1986 the present emergency, covering the whole country and still in force, was proclaimed.

The regulations issued on June 12 were wider in scope than those granted under the earlier emergency. The principal regulations, issued by the State President, include a power of arrest and detention by the most junior soldier or policeman for up to 14 days, infinitely extendable by secret, unchallengeable decision of the Minister. Section 3(1) of the regulations says 'a member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or the person himself, or for the termination of the state of emergency, and may, under a written order signed by any member of a Force, detain, or cause to be detained, any such person in custody in a prison.' After 14 days the person must be released unless the period is extended by the Minister.

The regulations prohibit the making, possession or dissemination of subversive statements - defining 'subversive' so widely as to cover virtually any criti-

cism of the status quo; they gave the State President power to outlaw and seize any publication deemed by him to threaten the interests of the state; they prohibited the publication of any information about police activities in relation to any 'unrest' incident; they granted an indemnity to members of the security forces against prosecution or civil liability arising out of their unlawful acts done in good faith; and they purported to oust the jurisdiction of the courts to adjudicate on the lawfulness of the regulations or anything done in reliance on them. A bewildering profusion of local regulations were issued by divisional police commissioners under delegated authority including detailed restrictions on funerals, curfews, banning of the possession of T-shirts and emblems of 47 organisations in the Eastern Cape, prohibition of school pupils being outside their classrooms in school hours, prohibition of dissemination of statements made by 119 named organisations in the Western Cape, prohibition of gatherings convened by named organisations in the Witwatersrand, prohibition of loitering in the whole of KwaNdebele. Breach of any regulation is a criminal offence but few charges have been laid for such breaches because detention without charge is simpler – and it avoids the need to bring the accused before a court.

The other major advantage to the Government is the ability to legislate by regulation without going through parliamentary processes. The myriad detailed regulations which have been issued would bring Parliament to a halt if they had to be the subject of legislation. Of course, another question is why the South African government, already having given virtually unlimited power to its forces, should feel the obligation to provide legal authority for every action. It is

paradoxical that a government which violates on a massive scale the rule of law as understood by all civilised nations should attach importance to narrow legalism. The Government's attempt to exclude the courts from supervision of the Emergency regulations has not been wholly successful. The courts have refused to acknowledge the ouster clauses, taking the view that their power to determine the validity of delegated legislation is inherent in their constitutional function. Furthermore, relying on doctrine asserted by the English courts, they have declared certain parts of the Emergency regulations ultra vires or void for uncertainty. In other cases they have ordered the release of emergency detainees on grounds analogous to those discussed in relation to detentions under the Internal Security Act. The fact remains, however, that very few indeed of the detentions under the emergency have been successfully challenged. The number of detainees since June 12, 1986 is estimated at about 25,000 – no exact figure is known. Of these some 40% are believed to be children under 18.

The behaviour of the security forces in black townships has been removed from public scrutiny. The burden of proving bad faith to defeat the immunity rests with the complainant. It is a virtually insurmountable burden. We were informed of only one case in which a police officer has been prosecuted for violence during the emergency. That case is still continuing.

The security forces have in effect been given a free hand to act without legal restraint. The width and uncertainty of the legislation, the self-assurance of the police and the evident determination of the Government to suppress dissent by any means necessary have created an atmosphere of terror in the townships. In

relation to the media they have caused all but the bravest publishers and journalists to become self-censors, fearful of offending an all-powerful executive.

## **7. The suppression of opposition to apartheid**

The State of Emergency has been used as a means of preventing ordinary peaceful political activity. The formation of the UDF to oppose the new constitution in 1983 was accompanied and followed by many public meetings, the essence of democratic organisation. The Government has chosen not to ban the UDF – it would be difficult to do this without banning all its 600 or so affiliated organisations, many of which are manifestly innocuous church groups – but it has evidently determined to do everything short of banning to impede its activities. The Internal Security Act of 1982 empowers any magistrate to ban any meeting within his area or to impose conditions on the holding of meetings. The Government may ban any meetings anywhere. Since the State of Emergency was declared meetings have been routinely prevented for any groups having a remotely political purpose. The UDF in particular has been unable to hold public meetings. The Emergency regulations specifically ban advocacy of 'alternative structures' illustrating the Government's concern to prevent the growth of alternative systems. The people have generally refused to accept the legitimacy of the officials and councillors appointed or sponsored by the Government.

