

***For the Rule of Law***

# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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# THE INTERNATIONAL COMMISSION OF JURISTS

It was to realise the lawyer's faith in justice and human liberty under the Rule of Law that the International Commission of Jurists was founded.

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# Human Rights in the World

## Discrimination against minorities

*"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."*

*Article 27 of the International Covenant  
on Civil and Political Rights*

### Spain

In REVIEW No. 10, we briefly recalled the situation of minorities in Spain, particularly the Catalans. We must now regretfully report that the situation facing Catalan culture is deteriorating, as the result both of government action and of extra-legal harassments by vigilante groups, who apparently are permitted to act with impunity.

As a background to the present situation it must be kept in mind that, prior to the Spanish Civil War, there existed a semi-autonomous government in Catalonia. At that time there were 25 daily newspapers and approximately 800 periodicals in the Catalan language. The Spanish government's policy of enforced assimilation has resulted in the elimination of the Catalan language daily press and, of the 800 periodicals, there remain only 40 to 50, and those are bi-lingual, that is publish some articles in Catalan and others in Spanish. The use of censorship powers has also greatly reduced the numbers of books appearing in the Catalan language.

There have remained, however, many Catalan scholars who desired to preserve Catalonian culture and their most ambitious project was the publication of the "Great Catalonian Encyclopedia", scheduled to be in 20 volumes of which 4 had already appeared.

In June of this year, a group appeared publicly calling itself the "Spanish National Socialist Party", with an activist sub-group by the name of the "Hitler Commando". Since then there have been several attacks against bookstores in Barcelona and Valencia which carried books in the Catalan language. On the 3rd of August, there was a break-in at the offices of the Great Catalonian Encyclopedia and the files, equipment and machinery were destroyed. Slogans were scanded on the walls such as "Catalans to the wall", "Catalans will not pass", "Up with Spain", and "Jewish Capitalists". Swastikas were also scrawled on the walls. The Spanish police have taken no action against those responsible.

On October 28, 1973, Spanish police surrounded a parish house of a Roman Catholic Church in Barcelona and arrested 113 leading Catalonians of a variety of political affiliations who had been at a meeting to prepare the second Assembly of Catalonia. This was two years after the first Assembly had gathered 300 Catalonians opposed to the restrictions imposed on their region. The first Assembly had demanded public liberties and the kind of autonomy that Catalonia enjoyed in the early 1930s.

What the Spanish government decides to do with the Catalanian leaders it has arrested will be an indication whether Spanish society can evolve towards a greater tolerance for the cultural and linguistic rights of minorities.

## **Indonesia**

Potentially, the most explosive form of minority relations is when an ethnic, cultural or racial minority is heavily concentrated in a relatively privileged socio-economic group, such as among the commercial-professional classes, but is not in fact the dominant class in the society. They are a target for the frustrations and jealousies of the underprivileged and a target for manipulation by the dominant groups seeking to divert discontent which might otherwise threaten their own positions.

The classic and most tragic example of this position in the modern world was that of the Jews in Europe, and particularly Germany. Given the inflation-depression cycle through which Germany was passing in the early 1930s, the rising discontent of the working classes was channelled into anti-semitism. It was this intermediate social status of the Jewish minority which earlier had given birth to a nationalist reaction known as Zionism, according to which doctrine only the existence of a Jewish state could save the Jewish people from the dangerous position in which they were in. A more recent example of this same phenomenon was the mass expulsion of Asians from Uganda. Here again there was a minority which for historical reasons (this time related to colonial history and policy) found itself in the intermediate position and the butt for the frustrations of the masses inherent in a state of economic underdevelopment. It may be noted that the existence of an independent "home country", whether it be considered India, Pakistan, Bangladesh or the United Kingdom, was not a sufficient factor to prevent the elimination from Uganda of the previously prosperous Asian community.

We find a similar situation in Indonesia with regard to the Chinese minority, and here again the existence of an independent and now powerful China has not been able to prevent the position of the minority from becoming ever more precarious. The minority in question consists of approximately 3 million people out of a population of 128 million. 50% or approximately 1.5 million are pure Chinese and the other 50% are of mixed origin.

Already in 1959, under the Sukarno regime, restrictions were placed on those retaining their Chinese nationality, and they were not permitted to own businesses in the country-side. (Those of Chinese origin at that time had to elect between Chinese and Indonesian citizenship.) In addition, Chinese schools favourable to the Taiwan regime were closed. In 1966, after the coup, and the coming to power of Suharto in 1965, all remaining Chinese schools were nationalized and transformed into Indonesian schools. Since that period, all Chinese newspapers and journals have been banned and Chinese organisations are not permitted. Signs on shops have to be in Indonesian, and Indonesians of Chinese origin have adopted new Indonesian names. Nevertheless, even adopting an Indonesian name has not been sufficient protection against discrimination. In official matters, such as entrance into university or application for a passport, when there is doubt as

to their origin (many of mixed background look Indonesian) applicants are requested to produce their Nationality Cards on which the change of name is noted. As a result the Polytechnic School of Bandung, which formerly had a large proportion of Chinese origin students (a normal expectation considering the middle-class status of the parents) now has very few. This is just one of many examples.

What is even more serious is that the physical safety of this minority community is not assured. Already in 1962, there were serious anti-Chinese riots in Bandung and other cities of West Java. In August, 1973, an untrue rumour that a Chinese driver had struck an Indonesian boy and caused his death resulted in rioting in Bandung with approximately 15 deaths and hundreds of injured. Markets and stores were burned as well as cars.

This is but a signpost as to the explosive situation that exists, and unless the government takes action to improve the racial climate, it is to be feared that more serious situations will arise in the future.

## **Bantustan "Homelands" in Namibia — a new Servitude**

The recent public floggings in Ovamboland in northern Namibia (South-West Africa) have once more brought the plight of the Namibian people to the attention of the world. Although such medieval practices are particularly news-worthy, they are only the most recent innovation of a regime whose suppression of the indigenous population goes back many years. In 1920, the South African government received a League of Nations mandate to govern the territory to "promote to the utmost the material and moral well-being and the social progress of the territory". Having failed to do this, the United Nations General Assembly in 1966 took the mandate away. However, faced with repeated demands of the UN, of the International Court of Justice and of the people of Namibia themselves that South Africa end its illegal occupation of the territory, the Republic has responded by tightening its strangle-hold on the territory and by implementing its Bantustan policy, intended to preserve *apartheid* in Namibia.

Passed into law by the Development of Self-Government for Natives Nations of South-West Africa Act No. 54 of 1968, the Bantustan programme delineates "homelands", which are eventually to be accorded a South African version of self-rule, for six of the native peoples of Namibia. But the lands set aside for these so-called homelands constitute only 39.6% of the poorest and least desirable land, the rest of the land, containing all of the urban areas and virtually all of Namibia's rich mines, being reserved for the whites who are outnumbered 7 to 1 by blacks in Namibia. The government commission, which originally recommended the creation of the Bantustans, itself admitted the economic unviability of several of the proposed "homelands". Only Ovamboland, of all the Bantustans, offers any semblance of plausibility as a functioning state. And even in Ovamboland, the shortage of jobs requires that at any given time as many as one-third of all adult males will be away far to the south working on the white man's farms, or in his factories or mines.

In spite of South Africa's attempt to appease world opinion by granting this semblance of self-government, the truth is that the Bantustans have been carefully drawn to maintain the status quo according to which the natural wealth of Namibia will continue in the hands of the white man, and the black man will have to continue his way of life as a migrant labourer in order to survive.

The opposition and protests of the people of Namibia have in the past few years grown steadily stronger, making the pretence that South Africa is able to govern the territory less and less tenable. 1971-72 witnessed the first major protest among blacks in Namibia. This was the labour strike in protest against the inhuman conditions imposed by the contract labour system, which it would be no exaggeration to call a modern form of slavery. Under this system, even as modified after the strike, the African worker is still not able to sell his labour in a free market. Instead, work contracts with fixed wage rates are offered by employment bureaus on a "take it or leave it" basis. The contracts are for long periods of 12 to 18 months during which time the African worker, in the large urban areas, must live in compounds (separated from his family since he is not allowed to bring them with him) often in conditions of overcrowding and squalor. Although the strike succeeded in effectively crippling the all-important mining industry, it was able to force only some small improvements, and the main features of the contract labour system remain as before: the low wages, the long forced separation of men from their families, and the deplorable conditions of the compounds.

After the strike, the South African government was sufficiently intimidated to subject Ovamboland to emergency regulations which prohibited all meetings and gatherings except by permit, other than church services, sporting events and sessions of government bodies. In addition, the vaguely defined crime of "subversive or intimidating statements or actions" was created, which included taking part in a boycott, refusing to obey a chief or headman, or treating a chief or headman with disrespect. Namibian leaders countered by organizing a campaign to boycott the forthcoming Bantustan elections in protest not only against the elections—which were regarded as a sham inasmuch as the emergency regulations in force prohibited political meetings except at the pleasure of the government—but also against the Bantustan policy which ensured not a unified and independent Namibia, but one fragmented and under the control of South Africa. In the wake of the campaign came a wave of arrests and detentions intended to silence the opponents of *apartheid*. In May 1973, three Namibian leaders, Mr Johannes Nangutuula, Mr Andreas Nuukwawo, and Mr John Otto, were arrested for having addressed an "illegal" meeting. And a few days later, the printing press of the 300,000 strong Evangelical Lutheran Ovambo-Kavango Church (whose leader, Bishop Leonard Auala, had strongly condemned the elections) was destroyed in an explosion in the early morning hours. Nevertheless, the result of the elections on August 1-2 showed a resounding success for the boycott campaign. The Ovambos indisputably rejected the elections and all they stood for: of those eligible to vote only 2.5% actually voted.

After the elections, the three leaders originally arrested in Ovamboland in May were taken to court in Ondangua. Around 3,000 supporters staged a demonstration which was scheduled to march towards

the Magistrate's Court, but long before they reached the Court, para-military troopers charged into the crowd, beating men, women and children with batons and riot-sticks. A large number of people were hurt. Some were taken to the hospital while others were left behind on the ground, too injured to move. The trial of the three leaders ended on August 20. They received fines or alternative prison sentences. The fines were paid, but while this ought to have ended the matter, Mr Nangutuuala was held in detention for a month and then handed over to the Tribal Authorities in Ovamboland for trial. On October 12, he was publicly flogged on instructions of the Chief Minister, Chief Filemon Elifas. A tribal policeman gave him 21 lashes on his naked buttocks with the rib of a palm branch after which he had to be taken to a hospital for treatment. The following day, Mr Nuukwawo was also publicly flogged, also on orders from Chief Elifas and the tribal council. Mr Nuukwawo had been accused before the council of giving information to newspapers, belonging to SWAPO (a legal organization) and distributing pamphlets. These were part of a wave of public floggings totalling more than 100 persons, including women and children. Appeals to the South African government to put an end to this barbarism were callously rejected by Mr Michael Both, Minister of Bantu (African) Administration and Development, who said that the floggings in Ovamboland were "absolutely a tribal matter and it is an old custom of the tribe".

The truth is that the punishment of flogging has until recently only been rarely imposed, and then in private without the indignities to which these people were subjected. The usual tribal sanction is a fine. As to the contention that the floggings are a tribal matter, the High Court for South-West Africa has temporarily banned any further flogging until it can meet again to decide the legal issues involved. It is not, however, expected that the banning order on flogging will put an end to the wave of arrests and detentions now being carried out in Ovamboland. Whatever the Court may decide as to the legal issues, it is common knowledge that the tribal authorities and chiefs have no authority except that given to them and recognized by the South African authorities. It is not surprising, however, that in view of its recent reverses in Namibia, the South African government should now use this new approach for dealing with its opponents. For the South African regime has long recognized the value of working through a collaborator class. This serves to deflect responsibility for policies from the white government to the local leaders and to turn popular resentment inwards so as to prevent the unity which may one day throw off the shackles of *apartheid*. In this, the South African government has found willing accomplices among the ageing tribal chiefs who see their own power threatened by the young, better educated men of the tribe. Thus while South Africa may choose to take the pose of an innocent bystander, only the very naive will believe it has clean hands in the current reign of terror being waged in Ovamboland under emergency regulations which it itself put into force.

Although the people of Namibia have amply demonstrated their intention to free themselves from South African rule—and will no doubt succeed in this in the long run—whether or not justice will prevail in the short run may depend as much on the role to be taken by the rest of the world as on the Namibian people themselves. Apart

from the obligations imposed by humanitarian principles, the world community bears a particular responsibility towards the people of Namibia whose fate was tragically linked to the South African regime by the League of Nations not quite fifty years ago. The South African Mandate has now been terminated by the United Nations and South Africa's continued presence in the territory declared illegal by the International Court of Justice in 1966. It is unfortunately those nations whose responsibility toward this people is greatest in terms of their historical and economic ties who have done the least towards ending the South African tyranny. On the contrary, they have through their corporations joined in the plunder. Because of the slavery-like practice of contract labour, Namibian labour is among the cheapest in the world, resulting in huge profits for foreign investors, mainly American and British corporations. In addition to the economic factor, there is another, more cynical, factor involved, that of race. One must wonder if the nations of the West would display the same indifference toward the sufferings of the Namibian people if their colour were white.

## **Special Powers in Pakistan and Bangladesh**

In the last issue (REVIEW No. 10) a brief note called attention to the new Constitutions of Pakistan and Bangladesh with their "independent judiciaries and what should prove to be effective guarantees of the fundamental freedoms".

Unfortunately, lawyers in both countries have been led to protest that the principles of the new Constitution are being subverted by the use of earlier legislation suspending fundamental rights, which still continues in force. In both cases, the complaints are directed in particular against special powers of arrest and detention, and special tribunals.

### *Pakistan*

Under Article 10 of the new Pakistan Constitution the principal safeguards against arbitrary arrest and detention are the right to be informed about the grounds for arrest, the right to consult a lawyer of one's choice, and the right to be produced before a magistrate within 24 hours. These provisions do not apply to a person who is held under a law providing for preventive detention, but according to Art. 10 any such law must contain the following safeguards:—

- preventive detention may not last beyond one month unless a Review Board of High Court Judges is of the opinion that there are sufficient grounds for detention;
- the grounds for detention must be communicated to the detainee within one week;
- during the two years dating from a person's first arrest, he cannot be detained for more than a total period of 12 months.

However, even these safeguards were suspended by an order of the President made on August 15, 1973, the day after the new



Constitution came into force. The legal basis for the order is as follows. By Article 280 of the Constitution the Proclamation of Emergency made by President Yahya Khan on 23 November 1971 (i.e. shortly before the Indian invasion of East Pakistan), is deemed to be a proclamation under Article 232 of the new Constitution. Article 232 gives the President power to proclaim an emergency if the security of Pakistan is threatened by war or external aggression or by internal disturbance beyond the power of a Provincial Government to control. There are two important legal consequences of the continued state of emergency. First the President has power under Article 233 to suspend the right to move any court for the enforcement of any of the Fundamental Rights conferred by the Constitution and, secondly, the Defence of Pakistan Rules (DPR) framed under the Defence of Pakistan Ordinance, 1971, remain in force.

By his order of August 15, made under Article 233, the President suspended the right to move any court for the enforcement of the fundamental rights contained in Articles 10 (arrest and detention; see above), 15 (movement), 16 (assembly), 17 (association), 18 (trade, business or profession), 19 (speech), 23 and 24 (property), 25 (equality), and 27 (non-discrimination). The suspension applied to pending as well as future proceedings.

Under the Defence of Pakistan Rules (DPR) any person may

- be ordered to be detained without trial for up to 3 months in order to prevent him acting in a manner prejudicial to security, public safety or the defence of Pakistan (Rule 32), or
- be arrested without warrant by any police officer who reasonably suspects him of acting in the manner defined in Rule 32, and be held in custody for up to 15 days (Rule 208).
- be arrested and charged with any offence under Rules 42-49, including doing any "prejudicial act" or publishing any "prejudicial report" under Rule 49. Prejudicial act is very widely defined and includes any act intended or likely to prejudice the maintenance of peaceful conditions in any area or to "bring into hatred or contempt, or to excite disaffection against the Government...". Prejudicial report means any report which, or the publication of which, is an incitement to the commission of a prejudicial act.

By an Order of September 1, 1973, on a charge brought under DPR 42-49, if the prosecution oppose bail, the burden of proof shifts to the defence to prove that there are reasonable grounds for believing that the defendant is not guilty. In other words, he must virtually prove his innocence.

Special Tribunals have been set up under the Defence of Pakistan Ordinance, and the Government may direct that any DPR offence or any offence punishable with death, life imprisonment or imprisonment for 7 years or more shall be tried by such a tribunal. This means a summary trial, with restricted procedures, which may be held in camera. There is no right of appeal, except for an appeal against a sentence of death, a life sentence or imprisonment for over 10 years.

It will be seen that these Rules and procedures give very wide powers to the Government to silence its critics, powers which can only be justified in a real state of national emergency.

The Government's justification for this continued state of emergency is that (a) India has not withdrawn its declaration of emergency (it should be said that the Government's powers under the Indian legislation are more restricted), (b) India is still maintaining a military posture towards Pakistan and (c) the effects of the 1971 war have not yet been liquidated. In other words the emergency is justified by a supposed external rather than an internal threat. This justification has been much criticised, partly on the ground that the alleged external threat is unreal, and partly on the ground that all the action which has been taken under the emergency powers has been directed to suppressing internal opposition and not to preparations to meet an external threat. "How", it is asked, "do the arrests of editors, publishers and printers of newspapers, of political workers, of lawyers and judges, students and labour leaders under the DPR help Pakistan to counter the Indian Army's menace?" (*Dawn* newspaper, 20/9/73).

