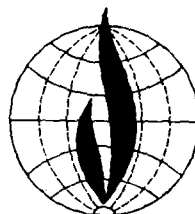


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THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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No. 47
December 1991
Editor: Adama Dieng

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Human Rights in the World

Colombia

Impact of the New Constitution*

Colombia's new constitution was promulgated on 4 July 1991. It was written by a national assembly over a five-month period to replace the charter that had been in effect since 1886. Often described as a "new social contract" or "new peace treaty", the document makes important advances in protecting human rights, administering justice, modernizing Colombia's political institutions and increasing political participation.

The 1991 constitution is probably too new to judge its ability to deal effectively with the problems it faces. For example, the overall human rights situation in Colombia has not improved much. Nevertheless, it is an innovative and essential tool for promoting change in Colombia. This essay first outlines the process involved in drafting Colombia's new charter. It then addresses three areas in which the constitution has made substantial changes, including the protection of human rights, administration of justice and presidential emergency powers. Finally, the essay examines some limitations of the reform.

The Political Context

Colombia has experienced widespread political violence for years, but no single phenomenon explains it. Part of the violence has stemmed from decades of guerrilla warfare and counter-insurgency operations by the military. A surge in right-wing paramilitary groups and drug-related violence during the past decade has claimed the lives of hundreds of peasants, union leaders and civic and political figures. Members of the police and army have also participated in an alarming number of human rights violations, especially in rural areas.¹

In order to quell political violence, Colombian presidents have relied on constitutional provisions which authorize them to declare a state of siege and assume emergency powers. Unfortunately, executive branch reliance on these powers has failed to curb political violence. Laws issued under state of siege have increased the power of the armed forces and have failed to safeguard against abuse by state forces. As a result, basic

* This article was prepared by Jayni Edelstein, a student at New York Law School who served as an intern at the ICJ. She was assisted by *Constituyente* Delegate Iván Marulanda and Alejandro Garro of Columbia University Law School of Law.

1. See Amnesty International Report 1991 (London, 1991); Americas Watch, *The Drug War in Colombia: The Neglected Tragedy of Political Violence* (New York, 1990); International Commission of Jurists and Andean Commission of Jurists, *Violencia en Colombia* (Lima, 1990).

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constitutional guarantees have been seriously eroded.

The Colombian judiciary has been equally ineffective in safeguarding basic rights and preserving the rule of law. Serious problems in the administration of justice and violent attacks against lawyers and judges have often resulted in virtual impunity for suspects in politically sensitive cases, while most prisoners accused of common crimes rarely come to trial but serve minimum sentences applicable to the crime they are accused of committing. The use of the military justice system to try police and army personnel implicated in human rights abuses has been a major obstacle in bringing alleged perpetrators to justice. The constitutional reform seeks to remedy many of these problems.

The Road to Reform

Constitutional reform was discussed by President Virgilio Barco Vargas in early 1988 but the student movement in early 1990 gave it a push. University students drew up a proposal to convene a constitutional assembly (*Constituyente*) that would reform the charter and end the violence sweeping the country. On 8 February 1990, they submitted the proposal along with 35,000 signatures to the President. The students printed unofficial ballots in favor of the *Constituyente* and called on voters to stuff the ballot boxes with the extra paper – popularly called *séptima papeleta* – in the 11 March 1990 parliamentary elections.

Although the votes were not officially counted by the National Registry, widespread support for the *Constituyente* prompted President Barco to issue a legislative decree calling for a referendum on the issue. Decree 927 provided for the

referendum to be held with the 27 May 1990 presidential elections. After the Supreme Court declared the decree constitutional, Colombians overwhelmingly voted “yes” to the *Constituyente* and elected Liberal party candidate César Gaviria Trujillo as President of the Republic.

President Gaviria reached an agreement on 2 August 1990 with representatives of the Social Conservative party, the National Salvation Movement and the M-19 Democratic Alliance on procedural and substantive aspects of the *Constituyente*. Then, on 24 August, he issued Decree 1926 embodying that agreement. The Supreme Court upheld the law on constitutional grounds but in its decision on 9 October 1990 it deleted several sections, including those limiting the subjects that the *Constituyente* could study for reform. *Constituyente* delegates were therefore afforded unrestricted power to rewrite the 1886 constitution.

Even before the Supreme Court rendered its opinion, working tables (*mesas de trabajo*) and preparatory commissions were formed to draft and consider constitutional proposals. The working tables – whose purpose was to facilitate wide participation in elaborating new constitutional norms – were set up by mayors, universities, trade unions, civic and community organizations, peasants, women and other special interest groups. The constitutional proposals they elaborated were submitted to the preparatory commissions, which studied and classified the proposals and made recommendations to the *Constituyente* and national government.

The preparatory commissions were organized thematically, for example Congress, Justice and the Public Ministry, Public Administration, Human Rights, Political Parties, Departmental, District

and Municipal Management, Participatory Mechanisms, State of Siege, Economic Issues and Fiscal Control. Each commission was divided into sub-commissions made up of specialists in their respective areas. The sub-commissions, which received thousands of proposals, operated until 30 November 1990.

Elections for *Constituyente* delegates were held on 9 December 1990. An unprecedented level of voter abstention² provoked strong criticism from members of Congress, who charged that the *Constituyente* did not legitimately represent the people. Nevertheless, the elections marked a profound change in the political landscape of Colombia by ending decades of dominance by the Liberal and Conservative parties. The M-19 Democratic Alliance – a former guerrilla group that had laid down its arms only eight months earlier – won 19 assembly seats. The Liberal party won 24 seats, the Conservative factions won 20 seats and the Evangelical Protestant Church and the Patriotic Union won two seats apiece. Indigenous elders Francisco Rojas and Lorenzo Muelas were elected to the *Constituyente* as well.³

President Gaviria inaugurated the *Constituyente* on 5 February 1991. The delegates met the next day and elected Antonio Navarro Wolff, Alvaro Gómez

Hurtado and Horacio Serpa Uribe as co-presidents of the assembly.⁴ The new constitution was promulgated just five months later.

The 1991 Constitution

Colombia's constitution marks a definitive break with the past. Whereas political leaders of the 19th Century attempted to promote their political agendas through new constitutions,⁵ the 1991 charter is a product of consensus and compromise. It is a modern and dynamic constitution which begins by characterizing the state as "democratic, participatory and pluralistic, and based on respect for human dignity". Sovereignty resides exclusively with the people and the state recognizes and protects the "ethnic and cultural diversity of the Colombian nation". Spanish is still the official language, but the constitution provides that languages and dialects of ethnic minorities "are also official within their territories". Catholicism ceases to be the official religion and there is full recognition of religious freedom.

The Senate has been reduced to 100 seats – elected nationally instead of by departments – with two seats reserved for indigenous peoples and up to five

2. Approximately 25 per cent of eligible voters cast ballots. See *¿Revolcón o catastrofe?* in *Semana*, Edición 449 (Bogotá, 1990).
3. Following a series of peace talks, three guerrilla groups gave up arms during the course of the *Constituyente* in exchange for, among other things, a voice in the assembly. The Partido Revolucionario Trabajador (PRT), Quintín Lame and Ejército Popular de Liberación (EPL) also participated in the *Constituyente*.
4. The historical relationship between the three co-presidents of the *Constituyente* will probably bewilder observers for years. Antonio Navarro was a top commander of the M-19 guerrilla group when it kidnapped Conservative party leader Alvaro Gómez in 1988. After 53 days in captivity, Liberal party member Horacio Serpa negotiated his release.
5. After independence from Spain, Colombia was plagued by intense political conflicts leading to one civil war after another. Between 1811 and 1886 there were 10 constitutions. See Pedro Pablo Camargo, *Crítica a la constitución colombiana de 1886* (Bogotá, 1987).

special seats for ethnic and political minorities. Regional autonomy is strengthened through the direct election of governors. Approximately 22 per cent of the national budget will eventually be transferred to departments and municipalities for health, education and services. Greater autonomy is also granted to the Bank of the Republic, which will regulate currency and credit. Finally, in an important check on executive power, Congress has been vested with the authority to impose motions of censure against ministers and remove them from office.

Individual and Human Rights

Chapter One of the section entitled "Rights, Guarantees and Duties" incorporates fundamental principles of the Universal Declaration of Human Rights into Colombia's new charter. It protects the right to life and prohibits capital punishment, forced disappearance, torture, cruel or inhumane treatment or punishment, forced labor, slavery and wrongful imprisonment. It guarantees a person's right to privacy and personal freedom, the freedom of thought, conscience, religion, opinion and expression. It prohibits censorship.

Chapter One also secures the right to peaceful assembly and to form trade unions. It guarantees the freedom to chose a profession and the right to work under dignified and just conditions. Equal protection under the law is guaranteed, as is habeas corpus, freedom from arbitrary arrest and detention, the right to be presumed innocent, freedom from ex-post facto laws and self-incrimination and the right to asylum.

An important advance in securing political participation and control over gov-

ernment is found in Article 40 of Colombia's new charter, which ensures the right to participate in the makeup, exercise and control of political power. Article 40 provides for the unlimited right to form political parties and movements (clause 3); to revoke the mandates of elected officials (clause 4); to institute public actions in defence of the constitution and laws (clause 6) and to have women participate at decision-making levels of public administration (clause 7). A source of deep concern in Colombia has been the need to improve mechanisms for citizen participation and governmental accountability.

Title II, Chapter Two, which covers social, economic and cultural rights, provides substantially more protection than most Western constitutions do. This section protects the sanctity of family and prohibits "any form of violence within the family". Children born inside or outside matrimony, whether adopted, procreated naturally or scientifically, have equal rights and duties. Article 43 states that women shall not be subjected to any form of discrimination and shall enjoy special state assistance during pregnancy and after childbirth.

Chapter Two guarantees free education and special protection for women, children, adolescents, the elderly and the disabled. It also guarantees a favorable living environment, adequate housing and the right to social security and health care. It provides for equal opportunity for workers, a minimum wage, job stability, the right to collective bargaining and the right to strike. Article 57 states that the law may establish incentives and methods for worker participation at a firm's management level. Article 64 imposes on the state the duty "to promote gradual access to land ownership for agrarian workers".

Chapter Three protects the right to a clean environment and imposes a duty upon the state to protect special ecological areas and co-operate with other nations in protecting ecosystems in border areas. Article 81 prohibits the manufacture, importation, possession and use of chemical, biological and nuclear weapons as well as the entry of nuclear or toxic waste into Colombian territory. In general, Title II of Colombia's new charter marks great progress in recognizing and providing for internationally recognized human rights.

Protection and Implementation of Rights

The rights and freedoms spelled out in any constitution require effective enforcement procedures if they are to have any real meaning. Although the new constitution contains a section on "protection and implementation of rights", it tends to place too much discretion in the legislature's hands in defining the scope of many key provisions.

Article 86 establishes that any person may bring an action (*acción de tutela*) to seek the immediate protection of his or her basic constitutional rights whenever those rights are vulnerable or threatened by acts or omissions by a public authority. Similar to an injunction in common law jurisdictions, the *acción de tutela* is a temporary mechanism to prevent irreparable harm. Based on similar provisions in the 1978 Spanish constitution and Mexican constitutional law, the *acción de tutela* is an important means to assert one's rights.

Similarly, Article 87 provides that any person may bring an action to compel the authorities to obey a law or administrative act. Article 88 establishes that the

popular action (*acción popular*) for the protection of rights and collective interests shall be regulated by law. The concept that any citizen, irrespective of standing or controversy, may challenge a law is one of Colombia's unique institutions in constitutional law. The citizen's action (*acción pública*) provides that anyone may immediately challenge the constitutionality of any law or decree. It is unnecessary for the claimant to prove a personal interest or stake in the controversy. The action was contained in many of Colombia's 19th Century constitutions although it was omitted from the 1886 constitution. It was introduced again through Legislative Act No. 3 of 1910. *Acción pública* is established in Article 40 (6) of the 1991 constitution.

Article 89 provides that the law shall define other forms of recourse, actions and procedures necessary to defend the integrity of legal order. Article 91 makes important advances in establishing that due obedience is not a defence in case of "manifest violation of a constitutional precept", but exempts military personnel on active duty. While the section on protection and implementation of rights is a marked improvement over the 1886 constitution, its interpretation and effectiveness remain to be seen.

To be sure, provisions in other parts of the text aim to safeguard basic rights as well. Article 281 provides for a Defender of the People (*Defensor del Pueblo*) under the Public Ministry. Similar to the ombudsmen in European countries, the office of the Defender will ensure the observance of human rights, including invoking habeas corpus petitions, bringing *acción de tutela* and submitting reports to Congress on its activities. The creation of the Defender's office demonstrates an important commitment to the protection and enforcement of human rights

standards contained in the 1991 constitution.

Structure of the Judiciary

The structure of the Colombian judiciary has been dramatically altered under the 1991 constitution. The Supreme Court no longer rules on constitutional matters. Instead it acts as the highest court for ordinary jurisdiction (*tribunal de casación*) and has the power to investigate and try members of the political branches of government.

To ensure that laws and governmental action conform, the new charter provides for a Constitutional Court (*Corte Constitucional*). Like constitutional tribunals in Europe, the Constitutional Court has the power to rule on a wide range of legal norms, including ordinary laws passed by Congress, decree laws and legislative decrees issued pursuant to emergency power. The Constitutional Court also rules on the constitutionality of international treaties and their ratifying laws, reviews referendums and plebiscites for procedural defects and hears appeals of *acción de tutela*.

Similar to the Spanish Constitutional Tribunal, the Colombia Constitutional Court is also authorized to review the constitutionality of legislative bills and statutes which the government rejects on constitutional grounds. This power has been criticized because of its potential to politicize the Court. The institution has also been criticized as being a mere copy of European courts.⁶ Once again, whether the Constitutional Court is too removed from the judicial process to be effective or whether it becomes truly

committed to individual liberty and the rule of law can only be judged over time.

Another important change in the administration of justice is the creation of the Superior Council of the Judiciary (*Consejo Superior de la Judicatura*), which has administrative and disciplinary functions. The Superior Council essentially oversees the judicial profession. It has the power to examine the conduct and discipline members of the legal profession, prepare the judiciary budget for submission to the government, establish regulations necessary for administration of justice and resolve jurisdictional disputes between courts.

The Council of State (*Consejo de Estado*) remains the highest court for administrative litigation. It also acts as the government's advisory body on administrative matters, hears actions for annulment of decrees when the Constitutional Court lacks jurisdiction and has authority to draft and present proposals for amending the constitution and legislative bills.

The creation of new courts and judicial functions has led to major changes in the appointment process. Judges of the Supreme Court and Council of State are chosen by members of the courts from a list of candidates submitted by the Superior Council of the Judiciary. The Superior Council is divided into an administrative chamber and a disciplinary chamber. In the administrative chamber, two judges are chosen by the Supreme Court, one judge by the Constitutional Court and three by the Council of State. In the disciplinary chamber, all seven judges are chosen by Congress from a list submitted by the President and ministers, except that the first members of

6. Hernando Yepes Arcila, *Cursilerías jurisdiccionales*, *El Espectador*, 4 July 1991.

the disciplinary chamber will be appointed by the President.

Constitutional Court judges are chosen by the Senate from lists of three candidates submitted by the President, the Supreme Court and the Council of State. However, Transitory Article 22 of the new constitution provides that the first Constitutional Court shall consist of two judges appointed by the President, one by the Supreme Court, one by the Council of State, one by the Attorney General and two by the judges themselves from a list submitted by the President.

Under the 1886 constitution, judges of the Supreme Court and Council of State were appointed for life by the sitting justices. The practice was widely criticized and prompted *Constituyente* delegates to adopt a new system. Judges of the Constitutional Court, the Supreme Court of Justice, the Council of State and the Superior Council of the Judiciary will now serve eight-year terms and may not be re-elected. Yet the abandonment of life tenure could jeopardize the independence of the courts. Justices will undoubtedly seek employment at the end of their terms, and the prospect of future employment may affect the impartiality of their decisions while sitting on the court. The turnover in justices every eight years may attune the courts to political developments. Finally, the court's institutional competence and overall effectiveness may be reduced since individual judges often develop their expertise by sitting on a court over time. For these reasons, the system based on fixed terms of service does not necessarily represent an improvement over the past system.

The Accusatorial System

Title VIII, Chapter 6 of the new constitution embraces a fundamental change in the administration of justice by adopting a Prosecutor General's Office (*Fiscalía General de la República*) and an accusatorial system. Similar to criminal justice systems in common law jurisdictions, the Prosecutor General will investigate crimes and bring charges against alleged offenders before the appropriate courts. The Prosecutor General is elected for a single four-year term by the Supreme Court from a list of three candidates submitted by the President. The fact that *Constituyente* delegates left most of the Prosecutor General's functions and attributes for the legislature to decide reflects their view that the institution should develop over time.

Colombia's inefficient criminal justice system led to widespread approval of the *Fiscalía*, but its creation has also been a source of concern.⁷ Notable concern has arisen over Article 250 (3), which states that the Prosecutor General shall direct and co-ordinate the functions of the judicial police "and other agencies assigned by law" because members of the Armed Forces have assumed judicial police functions in the past.⁸ Authorizing elite corps or military forces to exercise judicial police functions may endanger human rights and due process guarantees. To make matters worse, the Prosecutor General has no disciplinary power over those agencies that may exercise judicial police functions.

The scope of Article 250 (3) was not fully addressed during the *Constituyente*,

7. Alejandro David Aponte, *Constitución de 1991: La Administración de justicia, Análisis Político*, No. 13 (Santa Fe de Bogotá, 1991).

8. Gustavo Gallón, *La constitución inconclusa*, Cien Días, Vol. 4, No. 14 (Bogotá, 1991).

but several delegates demonstrated their intent. In discussing which agencies could exercise judicial police functions, Delegate Carlos Daniel Abello explicitly stated that the military forces would be excluded in all cases.¹ Several constitutional provisions also safeguard against abuse by the judicial police or other police agencies. The last clause of Article 213 – which regulates states of exception – provides that “in no case may civilians be investigated or judged by military penal justice”. Article 29 expressly states that “evidence obtained in violation of due process is null and void under law”. Article 252 prohibits modifying the agencies or basic process of accusation or trial during states of exception.

Nevertheless, the ultimate interpretation of Article 250 (3) rests with the law to be adopted. Its effectiveness in strengthening Colombia's system of justice or its potential to infringe upon basic rights will ultimately depend on the legislation adopted, the capability of police forces to remain neutral and the ability to maintain effective control over them.

Presidential Power and States of Exception

Since 9 April 1948 all Colombian presidents have resorted to emergency powers to deal with actual or perceived crisis during their administrations. This power emanated from Article 121 of the 1886 constitution, which provided that in case of war or internal commotion, the President could declare a state of siege, suspend laws deemed “incompatible” and issue decree laws to deal with the crisis.

Article 121 and its subsequent

amendments provided for very limited checks on the exercise of emergency power. The President needed the written consent of each minister before a state of siege could go into effect. He was also required to inform Congress of his reasons for invoking it, and all legislative decrees issued pursuant to Article 121 were subject to review by the Supreme Court. However, Article 121 did not establish a maximum time period for emergency rule, and the Supreme Court showed deference to the President on many occasions.

Constituyente delegates agreed that discretionary power may be needed to confront emergencies. Article 213 of the new constitution vests the President with emergency power but it sets limits. Article 213 provides that:

“In case of a serious disturbance of public order which presents an imminent threat to institutional stability, the security of the state, or national coexistence and which cannot be averted by using the ordinary powers of the police authorities, the President of the Republic, with the written consent of each minister, may declare a state of internal disturbance through the republic or in part of it for a period not to exceed 90 days.”

The plain language of Article 213 requires a President to meet a three-part test before invoking extraordinary powers. The Article further states that the government shall have the powers “strictly necessary for removing the causes of the disturbance”. If the language of Article 213 is interpreted reasonably, it will place important limitations on the exercise of emergency power. And while the 90-day period may be extended for two equal periods, the second extension requires prior approval by the Sen-

ate. Meaningful debate over extended use of these powers may serve to keep the executive within permissible boundaries.

Limiting language is found in Article 214 as well. Clause (1) provides that legislative decrees shall "only refer to subjects directly and specifically related to the situation that led to declaring the state of exception". Clause (2) states that the measures adopted must be proportionate to the gravity of the events. If strictly construed, the proportionality requirement will help to maintain proper balance between the political branches of government.

Article 214 (2) also states that neither human rights nor fundamental liberties may be suspended, and the rules of international humanitarian law shall be respected. Human rights concerns and the limiting language of these provisions reflect changes in Colombia's political landscape and an awareness that all could be victims of government arbitrariness. Given excessive reliance on emergency powers but continuing political turmoil, the delegates reached a reasonable middle ground between law and necessity.

