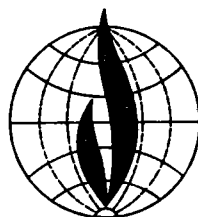


THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Human Rights in the World

Bahrain*

The Institutional and Legal Setting

Although Bahrain has been a member of the United Nations since September 1971, it has yet to ratify any international instrument in the field of human rights.

In 1973, two years after gaining independence, Bahrain acquired a Constitution, some of whose provisions guarantee the protection of human rights. For instance, paragraph (d) of Article 19 prohibits any citizen from being subjected to physical or mental torture or any type of degrading treatment. Furthermore, any confession obtained by the use of torture, coercion, threats or degrading treatment is invalid.

In August 1975, the government suspended several of the constitution's basic provisions and the National Assembly was dissolved.

What is serious about the suspension of the Constitution and the dissolution of the Assembly with regard to the respect of human rights in Bahrain is the fact that a certain number of laws threaten, if not violate, human rights. This applies in particular to the right of the individual to personal safety, to freedom from arbitrary arrest or detention, the right of anyone who is deprived of liberty to take proceedings before a court in order that

the court may decide without delay on the lawfulness of the detention (cf. Article 9, para. 1 and 4 of the international Covenant on Civil and Political Rights, hereafter called the "Covenant"), the right of every person to a fair and prompt public hearing by a competent tribunal (Article 14, para. 1 and 2), freedom of expression (Article 19, para. 2), and the right to peaceful assembly (Article 21).

An analysis of these laws brings to light the dangers and violations which they entail and which may infringe several rights at a time. The law on State security of October 1976 states in its First Article "where there is sufficient evidence that an individual has performed acts or uttered words which threaten internal or external State security, the Minister of the Interior is authorized to order his arrest and imprisonment in one of the prisons of Bahrain, search his home and take any necessary action to gather proof and carry out the investigation. The period of detention must not exceed three years."

Obviously, the phrase "threaten internal and external security" is vague and imprecise and enables the Ministry of the Interior to act arbitrarily (Article 9, para. 1 of the Covenant). Likewise, the period of detention, which can last up to three years, is a threat to everyone's

* This article is a shortened translation of excerpts from the 1988 annual report of the Arab Organisation of Human Rights.

right to take proceedings before a court in order that it may decide without delay on the lawfulness of the detention (Article 9, para. 4 of the Covenant).

Article 2 of the same law stipulates that the sessions of the trial are to be held in camera. Article 3, para. 4 directs that the court reports, of which a single copy is made, are confidential. These, along with the reports of the defence and the prosecution and the witnesses' statements, are treated as State secrets. These provisions are a violation of everyone's right to a public hearing (Article 14, para. 1 of the Covenant).

Article 7 of Royal Decree no. 7 (1976) which led to the establishment of the Court of State Security provides that: "the judgments delivered by this Court are final and are not subject to appeal or any other recourse." This is a violation of the rights to have one's case reviewed by a higher tribunal (Article 14, para. 5 of the Covenant).

The law of 1974 which sets up emergency tribunals, provides that the accused may be tried within 24 hours of arrest. This violates the right of every defendant to have adequate time and facilities for the preparation of his own defence and to communicate with counsel of his own choosing (Article 14, para. 3(b) of the Covenant).

The law of 1965 on security prohibits public marches, the distribution of tracts criticizing the regime and the circulation of criticism in the press or within associations. This law violates the right to peaceful assembly (Article 21 of the Covenant) and freedom of expression (Article 19 of the Covenant).

In addition to the laws, there are administrative rules and practices. For example, the former Minister of Education, Abdelaziz Mohamed Alkhalifa, confirmed in December 1980 that his Ministry had

been authorized to gather information on students and their activities. This is a violation of the right to hold opinions without interference (Article 19, para. 1 of the Covenant) and the right to association (Article 22, para. 1 of the Covenant).

Personal Freedom and Safety

The Arab Organization for Human Rights (A.O.H.R.) has received a complaint from the Committee for the Defence of Political Prisoners in Bahrain, dealing with four cases of prisoners who had not been tried even though they had been arrested as far back as 1980. These were Abdenbi Khayami, Abdelkrim Al Ardi, Faysal Marhoun, and Ja'far Safouan. The complaint asserted that they had been tortured and mistreated. In his reply, the Minister of the Interior stated that: "the information received by the A.O.H.R. is untrue: Abdenbi Khayami was released on 16 December 1986 although he was not brought to trial. The same was true for Abdelkrim Al Ardi, who was not tried but released on 28 May 1986. Faysal Marhoun and Ja'far Safouan were brought to trial before the Superior Court of Appeals, found guilty on 9 July 1986 and released on 28 May 1987". The A.O.H.R. is concerned about the lengthy detention of "political" suspects and hopes that the authorities in Bahrain will ensure that prevailing practices conform to international norms.

The Treatment of Prisoners and Detainees

Reports received by the A.O.H.R. revealed that detainees and political prisoners had gone on a hunger strike in July 1987 to protest against the violations of

their fundamental rights as political prisoners. The reports alleged that interrogations were accompanied by physical and mental torture, which led to a certain number of deaths among them.* These reports gave the names of two of those deceased: Mehdi Rida and Dr. Hachem Al Alawi (arrested with 19 others in July and August 1986, 18 of whom were accused of being members of the outlawed National Liberation Front of Bahrain), and put on trial (Case no. 1949/1986).

The A.O.H.R. wrote to the Minister of the Interior about the situation of this group of political prisoners. The Minister replied that there were no political detainees in Bahrain, but only criminals who were brought to trial once the investigation into their case had been conducted by the competent judicial authorities. As to Dr. Hachem Al Alawi, he had committed suicide and his death was not the result of torture or mistreatment as certified in the official medical documents. Those who had been arrested in July and August 1986 had been spreading doctrines detrimental to the people with the purpose of fomenting social unrest. They were brought before the competent court which would accord them all legal protection.

Contrary to official sources, Amnesty International, among others, confirmed that Dr. Al Alawi had died in September 1986, less than one month after his arrest, from the consequences of torture. The same is said about Mehdi Rida who was serving a sentence pronounced in 1981.

On 26 November 1987, the Committee for the Defence of Political Prisoners announced in a communiqué, published by

its London office, that Mohamed Darwich, a 29-year-old Bahraini detainee was in poor condition. He had been arrested in October 1985 and undergone long periods of solitary confinement, unable to contact either his family or lawyer. He had been refused use of the toilet, tortured and beaten with barbed wire. The Committee declared that the name of his torturer was Abderrahman Al Mrikhi.

The Committee also submitted a complaint to the A.O.H.R. about the torture suffered by Mr. Abdenbi Khayami who had been detained in Mahama Prison since 1980 without formal charges or judgment. He was alleged to have been hung by the feet for long periods, forced to remain standing for several days at a time, and beaten, whipped and attacked by dogs. He and other prisoners of conscience were given food contaminated with insecticide causing ailments leading to the destruction of the digestive tract and possible death. Such was the fate of Sheik Abbas Errasti, who succumbed six months after his release.

The A.O.H.R. contacted the Minister of the Interior to express its concern and to request an explanation on the conditions of Mahama Prison, and entreated him to take the necessary measures to stop torture, ill treatment and to improve food inspection.

A joint telegram from the Islamic Front for the Liberation of Bahrain and the Committee for the Defence of Political Prisoners in Bahrain mentioned a hunger strike organized by some political prisoners. 42 organizations asked the A.O.H.R. to intervene to rescue the strikers. However, when contacted by the

* The International Commission of Jurists has in past years received a number of complaints of torture of political prisoners in Bahrain. Representations on these cases to the authorities in Bahrain have evoked no reply.

A.O.H.R., the Minister of the Interior denied all allegations of a hunger strike.

The Right to a Fair Trial

On 29 October 1987, the Court of State Security declared 15 of the 18 defendants guilty. They had been charged (in the above-mentioned case 1949/1986) with belonging to the National Front for the Liberation of Bahrain. They sent a letter to the Emir of Bahrain, requesting their release and the suspension of their sentences. They also protested against the use of torture, and the lack of democracy and civil liberties.

Freedom of Expression

The law governing the press (1976) violates freedom of expression (Article 19, para. 2 of the Covenant) in Article 5 which states that "the Minister of Information can ask publishers to see the texts of any author before and at the time of printing or risk being closed down. Articles 13 and 15 entitle the Minister to prevent the publication of material detrimental to the regime. Article 18 imposes a maximum sentence of two years in prison or a maximum fine of 2,000 dinars or both on any person selling or publishing unauthorized or banned material.

Burma

Burma, known for its isolation, is very much in the news as a result of large scale demonstrations in July-August 1988 by Burmese students and the general public to end the political dominance of the army and the ruling political party, the Burmese Socialist Programme Party (BSPP). The economic hardship faced by the people and the general discontent against the rule of General Ne Win who has ruled the country for the last 26 years erupted into massive demonstrations on 26 July 1988, with the announcement of his retirement and the appointment of U Sein Lwin as his successor.

There were countrywide demonstrations by students and others calling for the removal of U Sein Lwin who is a former army officer and considered even more repressive than General Ne Win. The new ruler, in keeping with his repu-

tation, tried to crush the public demonstrations, proclaimed a state of emergency on 3 August and imposed martial law in the capital, Rangoon. There were reports that peaceful protests were met with severe repression by the army. For example, on 8 August in Rangoon, soldiers opened fire on unarmed and peaceful crowds of demonstrators including women and children. In spite of further repressive measures including a curfew, demonstrations continued and the army again resorted to shooting on 9 and 10 August, including at those gathered at the Rangoon General Hospital to donate blood for the injured during the previous days' demonstrations. The government admitted that between 8 and 12 August, 112 people had died as a result of the shooting by the army, but unofficial sources estimated up to 3000 deaths.

On 12 August 1988, President U Sein

Lwin resigned and the BSPP appointed Maung Maung as President, a civilian and former Attorney general. Though the resignation of U Sein Lwin reduced the scale and intensity of the demonstrations, they continued with demands for the restoration of democracy, the disbanding of the BSPP, the release of political prisoners and compensation for the relatives of those killed during the 8-12 August demonstrations.

According to some reports, in most parts of the country spontaneous local councils composed of monks and students took over the administration, leaving the government to exercise control only in Rangoon. Aung San Suu Kyi, the daughter of the Burmese nationalist hero, Aung San and others have recommended that an interim government be established until elections are conducted to establish a multi-party democracy. Indeed, in July 1988, prior to his retirement General Ne Win had proposed that a referendum be held as to whether Burma should be governed by a multi-party system. This was rejected by the BSPP which later retreated in the face of the concerted demonstrations, and on 10 September 1988 President Maung Maung announced that multi-party democracy would be introduced and elections would be held within three months.

However on 18 September General Saw Maung, Defence Minister, seized power stating that he is doing so in order to 'halt deteriorating conditions all over the country and for the sake and interest of the people.' He announced that democratic general elections would be held when normalcy returns and law and order is re-established. The military takeover and the ban on gatherings of five or more persons did not deter the demonstrations, and a large number of students and others took to the streets. In re-

sponse, the new military ruler resorted to harsh repressive measures including shooting at peaceful demonstrators.

In fact, from independence in 1948 until 1958, Burma had a multi-party system and was pursuing a democratic path. Burmese independence was spearheaded by a broad coalition called the 'Anti-Fascist People's Freedom League' (AFPFL). The Burmese Communist Party parted from the AFPFL after independence, and chose to take up arms against the government. In the late 1950s, the AFPFL itself split into two factions, one called the Clean AFPFL, a moderate wing led by the then Premier U NU, and the other, the Stable AFPFL, a more radical group. In 1958, due to factional fights between the parties, the Prime Minister invited General Ne Win to assume power and conduct elections. Elections held in 1960 brought U Nu's party to power once again. However, the election results did not solve the political crisis and the country faced intensified insurgency by some of the ethnic minorities, particularly the Shan and Kachin, which led to General Ne Win seizing power in March 1962, stating that this was necessary in order to save the country's unity.

Following the coup, a 'Revolutionary Council' was established, all existing political parties were banned, newspapers which were known for their independence were disbanded and the parliament as well as the judiciary were abolished. In December 1973, a new Constitution was approved by a popular referendum under which the BSPP became the 'only political party leading the state'. The Constitution also provided for a 'People's National Congress' (PNC) to be elected every four years to exercise legislative powers, for a 29 member State Council to be elected from among the members of the PNC and to exercise both judicial and

executive powers. The Chairman of the State Council was the President of the Republic, a post General Ne Win held until his retirement.

The administration at the local level was in the hands of 'People's Councils' but the real power rested with the head of the local army division. The BSPP remained the only political organisation and organised under its wing separate organisations for children, youth, workers, peasants etc. The army controlled the BSPP as well as the civilian administration by appointing retired or disabled army personnel in various government posts. These are said to have comprised up to 60-70 percent of total government employees. General Ne Win, with the help of the army, exercised total control and repressed all opposition to the regime. For example, security legislation such as the Anti-subversion Act was used arbitrarily to arrest opponents of the regime. Under this Act, a person can be detained without charge or trial for up to 180 days and detention may be extended with the approval of the cabinet.

Prior to General Ne Win's accession to power, Burma had an independent Judiciary which is said to have been destroyed under his rule. Article 96 of the 1973 Constitution provides for a 12 member 'Council of People's Justices' (CPJ) to exercise national jurisdiction and control over lower courts. The members of the CPJ were elected from among the members of the national assembly on the basis of a list drawn up by the State Council. Similarly, at the lower level, Judges' Committees which constitute the lower courts were elected from among members of the respective People's Councils. Normally, the National Assembly and People's Councils consisted of BSPP members elected unopposed, and as the judges were elected from among them,

the separation of powers recognising the judiciary as an independent branch, ceased to exist in Burma. Moreover, BSPP members without sufficient legal knowledge are said to have been appointed as judges particularly at the lower level.

General Ne Win's government also exercised tight control over the press by owning all the six national newspapers and appointing editors of other small newspapers whose editorials were censored by the government. Similarly, there were severe restrictions on the freedom of association, the establishment of organisations other than those that are part of the BSPP, and the right to strike.

For the last two decades, the Burmese government has been engaged in subduing minority groups who are fighting for autonomy from the alleged domination of Burmans. Of the total population of 38 million, the predominant ethno-linguistic group are Burmans and constitute about 25.4 million. The rest of the population is divided into numerous ethnic groups. Among the minority groups, the most numerous are the Shan (4.18 million), the Arakanese (2.28 million) and the Karen (1.9 million). The tough attitude of General Ne Win's government concerning the ethnic insurgencies is reflected in an 11 October 1987 editorial of the Working People's Daily, an official newspaper which stated that, 'successive Party Congresses had called for annihilation of insurgents. The elimination of the insurgents is..one of the political objectives of the Party and the State...'

A National Democratic Front was formed jointly by nine ethnic groups to fight the government. In some areas the Communist Party has joined forces with ethnic groups, particularly with the Shan and Karen rebels. In areas under the con-

trol of the Communist insurgents and ethnic groups, there exists a parallel economy, an elementary form of administration and there are allegations that in these areas the Communist Party and ethnic groups collaborate with narcotic syndicates and smugglers.

The most serious violations of human rights such as torture and extra-judicial killings are alleged to be committed by the Burmese army in their effort to deal with the insurgents belonging to the Burmese Communist Party and the ethnic minority groups. Normally, it is the local civilian population that suffers most from both the army and the insurgent groups. The insurgent groups coerce the local population into providing food and shelter, and if such support is not forthcoming they brand the local population as army spies and deal with them harshly. On the other hand, the government forces attack the local population as reprisals for providing support to the insurgents as well as to prevent such collaboration in the future. According to reports narrated by refugees who have fled to Thailand, the security forces routinely

practice extra-judicial killings, torture and ill-treatment of non combatant civilians. There are also allegations that the army forces villagers to work as porters or as guides and impose stringent restrictions on their movements and economic activities. Similar allegations are made against the insurgents too.

The National Democratic Front of the ethnic minorities in Burma, has publicly supported the present campaign by the students and others for democracy and it is not clear whether a change in the political system will facilitate the end of the civil war. A new regime, in addition to seeking to bring about a peaceful solution to the insurgency and revive the economy, will have to generate greater participation of the people and ensure protection of their basic rights. This should include restoration of the independence of the judiciary, freedom of the press, the right to organise, abrogation of repressive laws and appropriate mechanisms to inquire into human rights violations committed in the past by the law enforcement agencies as well as preventing such violations in the future.

Colombia

Historically, Colombia is a country with a democratic constitution providing for the protection of fundamental human rights. Dictatorships have been infrequent and recently elections have been held regularly every four years. Despite a relatively stable democracy, Colombia is beset by social problems, internal turmoil and a weak enforcement of law and order. Over the past few years, this has led to increasing violations of human rights

and a deterioration of the Rule of Law. The following description of events reflects the tragic plight of the country and portrays the violence which has gradually come to dominate life in Colombia.

A state of siege has been in force in Colombia for most of the past 30 years. It was lifted briefly in 1982 and reimposed initially in the departments of Caquetá, Huila, Cauca and Meta after several guerrilla attacks, in March 1984, and

then in the rest of the country in May 1985. The Executive has the power to issue legislative decrees suspending laws it considers incompatible with the state of siege.

The Colombian police statistics for murders in 1986 gave a ratio of one murder per 2,000 people, which is the highest ratio in the world for a country not at war. During the months of June and July 1988 numerous assassinations and three collective massacres raised the number of politically-related deaths in Colombia to 1,801 in the first six and a half months of 1988. Victims initially identified with left-wing opponents have now extended to include people known for their civic, academic or cultural contribution to society. Personal disputes, drug trafficking and political motivations account for most of the killings.

The main victims of massacres have been political parties, organised popular movements of peasants and workers, and recently intellectuals. The members of the UP, Unión Patriótica, a political party of the left which presents itself as an alternative between the two traditional parties, are one of the main targets. Over 500 members have been killed in the past three years and 41 members in the first four months of 1988. Members of other political parties have also been subjected to increased violence during this same latter period, during which 45 grassroots leaders, 29 liberals and 5 conservatives were shot. The free press is permanently intimidated, and at least ten journalists and writers had to go into exile after death threats.