The Government has also widely used the powers of arrest and detention which it has given itself under the Internal Security Act and the Emergency

regulations to put out of circulation its political opponents. UDF leaders in all parts of the country have been detained for flimsy reasons. Although the courts have held that reasons for detention can be demanded, it is very easy for the police to give specious reasons which cannot easily be challenged. For example, it is regularly claimed that the detainee is suspected of membership of the ANC, a banned organisation. The courts do not investigate such claims and hitherto have refused to order the detainee to be brought to court to give evidence which might refute them. It has already been pointed out that leaders of COSATU and the NECC have been put out of circulation in the same manner.

A further example of harassment of the UDF is the treason trial now taking place at Delmas, near Pretoria. We attended court and were able to talk to several of the defendants during the lunch break. The 19 defendants include leaders of the UDF, among them its National Secretary. Thirteen of them have been detained for more than 18 months, bail having been refused on three occasions. One of our members attended one of the bail hearings. Bail was refused on the ground of 'national security' but there was no evidence of any threat to national security – the court accepted the Government's argument that it could not disclose the evidence because to do so would, in turn, risk national security.

The same member of our mission was also present at the earlier treason trial at Pietermaritzburg. Sixteen UDF leaders were brought to trial, ostensibly for treason and other security offences but the real objective appears to have been to incapacitate the UDF by putting its leaders out of circulation. The Government withdrew the case after it had be-

come clear that Mr. Justice Milne would not accept its claim that the UDF, contrary to its pretensions, espoused violence and was so closely linked with the banned ANC as to be identified with all its policies. In Delmas, an executive-minded judge may be more likely to accept this claim than Mr. Justice Milne was prepared to.

## 8. Children

The number of persons detained under the emergency regulations since June 12, 1986 is believed to be in the region of 25,000. Of these it has been estimated that about 40% were children under the age of 18. The Detainees' Parents Support Committee (DPSC) has recently estimated that 10,000 children under 18 have been detained of whom 8,500 are under 17. Any figures which are obtainable are likely to be inaccurate. The Government is obliged to disclose the number of current detainees at the beginning of each session of Parliament. Up to February 12, 1987 the Government has released the names of 13,194 persons detained since the start of the present emergency. (Weekly Mail, 20-26 March, 1987). But these figures do not include those who, at the time when each set of figures was released, had been detained for less than 30 days. Furthermore, they do not include those who were detained under the Internal Security Act or who were held in custody awaiting trial or who were serving prison sentences following conviction. Furthermore, the Government's figures have been shown to be incomplete. We have seen one illustration: a letter from the Minister of Law and Order denies the detention of a named individual, yet a letter from the local police of the previ-

ous day acknowledges that he was detained by them. There is also confusion and uncertainty over the identity of detainees listed by the Government. The names are often mis-spelt and no information other than the name is disclosed. We were told that many families have been unable to trace children who may be detained but who may have been killed. The DPSC's Johannesburg office has recently published statistics relating to the detention of children in the district which they cover up to February 5, 1987. They record 885 children under 18 who have been detained since the start of the emergency. In Southern Transvaal 537 children aged 17 and under remain in detention. Of those detained in this area only three are known to have been charged with any offence. Among children who have been detained there are several aged 10, 11 and 12. At least four of the latter, who are identified in the DPSC report, have remained in detention since the start of the emergency and are still detained. Many have complained of assaults, some serious, which have been verified by medical examination following release.

The numbers of children who have been held in police cells awaiting trial is much larger. The Minister of Law and Order told parliament that in 1986 58,962 children aged 17 or under had been so detained. The average period of such detention was not stated. Many would undoubtedly have been subsequently released on bail and either acquitted or given non-custodial sentences. On October 15, 1986, according to the Minister of Justice, 2,677 children aged 17 or under were being detained in prison, of whom 254 were aged 15 or under. These figures do not include 2,280 small children (of whom 1,880 were black) who were staying in prison during 1986 with

their imprisoned mothers.

These bald statistics do not explain the special position of black children in the political struggle which is taking place in South Africa from which follows their prominence among the detainees. What has been described as the 'War Against the Children' stems from their vigorous resistance to discrimination in the segregated school system. The disturbances in Soweto in 1976, ruthlessly quelled by the police who took many lives, arose from the refusal of pupils to accept an inferior curriculum imposed by the Government. Because the segregated education system is a cornerstone of apartheid, the movement to change the structure of education and place control of the schools in the hands of the community is seen as an attack on the whole political system. If the community is allowed to control its schools it will not stop here; it will demand control of all political institutions. This explains also the Government's determination to suppress the UDF which has actively promoted the development of 'alternative' self-governing structures within the townships.

