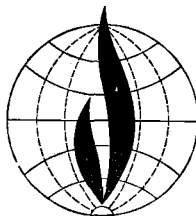


***For the Rule of Law***

# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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Editor: Seán MacBride

# What is The Review?

MOST OF OUR READERS already know **The Review**. For they have long been familiar with the International Commission of Jurists itself. The two-fold task of the Commission has been set out in the Editorial to this issue :

“On the one hand, the Commission must focus attention on the problems in regard to which lawyers can serve society and provide lawyers with the information and data that will enable them to make their contribution to society in their respective areas of influence. On the other, it must be the corporate voice of every branch of the legal profession in its unceasing search for a just society and a peaceful world.”

THESE ARE ALSO THE TASKS of our new consolidated publication, **The Review**. Hitherto these roles were fulfilled by the *Bulletin* and by the *Journal* with their separate readership and different contents. **The Review** will henceforth combine the role of these two publications. **The Review** will be a larger and more comprehensive quarterly publication than the *Bulletin*. **The Review** will provide, on a quarterly basis, not only studies in depth on current legal issues, but also up-to-date information on legal developments throughout the world.

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# THE REVIEW

OF THE

## INTERNATIONAL COMMISSION OF JURISTS

*Editor: SEÁN MACBRIDE*

MARCH 1969

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## Editorial

Seldom in the history of mankind have more challenging and dangerous problems confronted humanity. Science and material progress, socialisation, decolonisation, population growth and the erosion of basic ethical standards are rapidly changing the ecology of mankind. These are pressing and vital problems that require the urgent attention of statesmen, church leaders, philosophers, economists, scientists and lawyers alike. They involve every sphere of human activity and necessitate a complete re-appraisal of individual, national and international relationships. Differing ideologies should not inhibit such a total re-appraisal.

In this process of re-appraisal, the lawyers of the world have not only an important role to play but have a social duty to help in finding viable solutions. Be it as law makers, as arbiters or as interpreters of the laws and rules that govern human society in the many facets of its national, regional or international context, lawyers are the skilled tradesmen of this vital re-appraisal. In finding solutions for such problems as the protection of the *individual* from the ever growing power of the State or the curbing of the unbridled savagery of armed conflicts, lawyers should be the initiators of the re-appraisal process.

It is the role of the International Commission of Jurists to assist lawyers in making their contribution to the solution of these pressing and vital problems. The profession of law is not merely a means to earn a living. Lawyers have a social and ethical responsibility to society; the skills and experience they have acquired must be used for the betterment of society as a whole. While the immutable principles of justice upon which a proper legal system should be founded do not alter, law, as all other human institutions, should never be static; it must constantly undergo an evolutionary process to meet changed and changing circumstances. Lawyers must be the initiators of this evolution.

The International Commission of Jurists, as the corporate expression of the lawyers' faith in justice and human liberty under the Rule of Law, has a two-fold task. On the one hand, it must focus attention on the problems in regard to which lawyers can serve society and provide lawyers with the information and data that will enable them to make their contribution to society in their respective areas of influence. On the other, it must be the corporate voice of every branch of the legal profession in its unceasing search for a just society and a peaceful world.

## **Human Rights in the World**

### **Repression in Eastern Europe**

The invasion of Czechoslovakia came as a shock to the many people who believed that the countries of Eastern Europe were steering a firm course towards legality and respect for civil rights. Czechoslovakia had been denied the right to express itself in its own particular way. The invasion last August could have been dismissed as a terrible nightmare out of character with the hoped-for trend, were it not for the continued pressure on Czechoslovakia and the political trials that have taken place elsewhere in Eastern Europe.

The deterioration in legality and respect for civil rights, more particularly in the field of freedom of opinion, became more pronounced after the invasion of Czechoslovakia by the armies of the USSR, Poland, Bulgaria, East Germany and Hungary. But even before, discontent and unrest, especially among students and intellectuals, had clearly manifested itself and the governments concerned adopted repressive measures to stem criticism.

Early in 1968, the students of Warsaw and other university towns such as Cracow, Wroclaw, Lodz and Katowice expressed their dissatisfaction with the state of affairs in their country by passing strongly worded resolutions protesting against these repressive measures and demanding their withdrawal. Perhaps one of the most clearly formulated of these resolutions was passed by the students of the Polytechnic and College of Planning and Statistics in Warsaw.<sup>1</sup>

The resolution emphasized the solidarity of the students with all the students of Warsaw's Higher Schools and expressed deep concern over the shape which Socialism was taking in Poland. It protested against attempts to create a cleavage between student youth and society in general and condemned the brutal actions of the military against demonstrating students. It demanded the immediate release of all arrested scientific workers and students, the correction in the Warsaw press of false information about the causes and course of recent events, limitation on the control of the press and recognition of the rights and liberties of citizens as guaranteed by the Polish Constitution.

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<sup>1</sup> *The Times* of London, 14th March 1968.

On March 15th, five Members of the Polish Diet (Parliament) belonging to the catholic group *Znak* submitted two written questions to the Prime Minister asking what the Government intended to do, first 'to put an end to the brutal actions of the police and the plain-clothes militia against the university youth and to determine who was responsible for this brutal treatment of young people', and second 'to answer the burning questions which young people are asking themselves and which also trouble public opinion generally concerning civil liberties and the cultural policy of the government'. The Members' text noted that these demonstrations were the result of 'visible errors of the authorities responsible for cultural policy'.

The Polish roman catholic hierarchy also expressed sympathy for the young people. Church leaders wrote a letter to the Government on 21st March concerning 'the resort to force during the recent events'. They condemned 'the brutal use of force which is incompatible with human dignity and, far from contributing to the maintenance of peace, only reopens sore wounds'. Young people in Poland and throughout the world were concerned about 'the meaning of man's existence and their concern is linked with truth and freedom, which are inherent rights of every human being as an individual and as a member of society... Controversies which divide mankind today must not be resolved by force but by a penetrating dialogue'.<sup>1</sup>

The Government's reaction was quite different: in a speech on 19th March 1968 Mr Wladyslaw Gomulka, First Secretary of the Polish Communist Party, blamed Zionist Jewish forces for the disturbances and declared the demonstrations to be an alarm signal of the existence of an ideological and political movement against the Party and the authorities. It therefore decided to suppress the movement.

A purge was carried out in the army and in the administration against progressive elements and persons of jewish origin. In the social science field, for instance, Professor Stefan Zolkiewski, Secretary of the Social Science Division of the Polish Academy of Sciences, Professors Bronislaw Baczko, Zygmunt Bauman, Wlodzimierz Brus, Maria Hirszowicz, Leszek Kolakowski and Stefan Morawski were dismissed from the University of Warsaw for having 'protected and defended' students who were alleged to have organised the demonstrations. The professors, according to an official statement, 'had over the past years converted their faculty into a centre for political opposition' and had 'chosen to run counter to the policy of the State and the Party by adopting revisionist positions'.

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<sup>1</sup> *Le Monde*, AFP, 26th March 1968.

A considerable number of students were expelled from the universities; others were arrested after the demonstrations and were placed under preventive detention for several months—contrary to the Polish Code of Criminal Procedure.

The first trials of students arrested for taking part in the demonstrations were held in November 1968 in Lodz and Warsaw.

The Court at Lodz sentenced four students, Mr A. Kowalski, Mr Brunon Kapeca, Mr Andrzeji Makatrewicz and Mr Jerzy Szczesny to prison terms ranging from eight to eighteen months for having taken part in the March 1968 demonstrations.

The Warsaw Court sat *in camera* to hear the case of the students, Josef Dajczgewandt and Slawomir Kretkowski, who, the prosecutor claimed, had participated in 'commando' activities in order to 'undermine the leading role of the Party and the people's confidence in the Government and the Party'. The Court sentenced the two youths to two years' and two and a half years' imprisonment for 'having provoked disturbances against the State and the Party in order to carry out a political programme hostile to the Polish People's Republic'.

The trial of Mr Blumsztajn and Mr Litynski, who were accused of playing a major role in the organisation of the demonstrations, opened in Warsaw on 5th December 1968. The decision was given on 12th December 1968. Mr Jan Litynski was sentenced to two and a half years' imprisonment and Mr Severyn Blumsztajn to two years' imprisonment for having organised the demonstrations.

On 15th January last, two university lecturers, Mr Jacek Kuron and Mr Karol Modzelewski, were convicted of stirring up ill-feeling against the State and each sentenced to three and a half years' imprisonment. On the next day, four students, Miss Barbara Torunczyk, Mr Henryk Szlajfer, Mr Adam Michnik and Mr Wiktor Gorecki were charged under Article 36 of the 'Little Penal Code', which deals with offences that are 'especially dangerous during the reconstruction of the State'. They were sentenced to prison terms ranging from 20 months to two years. All four were of Jewish origin and came from old communist families.

All the trials were held in secrecy. Neither the fellow students of the accused nor their professors were allowed to appear before the Court. The newspapers did not report the proceedings, but they attacked the accused in violent terms: they were parasites, excentrics and irresponsible, spoiled children of officials appointed during the pre-1956 Stalinist period, and who, moreover, were often of Jewish descent. The technique of holding trials *in camera* and simultaneously organising a vilifying press campaign had not been used in Poland since 1956.

The silencing of student claims by administrative, police and judicial measures is contrary to the Polish Constitution (1952) and

the Universal Declaration of Human Rights. Article 48 of the Polish Constitution provides that 'the Courts are the custodians of the political and social system of the Polish People's Republic ; they protect . . . the rights of citizens'. In the case of the students a retrograde conception of the protection of the regime seems to have prevailed over the duty to safeguard the rights of citizens. Indeed the Constitution states :

*Article 71 (1)* The Polish People's Republic guarantees its citizens freedom of speech, of the press, of meetings and assemblies, of processions and demonstrations.

*Article 73 (1)* Citizens have the right to approach all organs of the State with complaints and grievances.

Furthermore, university students and students generally are assured of the State's 'special protection' in terms of Article 65, which runs :

The Polish People's Republic extends special protection to the creative intelligentsia—to those working in science, education, literature and art, as well as to pioneers of technical progress, to rationalizers and inventors.

The expulsion or arrest of students and teachers who used their constitutional rights to address grievances to the organs of the State, their trial *in camera* and the staging of a press campaign emphasizing the jewish origins of several of the accused are all curious examples of this 'special protection'. There has in addition been a clear violation of Article 69 of the Polish Constitution, which forbids discrimination on the grounds of race or religion, and of the provisions of the Universal Declaration of Human Rights and the International Convention on the elimination of all forms of Racial Discrimination, which Poland has signed.

Student agitation and the adoption of repressive measures by the government have not been peculiar to Poland, but are characteristic of recent events in other communist countries of Eastern Europe. In the USSR, for example, some people attempted to organize a public meeting in August 1968 in the Red Square to protest against the invasion of Czechoslovakia. Banners were displayed bearing slogans such as 'Long Live a Free and Independent Czechoslovakia', 'Hands off Czechoslovakia', 'Shame on Soviet Occupation', 'Your Freedom and Ours' and 'Freedom for Dubcek'. Plain-clothes policemen broke up the demonstration, and the demonstrators were roughly handled and severely beaten. As a result of this incident Mr Pavel Litvinov, a chemist, Mrs Bogoraz-Daniel (the wife of Yuli Daniel, who was convicted in March 1966 of anti-Soviet propaganda), Mr Babitsky, a linguist and art critic, Mr Delone, a university student, and Mr Dremluga, a worker, were tried in October for offences against law and order and were



sentenced on 11th October, respectively, to 5 years' exile, 4 years' exile, 3 years' exile, 2 years' and 10 months' imprisonment and 3 years' imprisonment in a corrective labour camp. Although the trial was supposedly public, only about forty people with special permits were allowed to attend. This illustrates a practice that has developed recently whereby a handpicked number of persons are admitted in order to give a trial the appearance of being held in public. It should be added that a number of foreign observers were refused permission to attend the Moscow trial. Soviet newspapers published no accounts of the trial, but simply attacked the defendants. *Moskovskaya Pravda* and *Vetsernaya Moskva* stated that the accused were being tried for anti-social acts, immoral conduct and joining together to commit serious breaches of public order.<sup>1</sup>

In East Germany too, several students appear to have been arrested for demonstrating their solidarity with the Czechoslovak people and to have been tried *in camera*. A communiqué of 28th October published by ADN of East Berlin (the State News Agency) reported that two trials had been held in which seven youths, including three girls, had been found guilty of 'propaganda and acts of subversion against the State'. They received sentences ranging from 15 to 27 months' imprisonment, which were suspended a month later, and the youths were released.

The events in Eastern Europe are indicative of the growing apprehension in these countries over recent unhappy trends. It should be remembered that it took many years before the methods adopted by the Stalinist regime were officially condemned and repudiated. It is hoped that it will not take as long for the present repressive measures to be recognised as indefensible.

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<sup>1</sup> A second trial was held in Moscow on 20th February. Miss Irina Belgorodskaya, a cousin of Mrs Bogoraz-Daniel, was sentenced to a year's imprisonment for spreading false rumours harmful to the soviet State. She had been arrested while collecting signatures for the release from prison of another intellectual, Anatoli Martchenko.

## Greece: Justice in Blinkers

Little has changed in Greece since the Colonels seized power two years ago. The regime is still totalitarian. The old Constitution has been repealed and the main provisions of the new Constitution, those governing the fundamental freedoms of citizens, have been suspended. Despite assurances to the contrary, a return to democracy seems as remote as before; the regime seems even to be tightening its grip on the country as opposition to it becomes more overt. A symptom of the deterioration in the situation is the increase in political trials. Most of the accused are quite clearly being tried for their political opinions. The principal victims of this purge are the liberal intellectuals.

The International Commission of Jurists sent Observers to two of these trials. Mr Michael Ellman, a solicitor from London, was sent to Athens in July 1968 to observe the trial of *Notaras and others* and Professor Edmond Martin-Achard, former President of the Geneva Bar, attended the trial of *Nestor and others*, held at Salonika in November 1968. The main points that Mr Ellman made in his report are again to be found in that of Professor Martin-Achard, which is reproduced in shortened form below and gives a good picture of how such trials are conducted.

Perhaps the most characteristic and disturbing feature brought out by these reports is the absence of any real legal basis to support the prosecution or the sentences imposed. The Colonels were not even able to resort to their 'Basic Decrees', a device purporting to give their actions legal validity.<sup>1</sup> They finally fell back on a law dating from the civil war, No. 509 of 1947, which is now their principal instrument for removing opponents under the semblance of legality.

The arbitrary use that is made of this law is indefensible. Acts which are often so innocuous that in a free country they would not even be considered criminal are assimilated to treason. Moreover, Law 509 was an emergency law passed during a civil war to meet a special situation; it should have been repealed long ago. In addition, its purpose was to outlaw communism: the accused must be shown to have committed acts 'in implementation of an ideology whose manifest and avowed aim is the forceful overthrow of the

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<sup>1</sup> See *Bulletin of the ICJ*, No. 34.

established social order and political system'. In most of the cases the elements of the offence under Law 509 were not present. But that was no obstacle. The military judges were soldiers not lawyers and saw no reason why they should be prevented by purely legal considerations from convicting the accused and imposing disproportionate sentences upon them.