Among the uses to which these powers have been put are :

- the detention under Rule 32 of 250 top Bengali civil service personnel on May 7, 1973, officially "in order to be taken to repatriation camps";
- to ban temporarily opposition newspapers (including *Jasarat*, *Hurriyat* and *Mehran*) and to arrest their editors, publishers and journalists (prominent among these was Altaf Gauhar, whose release by order of the High Court after 10 months' illegal detention was reported in REVIEW No. 8; he was subsequently rearrested without warrant on April 5, 1973, and later charged under the Prevention of Corruption Act before a Special Tribunal);
- the arrest and detention under DPR 32 and 42-49 of a large number of political opponents and critics, including lawyers who have protested against arrests under the DPR.

Before the power of the Courts to supervise the use of these exceptional powers was excluded by the Order of August 15, 1973, many cases had been brought challenging the detention orders. It is reported that the High Court of Sindh and Baluchistan, which dealt with some 100 habeas corpus petitions from January 1972 to June 1973, did not find a single case in which the grounds for detention could be upheld. Many other detention orders were withdrawn when the petitions against them were due to be heard, and the detainees were released. In other cases, proceedings have been transferred to Special Tribunals. An example is the case of Abdul Hammed Bhabha, a former member of a delegation to the UN, whose detention under DPR 32 was held illegal by the High Court on April 11, 1973, because the allegations against him were vague, indefinite and completely lacking in particulars. He was not released as the case had been ordered by the Government to be transferred to a Special Tribunal on April 7.

It is difficult to resist the conclusion that the state of emergency is being continued in order that the special powers which it confers upon the Government can be used for purposes beyond those originally intended.

## *Bangladesh*

On July 2, 1973, the Supreme Court Bar Association at Dacca passed a series of resolutions following a study it had made in response to requests from different Bar Associations throughout the country. The resolutions concerned certain of the President's Orders which were passed in 1972 but remained in force when the new Constitution came into force in December of that year.

The first of these resolutions concerns the Bangladesh Collaborators (Special Tribunals) Order 1972 (P.O. No. 8 of 1972). This order was referred to in critical terms in ICJ REVIEW No. 9, particularly for its retrospective provisions. The Bar Council categorises it as "the most unethical and unjust law contrary to all established principles of jurisprudence and fundamental rights as recognised throughout the civilised world". In particular the Council complains of:—

- the power of arrest merely on suspicion of a police officer and of detention in custody pending an order of a Magistrate, who in turn can order detention for 6 months pending inquiry or investigation; this detention can then be extended indefinitely by the Government (Article 3);
- the prohibition on granting bail (Article 14);
- the power of the Government to attach any property belonging to a "proclaimed person" (i.e. a wanted suspect) or to a person arrested under the Order or to a member of their families (Articles 17 and 17A);
- the power of the Government (not the Tribunal) to order the forfeiture of any or all of the property of a convicted collaborator (Article 12);
- the minimum sentence of 10 years imprisonment for certain offences (Article 11).

The Bar Council considers that these provisions are not only harsh and vindictive but betray a lack of confidence in the judiciary of the country. They ask that they should be replaced by the normal provisions of the Code of Criminal Procedure "which has stood the test of time". The same proposal is made in respect of similar provisions in the Bangladesh Scheduled Offences (Special Tribunals) Orders 1972 (P.O. No. 50 of 1972), which set up Special Tribunals to try persons accused of "black market" offences.

Another resolution calls for the repeal of the Government of Bangladesh (Services) Order (P.O. No. 9 of 1972) which empowers the Government to dispense with the services of any Government servant without any reason being shown and without any opportunity being given to him to show cause against the penalty. They describe it as shocking and violative of the principle of natural justice that "no man should be condemned unheard".

## *Conclusions*

The difficult situations facing the Governments in Pakistan and Bangladesh are not to be underestimated, and it is easy for those far removed from the problems with which they have to contend to criticise the special powers which they have assumed. However,

when such strong concern is expressed by the legal profession within the country, it does not seem out of place to urge that both governments should now consider moving to a fuller implementation of their new Constitutions.

The decision of the Bangladesh government on November 30, 1973 to release under amnesty all those held or convicted under the Collaborators (Special Tribunals) Order, except for those charged with murder, rape or arson is warmly welcomed. It is estimated that approximately 35,000 will benefit from this amnesty including high officials of the former Pakistani administration in Bangladesh. This course which was urged in the last issue of the REVIEW, is a generous act of statesmanship which should help to bring peace and harmony in Bangladesh and in the sub-continent.

## Philippines

Two principles, both important for the existence of the rule of law—the independence of the bar and freedom of the press—are raised in a case awaiting decision in the Philippines.

The case of *Vicente J. Francisco v. Media Advisory Council*, G.R. No. L-37423 came before the Supreme Court on a technical point, whether the *Lawyers Journal*, which reports decisions of the Supreme Court and arguments held before it and other articles of interest to the legal profession, came within the definition of “mass media”. Presidential Decree No. 191 requires such “media” to obtain a certificate of authority to operate. The substantial issue, however, is whether this journal is to be restricted because it published constitutional arguments before the Supreme Court impugning a Presidential Proclamation that announced the ratification of a new Constitution.

The background to this case are the political events of the last few years in the Philippines. On September 21, 1972, President Marcos imposed martial law. The new Constitution of 1973, replacing a 1935 Constitution, was adopted by citizens’ assemblies and, in the words of the supporting argument of Senator Tolentino in favour of the new Constitution, carried out a “peaceful and bloodless political revolution”. At the same time, the new Constitution gave rise to opposition which manifested itself in various petitions to the Courts challenging the ratification procedure.

The arguments on these petitions were of great political as well as legal interest, but due to the government control provisions instituted under martial law, the opposition arguments were not published in the daily press. Their appearance in the *Lawyers Journal*, although directed at a limited and specialised audience, gave the appearance of a breach of the Government’s control over public information. In these circumstances the Government’s Media Advisory Council moved to bar the distribution of the August 1973 issue of the Journal and require the Journal to obtain authorization for publication (which had not previously been demanded although the same or similar provisions on press control have been in effect since September 1972).

The publisher of the *Lawyers Journal*, who had previously shown his independence of spirit by suspending publication of the Journal

during the Japanese occupation (the Journal has been in existence since 1934), decided to challenge the action of the Media Advisory Council in the courts and to present to the court the broader issue of freedom of the press. In so doing, the Petitioner argued that the validity of martial law measures depend upon actual and reasonable necessity, and where necessity ceases, the measures can no longer be applied.

In citing various authorities in support of the fundamental freedoms, the legal argument recalled a statement by Voltaire which might well be kept in mind by leaders in many countries where fundamental freedoms are today in question :

“Tolerance was never the cause of internal strife in the state, but, on the contrary, the pursuit of intolerance has covered the world with blood. The tyrants of our thoughts have caused the greater part of the misfortunes of the world.”

## **“Inform or die” in Rhodesia**

*“Failing to report terrorists”* is now punishable by death or life imprisonment in Rhodesia, under the amendments to the Law and Order (Maintenance) Act passed by the Assembly on September 18, 1973. The same penalties apply to attending a course for the purpose of furthering a political object by the use of various unlawful means ; recruiting or encouraging a person to attend such a course ; or committing any act of terrorism with intent to endanger the maintenance of law and order in Rhodesia or in a neighbouring territory (i.e. Mozambique). Other amendments provide for the confiscation of property of people who helped guerrillas (e.g. by allowing them to camp on their land), and the banning of meetings for a period of up to a year.

## **The Rule of Law in South America**

The Rule of Law has suffered a series of set-backs in South America in 1973. The protection of individual and social rights, the independence of the judiciary, democratic elections of legislatures with powers to control the executive and to legislate in accordance with the provisions of the constitution, have all become the exception in this part of the world. The suppression of democratic forms has gone hand in hand with an increased use of official violence as a tool to maintain political control. The spread of military regimes, with one notable exception, has continued.

In 1973 both Chile and Uruguay ceased to belong to the diminishing group of countries in South America where democratic practices still prevail. For many years, these two countries had set an example, owing to the strong democratic traditions of their peoples and the respect for constitutional order shown by their armed forces. Uruguay for many years was called the Switzerland of South America and, more recently, Chile has been looked to as the scene of a crucial

political experiment, raising the question whether the social and economic structure of a society could be transformed peacefully by legal and parliamentary means.

### *Chile*

On September 11, 1973, the Chilean experiment ended when the army overthrew the constitutional government with the resultant death of the President, Mr. Salvador Allende. Then quickly followed the institution of martial law throughout the country, the dissolution of Parliament and the dissolution of all political parties. The ensuing violence against the supporters of the former government has had few parallels in recent years and none in South America. Mass arrests, executions without trial, tortures of political prisoners, the dismissal of workers active in trade unions, the closing of university faculties and the taking control of universities by military delegates, the burning of books, and the putting of prizes on the heads of political leaders have all come about in Chile in the last few months.

In a report submitted to the Secretary-General of the United Nations, three distinguished jurists, representatives of three international non-governmental organizations active in legal and human rights matters<sup>1</sup>, after a week's visit to Santiago in October 1973, stated that violations of human rights had occurred "of which the magnitude, the gravity and the systematic character could not be ascribed to uncontrolled elements". They also found that "the functioning of the ordinary courts of justice have been suspended in a number of cases. Martial law has been assimilated to a state of civil war and regulated by new decrees introducing new crimes and increased penalties and establishing courts martial whose decision are immediately implemented". The three jurists expressed the hope that "all the means of which the international community disposes will be put to work to bring to an end these serious violations of the rules of morality and of international law". What has been happening in Chile has brought protests from organizations and governments in many parts of the world. The United States Senate, for example, has adopted a resolution asking the President to withdraw all aid from Chile as long as human rights are not respected there.

On October 7, Pope Paul VI expressed his profound emotion in face of the sad reports on the violent repression in Chile. He went on to say in discussing events both in the Middle East and in Chile: "Public opinion, in effect sees each time more clearly, that blind recourse to homicidally cruel arms in order to re-establish order, that is to say the oppression of man by other men, is irrational and inhuman".

Of immediate concern is the position of the political prisoners. The International Committee of the Red Cross estimated at the end of October that there were over 10,000 such prisoners in Chile. The persistent reports of torture and summary executions coming from the prisons and places of detention give rise to serious concern. In addition, there is the problem of political refugees from other countries who found refuge in Chile under the Allende regime and

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<sup>1</sup> The Association of Catholic Jurists, The International Association of Democratic Lawyers, and the International Federation for the Rights of Man.

are now considered as enemies by the Military Junta. It is estimated that there are approximately 18,000 people in this category, a small portion of whom have been able to find refuge in foreign embassies in Santiago. Although there have been reports of mistreatment and arrest of refugees, and even the expulsion of 250 Bolivians back to their country of origin, the speedy action taken by the United Nations High Commissioner for Refugees and by certain governments has obtained from the Chilean authorities the promise to abide by the provisions of the UN Convention on Refugees to which Chile adhered. This prohibits the expulsion of a refugee to any country where his life or liberty would be in danger. The weakness of this Convention lies in Article 33 (2) which removes this protection against repatriation in a case where "there are reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he is". Since the Junta regard all Communists and Marxist Socialists as being a danger to security (even though these parties had been elected to power in free elections), the result is that the great majority of those who had sought asylum in Chile from such countries as Brazil, Bolivia and Uruguay, are afraid to come forward to claim the protection of the Convention for fear that they will be arrested and detained as a threat to security.

The Chilean military authorities have sought to justify their intervention into the political life of the country as being necessary to protect the Constitution against alleged encroachments by the previous President. Whatever the merits of this contention may have been, the Junta, so far from defending the Constitution, have scrapped it, and are now drafting a new Constitution which, from indications coming from members of the Junta, will have a strong corporatist bias, analogous to the Constitutions of Spain and fascist Italy.

The other justification put forward is that the intervention was necessary in order to save the Chilean economy from the disastrous effects of President Allende's policies. Apart from the fact that there is no legal basis for an intervention on these grounds, this is a dangerous doctrine which raises many questions. To what extent were Chile's economic difficulties due to the government's policies and to what extent to their being sabotaged by opposition interests encouraged and supported by outside forces who were more concerned to see the failure of Allende's socialist experiment than to help the economy of Chile?<sup>2</sup> What expertise do the military junta have in economic affairs which will enable them to handle the economy more successfully? Even if the Junta succeed in raising the gross national product, what policies do they have for reducing the gross inequalities of wealth which led to the coming to power of President Allende?

### *Argentina*

The Chilean Junta have vowed to destroy Marxism. Seventeen years ago the Argentinian armed forces sought to destroy Peronism by the overthrow of Peron and by imposing a military hold on the suc-

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<sup>2</sup> Cf. the evidence given by the Director of the CIA, William E. Colby, to the House Sub-Committee on Inter-American Affairs of the U.S. Congress; Washington Post, October 21, 1973.

ceeding governments. These governments, however, could not attract popular support and the economic problems facing the nation only tended to increase. In the end the military authorities decided to relinquish control and permit free elections. This in turn has led to the return of Peronism and then of Peron himself with a broader popular base than ever before. There are so many grave problems facing Argentina that it would be rash to attempt to predict the outcome of the Peronist experiment. What is clear, however, is that the military authorities have no magic wand permitting them to resolve what are basically economic and political problems. Nor is military force an adequate substitute for popular consent when trying to resolve such problems.

### *Uruguay*

After a long political crisis, President Bordaberry with the support of the military leaders dissolved Parliament and all elected local authorities on June 27, 1973, and assumed the right to rule by decree. This was the culmination of a process begun in February when the military authorities forced the creation of a National Security Council (COSENA), dominated by the military, to advise the President.

With the dissolution of Parliament came a series of measures aimed at controlling the press. At first there was no press censorship, but publications which have published matters displeasing to the government were suspended for 3 to 5 weeks. Since then the Communist and Socialist Parties have been banned as well as their newspapers and affiliated associations. A new law for the "repression of communism" is proposed.

Individual liberties have been suspended and the right to hold meetings or organize unions strictly limited. The major trade union federation (CNT) has been declared illegal and its leaders arrested. Some of the new rules covering trade unions and the right to strike are considered by Uruguayan lawyers to be in violation of constitutional guarantees as well as of international (I.L.O.) Conventions.

Arrests and detentions for political reasons are continuing. General Liber Seregni, an opposition candidate at the last Presidential elections, has been in detention for a long period without being brought to trial. There is much evidence of torture practiced against detainees, sometimes with fatal results. One such case is that of a student, Hugo Leonardo de los Santos-Mendoza, whose death by torture was reported by the Medical Association of Uruguay and confirmed by a doctor working for the military authorities. It has been alleged that Raul Sendic, the founder of the "Tupamaro" guerrilla movement, and eight of his associates are being held hostage to be executed in the event of any further activity by the Tupamaros.

The latest act of repression at the time of writing is the investing of the University of Montevideo by the army on October 28, putting an end to a long tradition of autonomy and free discussion, an autonomy which was guaranteed by the Uruguayan Constitution. The University has been closed and the rector, deans and other professors, as well as students have been arrested and charged with having permitted subversive activities to take place in the University. Among those arrested was Dr. A. Ramón Real, former dean of the Law Faculty and a respected member of the International Commission



of Jurists. While Dr. Real has spoken out boldly in defence of democratic procedures and the rule of law, he has never participated in any subversive activities.

### *Bolivia*

In Bolivia the nationalist government of General Torres, who himself came to power by a coup d'état, was overthrown by another coup on August 21, 1971, led by Colonel Hugo Banzer Suarez. Since that date about 2,000 persons are believed to have been arrested and detained on political grounds under very poor conditions. The detainees are reported to have been completely isolated from the outside world, and even visits by families and doctors were forbidden. There are numerous reports of torture, and 21 of the detainees appear to have disappeared completely. Most of those who were detained in the early months of the régime have been set free, but about 200 are believed to be still held in prison without trial. In May 1973, the Bolivian Minister of the Interior announced that 81 political prisoners had been handed over to the prosecuting authorities and would be tried shortly. No proceedings have yet been started, and the fate of the other 120 prisoners is unknown.

By a decree of November 5, 1971, the death sentence was reintroduced for crimes against national security tried before special military tribunals with emergency jurisdiction, even though the Constitution of February 2, 1967, which is still in force, had abolished the death penalty, and article 14 expressly excluded special tribunals ("*comisiones especiales*").

### *Brazil*

In Brazil the military régime has now been in power for nearly ten years. In the last two years, compared with the period 1968-1971, there have been fewer reports of torture of political prisoners, but this would appear to be due to the success achieved by these extreme methods of repression in eliminating the urban guerrillas. Reports indicate that torture continues to be used, at least on as large a scale as before, but now directed against persons suspected of common law offences, particularly corruption and drug offences. Also, the whole legal apparatus of repression remains in force.

The Catholic Church in Brazil has been particularly outspoken about the denial of human rights. In February, 1973, at the XXth General Assembly of the National Conference of Brazilian Bishops, an important item on the agenda was the application of the Universal Declaration of Human Rights in Brazil. A document was presented on violations of human rights reporting in detail 27 cases of persons who had died as a result of torture. In three statements made public after the Conference, the bishops openly denounced the dictatorship for being responsible not only for political repression and physical tortures, but also for the poverty, starvation wages, unemployment, infant mortality and illiteracy in Brazil. In spite of the much vaunted economic growth in Brazil, the gap between rich and poor is widening. The Assembly of Bishops decided "that the Church by the means of communication at her disposal must inform the public regarding violations of human rights, and must be ready to accept the consequences of this action".