Constitutional Limitations

There are two areas in which the new constitution falls notably short. First, *Constituyente* delegates left the military untouched. Instead of limiting the mili-

tary institution to its proper role, open-ended clauses in the new constitution tend to broaden its functions. In addition, several articles ensure that members of the security forces accused of committing offenses will be investigated and tried in military courts. Article 250, which outlines the duties of the *Fiscalía*, specifically exempts from prosecution offenses committed by active-duty members of the security forces. Article 221 reiterates that these crimes will be tried in courts-martial in accordance with the Military Penal Code.⁹ The system that has been a principal cause of impunity in human rights abuses is now constitutionally enshrined, raising serious doubts about the chances of successful prosecution of these crimes in the future.

Second, since *Constituyente* delegates dissolved Congress, they vested the President with extraordinary powers and provided that a Special Commission would be appointed to veto laws and prepare legislative bills until Congress resumed in December. Another task of the Special Commission – popularly called the *Congresito* – is to evaluate state of siege laws issued under the 1886 constitution.¹⁰ The *Congresito* has passed most of the legislative decrees submitted to it for review, including some issued in 1989 intended to curb paramilitary activity (decrees 813, 814 and 815), norms establishing penalties for persons who profit from drug-related investments (decrees 1895, 2390) and plea bargaining for drug traffickers who turned themselves in (Decree 2047). Decree 180 of 1988, known as the anti-terrorist statute, was approved

9. An identical provision is found in the 1886 constitution.

10. According to Transitory Article 8, decrees issued pursuant to state of siege powers shall remain in effect for 90 days, during which the President can convert them into permanent legislation if the Special Commission does not object.

in part as was Decree 2790, commonly referred to as the Statute for the Defense of Justice.¹¹

These decrees have increased the security forces' power to maintain public order but have resulted in widespread abuses and serious limitations of due process. The decrees issued pursuant to state of siege powers should have therefore been scrutinized by a politically accountable legislature.

Despite these limitations, the constitution lays the framework for a more balanced constitutional order and just soci-

ety. In a whirlwind of five short months, Colombia's political institutions were restructured and modernized. First-, second- and third-generation human rights are now constitutionally protected. Regional and local autonomy and greater citizen participation have become basic tenets. While the real effectiveness can only be evaluated in light of the laws enacted by Congress to implement these changes, the constitution symbolizes an emerging era of compromise and consensus and the people's demand for a better future.

Ghana Towards a Constitutional Government*

Ghana is finally on its way back towards a constitutional government. The Provisional National Defence Council (PNDC), which has been in power since 31 December 1981 after overthrowing the government of the Third Republic, adopted early in 1991 a law (PNDCL 252) outlining the path that will eventually lead to the restoration of constitutional democracy in Ghana. A Committee of Experts was formed and mandated "to draw up and submit to the (Provisional National Defence) Council proposals for a draft constitution of Ghana". This Committee commenced its deliberations

on 11 June 1991. Despite the complexity of its task, the Committee was able to publish an extensive report on 31 July 1991. The main features of this report will be highlighted below.

In preparing its proposals, the Committee took into account the earlier constitutions of Ghana (1957, 1960, 1969 and 1979) and the constitutions of other countries as well as relevant documents which were submitted by the PNDC and by the public. It operated on the cardinal principle that it should not reinvent the wheel. Its main aim was to ensure stability and the rule of law. The Committee

11. The government struck out several portions of the law before submitting it to the *Congreso* for approval, including provisions restricting habeas corpus and the right to defense, granting incommunicado detention, authorizing the military to assume judicial police functions and allowing security forces to search homes and make arrests without a judicial order.

* This article was prepared by Cees Flinteman, professor of law at the University of Limburg, the Netherlands.

emphasized that a constitution should be seen and utilized as an instrument for promoting development. It moreover underscored the prominent interest of the promotion and protection of human rights and fundamental freedoms. In its introductory remarks, the committee noted that "ultimately the viability of a constitutional order hinges on the commitment of the Ghanaian people to the constitution and their readiness to protect and defend as the custodian of their freedoms, aspirations and values".

In light of the above-mentioned considerations, the Committee has submitted a long list of highly interesting, relevant and innovative proposals in 17 key areas. These areas include, of course, details on the three traditional branches of government and on such key issues as directive principles of state policy, freedom and independence of the media, political parties, economic aspects of the constitution, chieftaincy and land administration. It is, unfortunately, not possible to discuss in this framework all the very interesting and well-considered suggestions of the Committee.

Separation of Powers

The Committee has outlined in its report a new model of separation of powers for Ghana. The most prominent aspect of this model is the introduction of a "split executive" – an Executive President elected by universal adult suffrage and a Prime Minister who commands a majority in Parliament. It acknowledges, thereby referring to the French experience, that such a division of powers may in practice lead to difficulties. Much will therefore depend on the good sense and co-operation of the two organs. The ex-

ecutive power will be vested in the President, who is obliged to exercise his functions in consultations with the Council of Ministers. The President cannot be unseated by Parliament, has a fixed term of four years and may be re-elected only once. The Prime Minister would preferably be the leader of the political party that commands a numerical majority in Parliament. All ministers should be individually accountable to the President and Parliament for the administration of their ministries and collectively for the administration of the work of the Council of Ministers. The Council of Ministers should resign only in case Parliament has adopted a vote of no confidence in the government.

The legislative power should be vested in Parliament, according to the Committee. It then gives details relating to the qualifications and disqualifications for membership in Parliament. It is recommended that the terms of Parliament should be five years and that the President may only dissolve Parliament in very special circumstances. Parliament would be elected according to the electoral system presently used in Germany (i.e. a combination of the plurality-majority, single-member district system and the proportional representation system).

The Committee strongly emphasizes the importance of an independent judiciary as "a critical ingredient of a viable constitutional order". The courts play a unique role in the protection and enforcement of the liberty of the individual. The judiciary should have exclusive power to determine all justiciable disputes and should be given the power of judicial review. The existing People's Tribunals should be fully integrated within the courts system. The Committee also submits specifics relating to the financial independence of the judiciary,

the reform of the courts system and the system of appointment, removal and retirement of judges.

It is finally noteworthy that the Committee suggests that the Juridical Committee of the Council of State should have the authority to decide upon the constitutionality of a bill at the request of the President, the Speaker, the Prime Minister, the Minority Leader or any 20 members of Parliament without prejudice to the jurisdiction of the ordinary courts over litigation relating to the enforcement of the constitutional rights of individuals.

Fundamental Freedoms

"It is man that counts, I call upon gold, it does not answer ... it is man that counts." This old Akan saying embodies the concept of human rights in a nutshell. The Committee underlines the importance of human rights as a critical ingredient of the democratization process. It advises that in light of Ghana's history and its ratification of major international human rights instruments (among others the African Charter on Human and Peoples' Rights) the new constitution should include a detailed catalogue of human rights and fundamental freedoms. This list should contain civil and political rights, economic, social and cultural rights as well as specific provisions on the rights of women, children and disabled persons.

Moreover, legislation should be introduced to implement the provisions of international human rights instruments to which Ghana is a party. In this respect, it is of interest that the Committee devotes a full chapter of its report to the freedom and independence of the media. The Committee states: "It is through the free press and mass media that people

become empowered and are able to exercise their basic democratic rights and assume their civic duties." In order to preserve the freedom and independence of the press, the Committee proposes the establishment of a Media Commission and the adoption of a set of basic principles for a free press and mass media to be respected by the government.

The Committee additionally stresses that the exercise and enjoyment of rights and freedoms should not be separated from the performance of duties and obligations. It recommends that the new constitution should explicitly state the duties of the citizen. The list includes the duty to enhance the prestige and good name of Ghana and respect the symbols of the nation, the duty to advance national unity and live in harmony with others, the duty to declare his or her income honestly and the duty to safeguard the environment.

Final Observations

One of the key issues in the future constitutional order of Ghana will be the role of the Armed Forces. The Committee addresses this thorny aspect in the final chapter of its report. It suggests that representatives of the Armed Forces should be given a place in the Council of State and the National Security Council. Members of the Armed Forces should also be eligible to become members of Parliament with leave of absence. The Committee does not have illusions that these mechanisms will be effective as a deterrent to military intervention. It concludes that the most effective defender of the constitution will be the people of Ghana. It is therefore essential for the new constitutional order to genuinely reflect the ordinary man and woman.

It was only possible in the preceding paragraphs to address some of the proposals of the Committee. The Committee's report constitutes a highly important document in the chequered constitutional history of Ghana. In a frank and open way it draws on the constitutional experiences of Ghana while referring to constitutional models of other countries in various parts of the world. In light of this, it provides for well-considered, highly relevant and innovative sugges-

tions for the constitution of the Fourth Republic of Ghana. Elements of continuity and of innovative change are presented in a balanced way. Together they provide a stable basis for future constitutional development. It is sincerely hoped that the report of the Committee will play a significant role in the further debates on a new constitution for Ghana. The first steps towards the restoration of constitutional government in Ghana are indeed most promising.

Israel and the Occupied Territories

The question of Israeli settlements in the Occupied Territories has been of deep concern to the International Commission of Jurists (ICJ). At the 43rd session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (August 1991), the ICJ was instrumental in the adoption of a United Nations resolution intended to solve this issue by legal means. The resolution requests that the Economic and Social Council seek an advisory opinion from the International Court of Justice on the question: "What are the legal consequences for States arising from building Israeli settlements in the territories occupied by Israel since 1967 notwithstanding Security Council resolutions 446 (1979) and 465 (1980)?"

Al-Haq, the West Bank affiliate of the ICJ, issued a document in August 1991 concerning Israeli settlement policy in the

Occupied Territories. The following text is excerpted from this document.

Introduction

There has been a dramatic increase in the illegal Israeli acquisition of Palestinian land and its settlement in the Occupied West Bank and Gaza Strip since January 1990. Settlement plans have been and are in the process of being implemented at a greatly expanded pace, with no regard for Israel's obligations as an occupying power under international law. Further, Israeli authorities have repeatedly indicated that they have no intention of either reversing or halting their illegal settlement policies and practices...

This increase in illegal land acquisition and settlement has accompanied the most significant rise in Jewish immigration since the first few years of Israel's

43-year history. Al-Haq is especially concerned about two aspects of this recent influx: First, some new immigrants are settling in the Occupied Territories; and second, the scope of the influx and the short duration in which it is occurring has placed an unprecedented strain on housing availability within Israel, leading other Israelis to move from within the pre-1967 Green Line to the Occupied Territories.

It is widely accepted under international law that land acquisition and settlement by an occupying power are illegal, contravening the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention. In particular, Israeli policies of land acquisition and settlement violate the requirements of Article 43 of the Hague Regulations that an occupied territory must be administered, with limited exception, for the benefit of the local population.¹

Al-Haq calls on the high contracting parties to the 1949 Fourth Geneva Convention to fulfill their obligation under the Convention and intervene with Israel in order to end its practices of land acquisition and settlement in the Occupied Territories. These policies and practices are clearly illegal and their continuation threatens the livelihood of Palestinians living under occupation and prejudices any long-term solution to the status of the Occupied Territories and peace in the region.

Land Acquisition

Recent Developments:

Al-Haq notes that since 1967, land registration records in the West Bank and Gaza Strip have been closed to the public. These records, which were available for public perusal before Israel's 1967 occupation of the West Bank and Gaza Strip, are currently available for land located within pre-1967 Israel. They are also available to the public in Jordan, whose laws continue to be binding in the Occupied Territories under international law. Al-Haq calls on the Israeli government to open these records to the public so that a complete accounting of Israeli land acquisition can be undertaken. Because of this lack of public access, the following figures are estimates and should be treated as such.

According to documentation and information compiled by al-Haq, illegal land acquisition by the Israeli military authorities has escalated significantly since the beginning of the *intifada* and especially since January 1990. Between January 1988 and June 1991 over 504,120 dunums of land² were confiscated by the Israeli authorities in the Occupied West Bank (excluding East Jerusalem) and Gaza Strip under various pretexts.³ This number amounts to 8.78 per cent of the total land area of the West bank (excluding East Jerusalem) and Gaza Strip.⁴ Of this, 418,642 dunums, or 7.29 per cent,

1. An analysis of Article 43 of the 1907 Hague Regulations is contained in Emma Playfair, "Legal Aspects of Israel's Occupation of the West Bank and Gaza: Theory and Practice", pp. 108-109, in Aruri, Naseer, (ed.) *Occupation: Israel Over Palestine* (London: Zed Books, Ltd., 1984).
2. One dunum equals .247 acres and is equal to 1,000 square metres.
3. The final status of a small per centage of this land is not yet determined as land owners are in the process of appealing the acquisitions.
4. The land area of the West Bank (excluding East Jerusalem) is approximately 5,375,000 dunums; the Gaza Strip is comprised of approximately 365,000 dunums.

were confiscated between January 1990 and July 1991.⁵

Background:

By 1986, according to Meron Benvenisti, Israel controlled over 52 per cent of the total land area of the West Bank (excluding East Jerusalem). Benvenisti also estimates that by 1988, 49 per cent of the total land area of the Gaza Strip was under Israeli control.⁶ Estimates of land acquisition through 1989 indicate that between 50 and 60 per cent of the Occupied Territories has already been expropriated and an additional area "has been subject to blanket restrictions on use and access falling short of outright expropriation".⁷

Israel suspended the process of land registration in 1968, effectively preventing Palestinians from formalizing ownership rights since that time.

Since the 1967 Israeli occupation of the West Bank, Gaza Strip and East Jerusalem, Israel has used a variety of methods to acquire Palestinian land, including the policy of declaring it "closed" or requisitioned for military purposes, classifying it as "state land" or "aban-

doned" property, and/or land to be used for "public purposes". Land acquisition refers to possession of various types of land obtained by any means. Land confiscation refers to private property that is seized by Israel without compensation and implies that the seizure is in response to a violation of law. In reference to land confiscation, Black's Law Dictionary (5th edition) states that "the provisions of due process prohibit the confiscation of property without compensation except where the property is taken in a valid execution of the police power."

Land Acquired for "Military Purposes":

Prior to 1979, the most frequently used method of land acquisition was to seize it for "military purposes".⁸ Although land seized for "military purposes" continues, in theory, to be privately owned under international law and hence ought to be returned to its owner(s), most of this land has in the past been used for non-military and apparently permanent purposes that do not serve the Palestinian population, such as Jewish settlements, settlement roads and settlement agriculture.⁹

5. The information on land acquisition is an approximation. It was compiled and cross-checked with the documentation of al-Haq, the Palestine Human Rights Information Center (PHRIC) and the Land and Water Establishment for Studies and Legal Services. Local organizations had incomplete information on land confiscation in the Gaza Strip. As a result, although the Gaza Strip is included in the total calculation, it is fairly certain that the actual total of land confiscation is higher. In addition, data on East Jerusalem is not consistently compiled nor is it identified as "East Jerusalem" *per se*, especially in regards to the numbers from 1988-89. As a result, some confiscations in East Jerusalem may be included in the total calculation.
6. Meron Benvenisti, *The West Bank Handbook: A political Lexicon*, (Jerusalem: West Bank Data Base Project, Jerusalem Post, 1986). Meron Benvenisti and Shlomo Khayat, *The West Bank and Gaza Atlas* (Jerusalem: The West Bank Data Base Project, Jerusalem Post, 1988).
7. Anthony Coon, *Urban Planning in the West Bank Under Military Occupation: An Examination of the Law and Practice of Town Planning in the Occupied West Bank* (Ramallah: Al-Haq draft copy, April 1991), p. 202.
8. Raja Shehadeh, *Occupier's Law: Israel and the West Bank* (Washington: Institute for Palestine Studies, 1988), p. 17.
9. *Ibid.*, p. 37.

Another method of land acquisition which falls within this category involves "closing" areas by claiming that they are "security zones" needed for military training. Invariably, such land is requisitioned at a later date.¹⁰ In 1989, 20 per cent of the West Bank was considered a "closed area" for military training.¹¹

Land Acquired as "State Land":

After the Israeli High Court of Justice restricted the ability of the Israeli authorities to appropriate land by the mere claim of "military necessity",¹² the occupied authorities switched to acquiring land by declaring it to be "state land". Thus, in 1979, Military Order 59 was amended by Military Order 364 to facilitate the transfer of land from Palestinians to Jewish settlers by declaring non-registered property "state land".¹³ In addition, Military Order 364 "render[ed] a mere declaration by the authorities that land is state land sufficient proof that the land is to be considered as such until the opposite is proven".¹⁴ The original intent of Military Order 59 was to "enable the [Israeli] Custodian of Government Property to assume control over and to manage the property of the Jordanian government [i.e. state land] for the duration of the occupation".¹⁵

Land Seized as "Abandoned" Property:

Another method of acquiring Palestinian owned and cultivated land includes seizing land from Palestinian "absentees" who were considered to have "abandoned" their property. Israeli Military Order 58 of 1967 "defines an absentee as someone who left the area of the West Bank before, during or after" the 1967 war.¹⁶ Nonetheless, "even when the ["absentee"] owner of the property has not left the area (and therefore his property does not qualify as abandoned property) and a Jewish settlement is in need of land, the Custodian can still acquire possession of it and enter into transactions with third parties who are either individuals or Israeli development companies".¹⁷ Article 5 of Military Order 59 makes such transactions valid provided they were entered into in "good faith" and the Custodian of Absentee Property believed the property to be abandoned when he entered the transaction, "even if it was later proven that the property at the time was not government property".

Land Expropriated for "Public Purposes":

Military Order numbers 131, 321 and 949 further allow the Israeli occupation

10. For example, Kiryat Arba, the largest Jewish settlement in the West Bank, was built on land that was "closed" for military purposes and then requisitioned. Shehadeh, *Occupier's Law*, p. 37.

11. Coon, *Urban Planning*, p. 206.

12. This is the landmark Elon Moreh case of June 1979 outlined in Shehadeh, *Occupier's Law*, pp. 18-22.

13. Shehadeh, p. 25 and 27.

14. *Ibid.*, p. 22.

15. *Ibid.*, p. 27.

16. *Ibid.*, pp. 34-35.

17. *Ibid.*, p. 35.

authorities to seize land by compulsory acquisition for "public purposes"¹⁸ which usually means the construction of settlements or roads serving settlements. The road system that has been built since 1967, for example, is designed to integrate the Jewish settlements in the West Bank, Gaza Strip and East Jerusalem with Israel "physically and economically" while at the same time fragmenting and containing existing Arab settlement and development.¹⁹ When a decision is made by the Israeli Area Commander to seize land for "public purposes", the owner may be imprisoned for five years or fined or both if he resists.²⁰

Expropriating land for "public purposes" and then declaring it "state land" has been the only method of appropriation so far used by the Israeli occupying authorities in East Jerusalem.²¹

Israeli Settlement

Recent Developments:

Estimates for the number of Jewish settlers in the Occupied Territories (excluding East Jerusalem) vary significantly ranging from 77,000²² to 120,000.²³ Based on conservative estimates, at least 104,000 Jewish settlers currently live in

18. *Ibid.*, pp. 37-39, Also, Sara Roy, *Gaza Strip Survey* (Jerusalem: West Bank Data Base Project, 1986).

19. Coon, *Urban Planning*, p. 239.

20. Shehadeh, *Occupier's Law*, p. 38.

21. Coon, *Urban Planning*, p. 204.

A late 1970s survey of land acquired and used for Jewish settlements demonstrated that almost 94 per cent of the land area acquired in the West Bank and 97 per cent of the land area acquired in East Jerusalem had been privately owned by Palestinians. Of the confiscated West Bank land (located for the most part in the Jordan Valley and its highlands), 40 per cent had been determined by the Israeli authorities to be "abandoned" by "absentee" landowners (conceding that it was privately owned); 25.5 per cent was owned and its ownership recognized by the British and Jordanians (by tax payments, etc.) although registration may not have been completed; and 28 per cent was registered as privately owned and its owners were forcibly evicted. In East Jerusalem, 96.7 per cent of the land surveyed was registered as privately owned and the owners were forcibly evicted. Calculations were derived from a table provided in Ibrahim Matar, "Israeli Settlements in the West Bank and Gaza Strip", *Journal of Palestine Studies*, No. 1, Vol. XI (Autumn 1981) pp. 103-110.

22. According to the Israeli Central Bureau of Statistics, by the end of 1989, there were 73,000 Jewish settlers living in the Occupied West Bank (excluding East Jerusalem) and Gaza Strip. *1990 Statistical Abstract of Israel*, p. 45. This number must be treated as a minimal figure because the Israeli Central Bureau of Statistics has a tendency to undercount settlers in the West Bank and Gaza Strip.

