

UNITED NATIONS
ECONOMIC
AND
SOCIAL COUNCIL



Distr.
GENERAL

E/CN.4/Sub.2/1985/16
21 June 1985

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Thirty-eighth session
Item 9 (a) of the provisional agenda

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO
ANY FORM OF DETENTION OR IMPRISONMENT

Study on amnesty laws and their role in the safeguard
and promotion of human rights

Preliminary report by Mr. Louis Joinet, Special Rapporteur

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1 - 8	3
<u>Chapter</u>		
I. AMNESTY AND HUMAN RIGHTS: HISTORICAL EVOLUTION	9 - 18	5
A. From individual clemency to collective amnesty	9 - 12	5
B. Evolution of amnesty laws in relation to crisis situations	13 - 18	5
II. TYPOLOGY OF AMNESTY LAWS	19 - 46	7
A. Relationship between the nature of political institutions and the nature of the power of amnesty	19	7
B. Legal foundations of the power of amnesty	20 - 21	7
C. Purposes of amnesty	22 - 46	8
1. Amnesty for ordinary offences	22 - 26	8
2. Amnesty for political offences	27 - 46	8

GE.85-12274



best copy available

CONTENTS (cont'd)

<u>Chapter</u>		<u>Paragraphs</u>	<u>Page</u>
	(a) Amnesty and the control of tensions	28 - 29	9
	(b) Amnesty and transition to democracy	30 - 32	9
	(c) Amnesty and the neutralization of opposition groups	33 - 35	10
	(d) Amnesty, guerrillas and dissociation	36 - 37	11
	(e) Amnesty, guerrillas and peace strategies	38 - 44	11
	(f) Amnesty and return of exiles	45 - 46	13
III.	THE OPTIONS AVAILABLE IN GRANTING AMNESTY	47 - 81	15
	A. Determination of the scope of the amnesty .	47 - 79	15
	1. Offences covered by amnesty	47 - 49	15
	2. Amnesty and political offenders, including violations of human rights .	50 - 76	15
	3. Amnesty and the victims of political offences, including victims of violations of human rights	77 - 81	19
	B. The effects of amnesty	80 - 81	20
	1. Immediate release of all political prisoners	81	20
	2. Right of political exiles to return ..	81	20
	3. Relinquishment of all proceedings, penal or disciplinary	81	21
	4. Restoration of civil and political rights	81	21
	5. Reinstatement of persons deprived of employment	81	21
	6. Right of victims of inhuman treatment or their families to reparations	81	21
IV.	CONCLUSIONS	82 - 85	22

Annex

List of (88) countries with regard to which information on amnesty laws has been obtained.

INTRODUCTION

1. In resolution 1983/34 of 6 September 1983, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, having become aware of the importance that the promulgation of amnesty laws could have for the safeguard and promotion of human rights and fundamental freedoms, requested the Special Rapporteur to prepare a general study of a technical nature on amnesty laws and their role in the safeguard and promotion of human rights. The Sub-Commission also requested the Rapporteur to present his findings and observations to it at its thirty-seventh session for consideration and transmission to the Commission on Human Rights.

2. In resolution 1984/8 of 28 August 1984, the Sub-Commission, after approving the preliminary study requested the Rapporteur to submit his final report at its thirty-eighth session.

Sources

3. Being a form of ad hoc, emergency legislation, amnesty laws are extremely varied in character and also short-lived. At the time of their promulgation they are the subject of extensive commentaries and initially intensively applied, only to be rapidly forgotten later. This may well explain the difficulty of obtaining the texts of amnesty laws.

4. At the Rapporteur's request and on his behalf, the Secretary-General drew the contents of resolutions 1983/34 and 1984/8 to the attention of States Members of the United Nations, the specialized agencies and intergovernmental organizations and non-governmental organizations in consultative status with the Economic and Social Council and requested them to provide any pertinent information and documents they might wish to submit to the Rapporteur. 1/ The proceedings of the Human Rights Committee together with a number of special reports concerning the human rights situation in particular countries and studies conducted by various non-governmental organizations (see annexed list) proved to be an invaluable source of information. 2/ In contrast, there are few if any bibliographic references to comparative law studies on the subject.

Scope of the study

5. In accordance with the mandate given to the Rapporteur in Sub-Commission resolution 1983/34, this study is limited to amnesties, 3/ the word being understood legally in the following sense: whether the persons amnestied have or have not been tried or convicted, or served a sentence, their conduct is deemed not to have constituted an offence and the penalty is considered never to have been enforced. The following are therefore not covered by the study:

1/ E/CN.4/Sub.2/1984/15. Thirty-seven countries transmitted information to the Rapporteur (see annexed list). The Council of Europe, the Organization of American States and a number of non-governmental organizations also provided information concerning their regions.

2/ See in particular the report of the Ad Hoc Working Group on the Situation of Human Rights in Chile (A/33/331, paras. 248 to 300).

3/ Including derivatives such as the French grâce amnistiante and amnistie judiciaire, which differ from amnesty proper only in so far as procedure is concerned.

Pardon, which remits the penalty but does not expunge the conviction;

Rehabilitation, which presupposes that the penalty has been enforced.

6. In accordance with the terms of reference, it is therefore proposed essentially to devote the study of amnesty in the strict sense and to deal only with amnesty for political offences. Amnesty for ordinary offences, which is granted on such occasions as certain anniversaries or celebrations, is mentioned only for the record, since in addition to the fact that it has already been the subject of numerous examinations, it would also require a special study beyond the scope of this report.

Purpose of the study

7. For the purposes of this study, an amnesty is considered to be the juridical expression of a political act whose expected effects directly concern the promotion or protection of human rights and, in some instances, the return to, or consolidation of, democracy:

Because the amnesty encourages national consensus in the wake of a political change brought about in a democratic framework (elections ...);

Because it is the first act in the initiation of a democratic process or marks a return to democracy; or

Because it is intended to block an internal crisis (non-international armed conflict) or to mark the end of an international armed conflict.