Children have thus been the particular target of violent repression. The security forces patrol the townships in heavily armoured 'Casspirs' and 'Hippos'. (Other kinds of police vehicles have been labelled 'Zola Budds' and 'Mellow Yellows'). They are looking for trouble and they provoke it. Stones are thrown; there is a violent response – often with rubber bullets, tear-gas or bird-shot. Even such 'non-lethal' weapons have caused serious injury or death. In the worst cases, shotguns and rifles are used. This was so at the Langa massacre of March 21, 1985, when 20 people were killed by the police (17 of them shot in the back).

Following an 'unrest' incident, a school boycott or other alleged breach of the law there are frequently arrests, sometimes of very large numbers. (On September 12, 1985 the police arrested 745 pupils of Hlengiwe High School in Soweto and detained them for a day and a night at Diepkloof prison before they were released without charge (S. Afr. J. Hum. Rts., vol. 1, p. 300)). Frequently, children are charged with public violence, a common law crime which carries a maximum sentence of 10 years imprisonment when tried before a Regional Magistrate. On being arrested children are detained at police stations and subsequently at prisons, often with adults. The prisons are grossly overcrowded. We were informed by the Deputy Minister of Law and Order that he would much prefer the children to be held at rehabilitation centres, but, unfortunately, none were provided for black children, only for white.

In police stations and prisons, physical abuse of children, including torture, is widespread. Electric shocks have been administered, and 20 instances of tear-gassing in prisons have been acknowledged by the Minister of Law and Order in Parliament. Beatings and assaults with sjamboks are commonly reported and we saw photographs of children bearing scars evidently the result of violent attacks. Two members of the mission saw children in Ciskei who bore marks of torture eight months after police interrogation. They said the police had whipped them with metal-tipped sjamboks and with strips of rolled wire, as well as scalding them with boiling water and burning plastic. The children complained that they had been denied medical treatment.

There are estimated to be many hundreds of public violence cases being con-

ducted throughout the country against children and young people. The Black Sash in Cape Town has recently monitored such cases and supplied us with the results of their work. Those charged with unrest-related offences are often refused bail and there are long delays before cases are brought to trial. In a very high proportion of cases, the charges are withdrawn at or shortly before the trial or the accused are acquitted. The Black Sash states that of 234 cases in the Cape Town and Boland area from January to October 1986, only 17% of those charged were convicted in court. The remaining 83%, who must be presumed innocent, have suffered severe hardship with little hope of redress. They have been punished and had their lives disrupted by what must in many cases be the improper use of legal processes.

Those who are convicted often receive what we regard as excessively harsh sentences. A four-year sentence is not unusual, even when the child is a first offender for whom an alternative non-custodial sentence should be found. We were informed that the Minister of Law and Order had decreed that no remission of sentence should be granted in public violence cases, thus making clear that it is seen as a political offence.

One member of our mission was in court in Cape Town in October 1986 when two Supreme Court judges refused to vary sentences of 7 years imprisonment on a number of youths aged between 16 and 20, all first offenders, the violence in question amounting to no more than punching a man in the face, causing bruises, setting fire to some curtains and breaking a window. Another case which shocks the conscience is that of the 13 year old Zachariah Makha-jane who was detained without charge

under the Emergency regulations on August 21, 1986. There had been disturbances at his school some months previously but they had long subsided. When his mother applied to the court for his release the police filed evidence saying that Zachariah was a leader of the Students' Representative Council and was alleged by a teacher who was unwilling to be identified to have threatened to chase children out of classrooms. A Supreme Court judge refused to order Zachariah's release in a judgement which makes no reference to the boy's age, though he plainly must have known it. An appeal to a full bench of three judges, which included the Judge-President of Transvaal and another judge who is generally regarded as the most liberal of the Transvaal judges, was dismissed on the ground that it had not been shown that the police had failed properly to form the opinion that detention was necessary for the maintenance of public order. Yet alternative possibilities were available: the child could have been put in care, or he could have been prosecuted for an offence if there was any evidence of any offence. It is impossible to defend the conduct of any judge who authorises the continued imprisonment of a 13 year old child in these circumstances.