Another body which has spoken up on the violation of human rights is the Brazilian Bar Association (*Ordem dos Advogados do Brasil*). On August 21, 1973, an advocate, Henrique Ornelas Ferreira Cintra, was officially reported to have committed suicide in his cell, at a time when he and three other advocates were under arrest by the Federal Department of Police in Brazilia. The President of the Bar Association convened an extraordinary session to discuss the ill-treatment of political prisoners, and the Bar Association sent a delegation representing all the Bar Associations of Brazil to demand an enquiry into the death of the advocate H.O. Ferreira Cintra. They eventually succeeded in obtaining an independent autopsy which confirmed death by strangulation. However, as a number of leading lawyers pointed out publicly, this still left unexplained how he could have hanged himself in view of the well-known practice of removing from suspects in detention all belts, ties or other articles which could be used for this purpose.

This case may be compared with that of a geology student at São Paulo University, Alexandre Vannuchi Leme, whose death was announced in the Brazilian press on March 22, 1973. The official explanation was that he died five days earlier as a result of being run over in the street just when he was being taken by security police officers to a rendez-vous with an associate. He had been arrested for alleged subversive activities. The family first learned of his death from the press, and was denied the right to see his body which, according to the police, had been buried in a pauper's grave outside São Paulo, even though the police were well aware of his name, parentage and address.

As indicated above, most of the torture in Brazil is now directed at persons, whether civilian or military, suspected of common law offences. At the beginning of 1973 four soldiers accused of smoking marijuana died as a result of the tortures to which they had been subjected. Those responsible for their death were tried and condemned to heavy prison sentences. (It is perhaps significant that an earlier enquiry into allegations of torture of civilians by the same torturers had resulted in their exculpation.) The governmental authorities have announced that they will not tolerate the practice of such crimes which are "foreign to the conduct of the armed forces and the morality of the Brazilian people". More recently 43 federal police officers, accused of corruption and abuse of power, have been expelled from the force by the President of the Republic, and some influential members of the São Paulo police, accused of belonging to the notorious "death squadron", have been arrested and are awaiting trial.

It may be hoped that the admission of the existence of torture and of arbitrary practices by the police and the army will prove to be the first step towards their elimination.

### *Colombia*

Of all the countries in South America, only four can now be said to have democratic governments which have come to power as a result of free elections, namely Argentina, Colombia, Guyana and Venezuela, and of these Guyana perhaps belongs rather to the Caribbean than to the South American region.

Colombia, a country where there is a strong attachment to liberal principles, has honourably joined Costa Rica as the second country to ratify the Interamerican Convention on Human Rights. It is a sad reflection that, but for the recent events in Chile and Uruguay, both those countries would by now probably also have ratified the Convention. As it is, in spite of Colombia's gesture, the coming into force of this fine Convention still appears a remote contingency.

Even Colombia has its problems of guerrilla movements with areas of the country subject to martial law and the jurisdiction of special military tribunals. Some international concern arose when several persons belonging to the liberal professions, including an internationally known film producer, Carlos Alvarez, were arrested in Bogota in July 1972 and accused of belonging to an urban section of the "National Liberation Army", the most important guerrilla movement of the country. They are now due to be tried early in 1974 before a military tribunal. Much publicity has been given in the Colombian press to these proceedings, including allegations of torture made by the defendants and complaints by defence lawyers of interference with defence rights. Permission has been given for the International Commission of Jurists to send an observer to the trial.

### *Conclusion*

As this brief survey shows, there is a real crisis of the Rule of Law in South America. The origins of this crisis, its deep-seated nature, and the means of resolving it involve considerations of a political and economic nature which lie outside the scope of this article. Nevertheless, it may be pertinent, on the occasion of the 25th Anniversary of the Universal Declaration of Human Rights, to call to the attention of governments the terms of Article 28 of the Declaration which state: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

## **Turkey - Some Hopeful Signs**

Since March 1971, when the leaders of the Turkish armed forces issued an ultimatum to the country's political leaders, the International Commission of Jurists has followed with increasing concern the developments affecting the democratic rights and practices encompassed in the 1961 Turkish Constitution and in the laws. In REVIEW No. 9 we reported on certain aspects of Military Justice in Turkey and in REVIEW No. 10 we analysed in detail the legal and constitutional changes which had been made to the permanent legislation, and which were destined to survive the end of Martial Law.

1973 has seen a continuation of arrests, mass trials and continuing though diminishing reports of torture. Even in mid-November, two months after the ending of Martial Law, there are still an estimated four thousand people awaiting trial (over 2,000 of them in custody) for political offences. Nevertheless, there have been developments during this year which give reason for restrained hope that the future will be better in terms of the Rule of Law and human rights.

First, and possibly most significant as a turning point, were the events surrounding the election of a new President by the Turkish Parliament in March and early April. The armed forces wished to have General Gurler, the Army Chief of Staff, elected to the Presidency. Informed opinion and the international press were convinced that they would have their way. Some hundred generals were present in the gallery of the Parliament when the elections began, but in spite of this demonstration the necessary votes to elect General Gurler could not be obtained. After a series of rounds the military leaders sought a compromise to salvage their reputation, by which the Presidential term of the incumbent, Cevdat Sunay, would have been extended for two years. To add weight to their position, General Sancar, the new Chief of Staff, issued a statement to the effect that if the term of President Sunay was not extended the military would have to "assume their responsibilities". Again there was a general belief that the military would have their way, but again they failed. In the end, a compromise candidate, a former admiral, Koruturk, was elected President.

It is reasonable to assume that these events, harmful as they were to the prestige of the military leaders, had some effect on the inner relationships among the factions existing in the armed forces. During the period of repression many officers were arrested for what were considered liberal or reformist views, so the existence of such divisions can be assumed. At this point it might be appropriate to recall that after the 1960 Military Coup, Turkey obtained one of the most liberal Constitutions in Europe, and that a general and several colonels who had been active in the 1960 Military Junta are among those being tried for "plotting to overthrow the constitutional government". In these days, when military intervention in government can no longer be considered an anomaly, it is interesting to note that military intervention often shifts the conflicts existing in the society, which the military's action was intended to correct, into the midst of the armed forces themselves. In any event, in early July, 35 generals, including those responsible for Military Intelligence which had been a prime target for torture charges, were re-assigned to minor posts. At the end of August, a number of leading officers were retired, including the remaining two senior officers who had signed the March 1971 ultimatum, as well as the Military Governor of Istanbul, who has been accused of sponsoring the use of torture in his district.

On September 26, Martial Law finally ended in the last two districts, Istanbul and Ankara, and on October 14 the parliamentary elections took place. After what appears to have been a relatively free election (if such a term can be used to describe a situation where thousands are held prisoner for their political opinions) there resulted a swing to the left, and the centre-left People's Republican Party emerged as the largest single party in the Parliament. This party did not, however, obtain an over-all majority so that, at the time of writing, the future government for the country is uncertain. The leader of the majority party, Mr. Ecevit, has promised as one of his first acts, should he succeed in forming a government, to seek the agreement of Parliament to an amnesty for those imprisoned for their political opinions. The amnesty will not extend to those held responsible for acts of violence, but it is thought that about 80% of those detained will be eligible for release.

It is a matter of irony that whereas the 1960 military coup, although directed against a right wing party, the Democratic Party, nevertheless resulted within a few years in the return to power of their spiritual heirs, the Justice Party, by contrast the 1971 military intervention, directed as it was against the left, has brought about a considerable advance of the major left of centre party.

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### INJUSTICE — AN INTERNATIONAL MATTER?

*"The United States deeply believes—that justice cannot be confined by national frontiers ; ..."*

The Hon. Henry A. Kissinger, speaking before the  
United Nations General Assembly on September 24, 1973.

## **Commentaries**

### **Draft Protocols to the Geneva Conventions**

The principal victims of modern war are the civilian population. It has been estimated that of those killed in the first world war 5% were civilians; in the second world war, 50%; in the Korean war, 60%; and, according to an estimate given by the US government to Congress relating to killed and wounded in the Vietnam war, 70%.

As the right to life is the basic human right, this terrible slaughter and maiming of civilians is perhaps the greatest violation of human rights in the modern world. The reasons for it are well known. Weapons which strike indiscriminately at civilians and military personnel and which can cause appalling suffering, have come to be described as "conventional". Many states now consider to be permissible the choice of targets and methods of attack which carry a strong probability of causing heavy civilian casualties. Under the concept of "total war", their accepted means of warfare include the starvation of the enemy, with the destruction of his crops, livestock, drinking water, irrigation systems and other objects indispensable to the survival of the civilian population. Finally, states consider it legitimate to counter the operations of guerrillas and resistance forces by the killing of hostages and even the wiping out of towns and villages with the massacre of their inhabitants.

Most of these means and methods of warfare are already in violation of international law, but the terms in which they are prohibited are usually of such a general character that belligerents find them easy to ignore. For example, article 22 of the Regulations annexed to the Fourth Hague Convention of 1907 states: "The right of belligerents to adopt means of injuring the enemy is not unlimited"; article 23 (e) says: "It is forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering"; Article 25 provides: "The attack or bombardment, by whatever means, of towns, villages, or buildings which are undefended is prohibited". The 1925 Geneva Protocol forbids the use of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices". Aware of the gaps in the protection afforded by the codes, both the 1899 and 1907 Hague Conventions contained the famous preambular Martens Clause providing "Until a more complete code of the laws of war can be drawn up the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilised peoples, from the law of humanity and from the dictates of the public conscience." Unfortunately the dictates of public conscience have had little restraining effect upon the parties to modern wars.

Some progress was made in the development of the humanitarian code when the four Geneva Conventions of August 12, 1949, were signed. These dealt in detail with the treatment of the sick and

shipwrecked, with the treatment of prisoners of war, and with the protection of the civilian population. The laws of war, i.e. the relations between belligerents in the conduct of operations, continue, however, to be largely governed by the Hague Conventions and the Geneva Protocol, which are now long out of date. It is hardly an exaggeration to say that they are still at the stage of outlawing dum-dum bullets and the dropping of explosives from balloons.

The need for a reappraisal of the rules applicable in armed conflicts and for a better application of the rules has long been recognised. In response to requests from the General Assembly of the United Nations and the League of Red Cross Societies, the International Committee of the Red Cross (ICRC) has been working for a number of years in formulating proposals to bring up to date the Geneva Conventions of 1949. Following two conferences with governmental experts, the ICRC have now prepared and distributed to governments two Draft Additional Protocols to the Geneva Conventions. The first deals with international and the second with non-international armed conflicts. These draft protocols are to be considered at a diplomatic conference in Geneva in February, 1974, sponsored by the Swiss Government. It is anticipated that a second and possibly a third diplomatic conference will be required before agreement is obtained on the wording of the protocols.

The International Commission of Jurists and a number of other non-governmental organisations have been invited to attend the diplomatic conference as observers. A working group of non-governmental organisations has been studying the draft Protocols and has drawn up a memorandum for circulation to governments commenting upon them, and proposing specific amendments for their improvement.

Bearing in mind that the ICRC have had to work within the limits of what appears to be the possible area of agreement, it may be said that the two Draft Protocols mark a very considerable step forward in the development of humanitarian laws. They not only bring up to date the provisions in the 1949 Convention on the treatment of the wounded, sick and shipwrecked, but introduced important new rules governing the means and methods of combat, prisoner of war status, protection of the civilian population and measures for implementing the Conventions.

The control of weapons and methods and means of combat is, for the most part, still stated in rather general terms, but there are specific prohibitions covering area bombing and "any methods which strike or affect indiscriminately the civilian population and combatants". There is also a prohibition against the destruction of "objects indispensable to the survival of the civilian population, namely, food-stuffs and food producing areas, crops, livestock, drinking water supplies and irrigation works", and another article prohibiting destruction of "works or installations containing dangerous forces, namely, dams, dykes and nuclear generating stations".

Prisoner of war status is proposed to be granted to members of organised resistance movements. There is also a draft paragraph extending this to members of independence movements engaged in an armed struggle for self-determination.

The difficulties in securing agreement upon the Second Draft Additional Protocol are very great. A number of governments are likely to oppose the protocol in its entirety on the ground that non-

international armed conflicts are not the concern of international law. (Most of these governments would argue that the liberation struggles of colonial and dependent peoples are international in character). This retrograde view will, it is hoped, be rejected, but inevitably the provisions of the Second Draft Protocol are in many respects less precise than those of the first. For example, in the case of internal armed conflicts, prisoner of war status is not proposed for captured adversaries. Instead, there are provisions to ensure that they shall be treated humanely, and the protections for them and for the civilian population in the common Article 3 to the Geneva Conventions, 1949, (against taking of hostages and against violence, torture and other forms of ill-treatment) are repeated. There are also general provisions for the protection of the wounded, sick and shipwrecked. This protocol also contains detailed provisions for protecting the civilian population against indiscriminate warfare and attacking targets indispensable to the survival of the civilian population, in similar or identical terms to those quoted above from the First Draft Protocol.

The provisions for implementing the protocols are unfortunately very general in character. There is an important proposal that the ICRC should act as protecting power in the absence of any other power having been appointed. There are also provisions for the better dissemination of the Conventions and Protocols in peace and in war and for qualified legal advisors to advise military commanders. In general, however, it is left to the parties to the conflict to take "all necessary measures for the execution of the obligations incumbent upon them", with no international machinery for enforcement.

The memorandum submitted by the non-governmental organisations draws up five fundamental principles which, it submits, should inspire the rules of international humanitarian law in the future. These are :—

- (i) Guarantees for an effective application of the provisions of the humanitarian conventions, and a system for their implementation, should be established.
- (ii) The fundamental humanitarian principles should be applied in all armed conflicts, internal as well as international.
- (iii) The parties to conflicts and the members of their armed forces do not have an unlimited right of choice of the means and methods of combat and targets for attack.
- (iv) The civilian population should enjoy a special protection respecting their non-combatant status and ensuring the indispensable conditions for their survival in all armed conflicts.
- (v) The use of weapons, means and methods of combat which strike or affect indiscriminately the civilian population and combatants, or which are of a particularly cruel character or cause particularly severe suffering, should be forbidden. These weapons, means and methods of combat should be specified by name in the Protocols.

Particular importance is attached to this last point. The non-governmental organisations take the view that the use of nuclear weapons and other weapons of mass destruction is already covered by the prohibition of means and methods of combat which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives. The memorandum goes on



to argue that there should be specific prohibition of particularly cruel weapons, such as napalm and certain other incendiary weapons, certain fragmentation bombs, and certain mines and high-velocity small arms. The memorandum also proposes international machinery for the investigation of alleged violations of the Conventions and Protocols.

Copies of the non-governmental organisations' memorandum can be made available on request to interested persons. It is hoped that lawyers and legal organisations in all countries will impress upon their governments the importance of making real progress in the development of humanitarian law at the forthcoming diplomatic conference.

## **Law and the Prevention of Torture \***

To mark the 25th Anniversary of the Universal Declaration of Human Rights, Amnesty International have launched a Campaign for the Abolition of Torture. Amnesty state that they have evidence to indicate that torture has been used against suspects and detainees in some 65 countries and that in nearly 30 of these it has been used as a regular administrative practice. Offending countries are to be found in all continents and in each of the main political systems, in western democracies and socialist countries, as well as under military dictatorships and the racist regimes of southern Africa.

Faced with these startling figures, lawyers in all countries must be concerned to consider what contribution the law and legal process can make to the elimination of this barbarous practice. The starting point is to consider the present laws and remedies, and their inadequacies.

There is probably no country in the world where the use of torture is not already a criminal offence, and where there are not, in theory, civil remedies available to the victims. Nevertheless, it is very rare that prosecutions or civil claims are brought before the courts, and still more rare for them to succeed. The reasons for this ineffectiveness of the law are not difficult to identify. First, the prosecuting authorities in the countries where torture occurs are usually either themselves the torturers or are closely linked to them, and it is only where public opinion or some other powerful influence can be brought to bear that any serious investigation, let alone a criminal prosecution, results. Secondly, the victim, as a private individual, is usually unable to produce corroborative evidence of his complaint, since he cannot communicate with anyone while he is being tortured or while any physical signs of his injuries remain visible. Also, he is often unable to name his torturers, and is not given the opportunity to identify them. Thirdly, judges are reluctant to give credence to allegations of this kind in face of emphatic denials by

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\* This article is based upon a report given by the Secretary-General of the International Commission of Jurists to a Conference on Torture convened by the British Section of Amnesty International in London on October 20, 1973.

the security forces, and sometimes even consider it outside their purview to inquire into them; if civilian judges show a readiness to do so, they may be replaced by military tribunals with a sterner approach.

There are, of course, creditable exceptions where allegations of torture have been seriously investigated, such as the Compton Report into brutality in Northern Ireland, and the subsequent decision by the British Government to accept Lord Gardiner's minority report on what should be considered permissible practices of interrogation (see ICJ REVIEW No. 8). Some civil actions claiming damages have been successfully brought in Northern Ireland but, as far as is known, there have not been any criminal prosecutions.

Apart from the position under national law, there are express prohibitions of torture in a number of international instruments, and some procedures, mostly rather rudimentary, exist for their enforcement.

The Charter of the United Nations, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights all prohibit torture or inhumane treatment of persons in custody.

The new procedure under the United Nations for the examination of communications regarding gross violations of human rights has been described elsewhere in this issue and in ICJ REVIEW No. 10. The procedure is only in its infancy and is painfully slow, but at least the stage has been reached where a decision has been taken to refer to the Human Rights Commission complaints against eight countries. It is thought probable that at least five of these include allegations of torture, namely those reportedly brought against Brazil, Indonesia, Iran, Portugal and the United Kingdom.

When the International Covenant on Civil and Political Rights has received sufficient ratifications to come into force, a new procedure will be available for the examination of communications by a Human Rights Committee set up under the Covenant. It will be able to consider complaints against those state parties who have made a declaration under Article 41 agreeing to complaints being made against them by other state parties, or who have signed the Optional Protocol agreeing to be subject to complaints by individual victims.