It is perhaps understandable that the Colonels should be fond of courts martial and should find in martial law a means of acquiring powers which are normally exercised by others. They are enabled to establish an authoritarian government, unembarrassed by opposition from those they rule over. But so long as martial law is in force, it is useless to talk of restoring the proper balance of power and normal political life, and equally useless for the Greeks to expect any guarantee of impartiality from the courts.

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*The trial of Nestor and others* took place in the military Court at Salonika from 6th to 13th November 1968.

The accused were Mr Stilianos Nestor, aged 37, attorney, Mr George Sipitanos, aged 31, graduate in political science, Mr Paul Zannaz, aged 39, businessman, Mr Constantine Pirsas, aged 31, teacher of English, Mr Sotirios Dedes, aged 35, attorney and Mr Argirias Maltsidis, aged 31, engineer. They were charged under Law 509 of 1947 with attempting to overthrow the regime in power with the aggravating circumstance of having acted through the press.

The accused were prominent men in Salonika, known to be liberals.

*The main count in the indictment* stated that from May 1967 to May 1968 the accused had conspired to propagate ideas in Salonika whose aim was to change by force the established social system. The prosecution alleged that the accused had founded an anti-national and revolutionary organisation entitled *Democratic Defence of Salonika*, linked with the Democratic Defence of Athens and the Patriotic Front. They had published and distributed pamphlets calling upon citizens to overthrow the national government by force and had attached labels to cars in Salonika bearing such words as 'Democratic Defence' and 'Democracy will win'.

*The Chairman of the Bench* was Colonel Karaponos; he sat with four Assessors, colonels and lieutenants-colonels in the Greek army. The prosecution was led by the Royal Commissioner, Mr Andrev Lakos—a civilian.

The Chairman was thorough in his conduct of *the proceedings* and asked many questions. The public prosecutor and the Assessors asked few.

Most of *the witnesses* were examined at length by the Chairman and defence counsel. The first two witnesses were policemen who gave lengthy evidence in support of their written reports. They refused to reveal their sources of information. Generally speaking the material facts

with which the accused were charged were not contested but only their actual meaning and legal consequences.

In his address, the public prosecutor stated that the accused had intended to overthrow the regime in power and the social system by means of violence. An offence under Law 509 of 1947 had been proved. The accused had moreover collaborated with the Patriotic Front, i.e. with the communists, which entailed the use of violence. There were, he accepted, mitigating circumstances in that... the accused were not communists. On the other hand, there was an aggravating circumstance in that they had made use of the press.

He demanded the following sentences of imprisonment: Nestor, 10 years; Sipitanos, 8 years; Zannaz, 6 years; Dedes, 6 years; Pirsas, 5 years, and Maltsidis, 5 years.

*Judgment* was delivered on 13th November. The following sentences were imposed:

Nestor	16 ½ years (as a principal)
Zannaz	10 ½ years (as an instigator)
Sipitanos	7 ½ years (as an accessory)
Dedes	5 ½ years (as an accessory)
Pirsas	5 ½ years (as an accessory)
Maltsidis	5 ½ years (as an accessory)

*An Observer's impression* of such a trial can only be unfavourable.

(a) The actual conduct of the trial was regular. (The indictment was read, the witnesses and defendants were heard and examined by the Chairman and counsel and there were final speeches from the prosecution and the defence). However all the judges were military personnel, senior officers of whom only the Chairman, if I am not mistaken, was a lawyer. Given the fact that there is a military government in power, a strong presumption arises that the principle of the Separation of Powers was not respected—the Court appeared to be an offshoot of the government.

The remarks made by the judges during the trial and the extreme severity of their decision (the sentences demanded by the public—civilian—prosecutor for the two main accused were considerably increased) can but confirm this impression.

The conception of the Court as expressed by the Chairman often shocked the Observers. He was not an arbiter in the accepted sense; he gave the impression of trying to make the accused and their witnesses see the rightness of the prosecution's case and he tended to overdramatize the facts.

(b) Several details left an unfavourable impression on us, for example the fact that the defendants' political opinions were apparently held against them and they were asked if they had changed their minds since they had been arrested (after 6 months' imprisonment!), that the witnesses were probed (quite dangerously) as to their present political beliefs, and that the prosecution adduced fresh evidence during the trial (a letter written by Mr Nestor, which came as a complete surprise to the defence).

(c) Much could be said concerning Law 509 of 1947 itself, an emergency law passed to suppress communism, and the extremely wide

application that is given to it. But this is not the first trial of persons who admittedly (the Chairman confirmed this) are not communists and assert their democratic conceptions.

(d) I do not think that sufficient proof was given that the accused wanted to change the social system, that they intended to use violence, or that they contemplated collaborating with the communist party. It may well be asked whether the accused were not primarily being tried for propagating their ideas and belonging to a movement hostile to the present government.

*To conclude*, I wish to emphasize that I was able to carry out my mission unhindered, but that I find it most desirable that international legal circles should continue to follow closely developments in the administration of justice in Greece.

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## Latin America

### Dangerous Swing Back to Militarism

The *de facto* military regimes in Latin America gained a further foothold early last October with the *coup d'état* that overthrew Fernando Belaúnde, President of Peru. It was followed by another in Panama on 11th October against the President of the Republic, who had taken office only a few days earlier. And in December, Brazil, the largest country in South America, suffered the same fate: an ostensibly democratic government (though it had come into power in circumstances that were hardly democratic) abruptly became an overt military dictatorship.

The overthrow of Argentina's constitutional president in 1966 was perhaps the first break in the trend of all but a few Latin American nations towards constitutional government. But the cases of Peru, Panama and Brazil are mentioned here as they are the most recent. They cannot be simply equated, however, since they are quite independent of one another and their causes, arising from quite different situations, are distinct. Nevertheless they do have one thing in common: in each case army officers assumed functions outside their field of competence and took over the entire administration of State, usurping the powers of those who were in lawful authority.

Generally speaking in nearly every case the process is the same. The President of the Republic is overthrown by force and a military junta is formed; it promulgates a 'revolutionary law' or similar instrument briefly stating the 'reasons' for its action; it outlines a programme for governing the country; it grants itself powers which under the Constitution are within the absolute reserve of the Executive and Legislature; it allows itself such a wide discretion as to the exercise of the powers that they become virtually unlimited, and it appoints one of its members Head of State. For form's sake, the Constitution is maintained and is even frequently referred to, though its provisions are subordinated to the so-called revolutionary law and are enforced only so long as they do not conflict with it. Furthermore, the articles guaranteeing fundamental rights are invariably suspended.

Once the dictatorship has been installed, lip-service is paid to the independence of the Judiciary. In many cases, however, the

judges of the higher courts (the Supreme Court and the Court of Appeal) have resigned when the *de facto* government was formed. In others, the military dictatorship has reorganized the Judiciary. In every case, the new judges, on taking up their duties, have had to declare under oath the supremacy of the revolutionary law over the Constitution. It follows that the acts of the Judiciary are void from the outset since the courts receive their jurisdiction from a body that has no authority to grant it. The judges undertake to give precedence to a law which is the negation of the constitutional order and which relegates the only authentic instrument—the Constitution—to a secondary role. In these circumstances it is difficult to argue that the Judiciary's independence is respected. The courts merely become another tool in the hands of the dictatorship and heighten its prestige by giving it a false appearance of legality. This is inevitable, despite the good faith of many judges who, sooner or later and in the most delicate cases, are obliged to adjudicate in accordance with provisions that have little to do with holding the scales of justice even.

Revolutionary laws moreover always contain ambiguous provisions that may be interpreted in the most convenient way; the dictatorship thus has a free hand and the individual is left to the mercy of the authorities.

The situation described—which is a general picture of what, with minor variations, has occurred in various countries—is grave enough in itself. Yet it is only the surface of a fundamental problem which is much more serious, since it calls into question the very stability of the political and legal institutions of certain Latin American countries. Governments which are supported by the majority of the people, and which appear as the genuine representatives of the nation and its aspirations, have in a matter of hours repeatedly been overthrown by brute force; and—like the people, from whom they derive the only legitimate mandate to govern—they have been powerless to resist. A further injury to the Rule of Law is that the army officers responsible for such *coups d'état* represent no one but themselves and abuse a power put in their hands for distinctly other purposes; it was certainly never intended that they should assume, in the name of the people, whom they do not consult, the rights of supreme arbitrators or saviours of the nation.

If analysed, the reasons given to justify their action are always seen to be insubstantial, and raise the question of whether the overthrow of the constitutional order was really the only alternative. In fact, unfortunately, the military authorities of certain Latin American countries consider their governments to be mere administrative delegates who must execute their instructions and do what they think best for the country—or be replaced. Such an attitude makes a farce of democracy, with the tragic result that

weak, inefficient and sometimes corrupt civil governments are encouraged. The nation's institutions are weakened because they fail to inspire confidence, and the country advances, if it advances at all, because of a few minority vested interests, often economic interests with roots abroad; the mass of the people remain in a perpetual state of backwardness, disenchantment and frustration and are left, besides, holding the short end of the stick.

It is only fair to say that the military, who distort to their advantage the normal scale of values and substitute the law of force for the Rule of Law, are not the sole responsible for this situation: part of the responsibility also rests with those citizens who, out of indifference, convenience or self-interest, allow it to exist. Those who have had the advantage of a good education, lawyers in particular, bear the responsibility of repairing these abnormal situations and guiding their country along a truly democratic course. The goal of all in authority should be to make everyone a part of the country's political process, to eradicate illiteracy, and to launch, with the backing of the nation as a whole, sound programmes for economic and social development that will finally do away with poverty and malnutrition, and will at the same time ensure an equitable distribution of wealth and fair opportunities for all. Admittedly, this is not an easy task. But it is urgent that steps should be taken now to carry it out. It must be acknowledged that in many respects the existing structures do not admit of further changes. The poor results produced have long testified to the need to devise new structures adapted to the specific characteristics of each country.

Needless to say, such progressive measures cannot be implemented under a dictatorship. Military regimes such as those described are the antithesis of a legal system, both in the way in which they come into being and in each of their actions. Despite an appearance of legality, they are born illegally and their rule is lawful in form only. The Universal Declaration of Human Rights is violated, in that their government is not based on the will of the people and that their first acts are to suspend fundamental safeguards and to impose arbitrary restrictions on freedom, security and other basic human rights.

What is most serious, however, is that the military regimes in Latin America, whose source is a *coup d'état*, have always caused a retrogression of the country as a whole. They deal a severe blow to democratic sentiments; they frustrate all those who have leadership qualities, and they produce profound divergencies among the people, which often prove to be irreconcilable. Unaware of how to run the State, they bring about apparent order in the streets—and little more. The large scale economic or social programmes languish from lack of adequate direction, and social reforms that may have been under way come to a halt and



gradually slip backwards. Lastly, international relations become more complicated; this is particularly harmful in the case of Latin America, whose numerous plans for integration provide an answer to the vast problems of underdevelopment.

### **Brazil**

Of the three countries mentioned at the beginning of this article, Brazil has witnessed the most flagrant and extensive violations of human rights. In 1964, the constitutional President, João Goulart, was overthrown by a military *coup d'état*.<sup>1</sup> Marshal Castelo Branco became Head of State and in 1967 introduced amendments to the Constitution granting wide powers to the President of the Republic, including the power to legislate by decree. At the same time, in a concern to give his government an appearance of democracy, he set up a two-party system consisting of the Government party, completely controlled by the Head of State and with an assured majority, and the Opposition.

In 1967, Congress, by indirect suffrage, elected Marshal Arturo da Costa e Silva President of the Republic. The Opposition gradually gained ground and the Government, finding that some of its members were taking independent positions on a number of questions that conflicted with its own, realized that the whole fiction of democracy would be jeopardized if that trend continued. The crisis was reached when the Government instituted proceedings against a deputy who had made a speech it considered to be 'offensive to the armed forces'. Before proceeding with the case, the Supreme Court had to request permission from the Chamber of Deputies to indict one of its members. To the Government's surprise, on 12th December 1968 the Chamber of Deputies, by a majority made up of the Opposition and a large number of Government representatives, rejected the Court's request. Moreover, on 10th and 12th December, the Federal Supreme Court granted the petitions for *habeas corpus* filed by the defence for a large number of students who had been arrested and, at the Government's request, indicted by military tribunals.

On 13th December, the Government promulgated 'Institutional Act No. 5', which was published the next day in the newspapers and whose essential provisions—which are alarming enough to speak for themselves—are summarized below.

*Article 1* maintains the Federal Constitution and the state Constitutions, subject to the amendments introduced by the Institutional Act.

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<sup>1</sup> See ICJ *Bulletin*, No. 20.

*Article 2* empowers the President of the Republic to order the recess of the National Congress and state legislatures at any time. During their recess, the President is empowered to legislate by decree. (Immediately after the promulgation of Institutional Act No. 5, the President, by Supplementary Act No. 38, ordered the recess of Congress as from that date.)

*Article 3* empowers the President to declare an *intervention* in any state or town unfettered by the constitutional safeguards,<sup>1</sup> and to appoint Government administrators for that purpose. (This puts an end to federalism since the President, through his administrators, directly governs the states or decides on matters that normally come within their province.)

*Article 4* authorizes the President to suspend the political rights of any citizen for ten years and empowers him to dismiss anyone from public office, federal, state or municipal.

*Article 5* establishes the additional measures that may be applied to citizens deprived of their political rights, including restricted freedom under police surveillance and prohibition to frequent certain places or to change one's residence. The suspension of political rights may, in addition, be extended to any other public or private rights (enabling the Government, for example, to forbid individuals to practise a liberal profession).

The last paragraph of Article 5 stipulates that the measures supplementary to the deprivation of political rights shall be enforced by the Minister of Justice, against whose decisions there will be no appeal to the courts.

*Article 6* suspends the safeguards, provided by the Constitution and the law, of irremovability from office and security of tenure both in the case of appointments for life and of fixed-term appointments, and authorizes the President to dismiss, remove or transfer officials and to dispose of posts at his discretion. (One of the most serious aspects of this provision is that it is fully applicable to members of the Judiciary at all levels.)<sup>2</sup>

*Article 7* empowers the President to declare and to extend a state of emergency.

*Article 8* enables him to confiscate property illegally acquired in the exercise of public functions, the burden of proof that such property has been legally acquired falling on the official.

<sup>1</sup> The declaration of an *intervention* in a state or town is an emergency measure permitted by the Constitution in strictly defined circumstances.

<sup>2</sup> The Government in fact dismissed three Supreme Court judges, Mr Victor Nunes Leal, Mr Hermes Lima and Mr Evandro Lins e Silva. The President of the Court, Mr Antonio Gonçalves de Oliveira, thereupon resigned, together with Judge Antonio Carlos Lafayette de Andrada.