According to the Israeli Finance Ministry, 4,000 new immigrants have settled in the territories (excluding East Jerusalem) since January 1990 (Jerusalem Post, 31 July 1991).

The sum of these two figures brings the total number of Jewish settlers currently residing in the Occupied Territories (excluding East Jerusalem) to at least 77,000 (not including natural population increase and veteran Israeli migration into the territories). In contrast, Anthony Coon estimates that there were over 85,000 settlers in the West Bank only (excluding East Jerusalem) by 1989. *Urban Planning*, p. 211.

23. According to Gush Emunim settlement leader in Bet El. 14 August 1991.

the Occupied Territories (excluding East Jerusalem).²⁴ In addition, well over 127,700 Jewish settlers reside in Occupied East Jerusalem.²⁵ The settler population of East Jerusalem has increased by at least 14.6 per cent since January 1990 when, according to the "Statistical Yearbook of Jerusalem", 111,400 Jewish settlers lived in the area.²⁶...

Settlement Construction Since January 1990:

An Israeli Housing Ministry spokesman recently stated that there were 4,500 housing starts recorded in "Judea, Samaria and Gaza" in fiscal year 1990.²⁷ According to the Washington Post, between January and October of 1990 Israel had allocated \$80 million to settlement funding.²⁸ In the past two years, 13,000 housing units and 1,900 mobile homes have been established in the Occupied Territories (excluding East Jeru-

salem) according to Aryeh Bar of the Housing Ministry.²⁹

In a report presented to the Knesset in May 1991, [Housing Minister Ariel] Sharon reported that 4,468 units were under construction in the Occupied Territories (excluding Jerusalem), with 95,000 units scheduled for completion by the end of 1991 for Israel and the Occupied Territories; Sharon refused to reveal what proportion of the 95,000 units were to be built in the Occupied Territories.³⁰ Israeli Deputy Minister of Construction and Housing Avraham Ravitz stated that there are 13,000 housing units being planned for the Occupied Territories (excluding East Jerusalem) in 1991 and 1992,³¹ with Knesset members Charlie Biton and Ali Ben Menachem charging that the Housing Ministry actually plans to build as many as 24,300 housing units in seven West Bank settlements by the end of 1992.³²

24. According to the Jerusalem Post, 26 April 1991, the Jewish population of "Judea and Samaria" is just over 100,000 "and growing rapidly".

The current Jewish settler population in Gaza Strip is approximately 4,000, with Gaza settlement leaders expecting it to reach 5,000 by the end of 1991. Conversation with Danny Rubenstein of *Davar*, 14 August 1991.

By June 1990, there were 94,650 Jewish settlers living in the Occupied Territories (excluding East Jerusalem), according to Joost Hiltermann, "Settling for War: Soviet Immigration and Israel's Settlement Policy in East Jerusalem", *Journal of Palestine Studies* No. 2, vol. XX (Winter 1991) p. 75. This citation originates from the Foreign Broadcast Information Service, 29 June 1990, quoting Ha'aretz, 22 June 1990.

25. See section titled "Soviet Jewish Settlement in the Occupied Territories," p. 9 for derivation of this calculation.

26. In 1989, the total population of Jerusalem was 504,100, according to the *Statistical Yearbook of Jerusalem*, No. 8, 1989 (Jerusalem: Municipality of Jerusalem, 1991), edited by Maya Chosham and Shlomit Greenbaum. Of these 361,500 were Jews and 142,600 were Palestinians, p. 27.

27. Jerusalem Post, 2 July 1991.

28. Hiltermann, "Settling for War", p. 75.

29. Jerusalem Post, 8 August 1991.

30. Jerusalem Post, 28 May 1991.

31. From *Government Investment in Settlements in the Occupied Territories* (Hebrew); report published by Peace Now, May 1991.

32. Jerusalem Post, 6 March 1991.

Bob Lang of the public relations section of the Judea and Samaria Council states that the Jewish population of the "administered areas" will increase by over 20 per cent in 1991, corresponding to the accelerated pace of settlement construction now being undertaken in the territories. The Jerusalem Post notes that Lang's figures are above and beyond "Jewish neighborhoods in East Jerusalem and the new communities being built by the Ministry [of housing] that will straddle the Green Line", which are "expected to attract tens of thousands of new immigrants and veteran Israelis".³³ In addition, Peace Now has noted that the Israeli Housing Ministry has spent 20 per cent of its budget on housing construction in the West Bank (excluding East Jerusalem) and Gaza Strip.³⁴

All indications point to an ongoing and continuous escalation of settlement in the Occupied Territories. For example, the Housing Ministry will soon launch the "Stars Plan" whose goal is the "founding of a dozen new communities straddling the Green Line just east of the coastal plain".³⁵ The plan was developed in response to the fact that the Green Line continues to provide a psychological barrier for many Jewish suburbanites in Tel Aviv and West Jerusalem who might otherwise relocate for less expensive and more spacious accommoda-

tions.³⁶ The plan will therefore bridge "star" Jewish settlements in the West Bank with inland communities by a road network that will bypass Palestinian villages and "mutually boost" the growth potential of Jewish communities on both sides of the Green Line.³⁷ The first stage, to be included in the 1992 budget, projects the construction of 16,000 new housing units for Jewish Israelis; an additional 31,000 units are planned in "subsequent years" for these Green Line neighborhoods.³⁸ In addition, Yediot Aharanot recently revealed that the Israeli Housing Ministry is planning to build as many as 106,000 units in the West Bank to accommodate 400,000 Jewish settlers over the next three to four years.³⁹

Occupied East Jerusalem:

As regards East Jerusalem, Ariel Sharon declared on 19 October 1990 that "there is no Green Line in Jerusalem. We never took on ourselves a commitment not to build in Jerusalem—never."⁴⁰ A few days later, he informed visiting Jewish Agency officials that "we are going for a massive construction plan in the heart of Jerusalem, at least 5,000 [units] a year for the next eight, most of it in East Jerusalem."⁴¹ More recently, Sharon stated in a newspaper article that "within a number of years" the govern-

33. Jerusalem Post, 26 April 1991.

34. Jerusalem Post, 6 May 1991.

35. Jerusalem Post, 8 April 1991.

36. According to Jan de Yong, Palestine Geographical Research and Information Centre, Jerusalem.

37. *Ibid.*

38. Jerusalem Post, 8 April 1991

39. Al-Fajr, 29 June 1991 and Al-Quds, 29 June 1991, from Yediot Aharanot, 28 June 1991.

40. As reported in Washington Jewish Week, 18 October 1990, cited in Hiltermann, "Settling for War", p. 81.

41. Hiltermann, "Settling for War", p. 82.

ment of Israel plans to increase the Jewish population in "greater Jerusalem" to one million people.⁴²

In the first half of 1990, the municipality of Jerusalem approved six new Jewish "neighborhoods", i.e. settlement extensions, in East Jerusalem for a total of 16,000 apartments that are projected to accommodate 56,000 Soviet immigrants. The Jerusalem municipality indicates that Jewish settlements or "neighborhoods" are planned for all "vacant" areas in the northern part of Jerusalem.⁴³ The Israeli Ministerial Immigration Committee, also known as the Aliyah Cabinet and headed by Sharon, adopted a plan that included increasing the rate of housing construction in the whole of Jerusalem from 2,000 to 5,000 units every year. In addition, the plan aims to increase the Jewish population in existing settlements of East Jerusalem by 45,000 to 60,000 within three years.⁴⁴

Recent Jewish Immigration and its Effects

Recent Developments:

Between January 1990 and July 1991 approximately 310,000 Jews immigrated

to Israel, 88 per cent of whom were from the Soviet Union.⁴⁵ The Jewish Agency predicts that there will be a total of one million new Israelis by the end of 1992, a number which they expect to double by the end of 1995.⁴⁶

Soviet Jewish Settlement in the Occupied Territories:

Israel denies directing recent immigrants to the Occupied West Bank and Gaza Strip although they believe that "new immigrants, like any other Israeli, have a right to live in Ariel and Emmanuel as much as they have a right to live in Tel Aviv or Kfar Sava".⁴⁷ Recent figures indicate that new immigrants are (whether directed or not) settling in the Occupied Territories. At least 4,000 new immigrants have settled in the Occupied West Bank (excluding East Jerusalem) and Gaza Strip since January 1990.

In terms of Jerusalem, Israel rejects the internationally accepted view that East Jerusalem and what it defines as the "municipality of Jerusalem" acquired since 1967 are occupied territory, and is actively and openly expanding settlements there.⁴⁸ On 23 January 1991, the Jerusalem municipality reported that almost 7,000 Soviet immigrants had set-

42. Jerusalem Post, 8 July 1991.

43. The "vacant" lands were expropriated from Palestinians in 1970 and 1980 for "public purposes". Hiltermann, p. 78.

44. The Foundation for Middle East Peace, *Report on Israeli Settlement in the Occupied Territories*, vol. 1, No. 1, January 1991, p. 5.

45. According to the Jerusalem Post, 4 July 1991, 200,000 immigrants arrived in 1990. The Jerusalem Post, 31 July 1991 cites that 310,000 Jewish immigrants have arrived since January 1990. The same article gives the figure of 117,000 for new immigrants that have arrived since January 1991. The total number of immigrants that have arrived since January 1990 would then be 317,000 — not 310,000.

46. Hiltermann, p. 72.

47. Jerusalem Post, 19 April 1990. Quote attributed to Knesset member Michael Eitan.

48. See Hiltermann, "Settling for War".

tled in East Jerusalem in 1990.⁴⁹ A recent Finance Ministry communique stated that between January and December 1990, 9.7 per cent of new Israeli immigrants settled in Jerusalem; according to the Finance Ministry, this is 12.2 per cent of the Jerusalem population.⁵⁰ The Finance Ministry has in addition estimated that 12 per cent of immigrants who have arrived since January 1991 have settled in Jerusalem.⁵¹ If one assumes (very conservatively) that 50 per cent of these new immigrants settled in East Jerusalem,⁵² then at least 16,300 of the 310,000 new immigrants who have arrived since January 1990 have illegally settled in East Jerusalem.

Migration of Veteran Israelis to the Occupied Territories:

An even more important link between recent immigration to Israel and the acquisition and settlement of the Occupied Territories is the situation of veteran Israelis who now find that they have more of an incentive to relocate from within pre-1967 borders into the Occupied Territories. Before the pressure created by the recent influx of immigrants to Israel,

Benvenisti estimated that compared to Israeli families living within pre-1967 borders, incentives and assistance are 50 per cent higher on average for Jewish families living in settlements outside of those borders.⁵³ For the more established Israeli citizen, the new demand for housing created by recent larger-scale immigration and the generous housing allowances Soviet immigrants are granted by the Israeli government has led to increasingly expensive and limited housing options within pre-1967 borders, a situation further encouraging their emigration to "Jewish neighborhoods" in the Occupied Territories.⁵⁴

Another incentive for veteran Israeli emigration to the Occupied Territories is the Israeli government's absorption of approximately two-thirds of the housing and other infrastructure costs for an Israeli Jewish family wishing to move to the Occupied Territories. For example, Israelis who settle in the Occupied Territories receive a 7 per cent income tax reduction, can buy land for only 5 per cent of its value, receive interest-free or low-interest mortgages and receive a housing grant of \$19,000 (for a family of

49. The Foundation for Middle East Peace, *Report on Israeli Settlement in the Occupied Territories*, Vol. 1, No. 3, May 1991, pp. 1 and 6. The report refers to the *Immigrant Absorption — Statistical Report* of the Jerusalem municipality when citing this figure.

50. Jerusalem Post, 17 May 1991.

51. Jerusalem Post, 31 July 1991.

52. This is a very conservative estimate and comes from Hiltermann, "Settling for War", p. 77.

53. Meron Benvenisti, *1986 Report: Demographic, Economic, Legal, Social and Political Developments in the West Bank* (Jerusalem: The West Bank Data Base Project, 1986), p. 53. Cited in Jerusalem Media and Communication Centre, "Soviet Jewish Immigration and Israeli Settlement in the West Bank and Gaza Strip", December 1990.

54. Upon arriving in Israel, a family of three receives an installment check for NIS 4,880 and a cash sum of NIS 750. They also receive half a year of free health insurance and generous mortgage benefits. They are allowed one free phone call at the airport to the Soviet Union and unlimited free phone calls within Israel. They receive free transportation wherever they want to go. Once they open a bank account, they receive NIS 17,370. Hiltermann, p. 73.

four).⁵⁵ Knesset member Michael Eitan recently stated that "thousands" of units were being built "for young couples who cannot afford apartments within the Green Line".⁵⁶ According to a recent report by Knesset members Haim Oron and Dedi Zucker, mortgages granted to Israelis who settle in the Occupied West Bank have essentially doubled in the past year as compared to mortgages provided for couples who settle in most areas inside the Green Line.⁵⁷ As a result of these economic discrepancies, Knesset members Oron and Zucker foresee "that young couples without money and new immigrants will try to purchase apartments in the settlements in order not to lose out on extensive benefits".⁵⁸

International Law Applicable to Israeli Land Acquisition and Settlement

Background:

International Law is unambiguous on issues of land acquisition and settlement in an occupied territory. Article 43 of the Hague Regulations requires that an occupied territory must be administered, with rare exceptions, for the benefit of the local population. Article 73 of the Charter of the United Nations similarly requires that in non-self-governing territories "the interests of the inhabitants of these territories are paramount". The acquisition of the majority of the local

population's land and its settlement by the occupying power is clearly not in the interest of, nor does it benefit, the Palestinian people.

The United Nations has repeatedly affirmed the applicability of both the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War to the 24-year-old Israeli occupation of the West Bank and Gaza Strip. In addition, the international community has historically rejected the validity of Israel's 1967 annexation of East Jerusalem and has repeatedly affirmed its status as an occupied territory.

The Israeli Position:

While Israel accepts the applicability of the Hague Regulations to the Occupied Territories as customary law, it does not accept the applicability of the Fourth Geneva Convention of 1949 even though the General Assembly of the United Nations voted by 141 to 1 (Israel) in 1981 that the Convention applies to the West Bank and Gaza Strip. After the first five months of the occupation, Israel took the position that it is not an occupier and therefore is not bound by the Geneva Convention but "agrees to apply the humanitarian standards laid down in these conventions".⁵⁹ Most legal scholars believe that all Israeli justifications in this regard "fail" in view of the clear wording of Geneva-IV, to which Israel is a party, and of the reiteration of the word-

55. Foundation for Middle East Peace, *Report on Israeli Settlement*, Vol. 1, No. 3, pp. 1 and 3. See the report for an extensive discussion of other incentives for Jewish settlement in the Occupied Territories.

56. Jerusalem Post, 8 May 1991.

57. Jerusalem Post, 22 April 1991.

58. Press release and report, "By Providing Extensive Benefits", 21 April 1991.

59. Shehadeh, *Occupier's Law*, p. 42.

ing in PR-I (Protocols to the Convention) of 1977, Article 85 (4a).⁶⁰

Land Acquisition:

In relation to seizure of land, Article 23 of the Hague Regulations of 1907 forbids an occupying country "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war". Article 46 of the Regulations specifically states that "private property cannot be confiscated". Article 52 requires that "requisition ... shall not be demanded ... except for the needs of the army of occupation". Israel's actions clearly do not fall within the exceptions allowed under the Hague Regulations. Land has been seized for the purpose of annexing territory, for settling Israeli civilian population and for other non-military purposes. Further, Israel's claim of military necessity is often offered in cases where the justification is arguable at best.

Land Settlement:

The settlement of an occupied territory also clearly violates Article 49 of the Fourth Geneva Convention, which re-

quires that "the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies". The International Committee of the Red Cross Commentary to the Convention agrees with this formulation, stating clearly that Article 49 "is intended to prevent a practice adopted during the Second World War by certain powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race."⁶¹

Even if the definition Israel uses for claiming that the land it has acquired is "state land" is correct, Article 55 of the Hague Regulations states that an occupying power "shall be regarded only as the usufructuror and administrator of state property." In keeping with this mandate, Israel must safeguard the property and "may not impair its substance or alter its character."⁶² Building Jewish settlements on these acquired lands is clearly a violation of this mandate.

60. Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, Fifth Edition (New York: Macmillan Publishing Co., 1989), p. 693.

61. Jean S. Pictet, (ed.) *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), p. 283.

62. Shehadeh, *Occupier's Law*, p. 33.

COMMENTARIES

Pérez de Cuéllar Discusses Sovereignty and International Responsibility

The ICJ is publishing the text of an address given by the UN Secretary-General Javier Pérez de Cuéllar to the University of Florence on 21 November 1991, one month before his term in office ended.

Throughout my term as Secretary-General of the United Nations I have sought to promote a partnership between the Secretariat and the intellectual community, for it has been my conviction that the United Nations should have access to the best thinking and the best ideas if it is to succeed in its global mission on behalf of peace based on justice, social progress, development and respect for human rights and fundamental freedoms. You will therefore understand my pleasure at being here with you today in this great university and for the opportunity to join you in a process of reflection on a topic that is of great importance to the future evolution of the international community: the relationship between sovereignty and international responsibility. ...

What I wish to say to you today about sovereignty and international responsibility is quite simple, namely that sovereignty and international responsibility are different sides of the same coin. They are intricately connected and one goes with the other. Let me explain what I have in mind.

In the Declaration on principles of international law concerning friendly relations and co-operation among States, which it adopted in 1970, the General Assembly interpreted the Charter's principle of the sovereign equality of States to mean that all States have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:

- States are juridically equal.
- Each State enjoys the rights inherent in full sovereignty.
- Each State has the duty to respect the personality of other States.
- The territorial integrity and political independence of the State are inviolable.
- Each State has the right freely to choose and develop its political, social, economic and cultural systems.
- Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

Sovereignty has as its fundamental objective to enable each people to chart its own course and to realize its full potential. However, the world has reached a stage where the full potential of any

people can only be realized through international co-operation for mutual benefit and the common welfare. International co-operation requires rules of conduct and standards of behaviour which are the essence of international responsibility.

The very core of the concept of sovereignty is regulated by international standards. Let us recall in this connection the stirring words of Article 21 of the Universal Declaration of Human Rights, which proclaims: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Let us recall further that Member States of the United Nations have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for, and observance of, human rights and fundamental freedoms.

The international standards thus prescribe that sovereignty shall reside in the people and that governments shall pursue strategies of governance aiming for the realization of human rights – strategies of governance that should never involve departures from fundamental rights. What this requires is that the constitutional, legislative, judicial and administrative orders of Member States shall be inspired in their conception and guided in their implementation by the international standards of human rights; that a culture of human rights should be striven for in each country through education and the dissemination of information on human rights; and that special arrangements shall be instituted to protect vulnerable parts of the population whose rights may be in danger. The en-

hancement of human rights thus contributes to the enrichment of popular sovereignty.

If the character, aims and standards of internal sovereignty are thus internationally defined, the external manifestations of sovereignty are similarly regulated. The first proposition that we may make about the external manifestations of sovereignty is that it should be influenced by, and should seek to promote, the goals and principles of the United Nations Charter. This is an inescapable consequence of the solemn commitment which each of the Member States of the United Nations has undertaken by virtue of their acceptance of the Charter. From this follows another essential proposition, namely that each government is open to scrutiny by the United Nations and is internationally accountable for its efforts to live up to the precepts of the Charter. An international responsibility to the United Nations is thus an inherent adjunct to the sovereignty of every Member State.

The General Assembly codified this principle in the Declaration on friendly relations which I referred to earlier. It affirmed that every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the United Nations Charter; to fulfil in good faith its obligations under the generally recognized principles and rules of international law; to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law. In particular, the General Assembly underlined the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the

United Nations. The General Assembly elaborated this principle as follows:

"Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues."

The General Assembly insisted, further, on the duty of States to co-operate with one another for the advancement of the common welfare. It declared that States have the duty to co-operate with one another, generally; to co-operate with other States in the maintenance of international peace and security; and to work together for the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all. It is interesting to note the General Assembly's pronouncement that Member States of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter. States, the General Assembly specified, should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries.

Each sovereign government also has an international responsibility to participate in and contribute to the maintenance of a global watch over the common welfare. The threats which humanity faces are many, including environmental, po-

litical, economic, social and humanitarian. Weapons of mass destruction can annihilate life on the planet; environmental deterioration affects all of our lives; international and internal conflicts, natural and man-made disasters all have the potential to exact high human and material costs. States can no longer be permitted to contribute to, or ignore, such dangers. All are responsible for the maintenance of an effective global watch. This is an international responsibility shared by every government, every people and every organ of society. The sovereignty that resides in the people and is meant to be exercised for the benefit of the people can neither be used against the people, nor for the destruction of the patrimony of humanity.