8. In order to achieve the expected goals, an amnesty must satisfy a number of requirements. Experience shows that if these requirements are not taken into account the process is often bound to fail. In the absence of a sufficiently broad consensus, the amnesty process may be seriously undermined, or may even increase dissension. Such is the purpose of this study.

I. AMNESTY AND HUMAN RIGHTS: HISTORICAL EVOLUTION

A. From individual clemency to collective amnesty

9. Amnesty is an outgrowth of the right of pardon, an act of individual clemency of theocratic origin. The divine nature of pardon was related to the sacred character of the King, whether the latter was himself a god or an intermediary between the gods and men.

10. Beginning in the ancient republics, the idea gained acceptance that the power of clemency was associated with the State or that it was at the very least an attribute of the social power. Collective pardon, the true ancestor of the modern amnesty, developed concurrently with individual pardons.

11. This evolution embodied a concern to remedy the imperfections of criminal law, in particular the injustices inherent in the system of "private prosecution". Private prosecution is contrasted with public prosecution, which is one of the prerogatives of government and seeks to punish offences against the life or organization of the group.

12. The appearance about the sixteenth century of laws intended to bring about peace gave impetus to the evolution of the amnesty which became used increasingly as a means of assuring social peace ("general and universal tranquillity") and even political peace ("obviating disorder and sedition"). 4/

B. Evolution of amnesty laws in response to crisis situations

13. This stage is closely related to the proliferation of wars, in the form of civil (religious or political) conflicts or international conflicts (crusades and colonization).

14. Under the pressure of these conflicts, amnesty measures are less and less confined to ordinary offences. Since the seventeenth century, for example, amnesties have been concerned with a growing number of deserters or with combatants in rebellions. In such cases, they are frequently coupled with an obligation to lay down arms.

15. In modern times, many countries have given amnesty a legal, and even constitutional, basis. The power of amnesty and its corollary, amnesty as a human right (the right of oblivion), are embodied in municipal law, but only indirectly reflected in international law.

16. In the case of prisoners of war, the spirit, if not the letter, of humanitarian law encourages governments not to carry out sentences of death. This provision is based on the assumption that the offence will probably be amnestied sooner or later after the cessation of hostilities and on the desire to avoid an escalation of reprisals. In the same spirit, Protocol II to the Geneva Conventions 5/ invites States parties "to grant the broadest possible amnesty to persons who have participated in the armed conflict" in order to facilitate the reciprocal return of prisoners.

4/ Jacques Foucaux, La rémission des peines et des condamnations: droit monarchique et droit moderne, Paris, PUF, 1970 (In particular, p.11 et seq.)

5/ International Committee of the Red Cross, Protocols Additional to the Geneva Conventions of 12 August 1949, Geneva, 1977. Protocol II relating to the protection of victims of non-international armed conflicts, article 6, para. 5.

17. The Convention relating to the Status of Refugees provides that a person can no longer benefit from the status of refugee when the circumstances in connection with which he was recognized as a refugee have ceased to exist. ^{6/} The promulgation of amnesty laws thus has a direct bearing on the humanitarian work of the Office of the United Nations High Commissioner for Refugees (UNHCR), particularly in regard to programmes of voluntary repatriation. Two other texts are of particular interest for the purposes of this study:

(a) The OAU Convention governing the Specific Aspects of Refugee Problems in Africa provides (article V) that, on receiving back refugees, the country of origin shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country and ensure that they are in no way penalized for having left their country for any of the reasons giving rise to refugee situations. According to UNHCR, amnesty is the most appropriate instrument for implementing this guarantee and can be effective in preventing the flight of refugees if it is proclaimed before the outflow begins;

(b) Conclusion No. 18 (XXXI) endorsed by the Executive Committee of the High Commissioner's programme deals specifically with the guarantees that should be offered to refugees opting for repatriation.

18. UNHCR and the International Committee of the Red Cross (ICRC) thus have a considerable interest in the promulgation of amnesty laws providing an effective basis for the return of refugees and prisoners.

^{6/} Convention relating to the Status of Refugees, article 1 (c) (5).

II. TYPOLOGY OF AMNESTY LAWS

A. Relationship between the nature of political institutions and the nature of the power of amnesty

19. The share of the executive and/or legislative powers in the exercise of the power of amnesty depends on the degree of authoritarianism of the system of government as is shown by the following:

(a) Systems based on the predominance of the prerogatives of the executive power, which thus has a quasi-monopoly of the power of amnesty;

(b) Systems based on the competence of the legislative power; because amnesty ex post facto eliminates the legal basis of the offence, in other words the criminal nature of the conduct as defined by law, procedural parallelism dictates that amnesties can be granted only by the legislature. This is expressly provided for in some constitutions. Similarly, the Egyptian Constitution authorizes granting of amnesty by presidential decree as an "intercessionary measure", subject to subsequent ratification by parliament. There are those who stress that amnesty is detrimental to the principle of separation of powers, in that it seriously detracts from the authority of the res judicata. Distrust of amnesty is, for this reason, a major factor in Swiss legislation. Only four acts have been promulgated since 1900, two of them (1955 and 1968) being of a purely fiscal character and the two others (1914 and 1939) providing solely for the reinstatement in the army of military offenders in order to strengthen the national defence forces. In Greece, ordinary offences cannot be amnestied, even by legislation.

(c) The role of the judiciary is usually only secondary, in that it becomes involved a posteriori, determining on a case-by-case basis the applicability of the amnesty. In some instances, the amnesty law itself provides for the creation of a specific body to monitor its implementation. For example, the Jordanian amnesty law No. 5, of 1973, provides for a special commission to resolve difficulties of implementation referred to it by the Government attorney. In the Philippines, presidential amnesty decrees enumerate the offences in question and the names of the persons to whom it is to apply are listed in subsequent decrees, after consultation with an amnesty commission. In Rwanda, the amnesty law of 20 May 1963 refers to political offences committed in the course of the struggle for national liberation, with the political character of individual offences being assessed by a political amnesty commission, appointed by the Ministry of Justice, upon referral by the Government Attorney. In Sudan, the amnesty law of 3 March 1972 stipulates that applications will be considered by a commission, which makes recommendations to the President for final decision.