Under the European Convention on Human Rights, complaints alleging torture can be considered by the Commission and, if necessary, the Court and Council of Ministers. Complaints may be made by any other state or, if the state concerned has agreed to it, by individuals. The outstanding case concerning torture was that brought by certain Scandinavian countries and the Netherlands against Greece. A very large body of evidence was received on torture, and the Commission in 1969 came to the conclusion that torture was used as a regular administrative practice in Greece. When the findings of the Commission were about to be considered by the Council of Ministers, Greece denounced the Convention and resigned from the Council of Europe. The torture appears to have stopped for a period of one year (during which the Greek Government agreed to inspection of interrogation centres by Red Cross representatives), but unfortunately there is abundant evidence to show that it was resumed again later.

When the American Convention on Human Rights (see ICJ REVIEW No. 5) comes into force, it will provide a procedure for the consideration of alleged violations of the Convention by a Commission and Court of Human Rights. They will be able to act on complaints by individuals or non-governmental organisations or, where the State concerned has agreed, by another State member. Unfortunately, only two countries, Costa Rica and Colombia, have as yet ratified the Convention. Meanwhile, the Inter-American Commission on Human Rights of the Organisation of American States receives and enquires into complaints from any source alleging violations of the American Declaration of the Rights of Man. Under this procedure they have investigated a number of allegations of torture. For example, in May 1972 the Commission decided that "evidence collected... leads to the persuasive presumption that in Brazil serious cases of torture, abuse and maltreatment have occurred to persons of both sexes while they were deprived of their liberty" (see ICJ REVIEW No. 8).

All these procedures are, of course, subject to the consent of the state concerned, and this is unlikely to be given by a country which practices torture. It may, however, be given by an earlier regime so as to be binding upon an offending successor.

Modest as are the achievements of these international procedures, they are nevertheless of considerable significance as marking a beginning in the field of international implementation procedures. They also establish that the practice of torture, like other serious violations of human rights, is a matter of international concern and is not to be regarded, in the words of Article 2(7) of the Charter of the United Nations, as falling within "matters which are essentially within the domestic jurisdiction" of the state concerned.

A number of ideas have been put forward for improving the machinery for the implementation of international law against torture. Some have proposed an International Convention against Torture with a procedure for investigating and reporting upon complaints, and with a requirement that states should be responsible to an International Commission for ensuring that violations by individuals are punished. Others think it better to press governments to ratify and bring into force the existing Covenants and Conventions. Another approach is to urge that torture should be recognised as being a crime against humanity and thus subject to international jurisdiction, much in the way that is being currently proposed in the UN for the crime of Apartheid. Finally, there are those who would press for a full judicial machinery with an International Criminal Court with jurisdiction to try and punish individual offenders.

It is likely to be some time before States are willing to accept any effective international judicial machinery. For this reason many international lawyers and non-governmental organisations have thought it better to press for improved machinery for enquiry into allegations of violations of human rights. Again, in the belief that a more limited field of jurisdiction would be more acceptable, some have suggested that this should, in the first instance, be limited to violations of human rights in armed conflicts. As recent experience has shown in Vietnam and elsewhere, many allegations of torture arise during international or internal wars.

All these ideas are worth pursuing, but it may be that the most effective action can be taken at the national level. It may prove more productive to direct this action not so much to providing criminal and civil remedies after the event, as to providing legal procedures which will make it unlikely that the event will occur. These could cover such matters as :—

- (i) the right to legal assistance, available immediately on arrest and during detention ;
- (ii) the right for arrested persons to communicate with their families ;
- (iii) strict rules regarding the length of interrogation sessions, with adequate periods for rest and refreshment ;
- (iv) medical examination before interrogation and, if requested by the person concerned or his lawyer, after interrogation ;
- (v) detailed recording of all relevant facts concerning interrogation, including the length and times of sessions, names of interrogators and guards, particulars and results of medical examinations, etc. ;
- (vi) a requirement that arrested persons be brought before a judge within 24 hours and thereafter kept in custody only under order and supervision of the court ;
- (vii) further interrogations, if any, to be carried out only by the judge ;
- (viii) adequate remedies for bringing complaints of illegal detention or ill-treatment before the court without delay (e.g. habeas corpus, amparo).

There should, of course, also be adequate penal sanctions against torturers, and enforceable civil compensation for ill-treatment. These and other proposals have been carefully examined in an admirable study prepared for the UN Human Rights Commission, the "Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile". Although it was published ten years ago, it has not yet been discussed by the Human Rights Commission. Every session of the Commission begins with a proposal that this item on the agenda be deferred.

One particular problem should be mentioned, namely that of the definition of "torture" or "ill-treatment". The difficulty is to know where to draw the line between permissible and impermissible methods of interrogation. Most would agree that any form of physical violence is impermissible. But what forms of psychological pressure can be allowed? Techniques of sense deprivation and isolation are common practices in many countries. Which of them are objectionable? The British Government accepted Lord Gardiner's recommendation to cease practices of "hooding", subjecting suspects to continuous monotonous noise, prolonged sleep deprivation, prolonged wall-standing, or putting them on a bread and water diet. For how long is it permissible to keep a suspect in solitary confinement? For how long may he be required to stand? Should these matters be defined in the legislation, or should the detailed consideration of particular practices be left for decision by the courts? Whatever answers are given to these questions, at the end of the day detailed administrative memoranda will be required for the guidance of interrogators.

Fundamentally, the abolition of torture, where it exists, is a political rather than a legal problem. Once the determination exists to root out torture, legal rules and legal processes can help to make it effective. The over-riding requirement is respect for the rule of law, in the sense that everyone, including the interrogators and the security authorities, must be and must know themselves to be subject to the law. Experience in many countries has shown that when security authorities believe themselves to be beyond the reach of the law, they will yield to the temptation to resort to extreme measures in order to obtain speedy results. The avoidance of torture requires strict laws, translated into strict administrative practices, strictly enforced, with an enquiry procedure by an impartial body armed with effective powers to investigate allegations of ill-treatment. Finally it requires strong and independent prosecuting authorities and judges to administer the law.

## **U.N. Sub-Commission on minorities and discrimination**

The meeting of the U.N. Sub-Commission on the Protection of Minorities and Prevention of Discrimination held in Geneva from 3-21 September, 1973, was of more than usual interest. A new stage was reached in the international implementation of human rights, progress reports were received on three current studies, and some important proposals were made for new studies to be undertaken by the Sub-Commission. By an unfortunate lapse, insufficient members turned up for the final meeting of the session to provide a quorum. Consequently the Sub-Commission were unable to adopt their report to the Human Rights Commission. It is hoped that a way may be found of overcoming this omission.

The new procedure for dealing with "communications" from the public alleging consistent patterns of gross violations of human rights was described in ICJ REVIEW No. 9. This year the procedure was carried a stage further forward. For the first time, the Sub-Commission decided to communicate findings under this heading to the Human Rights Commission. According to a report in the *London Times* of September 24, 1973, the communications referred to the Commission related to the United Kingdom (in respect of Northern Ireland), Portugal (in respect of the overseas territories), Iran, Indonesia, Burundi, Tanzania (in respect of Zanzibar), Brazil and Guyana. The subject matter of the communications is a matter for speculation, but it is likely that the ill-treatment of political prisoners figured in those relating to the U.K., Portugal, Iran, Indonesia and Brazil. The other communications probably related to tribal massacres in Burundi, forced marriages and other repression in Zanzibar, and discrimination against Indians in Guyana. According to the *Times* report, neither the U.K. nor Guyana had replied to the communications concerning them. It may be expected that they will now do so. The next stage will be for the Human Rights Commission to decide on which communications to take action. Their action may take the form either of a study or, with the consent of the government concerned, of a Committee of Enquiry.

In addition to the new communications procedure, the Sub-Commission was also asked by the Human Rights Commission as far back as 1967 to prepare annually for the use of the Commission "a report containing information on violations of human rights and fundamental freedoms from all available sources". No such report has yet been prepared. As a result of an intervention made on behalf of a number of non-governmental organisations, including the International Commission of Jurists, an interesting debate took place in which a number of members urged that the Secretary-General should provide documentation to enable the Sub-Commission to submit reports as asked by the Commission. In view of the constant and widespread allegations of violations of human rights and fundamental freedoms in all parts of the world, not all of which can possibly be dealt with under the new communications procedure, an authoritative annual survey by the Sub-Commission could prove to be of great value.

On the question of slavery and "slavery-like practices", the Sub-Commission decided to seek authority from the Economic and Social Council to set up a working group of five members to meet for three days before its future meetings to consider and examine any information from credible sources on this subject with a view to recommending remedial action. As the Sub-Commission recognised, States are often unwilling to report the existence of slaves in their own countries. This working group could provide a modest but important first step in setting up some international machinery of implementation of the Anti-Slavery Conventions. If this new procedure is approved, it will be one more recognition of the fact that violations of human rights are matters of international concern and are not, in the words of Article 2 (7) of the Charter, "essentially within the domestic jurisdiction of any state".

Progress reports were received by the Sub-Commission on three studies in hand dealing respectively with discrimination against ethnic, religious and linguistic minorities, with discrimination against indigenous populations, and with the prevention and punishment of genocide. The study on minorities is confined to the rights of minorities to enjoy their own culture, practice their own religion and use their own language. The preliminary and progress reports contain an interesting historical study of the subject. Indigenous populations are defined for the purpose of the second study as "the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant". In the progress report the rapporteur said he had decided to eliminate from the study the native populations of Southern Africa (as they were being studied extensively elsewhere in the U.N.) and the problems of the Syrian region of Golan and of the Palestinian Arabs. The study on genocide, unlike the other two, deals with a question which is already the

subject of a specific international convention. The rapporteur sees his task as being to re-examine the concept of genocide with a view to making the Convention effective, and to examining whether its coverage is as comprehensive as it should be. In addition he will study the problem of genocide as a phenomenon of the modern world.

All three studies deal with subjects on which the information provided by governments is likely to be somewhat limited and partial. The rapporteurs, who are concerned to report upon the *de facto* as well as the *de jure* situation, will welcome information from non-governmental organisations and from individuals. Anyone wishing to contribute is invited to send in their material either to the Human Rights Division of the U.N. in New York or to the International Commission of Jurists in Geneva. The ICJ has prepared a simplified form of questionnaire relating to the minorities study which is available on request.

Other matters on which the Sub-Commission has sought authority to undertake studies are "the adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to colonial and racist régimes of Southern Africa", and the exploitation of migrant workers through illicit and clandestine trafficking. They have also asked the Human Rights Commission to place on the agenda for the next session of the Sub-Commission "the question of human rights of persons subjected to any form of detention or imprisonment". A proposal was made for a study of the rights of non-citizens, with a view to preparing a draft declaration on their rights, but the discussion was not completed and has been adjourned to the next session.

The Sub-Commission had been asked by the Human Rights Commission to draw up guidelines for a projected study on the right of self-determination. The discussion on this subject was notable for the broad view taken by a number of the members of the nature of the right. For them self-determination covered not only the right to independence of people under colonial rule or external domination, but also included the right of peoples to consolidate their independence once gained and their right "to be free from any dominating force and any foreign interference or pressure". It was stressed that the study should not be limited to a survey of the development of the right to self-determination in the external relationship between the state and its citizens. The right of self-determination of peoples could be denied, for example, by an internal military coup unsupported by any expression of the popular will, just as much as by an external invasion. It is to be hoped that this study will be approved by the Human Rights Commission and that it may make an important contribution to the understanding of this right which is enshrined in the Charter of the United Nations.

## **International Crimes Tribunals in Bangladesh**

Last July the Bangladesh Parliament passed into law the International Crimes (Tribunal) Act, 1973. Its immediate purpose is to enable tribunals to be set up with jurisdiction to try under international penal law the 195 Pakistani officers held as prisoners of war in India.

According to a press release of April 18, 1973, the Bangladesh Government intend to try them "for serious crimes which include genocide, war crimes, crimes against humanity, breaches of article 3 of the Geneva Convention, murder, rape and arson".

As genocide, war crimes, crimes against humanity, and breaches of article 3 were not crimes under Pakistani or Bangladesh domestic law at the material time, it would not be possible to prefer charges for these offences under domestic law without having resort to retro-active legislation. Hence the decision to try them under international penal law. There is some authority to support this course. As article 15 of the Covenant on Civil and Political Rights declares, the principle that "no-one will be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed" shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations".

The Prime Minister, Sheikh Mujibur Rahman, has repeatedly stated that his country would welcome an international tribunal set up by the United Nations to try the "war criminals". As there is no prospect of obtaining the necessary international agreement to set up such a tribunal, Bangladesh has decided to provide for tribunals of its own. The greatest interest lies in the jurisdiction of the tribunals. Some reservations must be expressed about their constitution and their procedure.

Although the Act was passed with the trials of the Pakistani prisoners of war in mind, it is a piece of permanent and general legislation providing a machinery for the trial at any time under international penal law of war crimes and kindred offences committed in the territory of Bangladesh.

## **Jurisdiction**

As to jurisdiction, the Act provides in section 3 that the government may at any time set up one or more tribunals with jurisdiction "to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed, in the territory of Bangladesh" any of the crimes listed in the Act "for which there shall be individual responsibility". The crimes listed are:

- (a) Crimes against Humanity: namely murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane act committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated;
- (b) Crimes against Peace: namely planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;



- (c) Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, such as<sup>1</sup>:
  - (i) killing members of the group;
  - (ii) causing serious bodily or mental harm to members of the group;
  - (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (iv) imposing measures intended to prevent births within the group;
  - (v) forcibly transferring children of the group to another group;
- (d) War Crimes: namely violation of laws or customs of war which include but are not limited to murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detenus<sup>2</sup>, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;
- (f) any other crimes under international law;
- (g) attempt, abetment or conspiracy to commit any such crimes;
- (h) complicity in or failure to prevent commission of any such crimes."

This jurisdiction covers acts committed at any time, whether in peace or war, and whether during international or non-international armed conflicts. The only limitations are that the defendant must have been a member of an "armed, defence or auxiliary force" at the time of the offence and the offence must have been committed in the territory of Bangladesh.

It will be noted that genocide is defined to include the intent to destroy in whole or in part a "political group". This extends the definition contained in the Genocide Convention, and accordingly any charge founded upon these words in respect of acts committed before the passing of the Act may be open to objection on grounds of retroactivity. Some international lawyers would take the view that crimes against humanity, crimes against peace and war crimes are, in international law, restricted to such crimes committed in relation to an international armed conflict<sup>3</sup>. As the 1971 conflict in what is now Bangladesh was, in international law, an internal conflict up to the date of India's invasion, any charges founded on acts occurring before that date would, on this view, also be open to objection on grounds of retroactivity. The Constitution of Bangladesh provides in

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<sup>1</sup> Seemingly a printing error for "as such".

<sup>2</sup> Seemingly a printing error for "detainees".

<sup>3</sup> The Staff of the ICJ expressed a contrary view in their Staff Study on the Events in East Pakistan, 1971; see ICJ Review No. 8, pp. 36 and 37.

article 35 (1) "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence ..."

It is, perhaps, in order to overcome this difficulty that paragraph (e) includes among the crimes listed "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949". Article 3 common to the four Geneva Conventions applies to non-international armed conflicts and specifies a number of prohibited acts, though no procedure is laid down in the Geneva Conventions for enforcing this article.

Section 4 (2) of the Act provides that :

"Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 or is connected with any plans and activities involving the commission of such crimes *or who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes, or who fails to take necessary measures to prevent the commission of such crimes,* is guilty of such crimes."

The words in italics appear to be based upon the majority opinion of the U.S. Supreme Court in the Yamashita case (90 Lawyers' Edition, p. 499). Without the addition of wording such as "knowingly" or "wilfully", they introduce a vicarious liability which many penal lawyers would find repugnant, and it is open to question whether they form part of international penal law.

There is also a disturbingly wide statement of joint responsibility in section 4 (1), which reads: "When any crime as specified in section 3 is committed by several persons, each of such person[s] is liable for that crime in the same manner as if it were done by him alone". It is to be hoped that this would not be construed in such a way as to hold an individual responsible for another's acts of which he had no knowledge and which he did not intend.

Section 5 provides that the official position of the accused, or the fact that he was acting under government or superior orders, can never free him from responsibility, but government or superior orders can be a mitigating factor. This Section is based on the Nuremberg Principles drawn up by the International Law Commission and approved by the General Assembly of the United Nations. It is to be regretted that the important words in the Nuremberg Principles "provided a moral choice was in fact possible to him" have been omitted in the provision rejecting the defence of government or superior orders.

## Constitution

Tribunals are to be constituted *ad hoc* whenever the government decides to set one up. Each tribunal is to be composed of a chairman and between two and four other members. There was a difficult choice to be made in deciding whether to give this jurisdiction to a purely national tribunal or to one whose members were jurists

from other, and perhaps neutral, countries. The advantage of an international composition for the tribunal would be that its decisions would be more acceptable to world opinion, and proceedings would not be open to the criticism that they were a trial by the victors of the vanquished. As against this, an *ad hoc* tribunal might carry less authority than a permanent court, and the government might be suspected of appointing partial judges. This latter point could be met by inviting a neutral body to nominate a panel from which the tribunal members could be drawn. The International Commission of Jurists urged upon the government of Bangladesh that a tribunal with an international composition would be preferable.