*Article 9* enables him to establish the censorship of the press, radio and television.

*Article 10* suspends the constitutional guarantee of *habeas corpus* in the case of political offences against national security or the economic and social order (which covers virtually all possible instances).

*Article 11* excludes from the jurisdiction of the courts all acts carried out in relation to or in accordance with Institutional Act No. 5.

Although these provisions are eloquent enough to call for no comment, it is necessary to record surprise and indignation at the audacity of a group of army officers who are presuming to decide the fate of nearly ninety million people, depriving them of the law's protection.

The situation cannot be interpreted in any other way, as recent actions of the Government have shown. Large scale arrests of persons of all ages and walks of life have been carried out. Lawyers who have taken on the defence of those imprisoned have in their turn been arrested. Newspaper, radio and television directors, reporters and correspondents have also been arrested; these media of information are strictly censored;<sup>1</sup> and former Presidents of the Republic and other politicians of various tendencies have been divested of their political rights. The list of governmental actions in abuse of their extensive powers is a long one. The events in Brazil as 1968 drew to a close will be recorded as one of the gravest affronts to the United Nations' International Year for Human Rights.

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<sup>1</sup> The list that follows gives the newspapers that have been severely censored and the names of their respective editors or staff who have been arrested: *Correio da Manhã*, Niomar Moniz Sodre Bittencourt, Oswaldo Peralva and Paulo Francis; *Jornal do Brasil*, Alberto Dines, Carlos Castello-Branco and Sette Camara; *Tribuna da Imprensa*, Helio Fernandes; *Diário de Notícias*, Ostacilio Lopea. The magazine, *Veja*, which published a list of the persons arrested and an account of the political crisis, was severely cut by the censors. The correspondent of the French *Le Monde*, Ireneu Guimaraes, was also arrested.

# Forgotten in the Maghreb

The three countries in the Maghreb, Algeria, Morocco and Tunisia, have much in common, including unfortunately the practice of resorting to preventive detention, that is detention in the absence of a court order or other judicial safeguard. A trial may eventually be held—often after a long delay and without any proper judicial investigation or legal safeguards. But the overall intention of the authorities is either to dispose of opponents who are considered dangerous or to shelve a problem which they are unable or unwilling to resolve. It is hoped that the cases to which attention is drawn below will provoke States that resort to preventive detention to reconsider the practice.

## ALGERIA

1. President Ben Bella was overthrown on 19th June 1965 and immediately placed under detention together with several of his advisors. His place of detention, and that of many others, is unknown even today. Only the former president's family have been allowed to visit him on rare occasions and they did not know where they were being led. Such secrecy inevitably produces allegations of ill-treatment, which are regularly denied by the authorities, including the Minister of Justice. At the end of October 1968, Colonel Boumedienne hinted that certain political detainees might be brought to trial. At the beginning of November, the Algerian Official Gazette published an Order establishing a revolutionary court, which was to consist of judges appointed by decree and of army officers; it was to sit in Oran and adjudicate upon 'threats to the revolution and crimes against State security'. On 28th January last, President Boumedienne announced that the Court had been established. Attempts from inside Algeria and from abroad to give the prisoners material or legal aid met with failure and even resulted in the expulsion of certain foreign lawyers who had come to Algeria for this purpose.

Towards the end of 1968 it was learned that a number of prisoners had been released. In September, three Algerian nationals were freed, and in November, some one hundred detainees were set free, including three of the principal leaders of an extreme left-wing opposition group—Bachir Hadj Ali, Hocine Zahouane and

Mohammed Harbi—who were pardoned on the occasion of the 14th anniversary of the Algerian revolution but are still under house arrest. Two former Ministers of Mr Ben Bella as well as Mr Ben Allah, the former President of the Algerian Assembly, were also released from prison.

2. Others have undergone preventive detention in Algeria. They are the victims of abductions from aircraft<sup>1</sup> which were either flying over the high seas or over Algerian territory.

On 1st July 1967, Mr Moise Tshombe, former Prime Minister of the Democratic Republic of the Congo, was travelling between two of the Balearic islands in a private aeroplane which was forced to land in Algiers. The Congo (Kinshasa), which had sentenced him to death *in absentia*, applied for his extradition; in spite of the very debatable Opinion of the criminal division of the Supreme Court, the Algerian authorities refused to hand him over. The British pilots of the aeroplane and the Belgian passengers were later allowed to return home. There seems to have been no change in this situation, although there were rumours last year that Mr Tshombe was being ill-treated and that he was to be released or perhaps extradited to Spain. The Frenchman who forced the plane to land, Mr Bodenan, is also still in Algeria.

On 1st July 1967, a private aeroplane carrying three Swiss nationals from Africa to Geneva had to land for technical reasons at Tamanrasset (in Algeria), where two young police inspectors came aboard. At the next stop, Hassi-Messaoud (also in Algeria), they were arrested and charged with endangering national security and unlawfully possessing and trafficking in fire-arms. In spite of the efforts of their families, prominent persons, their defence counsel and the Swiss Federal Political Department, they were detained without trial or any other safeguard, including access to defence counsel. On 18th December 1968, after a year and a half of detention, they were released on the occasion of the Aid el Kébir, the mohammedan festival of peace and forgiveness.

## MOROCCO

1963 was the year of the Moroccan 'frontier war' with Algeria and of the 'July conspiracy',<sup>2</sup> a period full of disturbing aspects which were erased by the General Amnesty declared at the

<sup>1</sup> See *Journal* of the International Commission of Jurists, Vol. VII, No. 2, p. 243: 'Abductions Effected outside National Territory' by Daniel Marchand; see also *Bulletin* of the I.C.J., No. 3, p. 24: 'Kidnapping Incidents'.

<sup>2</sup> See *Bulletin* of the I.C.J., No. 18, p. 26: 'The Treason Trial in Morocco'.

beginning of 1965 by King Hassan II to commemorate the Aid el Kébir. In the words of the Moroccan Minister of Information, the Amnesty applied 'to the entire nation, not merely to one party or another'.<sup>1</sup>

Since therefore the General Amnesty covered acts committed prior to its declaration, it came as a surprise to learn at the end of November 1968 that fourteen persons were to be tried before the district Court of Rabat on charges of taking part, in late October 1963, in a conspiracy against King Hassan II and two of his advisors, Mr Guédira and Mr Oufkir.

The five-year lapse separating the alleged acts from the trial and also the General Amnesty itself did not prevent the King's prosecutor from demanding the death sentence for four of the accused, only one of whom was present at the hearing. Sentences of penal servitude for life were demanded for two of the other defendants and sentences ranging from ten to twenty years' penal servitude and five years' imprisonment for the others. The prosecution also asked for one acquittal. The Court imposed the death sentences demanded, but was much more lenient towards the other prisoners: five of them received sentences varying from five to fifteen years' penal servitude and six others were given terms of imprisonment. Two were acquitted—after having been left for more than five years in preventive detention.

## TUNISIA

Between 15th and 19th March 1968, demonstrations broke out at the University of Tunis. One hundred and thirty four intellectuals were arrested and tried (from 9th to 16th September) by a special court with jurisdiction over crimes against State security, which had been set up to deal with the students. No convincing evidence was brought that the accused had ever attempted to undermine the internal or external security of the State. Yet very heavy sentences were imposed on the accused, who apparently have no right of appeal. This is a clear case of the violation of freedom of expression and opinion.

Not all of the defendants stood trial in September: a certain number of them, it was understood, were to be tried immediately afterwards together with persons accused of attempting to assassinate President Bourguiba in August 1968. Certain issues were left pending at the first trial and were to be decided at the second. This was eventually held the following February. Thirty-one defendants appeared before the special court and were convicted of undermining State security and of forming an unauthorised party (the Baath

<sup>1</sup> See *Bulletin* of the International Commission of Jurists, No. 22, p. 32: 'General Amnesty in Morocco'.

Party). They received sentences ranging from one to eleven years' imprisonment. The prosecution's case would not seem to have been any stronger than at the first trial.

Although public opinion was active on the students' behalf, no steps were taken by the Tunisian authorities to remedy the situation. The students have been held in conditions of secrecy: neither their family nor counsel have had any contact with them since the trials. Allegations of ill-treatment have moreover been received from various quarters.

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## Zambia

Recent reports in the world press of discrimination in Zambia may be misleading as to the real policy of the Zambian Government.

At Mulungushi in April 1968, the President, Dr Kenneth Kaunda, announced economic reforms to 'Zambianise' business in Zambia. The reforms, which were to take effect from 1st January 1969, were designed to avoid monopolistic tendencies in business and to protect Zambian nationals from undue competition by expatriates. 'Exploitation, whether it is done by people of one racial group against another or done by the same racial group against their own kith and kin, is wrong,' the President said. 'We will not glorify it in Zambia by allowing it a place.'

However, certain confusion as to the actual policy of the Government in the implementation of the reforms has arisen, which the statements summarised below of the Attorney General, Mr James Skinner, may help to clarify. The Attorney General in effect pointed out that any discrimination in implementing the reforms would be against the law and reminded lawyers of their responsibility to see that instances of discrimination were duly remedied.

On December 31st, 1968, Mr Skinner challenged a report in the *Times of Zambia* that only members of the government party, the United National Independence Party (UNIP), would be granted trading licences. He said that if a Licensing Authority refused a licence to any applicant because he was not a member of UNIP, it would be acting in contravention of the Constitution. Section 25 of the Constitution protects persons from discrimination on the grounds of their political opinions, and public authorities are prohibited from exercising their powers in a discriminatory manner.

Furthermore the Attorney General said that if a Licensing Authority were to refuse to consider applications lawfully submitted, it would not only contravene the Constitution but would be acting in breach of its statutory duties. Persons who are entrusted with statutory functions must administer them according to the law, and lawyers have not only the right but the duty to present their clients' cases where licensing authorities act unlawfully.

On 30th January 1969, the Attorney General further emphasised the government's concern with the rights and duties of lawyers. He said that in a democratic and progressive society such as exists in



Zambia, people have a right to be represented by lawyers and that this right means nothing unless lawyers are free to put forward all arguments of law and of fact necessary for the advancement of their client's case. It would be a sad day for Zambia, the Attorney General said, if legal representation were to be denied to any member of the community. Anyone in the State who sought to prevent free or effective representation would be striking a blow against social progress and orderly society, for the law is the instrument which ensures the attainment of both.

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## **Special Study**

# **THE NEED TO RESTORE THE LAWS AND CUSTOMS RELATING TO ARMED CONFLICTS**

by

JEAN PICTET \*

### **1. Law of Geneva and Law of the Hague**

Socrates recommended that one should begin a dissertation by defining one's terms.

For some time now, the name, 'humanitarian law', has been used to describe the large body of public international law derived from humanitarian sentiments and centred upon the protection of the individual.

The term has both a broad and a narrow sense. In the broad sense, international humanitarian law consists of those rules of international conventional and customary law which ensure respect for the individual and promote his development to the fullest possible extent compatible with law and order and, in time of war, with military necessities. This fundamental principle is the result of a compromise between two conflicting notions: the humanist in us requires all action to be directed towards the welfare of the individual; yet human nature gives rise to painful necessities that justify certain restraints in order to maintain social order and a certain amount of violence in the extreme case of war. Humanitarian law comprises two branches: the law of war and the law of human rights.

Since the law of human rights does not come within the scope of this study, it will be enough merely to mention that its purpose is to ensure that individuals enjoy fundamental rights and freedoms and are protected against social evils. The main distinction between such rights and the law of war is that they are independent of the state of conflict. Two dates are significant in this respect: 1948, when the Universal Declaration of Human Rights was proclaimed, and 1950, when the European Convention on Human Rights was signed.

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\* Member of the International Committee of the Red Cross; Director-General of Legal Affairs. Lecturer at the University of Geneva.

The law of war also has a broad and a narrow sense. In the broad sense its purpose is to regulate warfare and attenuate its rigours in so far as military necessities permit. Its principle demands that the suffering inflicted by belligerents shall not be disproportionate to the object of war, which is to destroy or weaken the military power of the enemy.

The law of war may also be divided into two branches: the law of the Hague and the law of Geneva.

The law of the Hague, or the law of war strictly speaking, lays down the rights and duties of belligerents in conducting operations and limits the methods of warfare.

This law is, by and large, the result of the Hague Conventions, 1899, revised in 1907. It does not of course include the extremely important rules established at Geneva in 1929 and 1949, concerning the status of prisoners of war, the status of the wounded and shipwrecked in sea warfare, and the status of civilians in occupied territories.

The law of the Hague, however, also includes conventions that do not bear the name of that city, such as the Declaration of St. Petersburg, 1868, prohibiting the use of explosive bullets, and the Geneva Protocol, 1925, prohibiting the use of poisonous gas and bacteriological or similar means of warfare. For its part, the law of Geneva, or humanitarian law in its strict sense, is designed to ensure respect, protection and humane treatment of war casualties and non-combatants.

Since 1949, the law of Geneva has been given concrete form in four Conventions of the same name. This legal edifice is the most recent as well as the most complete codification of rules protecting the individual in armed conflicts. At present it doubtless represents, at least in volume, three-quarters of the law of war.

The Geneva Conventions were drawn up for the direct benefit of the individual and, as a general rule, they do not give States rights against him, as opposed to the laws of war which, though designed for the protection of the individual, often achieve that end by indirect means and are also designed to regulate operations. These laws, therefore, are still based to some extent on military necessities; the Geneva Conventions, on the other hand, ushered in a new era in which the individual and humanitarian principles are paramount.

Although the Geneva Conventions have been carefully revised, developed and adapted to changing circumstances, the law of the Hague has remained in a state of neglect often called chaotic. While techniques of warfare have made gigantic strides in half a century, especially during the two World Wars, most of the rules of war go back as far as 1907, a time at which aviation bombardment was unknown. This is the alarming problem which faces the world today and which must be solved.

## 2. Origins of the Law of War

Since the birth of life, creature has fought creature. Throughout the centuries men have groaned under the sword and the yoke. The pages of history are stained with blood. Massacres, torture and oppression are to be seen at every turn.

Freud showed that man's two main instincts, that of self-preservation and that of destruction, though apparently opposed, are at times linked. The instinct of self-preservation must resort to aggression if it is to triumph. Man will therefore seek to kill, and to make others suffer as a result, in order to increase by that much more his own chances of survival. In his fellow, man first sees a rival.

Among animals, the strong oppress the weak, just as for thousands of years men obviously did the same. Later, the defence reaction was extended to the group.

To make community life possible, society had to be organized. Since it was impossible to change man's nature, his instincts had to be curbed and he compelled to accept reasonable solutions. The group, by a decisive revolution, thus established a social order based on certain moral rules.

Society also gave authorities power to enforce these rules, which would otherwise have been a dead letter. This is the origin of law and public institutions.