The sovereignty that resides in the people and seeks to promote the welfare of the people cannot ignore the sufferings of people, whether inside or outside its borders. Sovereignty and solidarity are thus parallel concepts. One dimension of international responsibility that impacts upon sovereignty flows from our shared humanity and by our natural desire to come to the aid of people in need wherever they are. Sovereignty and humanitarianism thus also have a close nexus.

In this regard, it is now increasingly clear, as I stated in my last Annual Report, that "the protection of human rights is one of the keystones of peace. I am convinced that this is now more an exercise in harmonious international influence and pressure – through appeals, reprimands, admonitions or condemnations and, as a last resort, an appropriate United Nations presence – than what was regarded as permissible under traditional international law.

"It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States

cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity."

The nexus between sovereignty and humanitarianism introduces us to the notions of the international rule of law, the peaceful settlement of disputes and the role of the International Court of Justice. A sovereignty that resides in the people and wishes to advance the welfare of the people, a sovereignty that is guided by humanitarian values should lead us away from violent methods for the resolution of disputes. Rather they should lead us to the promotion of confidence-building measures, of arrangements to detect and to avert problems, of the observance of the norms of international law and of respect for the decisions of the International Court of Justice. Sovereignty and international responsibility thus lead us back to the international rule of law.

Sovereignty, international responsibility and the international rule of law direct us, next, to the role of international

institutions such as the United Nations. By promoting the rule of law, by fostering the peaceful settlement of disputes, by facilitating international co-operation for the enhancement of mutual welfare, international institutions, such as the United Nations, emerge into focus for what they really are: instruments to enrich the patrimony of each people, instruments to maximize the yields from the exercise of popular sovereignty. International responsibility thus entails that sovereignty be exercised in such a manner as to facilitate the role of the United Nations and that, still more, everything possible be done to strengthen the role of the United Nations.

For when the United Nations is strong, each of its Member States is strong. When the United Nations is strong, each people is strong. When the United Nations is strong, small and weak States can be protected. When the United Nations is strong, the sovereignty of the people is reinforced. Sovereignty and international responsibility thus require support for the United Nations and its sister institutions.

The Follow-Up Procedure of the UN Human Rights Committee

*Alfred M. de Zayas**

The Human Rights Committee (HRC) was established as the monitoring organ of the International Covenant on Civil and Political Rights (ICCPR), which entered into force on 23 March 1976. It consists of 18 experts elected by States parties to the Covenant, at present 100. Unlike the UN Commission on Human Rights, which is composed of delegations from 53 member States of the United Nations, the HRC members serve in their personal capacities and do not represent their countries. As a treaty body, it is not strictly *sensu a* United Nations organ, although it is assisted by the Secretariat, i.e. the Centre for Human Rights in Geneva, and reports annually to the UN General Assembly.

Under the Optional Protocol to the ICCPR, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit written communications to the HRC for examination. Currently 60 States parties to the Covenant have accepted the competence of the HRC to deal with individual complaints by ratifying or acceding to the Optional Protocol. No communication can be received by the HRC if it concerns a State party to the Covenant which is not also a party to the Optional Protocol. Consideration of communications under the Optional Protocol

takes place in closed meetings. Final decisions, however, are published in the HRC's annual report to the General Assembly and in a running series entitled "Selected Decisions of the Human Rights Committee" (volumes I and II have been already issued).

The HRC started its work under the Optional Protocol at its second session in 1977. Since then, 472 communications concerning 36 States parties have been registered for consideration. Examination of 125 communications was concluded by the adoption of final decisions on the merits. Violations of provisions of the Covenant were found in 98 cases.

"Views" and Remedies

The HRC's decisions on the merits are referred to as "Views" in article 5, paragraph 4, of the Optional Protocol. Although Views read like court judgements, the drafters of the Covenant did not call them so, nor did they confer upon them legally binding force. The Optional Protocol does not provide for an enforcement mechanism. Thus, the Committee's Views are more in the nature of recommendations, which States parties are free to implement or not to the extent they deem appropriate. Considerable moral weight is attached to the HRC's findings,

* Alfred M. de Zayas is a Human Rights Officer at the Centre for Human Rights. This article was written in the author's personal capacity and does not necessarily reflect the opinions of the United Nations Secretariat or of the members of the Human Rights Committee.

and it may be presumed that when a State voluntarily adheres to the procedure under the Optional Protocol, it does so in good faith and that it undertakes to honour the HRC's recommendations.

Beyond that, a State may provide in its domestic legislation that it will carry out the decisions of the HRC. For instance, pursuant to article 39 of Peruvian Law No. 23,506, a Peruvian citizen who considers that his or her human rights have been violated may appeal to the United Nations Human Rights Committee. Article 40 of the same law provides that the Peruvian Supreme Court will receive the resolutions of the HRC and order their implementation. This law was invoked by Rubén Muñoz Hermoza in a case involving arbitrary dismissal from public service. His communication (No. 203/1986, *Muñoz v. Peru*) was examined by the HRC, which found a violation of his rights under article 14, paragraph 1, of the Covenant.¹

When the HRC has made a finding of a violation of a provision of the Covenant in its Views, it proceeds to ask the State party to take appropriate steps to remedy the violation. For instance, in a case concerning the disappearance and possible death of the victims, the HRC found that "the right to life enshrined in article 6 of the Covenant and the rights to liberty have not been effectively protected" by the State party. In its Views the Committee stated that "it would welcome information on any relevant measures taken by the State party in respect of the Committee's Views and, in particular, invites

the State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers" (No. 181/1984, *Sanjuán v. Colombia*).² In another case concerning an alien who was held pending extradition, the HRC found that there had been a violation of article 9, paragraph 4, of the Covenant, because the author had been unable to challenge his detention before a court during the initial seven days following the issuance of the detention order. In its Views the HRC observed that "the State party is under an obligation to remedy the violations suffered by the author and to ensure that similar violations do not occur in the future". It indicated that "it would welcome information on any relevant measures taken by the State party in respect of the Committee's Views" (No. 291/1988, *Torres v. Finland*).³ In a case where the author was sentenced to death after a trial, which the HRC held had violated basic guarantees of fair hearing under article 14 of the Covenant, the HRC asked the State party to release the author (No. 250/1987, *Reid v. Jamaica*).⁴

Monitoring Compliance

It is encouraging to note that many States parties have honoured their commitments under the Optional Protocol by releasing prisoners, paying compensation to victims or amending legislation found to be incompatible with the Covenant. In its annual reports to the General Assem-

1. Human Rights Committee 1989 Report, Official Records of the General Assembly, 44th session, Supplement No. 40/44/40, annex X, section D, paragraphs I and 13.2.

2. Human Rights Committee 1990 Report, annex IX, section B, paragraphs 11 and 12.

3. *Ibid.*, annex IX, section K, paragraph 9.

4. *Ibid.*, annex IX, section J, paragraph 12.2.

bly, the HRC has been reporting on these successes. There is, however, no general overview on the degree of State compliance with the Committee's Views.

At its 38th session in March/April 1989, the HRC discussed the question of its powers in relation to the problems of the implementation of its Views. At its 39th session in July 1990, the HRC decided systematically to seek such information. In the past, the HRC had requested information verbally. Furthermore, HRC members have used the opportunity of examining States' reports under article 40 to raise the issue (and, indeed, to present lists of cases to the States' representatives). However, only in a few cases did States forward information to the HRC. Thus, the HRC often had no information on what had happened to a particular victim of a violation of the Covenant after it had issued its Views. Further, the HRC has received letters of complaint from a number of victims stating that their situation remained unchanged or that no appropriate remedy had been provided.

Legal Basis for Follow-Up Procedure

The world community associated great hopes with the establishment of the Human Rights Committee. As the monitoring organ of the most important human rights treaty to date, the HRC was entrusted with a weighty responsibility. Of course, there already existed regional human rights commissions which operated pursuant to regional conventions, but here at last was a multilateral treaty aimed at universal participation and a Committee of distinguished experts from all continents and legal traditions with a truly global perspective.

With the growing recognition of the individual as a subject of international law, bearing both rights and responsibilities, the idea of an international court of human rights with competence to examine complaints of individuals against States and the power to hand down binding judgements has been gaining ground. Admittedly the Human Rights Committee is not such a court, but it does exercise analogous responsibilities and it is the only international body to fulfil this need.

In the earlier years of the Human Rights Committee, members frequently discussed ways and means of increasing co-operation with States parties, especially in respect of the Committee's Views under the Optional Protocol. But doubts were expressed as to the legal basis for any action to be taken by the HRC subsequent to the adoption of Views in a particular case. At the HRC's 17th session in October 1982, some members expressed the opinion that nothing in the Covenant and the Optional Protocol, which circumscribe the HRC's mandate, empowered it to reconsider its Views on communications or to ensure their implementation. Some members expressed their understanding that the HRC was a *sui generis* body with no judicial powers and that the implementation of its Views was left to the good will of the State party concerned. They felt that the question of monitoring the implementation of those Views in the absence of a clear legal mandate to that effect might even be contrary to article 2, paragraph 7, of the United Nations Charter relating to non-interference by the United Nations in the internal affairs of sovereign States. Moreover, if States parties wanted to make the Committee's Views binding, they could use the amendment procedure under article 11 of the Protocol, an easier

matter in 1982, when there were only 28 States parties to the Protocol.⁵

Other members, however, felt that the HRC could not let its work under the Optional Protocol degenerate into an exercise in futility. They felt that due consideration had to be paid to both the letter and spirit of the Covenant, and that where the Committee believed that certain appropriate action was reasonably open to it, or was not expressly prohibited, the HRC should take it and that the Optional Protocol allowed considerable latitude for interpretation, since many issues were not specifically covered by its provisions.

Gradually a consensus emerged in the HRC that "follow-up" procedures were within its mandate. This is implicit in the preamble to the Optional Protocol, which declares that the HRC receives and considers communications "in order further to achieve the purposes of the Covenant and the implementation of its provisions". To this end it is legitimate for the HRC to engage in exchange with States parties regarding their response to the Committee's Views. The International Court of Justice has affirmed that even in the absence of specific enabling powers, an international body may act in ways not specifically forbidden for the achievement of its purposes and objectives (Case of Certain Expenses, ICJ Reports 1962). Moreover, the competence to "consider" communications, laid down in article 1 of the Optional Protocol, may be interpreted broadly as encompassing not only the examination of cases up to the rendering of Views but also beyond that to "consider" the measures adopted by a State party to remedy violations of the Cov-

enant found in the course of examination of a communication.

Indeed, certain follow-up competence must be inherent to the effective performance of the HRC's functions. Even if the Committee's Views are not legally binding judgements and the HRC has no power to ensure their enforcement, it must at least have authority to monitor the effect of its Views. This authority can be understood on the basis of the doctrine of implied powers (Reparation for Injuries Suffered in Service of the United Nations, Advisory Opinion, ICJ Report 1949, pp. 174-188), according to which every international organ must be deemed to have certain implied powers. Every procedure of international investigation or settlement (article 5, paragraph 2(b) of Optional Protocol) necessarily must have the means of determining whether a settlement has been reached and whether the settlement is being observed. States parties that voluntarily submit to the Optional Protocol procedure do so in good faith, intending to respect the Committee's Views. Accordingly, the HRC would not be going beyond its mandate by monitoring implementation.

Thus, even if the Optional Protocol is silent on the question of the HRC's powers subsequent to the adoption and transmittal of Views, it does not exclude the development of a reasonable follow-up machinery.

Further, it should not be forgotten that all parties to the Covenant have given the HRC a general competence to request "reports on the measures they have adopted which give effect to the rights recognized herein and on the progress

5. Human Rights Committee 1983 Report, Official Records of the General Assembly, 38th session, supplement No. 40 (A/38/40), p. 93, para. 392.

made in the enjoyment of those rights" (article 40, paragraph 1, of the Covenant). Such reports should be submitted "whenever the Committee so requests" (article 40, paragraph 1(b)), e.g. after the adoption of Views under the Optional Protocol. Accordingly, the HRC could request from any State party found to be in violation of the Covenant a brief, separate report on its compliance with the Committee's Views. Such a request might be addressed to States parties one year after the adoption of the Committee's Views. Thus, while formally linked to article 40 of the Covenant, this procedure would function separately from the examination of the regular periodic State reports.

Special Rapporteur

At its 39th session, the HRC decided to adopt these measures to "follow up" on its cases:

- When, in its Views under the Optional Protocol, the Committee makes a finding of a violation, the State party concerned will be asked in the Views itself to inform the Committee of what action it deems appropriate. A time limit will be indicated for the receipt of such information. This time limit shall be determined on the basis of the circumstances of each case; it shall not exceed 180 days.
- States parties have undertaken, under article 2, paragraph 3, of the Covenant, to ensure effective remedies for violations of the Covenant. If no reply is received within the indicated time period, or if the reply shows that no remedy has been provided, this will henceforth be noted in the Committee's Annual Report. Equally, positive

responses and co-operation from States parties will also be included in the Annual Report.

- The Committee's Guidelines for the preparation of Reports, requesting States parties who are also parties to the Optional Protocol, and in respect of whom any finding of a violation had been made in the period under review, shall be amended to include a brief section indicating "measures which they have adopted which give effect to the rights recognized therein" (article 40 of the Covenant) in respect of the authors concerned. Because of the periodicity of Reports under article 40, this information is additional to, and does not replace, the information that is to be given to the Committee under the time limits specified above.
- Should this information not be made available in the relevant periodic Report, questions relating to it will be included by the Committee in its List of questions that it customarily prepares for a State party a few days prior to the examination of the Report, and the matter will be pursued in the dialogue with the State party.
- The Committee will appoint a Special Rapporteur for the Follow-Up of Views.

The Special Rapporteur's duties are as follows:

- To recommend to the Committee action upon all letters of complaint henceforth received from individuals held, in the Views of the HRC under the Optional Protocol, to have been the victims of a violation, and who claim that no appropriate remedy has been provided.
- To communicate with States parties and, if it deems appropriate, with victims in respect of such let-

ters already received by the HRC.

- To seek to provide information on any action taken in relation to Views adopted by the HRC to date, when such information has not otherwise been made available. To this end, the Special Rapporteur will communicate with all States parties and victims in respect of whom findings of violations have been made, and to ascertain what action, if any, has been taken. This information, when collected, will also be made available in a future Annual Report.
- To assist the Rapporteur of the Committee in the Preparation of the relevant section of the Annual Report that will henceforth contain detailed information on the follow-up of cases.
- To advise the Committee on the appropriate deadline for the receipt of information on remedial measures adopted by a State party found to have violated provisions of the Covenant.
- To submit to the Committee, at suitable intervals, recommendations on possible ways of rendering the follow-up procedure more effective."⁶

At this same session, the HRC appointed János Fodor as Special Rapporteur for the Follow-Up of Views for a one-year term. At its 41st, 42nd and 43rd sessions, Mr. Fodor presented progress reports, which are at this stage confidential. The HRC has yet to decide whether such progress reports should be published or whether only certain informa-

tion contained in them should be incorporated into the Committee's Annual Reports.

Information from States Parties

Prior to the appointment of the Special Rapporteur on the Follow-Up of Views, the HRC had received information from States parties on action taken by them in pursuance of the Committee's Views. For instance, during its 31st session the HRC adopted its Views on case No. 188/1984 (R. Martinez Portorreal v. the Dominican Republic). The HRC had found that the author, a human rights lawyer, had been a victim of violations of articles 7, 9 and 10 of the Covenant. During its 39th session, the government of the Dominican Republic informed the HRC of the measures taken to remedy the violations, in particular, offering Mr. Martinez Portorreal and the members of the Dominican Committee for Human Rights all assurances and guarantees to facilitate their functions and issuing an official passport to Mr. Martinez Portorreal.⁷ At its 36th session, the HRC adopted its Views on case No. 238/1987 (Bolaños v. Ecuador), finding a violation of article 9, paragraphs 1 and 3, and of article 14, paragraphs 1 and 3(c) of the Covenant, because Mr. Bolaños had been kept in pre-trial detention for six years. The HRC urged the State party to release Mr. Bolaños from detention and to grant him compensation. At its 38th session, the State party informed the HRC that Mr. Bolaños had been released from detention a few weeks after receipt of the Committee's Views, and that the gov-

6. *Human Rights Committee 1990 Report*, Vol. II, annex XI.

7. *Ibid.*, annex XII, section A.

ernment of Ecuador had endeavoured to remedy the violations against him by assisting him in finding employment.⁸

Subsequent to the appointment of the Special Rapporteur in 1990, information is being received in a systematic manner, enabling the HRC to better evaluate the effect of its Views. Two examples are cited here:

- At its 38th session, the HRC adopted its Views on case No. 291/1988 (*M. Torres v. Finland*).⁹ The HRC found that there had been a violation of article 9, paragraph 4, of the Covenant because the author, an alien subject to extradition, had been unable to challenge the legality of his detention before a court during certain periods following his arrest. The HRC observed that the State party should "remedy the violations suffered by the author and ... ensure that similar violations do not occur in the future".

By a verbal note of 15 May 1991, in response to the Special Rapporteur's request, the State party informed the HRC that the Aliens Act had been revised by a Parliamentary Act that took effect on 10 May 1990, in order to make the provisions governing the detention of aliens compatible with the Covenant. Moreover, the Covenant has been incorporated into Finnish domestic law, making it directly applicable before Finnish courts and authorities. According to a decision dated 8 January 1991, the Finnish Ministry of the Interior agreed to pay 7,000 Finn-

ish marks to Mr. Torres as compensation.¹⁰

- During its 39th session, the HRC adopted its Views on case No. 305/1988 (*H. van Alphen v. the Netherlands*).¹¹ The HRC found a violation of article 9, paragraph 1, of the Covenant because the author, a Dutch lawyer, had been kept in detention for nine weeks in connection with his refusal to co-operate in an investigation against his clients.

By a verbal note of 15 May 1991, the Netherlands informed the HRC that although it was unable to share the HRC's conclusion that there had been a violation of article 9, paragraph 1, of the Covenant, it would, "out of respect for the HRC ... make to Mr. van Alphen an ex-gratia payment in the amount of [Dutch guilders] 5,000".¹²

Thus, it is evident that the HRC is having a direct impact on States parties to the Optional Protocol and also creating international case law. Even if only 60 States are parties to the Optional Protocol, the HRC's jurisprudence is being quoted in national courts and commented on in scholarly journals. As the only quasi-judicial body examining complaints from individuals, the HRC has a distinguished beginning and its pronouncements will no doubt gain in universal recognition. The Committee's Follow-Up Procedure responds to a generally perceived need to know how States parties are implementing its decisions. Publicity about

8. *Ibid.*, annex XII, section B.

9. *Ibid.*, annexe IX, section K.

10. Human Rights Committee 1991 Report, paragraph 705.

11. Human Rights Committee 1990 Report, Annex IX, section M.

12. Human Rights Committee 1991, Report, paragraph 707.

follow-up will in turn enhance the authority of the HRC's decisions. Surely, as more and more States parties voluntarily carry out the HRC's recommendations, other States that would not yet feel bound to comply will find it more difficult to justify non-compliance *vis-à-vis* other States and even *vis-à-vis* their own citizens. Still, it is an unfortunate fact that some States parties have failed to comply or fully to comply with the Committee's Views. Lacking an enforcement mechanism or the power to impose sanctions, the HRC relies on the legal persuasiveness and moral weight of its decisions and on the growing influence of world public opinion.

All in all, there is good reason for optimism, because the trend is clearly toward greater compliance, thereby setting an example for all States. It can be said

without fear of contradiction that the Optional Protocol procedure of the Human Rights Committee is emerging as an important tool in the common effort to establish a universal human rights culture. Part of this culture is the increasing public awareness that the United Nations work in the field of standard setting includes the establishment of a monitoring machinery and that decisions of treaty bodies like the Human Rights Committee are being implemented. Indeed, there is nothing as successful as success, and surely the HRC's success in follow-up will contribute to its effectiveness and reinforce the public's perception that HRC decisions are meaningful expressions of human rights law, and ultimately that real progress is being achieved in the realization of human rights for all.¹³

13. For a review of the case law of the HRC, see a recent publication of the Centre for Human Rights entitled "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee", which can be ordered free of charge from the Centre as Reprint No. 1. See also the Centre's Fact Sheet No. 7 on "Communications Procedures", which is available in all UN working languages.