B. Legal foundations of the power of amnesty

20. The power of amnesty differs in the various legal systems. Three types will be considered:

(a) Systems in which amnesty is founded on the constitution;

(b) Systems which rely on codification, notably in regard to procedural guarantees and the effects and scope of amnesty laws;

(c) The role of custom.

21. Finally, mention will be made of the continuing doubt as to whether amnesty laws, whatever legal form they may take, should be considered as emergency laws and should therefore be narrowly construed. In all legal systems, the prevailing tendency of courts competent to hear amnesty cases is to adopt the narrow construction.

C. Purposes of amnesty

1. Amnesty for ordinary offences

22. Amnesties covering ordinary offences must be clearly distinguished in their purposes from amnesties covering political offences.

23. In the field of human rights, amnesty for ordinary offences is an expression of the relatively broad power of civil society to grant every citizen the right of oblivion, if only to facilitate his reintegration into society.

24. Moreover, the constantly renewed hope of a future amnesty is a substantial contribution to the reduction of tension in prisons, especially when amnesty laws are promulgated at regular intervals.

25. Subsidiarily the authorities sometimes see in amnesty laws a means of dealing with the overcrowding of prisons, a situation which may prejudice the human rights of prisoners. The preambles of some amnesty laws explicitly refer to this consideration (e.g. Portugal, Decree Law No. 259/74 of 15 June 1974, providing for an amnesty for ordinary offences. See also the amnesty recently granted in the United Kingdom to reduce prison overcrowding).

26. In some cases, the purpose of an amnesty is strictly humanitarian. In Zaire, the act of 17 November 1981 covers disabled persons. In Syria, Act No. 26 of 12 March 1978 covers incurable or chronically ill prisoners. In the Eastern European countries, such humanitarian measures appear to be traditional, particularly in respect of children, women, the aged and the sick. In the USSR (Decrees of 19 October 1979 and 14 October 1981), in Bulgaria (1979) and in Hungary (Acts of 29 March 1975), measures of this kind have been adopted - in particular, to mark the International Year of the Child - for the benefit of minors, pregnant women and mothers of very young children.

2. Amnesty for political offences

27. As the aim of the authorities is directly linked to the current political situation, every amnesty can be described as being a "variable geometry measure". An analysis of the documents provided to the Rapporteur, shows that the goals most frequently sought are:

(a) Amnesty and the control of tensions

28. This is the role assigned to traditional amnesties granted at regular intervals to mark anniversaries, national holidays or elections. They are based largely on custom and are repetitive in nature, and their effectiveness lies in their regularity.

29. By the same token, as pointed out by the Inter American Commission on Human Rights (IACHR), the use of amnesty laws as a method of alleviating the consequences of emergency measures following the lifting of a state of emergency serves the same purpose. ^{7/} This point was highlighted in the Commission's report on Nicaragua (1981). ^{8/}

(b) Amnesty and transition to democracy

30. During the transition from an authoritarian régime to democracy, the scope of the amnesty is the tangible sign of the extent of the desire to open up the political process.

31. As the deadline for the establishment of democracy approaches, authoritarian régimes are tempted to grant themselves amnesty in order to escape the future rigours of democratic legislation. What is sought is not so much reconciliation as impunity. By promulgating an amnesty law known as the "pacification law" on 25 September 1983, the Argentine military junta attempted to obviate any possibility of criminal or civil proceedings being constituted against those responsible for serious violations of human rights committed during operations designed to restore public order. This law was based directly on Chilean Decree-Law No. 2191 of 18 April 1978, which benefited principally "those responsible for assassinations, torture and other offences committed during the administration of the Junta, rather than to grant a genuine amnesty to political opponents". ^{9/}

32. Like any amnesty granted unilaterally, the "de facto" Argentine law merely caused feelings to run higher. Consequently, one of the first acts of the new democratic régime was to repeal it and subsequently to introduce amendments to the criminal procedure enabling numerous persons detained on political grounds to be released. One example of a law which played a major role in the

^{7/} Daniel O'Donnell "Legitimidad de los estados de excepción a la luz de los instrumentos de derechos humanos", in "Derecho", publication of the Faculty of Law of the Universidad Católica Pontifical of Peru, 1984, No. 38.

^{8/} Doc. OEA/Ser.L/7/II/53, doc. 25 recomendaciones 3-5.

^{9/} Special report on Chile, A/33/331, page 68, paragraph 273, and annex XXVIII.

restoration and consolidation of democracy was the Uruguayan amnesty law of 8 March 1985. The reasons for this were both political and legal. Politically, it had been preceded by a large-scale propaganda campaign, even before the initiation of the democratic process. That campaign had facilitated the unification of the opposition - it is difficult to oppose a demand for a genuine amnesty - and enabled it to be used as a test of the political desire for openness. ^{10/} This was, so to speak, a "hard won" amnesty, which was ratified, after a broad exchange of views, by the newly elected parliament in a vote reflecting the diversity of opinions. A consensus, the prerequisite for the desired reconciliation, was thus achieved. Juridically, the amnesty enabled all political prisoners to be released, without granting impunity to those guilty of serious violations of human rights.

(c) Amnesty and the neutralization of opposition groups

33. Here, the purpose of amnesty is to seek social tranquility less by consensus than by a reduction of tensions, and thus of the opposition's scope for action by forcing it to adopt a passive role. The aim is normalization rather than reconciliation through both persuasion and dissuasion.

34. Such was the aim of the Polish amnesty law of 20 September 1984, enacted after the lifting of martial law, whose effects it was designed to alleviate. The goal of reducing tensions was achieved given the large number of individuals benefiting from the amnesty. ^{11/} From this standpoint, it was an excellent law, subsequently amended by two provisions which illustrate the exhortative approach involving the alternate use of persuasion and dissuasion. Persuasion: in order to benefit from the amnesty, offenders who have not been identified or against whom proceedings have not yet been taken, are encouraged under article 2 to present themselves within three months to the authorities to sign an undertaking to discontinue their activities and to disclose the nature, place and date of the reprehensible acts. Article 7 provides that, in the event of recidivism, any amnestied person forfeits entitlement to benefit from that measure. The sentence must be served or the proceedings re-opened. From this standpoint, it is not so much a law of amnesty as a measure employing the device of suspension.