There is increasing evidence that the army has been involved in this policy of intimidation and terror. In many locations, the death squads and, according to recent sources, the drug dealers and their gangs were held responsible for the

massacres and have been linked with the military, the armed forces and other authorities. A possible confirmation of these links was the illegal release in 1987 of Jorge Ochoa, a drug baron from La Picota Prison. He was escorted to the door by a judge and the Director of the prison at 8 p.m. on New Year's Eve. The official hours for the release of prisoners end every day at 5 p.m.

Investigations ordered by President Barco into the killing of 25 members of SINTAGRO, the banana plantation trade union, at "La Negra" and "Honduras" plantations in March 1988 in Urabá provided further evidence that the army was involved. The investigations were carried out by six judges and 30 agents of the DAS (the government security department), the only security force in the country not under the authority of the armed forces. On 3 May 1988, "Semana" a weekly magazine published extracts from a confidential report which provided evidence, including eye-witness testimonies that members of the B-2 intelligence units of the Voltigeros army battalion participated in the preparation and execution of the massacres. The report indicates that the purpose of the attack was to eliminate alleged guerilla supporters among the plantation workers. In September 1988, a judge ordered the arrest of two major drug dealers from the Medellin drug cartel, two members of the military, a police lieutenant and the mayor of Puerto Boyaca, all of them accused of having been involved in the killings.

Again in the following case, there seems to be evidence that the army was involved. During the month of May 1988, some 60,000 peasants and agricultural workers from the north-east and central regions planned to walk to the regional capitals protesting against the increased

insecurity in the countryside, the violence, the enactment of Law 30/1988 (a Land Reform Law which they regarded as more beneficial to the landowners than to the peasants), the extreme poverty and the destruction of natural resources by the companies operating in the region. The organizers of the demonstration had agreed to gather the people from different villages at several meeting points on the way to the capital. At these meeting points, the army tried to prevent the peasants from continuing their march in particular at "La Fortuna" and "Llana Caliente" where the army opened fire and threw grenades on unarmed civilians. According to a complaint filed by witnesses with the Public Prosecutor, the officers in charge were identified as being Captain Jaramillo and Colonel Rogelio Correa Campos. The same witnesses stated that a soldier who refused to obey the order to open fire at peasants was shot on the spot by the Colonel, and that several peasants who were captured were beheaded with their own machettes. The number of deaths is unknown due to the remoteness of the places, the confusion, and the fact that everyone tried to escape, and that bodies were not recovered. Many who remained or tried to escape were encircled by the army and detained.

The government's reaction has been one of increased repression. Apparently as a result of killings in Urabá, the government issued Decree Law 678 on April 14 declaring the region of Urabá an emergency and military-controlled zone (zona de emergencia y de operaciones militares). The Military Commander was empowered *inter alia* to adopt measures intended to keep public order (e.g. prohibition to sell alcohol), impose curfews, control meetings and demonstrations in public places, prohibit the transit of

people and vehicles in certain parts of the region, and dismiss local officials, including recently elected mayors. These measures may become permanent if approved by the departmental governor. The Procurator General argued that Decree Law 678 was unconstitutional as the "civilian authority may not be subordinated to military authority." However, the Supreme Court upheld its constitutionality.

The activities of the six guerilla groups are also a major factor in the increasing violence. The war map kept by the Colombian army is impressive. It shows that the guerillas are active in all provinces of the country. In the month of June 1988 alone, terrorist attacks have caused damage to telecommunications amounting to almost half a million dollars. Nearly everybody in Colombia accepts that there are guerrilla controlled territories, which the guerrillas call "liberated territories". These include areas controlled by the ELN (National Liberation Army) in the oil producing area of Arauca and the Magdalena Medio, and by the FARC (Revolutionary Armed Forces of Colombia) in the jungles of Guabiare and Caquetá.

Many of those who have courageously spoken out against human rights violations such as witnesses, lawyers and judges have become victims themselves.

On 25 January 1988 for example, Carlos Mauro Hoyos, Attorney General of Colombia was killed by a group of drug dealers called "Los Extraditables" (meaning those who could be extradited to the USA on charges of drug dealing). A month before he had said "while the State does not grant security to the citizens a form of private justice which is driving us to civil war will prevail. We have to put an end to government indif-

ference and to the citizens' fear of the judiciary". ("El Pais" Jan. 26 1988 p.i.3)

On May 29, 1988 the political leader of a right wing party, Alvaro Gomez Hurtado, was kidnapped. Responsibility was claimed by the M-19 guerrillas who described him as "one of the five oligarchs of the land" and said he was a prisoner of war and would be treated as such. The kidnapping provoked reactions in all political sectors. The gravity of the situation was recognised and the need for a national political pact was agreed upon. For the liberals, the pact was to deal with five main items; public order, public security, the mafia, the guerrillas and constitutional reforms. For the conservatives the only item was to be the search for peace. The Patriotic Union proposed a national dialogue with the participation of all economic and social sectors of the country. President Barco who was abroad in Europe affirmed however, that the situation in Colombia was not that serious, that the country had been subjected to war for 30 years and that the economy was doing well.

On July 6, 1988, the Attorney General of Colombia, Horacio Serpa Uribe, wrote to the Minister of Defence, Enrique Low Murtra expressing his concern about the situation in Colombia. He referred to the effects of the violence in creating confusion and distrust of public institutions, leading to further deterioration of the political system, already eroded by social inequality. He argued that most of the killings were political crimes to weaken political parties and ideological solidarity, to frighten entire communities, to preserve the economic system and to prevent the growth of means of popular expression.

For many Colombians, the lack of leadership, and of politically practical solutions to the serious problems the coun-

try is facing, is paving the way for a strong government of the right. Most politicians exclude a coup d'état because in their view it is unnecessary and also argue that it is difficult to get agreement on all sides for the proposed national dialogue as many are afraid to compromise their political careers.

Nevertheless, an attempt was made by the M-19 guerrilla group in July 1988 to bring about a national dialogue in which they agreed to take part. It is perhaps significant that of the total of 1,801 persons killed in the first seven months of 1988, 546 died in contacts between the army and the guerrillas. As a result, representatives of M-19 met with leading members of the three main political parties in Panama and signed a pact on 14 July calling for a summit with representatives of all the political and popular organizations including the guerrillas, the government and the army. The summit was to be held in Bogotá on July 29. The agenda included; the 'dirty war' (guerra sucia), defence of human rights, and solutions to social and economic problems. Gomez Hurtado was set free on 20 July and called for the participation of all political parties, the government and the army. All the political parties, the trade unions, the Church, three ex-Presidents (two liberals and one conservative) and many civic leaders confirmed their participation. Forty hours before the meeting was to be held the government said it would not participate and would not give safe-conducts to the guerrilla representatives. The reason given was that "the government would not negotiate under blackmail or the shadow of armed intimidation." The meeting thus took place in a little church outside Bogotá, with the participation of 30 political, religious, economic and popular leaders, without guerrilla, army or government

representatives.

It is urgent that proper investigations be carried out into the killings and other human rights violations reported in Colombia, and that those responsible be brought to justice. This is easy to say, but it can only be achieved if the investigations are carried out by a truly independent body. This could be achieved if the Judiciary were able to carry out its investigative functions more effectively. Unlike some other countries, such as France and Costa Rica, the Judiciary in

Colombia has no judicial police (*policia judicial*) to carry out investigations under its control. On the contrary, the judicial power has, if anything, been weakened by the events in the Palace of Justice in November 1985, when 17 judges were assassinated, among them the President of the Supreme Court, Alfonso Reyes. It is only by re-establishing the authority of an independent judiciary with adequate powers to carry out its functions under the rule of law that peace can be brought to Colombia.

Fiji

The last two issues of the ICJ Review (Nos. 39 and 40) dealt with the constitutional developments in Fiji and the process by which the constitutional process was being restored. However, following the May and September 1987 coups, there have been reports of serious violations of human rights.

Immediately after the May coup, there were arrests and short-term detentions of supporters of the deposed government and those who were critical of the coup. Those arrested included deposed cabinet ministers, trade unionists, shop keepers, journalists and supporters of the 'Back to Early May Movement' which advocated restoration of pre-coup political institutions. Most of those arrested, allegedly as a means of intimidation, were normally held for several hours or in some cases for a few days and released without being charged. This was made clear by the coup leader Colonel Rabuka who, when asked about the detention of Indian shop keepers, stated that, "we just take them in for questioning and then

they are released. The problem is that they are closing their shops not because of economic reasons but as a means of protest and to further political argument. That is why they have been taken in for questioning and we try to dissuade them from continuing these practices".

Following the second coup on 25 September, the regime went to the extent of arresting two of the Supreme Court judges, Justice Rooney and Justice Kishore Govind. Justice Govind was taken to a maximum security prison and lodged with ordinary criminals. After their release, Justice Govind took leave and went to Australia. Justice Rooney decided to follow his example, but his passport was seized and returned only on 8 October. He left the country on 17 October. Neither of these judges resigned their office but the regime stated that they were 'deemed to have resigned', in effect removing them from their office. The arrest of these two judges is linked to their outspoken criticism of the coup. Justice Govind in a speech at the open-

ing of the Criminal session of the Supreme Court in August had stated that, "We read every day of citizens being harassed, of being arrested at unearthly hours, of being subjected to ill-treatment and not being charged for any offence. We read of their being accused of distributing leaflets enjoining citizens to petition His Excellency the Governor-General for the restoration of democracy and of making anti-coup statements. How a petition to the Governor-General or statements condemning the coup, which His Excellency himself described as illegal, can ever be anti-social behaviour, defies logic and sanity".

Arbitrary arrests and detentions continued even after the establishment in December 1987, of the interim civilian Government under the former Governor-General, Ratu Sir Penia Ganilau. For example in May 1988, following the discovery in Australia of a large arms' shipment destined for Fiji, the government stepped up its security measures and promulgated a new Internal Security Decree on 16 June 1988. The Decree, in defiance of international law and standards was made retroactive from March 1988. It grants the police sweeping new powers of arrest, search and seizure, and provides for preventive detention without charge or trial for up to periods of two years renewable. The arms' discovery led to arrests of several persons in and around the Western Fiji towns of Ba, Lautu and Nadi. The arrest included a New Zealand lawyer, Christopher Harder, who came to defend five Fijian Indians who were charged in connection with the arms' case. The New Zealand lawyer was detained for 30 hours and later deported to New Zealand.

There were allegations that the discovery of the arms' shipment was used by the government to arrest its oppo-

nents and critics. For example one of those arrested during this period was Som Prakash, a lecturer in English at the University of the South-Pacific who was arrested along with those alleged to be involved in the arms' case, though his arrest is linked to his critical review of a biography of Brigadier Rabuka, the leader of the two coups. Another example of the government's arbitrary use of its assumed powers is the case of Ahmed Bhamji who was a Minister in the deposed Bavadra government. Following the coup, he migrated to New Zealand with his wife and four children. In June 1988, he returned to Fiji to fetch his mother who was ill, but his passport was taken at the airport and he has not been able to return. The ICJ sent a telex message to the Foreign Minister of Fiji urging that Ahmed Bhamji be permitted to return to New Zealand with his mother referring to Article 13 of the Universal Declaration of Human Rights (the right to leave any country, including his own), and to the principle of family reunion. In response, the ICJ received an unsigned telex from Fiji stating that "Ahmed Bhamji is prohibited from traveling beyond the limits of Fiji, until the authorities' full investigation of the illegal arms' shipment into the country is completed. Under the relevant provisions of the legislation which this is done, this status will be reviewed after six months. As this action falls within the criminal jurisdiction of the country, we fail to see how the Universal Declaration of Human Rights can or should apply."

As there is no suggestion of any evidence connecting Ahmed Bhamji with the arms' shipment, or even of his being questioned in this connection, this answer is specious and illustrates the arbitrary actions taken under the Internal Security Decree.

The promised return to parliamentary democracy under a redrafted constitution will be of little value unless it results in the withdrawal of decrees, such as the

Internal Security Decree, which are incompatible with a democratic government under the Rule of Law.

Human Rights in Iraq

Over the past decade the government of Iraq has committed serious violations of human rights. Capital punishment, extra judicial executions, torture and ill-treatment of prisoners, severe limitations on freedom of movement of Iraqi citizens and mass deportations of Iraqis from Iranian origin have been routine practice. The following report gives a short description of some of the Iraqi's violations of human rights.

The death penalty and extra judicial executions

The death penalty in Iraq is used as punishment for a wide range of criminal and political offences, including common law crimes of murder, arson, armed robbery, rape, economic corruption and forgery. In addition, capital punishment is imposed for different non-violent political activities. The following for example are subject to the death penalty: 1) Members of the Baath party who keep secret their previous party and political membership and links, or have links with other political parties during or after their period of affiliation in the Baath party. 2) Members or previous members of the armed forces who are engaged in prohibited political activities. 3) Anyone who publicly insults the President or his deputy, the Republic, the Revolutionary command council,

the Arab socialist Baath party, the National assembly or the Government with the intent of mobilizing public opinion against the authorities. These draconian sentences are sometimes even carried out without trial procedures.

Executions have become an established method for dealing with political and military opponents of the government, particularly members of the outlawed Dawa party (Iran-supported fundamentalists, shia muslims), the communist party and Kurdish political prisoners. Amnesty International (AI) reports that hundreds of executions are carried out every year.

In March 1988, for example, AI reported that 360 people were executed in Iraq in seven separate incidents in October and November 1987. Some of the victims were executed without charge or trial or after having been sentenced to death by military courts following in camera summary proceedings. The ages of the victims ranged between 14 and 73. In accordance with the usual practice in Iraq, families of the victims were asked to pay an "execution fee" ranging from 30 to 50 Iraqi dinars per body. These payments were said to cover state expenses on items such as bullets, coffins and transportation.

The death penalty has also been carried out for relatively minor offences. In May 1987, ten Egyptians were sentenced

to death for forging travel documents. In August 1987 seven Iraqis were executed for a charge of economic corruption. They were allegedly involved in facilitating contracts for foreign companies in return for bribes. Neither the trial nor the execution was public. (This practice violates article 6(2) of the International Covenant on Civil and Political Rights which provides that "sentence of death may be imposed only for the most serious crimes in accordance with the law in force...").

Torture and ill-treatment of prisoners

The Iraqi constitution prohibits torture and prescribes severe punishment for those who practice it. Iraq has also ratified the international Covenant on Civil and Political Rights, which prohibits torture. Nevertheless, torture is routinely practiced by the Iraqi security forces against political prisoners and those who violate national security. Beating, burning, sexual abuse, the infliction of electric shocks and extraction of fingernails and toenails are among the tortures described by former Iraqi prisoners. According to reports of the US State department and Amnesty International, treatment is worst immediately following arrest and during the period of interrogation and investigation, which can last for months. Some detainees were reported to have died as a result of torture.

In September and October 1985, 300 Kurdish children, some as young as 10 years old, were arrested in retaliation for the political activities of family members or were held in custody in an attempt to force their relatives to give themselves up to the authorities. Some were subjected to torture while in detention.

Three children were said to have died as a result of torture.

Arbitrary arrest and detention

In their 1987 reports, both Amnesty International and the US State department published that there were widespread arbitrary arrests and detentions of political prisoners, for long periods without trial or after summary trials. Among the detainees were members of prohibited political parties, government opponents or critics, army deserters and draft resisters refusing to fight in the war against Iran, and relatives of such people arrested as hostages in lieu of suspects sought by the government.

In March and early April 1987 a large number of civilians were arrested in Arbil, in northern Iraq, following an attempted assassination of the governor of Arbil by Kurdish opposition forces.

Limitations of the freedom of movement

There are severe limitations on the right of Iraqis to leave their country. All Iraqis have to obtain an exit permit in order to leave Iraq. Owing to the war's effect on the economy, permission to travel abroad is restricted to only a few categories of Iraqis – officials, government-approved students and persons needing medical treatment. There are limitations on the countries to which they can travel. The government can require the prospective traveler to post a substantial bond to assure return. Students who study abroad must provide a guarantor before travelling abroad. This guarantor and the student's parents may be held liable for the student's failure to

return. Emigration, although not banned, is discouraged. Prospective emigrants have had travel permission delayed and have been harassed.

Deportation of Iraqis from Iranian origin

According to a report of the "Commission for the Welfare of the Iraqi Refugees" more than 350,000 Iraqis have been deported to Iran since the coming to power of the Baathist regime, both before and during the war against Iran. The US State department report indicated that "large numbers" of Iranians and Iraqis of supposed Iranian descent were deported.

The first mass deportation was carried out in 1972, four years after the coming to power of the Baathists. The alleged reason for the deportation was that these Iraqis were Iranians, even though their fathers and grandfathers were born in Iraq. On 7th April 1980, 500 Baghdad business men of Iranian origin were invited to attend a "meeting" at the Baghdad Chamber of Commerce. There they were taken by force to the headquarters of the security police, stripped of all personal documents and possessions, and then forced across to the Iranian border. This operation was the start of increased deportations which extended to any Iraqi holding a nationality document labelling him as being of Iranian "origin", irrespective of his place of birth.

According to the Commission's estimate, between 50,000 and 100,000 people were deported between 1972 and

1980, and a further 300,000 from 1980 to the present. Moreover, the deportation procedure has been strict, humiliating and inhuman.

Without prior notice the houses of the deported people were surrounded and intelligence personnel entered and evicted the occupants. Their personal belongings were left behind and their valuables and documents were confiscated. They were then detained for periods lasting from three days up to two years. During their detention some were subjected to physical and mental torture. After detention they were deported to the Iranian border and left there without any personal belongings, money or identification documents. Across the border, they were subjected to attacks and rape by pro-Iraqi Gassimly tribes of Iranian Kurds.

