authorities concerned to examine those implications. The Commission recalls, furthermore, that in certain instances where authorities have in recent years modified their approach in the matter, they have provided an opportunity to persons affected by measures taken in pursuance of previous policies to be newly considered for employment. It recommends that competent authorities elsewhere give consideration to similar arrangements.

593. According to article 28 of the ILO Constitution, the Commission is required to indicate the time within which the steps recommended by it should be taken. It realises that extensive consultations with various authorities and other interested parties will be required to determine the measures to be taken and that the time within which the necessary decisions can be taken will also depend on the nature of those measures. In these circumstances, the Commission considers it advisable not to suggest a precise timetable for action. It recommends that the measures in question be taken as soon as practicable, and that the Federal Government give detailed information on all relevant developments in the annual reports on the application of Convention No. 111, presented in pursuance of article 22 of the ILO Constitution.

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594. The Commission wishes to express its appreciation of the collaboration which it has received from the authorities of the Federal Republic of Germany throughout the present inquiry and of their clearly expressed desire to respect the country's obligations under the Constitution and the Conventions of the International Labour Organisation. The detailed information and arguments which the Federal Government has presented to the Commission have greatly assisted it in obtaining a clear understanding of the situation and of the issues calling for determination. The Commission is confident that a similarly constructive approach in considering the conclusions and recommendations set out in this report will serve to reinforce international co-operation while at the same time removing from controversy an issue which, both within the country and beyond its borders, may have presented an image of a democratic order less firmly rooted than is in fact warranted by 40 years of remarkable achievements.

Geneva, 26 November 1986. (Signed) Voitto Saario
Chairman

Dietrich Schindler

Caracas, 5 December 1986. (Signed) Gonzalo Parra-Aranguren

Professor Parra-Aranguren signed the report subject to the following dissenting opinion:

GONZALO PARRA-ARANGUREN dissents from the opinion of the majority of the Commission, among others, because of the following reasons:

First: The undersigned firmly believes in the existence of peremptory rules of Public International Law, that are obligatory to the States and that cannot be abrogated or modified by Treaties, bilateral or multilateral. This standpoint, generally accepted nowadays, found clear expression in the Vienna Convention on the Law of Treaties (23 May 1969), where article 53 declares a Treaty void "if, at the time of its conclusion, it conflicts with a peremptory norm of general international law", i.e. one "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Moreover, article 64 provides that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

Certainly, it still is a matter of discussion which are to be considered peremptory rules of general international law, question that was not answered by the Vienna Convention. This situation may create difficulties in certain juridical areas, but the undersigned believes that there cannot be the slightest doubt, to accept that rules recognising fundamental rights of the human being must qualify as part of the jus cogens, and, therefore, every single State has to obey and respect them, not only in its relations with other States but also in regard to the international community.

Second: The Federal Republic of Germany, as is mentioned in Chapter 10, paragraph 506, among other defences argued that the measures object of examination by the Commission were taken "to protect the basic features of the free democratic basic order, and considers that an ILO Convention, aimed at guaranteeing human rights, should not be interpreted as to protect persons who advocate a totalitarian system"; and in support of this argument it referred to Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966.

The majority of the Commission rejected this argument, and, after stating that "it appears appropriate to note that the structure and approach adopted respectively in the International Covenants on Human Rights and in ILO Convention No. 111 are significantly different", in paragraph 507 comes to the following conclusions:

> ILO Convention No. 111 is confined to the specific question of equality of opportunity and treatment in employment and occupation. It sets out in some detail the action to be taken by governments with a view to eliminating discrimination in that field. It defines what is to be considered as discrimination for

the purpose of the Convention, and expressly identifies certain circumstances which shall not be so considered. It would appear diffcult to read into the Convention, in addition to the express exception clauses, an implied exception drawn from other, very differently conceived instruments. It is, moreover, to be noted that difficulties have been encountered in determining the precise scope and effect of the provision in the Covenants to which the government has referred.