^{10/} See in this regard the analyses made by the International Secretariat of Jurists for Amnesty in Uruguay (SIGAU) in La transición del Estado de Excepción a la democracia, Ediciones de Banda Oriental, Montevideo, 1985.

^{11/} According to the report submitted to Parliament by the Minister for Justice on 20 September 1984, 630 prisoners guilty of non-criminal offences against the State and public order were released, out of a total of 652 detainees. Proceedings against persons at liberty were discontinued in 1916 cases, of which 347 concerned social conflicts. Two hundred and twenty-five persons against whom action had not been taken presented themselves to the authorities to acknowledge their "anti-government acts" so as to benefit from the amnesty.

35. In some cases, persuasion involves the reduction of sentences. In Syria, Act No. 49 of 17 July 1980 adopts this exhortative method in respect of a religious opposition group. As members of the group are liable to the death penalty the law provides that any convicted member who dissociates himself from the group in writing shall have his sentence commuted to forced labour or life imprisonment, with the possibility of a maximum reduction of five years. Other penalties may be reduced by from one to three years.

(d) Amnesty, guerrillas and dissociation

36. Clemency is used in anti-guerrilla campaigns to encourage combatants to leave their organizations.

37. Recent Guatemalan legislation provides a clear illustration of this method. ^{12/} Impunity is granted to guerrillas who give themselves up to the authorities, lay down their arms and sign a sworn undertaking to take no further part in guerrilla activities. The initial law of 27 March 1982, under which guerrillas were allowed 30 days "repentance period", has been extended by an impressive number of decree-laws with progressively longer time-limits - 27 April 1983 (30 days), 11 August 1983 (90 days), 17 November 1983 (60 days), 17 January 1984 (60 days), 16 March 1984 (90 days), 15 June 1984 (90 days), 10 September 1984 (180 days) and 11 March 1985 (300 days).

(e) Amnesty, guerrillas and peace strategies

38. In the case of international conflicts, the question of amnesty, when it arises, is in theory dealt with by peace agreements. ^{13/}

39. On the other hand, in the case of non-international armed conflicts governed by common article 3 of the 1949 Geneva Conventions and by the Additional Protocol II, peace agreements, which are by nature intergovernmental, are not applicable. The promulgation of an amnesty law designed to facilitate or confirm the cessation of the state of belligerence or rebellion, can to some extent play the role of an armistice.

40. The law may even be negotiated through neutral persons or institutions, or by means of any other mediation or good offices procedure, without the laying down of arms being a prerequisite, and with the promulgation of the amnesty law confirming the cessation of hostilities or the beginning of a truce. This is true of the talks currently being held in El Salvador between the Government

^{12/} E/CN.4/1984/30, Report on the situation of human rights in Guatemala, paras. 3.15 and 3.18.

^{13/} E/CN.4/1984/90, Report on the situation of human rights in El Salvador, 3.15 and 3.18.

and FDR-FMLN, with the help of the good offices of the Catholic Church. ^{14/} The first of the two proposals presented by the Government involves "a general and unconditional amnesty for all those who have participated directly or indirectly in offences related to the situation of political violence".

41. In the course of negotiations to end the Biafran war, item 11 of the negotiation plan provided for an amnesty of the same kind for participants in the rebellion. This law was finally promulgated on 14 January 1970.

42. Throughout the negotiations which preceded the Camp David accords, the Egyptian representatives continually urged upon the American and Israeli delegates the "adoption of a new policy which could create a climate of confidence in the occupied territories". To this end, on 18 October 1978, the Minister for Foreign Affairs of Egypt sent a memorandum to the United States Secretary of State proposing, inter alia, "granting an amnesty to Palestinian political prisoners". ^{15/}

43. Colombian law No. 35 of 1^o November 1982 "decreasing an amnesty and enacting other provisions for the restoration and preservation of peace" is a particularly good example of such measures. Firstly, the law was the mainspring of the "peace strategy" which was to culminate, initially, in the current truce. Secondly, taking into account the deep-rooted causes of the conflict, particularly the poverty of the most underprivileged segments, article 8 of the law provides that "the Government shall be authorized to make the necessary budgetary appropriations and transfers and to contract the domestic and external loans required to organize and carry out programmes of rehabilitation, land distribution, rural housing, credit, education, health and job creation for those who, under the amnesty granted by this act, become reintegrated in peaceful life under the protection of the institutions, together with all inhabitants of regions affected by the armed conflict".

44. It will be recalled that, in its resolution 1984/16, the Sub-Commission enthusiastically encouraged this initiative, considering that it constituted a valuable precedent "since it progressively transforms a process of conflict into a momentum for peace, creating conditions for national reconciliation, inasmuch as it takes into account not only the facts but also the economic and social causes of the situation". ^{16/}

^{14/} See Michel Vauthey, Guerrilla et droit humanitaire, ICRC, Geneva, 1983, page 250.

^{15/} Address delivered at the Club diplomatique, Geneva, on 4 December 1984, by His Excellency Dr. B.B. Ghali, Minister of State for Foreign Affairs of Egypt.

^{16/} E/CN.4/Sub.2/1984/43, para 30.

(f) Amnesty and return of exiles

45. "Return of exiles" and "amnesty" are closely linked. A comparative study of the 19 pieces of legislation intended specifically to encourage return which were communicated to the Rapporteur 17/ reveals the following characteristics:

The amnesty frequently becomes void if there is no actual return (or submission of applications) within a period determined by the law, and varying from one month (Zaire) to two years (Romania);

Either a limitative list of the beneficiaries is set forth in the act, or the text sets out a general measure (Ethiopia, with regard to the return of refugees from Djibouti), and, in some cases, lists the persons excluded from the scope of the amnesty (Chad). Perpetrators of war crimes are generally excluded (Hungary and Yugoslavia);

In some cases, exiles must confirm in writing that they wish to benefit from the amnesty (Hungary, Lesotho and Somalia);

Occasionally, provision is made for a monitoring authority (Chad and Somalia) or for a guaranteed appeal procedure (Yugoslavia).