The violence being done to children in South Africa ought to be of great concern to the Government because of the long-term effects on the society as well as on the children themselves. It is difficult to understand why the government allows the present barbarous situation to continue. The disruptive effect of detention and imprisonment of children on their families may be devastating. On the children themselves, we heard from child psychologists that the effect may be disastrous and permanent. Post-trau-

matic stress disorders are common and it may be impossible for many such children to re-integrate into normal society. The policy of excluding children released from detention from school seems not merely cruel but a recipe for future social dislocation.

## **9. The administration of justice and the judicial system**

The constitutional system in South Africa makes Parliament supreme. The judges are bound by their oath of office to apply the law passed by Parliament. They have discretion in certain aspects, such as sentencing; they have responsibility for interpreting the law; and, as we have seen, they can determine the validity of subordinate legislation. Given the evident intention of the Government to deny human rights to the majority of its citizens, how far do these powers enable the judges to protect human rights? And how effectively do they use the powers they have?

Two recent studies of the attitudes of the judiciary from 1910 until 1980 have criticised their excessive readiness to support the policies of the government at the expense of individual freedom. (Corder - "Judges at Work", and Forsyth - "In Danger for Their Talents"). However, this tendency has been less marked in more recent years.

The judges see themselves as belonging to the same professional tradition as the English and American judges, in which a high degree of technical competence and independence from the executive are valued. Their positivist approach to their function leads them to exclude overt political influences and to assume an obligation to give effect to the intention of Parliament regardless of

their personal view of its wisdom or morality. They are criticised by such distinguished academic lawyers as Professor John Dugard for failing to take sufficiently into account the fundamental libertarian and egalitarian principles of Roman-Dutch law. It is certainly evident that many judges do not apply any presumption in favour of personal freedom when the release of detainees is sought. Moreover, it is quite obvious from the expressed attitudes of many judges that they support apartheid and the policies of the Government towards those who oppose it. Thus the claim to independence is not wholly justified. The judges are appointed by the Government and there have been a number of very obviously political appointments in the past by which the Government has sought to ensure that the courts will not upset state policy. We accept that judges are now more generally appointed on merit, but the predominance of executive-minded judges ensures that the courts will generally reach decisions which accord with the Government's wishes.

In the last two or three years some judges have demonstrated a degree of independence by ruling against the Government in a number of cases where they have had to interpret the Internal Security Act and the Emergency regulations. In four important areas the courts have been able to restrain the executive in order to protect individual liberty:

- a) although arrest and detention under s.3(1) of the Emergency regulations requires only the subjective opinion of the arresting officer, the court has insisted that a bona fide and genuine opinion should be formed. In at least one case, the release of a detainee has been ordered on this ground.

- b) a court has ruled that an emergency detainee is entitled to be given the reasons for his further detention beyond the initial 14 days, and in one very recent case a judge has ordered release on the ground that such reasons were insufficient.
- c) some parts of the Emergency regulations have been declared void for uncertainty and some actions (such as the seizure of a newspaper wrongly alleged to include illegal statements) held to be outside their scope.
- d) the interpretation of the law and the regulations has in some cases prevented the Government from action which they intended or believed the regulations permitted them to take. For example, clauses purporting to oust the jurisdiction of the courts to interpret the regulations have been held ineffective, and the explicit exclusion of access of lawyers to detainees has been held not to mean what it says. The latter decision is, however, at present under appeal.

Unfortunately, some of these 'liberal' decisions have been reversed by the Appellate Division and others have been nullified by the Government amending the law. It is plain that the Government will not allow an adverse decision to stand if it inhibits its freedom to detain whomever it wishes to detain. It is therefore obvious that the judges, however courageous and independent, can mitigate only marginally the impact of the security laws. At the same time, their presence on the bench lends undeserved credibility to a legal system in which personal and political freedom are left unprotected. We discussed this dilemma with several judges, most, but not all, of whom are regarded as liberal. We were impressed by their concern to as-

sure us that they would in no circumstances be prepared to accept any instruction from the Government save in the form of a law properly enacted. We were also impressed by their obvious awareness of the fundamental injustice of the system of which they were part. None of them was a Government supporter. They all felt they were justified in continuing to sit on the bench, and it was apparent that questions of individual liberty were not a regular part of their judicial work. This is the effect of the Government's policy of keeping 'security' cases out of the courts: judges are largely occupied with commercial disputes, divorces, motoring cases and 'non-political' crime. Consequently, they rarely need to face up to the conflict inherent in their participation in a repressive legal system. Whether any judge should continue to hold office under the present South African government and constitution is a moral question for each individual. Most of the black lawyers and political leaders with whom we discussed the question thought the 'liberal' judges should resign, but it was generally acknowledged that resignation would have little impact unless it was accompanied by public exposure of the reasons for resigning. Two judges were believed to have resigned in recent years in protest against Government action but they had not acknowledged it publicly. Other leading advocates were believed to have refused judicial appointments.