As a result of the deportation policy there are almost no Iraqis of Iranian origin left in Iraq. Of the few remaining Iranians, most have been imprisoned or live in fear of deportation or imprisonment. According to the US State department report, spouses of Iraqis of Iranian origin are required to obtain a divorce or suffer the same consequences. Other Iraqis whose grandparents are not shown to be of Iraqi origin are subject to arbitrary detention and deportation. Assyrian religious groups in the US, alleged in 1987 that many Iraqi-Assyrians were expelled to Turkey under this rule.

In September 1988 both the US State department and Amnesty International accused Iraq of widespread genocidal killings of Kurds by members of their armed forces released from other duties by the truce and cease fire.

Paraguay

On 14 February 1988, General Alfredo Stroessner was re-elected for the eighth consecutive time for a period of five years. He has thus been the sole leader of Paraguay since 1954, a period of 34 years.

According to government figures, General Stroessner as candidate of the ruling Colorado Party received 88.6% of the ballot. Despite government assertions that there had been a 92.6% turn out, the Committee for Free Elections (CFE), composed of the National Agreement Coalition of four opposition parties and labour and student organisations, claimed that abstentionism exceeded 50% in many areas. Opposition leaders and foreign observers denounced the widespread irregularities, including the prevention of secret voting, the stuffing of ballot boxes, the registration of voters who had died and intimidation by Colorado Party members at polling stations.

General Stroessner was presented as the only politician able to govern the country and indeed, without any real opposition candidate and fraudulent elections, the result was to be expected.

Hope was expressed in the article on Paraguay in the June 1987 issue of the Review (No.38) that the lifting of the state of siege in April 1987 would bring about an improvement in the human rights situation. However, Lord Avebury, Chairman of the British parliamentary human rights group which visited Paraguay in 1987 warned that the new penal code being drafted to replace the state of siege contained clauses which would enable the government to continue to repress political activities. Its measures dealt with sedition, rebellion, mutiny, breach of the peace and an all-encom-

passing definition of riotous assembly believed to cover all opposition meetings of over four people. On July 24, 1987, the Episcopal Conference of Paraguay rejected the proposed law on the grounds that it would "indefinitely maintain authoritarian rule".

Since the lifting of the state of siege, violations of human rights have continued. Colorado Party membership is tightly controlled and provides the basic criterion for employment in the government, including the judiciary and the security services. After the Colorado Party convention, press accounts indicated that dozens of people were dismissed from government payrolls because of their refusal to support the ascendant faction of the party. For the celebration of the centennial of the Colorado Party in 1987 a large rally was organised to which public servants were taken by bus. Those who did not participate were asked to submit medical certificates or risk dismissal.

Any form of opposition to the government is stifled and the suppression of demonstrations is marked by the increasing use of armed civilian vigilante groups linked to the militant faction of the Colorado Party

On 30 July, 1987, the Civic Assembly was held in Asuncion, organized by the Asamblea Nacional (a coalition of opposition parties) to demand the right of assembly. The meeting, attended by an estimated 500 people, was broken up by the police who used clubs and plated cable wire to disperse the participants, injuring 30 people and arresting 27. The latter were released on 3 August 1987. Two earlier civic assembly protests on 11 and 23 July, 1987 were similarly broken

up and their leaders arrested. There were also reports that on 5 November 1987, Colorado Party leaders encouraged armed groups to harass and assault members of the opposition.

Criticisms of the Stroessner government and reporting of its violations of human rights is not tolerated. The Catholic Church has been a particular target and the case of Father de la Vega, a Spanish Jesuit who worked for 11 years as Professor at the Catholic University of Asunción, provides a pertinent example. On 14 July, he gave a lecture on the theology of liberation and was detained the following day along with Hugo Yubi who had been involved in the organisation of the conference. They were interrogated in the headquarters of the Intelligence Division of the Police and detained incommunicado for two days. When they were released, Father de la Vega made public declarations deploring his warrantless abduction by the police who prohibited him from contacting a lawyer. On 25 July 1987, Father de la Vega was again violently abducted from his house by three men in plain clothes, beaten up and forced into a car headed for the airport. He was left at the Argentinian check-point without any documentation. After his passport had been fetched, he was expelled. Migration Law 470 requires a judicial order and a right to defence for all persons expelled from the country. The next day, the government acknowledged his expulsion, the Under-Secretary of State declaring it "an act of sovereignty executed by the State to protect the public order". Father Kevin O'Higgins, an Irish Jesuit, stated that de la Vega had simply been a victim of the polemic over the theology of liberation which began with the visit of the Pope. Monseigneur Carlos Villalba Aquino, Bishop of Misiones, stated that "there is

no doubt that the state openly persecutes and threatens the Church".

Despite broad constitutional assurances of freedom of speech and the press, the government has imposed serious restrictions in several cases. Direct criticism of the President, members of his family and military and civilian leaders is prohibited. The case of El Pueblo, which was the last remaining opposition newspaper, is a classic example. On 28 August 1987, it was closed down by resolution 643 of the Minister of the Interior, allegedly for preaching "hatred and class warfare". Police occupied El Pueblo headquarters in Asuncion, and confiscated files and equipment. On 31 August 1987, a charge was filed against the opposition politician Hermes Rafael Saguier for the crime of "instigation to sedition" under the law "for the defence of public peace and freedom of the people" (Law 209), because of the views he expressed about the armed forces at a human rights conference sponsored by the Churches Committee. The Public Prosecutor extended the charge to the directors of El Pueblo as accomplices owing to the publication of extracts of Mr. Saguier's declaration. Judge Godoy Uriarte then confirmed the resolution of the Minister to close down the paper. On 3 September, Mr. Rafael Saguier, who was already in prison for his participation in the Civic Assembly, was transferred to the Special Headquarters of the Police in Tacumbu Prison. There he was kept incommunicado for 14 days without access to his family or lawyer. Concerned about his brother, Miguel Saguier presented a habeas corpus petition to the Supreme Court on 15 September. The Bar Association sent a note of concern to the Supreme Court qualifying the situation as a denial of justice and a violation of the due process of law when, in theory, no

state of emergency was in force. Judge Llanes converted Saguier's detention to preventive detention and ordered his prosecution for the crime of sedition as requested by the Public Prosecutor.

El Pueblo was the last remaining opposition newspaper to be banned following the closure of ABC Color in March 1984 and Radio Ñanduti in January 1987.

The lifting of the state of siege in Paraguay has not resulted in a quantitative improvement in the human rights situation. Reports of restrictions and violations of basic human rights, including

an increasing number of arbitrary arrests, torture of landless peasants, and the ongoing restrictions on the freedom of the press are still frequent. Most of the repressive regulations are now part of the ordinary penal legislation rather than legislation of exception. In this way the state is able to crush any dissent and maintain the population in subservience. The lifting of the state of siege has proved to be largely a cosmetic facade behind which violations of human rights continue unabated.

Romania

Several European countries, among them Hungary, Austria and the twelve members of the European Community have expressed concern about the project of the government of Romania calling for 7,000 of the country's 13,000 villages to be leveled and their inhabitants to be relocated in about 600 "agro-industrial centres" by 1995. This decision to eliminate all villages with fewer than 3,000 residents is already being enforced and the inhabitants of four villages have already been resettled.

The main victims of the resettlement policy are Hungarians, Germans, Gypsies, Serbs, Ukrainians, Turks and Tartars, whose families have lived for centuries in Transylvania, and other parts of Romania. The Hungarians, with approximately two million, make up the largest minority group and constitute the largest minority in Europe. Out of Romania's population of 22.7 million, 11 per cent are

accounted for by these various minorities.

The resettled villagers are now tenants in tower block buildings erected in townships of over 3,000 inhabitants. Their apartments are without sufficient heating, and there are only communal washing and toilet facilities. The government's justification for these concrete slums are that the enlarged villages will raise the standards of living of the rural people to the level of town dwellers, and that the resettlements will release more land for agriculture. The alleged economic advantages of this policy have been challenged and the plan to turn all rural people into town dwellers is a deliberate attempt to destroy their culture, their traditions and their way of life, as well as to disperse these ethnic minorities and convert them in time into Romanians. This is in line with their educational policies.

Up to the 1950's, there were separate schools for Hungarians in their own language. However, in 1958 began the dismantling of the Hungarian language educational network, and now there are no Hungarian schools or universities.

In the case of the Hungarians of Transylvania, the minority had had a long tradition of a high level of education - notably through the religious schools - and had a well educated intelligentsia and a well qualified skilled working class. Immediately after the second world war, the full educational network was organised, including nursery, primary, secondary and university levels. Hungarian language schools were opened throughout Transylvania and other parts of Romania. By 1958 there were 72 such schools and as from that date, the government gradually converted these schools into Romanian schools, so that by the end of the 1970's there were no Hungarian schools left. Bolyai University and an agricultural college, both in Cluj, were taken over. Only the Medical Pharmaceutical Faculty at Triger Munes (which is still in existence) remained with teaching in Hungarian.

The main Hungarian complaints in the cultural field focus on shortages of teaching materials and increasing control by non-Hungarian speaking Romanians. For example, after the merger of the Hungarian theatre with the Romanian language theatre at Tirgu Muses, a new Romanian director was appointed who knew no Hungarian. Hungarian newspapers have been curtailed. According to Hungarians, one of the most harmful features of Romanian policy is the re-writing of the history of Transylvania in such a way as to exclude them completely. Moreover, the Hungarians claim that development policies are directed at forced assimilation of the national minorities,

and that they are often excluded from policy-making organs.

There appears to be a conscious effort to settle Romanians in Hungarian areas and to appoint them to jobs that Hungarians could do just as well. Hungarians argue that those who succeed in completing their education face great difficulties in finding employment in Transylvania and are obliged to look for work in the Regat. This has a two-fold impact: on the one hand, it breaks the links between the Hungarian intelligentsia and the remainder of the community, particularly the workers and peasants, with the result that upward mobility comes to a standstill. On the other hand, it assists the assimilation of the Hungarian professional class. The destruction will involve the demolition of villages, historic monuments, churches and graveyards of great architectural value, including several Orthodox churches and monasteries, some dating back to the 16th century.

This so-called "settlement organization programme", constitutes a violation of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, in particular the articles which guarantee ethnic and linguistic minorities the continuation of their own cultural life, and the right to a free choice of residence. Furthermore, it is in breach of Romania's obligations under the Helsinki Final Act, which states in Principle VII on Respect for Human Rights that "The Participating States on whose territory national minorities exist will respect the rights of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere."

The situation in Transylvania has be-

come a serious international issue, especially due to the many emigration flows it has provoked from Romania to Hungary and other countries. In early March 1988, Hungary's Prime Minister Grosz stated that 10,000 Romanian citizens had sought refuge in his country. Church sources later revealed that the figure had risen by 3,000 in the third week of March alone. About 95% of these people are members of the Hungarian minority in

Transylvania. About a third of the refugees have left close family relations behind, a spouse, children or parents. Their hopes that these will soon follow them to Hungary are seldom fulfilled. These refugees are not encouraged to return to Romania because they would be subject to punishment, and Hungary has decided not to force anyone, not even ethnic Romanians, to return to Romania against their will.

Sudan

An article in the ICJ Review (No. 36) portrayed the efforts of the government in its will to restore democracy in Sudan. Emphasis was placed on respect for the Rule of Law, not only in intention but also by the creation of structures guaranteeing fundamental human rights for all, and provisions for reparations for past violations. Although the fall of the Nimeiri regime was followed by encouraging measures in the field of human rights (ratification of both International Covenants and the African Charter, and the signing of the Convention against Torture), the situation in the South remains preoccupying.

The conflict in the South dating back to 1958 is complex. As mentioned by many observers, a military solution would merely exacerbate the feelings of frustration of the black populations of the South. These no longer count their dead and approximately 250,000, most of them from the Dinka tribe, the main ethnic group in the southern region of the country, have moved into exile in South-Western Ethiopia. In March 1987, a thousand Dinkas were killed at Al Dien by mem-

bers of the Rizeigat Arab tribe who had been issued by the government with guns for their self-protection. This Arab tribe constitutes a majority in the city which occupies a strategic position in the war opposing the government and the Sudan People's Liberation Army (SPLA). Far from being isolated, Al Dien is an important commercial centre linked to many other centres, either by road or by rail. Most of the Dinkas died, burnt alive, in the train carriages where they had been placed for their "security" with the "intention" of bringing them to Nyala. Among them, were not only men and women, but also young children. Many witnesses who survived the massacre of Al Dien strongly criticised the role of the police who withdrew from the scene at the beginning of the executions. A witness report by one of the members of the police force of Al Dien states that the deputy police officer "was in a state of shock; he was frightened and pale, and his orders were confused. When he arrived at the scene of the massacre, he was very frightened at the sight of all the dead bodies, the num-

ber of which increased at every street corner. He returned to his office and abandoned his men. He had ordered us not to shoot the assailants". This witness declared: "An immigration officer, Abdel-Rahman al-Fidelli, of the Rizeigat tribe, had shot the assailants to protect the Dinkas".

According to concurring testimonies, the police had previous knowledge of a possible attack by the Rizeigat on the Dinka tribes. However, the Prime Minister Sadiq El-Mahdi and the Minister of the Interior, Sid Ahmad al-Hussein declared that the massacre at Al-Dien was an act of retaliation for an attack of the SPLA on Safaha, a zone situated South of Al Dien, one day away by lorry.

On 15 September 1987, due to the controversy surrounding this massacre, the Prime Minister established a Commission to determine the responsibility of the regional officials and the losses incurred, and to propose means to prevent the recurrence of such incidents. The investigations of this Commission, as far as is known, were not rendered public and no judicial procedures were initiated against the perpetrators of the massacre.

According to an unofficial source, some Rizeigats were under close supervision after the massacre but it seems that they were not brought before a judge. The Sudanese government should take firm measures to put an end to these murderous activities of the Rizeigat militia. Such measures would have avoided the political assassinations perpetrated at Wau by members of the armed forces during the months of August and September 1987, following the Al Dien massacre.

Most of the "September Laws" introduced in 1983 under the regime of Nimeiri, are still applicable. According to the President of the Sudanese Organisa-

tion of human rights, there were approximately 400 condemned to amputation in the prison of Kober and Omdurman, awaiting a decision of the superior jurisdictions in June 1987. Since then, numerous condemnations to amputation have been confirmed, but none have been carried out to date. A motion of the National Islamic Front requesting that "confirmed sentences be carried out" was rejected by a majority vote of the Constituent Assembly. There was however no formal resolution suspending or rescinding the execution sentences. In the prison of Wed Medani, 15 of those condemned are still under sentence of amputation. According to a statement of the director of the prison, the delay in the execution of their sentences is due to an absence of technical means.

It is not clear what would happen to those condemned if the Sharia law is re-introduced as confirmed by the Prime Minister in a declaration of 29 April 1988. Will they be amputated or will they benefit from a measure of clemency thereby marking the beginning of a new legal era? According to the Radio of Omdurman, the Prime Minister declared: "It is clear that the Muslims have a right to their laws, to apply them whenever they want in the manner of their choice. They can do this as long as they do not impinge upon the human, civil and religious rights of non-Muslims. It is not true that we want to impose the Sharia on non-Muslims. We do not want this and neither does a single Muslim". This declaration does not seem convincing and the Sharia as a legal system remains a very controversial issue both to non-Muslims and Muslims.

According to Taha Ibrahim, an eminent Sudanese lawyer and reputed specialist in the Sharia, the sanctions provided in the draft Islamic code would

apply to the estimated one million displaced Southerners living in Khartoum. Over the last few years, this essentially Christian population fled from the war and famine which rages in the South.

The approval on 11 September 1988 of the new Islamic code by the Council of Ministers is seen as a threat to the future of these displaced southern populations.

The adoption of the new Islamic code by the Constituent Assembly was expected since the Southerners and the Northerners who opposed it constitute a minority. However, on 4 October 1988, as a result of a long and arduous session lasting seven hours, the Sudanese parliament rejected the draft submitted by the Minister of Justice, leader of the National Islamic Front. By rejecting the draft, the Sudanese parliamentarians sought to prevent John Garang, head of the SPLA, from becoming even more radical on the eve of a possible meeting with the Prime Minister, Sadiq El-Mahdi. It is now up to the legislative parliamentary Committee to draw up the propositions of Islamic-inspired laws, as provided for in the motion adopted, without the participation of a deputy from the Communist group, Mr. Izzedine Ali Amir, and the Southern parliamentarians. By leaving the room before the vote of the motion, they wanted to protest against the "fact that to draw up the new Islamic laws will

lead to the division of the country between the Arabic-Muslim North and the African, Animist and Christian South. This motion preserves the capital, Khartoum, in which about two million Southerners live, from the application of possible new Islamic laws. But would it not be better to envisage a simple return to the laic laws of 1974 in order to guarantee individual freedoms and save national unity?

The leaders of the Christian churches have vigorously denounced the initiative of the government to re-introduce the Sharia: "We reject the said Sharia laws because they deal with the rights of Christians as grants and not legal and constitutional rights", and "the enforcement of religious Islamic laws on non-Muslims overrides the rights of one third of the people to live according to their religious and cultural convictions and traditions." They view the re-introduction of Islamic laws at the present historical juncture as a major obstacle to peace and the just settlement of the current civil war in Sudan.

Indeed, a deterioration of the situation is not to be excluded as long as the government and the Sudan People's Liberation Movement have not entered into a serious dialogue to discuss a cease-fire and the drafting of a new or revised constitution.

Tibet

In September and October 1987 and again in March 1988, Tibetans demon-

strated for independence from China. Since then, the Tibetan issue has re-

ceived much attention in the press and there have been several reports* by human rights groups on the human rights situation in Tibet and the alleged brutality with which the demonstrations were dealt with by the Chinese authorities.