The Committee on the Rights of the Child

*Marta Santos Pais**

Established in accordance with article 43 of the Convention on the Rights of the Child, the Committee on the Rights of the Child consists of 10 independent experts "of high moral standing and recognized competence in the field covered by the Convention". They serve in their personal capacity and represent the principal legal systems in the world.¹

The Committee members were elected by secret ballot at the first meeting of State parties² from 27 February to 1 March 1991 in New York, a meeting organized only a year after the Convention of the Rights of the Child had been opened to signature. The meeting undoubtedly reflected how special the Convention of the Rights of the Child was to the States parties and how important the work of the Committee would be to realize the rights recognized by this legal instrument.

In fact, no first election for a treaty had ever taken place with such an unprecedented number of State parties (70) or such a long list of candidates.² And never had so many ballots been needed to decide the final composition of a small Committee. Those selected were Hoda Badran (Egypt), Luis Bambarén Gastelumendi (Peru), Fatima Borges de Omena (Brazil), Akila Belembaogo (Burkina Faso), Flora Eufemio (Philippines), Thomas Hammarberg (Sweden), Yuri Kolosov (Russian Federation), Sandra Mason

(Barbados), Swithun Mombeshora (Zimbabwe) and Marta Santos Pais (Portugal).

After the difficult and lengthy process of election, the Committee's composition shows a rich combination of backgrounds and experiences – lawyers, social workers, doctors, economists, journalists – all important to the holistic approach to the rights of the child.

It seems therefore interesting to consider, at first stage, the universe within which the Committee has been established and is intended to act – the Convention on the Rights of the Child.

The Spirit of the Convention

The Convention on the Rights of the Child constitutes a universal tool of advocacy and awareness, whose success does not depend on geography, legal systems, cultural or other traditions.

It was adopted by the UN General Assembly in November 1989, following 10 years of a long study and consideration by a Working Group of the Commission on Human Rights. It reflects the spirit of consensus which prevailed during the drafting process, as well as the compromise reached between different legal systems, cultures and traditions in respect of universally recognized human rights.

* Marta Santos Pais is a member of the Committee of the Rights of the Child.

1. See Convention on the Rights of the Child, article 43, paragraph 2.

2. Candidates were presented from all the geographical regions: Western Europe and others (4), Eastern Europe (3), Africa (12), Latin America and the Caribbean (11) and Asia (5).

This same spirit prevails in its entering into force, less than a year after its approval, and in the unprecedented number of ratifications from all the regions of the world.

The Convention is often considered as a real Charter on the Rights of the Child since it collects in the same text the norms and principles previously considered by a variety of international instruments and which are of different nature – civil, political, economic, social and cultural rights. With this approach, the Convention may decisively contribute to a greater awareness, better knowledge and wider implementation on the rights of the child.

Having a binding nature, the Convention is naturally not a simple body of principles or the enunciation of well-intended programmatic guidelines, as was the case of the Declaration on the Rights of the Child adopted in 1959.

Moreover, the Convention envisages the child not only as a person who needs special protection and assistance but as a person with rights and freedoms who is entitled to participate in the decision making process of all matters affecting him or her (article 12).

We should recall nevertheless that the Convention sets a list of rights and freedoms reflecting a minimum standard where possible consensus was reached, which means that it is not necessarily intended to cover the whole universe of the rights of the child or establish the highest possible standard in this field.

It is in this context that the Convention invites State parties to always apply the provisions that are more conducive to the realization of the rights of the child, set either in national legislation or in applicable international instruments (article 41). In light of this reality the Convention further envisages studies on is-

issues relating to the rights of the child (article 45c), studies which may contribute to the consideration of the possible expansion of the scope of the Convention.

The initial stage of the implementation of the Convention is therefore a particular moment of hope. And although we may realize that the Convention by itself has not the magic power to solve all existing problems, it has clearly shown a unique capacity to ensure an enlightened vision and create a framework for meaningful dialogue, solidarity and co-operation.

The hope is reflected in the approach of the rights of the child – not in opposition to the rights of adults or as an alternative to the rights of parents but as an integral form of human rights, inherent to all human beings. Every child is considered an individual, entitled to grow up in a family environment, in an atmosphere of happiness, love and understanding and not as a simple step towards adulthood.

A United Approach

It was in this environment of hope, making use of the special momentum for the implementation of the rights of the child, that the Centre for Human Rights, in co-operation with UNICEF, decided to convene an informal meeting of the Committee in May 1991.

The meeting proved to be a success, giving the Committee its first contact with the United Nations system of human rights and allowing a first common reflection on the promotion and protection of the rights of the child, together with UN organs, specialized agencies and non-governmental organizations active in the field.

As shown by the summary of the meeting, it was recognized that the Committee would benefit from the experience of previously constituted human rights treaty bodies. But it would also seek to be constructive and vigorous in order to meet the high expectations for its work.

The tasks of the Committee would be carried out in a spirit of dialogue and co-operation. It would assist governments in their reporting obligations (article 44) and in the consideration and evaluation of a system of technical assistance or advice (in light of article 45). It would work with the United Nations organs, specialized agencies and other competent bodies in their common activities toward effective implementation of the rights of the child, in the framework of their diverse but complementary mandates.

Further, it was considered necessary to co-ordinate with other mechanisms of the United Nations active in this field – namely the Special Rapporteur of the Commission on Human Rights on Sale of Children, Child Trafficking, Child Prostitution and Child Pornography, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.³

The role of the Committee was thus foreseen as positive and important for monitoring the Convention, identifying problems and difficulties, pointing to possible solutions and mobilizing resources to a better implementation of this international instrument.

Following this successful preliminary

step, the first session of the Committee on the Rights of the Child benefitted from an encouraging environment. A growing number of States, from all geographical regions, had become parties to the Convention⁴ while the United Nations organs, specialized agencies and other competent bodies active in the rights of the child showed a common will to ensure an active partnership in implementing the provisions of the Convention.

The three weeks of this first session were marked by a fruitful discussion on the different activities to be pursued by this supervisory body and by the adoption of documents of basic importance to its future work – the provisional rules of procedure and the guidelines for the initial reports of States parties.

Rules of Procedure

The Committee spent several meetings discussing its Rules of Procedure, having adopted them provisionally and intending to improve them continuously in the course of its future work.

As for other areas of activity, the Commission took into consideration the practice of various treaty bodies and tried to combine established procedures with flexible methods of work.

Important fields of the Committee's action are reflected in the Rules of Procedure. Some are necessary for the organization of its work to ensure the independence of its members.

3. One should recall the steps being taken by this organ of independent experts in the field of the administration of justice (studies on capital punishment and detention of juveniles are now under consideration) or of contemporary forms of slavery (where a working group is pursuing an important action in areas of sale of children, child trafficking and child prostitution as well as the question of child soldiers).
4. At the time of the session, almost 100 States had ratified or acceded to this legal instrument.

As a meaningful example, one could cite rule 14 on the filling of vacancies. This provision concerns a member who can no longer perform his or her duties or who, in the opinion of the other members, has ceased to carry out his or her functions. In such cases, the State party is requested to appoint another expert to serve for the remainder of the term, and the name and curriculum of that expert will be transmitted by the Secretary-General to the Committee for approval by secret ballot. Only upon approval by the Committee will the Secretary-General notify the States parties of the name of that new member.

Some other rules are to strengthen the role of the Committee as a supervisory mechanism, providing it with necessary and updated information and helping to foster an increasingly better level of protection for the rights of the child.

Areas where the Committee acts in relation with other entities, either States or UN bodies active in this field, or uses its capacity to report on its activities, to give guidance and create awareness of the need to improve the world-wide situation on the rights of the child:

- The consideration of States parties reports.
- The submission of reports by UN organs and specialized agencies in areas falling within the scope of their mandates.
- The consideration of requests or indications of technical assistance or advice.

Following this process:

- States parties submit periodic reports, reaffirming their commitment to ensure and respect the rights of each child in their jurisdiction without discrimination of any kind, specifically

informing on the level of the progress achieved in the realization of those rights (article 2, 4 and 44 and rules 66 to 71).

- UN organs and specialized agencies may be invited by the Committee to submit reports on the implementation of the Convention in areas falling within the scope of their activities, in order to foster the effective implementation of the Convention's provisions. To this purpose, they can also be invited to provide the Committee with expert advice (article 45 a and rule 70).
- In light of the information received from State parties and UN bodies, and the knowledge acquired on the progress made in the enjoyment of the rights of the child, as well as on the factors and difficulties affecting the degree of their implementation, the Committee is then in a position to consider a system of technical advice or assistance. In this framework, it will attend to the formal requests or the indications of such a need, reflected in States parties' report (article 45 b and rule 74).
- Following this evaluation, the Committee may transmit States' reports containing a request or indicating the need for technical advice or assistance, along with any observations or suggestions to the specialized agencies, UNICEF or other competent bodies, encouraging international co-operation and fostering an improved situation for the rights of the child.

At the first session of the Committee, it was largely felt that, in the individuality of the action of all these bodies, there was a need for co-ordination and consistency and for the establishment of a system of periodic evaluation and follow-

up of the activities undertaken.⁵

The mechanism established by the Convention and reflected in the Rules of Procedure therefore creates the framework for a constructive and fruitful dialogue between the intervening parties – to generate an updated network of information while providing for a meaningful and adequate system of technical assistance and advice.

It seems important to note the set of measures designed to promote the rights of the child, to provide for a better understanding of the Convention and of the role of the Committee. This particularly refers to:

- The formulation of general recommendations, based on information received from States parties, specialized agencies, UN organs and other competent bodies (rule 72).
- The preparation of general comments, with a view to promoting a better understanding and a further implementation of the Convention and assisting States in fulfilling their reporting obligations (rule 73).
- The presentation of reports on the activities of the Committee, either those addressed to the General Assembly or such other reports for general distribution, including those intended to highlight specific problems in the field of the rights of the child (rules 64 and 65).

The First Report

Following the adoption of these last provisions, and in view of the exceptional level of interest within the international community on its work, the Committee prepared a first report and presented it to the 46th session of the General Assembly.

The report contained recommendations and conclusions covering different fields of the Committee's activities.⁶ The first recommendation relates to the question of the sessions of the Committee (also considered by the Rules of Procedure, namely rule 2), a matter of importance for effective functioning.

In fact, in light of the existing number of ratifications and the corresponding list of initial States' reports expected from September 1992 on, the Committee will undoubtedly face an exceptional workload. Unless it meets at least twice a year and establishes a pre-session working group, it will build up an undesirable backlog in the consideration of those same reports and in the discharge of its other tasks, inevitably frustrating the high expectations for its activities.

It is therefore extremely encouraging to see the positive consideration given to this matter by the General Assembly, in the just adopted Resolution on the "Implementation of the Convention on the Rights of the Child".

5. It is in this framework that the participation of these bodies in meetings of the Committee or the distribution to them of official documents, considered by Rules 34 and 37, respectively, gain an additional relevance.

6. These recommendations and conclusions deal *inter alia*, with the questions of sources of information of the Committee, the relations to be established with other treaty bodies and United Nations organs and the recommendations is the Preparatory Meeting of the World Conference on Human Rights.

General Guidelines

The report issued by the Committee and presented to the General Assembly also included the General Guidelines on initial reports of States parties (article 44 and rule 66).

These guidelines are intended to provide guidance to each State party in the preparation of its initial reports, minimizing the risk of insufficient information and ensuring consistency and uniformity to the form and contents of the report.

Reaffirming the State's commitment to implement the rights set forth by the Convention, as well as establishing a meaningful dialogue with the Committee, the State's reports should inform (article 44 paragraph 1 and 2):

- On the measures adopted to give effect to the rights recognized by the Convention, that is to the steps taken by States parties to ensure and respect those rights without discrimination of any kind.
- On the progress made on the enjoyment of those rights, reflecting an evaluation of the effect of those adopted measures.
- On the factors and difficulties which may have affected the degree of fulfilment of the obligations under the Convention.

The report may still include a request or an indication of a need for technical advice or assistance in the implementation of the Convention (article 45 b). This occasion should not be seen as a simple formality but, as pointed out by the Committee, as an important occasion for

conducting a comprehensive review of the various measures undertaken, for monitoring progress achieved as well as for encouraging popular participation and public scrutiny of governments' policies.

The Convention reflects this same approach in its article 44, paragraph 6, and it has included an innovative follow-up system, requesting States parties to make their reports widely available to the public in their own countries.

With the same concern, the Committee adopted a recommendation for free availability by the United Nations Information Centres of Committee documents for general distribution, including States parties' reports and the summary records relating to their examination.⁷

In view of the importance attached to the reporting system, the Committee requested the Secretary-General to organize – in the context of the programme of Technical Assistance and Advisory Services of the Centre for Human Rights – seminars and workshops at the national level for the purpose of training those involved in the preparation of States party reports.⁸

In order to facilitate the task of governments, the Committee decided to group the reporting guidelines by clusters, on a thematic basis. Adopting such a solution, the Committee recognized that all the rights in the Convention were inter-related, each one of them being fundamental to the dignity of the child, in the respect for all the others.

At this stage it seems appropriate to refer to some of the particular areas where an innovative approach has been introduced.

In the chapter on general measures of

7. See Recommendation 4, par.1

8. See Recommendation 2, par.9

implementation, a reference is made to the existence of national or local mechanisms for co-ordinating policies relating to children and monitoring the implementation of the Convention, thus showing how important a role they can play in this field.⁹

The guidelines also point to the adoption of measures of dissemination on the Convention. In fact, article 42 (first article of Part II on implementation mechanisms) established the need for the State to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike. Only when there is sufficient information and understanding of the rights of the child can they be fully exercised and enjoyed.

This measure will enable any child to play a more responsible and participating role in the exercise of his or her rights and will also help to prevent violation of those rights.

In the chapter of general principles, the guidelines consider the best interests of the child, enunciated in article 3 of the Convention and repeatedly mentioned in several other provisions. According to the Convention, the best interests of the child shall be the primary consideration, whether undertaken by administrative, judicial or even legislative bodies.

Within the family environment, parents or other persons legally responsible for the child should take the best interests of the child as their basic consideration (in particular articles 5 and 18). This principle is so decisive that its consideration can even lead to the separation of the child from his or her parents as in the case of abuse or neglect of the child (article 9, paragraph 1).¹⁰

Another important aspect is the consideration of the respect for the views expressed by the child, established by article 12 of the Convention. This provision sets a completely new philosophy in the consideration of children's rights, underlining the value of the participation of the child in the decision-making process affecting him or her.

The child is therefore not only entitled to express views freely in all matters affecting him or her but those views shall be given due weight, in accordance with the age and the maturity of the child – or, to follow the wording adopted by other provisions of the Convention, in a manner consistent with the evolving capacities of the child.

The world-wide expression of enthusiasm and political commitment shapes an environment with endless capacity for securing a better future for children everywhere, an environment where the Committee on the Rights of the Child has

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9. In fact, the establishment of national commissions or committees on the rights of the child, composed of the different national institutions acting in this area, has proved to be successful. It has often provided for a comprehensive network of information, enabled the coordination of the different activities developed by those institutions and ensured a meaningful dialogue with the national community, this way contributing to a more effective and participatory implementation.
 10. The best interests of the child can thus be seen as a purpose to achieve in the implementation of the rights of the child, a limit to the action of those who contribute to his or her development and a criterion to take into account when there is need to decide upon a conflict between different rights of the child.

an essential role to play.

For the success of this challenge there is only a need for creativity, as described by a Portuguese poet:

*For each dream of every man
the world jumps and advances
like a colourful balloon
in the hands of a smiling child.*

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

The 43rd session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities took place from 5 to 30 August 1991 at the Palais des Nations in Geneva. Under Chairman Louis Joinet (France), the meeting adopted by secret ballot resolutions expressing concern for the first time over the human rights situations in Tibet, Kuwait and Cambodia. The 26 independent experts also took up the questions of impunity for violators of human rights, forced evictions, housing rights and fraudulent enrichment. Moreover, the Sub-Commission asked the United Nations to seek a ruling from the International Court of Justice regarding the legal consequences of Israeli settlements in the Occupied Territories.

The failed coup in the Soviet Union again highlighted disagreements among the experts over their competence to deal with breaking events. At the same time, attacks on the Sub-Commission by the United States Ambassador provoked a unified response.

The meeting was opened by the outgoing Chairman, Danilo Türk, who referred in his speech to the use of force to crush the movement for self-determination in his native Slovenia. Chairman

Joinet traced the history of the Sub-Commission as one of a gradual conquest of independence. Steps along this road, he said, were the decision to elect alternates rather than having them named by the permanent missions in Geneva and the adoption of secret ballot voting for country situations. He also called on the experts to give serious consideration to proposed reforms in the Sub-Commission's working methods. These proposals would only meet with limited success, however.

The International Commission of Jurists (ICJ) intervened four times: (1) on the need for increased UN monitoring of human rights violations, with particular reference to the situations in Iraq and the Israeli-Occupied Territories; (2) the questions of impunity and states of emergency; (3) the independence of judges and lawyers; and (4) corruption and its effects on the enjoyment of economic rights. The ICJ also worked for the passage of the resolutions on Israeli settlements, impunity, habeas corpus, the independence of judges and lawyers, states of emergency and the human rights situations in Iraq and Kuwait, and it lobbied strongly for the resolution on Tibet.

Administration of Justice

The UN General Assembly asked the Sub-Commission to give priority to questions of human rights in the administration of justice and the experts had before them several important studies in this area.

The sessional Working Group on Detention, which in the past three years had considered and adopted the draft declaration on the protection of all persons from enforced or involuntary disappearances, this year had no burning item on its agenda. No special working sessions were created, as in past years, and the debates were more formal and less productive than the give-and-take which had previously marked the group.

For several years, the ICJ has raised the issue of the Secretary-General's yearly reports on human rights of persons subject to detention or imprisonment. These reports contain information submitted by governments and inter-governmental agencies but only sanitized synopses (excluding country names) of material provided by NGOs. This year, Amnesty International announced that under these conditions, it would no longer submit information for the report. The ICJ and other NGOs supported this stand, noting that the practice of omitting names was rooted in a past when offenders could not be directly mentioned at the United Nations. However, no resolution of this issue was achieved.

Independence of Judges and Lawyers

The Sub-Commission heard Chairman Joinet's first report on the UN advisory services programme and on measures strengthening or weakening the independence of the judiciary and the protection of practising lawyers in different

parts of the world, a paper remarkable both for its substance and its methodology.

The first section of the report presented a comprehensive and penetrating critique of the strengths and weaknesses of the advisory services programme. In terms of seminars and workshops, its conclusions reflected in large part recommendations that the ICJ and other NGOs have been making for several years – particularly concerning a better definition of project goals and clearer identification of the target community, greater participation of local NGOs including judges and lawyers, the use of working groups to adopt conclusions and recommendations, better evaluation of project results, and more systematic and concrete follow-up such as the publication of reports and the creation of follow-up committees. The report also recommended that seminars focus more specifically on the independence of judges and lawyers.

The second part of the report, on measures taken to promote or undermine the independence of the judiciary and the legal profession, employed innovative and model methodology. Credible and specific information provided by NGOs, including the ICJ and associations of judges and lawyers, particularly on attacks against judges and lawyers, was set out in the report and then governments were given the opportunity to respond to this information. Several did so, and their comments were printed in *extenso* in addenda to the report.

On the day Mr. Joinet's report was discussed, the CIJL released its report "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers". Covering the period June 1990 to May 1991, the CIJL report listed 532 judges and lawyers who had been killed, detained or harassed in 51 countries.

The Sub-Commission endorsed Mr. Joinet's paper and entrusted him with the preparation of a further report on the independence of judges and lawyers. Concerning UN advisory services, it endorsed in particular the recommendation that the programme take into account the needs of the intended beneficiaries and ensure wider NGO participation.

Impunity

On the request of numerous non-governmental organizations, including the ICJ, Amnesty International, Federation Internationale des Droits de l'Homme, the International Human Rights Law Group and the World Council of Churches, the Sub-Commission asked Chairman Joinet and the Senegalese expert, El-Hadj Guissé, to prepare a paper on the question of impunity for perpetrators of violations of human rights. In its oral intervention, the ICJ recalled the adage that "impunity breeds contempt for the law" and described the failure to prosecute officials who violate rights as a major factor in allowing these violations to continue.

States of Emergency

Prior to the session, the Sub-Commission's Special Rapporteur on States of Emergency, Leandro Despouy (Argentina), convened an international expert meeting, with ICJ participation, which produced Model Legal Provisions applicable in emergency situations. These provisions provide guidelines, based on international norms and jurisprudence, for the proclamation of states of emergency, their duration and ratification; measures taken pursuant to states of emergency and their effects on human rights, detention powers, the judiciary and the legislature; and the restoration

of rights and compensation. The Model Legal Provisions constitute important guideposts for the protection of the rule of law at the time when it is the most vulnerable and it is hoped that they will, after further consideration by the Sub-Commission, become standard reference points. The Special Rapporteur also prepared his fourth annual report of 62 countries which have had a state of emergency in effect at any point since 1985.