The judges have been criticised not only on account of their participation in a legal system which denies basic rights to personal liberty. It has also been claimed that in administering the ordinary law, they have made decisions which seem inhuman and have imposed excessively harsh sentences. We have

given examples of sentences on children for public violence and the Makhajane case is another example (see above). This applies even to some of the 'liberal' judges.

## **10. Human rights in the homelands**

There are ten homelands of which four are described as independent: Transkei, Venda, Bophuthatswana and Ciskei. The non-independent homelands are for practical purposes governed as if part of South Africa – certainly as regards security matters. The self-governing homelands have their own security laws and separate judicial systems, though the Supreme Court judges are generally seconded from the South African judiciary. However, the human rights record of the independent homelands is even worse than that of South Africa proper, perhaps to some degree because they are less exposed to critical scrutiny by the international community. We have found an abundance of evidence that any political dissent is harshly suppressed, that detainees – including children – are brutally tortured by a police force which closely collaborates with, or is supervised by, the South African security forces.

Though the judges are as independent as are the South African judges, they show even more reluctance than their colleagues to stop abuses of power by the executive branch of government. It may be that they have even less confidence that their orders will be obeyed.

The level of encroachment upon the rule of law appears to vary among the homelands. Venda and Ciskei have the worst reputation. We have described the evidence which we saw of torture of

children in Ciskei. We heard Dean Fari-sani describe his arbitrary detention and brutal treatment by the security police in Venda.

In Bophuthatswana a Bill of Rights is embodied in the Constitution. In theory at least it provides for the possibility of the annulment by the Supreme Court of Government actions and even Parliamentary legislation. There is also an ombudsman with wide powers to investigate citizens' grievances. Many citizens nevertheless feel themselves powerless to enforce their civil rights, particularly their right to voice dissent and to organise political opposition to the Government.

## **11. Legal Aid**

The Rule of Law depends not only on the availability of fair legal procedures, an independent judiciary and laws which recognise basic human rights; it also requires that citizens have access to the law to defend their rights. This means that those who do not have the means to pay for legal representation in matters where their liberty is at stake must be provided with it at the expense of the State.

The provision of legal aid in South Africa is wholly inadequate and the money supplied by the Government for this purpose falls far short of the sums provided in comparable legal systems. The need for legal aid is particularly marked in South Africa where a very large number of trials are continuously taking place in which the accused, if found guilty, can face long terms of imprisonment and even the death penalty. In 1985 164 South Africans were hanged and the 1986 figure is unlikely to have been very different. The antiquated

pro Deo system provides legal representation in capital cases – this means that a very junior advocate is deputed by the Bar to take the case for a nominal fee, paid by the Bar. Many advocates in South Africa have had their first experiences of conducting criminal cases by defending black people charged with murder; experienced advocates are too occupied with well paid cases to undertake pro Deo work. Other impoverished defendants, that is virtually all those who are black, must rely on the help of those who are able to represent them without charge or who can be paid from charitable sources, usually from outside the country.

The Legal Resources Centre, with offices in Johannesburg, Cape Town, Port Elizabeth and Durban, does sterling work together with a number of attorneys and advocates in private practice who are willing to risk harassment and even detention to ensure that proper defences are presented at least in political cases. A measure of the risk is that at least five lawyers whose cases were brought to our attention have been detained during the present emergency while engaged in their professional work. The harassment of lawyers so as to discourage them from carrying out their duties is manifestly improper and itself undermines the rule of law.