According to press reports on the September 1987 demonstration, a group of monks and their supporters marched towards government buildings shouting slogans for independence. They were promptly arrested and beaten up by members of the Public Security Bureau (PSB). On the occasion of the 1 October demonstration a group of fifty to sixty Tibetans were arrested and taken to the offices of the PSB. Following their arrest, a crowd of two to three thousand gathered in front of the PSB office and demanded the release of those arrested. The demonstrators, realising that they were being photographed by the Chinese, threw stones at the photographers and then tried to enter forcefully into the PSB building. This resulted in PSB forces shooting at the demonstrators leading to the death of thirteen Tibetans and injuring several others. On 6 October 1987, a group of monks demonstrated and were promptly arrested.

The next major demonstration took place in March 1988 during an important festival for Tibetans called the Monlam Prayer festival. According to press reports, prior to the festival, tensions had increased between the monks and the authorities. The monks refused to hold the festival without the release of those arrested during the September and October demonstrations and the authorities insisted that the festival be held. Ulti-

mately, the festival was held with a heavy presence of the Chinese army and police. At the conclusion of the traditional procession, some monks shouted slogans for the release of those in detention and for the granting of independence. They were immediately arrested. According to reports, the large number of devotees who formed part of the procession started throwing stones, and the Chinese troops stormed the Jo-Khang temple leading to the killing of some monks within the temple, which in turn led to an uprising of the Tibetan population protesting violently. The violence continued until midnight leaving sixteen monks dead and many more wounded. Following the riots, a large number of Tibetans were arrested and there were allegations of ill-treatment and torture.

According to the Tibetans, the human rights violations committed by the law enforcement agencies following the demonstrations in 1987 and 1988 are part of a larger problem, namely that of living under alien rule. The Chinese and the Tibetans each put forward their own version of history concerning the status of Tibet. According to the Chinese, Tibet has always been part of China. The Tibetans claim that they have always been independent until 1950, when they were forced to negotiate with the Chinese central government and to accede to the agreement on 'Measures for the Peaceful Liberation of Tibet' signed in May 1951. (The historical background to this conflict is set out in the Asia Watch report on Human Rights in Tibet).

Under the 1951 agreement, the Chinese authorities assured the Tibetans

* "Human Rights in Tibet." An Asia Watch Report, Feb-1988.

"Tibet In China." An International Alert Report, Aug-1988.

"The Chinese and Human Rights In Tibet." A report to the British Parliamentary human rights Group, by W.P.Ledger.

that religious freedom would be guaranteed and that there would be no alteration in the existing political system nor in the powers of the Dalai Lama, Tibet's spiritual and temporal leader. Subsequent to this agreement, tensions arose between the Tibetan population in the eastern areas of the Tibetan plateau and the Chinese over the policies that were being carried out in these areas, which eventually culminated in a large scale uprising in Lhasa in 1959. As a result of the uprising and the brutal manner in which it was crushed, the Dalai Lama along with nearly 100,000 of his followers fled to India and established a government in exile.

In September 1965 central Tibet was constituted as an autonomous region (Tibetan Autonomous Region or TAR) and the contiguous areas with a Tibetan population were made part of neighbouring Chinese provinces. Between 1966 and 1980, particularly during the height of the cultural revolution, the basic rights of the Tibetans were systematically violated. Tibetans were the target of the 'Destroy the Four Olds' campaign' which involved the destruction of Tibetan ideas, culture, customs and habits. Moreover, the Tibetans' strong identification with their language and religion was seen as contributing to 'splittism' or secession. Nearly 6,000 temples and monasteries and some Buddhist universities were destroyed and the use of the Tibetan language was discouraged. In the economic field, a system of communes was introduced with state control of all food supplies. These were granted according to the amount of 'work points' obtained. The effect of some of the imposed policies is exemplified by the forced production of wheat rather than barley, the traditional Tibetan crop, leading to crop failure and widespread fam-

ine. The post Cultural - Revolution period saw changes in the official policy towards Tibetans and other minorities. The Chinese authorities have publicly admitted to making mistakes in Tibet and have endeavoured to make amends. As part of the new policy, efforts were made to bring more Tibetans into local government, to restore temples and open up the region to tourism. The Chinese authorities, as an expression of rapprochement with the Dalai Lama, allowed three fact-finding missions on his behalf to visit Tibet between 1979 and 1980.

In spite of such conciliatory policies, the confidence of the Tibetans is not fully restored and their deep-rooted antagonism finds expression in the demonstrations referred to earlier. The two main grievances of the Tibetans are restrictions on the practice of their religion and the large-scale settlement of Han Chinese in the Tibetan region. The limitations on religious freedom is illustrated by the fact that to become a monk one needs the approval of the Religious Affairs Commission (which since last year has been combined with the National Minorities Commission). Furthermore, the Tibetans complain that only a few of the temples and monasteries destroyed during the previous decade are being restored, and when the local population attempt to rebuild their temples, they are arrested for doing so without permission. The management of monasteries, including the control over their funds, is under strict supervision and restrictions are placed on those publicly offering prayers for the Dalai Lama, who is most revered and whose exile remains an important underlying cause for the resentment against the Chinese. In fact, some of the restrictions imposed on religious freedom violate the stated policy of the Chi-

nese government. For example, Article 11 of the 1984 Law on 'Regional National Autonomy for Minority Nationalities' states that, "The autonomous organs of regional national autonomy protect the freedom of religious belief of citizens of all nationalities. No state organs or public organisations can compel citizens to believe in or not to believe in religion, nor can they discriminate against citizens who believe in religion..."

As for the settlement of Han Chinese in the Tibetan region, the fear seems to be one of gradual sinocization of the region thereby gradually destroying the Tibetan culture and way of life. It is impossible to assess the actual extent of Chinese migration and how much it can be attributed to the active policy of the government. The official explanation given for the presence of the large number of Han Chinese is that they are professionals, such as doctors and engineers who are needed to train Tibetans and develop the Tibetan economy. The opening up of Tibet for tourism and the recent policy of encouraging a market oriented economy has also encouraged Chinese entrepreneurs to settle in Tibet. According to the Asia Watch Report, "much of what one reads about the development of Tibet is concerned more with the region than with its people... more and more it is a Chinese economy that is sprouting in the urban areas of Tibet, and the Tibetans are marginal to it".

The question of participation in economic activities and the granting of equal employment opportunities are re-

lated to the educational status of the Tibetans, who are discriminated against, all higher education being carried on in the Chinese language. All jobs in the government sector require a good knowledge of Chinese and selection is made on the basis of examinations held in Chinese. However, the Chinese authorities deny all allegations of discrimination against Tibetans, which include the allegations of Sinocization of the region as well as those concerning arbitrary arrests, torture etc.. These cannot be verified unless the authorities allow independent human rights organisations to visit Tibet and report on the actual situation. The Chinese authorities have turned down requests by non-governmental organisations, including the ICJ, to visit Tibet to enquire into the respect of the Rule of Law and human rights.

As stated at the beginning of this article, for the Tibetans the status of Tibet is linked to the question of human rights violations. The Dalai lama has made new proposals concerning Tibetan-Chinese relations. He has proposed: that China grant local self-government to Tibet leaving Tibetan foreign policy and military affairs in Chinese hands; the transformation of the whole of Tibet into a Zone of Peace; the abandonment of China's population transfer policy; respect for human rights; and the restoration and protection of Tibet's natural environment. The only reaction of the Chinese is their assertion that they have "sacred sovereignty" over Tibet and will not allow independence in any form.

COMMENTARIES

UN Sub-Commission on Discrimination and Minorities

The fortieth session of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities took place from 8 August to 2 September 1988 in Geneva.

Meeting for the first time after the election of its members by the Commission on Human Rights - half for two year terms, the other half for four year terms - the new Sub-Commission carried out its work in a less politicized manner than the departing Sub-Commission. This was partly due to the improvement in East-West relations as well as to the election of 13 new members.

In this spirit of cooperation, the Sub-Commission was able to make progress in several key areas which had previously been stalled including a second optional protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty; a draft declaration on the independence of judges and lawyers; and a declaration on the rights of the mentally ill. In addition, the Sub-Commission took a major step towards elaboration of a set of principles on the rights of indigenous peoples. When it came to dealing with actual situations of human rights violations, however, the Sub-Commission was in some cases less effective.

Indigenous Peoples

The pre-sessional Working Group on Indigenous Populations was once again one of the most vital forces in the U.N. system, bringing together 380 persons including indigenous people, NGOs and governments. This year it discussed the first draft by Chairwoman Daes (Greece) of an important declaration on indigenous rights being prepared ultimately for the General Assembly. The 28-point draft combines individual and collective rights with a special emphasis on the latter as an essential and inherent element of indigenous rights. It also provides for protection of indigenous identities as manifested in cultures, languages, religions, traditions and customs and the introduction of indigenous autonomy. While most indigenous organisations felt the draft did not adequately address the issues of self-determination and collective land rights, some governments believed that the draft went too far. The Sub-Commission voted to circulate the draft for comments to governments, indigenous peoples and NGOs and asked Madame Daes to prepare a second draft for next year's session based on these comments.

The Working Group and the Sub-Com-

mission endorsed the outline prepared by expert Alfonso Martinez (Cuba) on his "Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations", an issue of particular concern to indigenous peoples. Furthermore, the Sub-Commission recommended that the "International Year of the World's Indigenous Populations" originally proposed by the Working Group and the Sub-Commission for 1992 (but blocked by Spain at the Commission), should instead be scheduled for 1993 to coincide with the end of the Second Decade on Racism.

The Secretary-General of the ICJ, Niall MacDermot, read a statement submitted on behalf of 26 NGOs. It said that urgent action on the part of the U.N. was needed to bring to an end the violations of human rights of indigenous people and assure their existence. The 26 NGOs noted a discrepancy between the happy conditions reported by governments and those brought out by the indigenous peoples themselves who reported on genocide, torture and disappearances, treaty violations, denial of subsistence, inadequate food and shelter and other human rights abuses. This discrepancy was in itself symptomatic of a failure by those States to acknowledge the existence of abuses against indigenous peoples within their own jurisdictions.

Contemporary Forms of Slavery

The newly-renamed pre-sessional Working Group on Contemporary Forms of Slavery (formerly "Working Group on Slavery") received increased attention this year under the leadership of expert Eide. It had before it two in-depth studies, one on the sale of children and the

other on the human rights of sexual minorities, which was prepared by the former French ambassador in Geneva Mr. Jean Fernand-Laurent (CN 4/Sub.2/1988/30 and 31). In response to a request by the Commission, the Working Group prepared a programme of action for the years 1989-1991. Apart from the two main agenda items dealing with a review of contemporary forms of slavery and the prevention of traffic in persons, the main themes of future sessions will be: prevention of sale of children, child prostitution and child pornography (1989), eradication of the exploitation of child labour, and of debt bondage (1990); and prevention of the exploitation of prostitution and of traffic in persons (1991). Members of the Sub-Commission also recommended that the Working Group follow up the question of the sale of children for organ transplants.

Scientific Development, Disability

Under-Secretary-General Mårtenson, in introducing this item, urged that necessary steps be undertaken to ensure that the results of scientific and technological progress be used exclusively in the interest of peace, for the benefit of mankind and for the promotion and encouragement of human rights. He also emphasised the need to establish guidelines in the field of computerized files and for the protection of persons detained on the grounds of mental illness.

The ICJ made a statement concerning the relationship between AIDS and human rights, expressing concern about the increasing discrimination against persons who are HIV positive and those who are suspected of being infected because they belong to certain ethnic, cul-

tural or sexual groups.

In 1984, expert Despouy (Argentina), began a study of the relationship between human rights and disability, including discrimination against disabled persons, *apartheid* as it relates to disability, institutionalization, and economic, social and cultural rights as they relate to disability. In the 1988 progress report, the Special Rapporteur noted that his study covered, *inter alia*, violations of human rights which might lead to disability, such as amputation as a punishment, forced sterilization, castration, female circumcision, the blinding of detainees as an alternative to detention, and institutional abuse, including the use of drugs.

Under-development, he said, including lack of health care, food and education, are major factors contributing to disability. Several speakers suggested the disabled be guaranteed the best available care, techniques and appliances they require for an independent life.

The Special Rapporteur was asked to submit his final report at the next session. Under the same agenda item, expert Varela (Costa Rica) was asked to prepare a study on AIDS and human rights for the next session.

The sessional Working Group on Mental Health under the Chairmanship of expert Palley (U.K.) succeeded in completing its revision of the Draft Principles appended to the Report of Dr. Erica Daes. This was made possible by the agreement of the Working Group to hold numerous informal meetings outside normal working hours, and by the indefatigable contribution of its Chairperson. Consequently, the task of finishing the revision, which was expected to last several more years, was completed in one year.

In presenting the report to the Sub-Commission, Professor Palley recalled that the principles were based on the conclusions of two seminars organised by the ICJ, and expressed the thanks of the Working Group for the assistance it had received from the representative of the World Health Organisation and some specialist NGOs, including the ICJ.

In its resolution, the Sub-Commission referred the report to the Commission, and suggested that it request the Secretary-General to transmit it to member States, specialised agencies and NGO's for comments and suggestions.

Administration of Justice

The Sub-Commission decided, by consensus, to transmit to the Commission the analysis by the Special Rapporteur, Marc Bossuyt, of the proposal to elaborate a second optional protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty. Last year a similar proposal was narrowly defeated.

Similarly, the Sub-Commission after two successive deferrals, referred to the Commission for further action the Draft Declaration on the Independence of Justice which had been revised by the Special Rapporteur, Dr. L.M. Singhvi, in light of the comments received from several governments. Various members of the Sub-Commission had reservations about the very detailed nature of the declaration, as well as the wisdom of proceeding with this standard-setting at the same time as the Committee on Crime Prevention in Vienna (which had successfully promoted the more general Basic Principles on the Independence of the Judiciary) was engaged in preparing Basic Principles on the Role of Lawyers for

submission to the 1990 Congress on Crime Prevention and Control. However, the Sub-Commission felt that, eight years after Dr. Singhvi received his original mandate, it was time to send the declaration on to the Commission. This was particularly welcomed by the ICJ, as Dr. Singhvi's principles had been based largely on those produced in seminars organised by the ICJ.

The second report on states of emergency by expert Despouy contains an update to the list of states having, since 1 January 1985, proclaimed, extended or terminated a state of emergency, which Mr. Despouy had submitted in his first report. Noting that serious violations of human rights often occur under states of emergency, the Special Rapporteur discusses certain non-derogable rights such as the right to life and to be free from torture and other forms of cruel, inhuman and degrading treatment. Several experts pointed out that the report did not cover undeclared states of emergency, nor establish objective criteria justifying states of emergency. The final resolution invites governments to consider the adoption of legislation consistent with international instruments concerning states of emergency, and requests the Special Rapporteur, in conjunction with the Special Rapporteur on detention without charge or trial, to submit to the Sub-Commission draft standard provisions on emergency situations, including situations of internal unrest or tensions.

Under the hard-working chairmanship of alternate expert Carey (US), the sessional Working Group on Detention again produced several valuable initiatives. The ICJ, together with other NGOs, presented a draft Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances which was examined by the group in

several informal sessions. The Sub-Commission decided to send the draft to governments and NGOs for their comments, and asked the working group to complete work on the draft, preferably at its next session. Following the comments which the working group addressed last year to the Sixth Committee of the General Assembly concerning the Draft Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, it again prepared a list of comments on the draft as it had been amended.

The working group decided to separate the two aspects of the detention of persons for exercising their right to freedom of expression and opinion. Expert Joinet (France) will continue his study on administrative detention and expert Türk (Yugoslavia) will prepare the outline of a proposal for a study on the right to freedom of expression.

Mr. Joinet presented a preliminary oral report, and said he hoped to complete his study in 1989. It will cover:

- 1) administrative detention related to the prevention of serious disturbances of public order, including certain coercive measures taken by parties to a conflict in order to protect the civilian population in times of war, pursuant to Art. 42 of the Fourth Geneva Convention.
- 2) administrative detention related to the status of foreigners, including asylum seekers and refugees.
- 3) disciplinary sanctions applied in the form of administrative detention; and
- 4) administrative detention of persons in socially precarious situations, such as homeless or unemployed persons reduced to vagrancy.

Noting that administrative detention

itself was not prohibited by international law, but that it was the abuse of such detention which was prohibited, Mr. Joinet concurred with NGO's, such as the ICJ, which favour the establishment of certain minimum standards or norms.

Together with other NGO's, the ICJ delivered a statement criticising the wide use of administrative detention in Malaysia and Singapore to stifle political opposition.

On the recommendation of the working group, the Sub-Commission appointed expert Bautista (Philippines) to make a study on the plight of U.N. staff members who are detained or whose human rights are otherwise violated.

Among its other actions, the working group began to consider the human rights implications of the privatization of prisons and the execution of young offenders, both of which will, it is hoped, be examined in greater detail next year.

Human Rights Violations

For the second successive year, the Sub-Commission passed public resolutions expressing concern over only eight country situations (Albania, Chile, El Salvador, Guatemala, Haiti, Israel-Occupied territories, Namibia and South Africa). Ten such resolutions had been adopted in 1984 and 1985. A similar trend has emerged in the Commission where the mandates of two country rapporteurs (Guatemala and Haiti) were ended in 1987 - prematurely in the latter case if not in the former - while no new country rapporteur has been appointed since 1984.

Among the many NGO contributions, the ICJ made a statement on Iraqi use of chemical weapons, mass extrajudicial executions in Iraq, and human rights vio-

lations by the new military rulers in Haiti. (The offending government in Haiti was overthrown on 25 September 1988).

The most heated discussions took place regarding the situation in Iraq and East Timor. Amnesty International devoted its entire intervention on violations in Iraq, pointing to disappearances, mass extrajudicial executions, the "continuous" use of torture against the many political prisoners and widespread arbitrary detention. The ICJ co-sponsored the intervention of a Belgian doctor who gave first-hand testimony of Iraqi use of chemical weapons against the Kurdish town of Halabja. A report released days earlier by the Secretary-General described the "intensifying" Iraqi use of such illegal weapons. Nevertheless, a draft resolution on the situation in Iraq ran into stiff opposition from the five Arab members of the Sub-Commission. They were able to point, in public, to the peace negotiations between Iran and Iraq which were beginning in another room of the Palais des Nations just as voting got underway and, in private, to the consensus decision to put Iraq on the confidential procedure list for the Commission (a move reminiscent of Argentina's tactic during its "dirty war" of agreeing to be placed on the confidential list to avoid public debate). In the end, a motion not to take action on the resolution was passed 11-8 with 5 abstentions. The next week, tens of thousands of Iraqi Kurdish refugees arrived in Turkey, many bearing fresh wounds from chemical weapons.