46. In many cases, efforts to implement such legislation come up against three obstacles:

The obligation to return by, for example, imposing a time-limit, appears inconsistent with article 13 of the Universal Declaration of Human Rights and with article 12 of the International Covenant on Civil and Political Rights which guarantee the right of freedom of movement of individuals. The amnesty should be limited to restoring to the exile his full right to freedom of movement, without obliging him to exercise it;

The amnesty should lay down strict guarantees in order to ensure the safety of those benefiting from it. The effectiveness of such legislation is inversely proportional to the scope of the guarantees afforded. In the absence of such guarantees, the only effect of such legislation is to lend

17/ Albania (D.25 November 1959), Chad (Ord. of 29 July 1981 and 16 June 1983), Congo (Ord. 30 November 1970), Czechoslovakia (L.27 May 1969), Equatorial Guinea (D.10 October 1979), Ethiopia (Proclamation of 16 June 1980), Ghana (L.6 May 1968), Hungary (D.L.3 April 1955), Iraq (L.28 August 1976), Lesotho (L.14 July 1980), Liberia (L.23 December 1981), Romania (D.17 June 1976), Somalia (L.28 January 1982), Uganda (L.27 December 1978), Uruguay (L.1985), Yugoslavia (L.13 March 1962 and 22 November 1973), Zaire (L.24 June 1972 and 21 May 1983).

credence to the idea in world public opinion that a process of liberalization is in progress. In the case of Paraguay, for example, the authorization to return is based on a simple public statement by the authorities, and is not covered by the minimum guarantee afforded by the promulgation of a law. This omission, in addition to the continued state of siege, has deterred most of the very large number of exiles from returning; 18/

The exercise of the right to return creates major reception and integration problems. Some laws contain provisions on that question. In Ghana, the amnesty law of 6 May 1962 provides for facilities for return and for reintegration procedures. The Uruguayan law referred to above contains a provision (article 24) setting up a national repatriation commission to assist refugees.

18/ In this regard, see Sub-Commission resolution 1984/9 recommending to the Government of Paraguay "to consider enacting a measure of amnesty allowing the participation of all in the public affairs of the country". (E/CN.4/Sub.2/1984/13, para. 25).

III. THE OPTIONS AVAILABLE IN GRANTING AMNESTY

A. Determination of the scope of the amnesty

1. Offences covered by amnesty

(a) Tests used to distinguish political from ordinary offences

47. It is an observed fact that the tests used to distinguish political from ordinary offences are different in the different legal systems and that, within each legal system, they vary with historical circumstances.

48. The factors most frequently taken into consideration are:

(a) Offences in connection with a specific event, which may range from a street demonstration to armed rebellion;

(b) The criminal legislation applied which, by its nature, confers a political character on the trial or conviction. In a crisis situation, the laws in question are in most cases emergency laws such as national security laws, laws concerning the safety of the State, or anti-terrorist laws. In normal times, offences under electoral laws may be cited as an example;

(c) The specialized or even political character of the courts involved, whether ad hoc courts or courts with permanent jurisdiction but governed by emergency rules (special courts, military courts, State security courts).

(b) Broad interpretation of the notion of a political offence in the case of economic and social disputes

49. Amnesties often cover offences committed in connection with economic or social disputes such as street demonstrations, strikes or agrarian disputes.

2. Amnesty and political offenders, including violations of human rights

50. The political scope of an amnesty can be assessed by considering who it benefits or who is excluded from its benefit.

51. In some circumstances, it can be assumed, for example, that an amnesty covering persons guilty of conduct involving a serious infringement of human dignity (officials responsible for the use of torture as an administrative practice, persons guilty of crimes against humanity ...), far from encouraging national reconciliation, would only increase tension, at least initially. This would appear to be the case in Argentina, where the restoration of democracy in 1983 was not marked by the promulgation of an amnesty law, which would merely have exacerbated domestic antagonisms. The exclusion of crimes against humanity, as defined in the Nuremberg Charter appears justified (see paragraph 64). In Romania, for example, crimes against peace and humanity are excluded from amnesty. The same is true for former Nazis in the German Democratic Republic (Law of 25 September 1979) and, recently, in Hungary (Decree-Law of 3 April 1985). To a lesser degree, in Belgium, persons having participated in German Army activities during the Second World War are excluded from any amnesty. As a general rule, persons guilty of so-called offences of opinion are distinguished from persons guilty of offences against property or the person.

(a) Persons guilty of offences of opinion

52. It is generally considered that persons in this category should be priority candidates for amnesty.

53. This view is not without ambiguity. In fact so-called offences of opinion are not recognized as such by the international law of human rights, which forbids any form of persecution by reason of opinions. Since persons accused of such offences have simply exercised a legitimate right, penalizing them constitutes an offence.

54. On strict grounds of principle, granting amnesty to a prisoner of opinion is tantamount to an implicit acknowledgement that his conduct was criminal, whereas it is really the authority responsible for the penalty, being guilty of unlawful detention, might be granted amnesty.

55. For this reason, some legislations explicitly provide for the right to refuse amnesty or if amnesty is granted to request the re-opening of the case.

(b) Offences against property

56. This category calls for few comments. Persons committing such offences are normally amnestied where the offences were committed without serious violence against persons, particularly against police officers.

(c) Persons guilty of violence against persons

57. The fundamental options in the case of amnesty are as follows:

(i) Amnesty of persons guilty of acts of violence committed in connection with armed conflicts

58. Such acts of violence against the person are by definition mutual. Violence of this kind is obviously political in character, which in principle brings it within the scope of amnesty laws. Is the position the same in the case of conduct outside the armed confrontations constituting a pattern of serious and systematic violations of human rights committed in connection with the conflict, such as torture and involuntary or forced disappearances?