Third: The foregoing conclusion cannot be accepted by the undersigned, because, in his opinion, every Treaty, bilateral or multilateral, has to respect peremptory rules of general international law, in this particular case, those declaring fundamental rights of the human being. Consequently, the question is not one of accepting a new implied exception to Convention No. 111, but that Convention No. 111 has to respect and be read within the frame established by the norms of jus cogens, and that Convention No. 111 cannot be interpreted to protect individuals advocating, even by peaceful means, ideas that are against fundamental rights of the human being, because those ideas contradict rights recognised by peremptory rules of general international law.

Fourth: It is true that the Federal Republic of Germany, in support of its allegation, has only argued the eventual application of Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, but, according to the undersigned, the question to be decided by the Commission is a broader one that deals with the inter-relation between Treaties and the rules of jus cogens of general international law. Consequently, the argument under examination cannot be rejected, as the majority of the Commission does, by stating that "the structure and approach" adopted by both Conventions are "significantly different". This reasoning leaves unanswered the more important question related to the necessary subordination of Convention No. 111 to the peremptory rules of general international law, that declare fundamental rights of the human being; subordination that is even more evident in the case of Convention No. 111, in view of its historical background and of the objectives pursued by the ILO, as are summarised in Chapter 3, paragraphs 67 to 71.

Fifth: The majority of the Commission sustain (paragraph 508) that the individual conduct "aimed at the destruction of rights and basic freedoms" can only be subject to "conviction and punishment under penal law". The undersigned does not agree with such affirmation, because he believes that, besides criminal punishment, such conduct cannot be protected by any Treaty, even less by Convention No. 111, since it is contrary to specific commandments of peremptory rules of general international law.

Sixth: It is also not acceptable to the undersigned the affirmation of the majority of the Commission (paragraph 509) that the cases involved deal "with persons who have behaved lawfully and are in full enjoyment of their civic rights". It results very strange to sustain that a conduct is lawful without having examined whether or not the behaviour in question advocates the contravention of peremptory rules of general international law, consecrating fundamental rights of the human being that constitute the basis of the free democratic order, as they are expressed in the Constitution of the Federal Republic of Germany.

Seventh: In paragraph 518, the majority of the Commission refers to some allegations made by the Federal Republic of Germany, and in paragraph 519 adds:

> The above arguments raise a number of questions. Among them is the issue whether the programme of the DKP, and of other parties or organisations considered to have aims hostile to the Constitution, would involve changes in any of the intangible provisions of the Basic Law and, if so, whether this would lead the party or organisation into action of an unconstitutional nature or, on the contrary, would impose legal limits on the action which might be taken. The Commission finds it unnecessary to enter into these issues in the present context - namely, consideration of the scope of the definition of discrimination in Article 1, paragraph 1, of the Convention. The decisive question to be considered here is whether one can exclude from the aforesaid definition, and therefore wholly from the scope of Convention No. 111, the advocacy and pursuit of political aims in a form which everyone admits to be lawful ... That, however, is an issue which calls for consideration in regard to Article 1, paragraph 2 (distinctions based on the inherent requirements of particular jobs); it does not appear to justify distinctions within the definition set out in Article 1, paragraph 1.

The undersigned cannot admit the quoted affirmations, because he believes that the Commission had the duty to examine whether the measures object of the present inquiry were taken or not to protect fundamental rights of the human being. However, such investigation was not made and, consequently, it is not possible for the Commission to decide whether the conduct of the Federal Republic of Germany has been or has not been in conformity with Convention No. 111, because no contradiction could be affirmed if the measures were addressed to protect fundamental rights of the human being, as expressed in the basic democratic order consecrated by the Constitution of the Federal Republic of Germany. Therefore, the undersigned cannot and does not agree with the findings, conclusions and recommendations of the majority of the Commission.

Caracas, 5 December 1986. (Signed) Gonzalo Parra-Aranguren.