The solution now adopted seems to combine the worst of both worlds. Only Bangladesh jurists will qualify for membership, but the tribunals will be appointed *ad hoc* in each case. Although High Court and Supreme Court Judges will qualify for membership, a tribunal member may also be any person who is qualified to be or has been such a judge, as well as anyone qualified to be a member of a "General Court Martial under any service law of Bangladesh". If the tribunal is in all cases to be purely national it would seem preferable to clothe an existing superior court with the necessary jurisdiction. In this way it would be assured that the tribunal was composed of experienced judges, whose impartiality might be more readily accepted than that of an *ad hoc* tribunal.

Two other provisions concerning the constitution of the tribunal are open to objection. First, neither the constitution of the tribunal nor the appointment of its members can be challenged by the prosecution or defence. It is difficult to see why the right of challenge should be excluded. Secondly, if any member is unable to attend any sitting, for any reason, the trial can continue before the other members, and if one falls ill or dies, another member may be appointed in his place. In the result, members can take part in the decision who have not heard all the evidence. Moreover, the membership of the tribunal could at times be reduced to two members, or even to one.

## Procedure

In laying down the procedure for the tribunals and establishing the rights of the accused, the precedents of the Nuremberg Charter have been followed. Some of the procedures may seem strange to common law lawyers but are accepted practice in civil law countries. However, the evidence provisions are exceedingly wide. There is a general provision that a tribunal shall not be bound by the rules of evidence and may admit any evidence, including any documents or other materials, "which it deems to have probative value" (ss. 19 (1) and 23). The tribunal has a complete discretion to permit a party to cross-examine its own witnesses (s. 10 (g)). Unsigned as well as signed statements of witnesses to a magistrate or investigation officer can be received in evidence if the witness is dead or cannot attend without unreasonable delay or expense (ss. 8 (6) and 19 (2)).

One rather surprising provision is that "a tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations" (section 19 (4)). This would appear to allow the tribunal to take into account the

contents of highly contentious documents which had not been produced in evidence and which the defence had no opportunity to meet. There is already power under article 19 (1) for *any* document which the tribunal consider to have probative value to be admitted in evidence.

Although the tribunal is enjoined to sit in public, it has an absolute discretion to take any proceedings in camera.

The right to counsel is provided for in section 17 (2), but there is no provision for foreign counsel, although repeated assurances have been given that foreign counsel would be allowed if the Pakistani officers are brought to trial. When Mr. Malik, the former Civil Governor of East Pakistan, was tried before a Collaborators Tribunal, it was said that no-one had the power to grant authority for Sir Dingle Foot, former Solicitor-General of England, to defend him. It is important, therefore, that the necessary legislative authority for foreign counsel should be given.

Section 20 (2) provides for "sentence of death or such other punishment proportionate to the gravity of the crime as appears to the tribunal to be just and proper". This will be subject to the President's prerogative of mercy under Article 49 of the Constitution. There is a right of appeal against conviction and sentence to the Appellate Division of the Supreme Court.

## **Conclusion**

The purpose of this Act is to be welcomed. It is a new step forward in the development of international penal law. It is believed to be unique in legal history in making provision under national legislation for tribunals with a general jurisdiction to try offences under international penal law. In view, however, of the weaknesses in the Act, it is doubtful whether a tribunal set up under its provisions would gain acceptance outside Bangladesh, particularly in a matter so highly charged politically as that of the Pakistani prisoners of war.

# THE FUTURE OF THE LAW OF THE SEA

LUCIUS CAFLISCH \*

## I. *The Inadequacy of the Existing Law of the Sea*

The present law of the sea is mainly reflected by the four Conventions concluded at Geneva on April 29, 1958.<sup>1</sup> While the two Conventions pertaining to fisheries and conservation of living resources and to the continental shelf break new ground, the other two Conventions, which deal with the territorial sea and with the high seas, respectively, are essentially codifications of existing customary rules.

It is unfortunate that the Geneva Conventions of 1958 did not turn out to be a complete success. One of the main reasons was that States were unable to fix the maximum breadth of the territorial sea; the proposals put forward varied between three and twelve nautical miles. In 1960, another Conference held at Geneva attempted in vain to solve this problem. A proposal presented jointly by Canada and the United States, which provided for a six-mile territorial sea and an additional six-mile exclusive fisheries zone, failed to obtain the required two-thirds majority.<sup>2</sup> This crucial question was therefore left unsettled, although it can be asserted with confidence that under Article 24 of the Geneva Convention on the Territorial Sea the breadth of that sea may not, in any case, exceed twelve miles.<sup>3</sup>

There are, however, many other reasons for the partial failure of the framework elaborated at Geneva. For instance, the 1958 Conventions give no precise criteria for establishing the points from which the breadth of the territorial sea can be measured in the event of a deeply indented coastline. Provisions on so-called "mid-ocean" archipelagos, such as Fiji, Indonesia or the Philippines, are also lacking, and the same is to be said for artificial islands constructed for strategic or other purposes, such as pirate broadcasting, for example. It is well known that the few rules devoted to the conservation<sup>4</sup> and protection<sup>5</sup> of the marine environment are wholly inadequate.

However, the main reason for the present near chaos of the law of the sea seems to be the elastic definition of the outer boundary of the continental shelf given by the relevant Geneva Convention. Under Articles 1 and 2 of the Convention on the Continental Shelf, the coastal State may explore and exploit the natural resources of the ocean floor adjacent to its coast up to the 200-metre isobath,<sup>6</sup> "or, beyond that limit, to where the depth of the superjacent waters

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admits of the exploitation of the natural resources". This so-called "exploitability" test creates a curious and rather alarming situation: the continental shelf of each coastal State increases with the exploitability of the ocean floor. This means that the exploitability of the seabed and its subsoil at increasing depths causes the boundary of the legal continental shelves to move outward. In 1958, the framers of the Convention had assumed that this clause would remain purely theoretical for many years to come and that the ocean floor would not become exploitable much beyond the 200-metre isobath. This assumption proved to be erroneous, for modern technology has made it possible to exploit the seabed and subsoil far beyond this line. Accordingly, the parts of the ocean floor to which coastal States may lay claim owing to the exploitability test have grown to an alarming size. If that test is maintained and if marine technology continues to progress—as is clearly to be expected—the entire ocean floor will eventually be divided up among coastal States.<sup>7</sup> If this were to happen, the States endowed with a long coastline would obviously get the lion's share, while the land-locked States—Hungary, for example—would receive nothing. It is self-evident that such a division would be most unjust; in addition, it would be contrary to the time-honoured principle that the ocean floor beyond national jurisdiction as well as the waters of the high seas belong to the international community as such and thus may not be appropriated by individual States. It is therefore of vital importance to freeze national claims over parts of the ocean floor before the latter is divided up entirely.

## II. *The United Nations and the Law of the Sea*

The merit of having drawn the attention of the United Nations to the dangers of the present situation belongs to Malta and more particularly to its Permanent Representative to the United Nations, Ambassador Arvid Pardo. Towards the end of 1967, the Maltese Government had suggested that the General Assembly of the United Nations study the "Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction", that is, the ways and means to prevent individual States from appropriating further parts of the ocean floor.<sup>8</sup> According to Malta, this objective could be accomplished by giving the seabed and its subsoil the status of a "common heritage of mankind". In practical terms this would mean that the area in question belongs to the international community as such and is to be administered and possibly even exploited by an international agency.

The proposal put forward by Malta was favourably received and promptly acted upon. The Assembly immediately created an *ad hoc* Seabed Committee, the full name of which was "United Nations Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction". This *ad hoc* Committee, which had 35 and later on 42 members, was made permanent in 1968.<sup>9</sup> From 1967 to 1969, it discussed, together with the General Assembly's First Committee, the subject for which it had been created. Although the Committee was to deal with the future status of the seabed, the debate soon widened into a general discussion on the adequacy of the existing law of the sea as reflected by the 1958 Geneva Conventions. Many States expressed the view that this law was obsolete owing to

technological advances and unjust towards new and developing States. This was in particular the opinion of some Latin American States which had for some time already claimed exclusive economic rights or even full sovereignty over a 200-mile zone adjacent to their coasts. This claim had been justified by the fact that under the rules of the relevant Geneva Convention, some States—in particular Latin American countries—have but a small continental shelf, or no shelf at all, because their coast drops abruptly into the sea. In addition, the claimant States had pointed out that their traditional fishing grounds adjacent to their territorial sea were being depleted by large industrially operated foreign fishing fleets, especially by the fleets of the United States, the Soviet Union and Japan. Many other States, in particular developing countries, are now supporting the claim of these Latin American nations.

The discussions of the General Assembly's First Committee and of the Seabed Committee continued throughout 1970 and led to the adoption of some resolutions by the Assembly. It was decided, in particular, to increase membership in the Seabed Committee to 86 States and to plan for a Third United Nations Conference on the Law of the Sea in 1973.<sup>10</sup> Last but not least, the General Assembly adopted a "Declaration of Principles" which is to serve as a guideline for the international seabed régime and the ocean agency to be established.<sup>11</sup> The essential points of this most important document can be summarised as follows:

- The seabed beyond the limits of national jurisdiction and its resources constitute a "common heritage of mankind" (Principle 1) which shall not be subject to appropriation by individual States or persons (Principle 2); no State may claim or exercise, in that zone, sovereign rights or rights which are incompatible with the Declaration or with the international régime to be established (Principles 2 and 3).
- All activities regarding the exploration or exploitation of the resources of the area, and other related activities, shall be governed by the international régime to be established. This régime shall be given effect by an appropriate international "machinery"; it shall provide for the orderly and safe development and rational management of the area and its resources and shall ensure the "equitable" sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries (Principles 4 and 9).
- The area in question shall be used exclusively for peaceful purposes, for the benefit of mankind as a whole, and taking into particular consideration the interests and needs of the developing States as well as the need to preserve the marine environment and the resources of the area (Principles 5, 7, 8 and 11).
- All States, whether coastal or land-locked, shall have access to the area and its resources without discrimination and in accordance with the régime to be established (Principles 5 and 7).
- The "Declaration of Principles" shall affect neither the legal status of the waters or air space superjacent to the area nor the rights of coastal States in matters of pollution prevention or elimination (Principle 13).

From 1971 to 1973, the Seabed Committee—which was enlarged once more in 1971<sup>12</sup> and now has 91 members—attempted to prepare the future Law of the Sea Conference. With this objective in mind, it formed three Sub-committees, the first of which was to prepare a draft international seabed régime and machinery along the lines indicated by the “Declaration of Principles”. Sub-committee II had the task of drawing up a list of subjects pertaining to the law of the sea and of drafting provisions on these subjects. Sub-committee III, finally, was to elaborate articles on the preservation of the marine environment and on scientific research.<sup>13</sup>

Unfortunately, the full Committee and its Sub-committees were not very successful in their work. This is hardly surprising, for the issues they had to face were formidable indeed: the sea, which used to be a lawyers’ topic, has become one of the prime political issues of our time and is intimately connected with an alarming surge of nationalism and the equally disquieting struggle between developed and developing States. Thus, the Seabed Committee accomplished very little; it identified the issues to be placed before the Conference and extensively discussed the various possible international seabed régimes and agencies. It is therefore surprising that the General Assembly decided to hold the Third United Nations Conference on the Law of the Sea as early as spring 1974.<sup>14</sup> In the paragraphs that follow, an attempt will be made to identify and briefly discuss some of the crucial problems to be faced—and solved—by the forthcoming Conference.

### III. *Issues Before the Third United Nations Conference on the Law of the Sea*

#### 1. The Revision of the Existing Law of the Sea

##### *The Territorial Sea and the Contiguous Zone*

It will be recalled that lack of agreement on the breadth of the territorial sea proved to be one of the main stumbling blocks of the 1958 and 1960 Geneva Conferences. This experience is not likely to be repeated in the forthcoming Conference for, although there are still disagreements on this question, it has ceased to be the central issue. A consensus on a twelve-mile limit would now appear possible, provided States are granted exclusive economic rights in a sizeable area adjacent to their coasts (see below). The principal remaining problems, then, would be the more precise determination of the baselines from which the breadth of the territorial sea is to be measured<sup>15</sup> and the related question of whether and when midocean archipelagos may use straight baselines connecting the outermost points of their outer islands.<sup>16</sup>

##### *The Proposal to Establish a National Economic Zone or “Patrimonial Sea”*

A growing number of States—mostly developing countries—are demanding the creation of an Economic Zone or Patrimonial Sea. This zone would consist of an additional 188-mile belt adjacent to the territorial sea, and its establishment would no doubt entail the disappearance of the contiguous zone provided for by Article 24 of the Geneva Convention on the Territorial Sea. Coastal State juris-



diction, which would thus reach out to 200 miles from the shore, would not, however, amount to complete sovereignty over the area in question. The powers of the coastal State would consist in exclusive jurisdiction over all the living and non-living, renewable and non-renewable resources found on the seabed and in the subsoil of the Economic Zone or Patrimonial Sea or even in the superjacent waters. They would also include the right to enact and enforce rules for the safety of navigation and for the protection of the marine environment in this zone. This implies that other States might lose their freedom of fishing in the area but will in principle continue to enjoy the freedoms of navigation and of overflight as well as that of laying submarine cables and pipelines. It is quite clear, however, that even the exercise of these traditional freedoms—which have already been limited by the Geneva Convention on the Continental Shelf—would be further curtailed by the new exclusive rights attributed to the coastal State. It is quite likely, for instance, that the latter's powers to enact environmental protection rules in its Economic Zone or Patrimonial Sea will severely limit the freedom of navigation of, say, giant tankers. Similarly, that freedom may be restricted if the coastal State proceeds to intensively exploit given areas within the zone by means of installations located on large artificial islands. Extensive facilities erected by the coastal State on its seabed zone may further prevent other States from exercising their freedom of laying submarine cables and pipelines, and the laying of such devices may also be hampered by rules of environmental protection enacted by the coastal State. Last but not least, the creation of an Economic Zone or Patrimonial Sea will adversely affect the military and strategic interests of a number of States, for it is to be expected that coastal States would not have to tolerate the presence, in their zone, of military installations such as floating airports or supply stations.<sup>17</sup>

The proposed creation of large national zones of exclusive economic rights would thus amount to a radical departure from the traditional law of the sea and the freedoms it established. It would also reduce significantly the size of the International Seabed or Sea Area which, being the "common heritage of mankind", is to be managed and administered in common by the international community. That such "nationalistic" proposals have been formulated should, however, surprise no one. The existing international arrangements on fishing and conservation are largely ineffective and the fishing grounds of many States—especially of economically weak countries with long coastlines—are being depleted by foreign fishing fleets. The conventional rules concerning the protection of the marine environment cannot prevent the pollution and contamination of the waters and coastlines of these States by foreign vessels. Finally, many countries are incapable of exploring and exploiting the ocean floor adjacent to their coast by their own means and fear that other States might do so in their place. The past record of international cooperation in these fields does not suggest that an intergovernmental ocean agency would be able to cope effectively with these problems and thereby to alleviate the fears of the States in question.

Yet it is doubtful whether national appropriation of parts of the ocean space would achieve better results. Depletion of fishing grounds by foreigners, for instance, may well be followed by depletion caused by nationals. The record of coastal States in matters of pollution

prevention and elimination is not particularly encouraging and gives rise to justified apprehensions.

In addition, one should not lose sight of the fact that the creation of a large national Economic Zone or Patrimonial Sea is contrary to the interests of a considerable number of States: the great powers because it threatens their strategic freedom; the major maritime nations because it reduces their freedom of navigation and adversely affects the interests of their distant-water fishing fleets; the States with a short coastline and the land- and shelf-locked States, for they would gain little or nothing from the proposed extension of coastal State jurisdiction.<sup>18</sup>

For these reasons, the suggestion to establish a national Economic Zone or Patrimonial Sea has not been greeted with unbounded joy by everyone, and less radical proposals have been made. The United States, for instance, suggested to divide the national ocean space into a zone of exclusive jurisdiction limited by the 200-metre isobath, and a "trusteeship zone" reaching out to the margin of the geological continental shelf.<sup>19</sup> The latter zone would be exploited by the coastal State but the revenues would have to be shared between that State and the international community.<sup>20</sup> It appears, however, that this proposal is not likely to be adopted, firstly because the term "trusteeship" has a somewhat "colonial" flavour, and secondly because its adoption would allegedly reduce the International Seabed or Sea Area to practical insignificance<sup>21</sup>—but this, incidentally, is equally true for the 200-mile Economic Zone suggested by the very countries who criticise the United States draft. Another proposal would limit the zone of national jurisdiction with the help of a combined depth/distance criterion: the exclusive exploration and exploitation rights of the coastal State would reach out either to the 200-metre isobath or to a distance of, say, 40 miles, whichever is more favourable to that State.<sup>22</sup> A compromise along these lines would appear reasonable and should find considerable support, for it seems to strike an equitable balance between the justified claims of the coastal States, on the one hand, and, on the other hand, the necessity of preserving a substantial part of the "common heritage" as well as some remnants at least of the freedom of the seas. It remains to be seen, however, whether the deterioration of the international climate, which has now culminated in the Middle Eastern conflict and the ensuing oil embargo, is conducive to such a reasonable solution.

#### *The Proposed International Seabed or Sea Area*

The legal nature of the seabed and its subsoil has been amply discussed in the past, but the debate has been largely academic.<sup>23</sup> When the concept of the legal continental shelf and the exploitability criterion found their way into positive international law in or around 1958, however, an acute danger arose that individual States might gradually appropriate increasing portions of the ocean floor. This was the reason which prompted the Government of Malta to suggest the creation of an International Seabed Area comprising the ocean floor beyond the limits of national jurisdiction. According to the "Declaration of Principles" adopted by the United Nations General Assembly on December 17, 1970, this area is to be the "common heritage of mankind", i.e. a space exclusively affected to peaceful uses which should be administered or even exploited by the international

community as such. The latter should also carry out the important task of preserving the marine environment and its resources. The performance of these functions by the international community evidently requires the enactment of effective and detailed substantive rules as well as the creation of an international ocean agency.