At the same time, however, the power given had to be limited since the State, though its ultimate objective is the development of the individual, is likely to crush him in the process. Consequently, it was necessary to guarantee the individual certain fundamental rights that he demands for himself and that he may therefore recognize for others. This gave birth to the principle of respect for the individual—respect for his life, liberty and happiness.

This vast and gradual evolution, long confined within the boundaries of each State, eventually reached the level of international relations, where law soon came to grips with war itself. Since it could not stamp out war at one fell swoop, it attempted at least to mitigate its unnecessary rigours. The mutual interests of the belligerents led them to observe, in conducting hostilities, certain 'rules of the game', while philosophers and religions strove to improve morals. These are the origins of the law of war, which forms a very important part of public international law. Needless to say, this conquest was as difficult to achieve in the international field as it was in the domestic field. Moreover, it is far from being completed.

In early societies, war was merely the deadly triumph of the stronger. Battles were followed by slaughter. The defeated, including women and children, were at the mercy of the victor, who slew or enslaved them.

However, even primitive communities had some rules for lessening the horrors of conflicts; these were the embryos of the law of war.<sup>1</sup> Man understood that if he wished to be spared, he would have to begin by sparing others.

He recognized that in life there are more advantages in coming to terms with his fellow men than in mutual destruction. Gradually, under the influence of civilization and moral or religious doctrines, progress was made. Some monarchs set examples by showing clemency.

However, in the Middle Ages the fate of the vanquished and the civilian population was still far from enviable. In 313, the red-letter date of the Edict of Milan, the Church became a major temporal power overnight. Among its many consequences, this merging of Church and State led the ecclesiastical authorities to justify war. As this attitude disturbed many men who believed that the spilling of blood was a crime, and a crime condemned by the Scriptures, Saint Augustine formulated at the beginning of the fifth century the famous and baneful theory of the 'just war' intended to allay men's consciences for a small price by an unedifying compromise between the moral ideal of the Church and its political expediencies: as a result, mankind's advance was checked for centuries. That theory, briefly, was that a war waged by the legitimate sovereign is a war willed by God and that acts of violence committed in its cause cease to be a sin. The adversary, consequently, is God's enemy and his war can only be unjust.<sup>2</sup>

The most serious consequence of this conception is that the 'just' could allow themselves virtually any action against the 'unjust'. Their acts were never crimes but punishment of the guilty. Obviously, however, each party maintained that its cause alone was just. And under the hypocritical cloak of righteousness, both vied against each other in committing massacres. The Crusades—those 'just wars' *par excellence*—afford the most lamentable example.

The 16th century saw the rise of 'natural law', the advocates of which condemned useless suffering. The Reformation then split Christianity in two. Another principle of unity had therefore to be found for international relations: this was supplied by the law of nations. Grotius, who has been called the 'father of the law of nations', maintained that law was no longer the expression of divine justice but of human reason. He did not free himself however of the bonds of the 'just war'. He still accepted that the entire population of the hostile nation was an enemy and at the mercy of the victor. And at that time, the Thirty Years War unleashed its flood of miseries.<sup>3</sup>

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<sup>1</sup> Quincy Wright: *A Study of War*, 1942.

<sup>2</sup> G.I.A.D. Draper: *The Conception of the Just War*.

<sup>3</sup> Henri Coursier: *Etudes sur la formation du droit humanitaire*, Geneva, 1952.

At last the scientific spirit woke. Life was no longer considered a mere stage on the road to the hereafter but an end in itself, and society took its destiny into its own hands. The 'enlightenment' gave birth to humanitarianism, an advanced and rational form of charity and justice. The aim now was to secure the greatest happiness for the greatest number.

Great strides were then made, at least in Europe, in limiting the evils of war. Cartels—agreements concluded between the heads of armies—established the treatment to which the victims of war were entitled. These were often models of moderation. It was recognized, for example, that the peaceful population should not be molested. The repetition of such agreements created customary law, which received all the support of 18th century philosophers, particularly Jean-Jacques Rousseau. During that enlightened period, kings sometimes gave heed to philosophers.

In a famous passage of his *Social Contract*, Rousseau took to task the ancient sophism of the just war and replaced it at last by the welcome and fruitful distinction, between combatants and non-combatants.

For war is a means—the final means—whereby one State bends another to its will by using the necessary coercion to obtain that result. Any violence not essential to that purpose is useless; it then becomes only cruel and stupid.

These principles were taken up by the French Revolution. At the same time, however, military service became compulsory and men no longer fought only for bread but also for ideas. Mass wars were born, wars in which entire nations, after having mustered all their material and emotional resources, are pitted against each other. The era of 'total wars' began, which was to bring a substantial retrogression in human values. The situation of the victims of war was hardly improved during the second half of the 19th century. It was then that Henry Dunant made his moving appeal that led to the birth of the Red Cross in 1863 and the conclusion the following year of the first Geneva Convention for the protection of war casualties.

This Convention had a decisive influence on the development of the law of nations: on that date States agreed to sacrifice part of their sovereignty for the welfare of mankind. The impact of this event led to the conclusion of the other Geneva Conventions and the Hague Conventions. It may even be said that all present efforts to solve conflicts peacefully and outlaw war also spring indirectly from that movement.

Thus it was that Gustave Moynier, President of the Founding Committee of the Red Cross, could say in 1864 about the first Geneva Convention just concluded: 'To take this road is to make a decisive step; one step will inevitably lead to another until it will be impossible to stop. . . future generations will see the gradual disappearance of war. An infallible logic will have it so.' Let us accept the omen.

### 3. The Peace Conferences<sup>1</sup>

Although all humanitarian law springs from the great creative impetus given at Geneva in 1864, the first chapter of what would later come to be known as the law of the Hague was written at St. Petersburg in 1868. Alarmed by the invention of the explosive bullet, Alexander II, the Tsar who abolished serfdom, convened at St. Petersburg a conference for the purpose of 'alleviating as much as possible the calamities of war'. It resulted, on 11th December 1868, in the Declaration of St. Petersburg, a treaty which is binding, even today, on seventeen States. It abolished 'any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances'.

What gives a profound significance to the Declaration, however, is that its Preamble formulated straightaway, and with remarkable accuracy, the fundamental principle of the law of war. It reads:

Considering... that the sole legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable;

That the employment of such arms would, therefore be contrary to the laws of humanity...

Another fact worthy of mention is that the Powers agreed to work together in the future with a view to prohibiting the use of inhumane weapons. It is a fact that might well be recalled today.

A few years later the Russian Government submitted to the other governments a 'Draft International Convention concerning the Laws and Customs of War' and invited them to send delegates to a meeting at Brussels on 27th July 1874. The main problem was to define combatants by determining who is entitled to take part in the fighting. Here the Brussels Conference drew up its famous four conditions that were later to be incorporated, word for word, in the Regulations respecting the Laws and Customs of War. In relation to bombardments, the Brussels Declaration stipulated that undefended towns or villages should not be attacked; this was the future basis of the Hague Convention. The Brussels Declaration, however, has never had the force of law since no State ratified it.

It is a well known fact that such eminent men as Francis Lieber, Johann Bluntschli and Gustave Moynier had a decisive influence on

<sup>1</sup> The author here is indebted to the work of Pierre Boissier: *Histoire du Comité International de la Croix-Rouge*, Paris, 1963.

the development of the present-day law of nations. Moynier wrote the 'Manual of Laws of Land Warfare', which the Institute of International Law adopted at Oxford in 1880 under the name of the 'Oxford Manual'. This manual, which formulates the principles of the law of war with unprecedented logic and clarity, has been a model for many national military regulations.

In August 1898, a piece of news came like a thunderclap: Nicholas II, continuing the tradition, proposed an international conference for the purpose of 'putting an end to the incessant armaments and seeking ways of preventing the disasters which threaten the entire world'. This programme was so vast that it raised great hopes and there was already talk of a new era in the history of mankind. A further Russian note restored matters to their proper proportions: the idea was not to achieve general disarmament but only to check the arms race and to prohibit new weapons.

The ground work having been prepared by the newly-formed Inter-Parliamentary Union, the Conference opened at the Hague on 18th May 1899. Though it soon abandoned the attempt to limit armaments, it did lay down three prohibitions: against projectiles launched from air-borne balloons, poisonous gas and expanding or flattening ('dum-dum') bullets. The first two means of warfare, moreover, were merely forerunners of worse to come.

The main task of the first Peace Conference, however, was the establishment of 'Regulations respecting the Laws and Customs of War on Land', which was based largely on the Brussels Declaration and the Oxford Manual. In this respect, the Conference introduced little that was not already contained in the military regulations of the major Powers. As Professor A. de la Pradelle has pointed out, difficult and controversial questions are often evaded and an easy agreement reached on matters that have long been settled in practice. The value of the efforts made at the Hague towards codification, however, should not be underestimated as they have had considerable influence on the development of the law of nations.

In its final Act, the assembly recommended that a second Peace Conference should be held in order to complete the work begun, particularly in the field of sea warfare. This Conference was held eight years later, on 15th June 1907, also at the Hague, this time on the initiative of the President of the United States.

The three existing Conventions were revised, particularly the first relating to the peaceful settlement of conflicts, and a draft procedure for their prevention—arbitration—was introduced. Two of the three declarations were retained: those concerning dum-dum bullets and balloon-launched projectiles. Of the new Conventions, one related to the commencement of hostilities and another to the rights and duties of neutrals. The other eight were devoted to sea warfare, which was the main work of the Conference. Another significant accomplishment was the famous *Marten's clause* in the Preamble to Convention IV,



which states that 'until a more complete code of the laws of war can be drawn up. . . the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience'. This declaration shows that the Hague rules were first of all the expression of customary law, the value of which goes beyond the letter and places them, in a sense, outside time.

It had always been intended to hold another diplomatic conference in order to develop the Hague Conventions and adapt them to current needs. But two World Wars, with their interminable wake of suffering, took place without the plenipotentiaries having met for that purpose. Who will take the initiative to convene the third Peace Conference? Who will take up the torch?

#### **4. Protection of the Civilian Population Against the Dangers of Indiscriminate Warfare**

The International Committee of the Red Cross (ICRC) was the body responsible for promoting and maintaining the law of Geneva and not that of the Hague, although it was the first Geneva Conference of 1864 that gave the initial impetus to the overall work, while Dunant and particularly Moynier contributed to the establishment of the Hague rules.

However, in the face of the enormous dangers to which civilian populations were exposed because of the considerable developments in means of warfare and seeing that neither governments nor the League of Nations were taking any action, the ICRC raised its voice here too and made proposals for the prevention of such dangers. In doing so, it stepped outside the framework of the Geneva Conventions. It did so deliberately because of the fundamental human interests at stake and it believes that in so doing it remained faithful to its duty.

As early as the end of the first World War, it submitted to the first Assembly of the League of Nations a series of suggestions for outlawing certain methods of warfare that had been used in 1914-1918. It recommended, in particular, that the use of poisonous gas as well as aviation bombing against the civilian population should be prohibited and that the notion of 'undefended localities' should be defined so as to ensure stricter observance. In 1921, the 10th International Conference of the Red Cross invited governments to conclude agreements on these lines in order to complete the Fourth Convention of the Hague. A Commission of Jurists of the Hague, set up by the Washington Conference, drew up a code for limiting air-raids, but it was not ratified by the Powers. Therefore, from 1928 to 1931, the ICRC held meetings of four commissions of international experts, jurists and scientists, whose task was to find ways of protecting the

civilian population against chemical and biological warfare and against air warfare in general. In 1931, the ICRC submitted the conclusions of those commissions to the first Conference for the Reduction and Limitation of Armaments convened under the auspices of the League of Nations. It addressed an appeal to that Conference requesting the prohibition, pure and simple, of air-raids against populated areas.

On the failure of these attempts, the ICRC redirected its efforts towards the possibility of creating 'hospital and safety zones and localities'. In 1938, the 16th International Conference of the Red Cross appealed to governments to limit their bombardments. The same year, at last, the Assembly of the League of Nations adopted a resolution condemning international bombardment of the civilian population and recalling the precautions to be taken to spare non-combatants in attacks against military objectives. Regrettably, that resolution was to remain a dead letter.

For shortly after, the second World War broke out. Foreseeing the disaster that was about to befall defenceless populations, the ICRC addressed a solemn appeal to governments on 12th March 1940, asking them, in particular, to confirm general immunity for peaceful populations, to define their military objectives, and to refrain from indiscriminate bombardments and reprisals. Although fourteen Powers, including the principal belligerents, endorsed that appeal, none applied it in practice. It was followed by another on 12th May 1940 and by reminders on 23rd July and 13th December 1943, also without success.

The ravages caused by the second World War left the world stunned. While the first World War had caused 10 million deaths, including half a million civilians, the second killed 50 million persons—26 million combatants and 24 million civilians. Of that number, according to the most cautious estimates, a million and a half civilians were killed in air-raids, not counting the great number disabled for the rest of their lives. Men had looked on helplessly while death and destruction were rampant, and the means of warfare irreversibly became more and more 'total'—starting with conventional bombardments, going on to blitzkriegs and the V2 rockets, and ending with the terrifying explosion of the atomic bomb, in a second changing the face of the world.

It is realized now, somewhat late, that the massive bombardments of cities did not 'pay' from the military standpoint. Such bombardments were not justified either morally, legally, or even from a practical point of view. Most jurists now consider that the use of the atomic bomb is contrary to law.

On 5th September 1945, shortly after the nightmare of Hiroshima, the ICRC sent a circular letter to national Red Cross Societies drawing their attention to the alarming questions created for the world by that unprecedented event. It was thus the first international institution to raise its voice against nuclear weapons.

In August 1949, government delegates signed four Geneva Conventions. One of them, the fourth, was entirely new and filled a great gap, the painful effects of which had long been felt: the protection of the civilian. It must be noted, however, that the Fourth Geneva Convention protects civilians only against abuses of power by the enemy authority. It does not come within the sphere of the law of war and the use of weapons, with the important exception of the provisions protecting hospitals against all attacks.

Moreover, since the War nuclear physics has steadily pursued its alarming discoveries. At present, a single thermonuclear bomb would annihilate a large city, and the major Powers possess enough to wipe out life on earth. Although demolished cities have been rebuilt, governments have done nothing to re-establish the rules of the Hague, many of which are buried under those ruins.

As early as 5th April 1950, immediately after the new Geneva Convention had been signed, the ICRC requested governments to make every possible effort to prohibit the use of atomic and indiscriminate (' blind ') <sup>1</sup> weapons. The governments remained silent, however, and the ICRC, with the help of experts, drew up ' Draft Rules to Limit the Risks Incurred by the Civilian Population in Time of War '. This draft Convention, which was submitted to the 19th International Conference of the Red Cross at New Delhi in 1957, no longer aimed at prohibiting a specific weapon but at outlawing means and methods of warfare that unduly hit non-combatants. It led to a noteworthy publication of the ICRC.

The Conference, at which governments were represented, merely gave its basic approval of the draft Convention and asked the ICRC to transmit it to the various governments. These, however, having received it, proved unwilling to conclude on that basis a Convention with the force of law.

