QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Written statement submitted by the International Commission of Jurists (a non-governmental organization in category II consultative status)

The Secretary-General has received the following communication which is circulated in accordance with Economic and Social Council resolution 1296 (XLV).

25 January 1983

NEW CONSTITUTION IN EQUATORIAL GUINEA

On 15 August 1982, almost three years after the coup d'état which overthrew the dictatorship of Francisco Macias Nguema, a new political Constitution known as the "Basic Law" was adopted by a popular referendum. Equatorial Guinea received its first Constitution in 1968 when it gained independence, ending almost 500 years of Portuguese, then Spanish colonization. This Constitution was short-lived as several of its articles ceased to be applied as early as 1971 when they were illegally repealed by Macias Nguema, who had already established himself as an absolute dictator. Macias declared himself President-for-Life by decree in 1972. This process was completed in July 1973, when Macias had a new Constitution adopted to replace that of 1968, seeking to give an appearance of constitutionality to his régime. As was pointed out in the ICG report on "The Trial of Macias in Equitorial Guinea" (1979) there existed an enormous legal vacuum after his overthrow as the regime had enacted hardly any legislation. The State was in practice governed without law by a system of purely arbitrary rule.

The coup of August 1979 was led by Lieutenant-Colonel Teodoro Obiang Nguema, a nephew of the former President Macias, and at the time Vice-Minister of the Armed Forces. Soon after the coup, the Constitution of 1973 was declared by Decree to be no longer of any effect, and the country was governed without a Constitution by a Supreme Military Council, presided over by Colonel Obiang Nguema, until the current constitution was adopted in August 1982.

The preparation of the 1982 Constitution

At the outset, this Constitution suffers from a major defect in that its text was drafted solely by a 20-member Commission designated by the Supreme Military Council. No representatives of the people or of political, trade union, social or community-based organizations participated in the preparations or in discussions on
the text. At no time was the draft studied and discussed by persons other than those designated by the government. Political parties were still banned and many opposition leaders, uncertain about the new regime, had not returned from the exile into which they were forced by the Macias regime.

This method of formulating the Constitution is all the more surprising having regard to the fact that the Special Rapporteur on Equatorial Guinea of the United Nations Commission on Human Rights, Mr. Fernando Volio Jimenez, had insisted in his reports and clearly recommended to the new government that, given its vital importance, the text of the Constitution should be widely discussed throughout the country and that the various sectors of the society should participate in this procedure. To this end, he had recommended the appointment of a National Constituent Assembly, responsible specifically for preparing the text.

In consequence, and considering that there was no political campaign to explain to the electorate the implications of voting for or against the new Constitution, it is questionable whether the new text in any real sense reflects the will of the people of Equatorial Guinea.

Outline of the Constitution

The Constitution provides for a strong presidential system of government, with a wide range of powers conferred on the Executive. There is to be a single chamber Parliament, called the House of Representatives of the People, with 45 to 60 deputies elected for a five-year period by "universal, direct and secret ballot" (Art. 116). It is to meet twice a year for a maximum period of two months. It will have little power to exercise any control over the Executive. Whereas the President may dissolve the Parliament (Art. 121) he is not accountable to it.

At the Head of the Judiciary is a Supreme Court whose members are to be appointed and dismissed by the President (Art. 147). This greatly affects the independence of the Judiciary, as appointment to and continued tenure of office in the Supreme Court will depend solely upon the will of the President.

The Constitution contains in Chapter III 22 articles which declare the Rights and Duties of Persons, as well as the legal remedies and safeguards to ensure the application of these provisions. This is a comprehensive and adequate enumeration, following the lines of other instruments such as the International Covenant on Civil and Political Rights. Its effectiveness, however, in guaranteeing these rights is very doubtful in view of the power of the President to suspend Chapter III (see below).

While the right to life and physical integrity is affirmed, and torture and inhuman treatment are explicitly prohibited, the death penalty is maintained without limitation. The causes in which it may be applied are to be determined by law.

The articles referring to remedies and safeguards for the respect of rights are commendable. Thus, the remedy of habeas corpus is available (Art. 38) and extends not only to unlawful imprisonment, but also to torture and ill-treatment. Provision is made for recourse by way of amparo (Art. 59) for judicial review of executive decisions and acts, and the courts have power to declare a law, decree or regulation unconstitutional for reasons either of form or substance (Art. 40). These provisions, however, can also be suspended by the President under emergency powers.
With respect to political rights (Art. 23 et seq.) no reference is made to political parties. This is unfortunate, particularly as one of the main opposition movements, the A.M.R.D. (National Alliance for the Restoration of Democracy) has complained that it had not been allowed to participate in drafting the Constitution, nor in general political activity, and has insisted on its right to a role in the reconstruction of the country and the establishment of a true democracy.