The establishment of an International Seabed or Sea Area raises difficult questions. It will be remembered, for instance, that the area in question shall be affected exclusively to peaceful purposes. The implementation of this idea would, however, raise several practical problems. It is certain that the international area could not be used for carrying out nuclear tests.<sup>24</sup> It seems equally clear that the implantation, storage, testing or use of nuclear weapons or of other weapons of mass destruction on the ocean floor beyond national jurisdiction would be prohibited.<sup>25</sup> One may ask, however, whether this prohibition would have to be extended to implanting, storing, testing or using conventional weapons in the international area, and whether the resources extracted from that area—oil or uranium, for instance—would have to be reserved for peaceful uses. If this were to be the case, the most difficult question of how to enforce this rule would arise.

Another sensitive point in the proposal to establish an international seabed or sea régime is the idea that the benefits from the exploitation of the area should be equitably distributed among nations, taking into particular consideration the interests and needs of the developing countries. Despite its apparent attractiveness this principle is so vague as to raise almost insuperable problems. What, for instance, do we mean by "equitable" distribution? Which States are "developing countries" for the purposes of the planned régime, what are their real needs, and who is to assess these needs? What should be the shares going to the developed and to the developing countries, respectively?

#### *The Protection of the Marine Environment and the Conservation of its Resources*

The proposal to create an international seabed and sea régime is mainly aimed at ensuring that the immense resources the oceans may contain are not squandered away and will benefit mankind as a whole. However, in order to reap benefits from the area, it is necessary to make sure that the marine environment and its resources are adequately protected and to enact strict rules to that effect.

While everybody is prepared to accept this postulate in the abstract, very few States seem willing to sacrifice some of their short-term interests in favour of their long-term interests, let alone those of mankind. Yet the endless discussions on economic zones, fisheries, international ocean régimes and machineries is futile if the biological survival of the sea is not assured through the adoption of stringent universal rules on conservation and marine pollution. It is furthermore essential that the application of such rules be supervised by a central authority, for if this task were left to regional organisations or individual States, their effectiveness would become doubtful. It will therefore be necessary to establish international monitoring and control services, compulsory international adjudication, and collective enforce-

ment mechanisms on a global level. Failure to meet these objectives would probably result in the wanton destruction of one of the most promising—and perhaps the last—resource potential of mankind.

### *The Position of Land- and Shelf-locked States*

There are at present twenty-eight States having no sea coast<sup>26</sup> and twenty-two States who are “shelf-locked”, i.e. States whose legal continental shelf is entirely cut off from the ocean floor beyond the limits of national jurisdiction.<sup>27</sup> Taken together, the land- and shelf-locked States form more than one third of the international community.

The existing law of the sea has somewhat neglected the rights and interests of the land-locked States. It is true that they are entitled to a maritime flag<sup>28</sup> and enjoy the freedoms enumerated by Article 2 (1) of the Geneva Convention on the High Seas<sup>29</sup> as well as the right of innocent passage provided for in Article 14 (1) of the Geneva Convention on the Territorial Sea,<sup>30</sup> but the effectiveness of these rights is greatly diminished by the fact that in the absence of special agreements these States have no enforceable right of access to the sea and no right of transit through the territory of neighbouring coastal States.<sup>31</sup> As they are deprived of both territorial sea and continental shelf, they would derive no benefit from the creation of an exclusive national Economic Zone or Patrimonial Sea, nor could they take an active and direct part in the exploitation of the International Seabed or Sea Area in the absence of particular agreements to that effect.

Although they dispose of a territorial sea as well as of a (limited) continental shelf, the shelf-locked States are in a somewhat similar position: they have no possibility of expanding that shelf and therefore would not benefit significantly from an extension of national jurisdiction over parts of the high seas.

It has been asserted time and again that the land- and shelf-locked States have no means of improving their present unsatisfactory position because they lack bargaining power. This is simply not true. The fifty land- and shelf-locked States make up more than one third of the countries who will participate in the forthcoming Law of the Sea Conference. If they put aside their ideological differences and regional ties and act as a bloc, they will be able to prevent the future Law of the Sea Conference from taking decisions by the two-thirds majority which will no doubt be required, and this ability might give them considerable political leverage.

The land- and shelf-locked States could use this bargaining power to further either of two policies. In the first place, they could advocate narrow limits of national jurisdiction over the sea, thus favouring the international seabed or sea régime. The danger of this policy is that it could ultimately lead to a total failure of the forthcoming Conference and thus lead to chaos on the sea. The second possible policy would consist in proposing a *quid pro quo*: the land- and shelf-locked States could concede a moderate extension of national maritime jurisdiction against a guarantee of *effective* access to the sea—including the necessary rights of transit—and the assurance that they will participate on an equal footing in the exploitation of the International Seabed or Sea Area as well as in the exploitation of some national

Economic Zones on a regional basis. If the land- and shelf-locked States remain united, they would seem to have a good chance of obtaining substantial concessions along these lines.

## 2. The Proposed International Ocean Agency

The common exploration and exploitation of the International Seabed or Sea Area and the preservation of the *marine environment* and its resources call for a relatively sophisticated institutional framework. However, there is at present no consensus among States as to the precise shape of the institution(s) to be created. While the preference of some States—notably Latin American countries—goes to regional mechanisms, other States favour a universal organism. The latter could be a subsidiary organ of the United Nations General Assembly, or a specialised agency of the United Nations, or even a separate organisation; the tasks to be accomplished could also be entrusted to an already existing agency such as the Intergovernmental Maritime Consultative Organisation (IMCO).

The powers of the future Ocean Agency are also a matter of much debate: should its functions extend to the entire law of the sea, or should they be limited to the exploration and exploitation of the international area (including fisheries), or should they even be confined solely to the natural resources of the seabed and its subsoil? Should the proposed Agency be conceived along the lines of traditional international organisations, or should it be vested with international law-making functions and powers of enforcement? Should it merely supervise the activities of States and of their nationals on the seabed or in the sea, or should it directly engage in activities of exploration and exploitation? <sup>32</sup>

Although it is at present impossible to predict accurately the outcome of the forthcoming Conference, the debates of the Seabed Committee reveal some trends in these matters. It would seem, for instance, that the future Ocean Agency will be a universal institution and that its main functions will consist in the application of the treaty or treaties to be concluded, in the supervision of exploration and exploitation activities, and in the distribution of revenues. The delicate question of whether the Agency itself should engage in the exploration or exploitation of the International Seabed or Sea Area, however, remains open, although ultimately a negative answer would seem more probable.<sup>33</sup> The Agency will have at least two organs: an Assembly which will be composed of all member States and whose role will be predominantly consultative; and a Council with restricted membership but extensive powers. The composition and the voting rules of this Council will no doubt rank among the main issues to be solved by the Conference. In addition, the creation of a Secretariat and of a Tribunal has been suggested.

It is obvious that agreement on the Agency to be established will be at least as difficult to reach as consensus on the substantive issues with which the future law of the sea is confronted. The "supranational" powers, *i.e.* the law-making and enforcement functions which might be conferred upon the Agency could well prove to be one of the crucial questions. As already pointed out, the composition of the Council to be created might be another crucial problem, for it will be extremely difficult to find an acceptable balance between the different groups of States and interests involved.

#### IV. Conclusion

From Grotius' time to the first decades of the twentieth century, the sea was primarily viewed as an area of communication and as an inexhaustible fishing ground. Modern technology has almost totally transformed the uses of the sea. Navigation has ceased to be the only way of crossing the oceans, and maritime transportation has been revolutionised by the advent of giant tankers, offshore terminals, and pipelines. The sea's once inexhaustible fishing grounds are being rapidly depleted owing to industrial catching methods. Sophisticated technology has operated a complete change in maritime strategy and warfare. Finally, the sea and the ocean floor have become an increasingly accessible source of food and vital raw materials. It is not to be excluded that one day large numbers of human beings will live on the surface of the sea or even in underwater dwellings.

Owing to these developments the problems to be dealt with have become increasingly complex. The situation can no longer be analysed in the simple terms of the *Mare liberum* / *Mare clausum* controversy of past centuries, nor is it possible to continue to give freedom of navigation the absolute priority it enjoyed during the period of discoveries and of colonial expansion.

The complexity of the present situation is compounded by the political changes which have marked the postwar era, in particular the process of decolonisation. With the support of Latin American countries and of the People's Republic of China, many of the newly independent States repudiate the classical law of the sea because it has allegedly favoured the developed over the developing countries and has thus contributed to widening the gap between the former and the latter.

A further complication may arise as a consequence of the world-wide oil crisis engendered by the recent conflict in the Middle East. It is difficult to foresee how the shortage induced by the oil-producing Arab States will affect the latter's position or that of the oil-consuming States at the forthcoming Conference. Some consumer countries whose adjacent seabed is thought to hold large reserves of oil may, for instance, be tempted to abandon their former positions and to advocate a substantial extension of national maritime jurisdiction in order to lessen their dependence on Middle Eastern oil. On the other hand, some Arab States may adopt the contrary policy in order to perpetuate these links of dependence. It is also possible, however, that the oil resources likely to be found off the coasts of these Arab States are vastly superior to those which may be contained in submarine areas adjacent to the coasts of the consumer countries, in which case neither group of States would have an incentive to modify its present position.

Although the future of the law of the sea is thus most uncertain, the above considerations yield at least one firm conclusion: the classical law of the sea no longer adequately reflects the needs of the international community and is rapidly falling into obsolescence. New law must be made, and international agencies must be created to apply and enforce this law. Unlike the Geneva meetings of 1958, the Third United Nations Conference on the Law of the Sea will therefore face a task which is primarily political. Lawyers reared in the classical

traditions of the law of the sea may deplore the sacrifice of large parts of the freedoms of the seas, but this appears to be the only alternative to chaos in an area which has become of major importance for the future and, indeed, for the survival of mankind.

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<sup>1</sup> Convention on the Territorial Sea and the Contiguous Zone, United Nations Treaty Series (UNTS), vol. 516, p. 205; Convention on the High Seas, UNTS, vol. 450, p. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, UNTS, vol. 559, p. 286; Convention on the Continental Shelf, UNTS, vol. 499, p. 311.

<sup>2</sup> The proposal was accepted by a vote of 54 in favour and 28 against, with 5 abstentions. It would have been adopted if one of the States voting against it had abstained.

<sup>3</sup> Art. 24 (2) of the Convention provides that: "The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." *A fortiori*, the outer boundary of the territorial sea may not transgress the twelve-mile limit.

<sup>4</sup> The Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas has proved largely ineffective, for it mainly provides for the conclusion of agreements between the States concerned instead of formulating stringent global rules on conservation. In addition, it is at present binding upon 34 States only, *cf.* the table of ratifications in S. H. Lay, R. Churchill & M. Nordquist, *New Directions in the Law of the Sea*, Dobbs Ferry, N.Y., Oceana Publications, Inc., 1973, vol. II, pp. 800-805.

<sup>5</sup> The relevant provisions on marine pollution are Art. 24 and 25 of the Geneva Convention on the High Seas and Art. 5 (7) of the Geneva Convention on the Continental Shelf. In what respects these rules are insufficient has been pointed out elsewhere by this writer: "International Law and Ocean Pollution: The Present and the Future", *Belgian Review of International Law* 1972, No. 1, pp. 7-33, at pp. 22-23.

<sup>6</sup> That is, the line formed by the outermost points of the adjacent ocean floor at a depth of 200 metres.

<sup>7</sup> A map reproduced in *The Futurist*, vol. 6, 1972, pp. 110-111 shows how the ocean floor would be divided up among States if the open-ended criterion of exploitability established by the Geneva Convention were to be maintained.

<sup>8</sup> Memorandum presented by Malta to the Secretary-General of the United Nations on August 17, 1967, U.N. Doc. A/6695; speech delivered by Mr. Pardo to the First Committee of the General Assembly on November 1, 1967, U.N. Doc. A/C.1/PV. 1515 and 1516.

<sup>9</sup> United Nations, General Assembly, Resolution 2467 A (XXIII) of December 21, 1968.

<sup>10</sup> United Nations, General Assembly, Resolution 2750 C (XXV) of December 17, 1970.

<sup>11</sup> United Nations, General Assembly, Resolution 2749 (XXV) of December 17, 1970. The legal nature of this Declaration has been analysed by K. Skubiszewski, "La nature juridique de la 'Déclaration des principes' sur les fonds marins", in L. Caflisch (ed.), *Hydrospace in International Relations. Annals of International Studies*, vol. 4, 1973 (hereinafter cited as *Annals*), pp. 237-248, especially at pp. 246-248.

<sup>12</sup> Pursuant to General Assembly Resolution 2881 (XXVI) of December 21, 1971, the Enlarged Seabed Committee was joined by the People's Republic of China, Fiji, Finland, Nicaragua and Zambia.

<sup>13</sup> The tasks of these Sub-committees are defined in U.N. Doc. A/AC.138/SR. 45 of March 12, 1971, pp. 7-8.

<sup>14</sup> See General Assembly Resolution 3029 A (XXVII) of December 18, 1972. Originally the 1974 Conference was scheduled to take place at Santiago

(Chile), but this choice has now proved to be unsuitable owing to recent political events. Very likely the Conference will meet at Caracas (Venezuela), but no formal decision seems to have been taken yet.

<sup>15</sup> This problem has never been fully solved. According to Art. 3 of the Geneva Convention on the Territorial Sea, the line normally used for measuring the breadth of the territorial sea is the low-water line along the coast. Under Art. 4 (1) of the Convention, however, straight baselines may be drawn in places where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity. Such straight baselines "must not depart to any appreciable extent from the general direction of the coast" and "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters". These rules are far too imprecise and allow for all kinds of abuses. It would seem necessary, in particular, to limit the maximum length of straight baselines.

<sup>16</sup> On this problem, see G. Marston, "International Law and 'Mid-Ocean' Archipelagos" *Annals*, pp. 171-190. In this connection, the somewhat particular attitude taken by Fiji is worth mentioning: Fiji would consider the waters enclosed by the straight baselines to be territorial rather than internal waters, see statement of July 26, 1971, U.N. Doc. A/AC. 138/SR. 62, pp. 9-17.

<sup>17</sup> Even under the existing law it is questionable whether foreign States may establish military or other installations on the continental shelf, for such facilities might interfere with the exercise of the coastal State's sovereign rights over its shelf.

<sup>18</sup> There may be conflicting interests within one single State. The United States, for instance, could well advocate a broad area of national jurisdiction in order to protect her coastal fisheries and to secure the exclusive exploitation of the mineral resources contained in a large area adjacent to her coast. On the other hand, the importance of her distant-water fishing fleet and above all her strategic and shipping interests could induce her to favour narrow limits of national jurisdiction.

<sup>19</sup> That is, comprising the continental slope and rise.

<sup>20</sup> Cf. the so-called "Nixon Proposal", U.N. Doc. A/AC. 138/25 of August 3, 1970, *International Legal Materials*, vol. 9, 1970, p. 1046. This proposal has no bearing on fisheries.

<sup>21</sup> See Asian-African Legal Consultative Committee, Report of the Twelfth Session 1971, pp. 305-306.

<sup>22</sup> See the Preliminary Working Paper submitted by Afghanistan, Austria, Belgium, Hungary, Nepal, the Netherlands and Singapore on August 19, 1971, U.N. Doc. A/AC. 138/55, and the Polish Working Paper of July 28, 1971, U.N. Doc. A/AC. 138/44, p. 5.

<sup>23</sup> C. J. Colombos, *The International Law of the Sea*, 6th ed., London, Longmans, Green & Co., 1967, pp. 66 and ff., for instance, holds that the seabed is a *res communis*, i.e. an area belonging to the international community as a whole. For a contrary view, see Sir Cecil Hurst, "Whose Is the Bed of the Sea?", *British Year Book of International Law*, vol. 4, 1923-1924, pp. 34-43.

<sup>24</sup> This prohibition already results, for the States who are parties to it, from the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and under Water, of August 5, 1963, UNTS, vol. 480, p. 43.

<sup>25</sup> This prohibition is already contained, for the States who are parties to it, in Art. I and II of the Seabed Demilitarisation Treaty which entered into force on May 18, 1972, *International Legal Materials*, vol. 10, 1971, p. 145.

<sup>26</sup> These States are: Afghanistan, Austria, Bolivia, Botswana, Burundi, Byelorussia, Central African Republic, Chad, Czechoslovakia, Hungary, Laos, Lesotho, Liechtenstein, Luxemburg, Malawi, Mali, Mongolia, Nepal, Niger, Paraguay, Rwanda, San Marino, Swaziland, Switzerland, Uganda, Upper Volta, Vatican, Zambia.



<sup>27</sup> These States are : Belgium, Cambodia, Denmark, Ethiopia, Finland, the German Democratic Republic, the Federal Republic of Germany, Iran, Iraq, Jordan, Kuwait, Malaysia, the Netherlands, Poland, Saudi Arabia, Singapore, Sudan, Sweden, Thailand, North Vietnam, Yemen, Yugoslavia.

<sup>28</sup> See the Barcelona Declaration on the Right to a Flag of States Having no Seacoast, of April 20, 1921, League of Nations Treaty Series, vol. 7, p. 74.

<sup>29</sup> "Freedom of the high seas . . . comprises, *inter alia*, both for coastal and non-coastal States : (1) Freedom of navigation ; (2) Freedom of fishing ; (3) Freedom to lay submarine cables and pipelines ; (4) Freedom to fly over the high seas."

<sup>30</sup> "[S]hips of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea".