(ii) Amnesty and serious and systematic violations of human rights

59. Violations in this category may be committed in the course of confrontations in international or civil conflicts, but they may also occur in the absence of any conflict, notably under a tyrannical régime or to a lesser degree, under an authoritarian government.

60. Especially in the latter cases, it must be recognized that violations are generally the fault of the State, which is then tempted to promulgate a reciprocal amnesty law that is essentially concerned with arranging for the impunity of public or parapublic officials guilty of major infringements of human dignity. ^{19/}

^{19/} See A/35/522, para. 232. See also Report of the Human Rights Committee, General Assembly, Official Records: Thirty-fourth Session, Supplement No. 40 (A/34/40), para. 81.

61. Violations of the same character may also occur in the course of armed conflict. Some amnesty laws explicitly refuse to grant impunity to persons guilty of such violations or to State officials, both categories being excluded from the application of the law. 20/

62. In this connection, the suggestions made by the General Assembly 21/ and by the Sub-Commission 22/ that consideration should be given to the circumstances in which torture, involuntary or forced disappearances and even summary executions might, in some cases and subject to certain conditions, be considered international crimes or crimes against humanity are of considerable interest for the purposes of this study since they provide a means of better defining the cases to which amnesties should not apply.

63. Under international law, crimes of this kind are not classed as political offences or, more accurately, the rules of international law, while not denying their political character, preclude the application of various measures of protection available to political offenders.

64. Persons guilty of crimes against humanity cannot be considered as political refugees 23/ or be granted territorial asylum. 24/ Similarly, States are invited to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition of persons guilty of crimes against humanity and to ensure that statutory or other limitations shall not apply to the prosecution and punishment of such crimes. 25/ They are also asked not to take any legislative or other measures which might be prejudicial to the international obligations they have assumed in regard to the extradition of persons guilty of such offences. 26/ This means that contrary to the generally accepted rule the political character of the offence is not denied but cannot be used as grounds for refusal to extradite the offender.

20/ In this sense, article 3 of the Colombian Amnesty Law, No. 35, of 19 November 1982, excludes persons guilty of killing other than in combat if they behaved brutally or killed the victim after making it impossible for him to defend himself. This provision applies to cases involving torture, forced or involuntary disappearances and executions.

21/ See A/34/583/Add.1, para. 168.

22/ In resolution 1982/12, the Sub-Commission suggested, through the Commission on Human Rights, that the Economic and Social Council should request the General Assembly to invite the International Law Commission to take into account, when elaborating the draft code of offences against the peace and security of mankind, the opinions expressed and the comments made by the members of the Sub-Commission on the question of missing and disappeared persons, with a view to declaring as a crime against humanity the practice of persons being rendered "missing and disappeared" involuntarily. See also foot-note 27/.

23/ See Convention relating to the Status of Refugees, article 1.F.

24/ See Declaration on Territorial Asylum, art. 1 (General Assembly resolution 2312 (XXII) of 14 December 1967).

25/ See Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, articles III and IV;

26/ See General Assembly resolution 3074 (XXVIII) of 3 December 1973 on the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, para. 8.

65. Finally, does the non-applicability of statutory limitations to crimes against humanity preclude amnesty? It should be clearly understood that the exclusion of limitations is intended simply to avoid the extinction of public action and thus impunity. However, when prosecution has taken place and the sentence has become final, amnesty becomes compatible with non-applicability of limitations, particularly when the sentence has been carried out.

(iii) Criteria for considering systematic and serious violations of crimes against humanity

66. It would appear that ill-treatment as a result of acts that are reprehensible but isolated or not premeditated should be excluded from this category. Such treatment undoubtedly constitutes a violation of human rights but the criteria in accordance with which such violations can because of their intensity be placed on the same footing as crimes against humanity for the purposes of amnesty remain to be established. 27/

67. Some criteria can be inferred from the Nuremburg and Tokyo principles and case law and more recently from those of the European Commission of Human Rights and the European Court of Human Rights.

68. With regard to the first point it will be noted that although torture is not mentioned specifically in the paragraph of the Charter of the Nuremburg International Military Tribunal dealing with crimes against humanity, it was covered by the words "and other inhumane acts committed against any civilian population" (article 6 (c)). This ambiguity was removed by the Control Council in Law No. 10 of 27 December 1945, which explicitly mentioned torture in a list of such inhumane acts. 28/

69. According to the International Military Tribunal for the Far East on Japanese war crimes, acts may not be isolated but need not be massive if the exactions committed are aimed at human groups and are systematic in character.

70. The systematic character of such acts is fundamental to the case law of the European Commission and Court which require that torture should take the form of "administrative practices".

71. The Court considers that such a practice exists when the following requirements are satisfied:

(a) An accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions, but to a pattern or system;

27/ In resolution 1982/11 submitted for the approval of the Commission on Human Rights, the Sub-Commission requested "the General Assembly to invite the International Law Commission to take mass and flagrant violations of human rights and the comments on such violations made by the members of the Sub-Commission into account when elaborating the draft code of offences against the peace and security of mankind".

28/ See E. Eroneanu, Le crime contre l'humanité, Paris, Dalloz, 1961 (annex, p. 319, Law No. 10 of 20 December 1945, art. II c).

(b) Tolerance on the part of the higher authorities. 29/

72. When these requirements are satisfied - in the case of torture, involuntary or forced disappearances or extrajudicial executions - the infringement of the "human condition" is such that the right of oblivion may become a right to impunity.

73. If priority is given to a long-term policy to prevent such infringements of the human condition, the authority granting amnesty will have to draw a line between the right of oblivion and the right to impunity.

74. The most effective deterrent to the use of torture is the knowledge on the part of torturers that they may one day be required to account for their actions.

75. At the very least the authority granting amnesty, drawing on the legal theory of conspiracy, can exclude the instigators and higher officials from amnesty, particularly those in charge of agencies responsible for devising such "administrative practices", regardless of whether they are responsible for supervising their implementation.