Habeas Corpus

The International Covenant on Civil and Political Rights, in article 9(4), provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". This right, known as habeas corpus, is of capital importance to those deprived of their liberty, serving as it does to protect the detainee's personal freedom by requiring that the legality of detention be determined, and as it ensures that life and physical integrity be respected (it is usually necessary that the detainee be brought before a judge).

Nevertheless, all too many states almost automatically suspend this key right in times of emergency. In its 1983 study on "States of Emergency: Their Impact on Human Rights", the ICJ found that "the principal factor implicated in abuse of detention powers is the suspension of the right to challenge the legality of detention in a court of law". However, habeas corpus is not one of the rights which, under article 4 of the International Covenant on Civil and Personal Rights, is expressly made "non-derogable".

The Sub-Commission recommended that the Commission call on all states that have not yet done so to establish a procedure such as habeas corpus by which anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court so that the court may decide without delay on the lawfulness of detention and order release if the detention is not lawful. It further called on all states to maintain the right to such a procedure, at all times and under all circumstances, including during states of emergency. In so doing, it cited the draft "Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances", the Model Legal Provisions applicable in emergency situations, the advisory opinion of the Inter-American Court of Human Rights that habeas corpus is "essential for the protection of the rights and freedoms whose suspension (the Inter-American Convention on Human Rights) prohibits" and the ICJ-sponsored Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

The Right to a Fair Trial

A second report on the right to a fair trial was presented by Mr. Chernichenko (Soviet Union) and Mr. Treat (United States). The report examined the jurisprudence of the UN Human Rights Committee with respect to different aspects of this right. The Sub-Commission authorized the two experts to continue their study over a period of several years.

Country Situations

For the third consecutive year, all voting on country situations was conducted by secret ballot. Two years ago, in the

face of the enormous pressure unsuccessfully exerted by China to try to ward off a resolution condemning the Tiananmen Square massacre, the Sub-Commission suspended rule 59 of the Economic and Social Council (ECOSOC) Rules of Procedure for its subsidiary organs on an ad-hoc basis to allow secret voting on country resolutions. It was argued that voting by secret ballot on specific issues would strengthen the independence of the experts by shielding them from such pressure.

In 1990, the Sub-Commission again suspended its rules to vote by secret ballot, but it also asked the Commission on Human Rights to propose to ECOSOC an amendment of the Sub-Commission's procedures permitting the use of a secret ballot for country situations whenever a majority so decides, without resorting to a suspension of the rules. The Commission and ECOSOC went along, and the rules were duly changed. On Chairman Joinet's motion, all votes on country situations were thus conducted by secret ballot. For the second consecutive year, all country-specific resolutions were adopted.

Cambodia

The Sub-Commission, for the first time, passed a resolution on the situation in Cambodia (by 14-4 with 4 abstentions and 1 expert "not participating"). Convinced that "it is the duty of the international community to prevent the recurrence of genocide in Cambodia" and noting with satisfaction the establishment of a Supreme National Council, the Sub-Commission called on the S-G to dispatch missions to Cambodia and to refugee camps in Thailand to examine the human rights situation and report to the Paris Conference on Cambodia.

East Timor

In anticipation of the pending mission from the Portuguese Parliament to East Timor, as well as the invitation to the Special Rapporteur on Torture to visit the island, no draft resolution on East Timor was introduced this year. The interested parties instead negotiated a text, which was read as a "Chairman's Declaration" welcoming these two visits.

El Salvador

The Sub-Commission welcomed the agreement concluded between the government and the FMLN guerrillas for the verification of human rights obligations and the establishment of the UN Observer Mission in El Salvador "with the initial task, unprecedented in the history of the United Nations, of verifying implementation of the agreement on Human Rights as part of an integrated peace-keeping operation". The Sub-Commission (18-1-3-1) called on the parties to eradicate human rights violations and to reach a final accord to end the armed confrontation and establish conditions for the promotion of democracy and human rights. The resolution was adopted only after floor amendments by Theo van Boven (the Netherlands) were incorporated calling upon the authorities to ensure progress in the punishment of those guilty of the murders of six Jesuit priests, a mother and her daughter in November 1989.

Guatemala

In light of the negotiations between the government and the guerrilla movement, the Sub-Commission by a large consensus (19-1-1-2) urged the government to ensure that rights are respected, particularly by its security forces, em-

phasized the importance of strengthening the independence of the judiciary, exhorted the government to adopt measures to improve the lot of the indigenous population and urged it to enter into a dialogue with refugees and displaced persons.

Iran

The Sub-Commission (19-2-1-1) expressed "its deep concern at the escalating grave violations of human rights" in Iran, "in particular those relating to the right to life, the right to freedom from torture ... the right to liberty and security of person, the right to a fair trial and the right to freedom of thought, conscience, religion and expression". It called on the Commission (which had extended its Special Representative's mandate only in a last-minute compromise) again to extend the mandate at its next session.

Iraq

The Sub-Commission (16-2-4-1) expressed "grave concern at the flagrant and massive violations of human rights committed by the government of Iraq, in particular against the Kurdish and Shiite Muslim populations". A request to the Secretary-General to take appropriate steps to establish a human rights monitoring operation within Iraq was deleted from the resolution before passage.

Israeli-Occupied Territories

In a repetition of previous resolutions, the Sub-Commission reaffirmed (16-2-4-1) that the Israeli Occupation "itself constitutes a gross and systematic violation of human rights" and condemned Israel for its settlements in the territories, its occupation of the Golan Heights and

other violations of international law. At the request of Al-Khasawneh (Jordan), van Boven (Netherlands), Guissé (Senegal), Khalil (Egypt) and Turk (Yugoslavia), the Sub-Commission asked its parent bodies, the Commission on Human Rights and the Economic and Social Council, to request an advisory opinion from the International Court of Justice on the Israeli settlements in the occupied territories. The close vote of 10-4-6 came over the opposition of Egypt, Israel, Syria and the United States. The ICJ, which worked together with the experts on the resolution, hailed it as a victory for the "settlement of disputes by legal means". The question to be asked of the Court is: "What are the legal consequences for States arising from building Israeli settlements in the territories occupied by Israel since 1967 notwithstanding Security Council resolutions 446 (1979) and 465 (1980)?"

Kuwait

In a controversial resolution, the Sub-Commission (16-4-2-1) voiced "concern at reliable and specific reports of arbitrary arrests, torture, unfair trials, enforced or involuntary disappearances, deaths in custody and possible extra-judicial executions in Kuwait, as well as deportations and other abuses against non-Kuwaitis since the withdrawal of Iraqi forces". It therefore "expressed its hope" that the special representative appointed by the Commission to look at

Iraqi abuses in occupied Kuwait would also give "due attention" to these more recent issues and "inform the Commission on developments affecting the situation of human rights in Kuwait since the withdrawal of Iraqi forces". While Al-Khasawneh (Jordan) gave a moving account of meeting Palestinian refugees fleeing post-war persecution in Kuwait, experts Guissé (Senegal), Ilkahanaf (Somalia), Treat (United States) and Warzazi (Morocco) spoke against the resolution, as did the Kuwaiti government observer. They argued that the excesses were to be expected in the aftermath of a war and also challenged the right of the Sub-Commission to interfere with a Commission mandate.*

South Africa

While welcoming the positive developments in South Africa resulting from the policy measures introduced by the government of South Africa following internal and international pressure, the Sub-Commission (20-0-1-1) condemned the illicit government funding of the Inkatha Freedom Movement, called for the release of all political prisoners from the townships, strongly urged the international community to maintain sanctions against the government and also strongly urged that governments that have recently established diplomatic and economic ties to Pretoria or are contemplating doing so "reconsider their decision".

* Mr. Van Boven recalled that in March 1988 the Commission appointed an "expert" to provide advisory services to the new civilian government of Haiti. In June 1988, however, a coup overthrew that government. In a resolution in August 1988, therefore, the Sub-Commission similarly "expressed its hope" that appointed expert Philippe Texier would also inform the Commission on the evolution of the human rights situation. In his report to the Commission, the expert, after reproducing *in extenso* the Sub-Commission resolution, relied on it to discuss the evolution of the situation in Haiti.

Tibet

The most closely fought resolution was that on human rights in Tibet. Chinese lobbying included presenting the experts with a documentary film portraying alleged improvements in Tibet since the Chinese annexation. Chinese pressure on the experts and their governments was reportedly intense, though its effects were greatly mitigated by the secret ballot. Nevertheless, there was speculation that the pressure was related to the sudden departure from Geneva before the vote of the Philippine expert Mary Concepcion Bautista who, together with van Boven, had co-sponsored the resolution on Tibet. The resolution, adopted (9-7-4-2) after a long statement by the Chinese expert, expressed the experts' concern over reports of human rights violations "which threaten the distinct cultural, religious and national identity of the Tibetan people" and called on the government of China to fully respect the rights of the Tibetan people. It also asked the Secretary-General to give the Commission information on the situation in Tibet provided by China "and other reliable sources". The resolution marked the first time since China's admission to the United Nations that the situation of Tibet had been so raised and the resolution was declared "null and void" by the Chinese observer delegation.

Confidential 1503 Procedure

The Sub-Commission's pre-session Working Group on Communications reportedly transmitted the cases relating to 10 countries to the full Sub-Commission. In confidential session, the Sub-Commission reportedly transmitted to the Commission the cases of Bahrein (by a vote of 13-8-2), Chad whose considera-

tion was postponed at the Commission (17-4-2), Myanmar which is already under examination by a special rapporteur at the Commission (18-2), Somalia which is already under examination by the Commission (15-4-2), Sudan which is already under examination by the Commission (19-0-1), Syria (17-1-4) and Zaire (21-0-1). The cases of Bhutan (18-2-3) and Turkey (14-6-1) were reportedly left pending, while that of Guatemala was dropped (16-3-3).

The Sub-Commission also decided (15-3-1) not to accept cases under the 1503 procedure seeking compensation for losses caused during World War II.

US Criticism

Just prior to the session, the US Ambassador to the United Nations in Geneva, Morris B. Abram, complained about the Sub-Commission (and the Commission) in an article in the Harvard Human Rights Law Journal. Mr. Abram criticized Sub-Commission work on issues such as human rights, the environment and cultural property and described the report being prepared by the Cuban expert Miguel Alfonso Martinez on treaties between states and indigenous peoples as a "politically motivated fishing expedition". At a Geneva press conference, Mr. Abram (who had served on the Sub-Commission in the 1960s) stated that if the Sub-Commission "doesn't reform, as the Human Rights Commission has ordered it to do, then it should probably be abolished". On the final day of the session, Mr. Abram took the floor to lament what he called a decline in expertise and independence on the Sub-Commission since he served on it 30 years ago. He also took the Sub-Commission to task for adopting resolutions on country situa-

tions already under consideration at the Commission. He charged that the Sub-Commission, by mimicking the Commission, had "strayed from its original mandate".

In response, Judge Rajindra Sachar (India) asserted that the Ambassador's speech "lowered the dignity of the Sub-Commission". The experts pointed out that the studies singled out by Mr. Abram had been approved by the Commission and the Economic and Social Council, which had also specifically authorized the Sub-Commission to deal with country situations. One NGO, the International Service for Human Rights, described the Ambassador's statement as "insolent".

While many would agree with the Ambassador's lament that too many members of what should be a body of independent experts are foreign service officials, the Sub-Commission has proved time and again its unique standing in the UN system, not only where studies and standard-setting are concerned but also with respect to country violations. Recent votes on China, East Timor, Iran and Tibet have shown that the Sub-Commission is the one place in the UN system where human rights violations are considered on their merits, rather than on the political strength of the competing interests.

Sub-Commission Reform

In accordance with last year's decision, the Sub-Commission established a sessional working group to prepare an overview and analysis of suggestions to enable the Sub-Commission to better discharge its responsibilities in dealing with human rights violations. The group came up with a number of innovative proposals, including several by Chairman

Joinet. Although it was unable to make any major breakthrough on the question of country situations, it did produce several recommendations as regards studies. In particular, it suggested that, where special rapporteurs so wished, "commentators" could be named from among the experts to review and critique their reports. This suggestion, which originally emanated from the ICJ, was implemented during the session in the resolutions on the studies of the judiciary and states of emergency.

The Sub-Commission established an inter-sessional working group to prepare concrete proposals on reform of the agenda, studies, resolutions and the examination of human rights situations.

Other Actions

- In a two-week session attended by over 400 representatives of indigenous peoples, NGOs and governments, the Working Group on Indigenous Populations prepared an updated draft of the declaration on indigenous rights.
- The Working Group on Contemporary Forms of Slavery focused this year on the prevention of prostitution and the traffic in persons, and it prepared a plan of action that was transmitted to the Commission on Human Rights.
- The Sub-Commission held a joint meeting with the Committee on the Elimination of Racial Discrimination. A further meeting is scheduled for next year when, it is hoped, a more substantive discussion will be possible.
- A resolution on forced evictions was the first time a human rights body formally recognized that practice as a "gross violation of human rights". It cited UN figures that "over 1 billion persons throughout the world are

- homeless or inadequately housed" and noted that while governments often seek to disguise evictions through terms such as "urban renewal", most evictions cannot be justified under human rights law. It called on governments to compensate or provide alternative accommodation for evictees.
- The experts asked their colleague, Judge Sachar, to carry out a study on the right to housing.
 - The Sub-Commission, responding to a joint NGO initiative, asked the Commission on Human Rights to consider the question of the fraudulent enrichment of state officials as a violation of economic, social and cultural rights. The ICJ had taken the floor to denounce "the shameful transfer" of dictators' stolen wealth from the South into banks in the North.

African Commission on Human and Peoples' Rights

The 10th ordinary session of the African Commission on Human and Peoples' Rights (ACHPR), which was held in Banjul, the Gambia, from 8 to 15 October 1991, was a significant event in fostering the promotion of human and peoples' rights in Africa. The significance of the session derives primarily from a number of important developments. The session

coincided with celebrations marking not only the 10th anniversary of the adoption of the African Charter on Human and Peoples' Rights¹ but also the fifth anniversary of the entry into force of the African Charter² and the fourth anniversary of the inauguration of the African Commission.³

In contrast with previous sessions,

1. The African Charter on Human and Peoples' Rights was adopted by the 18th Assembly of Heads of State and Government of the OAU meeting in Nairobi, Kenya, in June 1981.
2. The African Charter entered into force on 21 October 1986.
3. The first 11 commissioners, all lawyers, chosen from "African personalities of the highest reputation, known for their high morality, impartiality and competence in matters of human and peoples' rights" made their solemn declaration in terms of article 38 of the Charter "to discharge their duties impartially and faithfully" on 2 November 1987 in Addis Ababa during the first session of the Commission. The Commission's headquarters were opened in Banjul, the Gambia, in June 1989.

The first 11 commissioners selected in July 1987 were as follows:

Alioune Blondin Beye - Mali - 2 years Member of the Council of State and former Foreign Minister, currently Secretary -General African Development Bank.

Ali Mahmoud Buhedma - Libya - 6 years (retired diplomat and legal practitioner).

Ibrahim Ali Badawi El-Sheikh - Egypt - 2 years (civil servant/diplomat)

Alexis Gabou - Congo - 6 years (magistrate, currently minister of the interior).

Sourhata B. Semega Janneh - Gambia - 2 years (legal practitioner).

Haresh Robert Kisanga - Tanzania - 4 years (high court judge) *(Continued on next page)*

particularly the ninth session in Lagos, the ACHPR was able to convene as scheduled with no quorum problems.⁴ Out of the 11 commissioners, two were absent and nine participated in the proceedings.⁵

The elections for the Commission's Chairman and Vice Chairman took place during the beginning of the 10th session. Dr. Ibrahim Ali Badawi El-Sheikh (Egypt) and C.L.C. Mubanga-Chipoya (Zambia) were elected Chairman and Vice Chairman respectively replacing Professor U.O. Umzurike (Nigeria) and his Vice Chairman Alexis Gabou (Congo).

Participants at the session included a representative of the UN Undersecretary-General for Human Rights, the Chairman

of the Inter-American Commission of Human Rights and the Secretary-General of the International Commission of Jurists (ICJ). In addition, and for the first time in the history of the ACHPR, over 50 representatives of non-governmental organizations participated in the open session of the African Commission.

Several representatives of NGOs were offered the opportunity to address the Commission on a variety of issues touching upon the relationship between the NGOs and the ACHPR and on human rights in Africa. International and African NGOs which had duly completed application papers in accordance with the Commission's Rules of Procedure were admitted to observer status.⁶ It is a mat-

3. (Continued) Moleleki D. Mokama - Botswana - 6 years (Attorney General, currently Chief Justice of Botswana).
C.L.C. Mubanga-Chipoya - Zambia - 4 years (civil servant).
Youssoupha Ndiaye - Senegal - 6 years (high court registrar).
Isaac Nguema - Gabon - 2 years (academic/legal officer).
Grace Stuart Ibingira - Uganda - 4 years (retired diplomat).
Following the resignation of G.S. Ibingira on 25 April 1989, U.O. Umzurike (Nigeria), Professor of Law, was elected to complete his 4-year term while the other commissioners who had been elected for 2 years were re-elected for 6 years by the Assembly of Heads of State and Government meeting in Addis Ababa 24-26 July 1989.
4. The ninth session held in Lagos, Nigeria, was unable to secure the quorum of seven. See W. Benedek. The 9th Ordinary Session of the African Commission on Human and Peoples' Rights/Report and Comment, Human Rights Law Journal vol 12 No 5 pp 216-219 (31 May 1991).
5. Minister Alexis Gabou and Youssoupha Ndiaye were absent, the latter having sent apologies. Alioune Blondin Beye did not stay until the conclusion of the session.
6. The following 19 NGOs were admitted to Observer Status with the ACHPR: International Human Rights Law Group, Minnesota Lawyers International Human Rights Committee, Federation International de l'Action des Chrestiens pour l'abolition de la Torture, African Union of Lawyers, Groupe d'Etude et de Recherche sur la Democratie et le Développement économique et social (Dakar), Anti-Slavery International for the Protection of Human Rights, Congressional, La Ligue Ivoirienne des Droits de l'Homme, L'Association des Juriste Africains, L'Association pour la Promotion de l'Etat de Droit, Rencontre Africaine pour la Défense des Droits de l'Homme, Decade of Human Rights Education, Marangopoulos Foundation for Human Rights, Legal Research and Resource Development Centre, Organization Mondiale Contre la Torture, International Service for Human Rights, Groupe d'Etude et de Recherche sur la Démocratie et le Développement Economique et Social (Abidjan), International League for Human Rights and l'Association Nationale des Droits de l'Homme (Gabon). Additionally the African Bar Association and Ligue Centrafricaine des Droits de l'Homme were granted observer status subject to presentation of their basic documents.

ter of regret, though, that in some cases NGO application documents were reportedly lost by the Commission's Secretariat.

Generally speaking, the public discussions tended to centre around procedural matters with little focus on the actual human rights situation in Africa. The matter provoking the most comments from the commissioners was the presentation of the conclusions and recommendations of the NGO workshop which preceded the 10th session. In particular, proposals to appoint women commissioners and NGO concerns over possible conflict of interest arising from the composition of the Commission were mentioned by several commissioners. The proposal to include women was opposed by some commissioners while others remained silent. In regard to the issue of impartiality and independence of the Commission, the view was expressed that as they served in their individual capacity the commissioners were independent of their respective governments and could be trusted to act with integrity in human rights matters.

Examination of National Periodic Reports

As noted in the report of the 9th session, seven of the 40 States had sent their periodic reports and Rwanda, Tunisia and Libya had sent representatives to respond to questions relating to the discussion of their reports.

The reasonable expectation was that reports from four other States – Nigeria, Togo, Tanzania and Egypt – would be discussed during the 10th session. Unfortunately, apparently due to an oversight by the Commission's Secretariat in neglecting to inform the four States scheduled for consideration to send their representatives, the review could not take place during the session. It is to be hoped that steps would be taken to rectify this error. It is submitted that in regard to the reporting procedures ample time be given to facilitate States' compliance. Months before the session to which the representatives are to be invited, it is crucial that relevant questions and other requests for additional information be sent to the States concerned. Upon receipt of the questions, the State representatives have to be sufficiently briefed to provide adequate responses to questions posed at the session. This would result in meaningful dialogue between the State representatives and the commissioners. It must be stressed that prompt consideration of the State reports does not only constitute an effective discharge of the Commission's protective mandate expressed in terms of Article 45 of the African Charter, it also serves as a positive encouragement to those State parties which have not already done so, to submit their reports in accordance with the obligation imposed upon them by the African Charter.⁷

Other noteworthy features of the 10th session include the Consultants' Report and the relationship between the Commission and NGOs.