The right to strike is denied not only to all civil servants but also to all workers engaged in providing public utility services or services which, if paralysed, may harm the economy or national security (Art. 58). This article curtails the trade union rights of a very large number of people and runs counter to the term and spirit of the relevant ILO Conventions.

Provision is made for a Council of State, ten of whose eleven members are appointed by the President (Art. 101). This body is responsible inter alia for

- supervising "the democratic development of the political and social life" of the country;
- guaranteeing national sovereignty, territorial integrity, national unity, peace and justice;
- approving the candidates for election to the Presidency;
- hearing and deciding disputes concerning elections; and
- pronouncing upon the constitutionality of "institutional" laws, before they enter into force.

The President also appoints the thirty members of the National Economic and Social Development Council (Art. 150), a consultative organ in economic, social, fiscal and development matters.

The President is given broad powers "in case of imminent danger" to suspend the rights and safeguards in Chapter III, including habeas corpus and amparo, and to adopt "exceptional measures", which are not defined (Art. 93). The President may declare a state of siege, alert or emergency, without having to consult Parliament, still less to submit the measure to it for approval (Art. 94). The Parliament is not empowered to annul such a measure. Emergency powers framed in such wide terms make the continuation of such elements of democracy as the constitution contains dependent solely upon the will of the President.

The President may also, under exceptional circumstances or in urgent cases of emergency, be authorized by the House of Representatives to legislate by decree on matters which normally require acts of parliament (Art. 119 and 134).

Under Article 90, for a person to be eligible to become President he must, inter alia, "have been resident in the country for ten years". This provision is seen by the opposition as one aimed at preventing its leaders from standing in future elections. It may be recalled that from 1970 onwards the Macias dictatorship drove out almost a quarter of the population, who became political exiles or economic migrants. Many of the potential leaders of the country, including those who resisted the dictatorship of Macias, have therefore not been resident in the country over the past ten years.
Under the terms of Article 89, the President of the Republic should be elected by "universal, direct and secret ballot" for a seven-year period. Article 91 adds that he may be re-elected. This raises perhaps the most serious aspect of this Constitution - its three Transitional Provisions and an "Additional Provision". The latter suspends the application of Article 89, and the Constitution itself designates Col. Obiang Nguema as President of the Republic for the first seven years.

This provision calls to mind the case of Chile where, in 1980, the military regime obtained approval of a Constitution which included a number of transitional provisions under which the Constitution would become fully applicable only in 1997 and which provided that General Augusto Pinochet is to remain in power until 1989. Similarly, in November 1982, in Turkey, General Evren obtained approval in a referendum for a draft Constitution which names him as President for the next seven years.

The Transitional Provisions also state that until such time as the Parliament is elected, for which no date is fixed, the President shall assume all legislative functions. Also, "until career judges and prosecutors are trained" the President may request the Supreme Court to reconsider its judicial decisions. This is an extraordinary and wholly inappropriate power even for a transitional period, particularly as the transition is of undetermined duration.

Conclusions

The provisions of the Constitution lend weight to the claim of the opposition that the true aims of the present government and of Col. Obiang Nguema are to keep themselves in power indefinitely and to institutionalize a system which gives them full control over the political life of the country. Opposition circles have also pointed out that, while the people of Equatorial Guinea come from six ethnic groups, the President has, for the most part, placed people from his native village and region ("Hmong") and from his ethnic group in the main administrative posts of the State. This creates problems with implications for the principle of equality before the law and prohibition of discrimination as proclaimed by the Constitution.

It is regrettable that the opportunity has been lost to adopt a Constitution ensuring major progress towards democracy in Equatorial Guinea. When in 1982 the United Nations Commission on Human Rights discussed the plan of action proposed by the Secretary-General of the United Nations in the framework of the programme for assistance in human rights it was repeatedly stressed that, in order to ensure a return to democracy, the government should allow and even encourage the safe return of exiles, including those who legitimately aspire to participate politically in reconstruction, and that political parties and trade unions should once again be allowed to operate freely (see ILO Review No. 28, p. 37). None of this has been done.