Undiscouraged, the ICRC, submitted the question again to the 20th International Conference of the Red Cross held at Vienna in 1965. That Conference recognized at least certain principles that should always be observed in order to ensure innocent populations a minimum of protection. In this connection, it adopted an important resolution earnestly requesting the ICRC to carry on its efforts to guarantee the protection of the civilian population.<sup>2</sup>

Encouraged by this significant success, on 19th May 1967, the ICRC sent a circular to all States parties to the Geneva and Hague Conventions, together with a memorandum suggesting that every effort should be made to secure official approval of the four principles which formed the basis of the Vienna resolution.

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<sup>1</sup> See annex to this article, at p. 41 below.

<sup>2</sup> See, by the same author, ' The 20th International Conference of the Red Cross: Results in the Legal Field ', *Journal of the ICJ*, Vol. VII, No. 1 at p. 10.

In a more general context, the memorandum then went on to raise the question of restoring the law of war:

The observance of rules destined, in case of armed conflicts, to safeguard essential human values being in the interest of civilization, it is of vital importance that they be clear and that their application give rise to no controversy. This requirement is, however, by no means entirely satisfied. A large part of the law relating to the conduct of hostilities was codified as long ago as 1907; in addition, the complexity of certain conflicts sometimes places in jeopardy the application of the Geneva Conventions.

No one can remain indifferent to this situation which is detrimental to civilian populations as well as to the other victims of war. The International Committee would greatly value information on what measures Governments contemplate to remedy this situation and in order to facilitate their study of the problem it has the honour to submit herewith an appropriate note.

The 'note' was a *summary review of the international law rules concerning the protection of civilian populations against the dangers of indiscriminate warfare*—a kind of stock-taking of the rules still in force. Since the questions dealt with would undoubtedly form the main part of a programme for reaffirming and developing the laws and customs relating to conflicts, the Note is reproduced in an annex to this article.

However, the ICRC circular of 19th May 1967 did not produce the reactions from governments that were hoped for. Nevertheless, the idea is in the air, as is evidenced, even outside the Red Cross, by the appeal made by the International Commission of Jurists<sup>1</sup> and by Resolution No. XXIII of the International Conference on Human Rights held at Teheran in May 1968.<sup>2</sup> This is a source for new hope.

## 5. Domestic Conflicts

Another major problem remains to be solved: how to ensure that the rules of the law of nations, or at least their essential principles, will be applied in conflicts that are not international, i.e. in civil wars and internal disorders.<sup>3</sup>

<sup>1</sup> *Editor's Note*: see Press Release of the International Commission of Jurists on 'Human Rights in Armed Conflicts: Vietnam' of 7th March 1968, reproduced in *Bulletin* No. 34, p. 41.

<sup>2</sup> Since this article was written, the Resolution of 19th December 1968 (reproduced together with Resolution XXIII on pp. 50-53 below) was adopted unanimously by the General Assembly. This embodies the Teheran Resolution and restates the broad principles set forth by the XXth International Conference of the Red Cross at Vienna in 1965.

<sup>3</sup> See Jean Siotis: *Le droit de la guerre et les conflits armés d'un caractère non-international*, 1958.

This is an urgent humanitarian need. Civil wars proportionately cause more suffering than international wars because of their desperate nature and because of the hatred they engender. Those engaged in the struggle know the men they are fighting against and have personal reasons for bearing them ill-will. In struggles between foreign nations, on the other hand, how many soldiers know the men they are sent to kill? Certainly very few.

The attitude underlying civil wars could hardly be described better than by quoting Vitellius's dreadful remark on the battlefield of Bedriac, reported by Suetonius. When one of his soldiers remarked that the bodies of the enemies, having remained for days without being buried, smelt bad, Vitellius replied: 'The body of an enemy always smells good and it smells even better when he is a fellow-countryman!.'

In reality, no one thought until comparatively recently that the law of nations would have to be applied in revolts against the established order, which were regularly bathed in blood.

It was Vattel, a jurist of the 18th century from Neuchâtel, who put forward for the first time, and very timidly at that, the notion that humanitarian principles should be applied to rebels. Less than twenty years later a great hope was born: during the American war of independence, both parties observed legal and humanitarian rules. Unfortunately, that hope was short-lived: other civil wars were branded by atrocious massacres. Despite the deadly nature of the American Civil War, law was not entirely ignored because of two outstanding men, Abraham Lincoln and his legal advisor, Francis Lieber. But during civil wars that followed, men once again resorted to cruelty and slaughter.

It was then that the Red Cross entered the lists. For it, there are no legitimate or illegitimate wars: there are only victims to be helped. Blood is the same colour everywhere and always.

After considerable resistance, it was finally acknowledged that the Red Cross had a duty to intervene in such conflicts. The most typical case was the Spanish Civil War of 1936-1939, when the ICRC was able to alleviate some of the suffering caused by the struggle.

This led to the idea of introducing into the Geneva Conventions a bold and paradoxical provision under which a purely national situation would be subject to international law.

There were serious difficulties, however, since such a notion ran counter to the sacrosanct principles of the State's sovereignty and security. Government representatives considered that if a State were obliged to apply humanitarian law in civil war, it would encourage revolts and would be helpless to repress criminal acts of subversion.

After months of discussion, a Diplomatic Conference of 1949 adopted the now famous Article 3, of all four Geneva Conventions,

which is a 'miniature convention' in itself. It provides that in non-international conflicts all parties must observe a number of essential humanitarian principles, concerning respect for non-combatants, the prohibition of torture, the taking of hostages, and unlawful sentences and executions. These provisions have already enabled the ICRC to intervene in many conflicts.

This is only a first step, however. The Geneva Conventions, moreover, do not cover the entire field of human suffering nor all sectors of the law of war. Modern times are characterized by the rise of political ideologies that aim at subordinating everything to their ends. At the same time, subversive movements that aim at changing the established order, also by violence, have flourished. The result has been extreme tension between States, sometimes called the cold war, and, within States, the existence of factions struggling for one another's destruction. Very often besides, citizens are subject in their own country to emergency laws, deprived of freedom merely because of their opinions, disposed of arbitrarily and, in the last analysis, treated worse than enemy soldiers captured with weapons in their hands.

In the course of history, law first developed inside human communities. Attempts were then made to extend some of its elements to international wars and afterwards to civil wars. By a strange and surprising reversal, the safeguards afforded to the individual by the law of war now need to be applied in time of peace and to the domestic affairs of nations!

Consequently, there is a growing tendency to consider that the purpose of international law is to ensure a minimum of safeguards and humane treatment for all men in time of peace as in time of war, regardless of whether the individual is in conflict with a foreign nation or with the society to which he belongs. This development will no doubt continue, the ultimate goal being to achieve a uniform status for political prisoners established according to international rules.

Meanwhile, the ICRC is working for the extension to such victims of the principles of the Geneva Conventions. On three occasions already, it has held meetings of internationally known experts, who have drawn up certain fundamental rules for the treatment of political prisoners and established the bases on which the Red Cross may take action for their protection.

In this field, the action of the ICRC goes hand in hand with that of organizations specializing in the protection of human rights. There must not be a no-man's-land in humanitarian action.

## 6. Other Problems

Since the end of the first World War, the international community has concentrated its efforts on ensuring collective security, maintaining peace and, by prohibiting violence, outlawing war. These efforts,

which in 1928 had led to the Briand-Kellogg Pact, found their consecration in the Charter of the United Nations. This is certainly welcome; but a high price has been paid for success. States, though they still war against one another, no longer admit that they are at war and refuse to recognize that the rules of humanitarian law apply although the objective conditions for their application obtain. They thus abuse their discretion, which is far too wide, to determine the nature of a conflict. It is useless to entertain illusions. Not only is the use of force still legally possible in certain cases but, unfortunately, it is constantly the practice. This is abundantly demonstrated by the fact that the means of warfare are forever being improved and large-scale armies are everywhere maintained. Although men for a long time refused to face this fact, today it cannot be denied; and the General Assembly of the United Nations itself has affirmed, by its resolution of 1967 reminding nations of the prohibition of atomic weapons and chemical warfare, that civilization has a stake in the strict observance of the rules of international law on the conduct of hostilities. It is thus recognized that, until such time as an end has finally been put to war, it must be governed by the Rule of Law and the dictates of humanity. It is in this spirit moreover that UNESCO, as a specialized agency of the United Nations, sponsored the work that led, in 1954, to the Convention relating to the Protection of Cultural Property.

The outlawing of war has had another consequence. The theory of the 'just war' has been revived in another form. Basing their stand on the notion of aggression, some would maintain that the victim of aggression is not bound by the same rules of war as the aggressor. Such an attitude must be rejected as far as the rules for the protection of the individual are concerned, for it is essential that humanitarian law should be applied by both sides in every armed conflict. For the same reasons, the emergency forces of the United Nations must also respect the law of war.

It has also been thought that the existence of weapons of mass destruction and 'the balance of terror' between the major Powers would contribute to preventing war. And in fact the existence of such weapons has profoundly modified the nature of international relations and has certainly checked the Powers on the road to nuclear war. It is certain, too, that the clouds threatening the world are so dark that every effort made by the United Nations and the Disarmament Commission to prohibit the use of atomic energy for the purposes of war is to be welcomed. But until such time as that is achieved, and that time may still be far distant, the so-called minor and localized conflicts continue to proliferate and to cause countless victims. As a result, it is becoming increasingly clear that, although a nuclear war would seem by its very nature to elude any rules and regulations, the other forms of war that still exist demand, now more than ever, the reaffirmation of the laws to limit their ravages.

As far as the matters to be dealt with in restoring these laws are concerned, mention has already been made of the most important questions—the protection of civilian populations against the dangers of indiscriminate warfare, the prohibition of the use of certain weapons (even against armed forces) in civil wars and guerrilla warfare. These questions, however, do not exhaust the field to be covered.

Despite the difficulties involved, the categories of persons who may commit belligerent acts must be so redefined as to prevent the confusion, repressions and hardship caused by uncertainty. Such a study is essential at a time when partisans, saboteurs and irregular troops take part in ill-defined struggles (guerrilla movements). It is also necessary to reaffirm and define certain essential humanitarian rules that the belligerents must observe in conducting hostilities, such as protection of the enemy who surrenders, the question of giving quarter, the treatment of parachutists, blockades and pillage.

The rules of protection for the inhabitants of occupied territories were already considerably developed in the fourth Geneva Convention. Similarly, the rights and duties of neutrals were expanded by the third Geneva Convention, when it established that its provisions were to apply to prisoners of war interned in neutral countries, without prejudice to any more favourable treatment that might be given to them. As for the numerous rules on sea warfare, at times disputed or forgotten, it would be appropriate for experts to examine those that should be reaffirmed or developed in the light of the humanitarian ideals of our times.

Lastly, measures to ensure observance of the law are extremely important. In this respect, reprisals, if they cannot be completely prevented, must at least be limited and checked or irremediable disasters will follow. Machinery should also be provided, in particular, to sanction offenders<sup>1</sup> and to ensure that effective control is exercised by the Protecting Powers.

What conclusions are to be drawn from all this? An essential feature of contemporary times is the upheavals and conflicts that have led to demographic and technological expansion, precipitated the clash of profoundly different ideologies, and brought about the emergence on the world scene of many new States. International 'morals', as hitherto conceived, have been weakened as a result, and a large part of the law of nations has been called into question. Although the 20th century has had the merit of proclaiming human rights, it has also witnessed the return of massacres, torture and brutality that mankind, in its hope of progress, had believed were forever banished from the face of the earth. Hatred and fanaticism have shown their face again.

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<sup>1</sup> In this connection, it would be well to refer, in particular, to the *Nuremberg Principles* formulated in 1950 by the International Law Commission of the United Nations.



To yield to this ' neo-barbarism ' would be to abdicate. In reality, although the laws of war are partly inadequate and outdated because they are no longer adapted to present facts, their principles remain valid because they are the expression of an abiding truth. Today as yesterday, certain acts of war must give way to the requirements of humanity. Reason must be master of the inventions of science, and law, although it cannot ignore them, must not exonerate but dominate their effects.

Acts which violate humanitarian principles are not, as they are sometimes presented, ineluctable necessities of war but often expedient solutions that do not pay in the long run and that the parties to the conflict could dispense with without jeopardizing their cause.

Revision of the law of war is urgent. It should be the constant and pressing concern of all men who wish to work, each in his own field and to the best of his ability, towards reconstructing the world in the image of man. Everyone knows that the ICRC, with its long experience, is prepared to assume and devote every effort to that task. No one doubts that public opinion will throw all its enthusiasm into the scale. If the peoples of the world, weary of being manipulated by the blind forces that threaten them, raise their voices and set in motion a ground swell that cannot be stemmed, governments will be forced to sit up and listen. And the battle will be won.

One thing is certain. The law to be built will be accepted and prevail only to the extent that it is founded upon the aspirations of all nations, that it finds within the world community common denominators—in a word, to the extent that it is placed on a universal basis. It depends for its force on its consistency with the mutual and clear-cut interests of the various nations. What is useful to the majority inevitably triumphs in the end. As Saint-Exupéry said: ' In life, there are no solutions. There are forces on the march: they have to be created and the solutions will follow.'

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## ANNEX

### Summary review of international law rules concerning the protection of civilian populations against the dangers of indiscriminate warfare

The basic rule is laid down in article 22 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of October 18, 1907, namely: ' *the right of belligerents to adopt means of injuring the enemy is not unlimited*'. From this principle, still valid and confirmed by the XXth International Conference of the Red Cross, the following rules are derived.

### 1. Limitation for benefit of persons

Whilst combatants are the main force of resistance and the obvious target of military operations, non-combatants shall not be subject to and shall not participate in hostilities. It is therefore a generally accepted rule that *belligerents shall refrain from deliberately attacking non-combatants*. This immunity to which the civilian population by and large is entitled—provided it does not participate directly in hostilities—has not been clearly defined by international law, but in spite of many examples of blatant disregard for it, it is still one of the main pillars of the law of war.

In 1965 the International Conference of the Red Cross in Vienna formulated (in its Resolution XXVIII) the following requirement as one of the principles affecting civilians during war and to which governments should conform, viz: '... distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.'

A major rule deriving from the general norm quoted above is that *bombardments directed against the civilian population as such, especially for the purpose of terrorising it, are prohibited*. This rule is widely accepted in the teachings of qualified writers, in attempts at codification and in judicial decisions; in spite of many violations, it has never been contested. The XXth International Conference of the Red Cross, moreover, did not omit to re-state it.

International law does not define civilian population. Of course, any sections of the population taking part in hostilities could hardly be classified as civilian. The view is general that civilians staying within or in close proximity to military objectives do so at their own risk. But when such people leave objectives which may be attacked and return to their homes they may no longer be subject to attack.

Another rule deriving from the general norm is that *belligerents shall take every precaution to reduce to a minimum the damage inflicted on non-combatants during attacks against military objectives*.