The situation in East Timor was the focus of interventions by Portugal and Angola. Portugal noted that Indonesia had failed to comply with the request made in Sub-Commission resolution 1987/13 to allow unrestricted access and facilities to humanitarian organisations

and instead had "established a veritable barricade around East Timor". A draft resolution reiterated this request and called on Indonesia to observe the human rights of the people of East Timor. Despite ample evidence of continuing gross violations of human rights in East Timor, a strong lobbying effort by Indonesia resulted in the 10-9-5 passage of a motion to take no action on the resolution.

In the resolutions that were adopted, the Sub-Commission expressed "deep concern" about the treatment of minorities in Albania (12-4-6), and called upon the government to restore and guarantee the human rights and fundamental freedoms of ethnic and religious minorities, in particular the Greek minority, and to free all political prisoners.

In a strong resolution on Chile, the Sub-Commission by consensus expressed alarm at the impunity with which the police and security services operate in that country. It asked the Commission to urge the Chilean government to clarify the situation concerning disappeared persons, to suspend death sentences, to release political prisoners, to respect the right to life and to restore trade union freedom and indigenous rights.

The consensus resolution on El Salvador was also stronger than in previous years, expressing "deep concern" about the recent increase in human rights violations, the actions of death squads, and lack of freedom of association.

On Guatemala, about which no action was taken in 1987, a consensus resolution requested the Commission's expert under the advisory services programme, Mr. Héctor Gros Espiell, to pay particular attention in his next report to the obstacles encountered owing to the lack of co-operation by elements of the military

and security forces, and to indicate ways in which this could be remedied through advisory services.

The resolution on Haiti, which was promoted by the ICJ, deplored the violent interruption of the elections in November 1987 and the July 1988 coup and expressed its concern about the wide scale of extra-judicial executions, torture and ill-treatment of detainees. It called on the expert appointed to render advisory services to report to the Commission on how recent developments affected his ability to carry out his mandate and urged the Commission to consider the possibility of appointing a special rapporteur to study the human rights situation in Haiti without prejudice to the continuation of the advisory services.

The resolution adopted (16-1-7) concerning the situation in the Israeli-occupied territories, characterized the acts perpetrated by the Israeli occupation authorities as "crimes against humanity" and crimes of war under international law. It also affirmed the right of the Palestinian people to resist the Israeli occupation and supported the call for an international peace conference.

Two resolutions were adopted on Namibia, both by consensus. One expressed hope that the current negotiations for the independence of Namibia will be completed as soon as possible. The other notes that the Sub-Commission "should not confine its activities to passing judgement on countries or preparing draft documents on human rights, but should also help to enrich national legislation on human rights whenever requested to do so". It requested the Secretary-General to make available to the future Constituent Assembly of Namibia human rights advisory services, expressing the willingness of Sub-Commission members to provide assistance

in that regard.

Responding to a movement begun by John Humphrey, the first Director of the U.N. Human Rights Division, the Sub-Commission also passed, by consensus, a resolution on compensation for victims of gross violations of human rights. It recognizes that such victims should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage, and that in the event of the death of the victims as a result of such acts, their dependents should be entitled to fair and just compensation. The Sub-Commission will discuss the matter of compensation at its next session and consider the possibility of developing some basic principles and guidelines in this respect.

A long discussion was again devoted to how the Sub-Commission should treat information it receives on human rights violations. Concern has been raised in several quarters that, by using the same methods to respond to the same violations as the Commission, the Sub-Commission is not properly fulfilling its role as a body of independent experts. In response, Experts Eide (Norway) and Van Boven (Netherlands) prepared a working paper recalling that part of the Sub-Commission's mandate, under Commission resolution 8 (XXIII), was the preparation for the Commission of a "report" containing information on violations of human rights and fundamental freedoms from all available sources. In fact, this has not been done in 20 years. Rather, the Sub-Commission brings such situations to the attention of the Commission - in the form of short resolutions - often after they have already been under close public scrutiny by the Commission.

The working paper recommended that renewed attention should be given to making such a report, which could be

prepared by a working group and contain a summary of information presented to the Sub-Commission. Members could also seek, where necessary, further clarification from speakers who presented information to the Sub-Commission. In order to give the report a certain focus an omnibus resolution might be attached outlining trends and developments which could serve as an "early-warning device". The authors, and several other experts, noted the logistical difficulties involved in evaluating and summarizing the mass of information which would be received. Other experts pointed out that resolution 8 (XXIII) was adopted before the 1503 procedure was established, and that the latter serves the same purpose. Nevertheless, it is clear that the Eide/Van Boven proposal will command attention in the coming years as the Sub-Commission attempts to make its work more effective.

One NGO, the Four Directions Council argued that there seemed to be a lack of regard for the root causes of violence which were mostly socio-economic. The United Nations, it said, should be encouraging measures such as land reform, debt relief, economic co-operation and improved educational opportunities rather than merely focusing on symptoms such as torture and other human rights abuses.

Promotion and Protection of Human Rights

Under this and other related agenda items there were five sub-items dealing with minorities and other vulnerable groups, in particular women and children. The Sub-Commission also had before it two studies prepared by Special

Rapporteurs; one by expert Daes (Greece) on the status of the individual in contemporary international law and one by former expert Mubanga-Chipoya (Zambia) on 'the right of everyone to leave any country, including his own, and to return to his country, and to have the possibility to enter other countries without discrimination.'

The ICJ made two statements, one on divorce laws discriminative against women in Pakistan, and another on the treatment of minorities in Romania. The ICJ expressed concern about the Romanian government's project calling for 7,000 out of the country's 13,000 villages to be leveled and their mostly ethnic Hungarian inhabitants to be relocated in about 600 "agro-industrial centers" by 1995. The ICJ contended that this so-called "settlement organisation programme" constituted a violation of Romania's obligations under the Covenants as well as a breach of the Helsinki Final Act.

Without sufficient time to analyse the Daes and Mubanga-Chipoya reports, the Sub-Commission decided that they should be up-dated and reconsidered at the next session. It also adopted a resolution on the protection of human rights defenders, including lawyers, calling for effective measures of protection for those working to promote and protect human rights, as well as complainants and witnesses subject to 'threats to life or limb'.

Under this item, two important initiatives were taken. One resolution invited expert Palley to prepare a working paper on possible ways and means to facilitate the peaceful resolution of situations involving minorities. Another appointed expert Türk, was to begin an analysis of the problems related to the realization of economic, social and cultural rights.

Racial Discrimination

This agenda item comprised two parts: (a) measures to combat racism and racial discrimination and, (b) adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to South Africa. The debate centered on two reports respectively by experts Eide (Norway) and Khalifa (Egypt).

Mr. Eide summarized the achievements made and obstacles encountered during the Second Decade of Action to Combat Racism and Racial Discrimination, and noted the constant refusal of the South African régime to co-operate with the international community in efforts to eliminate racism.

Mr. Khalifa reported on his up-dated list of companies and banks co-operating with South Africa. He pointed out the need for a more refined list reflecting the distribution of their activities by economic sectors. He also expressed the opinion that selective sanctions imposed by only six industrial powers would be sufficient to bring an end to the *apartheid* system.

Disappeared Argentine Children

Last year, expert van Boven had been appointed, largely through the efforts of the then - Chairman Despouy (Argentina)- to investigate the cases of Argentine children who had disappeared during the military dictatorship and who had subsequently been located in Paraguay. In his report, van Boven noted that Argentina had fully cooperated with his mission there but that Paraguay had refused even to allow him to visit the country. Nevertheless, he questioned whether the Argentine authorities had done all

they could to locate and repatriate the children, noting that most of the work (in locating 45 of 208 such children) had been accomplished by the Grandmothers of the Plaza de Mayo. Both the observer from Argentina and alternate expert Flores (Argentina), took sharp issue with van Boven's criticisms.

Special Rapporteur Dumitru Mazilu

The Sub-Commission reacted strongly to the second non-appearance of former Romanian expert Dumitru Mazilu who had been appointed Special Rapporteur on youth and human rights. At the opening session both the outgoing chairman, Mr. Despouy (Argentina) and the Under-Secretary General for Human Rights, Mr. Mårtenson, expressed concern about Mr. Mazilu's case. According to a hand-written letter from Mr. Mazilu which was circulated at the Sub-Commission, the Romanian government had refused to allow him to attend the meeting in 1987 and police are now following him day and night. The Romanian government did not nominate him for re-election in 1988, but submitted the name of another candidate who was elected by a bare majority by the Commission on Human Rights.

The Sub-Commission sent a cable asking the Secretary-General "to bring to the Government's attention the Sub-Commission's urgent need to establish personal contact with Mr. Mazilu, and to convey the request that the Government assist in locating Mr. Mazilu and to facilitate a visit to him by a member of the Sub-Commission and the Secretariat to help him in the completion of his study on Human Rights and Youth, if he so wishes."

The Government replied that the Sec-

retary-General had no juridical basis to intervene in a matter between a citizen and his government and rejected the request to allow a visit to Mr. Mazilu.

Subsequently, the Sub-Commission adopted a resolution (16-4-3) requesting the Secretary-General to again approach the government of Romania, and recommending that if the government refused the request, the Commission on Human Rights should, through the ECOSOC, ask the International Court of Justice for an advisory opinion on Mr. Mazilu's immunities as a United Nations Special Rapporteur.

Relations with NGOs, governments

Almost all information on violations of human rights considered by the Sub-Commission and the Commission is provided by NGOs. Indeed, without the contributions made by the representatives of victims of abuse, discussions in these fora would be abstract and perhaps meaningless. Nevertheless, in recent years, NGOs have come under increasing fire. Some governments accused of gross violations resort to *ad hominem* attacks on the reporting NGO rather than dealing with the issues of fact. NGOs have also been criticized for using too much time and for duplicated interventions. This year, an effort was made by NGO's to coordinate interventions and strategies, resulting in several joint presentations to the Sub-Commission.

While some experts, including Treat (U.S.A.), complained of being harassed by NGOs in support of particular resolutions, only expert Eide raised the more troubling question of governmental pressure on the experts. The Peoples Republic of China (concerning Tibet), Indonesia

(concerning East Timor) and Iraq were each reported to have contacted governments asking them to put pressure on their supposedly independent experts. In the case of Indonesia, for example, two

experts not only withdrew their names as co-sponsors of a resolution on East Timor, but voted in favour of a motion not to consider the resolution.

AIDS and Discrimination

Over 120,000 cases of AIDS and those connected with the AIDS virus in 142 countries have been reported to the World Health Organisation (WHO). Its estimate of the number of those infected with the virus amounts to between 5 to 10 million.¹

Such is the toll of AIDS (acquired immunodeficiency syndrome) which has hit the world in the early 1980's and has spread insidiously across national, ethnic, cultural and sexual boundaries.

Most of the AIDS cases are concentrated in the Americas, Europe and Africa but countries in Asia and the Pacific have also been affected by the epidemic. AIDS was first discovered among homosexuals in North America. Since then, epidemics have been reported among drug users, prostitutes and minority groups, and recent figures have shown an increase among the heterosexual community.

The AIDS virus (HIV) is transmitted in four major ways; through sexual intercourse (the major route); through infected blood and blood products* (blood transfusion recipients and haemophiliacs are particularly exposed to this form of transmission); through the use of contaminated equipment (especially through the sharing of needles during drug abuse) and from mother to child before, during or shortly after birth. It may take a number of years before persons infected with the virus develop the AIDS disease. Nevertheless, they can transmit the virus to others by the methods stated above. Although there is no recorded evidence of HIV transmission through other forms of contact, the psychological, social and economic impact on the infected person's immediate circle and on society is substantial. This has led to the outbreak of what is known as the third epidemic;** the epidemic of stigmatisation,

* Such as the clotting agent given especially to haemophiliacs.

** The three epidemics (as described by WHO) represent phases in the invasion of the community by the AIDS virus. The first is the epidemic of silent infection which is often unnoticed, the second, after a delay of several years, is the epidemic of the disease AIDS.

persecution and discrimination of those infected or perceived to be infected because they belong to a certain cultural, ethnic, economic or sexual group.

The World Health Organisation, which has taken the leading role on this issue, has asserted that discrimination has widespread and serious consequences for public health and the control of the disease. The WHO says the effect of discrimination is that "persons already HIV-infected and those who are concerned they may be infected will actively avoid detection, and contact with health and social services will be lost. Those needing information, education and counselling or other support services would be 'driven underground'. The person who fears he or she may be infected would be reluctant to seek assistance out of fear of being reported - with severe personal consequences. The net result would be to seriously jeopardize educational outreach and thereby exacerbate the difficulty of preventing HIV infection".² Consequently, persons infected with the virus are entitled to the same privacy, confidentiality and humane treatment as that granted to persons suffering from other fatal diseases such as Hepatitis B also transmitted through infected blood.

The response to AIDS has provoked unparalleled reactions. Examples of discrimination at national level include compulsory testing for foreign students wanting to study in countries such as Germany, Belgium, the USSR and Czechoslovakia; Africans seeking work permits in Cyprus; foreigners other than Europeans who seek to work in South Africa; applicants for immigration visas and refugees and aliens seeking residence permits in the USA (but not tourists, students and business visitors).³ Persons who are HIV positive or thought

to be infected have been evicted from jobs and housing; have been refused life insurance and marriage licenses, and children have been barred from schools. In Brazil, Costa Rica, Puerto Rico, UK and the USA such persons have been denied medical or dental treatment⁴ and reportedly segregated and abused in hospitals and clinics. Violations of civil rights in the criminal justice system include court appointed attorneys refusing to represent persons thought to be infected, and many courts demand testing for the virus as a condition of bail, parole or probation for defendants accused of sex or drug-related crimes. The imposition of prison sentences for persons having infected another even unintentionally has also been reported. Those infected have been ostracised by family, friends and at times by society altogether.

The AIDS crisis has re-kindled some deep-seated prejudices within society towards certain groups. The fact that initially the main groups most at risk were already stigmatised by society such as homosexuals, prostitutes and drug users has led to widespread discrimination against individuals belonging to these groups or associated with them. Such attitudes are reinforced by certain sectors in society who regard such persons as violating the moral order and who should therefore be punished for their behaviour. One Brazilian Doctor for example wrote that "if AIDS is limited to homosexuals, it will be a disease of public service", some Soviet medical students actually welcomed the advent of AIDS because it would "wipe out all drug addicts, homosexuals and prostitutes"⁵ and others viewed AIDS as God's punishment inflicted upon those whose behaviour is deemed immoral.

Discrimination further arises from the phenomenon of society's constant search

for scapegoats which are blamed for events that are inexplicable or problems that cannot be solved. In the Middle Ages, witches were held responsible, in Hitler's Germany it was the Jews and the Communists, and in this case, homosexuals, drug users, prostitutes and minority groups are blamed.

Every society and every member of that society has an innate drive for self-preservation. In the face of a threat, in this case that of a deadly virus which can be communicated from person to person, every individual will set up barriers in order to avoid it. The natural response is therefore to avoid coming into contact with an infected person at all costs. However, in the light of existing scientific empirical evidence, AIDS is not transmitted through casual contact. Discrimination against those infected or perceived so is therefore unjustified especially in settings where contact need only be casual such as at the work place, in shops, schools, at home etc..." We therefore need to perform a difficult task, that of separating deeply irrational fear from scientific understanding".⁶

Many of the measures adopted to control AIDS have been introduced in response to societal pressures in the fight for self-preservation and the exclusion of those who pose a threat.

One of the responses to the AIDS crisis has been the enactment of AIDS legislation which has developed rapidly to face the threat and provide for measures such as the screening of blood; the notification of cases; the introduction of compulsory testing; and the mechanisms for dealing with those infected.

Some of these laws are justified both scientifically and ethically and contribute to the fight against the disease, such as the screening of blood and blood products to safeguard blood transfusion re-

cipients and haemophiliacs against infection. Others, however, are unjustified because they discriminate unnecessarily against individuals who are infected. Such laws pertain for example to the incarceration or isolation of individuals infected or perceived to be infected such as in Cuba and South Korea where those known to be infected are detained.⁷ Some of these laws are very severe such as for example the US public health statutes which are based upon the principle that the restriction of individual rights (such as the right to liberty and privacy) is justified by the avoidance of future harm to the community. The exercise of public health powers are therefore not restricted by procedural safeguards protective of individual rights, especially where they may imply the restriction of a person's liberty without the Commission of a criminal offense.

Such discriminatory legislation may have two kinds of effects. Firstly, it may lead lawyers and public health officials to employ harsh and unjustifiably restrictive measures. Secondly, it may promote fear of discrimination among those who are infected or fear infection who will consequently be driven underground and fail to come forward to benefit from public health programmes and control measures.

Another major response to AIDS has been the introduction of mandatory testing of certain groups or for certain purposes. Before carrying out any tests, it is important to consider reasons for testing, the use of the test results and the gains that can be achieved from such information. The test itself may not provide accurate information, firstly because it is taken only at one point in time thereby disregarding the three weeks to three months period between the time of infection and the appearance of antibodies in

the blood – a person who tests negative may therefore be found to be positive a few weeks later. Secondly, any person can become infected at a later date. Such measures may foster false assurances and consequently lead to increased transmission. There are insufficient resources to test the entire population and testing merely certain sections of society tends to result in action to “identify and segregate or even quarantine individuals found to be positive”.⁸ Such tests are only marginally useful. There are no justifiable restrictions which will reduce significantly the incidence of the disease, but the results, in the absence of appropriate measures of confidentiality, may easily be used to discriminate against those who are infected as exemplified by countries such as West Germany (Bavaria), Guatemala, Israel, Panama and South Korea which require mandatory testing of only certain categories of citizens.