Particular difficulties are experienced by those faced with prosecution in rural areas. There are few lawyers practising in such areas and those that exist are almost invariably dependent on the white property owners for their income. Consequently they feel unable or are unwilling to represent black people apparently in conflict with the established order. The few progressive lawyers are almost all based in the major cities. Some of these told us that they are pre-

pared to travel to rural areas but the distances are often so great that they can handle only a limited number of rural cases. They also complain of obstruction from the prosecutors, from the police and even from the magistrates. It must be remembered that the magistrates in South Africa are government servants and usually favour the prosecution in political cases. Defence lawyers coming from the city complain of discourteous treatment, being made to wait for local lawyers to have their cases dealt with, and being summoned to the court to make formal applications which could have been dealt with by correspondence. When defence lawyers seek to instruct local lawyers to act as agents they often decline to do so on political grounds.

There are also complaints that attempts to establish local advice centres in rural townships are thwarted by the police – advice workers have been detained under the Emergency. There have recently been proposals to appoint peripatetic salaried lawyers to advise the inhabitants of rural townships, but funds are not provided by the Government for this purpose and private funding is scarce.

## **12. The security forces and the security state**

South Africa is sometimes referred to as a police state. If this expression means that the state is run by the police unrestrained by the Rule of Law, then South Africa comes close to fulfilling the definition. This is so on two levels. The police (and the Government) do not comply with the law as passed by the Parliament, but in any event the law passed by Parliament does not consti-

tute the Rule of Law because it excludes the judges from any power to safeguard human rights.

What we have said already demonstrates that the police have virtually unlimited powers to arrest and detain and have little to fear from the courts. There is little evidence of disciplinary action taken against the police in cases where they have been manifestly guilty of gross abuses. For example, the Legal Resources Centre in Cape Town had obtained an interdict against the Minister of Law and Order and the police to restrain further assaults on the residents of some of the squatter camps in the area of Crossroads. Notwithstanding the interdict, attacks were mounted by vigilantes and police (established by photographic as well as overwhelming eye-witness evidence) which, on June 9 and 10, 1986, led to the eviction of some 60,000 people and the destruction of their homes and property. When the case came to court again for the interdict to be made final, the Government conceded the case. Yet no disciplinary action or court action has been taken against the police notwithstanding their gross contempt of court. Also in the Cape Town area was the notorious incident of the 'Trojan horse' when three children were shot dead by policemen who emerged from boxes on top of an unmarked lorry and opened fire. After the killings they arrested several people in the neighbourhood and charged them with public violence, alleging that they were throwing stones. When the case came to court in late 1986 the police were unable to produce any credible evidence and the case was dismissed. No prosecution or any disciplinary action has been taken against the policemen responsible for the killing.

In exercising control over the town-

ships there is compelling evidence that the security forces take advantage of the existence of significant numbers of black people who, whether for ideological or economic reasons (we suspect more commonly the latter) are prepared to assist the authorities to quell the opposition. The Government seeks to evade responsibility for much of the violence in the townships by ascribing it to 'black on black' conflict. Manifestly, there are fierce differences of viewpoint between black people. Sometimes these may be the legacy of ancient tribal rivalries, but they appear to be much more frequently the result of the apartheid system, which creates desperate competition for scarce resources.

The black groups which support the authorities are generally known as vigilantes. In Natal the Inkatha movement led by Chief Buthelezi fulfils this role. In the Cape Town area, the vigilantes are called 'witdoeke' an Afrikaans word referring to the white armbands which many of them wear. The evidence of collusion with the police in the Crossroads affair is overwhelming. The 'comrades' are the young opponents of apartheid who generally support the UDF. Government support for those who are prepared to attack the comrades may take the very tangible and attractive form of money payments, priority in housing and employment and the provision of weapons. In the case of Inkatha, the Government may not be directly involved, but Chief Buthelezi's own political power as Chief Minister of the KwaZulu homeland gives him a similar interest and power to reward his supporters. We have seen no evidence that Chief Buthelezi has been personally involved in the rash of recent murders of UDF supporters in KwaMakutha, KwaMashu, and other places in Natal, but the evidence of

Inkatha involvement is strong. A recent academic study of disturbances in the area concludes that by far the greatest number of them have been initiated by Inkatha members.

A recent tendency has been for vigilantes to be recruited into the police – either the South African police force itself or the local township police. These 'kitskonstabels' (instant cops) are given minimal training and sent into townships where they are not personally known. Many are driven to join the police by severe unemployment and some have been driven to suicide by the hostility of their families or the agony of concealment. The increasing use by the Government of its economic power over black people to compel them to police each other is another way in which it seeks to perpetuate minority rule.