This latter rule is perhaps less widely admitted than those previously mentioned. However, in an official resolution of September 30, 1938, the League of Nations considered it fundamental and it has been given effect in the instructions which many countries have issued to their air forces.

The precautions to which allusion is made would include, for the attacking side, the careful choice and identification of military objectives, precision in attack, abstention from target-area bombing (unless the area is almost exclusively military), respect for and abstention from attack on civil defence organizations: the adversary being attacked would take the precaution of evacuating the population from the vicinity of military objectives.

As can be seen, the obligation incumbent on the attacking forces to take precautions depends in part on the 'passive' precautions taken by the opposite side, or, in other words, the practical steps taken by each belligerent to protect its population from consequences of attacks. What is the extent of such an obligation? In some attempts at drafting regulations it has been suggested that bombing attacks should not be carried out if there is strong probability of indiscriminate effect causing the population to suffer. The International Committee of the Red Cross, for its part, proposed, in its appeal of March 12, 1940, that belligerents should recognize the general principle that *an act of destruction shall not involve harm to the*

*civilian population disproportionate to the importance of the military objective under attack.* On a number of occasions, and recently by qualified writers, by experts and by some army manuals of the laws and customs of war, this rule has been re-stated.

## 2. Target limitation

In this connection, the accepted rule is that *attacks may only be directed against military objectives, i.e. those of which the total or partial destruction would be a distinct military advantage.*

There has always been an accepted distinction between the fighting area and the zones behind the lines. This distinction is purely technical in origin, the theatre of operations depending on the ground gained by the advancing troops and the range of weapons. *Until the advent of air raids, areas behind the firing lines were in fact immune from hostilities.*

This out-dated concept was the basis for the law of conventional warfare, i.e., in the main, articles 25 to 27 of the Regulations annexed to the IVth Hague Convention of 1907. In those articles the word 'bombardment' must be construed to mean 'shelling'; since that time the aeroplane has made air bombardments possible well behind the lines.

Nowadays, a belligerent's whole territory may be considered a theatre of hostilities. The 1907 rules are still applicable to the fighting area at the front. So far as areas well behind the lines are concerned, they are in part out of date.

Although during the Second World War indiscriminate bombardments wrought widespread havoc, no government has attempted to have the practice recognized as lawful. The contrary has in fact been the case. States have shown a marked tendency to justify their air bombardments as reprisals against an enemy who first had recourse to this method, or, as in the case of the use of the atomic bomb, as an exceptional measure dictated by overriding considerations, such as the saving of human lives by putting an end to the war quickly.

*Our first rule of target limitation is not contained in treaty law, but its validity is founded on many official statements, made particularly during the Second World War and the wars of Korea and Vietnam. It has been evolved progressively by analogy with a provision contained in the IXth Hague Convention of 1907; this authorizes naval shelling of certain important military objectives, even if these are situated in undefended towns. The 1949 Geneva Conventions and the 1954 Hague Convention contain several references to the concept of military objective.*

Several documents, such as the draft issued by the Commission of government jurists who met in The Hague (December 1922 - February 1923) and the Draft Rules drawn up in 1956 by the International Committee of the Red Cross, have suggested definitions or lists of military objectives. It is generally admitted *that an objective is military only if its complete or partial destruction confers a clear military advantage.* It is held, also, *that any attacking force, before bombing an objective, shall identify it and ascertain that it is military.*

There are buildings which cannot under any circumstances be considered as military objectives; they are given the benefit of special immunity under

the Geneva Conventions (I, art. 19, IV, art. 18), the Hague Regulations of 1907 (art. 27), and the 1954 Hague Convention relating to the protection of cultural property (art. 4), namely *belligerents will in particular spare charitable, religious, scientific, cultural and artistic establishments as well as historic monuments*. In addition, under the Fourth Geneva Convention, *belligerents may, by special agreement, set up safety or neutralized zones to shelter the civilian population, particularly the weaker members thereof, in order to provide them, under such agreement, with special protection against the effects of hostilities*.

These Conventions stipulate that it is the duty of the authorities to indicate the presence of such buildings and zones by special signs.

Mention must also be made of article 25 of the Regulations annexed to the IVth Hague Convention of 1907, considered for years as one of the fundamentals of the law of war namely: '*The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited*'. The subsequent development of air warfare has vitiated this provision so far as areas behind the fighting lines are concerned; it is a provision which has been supplanted by the military objective concept. It is nevertheless still valid for ground fighting. When localities offer no resistance, an enemy who is able to take them without a fight shall, in the interest of the population, abstain from attack and useless destruction.

It has become customary to declare towns 'open' if it is not intended to defend them against an enemy who reaches them.

### 3. Limitations on weapons and their use

In this respect the basic rule is article 23 (e) of the Regulations annexed to the IVth Hague Convention of 1907, namely: '*It is forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering*'.

Its characteristic is that its aim is not only to spare non-combatants, but also to avoid any suffering to combatants in excess of what is essential to place an adversary hors de combat. This implies that weapons and methods as described below should not be used. Due to the nature of modern war, this field of law no longer concerns only combatants, but also civilian population.

#### (a) *Weapons inflicting needless suffering*

The Conventions of The Hague and of St. Petersburg prohibit the use of '*Poison or poisoned weapons*' (Hague Regulations, art. 23, a), '*a projectile of a weight below 400 grammes which is either explosive or charged with fulminating or inflammable substances*' (St. Petersburg Declaration, 1868) and so-called 'dum-dum' bullets '*which expand or flatten in the human body*' (Hague Declaration, 1899).

It might well be asked whether such new weapons as napalm and high velocity rockets should not be included in this category. They have not so far been expressly prohibited but they do cause enormous suffering and the general prohibition which forms the sub-heading to this section seems applicable to them.

Mention must also be made of a clause in the St. Petersburg Declaration to the effect that parties thereto reserve the right to come to an understanding

whenever a precise proposition shall be drawn up concerning any technological developments in weapons, with a view to maintaining the principles they have established and reconciling the necessities of war to the laws of humanity. It is unfortunate that States have not followed up this suggestion which today is as valid as ever.

(b) 'Blind' weapons

These weapons not only cause great suffering but do not allow of precision against specific targets or have such widespread effect in time and place as to be uncontrollable. They include, for instance, chemical and bacteriological weapons, floating mines and delayed action bombs, whose insidious effects are such that they preclude relief action.

The Geneva Protocol of June 17, 1925, *prohibiting the use in war of asphyxiating, poisonous and other gases and of bacteriological methods of warfare* has replaced older prohibitions (the 1899 Hague Convention, the Treaty of Versailles) and shall be considered as the expression of customary law. In an almost unanimous resolution on December 5, 1966—which affirms that the strict observance of the rules of international law on the conduct of warfare is in the interest of maintaining the accepted norms of civilisation—the United Nations General Assembly called for strict observance by all States of the principles and objectives of this Protocol, and condemned all actions contrary to those objectives. This very brief Protocol is in the nature of a Declaration subject to ratification by the Powers and binding them in the event of conflict with any co-signatories. This formula seems to have been well chosen and remarkably successful; only one violation has been recorded. It should be pointed out, however, that almost eighty States are not participants.

Unanimous agreement on the interpretation of this prohibition has not been achieved by qualified writers. The Protocol mentions not only asphyxiating gases but also 'other' gases. Does this mean all gases or only those which are a hazard to life and health?

The major problem however has been set by nuclear weapons.

In a resolution adopted on November 24, 1961, the United Nations General Assembly stated that the use of nuclear and thermo-nuclear weapons, which exceed even the field of war and cause uncontrollable suffering and destruction to humanity and civilization, 'is contrary to international law and to the laws of humanity'. It must be added, however, that this resolution was not adopted unanimously, did not cover the case of reprisals and, what is more, it envisaged at some future date the signing of a Convention on the prohibition of nuclear weapons, and it also requested the United Nations Secretary-General to hold consultations with governments on the possibility of convening a special Conference for that purpose.

Until such a Convention has been drawn up and widely ratified—it is still not yet known when this special Conference will meet—the fact must be faced that qualified writers differ on this question. It is not our aim here to decide this important controversy. We would state merely that the use of atomic energy in war has not been expressly forbidden, for the conventional law on the conduct of warfare dates back to a time when atomic energy was unknown. However this does not justify its use: in the implementation of the law of war, as any other law, general principles must apply to cases not previously foreseen. It is in fact these very principles which

the present survey reviews, i.e.: no attack on the civilian population per se, distinction between combatants and non-combatants, avoidance of unnecessary suffering, only military objectives to be targets for attack, and even in this latter case, the taking of every precaution to spare the population.

This view was proclaimed by the XXth International Conference of the Red Cross which met in Vienna in 1965. The Resolution No. XXVIII then adopted postulated certain essential principles of protection for civilian populations and added that '*the general principles of the Law of War apply to nuclear and similar weapons*'. This does not imply that the Conference intended to make any decision on the legitimacy of using such weapons; it merely made it clear that in any event nuclear weapons, like any others, were subject to these general principles until such time as governments came to an understanding on measures for disarmament and control with a view to a complete prohibition of the use of atomic energy in warfare.

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# JUDICIAL APPLICATION OF THE RULE OF LAW

by

L. G. WEERAMANTRY \*

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## THE CONCEPT OF STATE RESPONSIBILITY

### Responsibility towards Unborn Children

The decision of the French *Conseil d'Etat* in Mme Saulze's case is a most interesting one, in that it shows the extent to which the civil law concept of State responsibility is being developed.

Under the concept as understood in France and other countries which have come to recognise it, the individual can bring an action against the State for injury or damage caused to him,

(a) where the injury or damage results from the negligence or wrongful acts of the Executive or other organ of the State.

(b) where the injury or damage results from State operations and is not caused by negligence or wrongful acts (*responsabilité sans faute*).

The second aspect of the concept is one of growing importance in the field of human rights. It is born of the recognition that special hardship resulting from State action taken in the interest of the community should be shared by all its members. The nature of the concept is explained in Mme Saulze's case as follows :

The concept that the State may be liable even in the absence of negligence or wrongful act (*responsabilité sans faute*) has been judicially evolved to correct the inequality inherent in the law that governs the relations between the State and the individual. It acts as a balance between two principles : the overriding interest of the general welfare, which it is the duty of the Administration

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\* B.A. (London) ; Advocate, Ceylon Bar ; of Gray's Inn, Barrister-at-Law ; Senior Legal Officer, International Commission of Jurists.

to assert whenever the interest of individuals is in conflict with it, and the principle of equality which requires that any damage resulting from State action in relation to public undertakings should be compensated when it exceeds that which normally must be accepted in day-to-day life.

This takes account... of the importance assigned to the concept of *responsabilité sans faute* when the equality of citizens is disturbed as a result of a... law or regulation... or an administrative act where, in the case of public works for instance, the Administration has been given exceptional privileges and powers.

But it also includes the extension of the concept to all cases where the Administration creates... a special risk, either for its own servants or others, to the detriment of the principle of equality.

At the recent European Conference of the International Commission of Jurists on The Individual and the State, held at Strasbourg on 26th and 27th October, 1968,<sup>1</sup> the concept was for the first time recognised on a universal basis as one that was essential to ensure the better protection of the individual. Conclusion 14 of that Conference runs thus :

The State should be liable for damage arising from the negligence or wrongful acts of its executive and other organs. Under the concept of State responsibility, the State should also be liable in principle for damage resulting from those of its operations which cast upon an individual a burden which is unreasonable in relation to the rest of society, particularly when his ability to earn his livelihood, his family rights or his property rights are adversely affected.

The facts of Mme Saulze's case are as follows: the plaintiff-respondent, a schoolmistress teaching at a girls' school at Sancerre, had contracted german measles during an epidemic which affected her school. She was at the time a few months pregnant. The child born to her was found to suffer from serious disabilities, which were proved to have been caused by the mother's illness. Finding that the injury to the child was attributable to the mother's employment, the Administrative Tribunal of Orleans held that this was a proper case where the State should be liable.

The Minister of National Education appealed against the judgment of the Administrative Tribunal to the *Conseil d'Etat*. The *Assemblée du Contentieux*<sup>2</sup> of the *Conseil d'Etat* confirmed the judgment of the Administrative Tribunal of Orleans and dismissed the appeal. In doing so, it held that there was no doubt that the injury in question was directly attributable to the respondent's work, and that a child who had been conceived must

<sup>1</sup> The Conclusions of the Conference are to be found in *Bulletin* of the ICJ, No. 36, p. 1.

<sup>2</sup> The *Assemblée du Contentieux* is a full bench of the Judicial Division of the *Conseil d'Etat*.



be recognised as a distinct individual, towards whom the benefit of the principle of State responsibility should be extended. The *Conseil d'Etat* also observed that this was a case where the need for the mother to perform public duties under certain adverse conditions exposed the child in the womb to special and abnormal risk. In view of the serious consequences to the child, he was declared entitled to compensation from the State for life.

While the recognition of the property and other rights of an unborn child has long been a part of civil law principles and has its roots in Roman law, the application of the doctrine of State responsibility to unborn children is a new and interesting development for jurists interested in the growth of human rights jurisprudence. The Strasbourg Conference referred to above was held in October 1968, and the decision of the *Conseil d'Etat* in this case was given in November. In the light of these, the further development and practical application of the concept of State responsibility in those countries that recognise it and the possible adoption of the doctrine in countries that do not as yet do so will be watched with interest.

Conseil d'État, France

*THE MINISTER OF NATIONAL EDUCATION v. DAME SAULZE*

Rapporteur : Mrs Bauchet. Commissaire du Gouvernement : Mr Bertrand

Decided : 6 November 1968

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## RIGHT TO PERSONAL LIBERTY

### Power of Courts to Review Preventive Detention Orders

In countries where preventive detention exists and persons can be arrested and detained under emergency provisions or Defence Rules, it is of vital importance that the Judiciary should always be vigilant to determine whether, in any given case, the circumstances have arisen or the conditions have been fulfilled under which such an arrest or detention could be justified.

This case of *Kasuri v. East Pakistan* relates to the arrest on 28th March 1967 and detention of three persons under the Defence of Pakistan Rules. The High Court of East Pakistan took the view that the grounds or material on which the detaining authority satisfied itself of the need for detention were open to judicial review, and that the mere subjective satisfaction of the detaining authority did not suffice for lending validity to the detention order. The Court

itself had to be satisfied on the point of the sufficiency and reasonableness of the grounds that formed the basis of the order.<sup>1</sup>

The activities of the three detainees in this case considered as a whole go to show that they were voicing grievances and protesting against certain policies and actions of the Government, including alleged police excesses on peasants and workers. The Court observed that, in a democratic State, citizens have the right to criticize Government measures and activities, but they cannot use that right as a licence to bring the Government into hatred or contempt, or to disturb law and order. In view of the nature of the grievances aired and the protests made by the detainees, the manner in which they acted and the conditions prevailing at the relevant time, it could not be said that their activities were likely to endanger public safety or the maintenance of public order and peaceful conditions in the country, far less the maintenance of essential supplies and services.