Many of these measures seem merely to have provided palliative responses to the fear and helplessness so many individuals and countries are confronted with in the face of the AIDS crisis, but they contribute little if anything to AIDS control and they are a source of much AIDS-related discrimination. Indeed, they are more likely to lead to further spread of the disease by driving those infected underground.

The control of past epidemics of infectious diseases, especially those that are sexually transmitted has shown that: denial and repression of sexuality have failed; victim-blaming and moralising have failed; and medical interventions have failed. In the past, behavioural changes have often proved a significant

factor in disease control and at present, this seems to be the only major hope in preventing the spread of AIDS. Thus “the only vaccine we have at the moment.... is knowledge”.⁹

There are three major lines of defence in controlling AIDS. The first and foremost is education aimed at providing information about the transmission of the disease and a greater understanding of relevant high-risk behaviours as part of an AIDS prevention strategy.

The second is the establishment of public health programmes geared towards:

- providing voluntary testing sites and strict confidentiality of test results so that those infected can modify their behaviour, and
- easy access to health care, drug rehabilitation and counselling services.

The third is the prevention of discrimination of those infected or perceived to be infected, firstly because it violates fundamental rights as set out in the Universal Declaration of Human Rights and other international human rights instruments, and secondly because it has proved counterproductive in preventing the spread of AIDS.¹⁰ Discrimination can be avoided by encouraging voluntary rather than mandatory testing for the virus; confidentiality of test results; laws and policies accompanied with anti-discriminatory provisions for the protection of those infected; and calling on every member of society to portray compassion and understanding of those who must bear the burden of AIDS.

NOTES

- 1) As of June 1988, J. Mann "The Global Picture of AIDS" WHO, June 1988.
- 2) J. Mann "AIDS, discrimination and public health" WHO 1988.
- 3) WHO Foreign Office Document "AIDS related restrictions apparently in force - April 1988".
- 4) "The Third Epidemic: repercussions of the fear of AIDS" - Panos Institute, unpublished.
- 5) IBID.
- 6) Allan M. Brandt "AIDS, from social history to social policy" in Law, Medicine and Health Care, Vol. 14, No. 5-6 Dec. 1986, p. 241.
- 7) "The Third Epidemic: repercussions of the fear of AIDS" Panos Institute - unpublished.
- 8) Allan M. Brandt "AIDS, from social history to social policy" in Law, Medicine and Health Care Vol. 14 No. 5-6 Dec. 1986, p. 236.
- 9) M. Kirby "AIDS, dilemmas for decision-makers", p. 17 unpublished.
- 10) See examples described in the Human Rights Internet Reporter, Summer 1988.

Malaysia – the Judiciary and the Rule of Law

by
Justice Kirby CMG*

Arrests and the Malaysian Internal Security Act

Everyone concerned about the rule of law and respect for human rights must pay close attention to recent developments in Malaysia. The situation there is of special concern to Australian judges and lawyers. This is because Malaysia is in our region. It shares many of the same historical links to the common law and the English tradition of an independent judiciary. Moreover many Australian judges and lawyers undertook their studies at university side by side with students from Malaysia in the 1960s. Although many Malaysian lawyers continued at that time to receive training in England, some were educated in Australia. Close friendships were formed. Malaysia always seemed such a stable, law abiding multicultural society adhering to the rule of law. It enjoyed a strong constitution and an independent judiciary. Its economy flourished under these beneficial features of its government.

Lately, things have changed dramati-

cally. In a recent report to the Australian Section of the ICJ, (ICJA) there were recorded the arrests and detention of approximately a hundred persons detained under the Malaysian *Internal Security Act*. Some of the people arrested were Members of Parliament, educationalists, leaders of reform groups, academics and religious workers. The leader of the main Opposition Party was arrested. So was a leading human rights lawyer. Many features of the hearings, judgments and legal provisions applied to these people were criticised in the ICJA report. The Bar of Malaysia has a long record of support for human rights, democracy and the rule of law. It has made strong statements calling for the unconditional and immediate release of all the persons detained.

The Lord President Writes to the King

During 1988 a number of suits in the courts of Malaysia against the Govern-

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ment and Government Party resulted in attacks on the judiciary by members of the Government, notably the Prime Minister. These culminated in amendments to the constitution and the suspension and later dismissal of the Lord President of the Supreme Court of Malaysia. The Lord President, Tun Mohd Salleh Bin Abas was summoned to the presence of the Prime Minister to be told of his suspension. His alleged offence was a letter he had written on behalf of Malaysian Judges to the King of Malaysia. The Lord President wrote the letter in a representative capacity. The terms in which he reported the anxiety of the judges about developments affecting the judiciary were mild by comparison with statements frequently made in Australia, England and elsewhere when judges detect unwarranted intrusion by the Executive Government into the Judicial Branch.

Because the Lord President would not stand down, conceiving himself guilty of no wrongdoing, he was hastily investigated by a hand-picked Tribunal. Some of the members of the Tribunal were inappropriate participants in it, being junior in rank to the Lord President; possible candidates to succeed him; or, in one case, a person who had actually participated in the vote of the judges that the allegedly offending letter should be sent to the King. The Malaysian Bar protested against the constitution of the Tribunal.

The ICJ, Geneva, issued a statement questioning whether any action by the Lord President constituted "misbehaviour" or "inability" within the meaning of the Malaysian Constitution. The letter sent to the King of Malaysia had been a private one. By the standards of the common law world it did not even begin to justify the extreme action which had followed it. The letter was obviously just a

pretext to remove the independent minded Lord President Salleh Abas from his office.

Removal of Judges

When the Lord President challenged the adverse decision of the Tribunal in the Malaysian courts and sought a stay whilst his challenge was pending in the High Court of Malaysia, the five Supreme Court Judges who granted the stay were in turn suspended on the initiative of the Government. The five judges explained that it was their duty under the law to hear and determine the application brought as a matter of urgency. Clearly, they did no more than to perform their judicial functions as the law and their judicial oaths required them. The result of their insistence upon the rule of law has been disastrous for them personally. But it is even more disastrous for the law and the independence of the judiciary in Malaysia. The former Prime Minister of Malaysia, Tunku Abdul Rahman, has described the events as putting Malaysia "on the road to dictatorship."

Judges and lawyers throughout Australia, and other common law countries in the region have watched these developments with the greatest anxiety. The apparent misuse of the internal security law has now been escalated into attacks on the judiciary and even the removal from office of the most senior judges in the country. The only shining examples to be given at this time were the courage of the former Lord President Salleh and of the Judges of the Supreme Court suspended for doing no more than their judicial and constitutional duty. The Malaysian Bar has also been fearless in its support of the independent judges and in its condemnation of the attacks on the judi-

ciary. In this fearless support of judicial independence lies hope, in the long run, for the future of the rule of law in Malaysia.

I met Tun Mohd Salleh Bin Abas when he was Lord President. In February 1988 we both attended a conference in Bangalore, India on the recognition of international human rights norms and their application in domestic law. I found Tun Salleh courteous, perceptive, intelligent and independently minded. He took an active part in the deliberations of the Chief Justices and Judges who attended the conference. He was properly discreet and courteous. When the question of a concluding statement by the participants at the end of the conference was mooted, he urged, instead, that the statement should be made only by Justice Baghwati, the former Chief Justice of India. (See (1988) 62 ALJ 531; (1988) 14 CLB 882). This signalled the Lord President's high sense of propriety and the limits which he imposed upon himself in the public expression of opinions on matters which could be regarded as in any way controversial in Malaysia. Out of respect for his views, the concluding statement of the Bangalore Conference was made by Chief Justice Baghwati of India. Imagine, then, my surprise to hear that it was suggested that Tun Salleh should be removed from office for the indiscretion of writing a private letter to the King at the behest of his judicial colleagues.

Understanding the Independence of the Judiciary

At the swearing in of the new Chief Justice of New South Wales (Chief Justice Gleeson) on 2 November 1988, the State Attorney General (Mr John Dowd MP), a past President of the Australian Section of the ICJ, reminded those pres-

ent of the need to reinforce respect for the independence of the judiciary. Necessarily, judges must occasionally do things which upset the Executive Government. Mr Dowd said:

"The separation between the judicial and the executive branches of Government is not simply a matter of theory but of crucial importance to the maintenance of our system of Government. There is no doubt that Governments are irritated from time to time because a decision by a court does not conform to Government policy; or in some way the bulldozer of the State is forced to halt before it squashes the right of some individual or organisation... The importance of the role of the courts in the balancing of interests and the application of the law without fear or favour is not as widely understood as it should be. So it is worth restating publicly here today. The authority of the courts and their ability to carry out constitutional functions is directly related to the way in which the public perceives the administration of justice."

It seems that respect for judicial independence in Malaysia has been overborne by transient political passions. The precedent of the removal of judges from office is a very sorry one. It is not only a terrible assault upon judges of integrity and honour. It is an attack on the constitutional independence of the judiciary. Unless quickly reversed, it will do great damage to the confidence of the outside world in the Malaysian judicial and legal system. A judiciary attacked in this way may become supine and subservient to the Executive. One has only to look at what happens to those who do their duty!

The Duty to Speak up

No Australian lawyer, still less a judge, has a right to interfere in the internal affairs of another country. But no one with an affection for Malaysia and its people, a feeling for the historical link through the shared traditions of the common law and a respect for the principal victims of these recent events can keep silent at this time. It is essential that those who enjoy the blessings of the rule of law and respect for human rights should speak out against abuses, wherever they occur. Lately, there have been too many abuses in the Asia/Pacific region. That is why Australasian lawyers cannot remain silent about the situation in Malaysia. They owe it to the independent judges of Malaysia and to the Malaysian Bar to speak out and to express their deep concern. They owe it to the suspended and dismissed judges to express their admiration for their fearless actions. They owe it to fellow human beings in Malaysia to do what they properly can to let it be known that these shocking events are becoming more and

more widely known. And that they will do great harm to confidence in Malaysia's economy and political and legal system. Only in this way may those embarked on the "road to dictatorship" be forced to turn back.

I have asked the International Commission of Jurists to devote a session to the situation in Malaysia during the forthcoming biennial meeting of the Commissioners of the ICJ. This will take place in Caracas, Venezuela between 15-21 January 1989. Meanwhile, missions of Australian lawyers and others are going to Malaysia to gather information which will be placed before the International Commission of Jurists. That Commission, with its global function of monitoring derogations from the rule of law and human rights will, I am sure, make it its business to call the situation in Malaysia to the notice of the widest possible international community. May the independent judges of Malaysia gain strength from the support which they have from the independent judges of their region. Judicial independence matters most when it is most in peril.

The Universal Declaration of Human Rights and Latin America

by
*Marcelo G. Kohen**

1988 will mark the fortieth anniversary of the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man. There has been a lot of discussion about the legal scope of these declarations in their regional and international spheres, but their true significance lies in the influence they have had on public opinion, governments and international organizations in creating an awareness that certain rights are inherent to human nature and therefore, deserve special protection. Consequently, the state of human rights in various countries is no longer a domestic matter, and the international community is fully entitled, henceforth, to ensure that these rights are enforced.

This anniversary, then, is an appropriate time to assess the influence of Latin America in the promotion and adoption of the Universal Declaration and to examine the state of human rights on the continent forty years later.

The Latin American Background of the Universal Declaration

Latin America has played a dual role in the adoption of the Universal Declaration of Human Rights. Firstly, the Inter-American system, as the first organized regional one, had already adopted a se-

ries of declarations on fundamental human rights. Secondly, Latin American countries were the first to propose the adoption of a universal declaration at the United Nations.¹

As early as 1938, the Eighth International Conference of American States, held in Lima, adopted a "Declaration in the Defence of Human Rights."² Eight years later, the Inter-American Conference on the Problems of War and Peace, held in Chapultepec, Mexico in 1945, adopted the resolution "International Protection of the Essential Rights of Man,"³ in which the American States expressed their commitment to the principles established by international law for the safeguard of the essential rights of man, declared their support of an international system for their protection, and requested that the Inter-American Juridical Committee draft a declaration along those lines to be submitted to the governments.

The Ninth International Conference of American States, held in Bogota between March and May 1948, approved the Charter of the Organization of American States (O.A.S.) which sets forth the fundamental rights of man as one of its founding principles, "The American Declaration of the Rights and Duties of Man" and "The American Charter of Social Guarantees."⁴ The American Decla-

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tion, then, precedes the Universal Declaration by eight months. It may be of interest to make a brief comparison of the two for the purpose of determining their similarities and differences.

The Similarities and Differences Between the American Declaration and the Universal Declaration

Both declarations show evidence that they are rooted in liberal and natural law⁶ and they both focus on individual rights, mainly civil and political rights. The American Declaration mentions the rights to life, liberty, personal integrity, equality before the law, freedom of worship, speech, thought, residence and movement, the right to freedom from interference in the privacy of home and correspondence, the right to own property, to a fair trial, to protection from arbitrary arrest, the right to peaceful assembly and association, to vote, to participate in the government and the right to asylum.⁶ Also included are the rights to the protection of the family, of health and well-being, to education, culture, work and rest. All these rights are enumerated in the Universal Declaration, although there are significant differences between the two documents.

First of all, the American Declaration is not simply a list of rights; it also contains a list of the individual's duties towards his fellow man and towards the State, which seems to set clear limits on the afore-mentioned rights.⁷ The Universal Declaration, in Article 29 only, refers more solemnly to the individual's duties to the community. Consequently, the American Declaration mentions the duty to obey the law whereas the Universal Declaration states that the limitations

imposed by the law "are solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

There are, however, some important omissions from the American Declaration, which were salvaged in the Universal Declaration, for example, the recognition that political power must be based on the people's will. The failure to mention this basic right in the American Declaration can be explained by the continued existence of authoritarian governments and dictatorships in Latin America, which, both then and now, are a flagrant violation of this basic right intended for the enjoyment of all. This also explains why no reference is made to the compulsion to rebel against tyranny and oppression if human rights are not protected under the rule of law, which is included in the preamble of the Universal Declaration. This latter document also contains improvements from the technical and linguistic point of view, even though it is a synthesis of divergent ideological standpoints. For example, the Universal Declaration explicitly prohibits subjecting a person to torture or cruel, inhuman or degrading punishment or treatment, while the American Declaration states only that everyone is also entitled "to humane treatment during the time he is in custody."

Both Declarations were the result of a compromise and reflect the concept of human rights which prevailed at the time of their adoption. This explains why the emphasis was placed on civil and political rights, and that economic, social and cultural rights were only sketchily described. Nevertheless, the Inter-American system went further on this point because it adopted the American

Charter of Social Guarantees, which represented a step forward in the description of rights pertaining to work and social security, but which unfortunately received little publicity.

One right which is noticeably absent from both Declarations is the people's right to self-determination. This right is mentioned in the Charter of the United Nations,⁸ and already in 1952, the General Assembly decided to include this principle in its future covenants on human rights,⁹ which it did in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights in 1966. Conversely the Charter of the O.A.S., adopted in 1948, and the American Covenant on Human Rights of 1969, remained silent on this point. It is only recently that the Inter-American system has taken steps to adopt the principle of self-determination in its Charter, but merely described and presented it as a right of States not of peoples.¹⁰

The Evolution of the Inter-American System in the Protection of Human Rights

As has been seen, although the Inter-American system preceded the United Nations and other regional bodies in issuing their declarations, it fell well behind the United Nations and the Council of Europe when it came to making treaties and establishing institutions. The Inter-American Commission on Human Rights was created in 1959, but achieved status as a main body of the O.A.S. only in the Protocol of Buenos Aires in 1967. The American Convention on Human Rights, also known as the Treaty of San José of Costa Rica in 1969, establishes compulsory standards of behaviour for

the Member States in this regard, expands the role of the Inter-American Commission of Human Rights and sets up the Court of Human Rights. However, it was not until 1978 that this treaty took effect and it is only recently, since the democratization process of the eighties, that the majority of States in the area have adhered to it. Regretably the United States has still not ratified the Treaty of San José.

As to the Inter-American Court of Human Rights, it has acted mainly in an advisory capacity, and it was only in 1986 that the first law suits concerning the forced disappearance of persons were brought to its attention. On July 29, 1988, the Inter-American Court, in the first contested case considered by the Court, found the Government of Honduras responsible for a disappearance.¹¹

This wave of democratisation and increased awareness of serious and flagrant violations of human rights in most countries of the area, have made possible the adoption of the American Convention to Prevent and Punish Torture¹² and have aided in the preparation of a regional draft of a Convention on the Enforced Disappearance of Persons.

Conclusion

The visible progress made in the establishment of standards obviously does not mean the end of human rights violations. The organization of a system to promote and protect these rights, which is better developed today than ever before, is not in itself a guarantee against future violations. The continued existence of military dictatorships, obstacles to democracy in those countries where democracy has recently been restored, the unresolved problems of disappear-

ances, torture, and other degrading practices, the situation of indigenous populations and of thousands of refugees are only part of a long list of pressing issues in this field. Continued dependence, antiquated structures and the external debt burden are today the greatest hurdles to the reinforcement and development of democracy and the respect for human rights on the continent.

Within this context, the American and Universal Declaration, the machinery created by them and other international in-

struments are a valuable arsenal for the defence and promotion of human rights. Forty years following the adoption of these two Declarations, their political, moral and legal weight has increased. This explains why the Universal Declaration of Human Rights is probably the most well-known international document at the present time and one of the most often cited in the resolutions and treaties of the United Nations and in the various regional instruments, such as the American Convention on Human Rights.