7. Article 62 of the African Charter provides: "Each state party shall undertake to submit every two years ... a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present charter."

The Final Communique

The 10-page communique embodying the draft agenda of the 11th session of the Commission touches on several significant themes reflecting the overall growing importance of the Commission in regard to the discharge of its mandate. It begins with the attendance of nine members of the commission and the opening ceremony presided over by Prof. Umozurike, the Commission's outgoing Chairman. Speeches were made by other personalities in an impressive ceremony befitting the 10th session and the 10th anniversary of the adoption of the African Charter. In his address Hassan B. Jallow, the Gambian Attorney General and Minister of Justice, representing the President of the Gambia, assured the Commission of the government's enduring commitment to the facilitation of the work of the Commission by providing the necessary assistance to enable it achieve its objectives. The ICJ Secretary-General Adama Dieng also stressed the need for co-operation among NGOs and their collective assistance to the Commission to ensure success in the discharge of the Commission's mandate.

Other speakers included Mr. Robinson, the Chairman of the Inter-American Commission, who had been especially invited to address the 10th session. The Communique reported that the Commission had learnt from the statement of the chairman of the Inter-American Commis-

sion of measures that could be utilized to enhance the performance of the African Commission. These measures included the possibility of carrying out investigations in State parties; the possibility of undertaking actions and adopting interim measures in order to avoid irreparable prejudice to victims of human rights violations; measures to be taken to counter delaying tactics used by some member States to impede settlement of cases presented to the Commission; and the possibility of visiting prisons; preparing special reports on the human rights situation in a given country and exempting indigent complainants from stipulations governing the exhaustion of local procedures. Mr. Falk, representing the United Nations Undersecretary-General for Human Rights, congratulated the African Commission on its promotional work referring to the UN Centre's Plan for Action for the Promotion and the Protection of Human Rights in Africa.⁸

Dr. N. Mutsinzi, the Commission's Secretary, made a statement on behalf of the Organization of African Unity (OAU) Secretary-General Ahmed Salim Salim.

The major topics on the agenda of the session included the following: consideration of application for observer status resulting in the granting of such status to 19 NGOs unconditionally and two others conditionally on the submission of their basic documents;⁹ consideration of the conclusions and recommendations of a workshop organized by the ICJ and the

8. UN Centre for Human Rights, Plan of Action for the Promotion and the Protection of Human Rights in Africa 1991-1995. The plan includes the establishment of an Information and Documentation Centre for the African Commission; the strengthening of the Commission's Secretariat through the appointment of a legal officer and other supporting staff and the costs of the two consultants appointed by the Commission to draw up a programme of activity for it.

9. See footnote 6 supra for list of NGOs admitted to observer status during the 10th ordinary session of the ACHPR.

African Centre for Democracy and Human Rights Studies on NGO participation in the work of the African Commission;¹⁰ matters arising from the preceding session; protective and promotional activities of the Commission; consideration of periodic reports; report of the Consultants on the Programme of Activities;¹¹ consideration of the Rules of Procedure and the report of the activities of the OAU relevant to the Commission.

With regard to protective activities, the final communique notes that the Commission considered a number of complaints other than those of States parties, including cases already declared admissible and new cases. Concerning the new cases, the Commission considered 18 new communications and decided that for 15 of those cases the communications were to be brought to the knowledge of the States concerned and their authors requested to indicate whether all local remedies had been exhausted. With respect to two of the cases, the Commission's Chairman was mandated to refer the matter to the current Chairman of the OAU in accordance with article 58 (3) of the African Charter. With regard to one of the cases the Commission decided to request the State concerned for a temporary suspension of the measures envisaged.

Finally, regarding cases already declared admissible, the Commission considered seven communications which had been settled in a satisfactory manner and closed the dossiers. The major procedural matter of revising the Commission's

Rules of Procedure¹² was also tackled. A commissioner was appointed to consolidate a number of amendments that have been previously submitted to facilitate a full debate on the matter during the 11th session.

The communique concluded with two other important issues to which considerable prominence was given. First the matter of the submission of periodic reports by State parties and second, the situation in South Africa. In regard to the first, the commission finally directed a number of questions to the States concerned in an effort to lay out a foundation on which to improve the State reporting system in accordance with guidelines already prepared.¹³ On South Africa, the Commission noted the reports of continuing violence and the recent signing of a national peace accord by political organizations including the African National Congress, the Inkatha Freedom Party and the South African government, intended to end the violence. The final communique of the 10th ordinary session of the African Commission concluded that the Commission:

"Condemns the use of violence in South Africa to settle disputes by anybody in South Africa and, in particular, the recent massacre of 18 people in Thokoza near Johannesburg.

"Appeals to the government to fully comply with its undertakings under the national peace accord.

"Calls on the government to accede to the demands of the majority of South

10. See discussion *infra* under sub-title "Relationship with NGOs".

11. Discussed below.

12. See item 2 of Report of the ninth ordinary session by W. Benedek, footnote 4 *supra*

13. See guidelines on State Reporting embodied in Commission's letter to all state parties, AFR/COM/HPR/CM/AD 38.

Africans for the establishment of an interim government and a constituent assembly.

"In keeping with the preamble of the Charter of the Organization of African Unity requiring total commitment to the elimination of apartheid, calls upon the heads of State of the OAU to consider carefully the human rights conditions prevailing in South Africa."

Consultants' Report

One of the earliest plans drawn up by the African Commission at its inception was a Programme of Action, which was formulated during the second session in Dakar in February 1988. The programme spelt out three broad categories of promotional activities: (1) Charter ratification campaign strategies; (2) research, seminars and dissemination of information on the African Charter and the work of the Commission, (3) measures to foster co-operation with national, regional and international human rights organizations.

In order to turn these broad objectives into specific actions that were immediately implementable, the Commission, at its seventh session in Banjul in April 1990, decided to engage the services of two consultants.¹⁴ The team was mandated, *inter alia*, to:

- (1) Prepare an inventory of international and national institutions with which the Commission could have co-operative relations in the field of the promotion and protection of human and peoples' rights.

- (2) Work out general lines of co-operation between the Commission and non-governmental organizations including the Banjul-based African Centre for Democracy and Human Rights Studies.
- (3) Make proposals for a variety of promotional activities to be undertaken by the Commission specifying possible sources of funding.

Two preliminary reports were submitted by the consultants to the eighth and ninth sessions of the Commission. The final report was submitted during the 10th session. Consideration of the report was given prominence in the agenda of the session and considerable attention paid to its presentation.

The 68-page comprehensive report deals with a variety of promotional activities which could realistically be undertaken by the Commission and its Secretariat. Each promotional activity is described in detail, including a budget and attention drawn to possible sources of funding. The report not only provides valuable background information regarding the priorities set by the Commission as well as existing national, regional and international human rights organizations. It also presents a wide range of valuable proposals which are readily implementable, given the will and the desire on the part of the Commission to pursue the funding sources outlined in the report. Other specific proposals include the holding of seminars on a broad range of topics, the strengthening of the Commission's Secretariat, including the establishment of a Special Fund for that pur-

14. The consultants were the ICJ Secretary-General Adama Dieng and Wolfgang Benedek, associate professor of International Law at the University of Graz, Austria.

pose, specific projects with costings and the creation of a documentation centre and an African library of human rights. With a view to maximizing the role of the Commission, the consultants made the following important observation:

Ideally, the African Commission should have, in each African country, one or more institutional contacts which could be used as "focal points" in its work.¹⁵ The report contains several suggestions for a variety of promotional activities which could be undertaken by the Commission.

Two specific proposals embodied in the consultants' report were adopted at the 10th session. (Presumably due consideration regarding adoption would be given to the other specific proposals at the next session.) The two specific proposals concerned "Workshops and Seminars" and "Infrastructure and Resources Needed" for the strengthening of the Secretariat and the establishment of an Information and Documentation Centre. In adopting the proposal on workshops and seminars, the Commission gave priority to six seminar topics:

- (1) The human rights of women and children under the African Charter.
- (2) National implementation of the African Charter on Human and Peoples' Rights.
- (3) The right to fair trial with particular reference to legal aid.
- (4) The human rights of refugees and internally displaced persons.
- (5) Human Rights in a post-apartheid South Africa and the African Charter.

- (6) The role of the media in promoting and protecting human rights in Africa.

There is little doubt that the timely submission of the final report of the consultants during the 10th session combined with the attendance by a record number of African NGOs made an impact upon the Commission and the NGOs. It is important that the report be published and widely distributed to all NGOs in observer status with the Commission. This would provide an effective means by which NGOs could evaluate the Commission's performance and act as a pointer to areas of co-operation between such NGOs and the Commission. Furthermore, a periodic appraisal of the Commission's Programme of Action and the concrete measures outlined in the report will augur well for the strengthening of the Commission.

Relationship with NGOs

A record number of 21 NGOs applied for and were granted observer status with the African Commission during the 10th session. This brought the total of NGOs in observer status with the Commission to 58. The number includes several African NGOs that had been encouraged to apply by the Commission itself and such international NGOs as the ICJ and Amnesty International.

Taking place immediately after a workshop on NGO Participation in the work of the African Commission, sponsored by the ICJ in collaboration with

15. Dieng A. and Benedek W. Proposal for Programme of Action of the African Commission on Human and Peoples' Rights: 1992-1996 Final Report (English version) p. 24 .

the African Centre on Democracy and Human Rights Studies as well as the African Commission, several NGOs were afforded the opportunity to attend the 10th session.¹⁶ The NGO workshop, which undoubtedly made an impact on the 10th session, had three objectives: first, to develop NGO strategies for working on a continental level with each other and with the African Commission; second, to promote dialogue between NGOs and the African Commission; third, to provide an opportunity for NGOs to attend and participate in the public sessions of the African Commission's meetings. The workshop was attended by 59 individuals representing 35 NGOs, five members of the Commission and several international observers. A background paper presented by the ICJ legal officer for Africa (the writer of the present report) emphasized the crucial role of NGOs in collaboration with the Commission and States parties in regard to implementation of the Charter.¹⁷ The paper also stressed the need for African and international NGOs to support the promotional and protective activities of the Commission. This was particularly important in regard to State reporting and monitoring procedures, for example a commissioner member designated as a country rapporteur could be furnished with comments on a particular State report.

Furthermore, an alternative report could be prepared by NGOs to provide a balanced picture of the particular country's human rights situation.¹⁸

Upon concluding its deliberations, the workshop prepared a list of recommendations which was submitted to the 10th session of the African Commission. Among the key points highlighted in the recommendations were: a call for the strengthening of the Commission's Secretariat including the provision of manpower and infra-structural support (a point also emphasized in the consultants report); the problem of potential incompatibility regarding the holding of high political office with membership of the Commission; possibility of developing mechanisms which would enable women to be elected as commission members; the role of NGOs in providing assistance to the Commission and steps to amend the African Charter to incorporate "the duty to eliminate dictatorship in all its forms and to promote democracy in Africa".

It is noteworthy that after a debate on the conclusions and recommendations of the NGOs workshop, the commissioners not only endorsed the right of access of NGOs to the open sessions of the Commission but they also adopted a major part of the recommendations presented by the NGOs. The relationship between

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16. A record number of 50 representatives of NGOs participated in the 10th session of the African Commission.
 17. Amoah, P.K.A. Participation of Non-Governmental Organizations in the work of the African Commission on Human and Peoples' Rights. Background paper presented at NGO workshop at the African Commission organized by the ICJ in collaboration with the African Centre on Democracy and Human Rights Studies and the African Commission, Banjul, the Gambia 5-7 October 1991.
 18. See comments submitted to the African Commission during the 10th session by the Constitutional Rights Project of Nigeria. *Constitutional Rights Journal* vol. No 4 Oct-Dec, 1991. p 12-14.

the Commission and NGOs formalized by the granting of observer status by the former to the latter has been further strengthened by the attendance of a record number of NGOs in the 10th session. If NGOs faithfully carry out their promises to support and assist the Commission in its task of promoting and protecting human and peoples' rights in the countries where the NGOs operate, there is little doubt that such involvement would prove essential for the effectiveness of the Commission.

Conclusion

In the final analysis the effectiveness and relevance of the African Commission revolve around the procedural aspects of its role in the fields of the promotion and protection of human and people's rights. Simplified procedures and speedy redress are two major factors which enhance the credibility of the Commission and inspire public confidence in it.

The Commission's role has to be complemented by States' strict compliance with the Charter's mandatory provisions. NGOs must act as catalysts in this process. In this regard it is of the utmost importance that the Commission, States parties and the OAU Assembly pay heed to the conclusions and recommendations of the NGO workshop. In particular, the procedural problems posed by articles 58 (3) and 59 of the Charter need to be resolved.

The procedural constraints under which the Commission operates constitute a serious handicap. These limitations have adverse consequences on the effectiveness of the African Commission as the main implementation machinery of the African Charter. As already pointed out, the 11-member Commission meets

only twice a year, eight to 10 days each session, with a rather elaborate agenda, and has no power beyond investigating and reporting, giving advisory opinions when requested to do so and undertaking promotional activities. The Charter leaves it to the OAU Assembly of Heads of State and Government to decide what action to take.

Two provisions of the Charter concerning, respectively, cases of emergency and confidentiality of measures taken by the Commission, are particularly noteworthy. In terms of Article 58 (3) Response to Emergency Situations:

"A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study."

Such a bureaucratic approach to an emergency, it is respectfully submitted, is a serious flaw in the Charter's effectiveness as a weapon for human rights. Given the current schedule of meetings of the Commission, an in-depth study ordered in November, for instance, would probably await the Commission's consideration four months later during next session in March. The completion of the actual in-depth study itself and the formulations of recommendations to the Assembly via the Commission could take several months. In the meantime, the victims of the emergency situation are denied remedies.

Confidentiality Principle

This provision, like the preceding article, creates procedural problems which tend to weaken the effectiveness of the protective function of the African Commission. Article 59 provides:

"All measures taken within the provision of the present chapter shall remain confidential until such time as the Assembly of Heads of State and Government shall otherwise decide."

In the absence of clear guidelines from the Assembly, the Commission has so far tied its own hands by adopting a strict approach towards the issue of confidentiality. It has tended not to disclose the names of the States against whom complaints have been made. This strict adherence to the principles of confidentiality has tended to shield the work of the

Commission from public view and scrutiny. The end result has been protection to States parties but exposure of the Commission to charges of ineffectiveness and lack of certainty about the end result of its work. Both situations undermine the confidence of the general public in the Commission.

Despite these procedural problems, the positive attitude of the Commission towards NGOs, the latter's participation in the 10th session, and the increasing democratization in Africa are factors which should contribute to increased activism by the Commission.

ARTICLES

Changes to the Security Laws in South Africa

*Jeremy Sarkin-Hughes**

While major reconstruction of the South African security legislation is inevitable, its advent has been slow. The government, in the Pretoria Minute of 6 August 1990, undertook to review the security legislation and give "immediate consideration to repealing" certain provisions of the Internal Security Act. However, the total number of detentions recorded in 1990 was double the number recorded in 1989. It was only in May 1991 that the government introduced a bill into Parliament to repeal some sections of the Internal Security Act and amend others. A second bill was later introduced which modified some of the proposed amendments of the first bill.

In South Africa the security apparatus, designed to preserve white domination, has been a rigid and permanent feature of the legal system since the 1950s, although modified and streamlined in 1982 when the Internal Security Act, No. 74 (ISA), was enacted. This apparatus bolstered the already enormous powers of the executive at the expense of individual rights and liberties. The ISA and the Public Safety Act were the major security instruments, used in various ways to silence extra-parliamentary political opponents of the government. In fact, the

Human Rights Commission reports that some 78,000 people have been detained over the last 30 years under these laws.

Characteristic of the ISA was the authority to prosecute a myriad of widely defined security crimes, to proscribe organizations and to ban individuals, meetings, gatherings, publications and processions.

In the memorandum on the objects of the new legislation it is stated "that the primary object of the bill is to bring security legislation into line with the new dynamic situation developing in South Africa in order to ensure normal and free political activities".

While the amendments, and what has been left, might achieve some of these aims, the bill still contains barriers to the goals set out in the memorandum. What is achieved by the amendments is to bring the members of the judiciary into the security system, embroiling them in the politics of detention, thereby tainting themselves even further in the eyes of many South Africans.

In Section 54 (S54) of the ISA the principal offences were the broad and ill-defined crimes of terrorism, subversion, harbouring and sabotage. These are unchanged by the bill. The section that

* Jeremy Sarkin-Hughes is a Faculty of Law lecturer at the University of the Western Cape in South Africa.

made it an offence to advocate, advise, defend or encourage any of the objects of communism, S55, has been repealed, as has schedule 2 which incorporated other offences into the ISA. Amended is S64, which changes the time limit for the Attorney General to give consent for a trial, and S72, which originally mandated that certain reports be forwarded to the House of Assembly (white). These reports would now be forwarded to all three houses.

The effect of the changes to the ISA is best illustrated by examining the impact they have had on the following rights:

Freedom of Association

Sections amended:

Section 4 of the old ISA conferred a wide discretion and hence an almost limitless authority on the Minister of Justice, permitting him to declare an organization unlawful "if the Minister is satisfied" that, among others, the organization engages in activities which endanger or are calculated to endanger the security of the state or the maintenance of law and order. The Minister's subjective opinion as to the jurisdictional grounds was decisive and no court could substitute its opinion for his unless it could be proved that the Minister acted *mala fides*, mindlessly or for improper considerations.

The new section 4 reads that an organization may be declared unlawful, without notice to the organization and by publication in the government gazette, if the Minister has "reason to believe"

a) that the organization by violent or forcible means, or by the instigation or promotion of violence or disturbance,

rioting or disorder, attempts or endeavours to: overthrow the State authority in the Republic; achieve, bring about or promote any constitutional, political, industrial, social or economic aim or change in the republic; or induce the government to do or abstain from doing any act or to adopt or to abandon a particular standpoint;

- b) that the organization threatens with violence or the instigation or promotion of violence or disturbance, rioting or disorder, or with means which include violence or disturbance, rioting or disorder, in order to achieve any of the said objectives; or
- c) that the organization propagates or encourages violence or disturbance, rioting or disorder, or means which include violence or disturbance, rioting or disorder, as a means of achieving any of the said objects.

This provision places an objective standard on the Minister of Justice's reason to believe and allows the courts to investigate this belief in terms of the judgement in the case *Hurley v Minister of Law and Order*. This case held that the phrase "reason to believe" enables a court to satisfy itself that such jurisdictional facts exist. Whereas the power of the Minister was previously very wide and arbitrary and his opinion could not be subject to court investigation, an important safeguard is now built in to allow the Supreme Court to examine whether there are, objectively speaking, valid grounds for acting in terms of the powers available. However, it is argued that this section does not go far enough in that the Minister's authority is still too far-reaching. Repealed is S70 which, among its provisions, permitted the Minister to declare an organization unlawful, prohibit the printing, publication or dis-

semination of any publication and warn an organization or publication to refrain from certain activities.

Section 10(1) of the bill, as amended, now mandates the Minister, if he declares an organization unlawful in terms of S4(1), to provide a written statement containing information relating to the reasons for his decision, to an office bearer of such an organization. The section does, however, contain a limiting clause which states that the Minister need only provide this information if requested to do so within 30 days of the publication of the government gazette declaring the organization to be unlawful. It is argued that this is insufficient time for the request to be put to the Minister.

In S6 of the old ISA, the Minister could use inordinately excessive powers to investigate an organization if he had reason to suspect that its activities, purposes, control or identity were such that it ought to have been declared unlawful. All these extensive powers, as well as the power to mandate that the occupier of the premises entered should furnish such facilities as required, are now given to the liquidator of the organization in terms of S14(12) and S14(13) in the Internal Security and Intimidation Amendment Bill. In terms of S7 of the old legislation, the Minister had to consider the advice of an advisory committee of three people, appointed by the State President on the recommendation of the Minister of Justice, before he could exercise any of his powers. The question as to whether the organization should be heard lay in the discretion of the committee, which could have decided that to grant such a hearing would be contrary to the public interest. These sections provided little, if any, safeguards for the rights of those affected and sections 6 and 7 have now been re-

pealed as have sections 8 and 9 which included what constitutes a decision, the procedures the committee has to follow, and how and when witnesses can be subpoenaed by the advisory committee.