<sup>31</sup> See Art. 3 of the Geneva Convention on the High Seas and the comments by M. S. McDougal & W. T. Burke, *The Public Order of the Oceans*, New Haven, Yale University Press, 1962, p. 113 and by V. Ibler, "The Interests of Land- and Shelf-locked States and the Development of the Law of the Sea", *Annals*, pp. 55-65, at pp. 57-58.

<sup>32</sup> For an analysis of some of the proposals submitted by States, see the "Comparative Table of Draft Treaties, Working Papers and Draft Articles" submitted to the Seabed Committee by the United Nations Secretariat on January 28, 1972, U.N. Doc. A/AC. 138/L. 10.

<sup>33</sup> See the Working Paper submitted by Japan on November 23, 1971, U.N. Doc. A/AC. 138/63.

# RACE AND SOCIAL STRUCTURE

by

MARION GLEAN O'CALLAGHAN

*[December 10, 1973, the twenty-fifth anniversary of the Universal Declaration of Human Rights, has been chosen by the General Assembly of the United Nations as the commencement of the U.N. Decade for the Elimination of Racism and Racial Discrimination. To mark the occasion, we have invited a social anthropologist, Marion Glean O'Callaghan, to examine the problem of racism and racial discrimination from the point of view of the social sciences. For those unfamiliar with this discipline, the article may not prove easy reading, but we believe it will repay careful study. Lawyers who wish to find effective ways to "outlaw" racial discrimination will do well to study the problem in the social context in which it occurs. Marion Glean O'Callaghan's work is centred mainly on the problems of societies in which "race" is important. She was a founder member of CARD—the Campaign Against Racial Discrimination—in the United Kingdom.]*

In discussing race, one is continuously confronted with a basic confusion. "Race" means a specific thing for the biologists, it has a different meaning in everyday conversation. Yet, the two meanings are continuously used, or rather "race" in everyday conversation is used, with the implicit assumption that the social reality and the biological reality are one and the same thing.

The "clarification" of the situation has added to the confusion. In the 19th century, and early 20th century, linguistic groups, religious groups, Anglo-Saxons, Celts, Aryans, Slavs, Negroes, Jews were all "races". The term was used interchangeably with nationality or culture. It may well be that this was never by chance but that the term was correlated with emergent nationalism, minority relations and shifts of population to industrialized areas. It is generally accepted today however that this use of the term was a misnomer. Much of the work done after the Second World War was aimed at eliminating the concepts of Aryan or Slav or Jew. "Race" remains today correlated with "colour". This seems to indicate a growing "logic" in classification, for "social race" and biological race appear as the same thing.

One result of this has been the ease with which arguments on racial equality are side-tracked into arguments on group IQ or intellectual capacity. It is assumed that there is a "race", that from this flows certain social "problems" and that these can be resolved either by separation or by comprehension. In either case, the relevance of social classification is ignored and is replaced by the relevance of biological classification. The enormous prestige of the biological sciences with their assumed "objectivity" has added a certain logic to the argument, while some strands of philosophy by emphasizing the "other" has lent a respectability to the particularity of "race" as being the archetype of the stranger or *l'autre*.

It follows from this that what is euphemistically called "race relations" is seen as a distinct category of relationships, governed by a-typical norms and relegated to a particular type of "work".

It is not by chance that this should be so. For "race" is about partial exclusion and about the salience given to inherited and immutable "differences" as indices of status and culture. *Where "race" operates it is a major method of social classification and, as any other method of classification it is defined by certain basic structural relations, regulated by major social institutions and supported by a selecting out of certain cultural values and traditions.*

It is the pervasiveness of "race" within a society that accounts for the difficulty of "eliminating racism", since the difficulty lies, not with a single set of factors nor a single social strata, nor necessarily with race "contact"; it lies with the social structure itself.

It follows from what I have said that the definition of what is a race is socially determined. "Race" may be defined by appearance, by access to wealth or elite culture, by known ancestry or by religion.

These are likely to coincide by the very nature of any social stratification, but they are in themselves not a sufficient condition for "races" emerging.

However, once "race" has become relevant, perception itself is governed by the definition of what is a race. This perception may be linked to skin colour or hair texture as in the USA, it may be modified by class and wealth as in the Caribbean or Latin America, it may be defined in religious terms as in the case of the Jews, or today in Northern Ireland. But "perception" is in no way a *criteria* for the emergence of racism, as witness the lack of correlation between caste and colour in Nepal, the physical similarity between some French men and some North Africans, or Jews who were indistinguishable from Germans in Nazi Germany.

While perception is not linked to the emergence of racism, once racism does emerge races are, however, perceived as different. Cultural and physical variations become of particular importance. Not only identifying the subordinate race, but as a method of maintaining the cohesion of the dominant race, while outgroup hostility maintains the nature of group boundaries. Not every group in the society becomes a "race". Where groups are incorporated into the dominant "group", they may remain culturally identifiable, but these differences carry with them no allocation of roles, nor are they indices of subordination or control.

Only certain groups become "races"! This is not by chance, *what is considered a race is determined by the nature of contact and the*

*resultant method of group incorporation. Superiority or inferiority are not biologically determined, rather they are ideological justifications for a differential access to wealth and power.*

It must be emphasised that "strangeness" or familiarity has little, if any, relevance to racism. Strangers may be incorporated as individuals into a society, or they may be incorporated as a group. They may be incorporated into the dominant "race" as are Europeans emigrating to South Africa, or they may be relegated to an outgroup as are Caribbeans emigrating to Britain. What determines whether or not they are perceived as a race, with social positions defined for them and for the generations to follow theirs, depends on the definition of their group position by the host society.

"Racism" is more often seen in a society where groups have lived together with a long history of contact and where the society is composed of competing segments in a struggle for political and economic control, demarcated by a discontinuity of cultural institutions and governed by force rather than by consensus.

This is the typical "settler" society. The nature of the conquest determines the ramifications of the racial structure. To the extent that settlers form a small oligarchy concentrated in the upper levels of society—the typical plantation society—to that extent is "race" roughly coincident with class, and to that extent is access to science and technology likely to modify the nature of control by permitting the emergence of a parallel middle class from the subordinate race. The very changing nature of the plantation as a viable economic structure hastens this process, as in the Caribbean or in the Republic of Ireland. "Race" may remain significant as an index of former status, but it can be argued that it is no longer the major method of social classification having been replaced by class. It may still remain of some emotional value, or as a method of political mobilization for the working class drawn from the former subordinate race, but in structural terms the race-based nature of the former ruling classes has been shifted.

In a settler society where the number of immigrants have been relatively substantial a different type of society results. Here the class structure of the metropolitan country is reproduced and the conquered are incorporated as the lowest strata of society. The social institutions that are elaborated reflect both the fact of conquest and the class distinctions internal to each group. Conquest or race however takes priority over class and the cohesion of each group is maintained by the dimensions of outgroup hostility.

The dominated are either reduced to some type of unfree or contract labour, or relegated into ghettos or depressed enclaves. But there is often a "poor white" section of the dominant group. Economic differentiation therefore only imperfectly coincides with race, political control is maintained by the group solidarity of the dominant segment, social institutions are marked by discontinuity and cultural symbols are of particular importance. This society is the typical "plural society". It is inherently unstable. Political change is usually accompanied by violent upheavals. And because of the importance of political power for the elaboration of economic control or the distribution of economic rewards, shifts in the economy do not necessarily bring about changes in the basic social structure. There is a failure

of class solidarity between workers of the various segments and class conflict is accordingly weak. Where it does occur it occurs within groups rather than across them. Class is subordinate to race, and the basic cleavage of the society follows the lines of ethnicity.

In this type of society, even where "racism" may be dormant for a while, it becomes operative in time of crisis or threatened social change. The exclusion of the dominated strata from change will be argued in racist terms, while the upwardly mobile of the dominated strata will be recuperated and reintegrated into the subordinate group.

Where "race" is a major method of social classification, subordinate conflict is likely to occur between competing segments within the dominated sector. This conflict is likely to be at its sharpest where the factors coincide: the emergence of a middle class and a period of possible political change. The emergence of a middle class among the conquered is unlikely to be an indication of any major shift in basic economic control. The contest is therefore more likely to be over political control and sometimes over the middle levels of the economy, e.g. trading. But the bid for middle class status in any racially demarcated society is likely to be accompanied by group mobilization, group closure and group nationalism since the status of an individual in a racially structured society is linked with the overall status of his group. This is true of the Irish and Italians in New York, or Indians in Guyana and Trinidad.

"Race" is not only of importance in "settler" societies. Settler societies are closely linked with the expansion of the metropole. In capitalist colonialism expansion was argued in racist terms, and even where pre-capitalist European expansion existed, e.g. Latin America, the liberal changes of the late 19th century and the 20th century superimposed a capitalist colonialism on the formerly rigid pre-capitalist system. It should be noted here that racism is neither ideologically nor necessarily a part of capitalism nor of marxist socialism. The theory of a capitalist society postulates as its idea criss-crossing relationships the eventual dissolution of groups—including class—through a gradual cooption into a spreading middle class. The society is regulated through consensus.

Marxist socialism on the other hand postulates class consciousness and class conflict. Classes are defined by their relationship to economic production and the primacy of race is denied.

However, capitalist colonial expansion was accompanied by the establishment of settler societies, and, where these were not established, colonialism supposed the oligarchic control of the metropole. This linked with the economic differentiation into industrial and primary producers, metropole and colony resulted in "race" as a justification for continued control. Dominance and subordination vis à vis non European societies, elaborated during the epoch of colonial expansion, retain their importance today. But it would be a mistake to see "racism" in European societies of the latter half of the 20th century as simply a hangover from the past. Underdevelopment remains as does economic dependency. Both help to maintain the former colonial economic relationships. One important characteristic of highly industrialized societies is their need for labour. This is not a new phenomenon. Industrialization in Europe first recruited workers from country districts to urban areas, then from relatively poor agricultural European

countries into the more technologically advanced. At present workers are not only recruited from poor European countries but increasingly from former colonial territories. Nor are they simply recruited. They are needed for specific jobs which full unemployment of the native population leaves vacant. They are incorporated *as a group* at the lowest level of the social strata and their exclusion from upward mobility is increasingly argued in racist terms. They are thus partially excluded from the overall political consensus while competition with or integration into the native working class is minimized.

The late 1950s and the early 1960s were marked by an upsurge of liberal optimism. This optimism was not confined to "race", it included "class", "peace" and the hope of unending economic expansion. In the area of race relations, it was marked by four features: a decline in biological theories of race, a belief in knowledge—i.e. inter-racial contact and education—as the answer to "prejudice", the corollary that "race" was about individual morality or immorality, i.e. that social structure did not operate in any crucial way, and, fourthly, mass inter-racial movements for integration or Civil Rights. Race relations were also marked with paternalism. But this paternalism should not be confounded with individual paternalist attitudes—which in any case are not structurally important—the paternalism stemmed from the weakness in terms of political or economic power of the dominated group. Where this weakness did not occur, e.g. some Jewish groups, relationships were not marked by paternalism and the result of the 1950-1960 period was predictably different. The problem with liberal optimism was its acceptance of the given social structure, the belief that the institutions as they functioned could achieve social change and its minimization of conflict. Moreover, the assumption that groups—whether they were classes or races—were an illusion, made it possible to avoid the question of group discrimination, the allocation of group roles and differential group incorporation into the political society. By 1970, liberal social change had not drastically changed the class nature of European society. Recruitment to the ruling élites whether these were political élites, cultural élites or economic élites, had not been substantially modified by the expansion of the educational system. But it was in the crucial area of "race" that liberalism had failed to provide enough or fast enough social changes. In some countries, particularly settler societies and late capitalist European societies, the situation had worsened. The liberal remedies of law and education had proved workable only in such areas where some basic structural changes had already taken place: post-colonial non-plural societies, and the "weak" plural societies of a plantation type: the Caribbean and the Republic of Ireland. In North America, there was some change, i.e. the emergence of a middle class drawn from the dominated segment and penetrating administration and bureaucracy. But political change in plural societies had been marked by increasing conflict often violent, e.g. Ulster and parts of Southern Africa and Burundi, or by increasing repression to prevent change: Rhodesia and South Africa. It has become increasingly obvious that education, law or say mass media as major institutions of the society, function not only to give information or to form technicians, but also to recruit for élite positions and to distribute rewards according to a particular value system. As such, they are elaborated by the dominant strata, function within the framework of

dominant ideology and maintain the prevailing social stratification. This is true whether the issue is class or race. The problem is therefore far-reaching, since it is not the content of education or TV programmes or the prejudice or not of teachers and journalists that are the key issues. Rather, the issues are the ramifications of social structure and the dynamics of group control.

One aspect of the 1970s is the collapse of integrationist philosophy and with it integrationist movements. These arose where a bid for élite or middle class status on the part of the subordinate group was accompanied by weak group nationalism among the dominated strata. Where this matter did not occur, e.g. Jews and Irish, "inter-racial" organizations were not seen as the major vehicle for change.

It would be unfair to write off the integrationist movement as having failed. Rather, it permitted the emergence of a black middle class with access to middle level technical and administrative posts. It did not, and could not, however, provide for group cooption. Moreover, the very weakness of the subordinate group ensured that paternalism would remain as a real problem in group relationships.

The rise of Black Power was partly determined by the failure of the liberals and by the marginal success of the integrationists. Black Power, then, was the reaction to blocked mobility, the group nationalism which accompanies a group's bid for increased status and an urban mass movement of a segment excluded from access to the political power and economic bargaining of the majority population. It was not a single movement but the response of diverse and potentially conflicting strata to the fact of slow social change and sometimes reversal. Some exponents of Black Power argued the case for group closure in terms that would seem a *cooption* of dominant ideology and in some instances a reversal but nevertheless acceptance of assumptions within that ideology.

*To the extent that dominant ideology postulates inherited cultural characteristics, to that extent is the ideology of the dominated likely to accept this assumption and to reverse its implications.*

One of the indications of the direction of change is the terms in which dominant ideology is argued. Today we are witnessing an upsurge in biological racism. This is part of the trends towards discussing society in biological terms, and of reducing social phenomena to the influence of biological traits. Social responsibility is minimised by the "naturalness" of supposedly inherited characteristics whether this is aggressivity or the pecking order or differences in IQ. Biological inheritance guarantees the permanence of a particular status quo by ensuring that group inequalities are linked to supposedly inherited group characteristics and therefore immutable. These arguments would seem to occur whenever the question of group incorporation threatens the existing social order. They were of particular importance in the USA when freed slaves posed a "problem" of political incorporation. They have occurred in Chile when the defeat of the Mapuche and liberal reforms posed the question of the political integration of the Indian minority. The present trend while answerable in scientific terms—no society anywhere is arranged according to biological intellectual inheritance but by access to power and wealth—must nevertheless be taken seriously as marking the possible end of liberal philosophy within the dominant group, whatever the serious

shortcomings of that philosophy. Overt racism is becoming once more respectable. This is not by chance. As industrialized countries fear the loss of the primary producing client states, as the working class questions their partial exclusion from an expanding consumer society, it is easy for the social conditions of the pre-war colonial era to be reproduced with damaging effects on the already fragile social change which in some places have taken place.

We are faced with a sober question for the Decade for action against racism and racial discrimination. We would have made a beginning towards clarifying the issues if the red herrings of "inheritance" and "biology" were removed and the special position of "race" as outside of society and racism as original sin were denied. "Race" is a particular type of social classification which occurs for particular reasons in some types of society. It is not inevitable nor is it outside of *normal* scientific research or political action. It is inextricably bound to the history of a given society, its present structure and its social institutions. Because of this, what needs to be done goes beyond good will or good intentions.



# STATE LAW AND THE CHRISTIAN CONSCIENCE IN SOUTH AFRICA

by  
Anthony ALLOTT \*

The trial just concluded in Pretoria of the Rev. Beyers Naudé represents a new and sharp confrontation between the oppressive legalism of the South African government on the one hand, and the witness of those Christians who do not accept the *apartheid* society as being either Christian or unchallengeable on the other. It is clearly the Pretoria government's intention to extend the systematic silencing of the opponents of racial injustice to the Christian churches themselves. One recalls the recent actions against the Anglican Dean of Johannesburg and Father Cosmas Desmond. Now it is the turn of the non-conforming members of the Dutch Reformed churches, represented pre-eminently by Dr Naudé, and of those associated with him—Methodists, Anglicans and others—in the work of the Christian Institute (CI).

Beyers Naudé is a remarkable, indeed unforgettable, man. He is an Afrikaner of Afrikaners; himself the son of a Dutch Reformed preacher, he too was a minister of the Dutch Reformed Church (DRC) and rose to become a moderator and leading spokesman, nationally and internationally, of his church. At the same time he was a member of the secret Afrikaner society, the Broederbond. His work, and that of the Transvaal synod of the DRC in which he played a leading role, greatly influenced the final text of the Cottesloe Declaration issued by all the Christian churches in South Africa in 1960, in the aftermath of Sharpeville. In that Declaration, the rights of all races to participate in government, to own land anywhere, and to intermarry, were spelt out.

\* Professor Antony Allot, Professor of African Law at the Institute of Oriental and African Studies, London University, attended the trial of the Reverend Dr. Beyers Naudé as an Observer on behalf of the International Commission of Jurists. This report on the trial appeared as an article in *The Tablet* weekly newspaper in November and is reproduced here with the kind permission of the Editor. Since the article was written it has been announced in South Africa that Dr. Naudé has now been charged under the Suppression of Communism Act, in his capacity as one of the directors of the press which published the report of the Christian Institute, with publishing a statement by one of the banned NUSAS student leaders, Mr. Pretorius. It is clear that the South African government are determined to try to silence this formidable Christian critic of *apartheid*.