In the light of its findings, the Court held that the orders of detention made in respect of the three detainees were not in accordance with law and in excess of jurisdiction; it directed that the detainees be forthwith released.

The Rule of Law principle of judicial control over the exercise of emergency or other powers enabling preventive detention is fully set out in Conclusion 19 of the Strasbourg Conference of Jurists. Although this Conclusion relates to the need for judicial control over the exercise of emergency powers, it is *a fortiori* applicable to the exercise of executive power under Defence Rules or other legislation deriving its validity from the Constitution of a country.

Conclusion 19 runs thus :

There should be a system of judicial control over the assumption and exercise of emergency powers by the executive with a view to

(a) determining whether the circumstances have arisen and the conditions have been fulfilled under which the powers may be exercised ;

(b) limiting the extent to which such emergency powers may be exercised in derogation of the fundamental rights of the individual ; and

(c) giving the courts a supervisory jurisdiction to ensure that emergency powers are used only for the specific purpose for which they were granted, and that they are not exceeded. The courts should have the power to grant effective remedies in cases of misuse or abuse of emergency powers.

During protracted emergencies there is a tendency on the part of the Executive, arising from the continuous exercise of wide

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<sup>1</sup> See also *Motahar Hossain Siddiqui v. The Government of East Pakistan* (Civil Appeal No. 66D of 1966).

powers of arrest and detention, to adopt a casual attitude towards personal liberty. In *Sadanandan v. The State of Kerala*<sup>1</sup> Mr Gajendragadkar, the then Chief Justice of India, observed that the continuous exercise of wide powers of detention tended to make the conscience of the authorities exercising those powers blunt to the rights and freedoms of the citizen, and that this cavalier attitude towards fundamental rights could ultimately pose a serious threat to the basic values on which the democratic way of life in India was founded. There have been several cases where the Indian judiciary, in the interests of personal liberty, have strictly construed legislative provisions authorizing preventive detention.<sup>2</sup>

In regard to administrative orders restricting the right to personal freedom, the Courts, or Administrative Tribunals in the case of civil law countries, enjoy the power of examining the reasons on which orders of administrative detention are based. Where the reasons are vague or the orders are based on facts which are materially incorrect, the appropriate Court or the Administrative Tribunal, as the case may be, has power to declare the order void.<sup>3</sup>

High Court of East Pakistan

**MAHMOOD ALI KASURI AND OTHERS v. THE GOVERNMENT OF EAST PAKISTAN**

Before Khan and Sayem JJ.

Decided : 19 March 1968

## ADMINISTRATIVE ORDERS AND DECISIONS

### Reasoned Administrative Decision Essential Requirement of Rule of Law

The facts of *Medcon Construction v. Cyprus* disclosed that the Minister of Communications and Works had invited tenders for the supply of crushed metal. The three tenders, one from the Applicants, one from the Interested Party and one from a third party, were opened at a meeting of the Tender Board on 5th March

<sup>1</sup> See Digest of Judicial Decisions on Aspects of the Rule of Law, *Journal of the ICJ*, Vol. VII, No. 1, pp. 146-147.

<sup>2</sup> See *State of Maharashtra v. Sangzivi*, Digest of Judicial Decisions, *Journal of the ICJ*, Vol. VII, No. 1, pp. 149-150; also *State of Bihar v. Rambalak Singh*, Digest of Judicial Decisions, *Journal of the ICJ*, Vol. VII, No. 1, pp. 147-149.

<sup>3</sup> See *Minister of the Interior v. Mony*, *Conseil d'Etat*, France, Digest of Judicial Decisions on Aspects of the Rule of Law, *Journal of the ICJ*, Vol. VIII, No. 1, pp. 121-122.

1966 and were handed over to a representative of the Ministry. The Tender Board itself took no decision on the matter; it was informed, by letter dated 12th March from the Director of Public Works, that 'the decision of the Minister of Finance'—who was also acting as Minister of Communications and Works—was that the contract should be given to the Interested Party.

Store Regulation 41D governing tenders reads:

The Minister of Finance may suspend consideration [by the Tender Board] of any tender and refer it to the Council of Ministers for a decision.

The Minister of Finance referred the question to the Council of Ministers and obtained the Council's oral approval of his proposed action.

The Court, in its judgment annulling the decision to award the tender to the Interested Party, observed that Regulation 41D was, by its very nature, a measure to be resorted to in special circumstances and for good reason, to be explicitly stated in the Minister's decision. It definitely did not enable the Minister to take a decision on the tenders himself and submit it for covering oral approval to the Council of Ministers. It was essential for the propriety of proceedings of public collecting organs that they should keep such written records of proceedings as were required for purposes of good and proper administration.

One cannot conceivably speak of an effective decision of the Council of Ministers having been validly taken unless a written record thereof existed. This was required not only for reasons of good administration, but for constitutional purposes, in view of the letter and spirit of Article 57 of the Constitution. The whole administrative process leading up to the decision to award the contract to the Interested Party was fatally defective, due to the absence of a duly taken and reasoned decision<sup>1</sup> of the Minister of Finance to refer the matter to the Council of Ministers and of any such decision of the Council of Ministers itself.

From the minutes of a meeting held at the Ministry of Finance on 10th March 1966, it appears that it was found that the tender of the Interested Party was much lower than that of the Applicants but that, on the other hand, the Interested Party had failed to comply with certain terms of the invitation for tenders. It was further stated in the minutes that the saving which would result from the acceptance of the tender of the Interested Party was an important factor; and therefore the public interest required that the non-compliance by the Interested Party with these terms should be overlooked. Commenting on this minute the Court observed:

<sup>1</sup> See also *Constantinides v. Republic of Cyprus*, Digest of Judicial Decisions, *Journal of the ICJ*, Vol. VIII, No. 2, pp. 119-120.

Moreover, tenderers were entitled to equality of treatment, and to exempt the Interested Party from compliance with the express requirement of term 13 of the invitation for tenders, and from the sanction for such non-compliance was not only contrary to good and proper administration and in abuse or excess of powers, but also *contrary to the requirement of equality of treatment laid down by Article 28(1) of the Constitution...*

I have not the slightest doubt that the Minister of Finance has acted, as he did in this case, in all good faith and in an effort to expedite matters and make a saving of public funds, but, *where good and proper administration and the Rule of Law are concerned, the end can never justify the means, however worthwhile such end may be.*

The judgment refers to two important Articles of the Cyprus Constitution. Article 28(1) is an equal protection clause based on the Universal Declaration of Human Rights and the European Convention, and states that

All persons are equal before the law, the administration and justice, and are entitled to equal protection thereof and treatment thereby.

Article 57 has several sub-sections, but its essence is that decisions taken by the Council of Ministers must be transmitted forthwith to the office of the President and the Vice-President of the Republic, who shall have the right to return it to the Council of Ministers for reconsideration. It also gives the President and Vice-President the right to veto decisions of the Council. The section clearly suggests that decisions should be taken by the Council of Ministers only in matters of vital importance to the State and that the power to make such decisions should not be arrogated in less important matters.

Attention must be drawn in this connection to Conclusion 13 of the Strasbourg Conference on the Individual and the State, which relates to the motivation for an order. It runs thus:

When an administrative order is made which affects or is likely to affect the rights of the individual, the reasons for the order should be fully stated.

The case in question provides a good example of the correct application by a Court of the principle underlying this Conclusion.

Supreme Court of Cyprus

*MEDCON CONSTRUCTION AND OTHERS v. THE REPUBLIC OF CYPRUS* (1968 9 J.S.C. pp. 967-975)

*Before Triantafyllides J.*

Decided: 7 September 1968

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## **Basic Texts**

# **Human Rights in Armed Conflicts**

Peace is the underlying condition for the safeguard of individual liberty. Unfortunately armed conflicts continue to plague our world. The prime concern of the international community must be to end such armed conflicts and to achieve general and complete disarmament; as the techniques and means of destruction escalate, these tasks become more urgent. In the meanwhile, every effort should be made to minimise the brutality and the erosion of the humanitarian principles enshrined in the Hague and Geneva Conventions.

Growing realisation of the urgency of these problems by the United Nations is evidenced by three important resolutions recently adopted which we set out below.<sup>1</sup>

Resolution No. XXIII

### **THE PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICTS**

Resolution adopted by

#### **THE UN INTERNATIONAL CONFERENCE ON HUMAN RIGHTS**

Teheran, 22nd April—13th May 1968

THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS,

CONSIDERING that peace is the underlying condition for the full observance of human rights and war is their negation,

BELIEVING that the purpose of the United Nations Organization is to prevent all conflicts and to institute an effective system for the peaceful settlement of disputes,

OBSERVING that nevertheless armed conflicts continue to plague humanity,

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<sup>1</sup> Also see *Journal* Vol. VII, No. 1 page 3; *Journal* Vol. IX, No. 1 Introduction; *Bulletin* No. 21 page 1; *Bulletin* No. 34 page 41; *Bulletin* No. 35 page 3; Special Study by M. Jean Pictet in this issue of *The Review*.

CONSIDERING, also, that the widespread violence and brutality of our times, including massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare, including napalm bombing, erode human rights and engender counter-brutality,

CONVINCED that, even during the periods of armed conflict, humanitarian principles must prevail,

NOTING that the provisions of the Hague Conventions of 1899 and 1907 were intended to be only a first step in the provision of a code prohibiting or limiting the use of certain methods of warfare and that they were adopted at a time when the present means and methods of warfare did not exist,

CONSIDERING that the provisions of the Geneva Protocol of 1925 prohibiting the use of 'asphyxiating, poisonous or other gases and of all analogous liquids, materials, and devices' have not been universally accepted or applied and may need a revision in the light of modern development,

CONSIDERING further that the Red Cross Geneva Conventions of 1949 are not sufficiently broad in scope to cover all armed conflicts,

NOTING that States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict,

NOTING ALSO that minority racist or colonial regimes which refuse to comply with the decisions of the United Nations and the principles of the Universal Declaration of Human Rights frequently resort to executions and inhuman treatment of those who struggle against such regimes *and considering* that such persons should be protected against inhuman or brutal treatment and also that such persons if detained should be treated as prisoners of war or political prisoners under international law,

1. REQUESTS the General Assembly to invite the Secretary-General to study

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts, and

(b) The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

2. REQUESTS the Secretary-General, after consultation with the International Committee of the Red Cross, to draw the attention of all States Members of the United Nations system to the existing rules of international law on the subject and urge them, pending the adoption of new rules of international law relating to armed conflicts, to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with 'the principles of the law of nations derived from the

usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience'.<sup>1</sup>

3. CALLS ON all States which have not yet done so to become parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925, and the Geneva Conventions of 1949.

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The Resolution was sponsored by India, Czechoslovakia, Jamaica, Uganda and the United Arab Republic. It was introduced in the Second Committee of the Conference, where it was adopted by 53 votes in favour, none against, with 1 abstention. At the Plenary Session of the Conference it was adopted by 67 votes in favour, none against, with 2 abstentions.

A/Res.2444 (XXIII)

## HUMAN RIGHTS IN ARMED CONFLICTS

Resolution adopted by

THE GENERAL ASSEMBLY (23RD REGULAR SESSION)

19th December 1968

THE GENERAL ASSEMBLY,

RECOGNIZING the necessity of applying basic humanitarian principles in all armed conflicts,

TAKING NOTE of resolution XXIII on human rights in armed conflicts, adopted on 12 May 1968 by the International Conference on Human Rights, held at Teheran,<sup>2</sup>

AFFIRMING that the provisions of that resolution need to be effectively implemented as soon as possible,

1. AFFIRMS resolution XXVIII of the twentieth International Conference of the Red Cross held at Vienna in 1965, which laid down, *inter alia*, the following principles of observance by all governmental and other authorities responsible for action in armed conflicts:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian population as such;

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<sup>1</sup> The words in quotations are taken from the Preamble of the Hague Convention No. IV of 18th October 1907. They are known as the 'Martens Clause', after their author, Professor F.F. de Martens (see p. 28 above). Convention, Art. 63; Second Convention, Art. 62; Third Convention, Art. 142; Fourth Convention, Art. 158).

<sup>2</sup> See above.



(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible ;

2. INVITES the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study :

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts ;

(b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare ;

3. REQUESTS the Secretary-General to take all other necessary steps to give effect to the provisions of the present resolution and to report to the General Assembly at its twenty-fourth session on the steps taken by him ;

4. FURTHER REQUESTS Member States to extend all possible assistance to the Secretary-General in the preparation of the study requested in paragraph 2 above ;

5. CALLS UPON all States which have not yet done so to become parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949.

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Adopted unanimously by 111 votes in favour and no abstentions, this resolution had previously been approved on 10.12.1968 by the Third Committee before which it had been submitted by the following countries : Afghanistan, Denmark, Finland, India, Indonesia, Iraq, Jamaica, Jordan, Morocco, Norway, Philippines, Sweden, Uganda, United Arab Republic, Yugoslavia and Zambia.

A/Res.2454 (XXIII)

## QUESTION OF GENERAL AND COMPLETE DISARMAMENT

Resolutions adopted by

THE GENERAL ASSEMBLY (23RD REGULAR SESSION)

20th December 1968

### A

THE GENERAL ASSEMBLY,

REAFFIRMING the recommendations of its resolution 2162 B (XXI) of 5 December 1966 calling for strict observance by all States of the principles and objectives of the Protocol for the Prohibition of the

Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925,<sup>1</sup> condemning all actions contrary to those objectives and inviting all States to accede to that Protocol,

CONSIDERING that the possibility of the use of chemical and bacteriological weapons constitutes a serious threat to mankind,

BELIEVING that the people of the world should be made aware of the consequences of the use of chemical and bacteriological weapons,

HAVING CONSIDERED the report of the Conference of the Eighteen-Nation Committee on Disarmament,<sup>2</sup> which recommended that the Secretary-General appoint a group of experts to study the effects of the possible use of such weapons,

NOTING the interest in a report on various aspects of the problem of chemical, bacteriological and other biological weapons which has been expressed by many Governments and the welcome given to the recommendation of the Conference of the Eighteen-Nation Committee on Disarmament by the Secretary-General in the introduction to his annual report on the work of the Organization for 1967-1968,<sup>3</sup>

BELIEVING that such a study would provide a valuable contribution to the consideration in the Eighteen-Nation Committee on Disarmament of the problems connected with chemical and bacteriological weapons,

RECALLING the value of the report of the Secretary-General on the effects of the possible use of nuclear weapons,<sup>4</sup>

1. REQUESTS the Secretary-General to prepare a concise report in accordance with the proposal in section II of the introduction to his annual report for 1967-1968 and in accordance with the recommendation of the Conference of the Eighteen-Nation Committee on Disarmament contained in paragraph 26 of its report ;

2. RECOMMENDS that the report be based on accessible material and prepared with the assistance of qualified consultant experts appointed by the Secretary-General, taking into account the views expressed and the suggestions made during the discussion of this item at the twenty-third session of the General Assembly ;

3. CALLS UPON Governments and national and international scientific institutions and organizations to co-operate with the Secretary-General in the preparation of the report ;

4. REQUESTS that the report be transmitted to the Eighteen-Nation Committee on Disarmament, the Security Council and the General Assembly at an early date, if possible by 1 July 1969, and to the Governments of Member States in time to permit its consideration at the twenty-fourth session of the General Assembly ;

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<sup>1</sup> League of Nations *Treaty Series*, vol. XCIV, 1929, No. 2138.