76. This solution has been chosen by Portuguese legislation. The prosecution and trial of agents and higher officials of the PIDE (International Police for the Defence of the State), later the DGS (Directorate General of Security), 30/ has been given the status of a constitutional provision, with the result that cases in which amnesty has been excluded (higher officials) cannot be re-opened, except in accordance with the procedure for amending the Constitution.

3. Amnesty and the victims of political offences including victims of violations of human rights

77. The principle that the rights of victims should be safeguarded is generally recognized in amnesty laws and is one from which there can be no derogation except by virtue of an explicit provision. 31/ Such derogations should be excluded in the case of serious violations that can be considered as crimes against humanity.

78. In some cases, the authority granting amnesty, not content with assuring the criminal impunity of torturers, also seeks to organize a conspiracy of silence by depriving the victims of any possibility of obtaining the material or even moral reparation to which they would be entitled under ordinary law. The purpose is less to avoid a civil sanction such as the possible payment of compensation than to eliminate any possibility of inquiry that might lead to publicity during a civil suit, further confirmation of the fact that publicity is the sanction most feared by persons guilty of serious offences against the human condition.

29/ Publications of the European Court of Human Rights, Series A, Judgements and Decisions, vol. 25, Case of Ireland v. the United Kingdom, Decision of 18 January 1978, para. 159.

30/ Constitution of the Portuguese Republic, Article 309.

31/ For example (France): The rights of third parties were formally set aside by at least two laws, the law of 5 January 1951 (article 33) and the law of 20 February 1953 (article 2).

79. It will be recalled that in resolution 15 (XXXIV) adopted in 1981, the Sub-Commission took a decision on these lines and urged States not to adopt laws which might impede inquiries concerning disappeared persons, including inquiries made with the intention of vindicating the victims' rights (e.g. laws applying the theory of "absence" to disappeared persons or amnesty laws prohibiting the production of evidence of the injury suffered by victims).

B. The effects of amnesty

80. The scope of the effects produced on persons covered by the amnesty depends on the greater or lesser degree of national reconciliation the amnesty is intended to bring about.

81. This study shows that if the desirable effect of an amnesty were to be arranged in order of priority - since it is impossible to do everything at once - the following ranking might be acceptable:

1. Immediate release of all political prisoners

In the case of political prisoners of opinion, this rule should not be open to any discussion (see paragraph 52 et. seq.). Difficulties may arise in connection with offenders prosecuted or convicted for acts of violence committed, for example, in situations of non-international armed conflict or acts of rebellion. Either such persons have not yet been finally sentenced, in which case they can be released immediately, on the understanding that they will appear voluntarily before the competent court if the amnesty does not involve the termination of proceedings, or the final sentence has been pronounced and is currently being served, and they are excluded from the amnesty by virtue of the gravity of their acts. In such cases, the presumption of innocence may be regarded as applying retroactively on the grounds that they may have been deprived of the guarantees of a fair trial or have been subjected to inhuman or degrading treatment in the course of interrogation. They may be released and the reopening of the proceedings ordered. This was the procedure adopted under Uruguayan amnesty law No. 15737 of 8 March 1985, article 9 of which provides that the competent ordinary court must hear the evidence in the case within 20 days and either acquit the accused or confirm the sentence. In the latter case, the law provides that, in view of the harshness of previous conditions of detention, each day of detention already served will be equivalent to three days of imprisonment. This is to avoid the reimprisonment of persons whose earlier sentences are confirmed before being fully served.

The most commonly adopted procedure, however, is to progressively grant political prisoners excluded from the amnesty individual clemency measures (pardon, conditional release, reduction of sentence). Examples are: Burma (Amnesty of 28 May 1980) and Burundi (Amnesty of 26 November 1974).

2. Right of political exiles to return

This is not a question of restoring the right freely to leave and enter one's own country, the only right recognized in international law. For many exiles, exercising the right to return is more complex than might be expected because of personal, financial, economic or family circumstances. The decision to grant

amnesty should not, therefore, be subject to the condition of actual return. ^{32/} From this standpoint, laws under which eligibility for amnesty is subject to return to the country within a given period (see paragraph 46) are open to criticism.

3. Relinquishment of all proceedings, penal or disciplinary

Subject to the proviso contained in 1. above, this measure, in order to be effective, should be applied to all persons prosecuted and released before being sentenced, as well as to cases where offenders have not yet been identified.

4. Restoration of civil and political rights

National reconciliation is often marked by the legalization of outlawed parties and by elections, particularly where amnesty is linked with the restoration of democracy.

5. Reinstatement in their jobs of persons dismissed for political reasons

This measure can only be put into effect gradually, because of the practical difficulties involved (budgetary implications, post not vacant, etc.). Examples are: in the Congo, Amnesty Decree No. 79444 of 8 July 1979, which provided for reinstatement in former employment; according to Amnesty International, this measure became effective in almost all cases. For obvious reasons, reinstatement in official posts is easier, and therefore quicker, than reinstatement in private employment; in Spain, the Royal Decree of 30 July 1976 which provided for reinstatement in civil service posts subject to some reservations (servicemen entitled only to pension rights); in Uruguay, article 25 of the law referred to earlier states the principle of reinstatement in employment, with specific laws laying down subsequently the practical and complex procedures for reinstatement (resumption of career, rules of equivalency), while avoiding the dismissal of current holders of posts, except where they have been appointed in a blatantly irregular manner or where their responsibilities clearly exceed their qualifications. Consideration is also being given to measures designed to benefit workers in the private sector. ^{33/}

6. Right of victims of inhuman treatment or their families to compensation

Where the perpetrators of such treatment are amnestied, the right to compensation derives from the protection of the rights of third parties generally provided for in amnesty laws (see para. 77). Where the perpetrators are excluded from amnesty, victims may claim their rights, again in accordance with the norms of ordinary law or by virtue of a specific provision. This was the case in Portugal (see para. 76), where the right of victims and their families to compensation was laid down in an express provision to that effect.