When the DRC resiled from the commitment of their official representatives at Cottesloe to work for a juster society in South Africa, Dr Naudé was one who stood his ground. An ecumenical Christian Institute was being established to explore and work for the application of the Christian ethic to South African society and particularly to the racial system; Naudé was asked to be its first Director. His DR co-religionists, however, made it clear to him that he must choose: to be forced to leave the ministry if he assumed the directorship, or to abandon his pursuit, through the CI, of his biblically inspired vision of the just social order. It was an agonizing decision; to carry on as Director but thereby to isolate himself from the religion and community from which he sprang, or to be untrue to his conscience and inner convictions. His conscience prevailed, and in a moving farewell sermon to his congregation in 1963 he explained the grounds of his decision. Since then Dr Naudé has in effect been an outcast from the DRC, harried by his religious and political (the two terms are almost interchangeable) opponents. He won a prolonged libel action against a Professor Pont, obtaining the largest damages awarded up to that date in a South African defamation suit; but for the last year or two it has been the government which has been the principal aggressor.

In July 1972 the government established the mysteriously named Commission for the Investigation of Certain Organisations (popularly known, from the name of its chairman, as the Schlebusch Commission), specifically to report on the objects, organisation and financing of named organisations, including the CI, and their activities. Unlike normal commissions of inquiry, this one consisted entirely of practising parliamentarians, meeting and interrogating witnesses in secret. Under the regulations issued by the State President, it is a criminal offence for anyone, witness or otherwise, to report what happens upon his interrogation by the Commission, or to publish any statement that may have been submitted to the Commission. Of the organisations investigated, an interim report by the Commission on Nusas (the National Union of South African Students) has already been issued, in February 1973; the same day 8 Nusas leaders were served with banning orders under the Suppression of Communism Act.

It is against this background that officers and members of the CI and the Institute of Race Relations have refused to testify before the Schlebusch Commission. When summoned to Pretoria to give evidence, each refused to take the oath when put by the Chairman. Reasoned documents justifying this refusal on moral and religious grounds were handed to the Commission by some of those summoned, notably by Naudé himself. One of those summoned, Ilona Kleinschmidt, has already been convicted, but is now appealing. Trials of the others who refused to testify on September 24 or earlier were scheduled to be held at the Pretoria Regional Magistrates Court this last week. In the event, the trial of Dr Naudé, which began on Tuesday 13 November, ran far longer than the prosecution foresaw, judgment only being delivered on Friday 17 November. The trials of the others involved — James Moulder, Dot Cleminshaw, Horst Kleinschmidt, Rev. Roelf Meyer, Danie van Zyl, Rev. Theo Kotze, Peter Randall, and the Rev. Brian Brown — have been postponed until January 7 to 17, 1974.

Beyers Naudé's trial has excited world attention and concern. The British Council of Churches sent its Vice-Chairman, the Arch-

bishop of Wales (the Most Rev. Dr Gwilym Williams) to observe the trials, while I was asked to observe on behalf of the International Commission of Jurists (a body devoted to upholding the Rule of Law) in Geneva. The trial was sensational in a number of respects, not least because of the eminence of the accused, but also because of its unusual atmosphere and the unconventional form that the trial in practice took. Courtroom E, one of the smallest courts in the building, was allocated for the trial, and was so full of sympathetic supporters, black and white, that they overflowed into the well of the court. On the third day the presiding magistrate, Mr L. M. Kotze, had arranged for a much larger courtroom to be available; it was full, so far as one could tell, of sympathisers with Dr Naudé (except for a large number of security policemen failing to make themselves unobtrusive). A gaiety and calm confidence pervaded the courtroom, reminiscent of that which must have prevailed among the early Christians who had to face Caesar or the lions on the morrow.

The prosecution thought that this would be a simple open-and-shut case; Dr Naudé had admittedly failed to take the oath when required, and under s. 6 of the Commissions Act conviction must inevitably follow. The first challenge came when Mr Prinsloo, Secretary to the Commission, was called to give formal evidence of the refusal, which he did from the transcript of the Commission's proceedings. For the first time part of the proceedings of the Commission were exposed to public gaze. Defence counsel, Mr J. C. Kriegler, S.C. (who handled the defence brilliantly) then asked Mr Prinsloo to read out to the court in full the long statement submitted by Dr Naudé to the Commission, which, to his great discomfiture, he was obliged to do. Then, when the defendant himself was called to give evidence, his counsel took him through the whole of his spiritual biography, from the day of his birth to his appearance before the Commission, bringing out in detail the various domestic and international church conferences and synods in which the racial situation in South Africa had been considered, and Dr Naudé's justification, from scripture and from other authorities, of his stand on racial issues and his refusal to testify. Dr Naudé stated his objections to the Commission and its procedures as being that it consisted solely of parliamentarians, who might be incapable of an impartial judgment, that it functioned in secret, that those summoned before the Commission had no knowledge of what case or charge they might have to meet, that they were denied the assistance of counsel in testing the evidence against them, and that witnesses were put in peril of banning orders as a result of the Commission's reports. Under s. 6 of the Commission's Act, argued Mr Kriegler, a witness can refuse to testify or answer questions if there is "sufficient cause" for his so doing; in this case, he said, there was ample cause for Dr Naudé's refusal, because the composition and mode of functioning of the Commission made it "humanly intolerable" for him to testify.

The highlight of the case came when defence counsel read into the record the entire text of the farewell sermon which Dr Naudé had given to his parish in 1963. Dr Naudé was asked by his counsel to read out the sermon for the record, which — to the background of a dramatic electrical storm outside — he did. It must surely have been unprecedented for a sermon to have been preached in a magistrate's court, though Joan before her accusers, the Catholic and Protestant

martyrs at the time of the Tudors, and the Quakers of a later age, spring to mind in this connection.

It was to no avail. The magistrate, who, in his questioning of the accused, seemed at times to step out of his role and to debate with rather than question Dr Naudé, in his judgment found him guilty, rejected the argument of sufficient cause, told Dr Naudé that the law must prevail and that he, Naudé, was more guilty than most as being a leader and not a follower. He sentenced him to a fine of R50, with one month's imprisonment in lieu, together with a suspended sentence of 3 months' imprisonment, which would come into automatic operation if, within the next 3 years, he committed a similar offence. Dr Naudé's counsel immediately notified an appeal, which will probably be determined in December or early January.

In the debate between a narrow legalism and the duty of obedience to God rather than men, the state had won, as it was bound to do. There is some hope, however, that in the appeal court the broader legal argument of justification will prevail. If not, Dr Naudé, and those accused with him, will go to prison, as they have indicated that they will refuse to pay any fines imposed.

## **Book Reviews**

### **A Treatise on International Criminal Law Volume 1 — Crimes and Punishment**

Editors : M. Cherif Bassiouni and Ved P. Nanda

Publisher : Charles C. Thomas, Springfield, Illinois, USA

734 pp, \$ 26.50 cloth ; \$ 19.75 paper

Is there an international criminal law ? A group of 33 international legal experts from 17 countries have jointly produced a work dedicated to the proposition that there is, but that it is in a "nascent and nebulous stage" and suffers from the lack of an enforcing authority.

An international criminal law in the sense that the authors refer to as adjective law, the settlement of jurisdictional disputes between sovereign entities, has long existed and been enshrined in international treaty documents. In this category would come the various international treaties on judicial assistance and extradition as well as definition of jurisdictional competence.

This book is mainly concerned with substantive international criminal law, namely individual responsibility for acts which are criminal because in violation of internationally accepted standards of conduct. Inevitably differences of viewpoint emerge. As the editors say in their preface: "If a general thesis can be gleaned from the many outstanding contributions in the book, it would be that there is an ever-increasing need for an effective body of international criminal law. A simple, albeit incomplete, enumeration of international crimes can be grouped under three headings and should make manifest that the preceding is not an idle conclusion of sequestered scholars: they are (1) disruptions of world peace and security of mankind, (2) violations of rules of armed conflicts, and (3) common crimes against mankind. After the doctrinal and the theoretical bases of international criminal law are explored, all of these aspects are discussed..."

The main problems in developing international criminal law are seen to be the refusal of nation states to surrender or share their sovereignty, and the difficulty in reaching agreement on definition and codification and on the appropriate sanctions, jurisdiction and enforcement machinery. The authors put forward suggested approaches and recommendations, some of them, as the editors fairly claim, deserving serious consideration by scholars and statesmen.

Since this book was published, the Bangladesh "International Crimes (Tribunals) Act", discussed elsewhere in this issue, provides an example of a nation state willing to accept the existence of this jurisdiction and to provide a means for its enforcement.

### **Amnesty International Reports on Torture**

Pub. Duckworth & Amnesty International, London. 224 pp. £1.50 paperback, £3.95 hardback.

This report, prepared as part of Amnesty International's Campaign for the Abolition of Torture, contains informative essays on the

historical, medical, psychological, and legal aspects of torture as well as a survey of the evidence available to Amnesty International of the use of torture during the last decade in some 60 countries. It has been said by Amnesty spokesmen that in 36 of these countries torture is used as a regular "administrative practice", but these countries are not identified in the survey.

In some countries, such as the United States and the German Democratic Republic, the evidence is confined to allegations of serious maltreatment of prisoners by prison warders. In the USSR it relates to the confinement and treatment of political dissenters in mental hospitals and to the starvation diet in some of the prison camps. It is perhaps significant that no allegations of torture have been received from other East European countries. In a number of countries, such as Iran and Israel, the conclusion reached by Amnesty is that there is or has been strong *prima facie* evidence of torture meriting investigation by an impartial commission of enquiry. But there remains a hard core of countries where torture is or has until recently been used as a regular administrative practice by police, security or military authorities for purposes of obtaining intelligence or confessions (true or false) or for purposes of intimidation. These include Greece, Portugal, Turkey, Indonesia, Vietnam, South Africa, Brazil, Argentina (under the military dictatorship), Uruguay, Paraguay and Haïti.

If any criticism is to be made of this admirable report it is perhaps the failure to give credit to the United Kingdom Government for what it has done in relation to allegations of torture in Northern Ireland. The Report accepts (on p. 218) that the facts of torture in Northern Ireland following the introduction of internment without trial in 1971 were those disclosed in the Compton Report. No evidence is adduced to indicate that those (or other) torture practices have continued since March 1972, when the British Government accepted Lord Gardiner's recommendations to stop them. Nevertheless, Amnesty International suggest (on p. 105) that an administrative practice of torture "may exist" in Northern Ireland unknown to the British Government. It would perhaps have been more generous to recognise that the Government of the United Kingdom is the only one to have instituted an impartial enquiry, which ascertained the facts about torture practices, and then to have accepted the recommendation of a minority report of another impartial committee to stop those practices. If other countries had acted similarly there would have been little need for this Amnesty report.

Other recommended books :

*Kind and Usual Punishment*, by Jessica Mitford

Pub. Alfred A. Knopf, New York, 340 pp., \$7.95

A devastating study of prison reform in the United States.

*Guide de la Vie Privée*, par Anne Loesch et Henri Dussaud

Pub. Hachette Littérature, Paris, 190 pp., FFr 19.00

A witty and informative account of the law relating to privacy in France.

## **Basic Texts**

# **Draft principles on the freedom to leave any country and return to one's own country**

*[On May 18, 1973, at its 1858th Plenary Meeting, the United Nations Economic and Social Council passed Resolution No. 1788 (LIV) drawing attention of governments, international and regional inter-governmental organisations, non-governmental organisations and other concerned institutions and bodies to the draft principles on freedom and non-discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country. These result from a study prepared by José D. Ingles (Philippines), Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Sales No. 64-XIV-2).*

*The ECOSOC also decided that the Commission on Human Rights should retain on its agenda the question of the right of everyone to leave any country including his own, and to return to his country, and to consider it every three years coinciding with the Commission's discussion of periodic reports on civil and political rights.*

*Considering that these principles are an important contribution to the development of human rights, they are published here in full.]*

*Whereas the peoples of the United Nations have in the Charter solemnly reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and of women and of nations large and small, and expressed their determination to promote social progress and better standards of life in larger freedom;*

*Whereas the Charter declares that it is one of the purposes of the United Nations to promote and encourage universal respect and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion;*

*Whereas the Universal Declaration of Human Rights, further elaborating the principle of non-discrimination, proclaims that everyone is entitled to all the rights and freedoms set forth therein without distinction of any kind, and irrespective of the political, jurisdictional or international status of the country or territory to which one belongs;*

*Whereas* the right of everyone to leave any country, including his own, and to return to his country, enshrined in the Declaration, is essential for the protection of the full enjoyment by all of other civil, political, economic, social and cultural rights;

*Whereas* the free and untrammelled exercise of this right, including the right to seek, receive and impart information and ideas through any media and regardless of frontiers, is an essential condition for promoting mutual understanding and co-operation among the peoples of the world so that they may live together in peace as good neighbours;

*Whereas* this right can only be effectively guaranteed when formally acknowledged in national law consistent with the principles of the Charter of the United Nations and the Universal Declaration of Human Rights;

*Whereas* national efforts to protect this right would be a useful contribution to peaceful co-operation among nations aimed at creating an international and social order in which human rights and fundamental freedoms may be fully realized;

*Now therefore*, the following principles are hereby proclaimed as of universal application to ensure recognition and enjoyment of the right of everyone to leave any country, including his own, and to return to his country, and other related rights, and to prevent discrimination in respect of these rights:

#### I. THE RIGHT OF A NATIONAL TO LEAVE HIS COUNTRY

(a) Every national of a country is entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage or other status, to leave his country, temporarily or permanently. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

(b) No one shall be forced to renounce his nationality as a condition for the exercise of the right to leave his country; nor shall anyone be denied the right to leave his country because he wishes to renounce his nationality; nor shall he be deprived of his nationality solely as a consequence of his leaving the country.

(c) The conditions prescribed by law or administrative regulations for the exercise of this right shall be the same for all nationals of a country.

(d) The right of every national to leave his country shall in no case be exercised contrary to the purposes and principles of the United Nations. This right shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of national security, public order, health or morals and the general welfare in a democratic society. Any limitation which may be imposed shall not be aimed at destroying the right and shall be consistent with the purposes and principles of the United Nations.

(e) No deposit or other guarantee, financial or otherwise, shall be required to ensure the repatriation or return of any national.



(f) Economic controls or currency restrictions imposed with a view to safeguarding the national economy shall not be abused to deny any national the right to leave his country.

(g) No national shall be prevented from temporarily leaving his country because of pending obligations towards the State or another person, provided he gives reasonable guarantees for satisfying those obligations.

(h) Subject only to the satisfaction of his local obligations, any national who wishes to leave his country permanently is entitled to take with him his property or the proceeds thereof within the limits allowed by national laws governing the disposition of property and the export of currency.

## II. THE RIGHT OF A NATIONAL TO RETURN TO HIS COUNTRY

(a) Everyone is entitled, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage or other status, to return to his country.

(b) No one shall be arbitrarily deprived of his nationality or forced to renounce his nationality as a means of divesting him of the right to return to his country.

(c) No one shall be arbitrarily deprived of the right to enter his own country.

(d) No one shall be denied the right to return to his own country on the ground that he has no passport or other travel document.

## III. THE RIGHT OF A FOREIGNER (WHICH TERM INCLUDES STATELESS PERSON) TO LEAVE THE COUNTRY

(a) Every foreigner, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth, marriage or other status, has the right to leave the country of his sojourn.

(b) Every foreigner legally within the territory of a country shall have at least the same rights and guarantees, under the same conditions as a national, in the exercise of the right to leave the country.

(c) The exercise of the right of every foreigner to leave the country of his sojourn shall not be subject to any arbitrary restrictions.

(d) No foreigner shall be prevented from seeking the assistance and protection of his own country in order to ensure the enjoyment of his right to leave the country of his sojourn.

(e) Nothing in these principles shall be deemed to derogate from the right of a protected person to leave the territory of a belligerent power under the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in time of War of 12 August 1949.

## IV. TRAVEL DOCUMENTS

(a) No one shall be arbitrarily denied such travel documents as may be required for him to leave the country or to return to his

country, which documents shall not be subject to unreasonable costs or taxes.

(b) The formalities for the issuance of any travel document, including the conditions for its denial, withdrawal or cancellation, shall be provided by law or regulations which shall be made public.

#### V. FAIR HEARING AND ADMINISTRATIVE AND JUDICIAL RECOURSE

(a) Anyone who applies for a travel document, or permission to leave the country or to return to his country, shall be informed of the decision within a reasonable and specified period of time.

(b) Where the document or permission is denied, or is withdrawn or cancelled, he shall be entitled :

- (i) To be given the reasons for the decision ;
- (ii) To a fair hearing by an independent and impartial tribunal or body which shall examine all relevant evidence and decide the case expeditiously.

#### VI. SANCTIONS

No sanction, penalty, punishment or reprisal shall attach to any person for exercising or attempting to exercise the right to leave any country, including his own, or to return to his country, as proclaimed in these principles.

#### VII. APPLICATION OF PRINCIPLES

These principles shall apply to all independent countries as well as to Trust, Non-Self-Governing and other countries under any limitation of sovereignty.

#### VIII. CONDITIONS FAVOURING THE FREE AND INCREASED MOVEMENT OF PERSONS FROM ONE COUNTRY TO ANOTHER

(a) The full and complete enjoyment of the right of everyone to leave any country, including his own, depends in many instances on the general well-being of each society as a whole and on the existence of a vigorous economy within a just social and international order conducive to friendly relations between peoples.

(b) It is necessary, therefore, through national efforts and through dynamic international co-operation, to create conditions permitting free and increased movement of persons from country to country, which is affected, in practice, by international tensions and by the continued existence of conditions of economic and social underdevelopment which make it difficult for this right to be exercised by all, including the common man.

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