Another sinister development noted by many observers is the establishment of a network of joint management committees' (JMCs). The National Security Council is the body responsible for State Security. Its members are key cabinet ministers and leading generals and policemen. Directly accountable to it is a series of regional security committees and answerable to them are JMCs in almost every town in the country. Each JMC is chaired by the senior policeman or army officer in the neighbourhood and its deliberations are kept secret. Its functions appear to be to monitor dissent and discontent in its area and then to take appropriate action. That may include genuine redress of local grievances by the expenditure of its apparently limitless funds; it may also include alerting the police to the existence of unwelcome dissent, which can lead to detention or prosecution. We heard several stories of actions taken by the JMCs which overrode or by-passed

the elected authority in the area. It is clear that a secret parallel system of government has been created which can operate independently of the formal constitutional structure.

Albeit concealed behind a smoke-screen of disinformation, censorship and legal formality, the apparatus of the police state is already well established in South Africa.

The recent general election for the white House of Assembly increased the size of the National Party's majority, and gave the Conservative Party more seats at the expense of the liberal Progressive Federal Party. This shift to the right suggests that the policy of repression is more likely to be intensified than relaxed, and that violations of human rights and the Rule of Law will continue to cause misery and bitter resentment among the disenfranchised black majority of the population.

We have drawn attention to the growing marginalisation of the judicial system, by the removal of its jurisdiction to safeguard individual liberty, by the prompt re-introduction of regulations which courts have held ultra vires, by the renewed detention on fresh pretexts of those whom judges have ordered to be released and by the failure of the government and its agents to respect judicial decisions. Since the election a striking example has occurred in the expulsion from South Africa of the representatives of the BBC and Independent Television News for filming scenes of violent police assaults contrary to regulations which at the time when the filming took place the Supreme Court had struck down.

These policies undermine the Rule of Law and the independence of the judiciary. They encourage unjustified deprivation of liberty, violent physical assaults

and torture, which according to the evidence, are perpetrated extensively by the security forces, who are heavily armed and subject to little if any restraint. Whatever genuine fears the government may have about the threat of violent opposition to its rule, its measures in self-defence go far beyond any which could be justified under the international law of human rights, even in the most extreme circumstances. The exclu-

sion of judicial safeguards is far more strict than in other countries where terrorism is notoriously prevalent, such as Israel and Northern Ireland.

Both the policies themselves and their object, the maintenance of the domination of the majority by a minority, are legally and morally indefensible. The object cannot be achieved without escalating violence and must surely be abandoned urgently.

# BASIC TEXTS

## Declaration on the Right to Development

General Assembly resolution 41/128 of 4 December 1986

### The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for, and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling further the right of peoples to exercise, subject to relevant provisions of both International Covenants on Human Rights, their full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil,

political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts to promote and protect human rights at the international level should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the right to development:

## Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

## Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

## Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of

international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should fulfil their rights and duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

#### Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

#### Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

#### Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language and religion.

2. All human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights.

#### Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

#### Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be made with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

#### **Article 9**

1. All the aspects of the right to development set forth in this Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in this Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

#### **Article 10**

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

# **Council of Europe Committee of Ministers**

## **Recommendation No. R (87) 8**

### **Of the Committee of Ministers to Member States**

#### **Regarding Conscientious Objection To Compulsory Military Service<sup>1</sup>**

(Adopted by the Committee of Ministers on 9 April 1987  
at the 406th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Recalling that respect for human rights and fundamental freedoms is the common heritage of member states of the Council of Europe, as is borne out, in particular, by the European Convention on Human Rights;

Considering that it is desirable to take common action for the further realisation of human rights and fundamental freedoms;

Noting that in the majority of member states of the Council of Europe military service is a basic obligation of citizens;

Considering the problems raised by conscientious objection to compulsory military service;

Wishing that conscientious objection to compulsory military service be recognised in all the member states of the Council of Europe and governed by common principles;

Noting that, in some member states where conscientious objection to compulsory military service is not yet recognised, specific measures have been taken with a view to improving the situation of the individuals concerned,

Recommends that the governments of member states, insofar as they have not already done so, bring their national law and practice into line with the following principles and rules:

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1. When this recommendation was adopted:

- in application of Article 10.2.c of the Rules of Procedure for the meetings of the Ministers' Deputies, the Representative of Greece reserved the right of his Government to comply with it or not, and the Representative of Cyprus reserved the right of his Government to comply or not with paragraph 9 of the text;
- in application of Article 10.2.d of the Rules of Procedure for the meetings of the Ministers' Deputies, the Representative of Italy recorded his abstention in an explanatory statement said that his Government was of the opinion that the text as adopted fell short of the suggestions made by the Assembly, and therefore appeared to be deficient;
- in application of Article 10.2.d of the Rules of Procedure for the meetings of the Ministers' Deputies, the Representatives of Switzerland and Turkey recorded their abstentions and in explanatory statements said that their Governments would be unable to comply with the text.