^{32/} Report of the Human Rights Committee, General Assembly, Official Records, Thirty-eighth session, Supplement No. 40 (A/38/40), annex X.

^{33/} Alessandro Artucio, Uruguay - Alentador retorno a la democracia, in International Commission of Jurists Review No. 34, Geneva.

In the case of victims of forced or involuntary disappearance, the family's "right to know" is becoming increasingly recognized. In order to give effect to the moral right to compensation, the Chamber of Deputies of Uruguay, in adopting the amnesty law, set up a parliamentary commission to investigate cases of disappearance, so as to facilitate subsequent action by the courts. Such measures, which are based on the establishment in Argentina of a National Commission on Disappearances (CONADEP) should be encouraged.

CONCLUSION

82. Amnesty deals only with the effects and not with the causes of national dissension, especially when article 21 of the Universal Declaration of Human Rights, which spells out the foundations of a democratic régime, 34/ is not respected and a state of emergency is instituted. 35/

83. The same is true when serious and manifest violations of the most rudimentary cultural, social or economic rights are at the root of civil conflicts or dissension.

84. In such situations, the amnesty process can only be effective if it is coupled with social, economic or political measures permitting action to deal with the causes, viz.:

(a) In the short term, the repeal of emergency laws as a corollary of the amnesty: since like causes produce like effects, the release of political prisoners may come to nothing if the emergency laws which permitted massive arrests in violation of human rights subsist;

(b) In the medium term, the holding of elections in accordance with the stipulations of article 21 of the Universal Declaration of Human Rights;

(c) In the long term the implementation of economic and social measures attacking the root causes of national dissension (see above-mentioned Colombian law)..

85. In this report, the Special Rapporteur has endeavoured:

(a) To set out the practices followed by States dealing with amnesties - and all States are concerned with amnesty to some extent in the course of their history;

(b) To compare these experiences with a view to deducing a number of rules or constants which might serve as a framework for authorities proposing to initiate an amnesty, as well as to the jurists responsible for drafting legislation.

34/ Universal Declaration of Human Rights of 10 December 1948, article 21, paragraph 3: "This 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 equivalent free voting procedures".

35/ See the Study of the implications for Human Rights of recent Developments concerning Situations known as States of Siege or Emergency, prepared by Mrs. N. Questiaux (E/CN.4/Sub.2/1982/15, in particular paras. 148 to 161).

86. This frame of reference might also be of use to the experts of the various specialized international supervisory bodies, in order to enable them to better assess the impact - positive, negative or nil - of an amnesty law cited in justification of authorities whose activities are being challenged in a particular country; those who are endeavouring to promote amnesties particularly non-governmental organizations, might also find it useful.

87. This approach gives the greatest possible emphasis to the concerns of the Commission on Human Rights, which has expressed the wish that the Sub-Commission should give increased attention to general studies in the field of the promotion and protection of human rights.

88. In this sense, the study might also be considered if needed as a contribution, for the benefit of States Members of the United Nations considering the drafting of amnesty laws, to the programme of advisory services in the field of human rights established by General Assembly resolution 926 (X) of 14 December 1955. It is worth noting that the recent amnesty law of 8 March 1985 providing for the restoration of democracy in Uruguay draws widely on the ideas expressed in this report.

ANNEX

LIST OF COUNTRIES WITH REGARD TO WHICH INFORMATION ON AMNESTY LAWS HAS BEEN OBTAINED

AFGHANISTAN *	JAPAN *
ALBANIA	JORDAN *
ALGERIA	KENYA
ANGOLA	KUWAIT *
ARGENTINA *	LESOTHO *
BAHAMAS *	LIBERIA
BANGLADESH	MEXICO
BELGIUM *	MONACO *
BOLIVIA	MOROCCO *
BRAZIL	MOZAMBIQUE
BULGARIA	NETHERLANDS *
BURMA	NICARAGUA *
BURUNDI	NIGER *
CANADA	NORWAY *
CAPE VERDE *	PARAGUAY
CHAD *	PERU
CHILE	PHILIPPINES *
COLOMBIA *	POLAND
CONGO	PORTUGAL *
CYPRUS *	REPUBLIC OF KOREA
CZECHOSLOVAKIA	ROMANIA
DOMINICA *	RWANDA
DOMINICAN REPUBLIC	SAN MARINO *
ECUADOR	SOMALIA
EGYPT *	SOUTH AFRICA
EL SALVADOR	SPAIN
EQUATORIAL GUINEA	SUDAN
ETHIOPIA	SURINAME *
FINLAND *	SWAZILAND *
FRANCE *	SWEDEN *
GERMAN DEMOCRATIC REPUBLIC	SWITZERLAND *
GERMANY, FEDERAL REPUBLIC OF *	SYRIAN ARAB REPUBLIC
GHANA	THAILAND
GREECE *	TUNISIA *
GUATEMALA *	TURKEY *
GUINEA BISSAU	UGANDA
HAITI	UNION OF SOVIET SOCIALIST REPUBLICS
HUNGARY	UNITED REPUBLIC OF TANZANIA
INDONESIA	URUGUAY *
IRAN, ISLAMIC REPUBLIC OF	VIET NAM
IRAQ	YUGOSLAVIA
ISRAEL *	ZAIRE
ITALY *	ZAMBIA
IVORY COAST	ZIMBABWE

* Texts (37) furnished in response to the Secretary-General's letter of 2 December 1983.

Information has also been received from the specialized agencies and intergovernmental and non-intergovernmental organizations listed below:

SPECIALIZED AGENCIES

International Labour Organisation (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO).

INTERGOVERNMENTAL ORGANIZATIONS

Organization of American States (OAS)

NON-GOVERNMENTAL ORGANIZATIONS

Amnesty International, International Commission of Jurists, Bahá'i International Community, International Federation of Human Rights, International League for the Rights and Liberation of Peoples, Inter-Parliamentary Union.

OTHERS

United Nations Information Centre in Zaire.