NOTES

- 1) Cuba, Mexico and Panama proposed that the Conference of San Francisco should adopt a declaration of the essential rights of man, but the proposal was never discussed for lack of time. Panama also submitted a draft declaration of fundamental human rights at the first session of the General Assembly of the United Nations. Source, *United Nations Action in the Field of Human Rights*, New York, U.N. 1983, p.8.
- 2) *International Conferences of the American States, First Supplement, 1933-1940*. Carnegie Endowment for International Peace, Washington, D.C., 1958, pp.93-94.
- 3) Ibid. *Second Supplement, 1942-1954*. Pan American Union, Washington, D.C., 1958, pp.93-94.
- 4) Resolutions XXIX and XXX. Source, *Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System*. O.A.S. Washington, D.C., 1985, pp.17-25. and *Los derechos humanos en el sistema interamericano: Recopilación de instrumentos básicos*. Daniel Zovatto, Editor. Instituto Interamericano de Derechos Humanos, San José, Costa Rica, 1987, pp.131-139.
- 5) The preamble of The American Declaration reads: "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another." The first article of the Universal Declaration is identical in content.
- 6) It is no coincidence that Latin America has been a pioneer in the case of the law of asylum in regard to both treaties and customary law. The first convention on asylum was adopted in 1928, followed by others in 1933 and 1954. Diplomatic asylum has been traditionally practiced in Latin America.
- 7) The African Charter of Human and Peoples' Rights (Articles 27 to 29) also uses the method of enumerating rights and duties in the same international instrument.
- 8) In Articles 1, 2 and 55. The latter, in particular, links the right of peoples' self-determination to the observance of human rights.
- 9) Resolution 545(VI) of 5 February 1952, adopted by 47 to 7, with 5 abstentions.
- 10) Protocol of Cartagena de Indias (Amendment to the Charter of the O.A.S.) 5 December 1985. New Article 3, sub-paragraph e) to the Charter: "Every State has the right to choose, without external interference, its political, economic and social system and to organize itself in the way best suited to it (...)," Source, O.A.S. *General Assembly Document*. OEA/SER. P.,AG/doc. 16,(XXIV-E/85) rev. 2, February 26, 1986. Also found in OAS Treaty Series no. 66.
- 11) "*Velasquez Rodriguez*" Case. See this Review, *Judicial Application of The Rule of Law*, pp. 58-60.
- 12) This was approved in Cartagena de Indias in 1985, and came into force on 27 February 1987.

The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988

by
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During the most recent meeting of the International Labour Conference in June, the ILO completed the first stage of a two year revision of its Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries of 1957 (No. 107).¹ In so doing, the Organization has launched a standard-setting process parallel to activities underway at the United Nations since 1982.² Unlike the U.N., however, the ILO has proceeded without the clear endorsement or effective participation of indigenous peoples in its deliberations. This article will review and evaluate the revision of Convention 107 in light of developments on indigenous rights at the international level that have occurred during the past decade.

At present, Convention 107 remains the only international instrument that specifically concerns indigenous peoples. The Convention has long attracted broad criticism, however, because of its ethnocentric conceptions and programme of directed integration. Rather than providing a source of rights for indigenous peoples seeking to retain their territorial, political, social, and cultural integrity, the instrument mandates the gradual in-

tegration of indigenous individuals into national societies and economies, thus legitimizing the gradual extinction of indigenous peoples as such. Convention 107 does contain certain requirements of protection relating to the existing character of indigenous and "tribal" life, but the protective regime is temporary and transitional, intended only to ameliorate the harsh consequences of rapid loss of their culture during the integration process.

In overall terms, integration is the measure by which the obligation of protection is defined. Moreover, the specifics of protection presuppose complete state control over the affairs of the peoples concerned. For example, the Convention provides that "[t]hese populations shall be *allowed* to retain their own customs and institutions," but only "where these are not incompatible with the national legal system or the objectives of integration programmes" (Art. 7, emphasis added). Similarly, the right to individual and collective ownership of land is recognized (Art. 11), but indigenous individuals and societies may be dispossessed of their ancestral territories" for reasons relating to national security, or in the interest of national eco-

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conomic development..." (Art. 12).

Although directed integration of the kind contemplated by Convention 107 was viewed as progressive in the 1940's and 50's, in the context of indigenous peoples it is readily apparent that state programmes of this nature have had ethnocidal consequences. For these reasons, the Convention has been a dead letter for many years. Indigenous peoples and human rights NGO's have avoided attempting to utilize the restricted though excellent review procedures of the ILO for fear of giving any credibility to the substantive provisions and general orientation of the instrument. Indeed, Convention 107 has been an embarrassment to the ILO. At the opening session of the revision committee this year, Mr. Aamir Ali, representing the Director General, described the philosophy of the Convention as "repugnant."

While the problems with Convention 107 are glaring, it is not entirely clear why the ILO determined to resuscitate the instrument at this time. Since 1982, United Nations human rights organs have been engaged in standard-setting on indigenous rights with the active participation of indigenous peoples and NGO's. As a specialized agency with a limited and defined mandate relating to labour issues, the ILO seems poorly positioned to concern itself with the fundamental indigenous rights issues that have emerged in the U.N. process: self-determination, territorial integrity including resource rights, and cultural integrity. Rather than limit a revised instrument to labour, social security, health and education issues over which the ILO in cooperation with other specialized agencies has developed particular expertise, the International Labour Office has sought to retain a comprehensive focus

for its Convention. Although the ILO unquestionably has humane reasons for seeking to update its standards, the insistence on a thematically comprehensive Convention by a limited agency clearly indicates no small element of bureaucratic territoriality as a prime motivating factor.

The bureaucratic factor is an important aspect of the revision process. Because of its active role in organizing consultations with governments and drafting proposals between sessions of the General Conference and Governing Body, the International Labour Office (Office) has a great deal of influence over initiating and shaping proposed standards, far more than the United Nations Secretariat in a comparable exercise. In the case of Convention 107 specifically, the Office has been a major actor from the beginning. Indeed, it is highly unlikely that the Convention would ever have been revived but for the promotional activities of the bureaucracy; the revision process was entirely internally generated. In addition, the Office had a definitive role in establishing the framework for discussion of the revision at the General Conference.

In first formulating that framework, the Office had to confront an inherent tension between the intended comprehensive scope of the instrument and the restricted mandate and political climate of the ILO. Their initial proposal was for a partial revision that would remove integration and cultural bias from the Convention. A new organizing theme was recommended emphasizing procedural requirements of indigenous consultation and participation in programmes affecting them, a theme borrowed from the ILO rural development context.³ The Office proposal was the subject of vigorous debate at a meeting of a tripartite Com-

mittee of Experts empaneled to advise the Governing Body on the desirability of revision in 1986.⁴ The terms "participation" and "consultation" were challenged by a worker member of the body as "supplicant concepts" that gave the illusion of revision but in fact recognized no substantive rights. He advocated recognition of the right of self-determination as the focus for revision. These polar positions were the source of a vigorous and lengthy debate. In the end no consensus emerged; however, many members considered self-determination and indigenous consent to be the only acceptable organizing principles for a convention on indigenous rights.⁵

ILO Standard Setting Procedures

Unlike other intergovernmental organizations in which member states are represented exclusively by governments, representation in the ILO is organized on a tripartite basis. In addition to governments, the most representative worker and employer organizations in each member state have a role and a vote in all deliberative bodies of the organization. The worker and employer groups have evolved their own internal structures and procedures autonomous of governments.

Actual standard setting is conducted by the General Conference during its annual meetings. International conventions and non-binding recommendations are elaborated over a two year period. Revisions of existing conventions and recommendations may occur under a "single discussion" (one year) or "double discussion" (two year) procedure depending on the degree and complexity of proposed change. Procedurally, preliminary proposals prepared by the Interna-

tional Labour Office in consultation with governments are sent to an *ad hoc* tripartite committee of the Conference to produce a final draft text of the new instrument. Committee decisions on specific articles may be made by either consensus or majority vote.

When voting occurs, each tripartite delegate casts a single vote (weighted to ensure that the aggregate total number of votes available to each group, governments, workers, and employers is equal). Thus the worker and employer delegates of a state voting together on an issue may outvote their own government. In practice, the worker and employer representatives separately form highly disciplined caucuses that each speak with one voice on proposing amendments, debating language, negotiating consensus, and during actual voting. As in the case of individual voting, when the worker and employer groups agree on a point at the committee level it will automatically carry, even in the face of large-scale government objection.

An approved draft text of the proposed convention or recommendation is then transmitted to the plenary of the Conference for final decision on an article by article basis under tripartite voting procedures which give governments considerably more influence over the outcome.⁶

Apart from the tripartite structure itself and the special consultative role of a small number of international and regional worker and employer organizations, non-governmental organizations have no formal participation in the General Conference. Under the Standing Orders, Conference or committee officers may permit NGO's affiliated with the ILO or accredited as observers to make oral or written submissions; however, permission has been granted only in rare

circumstances. As a result, the representatives of indigenous peoples, the intended beneficiaries of the instrument, had no assured role in the standard setting process. It was readily apparent from the outset of the 1988 Conference that indigenous organizations would remain outside this rigidly controlled structure while others made decisions affecting their lives.

Indigenous Participation in the Revision of Convention 107

During the 1987 session of the U.N. Working Group on Indigenous Populations, an ILO official invited the indigenous representatives present to apply to the Governing Body for observer credentials for their organizations so that they could participate in the revision of Convention 107 at the 1988 General Conference. A number of the representatives were unaware of ILO activities in this field. Others, however, who had attended a pre-session meeting organized by indigenous NGO's that included a discussion with the same official, presented a consensus resolution to the Working Group that expressed "grave concern" about the substantive content of an Office questionnaire that would form the basis of a draft revision.⁷ Referring to the text as "in certain respects threatening to the progressive elaboration and recognition of the rights of indigenous peoples," they requested the Working Group to communicate their desire that the Governing Body "defer the revision process in order to allow a revision of ILO procedures to secure full participation of the indigenous peoples in the revision of Convention 107."⁸

In the intervening year, a number of indigenous organizations applied to the

ILO for observer credentials. Under ILO rules, however, only *international* NGO's are eligible to gain observer accreditation from the organization. As a result, indigenous organizations that function at the community or national level and are consequently most directly representative of and knowledgeable about the actual conditions and aspirations of their peoples were excluded from eligibility. With a few exceptions such as the Nordic Sami Council and the Inuit Circumpolar Conference that have direct representative links with indigenous communities, the international indigenous NGO's that consistently participate in U.N. activities are primarily advocacy organizations.

A small number of indigenous organizations ultimately attended the General Conference as observers along with two other interested observer organizations, Survival International and the International Work Group for Indigenous Affairs and one indigenous organization without credentials.⁹ As a result of negotiations between the Office and the committee chairperson and vice-chairpersons, each indigenous organization with ILO accreditation was permitted to address the committee for 10 minutes following the close of business on the second day of actual deliberations. In addition, the organizations *collectively* were granted one 10-minute presentation for each category of articles placed before the committee. Aside from these few brief speeches, indigenous representatives had no direct input into the process.

The only serious involvement available to indigenous organizations came indirectly through the worker caucus. In a break with tradition, the workers permitted representatives from the accredited indigenous NGO's to attend caucus meetings. Most importantly, the worker

group submitted amendments for consideration by the committee that reflected indigenous positions on many issues.

The indigenous NGO's had no involvement at all in the debates and deliberations of the committee during its article by article consideration of the Office text. In the words of the Director of the International Work Group on Indigenous Affairs, they "were relegated to the rim of the conference hall, looking on aghast as their fundamental rights were discussed, debated, horse-traded and, more often than not, thrown out." In spite of their enforced marginality, indigenous representatives met daily in an effort to formulate consensus proposals for submission to the worker's caucus and any sympathetic governments. During the second week of the committee session, however, representatives of the National Coalition of Aboriginal Organizations (Australia) publicly announced their withdrawal from the revision process. They based their decision to withdraw on rejection of the substantive decisions of the committee, the lack of genuine opportunity for indigenous participation, concern that the ILO and member states would use the small indigenous presence to legitimize the process, and differences in principle with a statement made by other organizations relating to territorial rights.¹⁰

A few other indigenous organizations attended the committee meetings for short periods of time.

The Revision of Convention 107

The 1988 committee session opened with an interesting and candid speech by Aamir Ali, representing the Director-General, in which he outlined the intentions and the dilemmas of the proposed

revision. In particular, he took note of opposing pressures on the committee caused by a desire to develop an instrument consonant with the aspirations of indigenous peoples and U.N. developments, while at the same time not wishing to jeopardize ratifications by going too far beyond existing national legislation. His proposed resolution was to avoid conflict by organizing the revision around procedural themes rather than substantive rights.¹¹

Indeed, one would have to look very hard to find substantive rights in the draft revision. The following is a summary analysis of the central aspects of the revised Convention at the present stage of development.

1. Identification of the Beneficiaries of the Convention

a) The draft revision eliminates the unusual concept of "semi-tribal" populations from inclusion in the Convention, retaining indigenous and "tribal peoples" as the focus of the instrument.

b) As in the original instrument, application of the Convention is limited geographically to "independent countries," a limitation that apparently excludes the indigenous peoples of Greenland, New Caledonia, Namibia, East Timor, and other colonial situations [Art. 1(1)]. An amendment offered by the worker caucus to universalize the scope of application was deferred for a legal opinion and further study and ultimately withdrawn following objections from the Office that the proposed change would affect other ILO instruments concerning dependent territories. If this is indeed the case, it is curious that the ILO would seek to create a two-tiered structure of standards in which indigenous peoples in independent countries benefit from a

revised protective regime, while those in colonial situations, particularly settler dominated colonial situations, would remain subject to antiquated ILO standards from an earlier era.

c) Following the usage of the 1986 Committee of Experts report and the clear preference of indigenous peoples, the Office draft conclusions proposed that the beneficiaries of the Convention would no longer be identified as "populations," but as the "peoples concerned" [Art. 1(3)]. This proposal proved to be among the most controversial aspects of the revision. Although viewed by indigenous peoples as an accurate description of their identity, an essential starting point for conceptualizing their rights, and a term of respect, the word "peoples" came under strong attack from a group of governments led most vociferously by Canada¹² and from the employer caucus. Several speakers warned that use of the term would lead inexorably to the dismemberment of states.

Canada, seconded by Sweden, submitted two amendments on the question. The first sought to replace "peoples" with "populations." The second, a fall-back position, proposed that if "peoples" were adopted as the term of identification, an additional sentence be added to limit the potential meaning of the term: "The use of the term 'peoples' in this Convention does not imply the right to self-determination as that term is understood in international law." During debate, Norway proposed a sub-amendment stating, "The use of the term 'peoples' in this Convention does not address the question of national self-determination as this term is understood in international law."

As no consensus formed around any of the proposals and none of the participants was sufficiently confident to press

for a vote, the matter was submitted to a small closed-door tripartite working party of the committee for further consideration. The working party reported back at the end of the 1988 meeting, recommending that the term "peoples" be used but only with the clear understanding that its use would not imply a right of self-determination. The group had not reached consensus on specific language, but suggested the following text as a basis for discussion in 1989: "The use of the term 'peoples' in the present Convention shall not be taken to affect the interpretation given to this term in other international instruments or proceedings, in particular as concerns the question of self-determination."

The suggestion was quickly rejected by several governments. Canada stated a preference for language proposed by the Australian employer representative that would seem to remove Convention 107 from any human rights context: "Nothing in this Convention shall be taken to imply that the peoples concerned are, by the force of this Convention, being accorded the right of self-determination or other rights in international law or as understood in other international organizations." In the end, no decision was made and the question was again deferred. The committee could not even agree to retain "peoples" in the draft text for 1989, replacing it with "peoples/populations" throughout.

The debate over terminology revealed with total clarity that governments would resist any incorporation of principles of indigenous self-determination into the Convention.¹³ Although argued on a symbolic level over a term of identification, the debate was both a preface to and a summary of a drafting process in which governments retained unilateral power over all aspects of indigenous

life affected by the operative provisions of the instrument. In light of these developments, it is not difficult to predict that indigenous peoples will only be regarded as "peoples" in the final 1989 text of the Convention to the extent that the term can be reconciled with the present exercise of state power.

d) The focus of the Convention has in large measure shifted from an exclusive concern with individual members of indigenous peoples to include the peoples as such. In the existing text of 1957, state obligations toward the individual were linked to the programme of directed integration. Indigenous social and cultural orders and institutions were tolerated only insofar as they smoothed the integration process. In contrast, statements of general policy in the draft revision concern both individual and collective matters and the draft as a whole foresees the continuation of distinct societies.

2. The Question of Indigenous Self-Determination

In a presentation before the 1986 ILO Committee of Experts meeting, the United Nations Assistant Secretary-General for Human Rights pointed out that self-determination has been the focal point of much of the conceptual development on indigenous rights, particularly in the area of indigenous self-control. Unfortunately, much of the draft revision of Convention 107 is inconsistent with those developments.

Despite strong support at the Committee of Experts meeting for self-determination as the organizing theme of a revised Convention, the Office text contained no language to that effect. In particular, in no case was indigenous consent made a precondition for government

action affecting even their most fundamental interests. The term "consent" appeared in the draft conclusions in but three provisions and then only in the requirement that governments "seek the consent" of the peoples concerned before undertaking specified actions. Although expressed as merely a procedural requirement for governments rather than a right of indigenous peoples, this language did not survive in the final draft. The phrase "seek the consent" was replaced by the weaker and more nebulous procedural requirement that governments shall "consult fully" when considering legislative or administrative measures directly affecting the peoples concerned [Art. 6(a)].¹⁴ In its present form, this article underscores the continued recognition of unilateral state power in the instrument.

In fact, government control pervades the draft Convention. The only condition placed on the application of national laws and regulations to indigenous peoples is that governments shall give "due regard" to customary laws [Art. 8(1)]. Moreover, although indigenous peoples have the right to retain their own customs and institutions (among the few rights actually endorsed in the Convention), the right only exists where customs and institutions "are not incompatible with fundamental rights defined by the national legal system or with internationally recognized human rights." [Art. 8(2)]. Nothing in the text ultimately protects indigenous peoples from state civil and criminal jurisdiction, development decisions related to indigenous territories [Art. 7], subsoil resource extraction [Art. 14(2)] or military conscription [Art. 10]. Although reference is made to "institutions" and "representative institutions," and some space has been opened for the recognition of in-

indigenous modes of social control [Art. 9], it is not presently possible to derive any right of indigenous self-government from the revised Convention.