The Chairman and Professor Schindler, after having been informed of the preceding statement by Professor Parra-Aranguren, decided to add the following observations:

1. The dissenting opinion by Professor Parra-Aranguren limits itself to a general affirmation of jus cogens and a reservation as to the findings, conclusions and recommendations of the majority of the Commission, but does not examine the decisive legal questions which are relevant in this connection.

2. The existence of jus cogens in public international law is beyond doubt. Likewise, it is generally accepted that rules recognising fundamental rights of the human being form part of jus cogens. The International Court of Justice implicitly confirmed this by referring to "certain general and well-recognised principles, namely: elementary considerations of humanity".[79] It can furthermore be taken for granted that the concept of "militant democracy" developed in the Federal Republic of Germany after the Second World War as well as the duty of faithfulness to the free democratic basic order incumbent on all public servants in the Federal Republic are designed to protect, among other values, fundamental rights of the human being, which form part of the free democratic basic order. There is no need to make any further investigations on these questions.

3. However, the fact that governmental measures are designed to protect human rights does not imply that they are necessarily lawful in every respect. A measure which is designed to protect human rights or rights of a certain group of persons may violate other human right or rights of other groups. On the other hand, the fact that a person advocates an order which may conflict with human rights does not exempt a State from its duty to apply international Conventions to that person. Jus cogens has only the consequence that all norms of treaties which are in conflict with it become void, but it has not the consequence that a treaty which is in harmony with jus cogens - as Convention No. 111 - is no more to be applied to persons who advocate an order which might conflict with human rights. Professor Parra-Aranguren attributes to jus cogens a meaning which it does not have either according to the Vienna Convention on the Law of Treaties or according to the generally accepted doctrine of jus cogens. It would be contrary to the very idea of human rights and would amount to a denial of human rights if persons who advocate ideas that may be in conflict with human rights would lose all rights deriving from international human rights Conventions. Such a concept not only has no basis in the law of human rights and the doctrine of jus cogens but would also gravely undermine the principle "pacta sunt servanda". The forfeiture of basic rights takes place only if it is provided for in a Convention.

4. It is important to note in this connection that Article 5, paragraph 1, of the International Covenant on Civil and Political Rights, as well as the corresponding provisions of Article 17 of the European Convention on Human Rights and of Article 18 of the Basic Law

of the Federal Republic of Germany, which provide for the forfeiture of human rights, limit this forfeiture to certain specific rights. Never does a person who abuses rights lose all rights deriving from human rights Conventions.[80] In the case of Article 18 of the Basic Law of the Federal Republic of Germany the rights for which the forfeiture can be pronounced are limitatively enumerated.

5. As to Convention No. 111, which does not contain any provision on the forfeiture of rights, it cannot be assumed that such an exception implicitly exists. Nor, as has been pointed out, can such an exception be derived from the rules of jus cogens.

6. The Report of the Commission rightly states that no exceptions are admissible under Convention No. 111 other than those provided for in the Convention itself. These exceptions sufficiently take into account the security needs of States. Persons who advocate an order which is in contradiction with the free democratic basic order and human rights may be excluded from all jobs for which an unequivocal behaviour with regard to the free democratic basic order and human rights must be regarded as an inherent job requirement, as explained in Chapter 10 of the report.

Dated 3 February 1987. (Signed) Voitto Saario
Dietrich Schindler

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The members of the Commission wish to express their appreciation to Mr. Francis Blanchard, Director-General of the International Labour Office, and to his staff for the assistance provided to them in the course of the inquiry. They wish to record their gratitude to Mr. Thiécouta Sidibé, Director of the International Labour Standards Department, for his valued support and advice. They express particular thanks to Mr. Klaus Samson, Mrs. Jacqueline Ancel-Lenners and Mr. Edward Sussex for their tireless efforts to provide the Commission with the requisite secretariat support. They also thank Mr. Kurt Händler, Director of the ILO Office in Bonn, for the help which he and his staff provided in enabling the visit to the Federal Republic to be carried out smoothly and effectively.

V.S. D. Sch. G.P.A.