<sup>2</sup> A/7189-DC/231.

<sup>3</sup> *Official Records of the General Assembly, Twenty-third Session, Supplement No. 1A (A/7201/Add.1)*, para 32.

<sup>4</sup> United Nations publication, Sales No. : E.68.IX.1.

5. RECOMMENDS that Governments give the report wide distribution in their respective languages, through various media of communication, so as to acquaint public opinion with its contents;

6. REITERATES its call for strict observance by all States of the principles and objectives of the Geneva Protocol of 17 June 1925 and invites all States to accede to that Protocol.

Adopted by 107 votes in favour, none against, with 2 abstentions.

## B

### THE GENERAL ASSEMBLY,

CONSIDERING that one of the main purposes of the United Nations is to save mankind from the scourge of war,

CONVINCED that the armament race, in particular the nuclear arms race, constitutes a threat to peace,

BELIEVING that it is imperative to exert further efforts towards reaching agreement on general and complete disarmament under effective international control,

NOTING WITH SATISFACTION the agreement of the Governments of the Union of Soviet Socialist Republics and of the United States of America to enter into bilateral discussions on the limitation and the reduction of both offensive strategic nuclear weapon delivery systems and systems of defence against ballistic missiles,

HAVING RECEIVED the report of the Conference of the Eighteen-Nation Committee on Disarmament,<sup>1</sup> to which are annexed documents presented by the delegations of the eight non-aligned members of the Committee and by Italy, Sweden, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America,

NOTING the memorandum of 1 July 1968 of the Government of the Union of Soviet Socialist Republics concerning urgent measures to stop the arms race and achieve disarmament<sup>2</sup> and other proposals for collateral measures which have been submitted at the Conference of the Eighteen-Nation Committee on Disarmament,

RECALLING its resolutions 1767 (XVII) of 21 November 1962, 1908 (XVIII) of 27 November 1963, 2031 (XX) of 3 December 1965, 2162 C (XXI) of 5 December 1966, 2344 (XXII) of 19 December 1967 and 2342 B (XXII) of 19 December 1967,

1. REQUESTS the Conference of the Eighteen-Nation Committee on Disarmament to pursue renewed efforts towards achieving substantial progress in reaching agreement on the question of general and complete disarmament under effective international control, and urgently to analyse the plans already under consideration and others that might

<sup>1</sup> A/7189-DC/231.

<sup>2</sup> A/7134.

be put forward to see how in particular rapid progress could be made in the field of nuclear disarmament;

2. FURTHER REQUESTS the Conference of the Eighteen-Nation Committee on Disarmament to continue its urgent efforts to negotiate collateral measures of disarmament;

3. DECIDES to refer to the Conference of the Eighteen-Nation Committee on Disarmament all documents and records of the meetings of the First Committee concerning all matters related to the disarmament question;

4. REQUESTS the Conference of the Eighteen-Nation Committee on Disarmament to resume its work as early as possible and to report to the General Assembly, as appropriate, on the progress achieved.

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Adopted by 109 votes in favour, none against, with 4 abstentions.

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## ICJ News

After many years of public service to the Rule of Law, the Executive Secretary, Dr V. M. Kabes, has left the Commission to take up an appointment in the private sphere. All who have come into contact with him—especially during the Commission's Conferences, which he has organized so effectively—will know his devotion to the Rule of Law and appreciate the value of his work to promote human rights and freedoms. The Commission is not alone in expressing its gratitude to Dr Kabes and wishing him success and happiness.

### HUMAN RIGHTS IN ARMED CONFLICTS

Since the adoption of Resolution XXIII by the UN Conference on Human Rights at Teheran last May (analysed in Bulletin No. 35 and published on page 50 above), there have been encouraging signs that Governments, together with public opinion are now increasingly concerned about the problem of the protection of human rights in armed conflicts. At its last session, the UN General Assembly adopted several resolutions reflecting that of Teheran.

In particular, Resolution 2444 of 19th December 1968 (reproduced on page 52 above) requested that studies be undertaken by the Secretary General in consultation with the International Committee of the Red Cross and other international organizations of the possible measures to strengthen existing humanitarian conventions, to ensure more effective protection of civilians, prisoners and combatants and to prohibit or limit the use of certain methods of warfare.

In furtherance of this resolution, the International Committee of the Red Cross organised a meeting during February of some twenty internationally known experts, who were present in a consultative capacity to discuss these problems. Among the experts were Mr MacBride, and Mr Kéba M'Baye, the first President of the Supreme Court of Senegal and head of ASERJ, the Senegalese jurists association affiliated to the Commission.

Also in connection with these important developments Mr Seán MacBride, Secretary General of the Commission, took part in a meeting of the Belgian League for the Rights of Man held in Brussels in January 1969.

The subject on which Mr MacBride was invited to address the participants was 'Human Rights in Armed Conflicts'. The Belgian League, one of the most dynamic organisations in the promotion of human rights, has been constantly and actively interested in this problem. The address by Mr MacBride was followed with great interest not only by the participants, but also by the Belgian press, radio and television and formed the subject of several interviews and articles.

### AFRICA

The Commission sent an observer to the trial in Salisbury (3rd-12th February) of the Reverend Ndabaningi Sithole, a Methodist minister and

leader of the banned Zimbabwe African National Union, one of the two main nationalist organisations opposing the white regime in Rhodesia.

Mr Sithole is a Bachelor of Divinity (Massachusetts, 1958), a former preacher and former principal of an African primary school. He entered politics in 1960.

He has been held in detention without trial since before 'UDI' under emergency regulations. The detention order expired on 19th November 1968. On 20th November, Mr Sithole was charged with subversive activities. He was tried in the High Court on the main charge of incitement to murder and on alternative charges of conspiracy to commit murder and of inciting others to violence contrary to the Law and Order Maintenance Act.

Mr Sithole was found guilty of the main charge and sentenced to six years' imprisonment with hard labour. Before sentence was passed, Mr Sithole dissociated his name 'from any subversive activities, terrorist activities and from any form of violence'.

The Commission's observer was Mr Muir Hunter, Q.C. from London, who is a member of *Justice*, the British Section of the ICI.

## LATIN AMERICA

The Commission is giving increasing emphasis to its work in Latin America. Mr Marino Porzio, the member of the Secretariat's legal staff whose field of work is Latin America, will be visiting the following countries during April, May and June: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, the Dominican Republic, Ecuador, Guatemala, Guyana, Mexico, Peru, Puerto Rico, Uruguay and Venezuela. His main task will be to strengthen links with National Sections and their members by a more active association in their work and to establish closer contacts with supporters of the ICJ in countries where there are no National Sections. He is in general terms to arrange for future cooperation and common plans of action. Dr Porzio is also to meet representatives of international organizations, with whom he will discuss the activities that are or might be carried out jointly with the Commission. He will see members of the Governments, who in many countries have shown interest in his visit, members of the legal professions, university authorities, and leading politicians, students and trade unionists. Dr Porzio will also give a series of lectures in several countries and take part in debates, discussion groups and seminars.

*In Argentina*, a commemorative ceremony was held on 10th December to celebrate Human Rights Year. It was organised by the Buenos Aires Section (whose President is Mrs Alicia Justo) in cooperation with the University of El Salvador.

*In Chile*, the Committee for Human Rights Year was organized by the Commission's National Section, whose President is Mr Osvaldo Illaniz Benitez (President of the Supreme Court), in cooperation with the Foreign Ministry and the Chilean United Nations Association. The Committee arranged for a series of lectures during Human Rights Year (from August to December) on different aspects of human rights. The lectures culminated in a ceremony on 10th December; among the speakers were the Foreign Minister, the Minister of Justice and the Chairman of the United Nations Association. The President of the Supreme Court also spoke, on a subject of particular importance to the whole of Latin America: the Inter-American Court of Justice. The National Section will publish the speeches and lectures.

*In Mexico*, the Institute of Legal Research of Mexico University is now holding an international Seminar, which is due to conclude on 6th April. The Seminar is sponsored by the Mexican Foreign Ministry, which is also helping to organise it. Legal and practical problems relating to human rights and their implementation are being discussed. There are a great number of

participants, some of whom have benefited from travel grants provided by the Inter-American Commission of Human Rights of the OAS.

## SPAIN

Human Rights Year was celebrated in Spain on the individual initiative of the Spanish Association of Friends of the United Nations, whose Secretary General is Mr Anton Canellas. After some difficulty and much hard work, a large public meeting was organized on 24th November. It took place on the premises of the Barcelona Bar. Dr Porzio, representing Mr MacBride, transmitted the Commission's best wishes.

The Commission publicly expressed support for the courageous petition sent to the Government by the Madrid Bar demanding better safeguards and treatment for political detainees. The Commission also condemned the dictatorial methods of the authorities and the waves of arbitrary arrests under the state of emergency, which it considered not to be justified by the national situation.

## INDIA

The newly formed Lucknow Section of the Indian Commission of Jurists held an important and successful Seminar in October 1968 on the 'Amendability of Fundamental Rights in the Indian Constitution'. The Seminar was organized in view of the fact that there was a bill before the Indian Parliament to facilitate the amendment of that portion of the Indian Constitution relating to fundamental rights. Shri B. P. Srivastava, reader in law at Lucknow University, prepared a Working Paper, and Opinions for discussion were submitted by Shri P. G. Krishnan, secretary of the Section and by Shri Jagdish Swaroop, senior advocate, Allahabad.

## THE PRESS

On 6th February last year, the Director-General of the International Press Institute invited the Secretary-General, the Executive Secretary and all the members of the legal staff of the Commission to Zurich. He asked the Commission to take part in a study on 'Libel Laws affecting the Press' as experts on the legal aspects. The Secretariat of the Commission has since been closely working with the IPI in this field. Valuable assistance has been provided by the National Sections of the countries which have been selected for the purposes of this study: Argentina, Denmark, France, Federal Republic of Germany, Japan, the Philippines, the United States of America and the United Kingdom.

*Justice* and *Libre Justice*, the British and French National Sections, held round table discussions in London on 3rd December 1968 and in Paris on 10th December. Lawyers and journalists had a very useful exchange of views on particular points of fundamental importance to the law of libel as it affects the press. The German, Danish and Japanese Sections also intend to organize similar meetings.

The preparatory work is to lead to a 'symposium' which will be held in Zurich (probably in May), where representatives of the press and the legal professions coming from the countries covered by the study will discuss the broad lines of a book dealing with the comparative law aspects of the subject. The book will almost certainly be finished by the end of this year and will be an invaluable contribution to an important subject, which is of direct relevance to the protection of human rights.

## **Books of Interest**

### **General**

*Haiti and the Dominican Republic*

by Rayford W. Logan

London New York Toronto 1968

Issued under the auspices of the Royal Institute of International Affairs

pp. 220

*L'Année Politique et Economique Africaine*

by Pierre Biarnes, Philippe Decraene, Philippe Herreman

Edited by the African Society

*L'Empire Américain*

by Claude Julien

Bernard Grasset, Paris 1967

pp. 399

### **Human Rights**

*Fundamental Rights in the Irish Law and Constitution*

by J. M. Kelly

2nd Edition

Allen Figgis & Co. Ltd., Dublin 1967

pp. 355

*International Protection of Human Rights*

by John Carey

Published for the Association of the Bar of the City of New York

by Oceana Publications, Inc., New York 1968

pp. 116

*Judicial Review of Administrative Action*

by S. A. de Smith

Stevens & Son Ltd., London 1968

pp. 629

*La Question Palestinienne*

Colloquium of Arab Jurists on Palestine 1967

*La vie privée et le Droit Moderne*

by J. Malherbe

Paris 1968

pp. 212

*Abuse of Power (from Cuba to Viet-Nam)*

by Theodore Draper

M. Secker & Waring Ltd., London 1968

pp. 244

*The Birthright of Man*

by Jeanne Hersch

Unesco, Payot, Paris 1968

pp. 588



*Les Droits de l'Homme*

by W. J. Ganshof van der Meersch  
University Press, Brussels 1968  
pp. 579

*Les Libertés à l'Abandon*

by R. Errera  
Edited by the 'Seuil', Paris 1968  
pp. 250

*O Contrôlo dos atos Administrativos pelo poder Judiciario*

by M. Seabra Fagundes  
Rio de Janeiro 1967  
pp. 473

*Stephanie on Trial (Prison Conditions in South Africa)*

by Albie Sachs  
The Harvill Press Ltd., 1968  
pp. 283

*The Legal Limits of Journalism*

by Herbert Lloyd  
Pergamon Press U.K. 1968  
pp. 121

**International Law***Répertoire du Droit International*

by Ph. Francescakis  
Daloz, Paris 1968

*The Law of Armed Conflicts (International Law as applied by International Courts & Tribunals)*

by G. Schwarzenberger  
Vol. II  
Stevens & Sons Ltd., London 1968  
pp. 881

*The New States & International Legal Order*

Extract from the 'Recueil des Cours' Vol. II  
by A. W. Sijthoff, Leyden  
pp. 102

*The Vietnam War and International Law*

by Richard A. Falk  
Princeton University Press 1968  
Sponsored by the American Society of International Law  
pp. 633

*L'Europe du Marché Commun*

by P. Drouin  
Edited by Julliard, Paris 1968  
pp. 416

*Liberté d'établissement et libre prestation des services dans le Marché Commun*

by Jean Bontemps

Establishment of Emile Bruylant, Brussels 1968

pp. 316

**Criminal Law**

*La Peine de Mort*

by Jean Imbert

Library Armand Colin, Paris 1967

pp. 207

*Pour la Peine de Mort*

by Jacques Charpentier

*Contre la Peine de Mort*

by Maître Albert Naud

Edited by Pierre Charié-Marsaines

Berger-Levrault, 1967

pp. 156

**Constitutional Law**

*Asian Political Systems*

Reading on China, Japan, India, Pakistan

by Betty B. Burch & Allan B. Cole

D. Van Nostrand Co. Inc., USA 1968

pp. 446

*La Cour Suprême et La Constitution*

by Jacques Bronsard

Research Institute of Constitutional Law, Montreal 1968

pp. 427

*Les Régimes politiques des pays arabes*

by Maurice Flory et Robert Mantran

'Thémis' Series, University Press, France, Paris 1968

pp. 469

**Socialism**

*Démocraties Populaires*

by Lazlo Nagy

Edited by Arthaud, Paris 1967

pp. 375

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