In place of rights to consent and control, the Convention offers procedural requirements of consultation and participation. It should be noted, however, that no procedural right has been acknowledged.

3. *The Question of Territorial and Resource Rights*

Increasingly, indigenous rights to ancestral places have been conceptualized legally in terms of territorial rather than simply proprietary possession. Territoriality best describes the complex interrelationship between indigenous peoples and the land, waters, sea areas and sea ice, plants, animals and other natural resources that in totality form the social, cultural, material, and deeply spiritual nexus of indigenous life. As a matter of both history and current reality, dispossession from territory whether caused by physical removal or environmental degradation has produced catastrophic effects on indigenous peoples. Consequently, in order for international standards to be meaningful, they must be adequate to defend the right of these peoples to retain their territories through succeeding generations – and to defend them against state as well as private encroachment.

Along with the debate over the term "peoples," the "Land" section of the draft conclusions proved to be among the most controversial and contentious elements of the Convention – so contentious in fact that the committee was unable to come to any resolution and deferred the entire matter to 1989.¹⁵ Despite this deferral, the language of the

existing Office text, debates surrounding the term "territory" during consideration of other articles, and the amendments submitted by governments together form a likely picture of the direction of the revised Convention in this area.

The issue of "territory" first arose in a worker caucus amendment to the phrase, "The peoples [now peoples/populations] concerned should have the right to decide their own priorities for the process of development as it affects their lives and institutions" [Art. 7]. The workers proposed that "territories" be included along with "lives" and "institutions." After strong debate in which a number of governments objected that the term had implications for national sovereignty, the amendment was adopted by a single vote. Apparently, the debate continued in the closed-door working party meetings considering "Land" issues, however, and formed a part of the deadlock. The Office preface to the draft Convention describes the bases of disagreement and makes the following recommendation: "It appears that the issues... may be resolved if the words 'lands' were used in connection with the establishment of legal rights, while 'territories' could be used when describing a physical space, when discussing the environment as a whole or when discussing the relationship of these peoples to the territories they occupy."¹⁶ In other words, the Office recommends that "territories" should be understood as a descriptive or symbolic term, while rights would only attach to "land."

Although the draft text on land issues provides for a stronger guarantee of state recognition and protection of ownership and possessory rights than the existing Convention [Art. 13, 14(1), 16(3), 17], the draft continues to permit states

unilaterally to remove indigenous peoples from their territories [Art. 15] and continues to authorize state power over the exploration for and extraction of subsoil resources within indigenous territories. Proposed amendments to the draft conclusions largely involved objections to the use of the term "territory," adding measures expanding government prerogatives over resource extraction, efforts to weaken procedural requirements of protection, and in one amendment, an attempt to include an express reference to expropriation in the text.

Perhaps the most pointed commentary on the draft text on land rights is contained in the committee report – a number of governments expressed support for the Office draft, noting that its provisions "accorded closely with existing national legislation."

4. *Recruitment and Conditions of Employment, Vocational Training, Social Security and Health, Education*

Not surprisingly, the greatest measure of improvement over the existing Convention is contained in the draft revision of articles on labour and social welfare concerns – all issues within the usual mandate of the ILO. During the committee session, worker caucus amendments strengthened most of the provisions and made several of them more responsive to indigenous perspectives. Even in these seemingly non-controversial areas, however, the draft text fails to ensure an indigenous right of consent with respect to government assistance programmes. Procedural requirements of participation and consultation are incorporated in the draft, but no ultimate right of rejection is endorsed.

Governments remain the final arbiters of what is appropriate for indigenous peoples.

5. *Recourse Procedures*

The draft text contains no provision that would give indigenous peoples direct access to ILO recourse procedures nor does it create new procedures for this Convention.

Conclusion

Although the revision of Convention 107 is at the midpoint of a two year process, the 1988 committee session produced a draft that will probably define the parameters of the instrument. As it appears at present, the ILO has succeeded in removing the overt language and imperative character of directed integration and has produced a text that is sufficiently procedural in character to be at least minimally ratifiable. When measured against the aspirations of indigenous peoples and the conceptual developments that are occurring at the United Nations, however, the ILO is producing an instant anachronism that may well prove a drag on the future substantive development of indigenous rights.

Unfortunately, the ILO has sought to maintain an institutional hold on a human rights process that has evolved far beyond its mandate. It has done so without any serious institutional effort to open its own procedures to allow the "participation" of the peoples who are the identified beneficiaries of Convention 107 and who must live with its consequences.*

* The editor intends to invite the ILO to comment upon this article in the next issue, if they so wish.

NOTES

1. "Report of the Committee on Convention No. 107," International Labour Conference, *Provisional Record*, No. 32, 75th Session, 1988.
2. See, Report of the Working Group on Indigenous Populations on its Sixth Session (1988), U.N. doc. E/CN.4/Sub. 2/1988/24.
3. International Labour Organization, "International Standards and Indigenous and Tribal Populations," unpublished Working Document, p. 33-06 (1986).
4. See, "Extracts From the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) in: International Labour Conference, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report VI(1), 75th Session, 1988, p. 100-118 [hereinafter Report VI(1)].
5. The author attended the meetings as legal adviser to an NGO member of the Committee of Experts. For published NGO reports of the meetings, see IWGIA Report on ILO Meeting of Experts on Convention 107, 1986 IWGIA Yearbook 73-92 and Leckie, *Indigenous Peoples, Recent Developments in the International Labour Organization*, SIM Newsletter, No. 16, p. 22-46 (November 1986).
6. E. Osieke, Constitutional Law and Practice in the International Labour Organization 148-51 (1985).
7. The questionnaire is printed in Report VI (1), *supra*, n. 4 at 93-9.
8. The Draft resolution is on file in the U.N. Center for Human Rights.
9. A number of indigenous individuals participated in the meeting as members of tripartite delegations: governments – Australia, Norway, Sweden, Finland, Nicaragua, United States; workers – United States, Canada, Australia, New Zealand, Norway; employers – Australia, United States.
10. The Coalition's legitimization fears may be well founded. In a written submission to the 1988 session of the U.N. Working Group, the ILO devoted over one-third of a short report on the revision of Convention 107 to the "participation of NGO's in the deliberations" – more than it devoted to a vague discussion of substantive issues. U.N. Doc. E/CN.4/Sub.2/AC.4/1988/3/Add.1.
11. Report of the Committee on Convention No. 107, *supra*, n.1 at 1-2.
12. The term "peoples" as applied to indigenous societies is commonly used in the municipal law of Canada.
13. There were nevertheless considerable differences in approach among governments on a number of basic issues. In general, two groupings emerged, with many governments in between. Denmark/Greenland, Colombia, Norway, Finland, Australia, Peru, Botswana, Argentina and Portugal were the most consistently progressive voices. On the other hand Canada, Brazil, Venezuela, India, Bangladesh, Japan, and the Netherlands most consistently sought to limit recognition of indigenous rights to rights recognized in national legal systems. Some governments, notably Canada and the U.S., at times sought to limit standards to a level below their own existing national law.
14. The phrase "seek the consent" remains in the draft text under the section on "Land" [Art. 14(2)] only because, as will be discussed below, the committee could come to no decision on territorial and resource issues and carried over the original Office language on these themes for 1989. The Office comment on the intent behind the phrase is quite interesting:

The use of this phrase... evoked considerable concern among some delegates that the right of States to take final decisions on the disposition of the national territory was being called into question. In fact, it was meant to indicate that a serious attempt should be made to obtain the consent of the inhabitants of the areas concerned before undertaking activities which affected them. There was no intention to imply a veto power and no implication that the State's power to decide be limited.

International Labour Conference, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report IV (1), 76th Session, 1989, p. 4 (emphasis added) [hereinafter Report IV(1)].
15. A total of 77 amendments to 14 draft conclusions were submitted. The entire matter was sent to a closed-door tripartite working party which, however, could only agree on deferral.
16. Report IV(1), *supra* n.14.

Judicial Application of the Rule of Law

Inter-American Court of Human Rights Case "Velásquez Rodríguez"

On 29 July 1988, the Inter-American Court of Human Rights, in the first contested case considered by the court since its creation, found the Government of Honduras responsible for the disappearance of Angel Manfredo Velásquez Rodríguez, a student at the National Autonomous University of Honduras.

This is the first of three cases concerning disappearances in Honduras presented by the Inter-American Commission on Human Rights to the Court and as a leading case is bound to have important repercussions.

In a communication dated 7 October 1981, the Commission received a complaint that Manfredo Velásquez was arrested without a judicial order by members of the Armed forces of Honduras, taken to an unknown spot and detained in a violent manner. He was detained on the afternoon of September 12, 1981 in the presence of several eyewitnesses who saw him being forced into a vehicle which took him to the police cells.

In October 1983, the Commission, taking into account that the Government of Honduras had not supplied the information that had been repeatedly requested, decided that the allegations contained in the complaint, in application of the terms of Article 42 of its Regulations were presumed true.¹ After the consideration of Honduras' observations and evidence, the Commission confirmed its previous

resolution, denying consequently, the request for reconsideration presented by Honduras, and resolved to refer the matter to the Inter-American Court of Human Rights.²

The Government of Honduras presented six preliminary objections on procedural matters. In its decision of 29 June 1987, the Inter-American Court rejected five and decided to consider the sixth objection (the lack of exhaustion of domestic remedies) along with the merits of the case. The Court had to decide, therefore, whether there was a violation of the American Convention on Human Rights and whether the consequences of this situation be remedied and the injured party paid fair compensation.

In its judgement of 29 July, the Court supported the Commission's views, that in the case of disappearances and if the missing person is still disappeared, the fact of having unsuccessfully brought habeas corpus proceedings is sufficient to exhaust domestic remedies. In the Manfredo Velásquez case, three habeas corpus applications and two criminal complaints were lodged without result. For this reason, the Court rejected the objection of non-exhaustion of domestic remedies.

With regard to the merits, the Court underlines the patterns of the systematic practice of disappearances: the victims were generally considered by the au-

thorities to be dangerous to the security of the State; the weapons used were reserved for the military and police authorities; on some occasions the arrests were carried out by law enforcement officials, with no attempt at concealment or disguise; the persons abducted were blindfolded, taken to secret and illegal places of detention and transferred from one place to another. They were interrogated and subjected to harassment, cruelty and torture. Some of them were eventually killed and their bodies buried in clandestine cemeteries. The authorities systematically denied that the detention had taken place and disclaimed any knowledge of the whereabouts and fate of the victims.

This practice of disappearances, as the Court said, "are not a novelty in the history of human rights violations. However, their systematic and repeated nature, their use as a technique designed to produce not only the disappearance itself, either temporary or permanent, of certain persons, but also a generalized state of anxiety, insecurity and fear, has been relatively recent. Although this practice is more or less universal, it has been exceptionally intense in Latin America in recent years. (...) Although there is no existing treaty in force applicable to the States parties to the Convention that uses this qualification, international theory and practice have often held disappearance to be an offence against humanity."³

The Court continued its analysis as to how forced disappearances constitute multiple violations of the rights recognized in the Convention. The abduction of a person is a case of arbitrary deprivation of liberty which also involves the right of the detainee to be brought promptly before a judge and to seek appropriate remedies for review of the law-

fulness of his arrest. Furthermore, subjecting victims to prolonged isolation and coercive incommunicado detention represents in itself a form of cruel and inhuman treatment, harmful to the person's mental and moral liberty and a violation of the inherent dignity of the human being. It also constitutes a breach of the right to integrity and, inasmuch as the practice of disappearances has frequently involved execution of the detainees, in secret and without trial, followed by the concealment of the corpse with a view to eliminating all physical traces of the crime, it represents a gross violation of the right to life. The Court concludes that this practice represents a radical breach of the American Convention on Human Rights in that it involves a gross departure from the values deriving from human dignity and the principles which are the very basis of the inter-American system and the Convention itself. "The existence of this practice also entails a disregard for the duty to organize the State apparatus in such a way as to guarantee the rights recognized in the Convention."⁴

Having described the patterns of the practice of disappearances, the Court concluded that the abduction and disappearance of Manfredo Velásquez conforms to these patterns. The Court stated that "the circumstances in which the disappearance occurred and the fact that, seven years later, it is still not known what happened to Manfredo Velásquez provide in themselves sufficient grounds for reasonably inferring that he was killed."⁵

The Court then raised the problem as to whether the disappearance of Mr. Velásquez may be ascribed to Honduras and thereby engage its international responsibility. According to the Court, Article 1(1) is crucial. It requires States par-

ties to respect and ensure fundamental duties and rights, so that any impingement of the human rights recognized in the Convention that may be ascribed, according to the rules of international law, as an act or omission by any public authority, constitutes the responsibility of the State as laid down by the Convention. The decisive factor is the determination whether a particular violation of human rights has occurred with the support or connivance of the public authorities or whether their attitude has enabled the infringement to occur in the absence of any preventive or punitive measures.

The Court pointed out that it is evident that subjecting prisoners to official organs of repression which practise torture and murder with impunity is in itself an infringement of the duty to prevent violations of the rights to physical integrity and life, even on the assumption that a particular individual has not been tortured or killed or that such facts cannot be proved in a specific case.

On the other hand, the Court recognized the complete failure of the Honduran State to investigate the disappearance of Manfredo Velásquez, as well as to repair the damage caused and to punish the perpetrators. All this demonstrates the fact that the Honduran authorities failed to act in accordance with

the requirements of article 1(1) of the Convention in order to provide effective safeguards for human rights within their jurisdiction.

The Court also underlined the right of the victim's relatives to be informed of his fate and, as appropriate, the whereabouts of his remains, as a rightful expectation which the State must satisfy with the means at its disposal.

Finally, the Court was convinced, and took it as proven, that the disappearance of Manfredo Velásquez was the work of agents acting under cover of their public office. "Even if this could not be demonstrated, however, the failure of the State apparatus to act – a fact which is fully proved – constitutes non-performance by Honduras of its duties under article 1(1) of the Convention, which required it to ensure to Manfredo Velásquez the free and full exercise of his human rights."⁶ With respect to this, the Court also mentioned that State responsibility continues to exist over time irrespective of changes of Government.

As far as reparations are concerned, the Court said that it obviously could not rule that the injured party be ensured the enjoyment of his rights or freedoms. However, in this context the payment of fair compensation is appropriate in order that such violations of human rights be prevented in the future.

NOTES

- 1) Resolution 30/83. October 14, 1983.
- 2) Resolution 22/86. April 18, 1986.
- 3) *Case Velásquez Rodríguez, Merits*. Paragraphs 149-153.
- 4) *Ibid.*, Paragraph 159.
- 5) *Ibid.*, Paragraph 188.
- 6) *Ibid.*, Paragraph 182.

Right to Protection from Inhuman or Degrading Punishment – Whether Whipping in Contravention of Constitutional Rights*

Stephen Ncube v The State; Brown Tshuma v The State; Innocent Ndhlovu v The State. Judgement delivered by the Supreme Court of Zimbabwe, 6 October and 14 December 1987.

The three appellants were convicted and sentenced in separate proceedings before a regional magistrate. The first appellant had pleaded guilty to the brutal rape of a 13 year old girl and was sentenced to a six year imprisonment with labour and a whipping of six strokes. The second appellant had pleaded guilty to raping, on the same day, two children aged six years and nine years to whom he stood in a position of trust and was sentenced to five years' imprisonment with labour on each count, and in addition was ordered to receive a whipping of six strokes. Despite his plea of innocence the third appellant was found guilty of raping his juvenile daughter on a number of unspecified occasions over a period of two-and-a-half years. He was convicted on one comprehensive count and sentenced to seven years' imprisonment with labour conjoined with a whipping of six strokes.

All three appellants were given leave to appeal but only in respect of that part of their sentences ordering them to be whipped. The issue to which it was directed that argument was to be addressed was whether, with effect from 18 April 1985 (the date from which, in

terms of the Constitution, the protection not to be held in contravention of the Declaration of Rights afforded to any written law which had effect immediately before the appointed date, ie, 18 April 1980 when Zimbabwe became a sovereign republic ceased to apply), the power of the regional magistrate to impose whipping under the authority of ss. 54(5) (C) and (8) of the Magistrates Court Act became unconstitutional and of no force and effect as being in violation of the protection from inhuman or degrading punishment provided for in s. 15(1) of the Constitution of Zimbabwe.

A full Court of the Supreme Court of Zimbabwe comprising the Chief Justice and four other judges upheld the challenge to the constitutionality of a sentence of whipping and ordered the imposition of the strokes to be deleted from the sentences. The Court comprehensively reviewed the law relating to corporal punishment in Zimbabwe and had regard to the comparative position including case law in, *inter alia*, Australia, Canada, South Africa, the United Kingdom and the United States of America. It also had regard to relevant case-law of the European Court of Human Rights, in particular the case of *Tryer v United Kingdom* 1978 (2EHRR/1) from which it quoted extensively. In reaching its decision the Court had regard to: – (i) the current trend of thinking amongst those distinguished jurists and leading aca-

* Reprinted from the Commonwealth Law Bulletin Vol. 14 No. 2, April 1988 pp 593-595.

demics to whom reference has been made; (ii) the abolition of whipping in very many countries of the world as being repugnant to the consciences of civilised men; (iii) the progressive move of the courts in countries in which whipping is not susceptible to constitutional attack, to restrict its imposition to instances where a serious, cruel, brutal and humiliating crime has been perpetrated; and (iv) the decreasing recourse to the penalty of whipping in Zimbabwe especially over the last ten years, and the declining number of laws on the Statute Book in which it remains a permissible penalty: *R v Lobi* 1942 SR 152.

More especially the Court placed reliance on the following adverse features which it said were inherent in the infliction of a whipping –

1. the manner in which it is administered is somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency;
2. by its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status;
3. no matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it: *Jackson v Bishop* 404 F. 2d 571 (1968); and
4. it is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.

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