## **A. Basic principle**

1. Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, on the conditions set out hereafter. Such persons may be liable to perform alternative service;

## **B. Procedure**

2. States may lay down a suitable procedure for the examination of applications for conscientious objector status or accept a declaration giving reasons by the person concerned;

3. With a view to the effective application of the principles and rules of this recommendation, persons liable to conscription shall be informed in advance of their rights. For this purpose, the state shall provide them with all relevant information directly or allow private organisations concerned to furnish that information;

4. Applications for conscientious objector status shall be made in ways and within time-limits to be determined having due regard to the requirement that the procedure for the examination of an application should, as a rule, be completed before the individual concerned is actually enlisted in the forces;

5. The examination of applications shall include all the necessary guarantees for a fair procedure;

6. An applicant shall have the right to appeal against the decision at first instance;

7. The appeal authority shall be separate from the military administration and composed so as to ensure its independence;

8. The law may also provide for the possibility of applying for and obtaining conscientious objector status in cases where the requisite conditions for conscientious objection appear during military service or periods of military training after initial service;

## **C. Alternative Service**

9. Alternative service, if any, shall be in principle civilian and in the public interest. Nevertheless, in addition to civilian service, the state may also provide for unarmed military service, assigning to it only those conscientious objectors whose objections are restricted to the personal use of arms;

10. Alternative service shall not be of a punitive nature. Its duration shall, in comparison to that of military service, remain within reasonable limits;

11. Conscientious objectors performing alternative service shall not have less social and financial rights than persons performing military service. Legislative provisions or regulations which relate to the taking into account of military service for employment, career or pension purposes shall apply to alternative service.

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### Indonesia and the Rule of Law – 20 Years of 'New Order' Government

*Published by the ICJ, Geneva, 1987. Available in English. ISBN 0-86187-919-8.*

*Hard-backed. 208 pp. Swiss Francs 50, plus postage.*

This study by the ICJ and the Netherlands Institute of Human Rights sets out the constitutional provisions and legislation relating to human rights and assesses their application in practice, as well as their compliance with international human rights norms. The detailed chapter on criminal law and procedure fills a gap that existed even in the Indonesian language.

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### Human Rights and Mental Patients in Japan

*Report of an ICJ/ICHP mission to Japan in May 1985 by Dr. T.W. Harding, Judge J. Schneider, Dr. H. M. Visotsky and Dr. C. L. Graves. Published by the ICJ, Geneva, 1986.*

*Available in English. ISBN 92 9037 032 7. Swiss Francs 10, plus postage.*

This mission to Japan reviewed and made recommendations on the legislation and practices for the treatment of mental patients. Many grave abuses in Japanese mental hospitals have been reported. The mission did not investigate these but commented that "the present structure and function of the Japanese mental health services create conditions which are conducive to inappropriate forms of care and serious human rights violations on a significant scale." The members of the mission, distinguished experts in the field, had discussions with government bodies and officials as well as many professional and concerned individuals. They visited several mental hospitals. Their report ends with 18 conclusions and recommendations pin-pointing the main areas of concern as a lack of legal protection for patients during admission and hospitalisation and a preponderance of long-term institutional treatment allied to a relative lack of community treatment and rehabilitation.

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### Human and Peoples' Rights in Africa and The African Charter

*Report of a Conference held in Nairobi in December 1985, convened by the ICJ.*

*Published by the ICJ, Geneva, 1986. Available in English and French. ISBN 92 9037 028 9.*

*Swiss Francs 10, plus postage.*

In continuation of its prominent role in the promotion of the African Charter, the ICJ brought together its own members and leading African jurists, mostly from countries that had not yet ratified the Charter, to discuss implementation of human rights in Africa with particular reference to bringing the Charter into force. It is perhaps significant that only a few months after this Conference, a sufficient number of ratifications were posed to enable the Charter to come into force. The report contains the opening speeches, the introductory report, the working papers and a summary of the discussions on legal services in rural areas and the Charter.

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