Section 12 assigns the time period after which prescription would apply. The old section stated that no proceedings would be instituted in a court of law if 14 days had expired since a notice had been issued declaring an organization unlawful. Section 12 of the bill, as amended, now sets a prescription of three months after the issue of the notice. However, a three-month period is still far too short and there cannot be adequate reasons for decreeing such a short period. The bill, in S12, also provides that no court shall have jurisdiction after 12 months to pronounce on the validity of such a notice. Fortunately, there is the clause that permits the court concerned to extend the time period if it is satisfied that the delay is not due to the fault of the party that instituted the action. Unaltered is S12(2) which states that no court shall have the jurisdiction to suspend or postpone the order made by the Minister. This is unfortunate as it would allow an arbitrary exercise of power to continue until the court has had the opportunity to hear the matter, which might lead to some delay and therefore the continuation of the oppressive exercise of authority.

Section 56 (which created the offences regarding unlawful organizations and prohibited publications) has been amended so as to make it an offence to: (1)(a) further the aims of an unlawful organization, (b) be in possession of a publication of such an organization without the Minister's consent, (c) allow premises to be used for a gathering of such an organization, (d) not answer the liquidator correctly, (e) not follow the directions of the liquidator, (f) hinder the liquidator

or (g) not pay the balance remaining to the state revenue fund. A penalty of imprisonment or a fine, or both, is provided for these offences. An escape clause is inserted which states that if the possessor of a publication violating S56(1)(b) satisfies a court that upon learning about the status of the publication (s)he had handed it a policeman, that person shall not be convicted.

Sections repealed:

- Section 11, which determined the review procedures that banned or unlawful organizations or publications can apply for.
- Section 14(10), which permitted the Minister to direct the liquidator of an unlawful organization to compile a list of persons who were office bearers, officers, members or active supporters of the organization. In terms of the amendment to S56, it is no longer an offence to quote a listed person or break a banning order.

Sections left untouched:

Sections 46 to 49, 51 and 53 still remain. These sections enable a magistrate or the Minister to outlaw public gatherings that they have "reason to apprehend" would seriously endanger public peace. They also give powers to certain police officers to close places to prevent prohibited gatherings and render illegal open-air gatherings without the consent of the authorities. Further, they authorize certain police officers to disperse prohibited, or supposedly riotous, gatherings by the use of force where necessary. It is, however, mandated that firearms are not to be used unless the gathering shows a manifest intention of destroying

or damaging valuable movable or immovable property.

It is argued that not only are these measures insufficient but they in fact hamper the ability of South Africans to organize freely and enter into debate surrounding the negotiating stage of a new constitution. Therefore, the fact that unacceptable portions of the old legislation have been retained and that the amendments are not far-reaching enough impinge severely on the success of the democratic process.

Also unaltered are sections 57 to 61 and S71. Penalties are imposed for the violation of sections 46, 47 and 48. It is an offence to incite others to commit offences or to solicit, accept or receive money or other articles for the purpose of assisting any campaign (conducted by means of any unlawful act or omission or the threat of such) against any law, or against the application or administration of any law or by assisting anyone to protest against a law.

Freedom of Speech

The amending bill provides for the repeal of S5, which permitted the Minister to ban any periodical or other publication if he was so disposed, and S15, which authorized the Minister to make the registration of a newspaper conditional upon a deposit of up to 40 000 Rands to ensure good conduct. Also repealed are sections 23 and 56, which prohibited the publication of statements or writings of certain individuals.

Unaltered is S63, which prohibits words or acts that have the intent to cause, encourage or foment feelings of hostility between different population groups in South Africa.

Freedom of Movement

Sections repealed:

- Section 28, which provided for indefinite detention on suspicion of terrorism, subversion, sabotage or being a threat to the security of the state.
- Section 50A, which provided for detention of up to 180 days.
- Sections 16 and 17, which allowed the compiling of a consolidated list of names and presumed the accuracy of the list when used in the courts.
- Sections 18 to 27, which restricted individuals from membership in certain organizations, mandated a person to be at a particular place (house arrest or banishment), prohibited an individual from being at a particular place, restricted certain individuals from attending gatherings, ordered an individual to report periodically at a police station and restricted certain individuals from taking part in the activities of any organization.
- Sections 33 and 34, which disqualified people whose names appeared on the consolidated list or who had been convicted of a number of offences (including terrorism, subversion, sabotage or being a Communist) from being a member of Parliament (if white, coloured or Indian) or from practising as an attorney, an advocate, a conveyancer or a notary.

Sections amended:

The infamous Section 29, which authorized indefinite detention for the purposes of interrogation, has been drastically amended. This was the most severe and widely used of the sections. It enabled any police officer above the rank

of lieutenant-colonel to make an arrest without a warrant if he "has reason to believe" a person committed, or intends to commit, a number of widely and vaguely defined offences contained in S54 or has information with regard to any of these offences. A person could be held until the police decided that all questions had been satisfactorily answered. This provision was totally inconsistent with the usual principles of criminal justice as it did not (and still does not) uphold the fundamental right to remain silent.

After 30 days, the Minister had to give his authority in writing if he wished to extend the order and enable the detention to continue. After six months, the reasons for the non-release had to be given to a board of review whose recommendations the Minister could reject. While there had been an ouster clause (an attempt to oust the jurisdiction of the courts to pronounce upon the validity of any action taken on the section), the circumvention of this clause provided little problem for the courts. No person, including lawyers, could gain access to the detainee without the consent of either the Minister of Law and Order or the Commissioner of Police. An inspectorate of detainees was established to visit those held in order to give a semblance of supervision. The inspectors and the board of review procedures have been repealed.

Although Section 29 had some safeguards for the rights of the individual, they were ineffective, so whatever protection was provided was in fact illusory.

Section 29 has been amended so as to ameliorate some of its harsher aspects, but detention for the purpose of interrogation still remains. The initial period of detention is a maximum of 10 days, with arrest by a police officer of rank (as previously) and still without a warrant. The

period can be extended after an application is approved by a judge of a provincial or local division of the Supreme Court in chambers at least 48 hours before the expiry of the 10-day period. The application should contain the date and reasons for the detention, the reason why further detention is sought and the place and the directions subject to which the detainee is being held.

S29(3)(b) mandates that the detainee and, if he so wishes, his legal representative shall be told of the application before it is heard. In the first bill no provision was made for the detainee to receive a copy of the application, but this has been included in the second version. However, the fact that the detainee might be told of an application for the extension of his/her detention only shortly before the hearing, thereby permitting no time to receive legal opinion and even prepare for the application, is still problematic.

The judge shall allow the detainee or his legal representative and the Commissioner of Police or a police officer (of or above the rank of brigadier) to submit written reasons why the detainee should be released or detained. In the first bill no provision was made for oral representation. The second bill now makes provision for this in S29(3)(d)(iv)(aa) & (bb). The judge is now given the discretion to hear oral representations from both the Commissioner or police officer and the detainee or his legal representative. The drafting of the section is garbled as it states "provided that the judge may afford the detainee or his legal representative or the detainee an opportunity to be heard in order to elucidate such reasons". If the application is refused, the detainee is to be released immediately, but if not no appeal is permitted as the decision of the judge is final.

The ouster clause, which states that no court shall be able to pronounce on the validity of any action made in terms of this section, was retained in S29(6) of the first bill. But since the courts afforded this clause scant respect in the past, it was removed in the second bill. It should be noted that safeguards are increased although some are once again illusory. In regard to informing various people of the arrest, the bill directs that the police officer shall "as soon as possible" after the arrest inform the Commissioner thereof, who in turn shall notify the Minister. Of greater significance is the clause that calls upon the police officer who carries out the arrest to notify a relative. The distressing point is that the protection provided by this notification procedure can be circumvented since S29(7)/h(i) also says that the detainee can request the police officer not to inform anyone. (Would this really ever happen?) Of even greater concern is S29(2)(t)(ii), which states that the notification procedure can be avoided if the Commissioner "has reason to believe" that it will hamper any investigation by the police.

This is nothing but a thinly disguised excuse for the invasion of the rights of the individual. Significant protection for detainees means that relatives know where they are so as to prevent possible police abuses, something which in South Africa is all too commonplace. The fact that this can be investigated by the courts is of little consolation as no one will know of the arrest and therefore the "reason to believe" will not in reality be tested.

Another concern is S29(6)(a), which states that no person shall have access to the detainee without the consent of the Minister and subject to conditions stipulated by him. Fortunately, a proviso was added in the second bill which states that the Minister may only refuse access

if he has "reason to believe" that it will hamper police investigations. Although this is an improvement on the earlier act, it will still allow the police to limit access and thereby undermine the safeguards. It is true that the wording allows the court to test the belief objectively, but there has to be a court hearing which will involve delays. Access is provided (and this cannot be refused) to the legal representative of the detainee but only for the purpose of preparing for the application before the judges. This might be for just a brief period, depending on how long before the application the detainee is informed and how quickly the legal adviser can get to him. However, the Minister may impose any condition on the legal representative and this access is extremely limited since before and after this application the legal representative may be refused access if there is "reason to believe" that this will hamper the police investigation.

An improvement is S29(9) which governs the visiting procedures mandated by the ISA. Visits under the old ISA were conducted on a fortnightly basis in private by a magistrate and a district surgeon. The first bill repeated these directives but stated that the visits should take place every 10 days. In the second bill the directive is that these visits should take place every five days and a report should thereafter be compiled and submitted to the Minister.

While this would provide some monitoring and supposedly reduce incommunicado detention, with its ensuing psychological trauma, the independence of these state officials has always been questioned. It is argued that the protection for the detainees which these visits seek can only be obtained if the monitors are totally autonomous of the state. Submitting the report to the Minister will

provide insufficient assurance to detainees and their relatives that abuses will be discovered, investigated and curbed.

An ostensible precaution provided in the second bill in S29(9) is that the detainee may be visited by a private doctor, if requested, but at his own expense and in the presence of a district surgeon. However, this should not obscure the fact that these rights can be rendered meaningless because the Minister or the Commissioner can refuse access by a medical practitioner if there is "reason to believe" that such a visit will hamper police investigations. Undoubtedly, when the detainee has suffered maltreatment, the doctor's admittance will be restricted to negating the supposed intent of the provision. By the time judicial intervention is obtained (supposing that it can), the effects of the ill treatment may no longer be visible, thus rendering inadequate the protection provided by this provision. This is critical, bearing in mind that at least 73 people have died in detention.

Unaffected provisions:

Of the utmost concern is that S30, S31 and S50 are left intact. S30 authorizes the Attorney General to prohibit bail virtually indefinitely if "he considers it necessary in the interests of the security of the state or the maintenance of law and order". S31 authorizes the Attorney General to detain the witness incommunicado for six months where no charge sheet has been lodged, or until the case has been concluded, which could be practically indefinitely, if "in the opinion" of the Attorney General the individual may abscond, may be tampered with or intimidated, or if he "deems" it to be in the interests of such a person or the administration of justice. As the phrase "in the opinion" is a subjective

discretion clause and the courts have determined that they cannot investigate such an opinion, there is none of the protection provided by the "reason to believe" clause, which as mentioned allows the courts to investigate the circumstances.

Also left unaltered is S50, allowing detention for an initial 48-hour period that may be extended to a maximum of 14 days after magisterial approval. Since no safeguards are built in, as in S29, maintaining sections 30 and 31 could mean that detainees initially held under S29 could be held under these laws.

Conclusions

South Africa, has, in the crises of recent years, spawned a permanent state of emergency with wide, drastic and even draconian powers that violate the notion of the rule of law despite sustained attacks against the security provisions. Victorious challenges to the laws have been pyrrhic, resulting in the legislature often re-enacting the law based upon the court decisions. Therefore, to some extent the courts became the government's unwitting drafters of security legislation during the 1980s. The same process is at work with the revisions of the Internal Security Act reflecting judicial pronouncements, especially where the phrase "reason to believe" is concerned.

The amending legislation must be viewed in the context of the changing circumstances in the country and the Pretoria Minute which stipulates: "In

view of the new circumstances now emerging there will be an ongoing review of security legislation. The government will give immediate consideration to repealing all provisions of the Internal Security Act that (a) refer to communism or the furthering thereof, (b) provide for a consolidated list, (c) provide for a prohibition on the publication of statements or writings of certain persons and (d) provide for an amount to be deposited before a newspaper may be registered."

While the amending bill satisfies this clause and will improve the Act somewhat, it does not give effect to the other part of the clause in the Pretoria Minute, which states: "The government will continue reviewing security legislation and its application in order to ensure free political activity and with the view to introducing amending legislation at the next session of Parliament."

The amendments reflect the changing political climate in the country, yet also reflect the anxiety regarding the future by the legislature when a new government is in power. At least part of the reason for the amendments must be to remove much of the arbitrary power entrusted to the present executive and provide safety mechanisms, through increased access to the courts, before a new administration is entrusted with this legislation.

Many parts of what remain in the Internal Security Act could stifle free political activity and there is no doubt that South Africa has a long way to go before its security legislation matches up to security provisions in other democratic nations.

Science and the Law

*Dr. Jerome R. Ravetz and Sir Denis Dobson**

The English legal system has recently been shaken by the notorious Maguire and Birmingham Six cases in which persons were falsely convicted of terrorist acts in the 1970s. These and other cases that collapsed have focused attention on the miscarriages of justice that can occur when the findings of forensic scientists turn out to be mistaken and when there is a breakdown of communication between lawyers and scientists.

Before these cases came to light, Justice (the British Section of the International Commission of Jurists) and the Council for Science and Society sponsored a study on the interaction of science and law. The initiative came from Paul Sieghart, a member of both organizations with an interest in reforms. The Chairman was Judge Christopher Oddie, who has played an active role in the work of the Judicial Studies Board. Members of the Committee were scientists who had experience in forensic work and lawyers, both practising and academic, who were concerned about the problems of scientific evidence.

The Committee concentrated mainly on criminal cases in the English system of courts. It considered the practical problems affecting the determination of scientific issues by the courts and the extent of the contribution that scientists can make in the evaluation of forensic evidence of all kinds.

In its report, entitled "Science and the Administration of Justice", the Committee analyzes the differences between the scientific and the legal approaches to questions of proof. A better understanding of these differences by lawyers and scientists, as well as a familiarity with each other's intellectual and working methods, is fundamental to any improvement.

Among the subjects covered by the report are the "adversarial" system in the English courts, problems concerning the burden of proof and – barring exceptional circumstances – the role of the jury in the determination of facts. Reviewing the practical problems, the report raises several issues. Is it realistically possible to reconcile the requirements of the adversarial system with the requirement that expert witnesses be absolutely impartial? To what extent can or should an expert witness articulate important points on which the advocate has asked no questions? And does the current arrangement give the Prosecution an unfair advantage over the Defence? The contributions of psychology, about perception and memory, and of psychiatry, in regard to legal conceptions of responsibility for crime, also need to be considered.

Many scientists who find themselves involved as expert witnesses in legal proceedings experience difficulty with

* Dr. Jerome Ravetz is Director of the Research Methods Consultancy in London and former Director of the Council for Science and Society. Sir Denis Dobson, KCB, OBE, QC, is former Permanent Secretary to the Lord Chancellor.

the adversarial court system. The report examines in some detail the problems of the expert witness and considers whether a trial involving scientific issues should be removed from the courts and dealt with in some other way. This might be by a tribunal of experts, by a court assessor or by an independent expert appointed by the court. It concludes that all these courses are open to objection and that a trial by judge and jury (or by judge alone in the normal civil case) remains the best method.

The report recommends a number of improvements in present procedures. Chief among these is the need for highly thorough preparation before trial, by means of more open disclosure of experts' reports and effective review of the issues likely to arise at the trial. In addition, more consideration should be given to the practical needs of the expert witness and the way that he or she is al-

lowed to present evidence.

The report also argues that the courts should become more fully aware of recent developments in the behavioural sciences and of the challenges these present to the traditional concepts of human personality, behaviour and responsibility.

The report approves of the recent re-organization of the Forensic Science Service, which it thinks would have prevented many of the abuses that occurred in the Maguire, Birmingham Six and other cases. But, it says, it cannot emphasize too strongly the need to develop the Forensic Science Service as an agency available to Prosecution and Defence alike on genuinely equal terms. There is a continuing need for more resources to be made available, for the fostering of closer contacts between forensic scientists and the universities and other organizations working in the same field.

BOOK REVIEW

Development and Human Rights in Africa

C.M. Eya Nchama

Editions Publisud (Paris)

Preface by Pierre Claver Damiba

"The fact of having been born and having grown up in the colony of Francisco Franco, one of the last dictators in Europe, and of having suffered the dictatorship of Francisco Macias Nguema and his family, including Obiang Nguema, currently in power in my country, has made me a permanent member of the oppressed. The latter two dictators have forced me to live in exile because of my political opinions."

It is in these terms that C.M. Eya Nchama, born in Equatorial Guinea and head of the research group on African history at the Institut Universitaire d'Etudes du Développement in Geneva, introduces his book entitled "Development and Human Rights in Africa".

It thus represents the contribution of a man of commitment and conviction, without impairing the seriousness and rigour of the book's approach. Since 1976, Eya Nchama has been following the work of the UN Commission on Human Rights as well as that of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. His active attendance has allowed him to be associated during the past 15 years with the important work carried out by both of these bodies on the elaboration of human rights standards.

Three objectives in particular have mobilized Eya Nchama: the struggle against racism and apartheid, economic and social rights, and the right to development. In a cogent summary of the problems he says: "The violation of human rights and the rights of people, the constant interference of the great powers in the internal affairs of African states, the disregard for African cultures and civilizations, the non-participation of women in public affairs and private business as well as racism and racial discrimination constitute the obstacles to development in Africa." And it is precisely this web of analysis that lends Eya Nchama's book its particular relevance.

Made up of four autonomous articles, the work displays a remarkable homogeneity of tone and reference.

First theme: the promotion and protection of human rights and the rights of peoples, contribution to the search for endogenous development.

Second theme: the role of non-governmental organizations in the promotion and protection of human rights.

Third theme: the right to development as a human right in the context of relations between the developed and developing countries.

Fourth theme: reflections on the right to life and the right to live in Africa.

Through the treatment of these four themes, the author draws an uncompromising picture of the current situation on the continent which should give us pause to reflect.

As Pierre Clavier Damiba, the UNDP Regional Director for Africa, states forcefully in the preface to the book: "The survival of Africa depends on our taking into account the freeing of energies which have been muzzled for too long, in order to permit everyone to be a responsible actor in the common work of development."

It would be pointless to try to summarize in a few pages this remarkably rich work, which must be read by anyone interested in Africa and in the world-wide debate regarding the principles and

standards of human rights. The book is rounded out with no less than 200 pages of annexed materials, bringing together a total of 16 documents, some of which are extremely rare. This is not the least of Eya Nchama's merits.

Pointing in conclusion to "the seminars, colloquia and conferences which have multiplied during the past 10 years at the initiative of human rights militants in Africa", the author considers that these meetings ultimately have as their objective, "to respond to one sole question: what should be done to promote human rights in Africa?" In publishing this work, Eya Nchama has made a fruitful contribution to action for the promotion of human rights and the rights of peoples on the African continent.

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RECENT ICJ PUBLICATIONS

The Burmese Way: to Where?

Report of a Mission to Myanmar (Burma)

Published by the ICJ, Geneva 1991

Available in English. 95 pp. 10 Swiss francs, plus postage.

The ICJ visited Myanmar without receiving specific approval from the military rulers, known as the State Law and Order Restoration Council. After talks with citizens and refugees, and extensive research, the report details widespread human rights abuses. They include torture, the conscription of children and the elderly to be porters for the army and the forced relocation of more than half a million people.

★ ★ ★

El Salvador: Una brecha a la impunidad, aunque no un triunfo de la justicia

El juicio por el asesinato de los Jesuitas

Published by the ICJ, Geneva 1991

Available in Spanish. 66 pp. 10 Swiss francs, plus postage.

The report examines the case of the nine military officers accused of murdering six Jesuit priests, their cook and her daughter at Central American University in El Salvador in 1989. It discusses the crack in the wall of impunity, which set a precedent, while criticizing the operation of the Salvadoran legal system.

★ ★ ★

Sri Lanka: The Activities of the Presidential Commission of Inquiry in Respect of Non-Governmental Organizations (NGOs)

Report of a Mission to Sri Lanka in May-June 1991

on Behalf of the International Commission of Jurists,

written by Stephen C. Neff

Published by the ICJ, Geneva 1991

Available in English, 74 pp.

The report looks into the role played by the Presidential Commission of Inquiry, established to examine the operation of non-governmental organizations. Among its findings, the report cites the oppressive nature of some of the Commission's requests for information and its potential "chilling effect" on the work of NGOs.

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