

for the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

HUMAN RIGHTS IN THE WORLD

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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.

The Commission has carried out its task on the basis that lawyers have a challenging and essential role to play in the rapidly changing ecology of mankind. It has also worked on the assumption that lawyers on the whole are alive to their responsibilities to the society in which they live and to humanity in general.

The Commission is strictly non-political. The independence and impartiality which have characterised its work for some twenty years have won the respect of lawyers, international organisations and the international community.

The purpose of THE REVIEW is to focus attention on the problems in regard to which lawyers can make their contribution to society in their respective areas of influence and to provide them with the necessary information and data.

In its condemnation of violations of the Rule of Law and of laws and actions running counter to the principles of the Universal Declaration of Human Rights and in the support that it gives to the gradual implementation of the Law of Human Rights in national systems and in the international legal order, THE REVIEW seeks to echo the voice of every member of the legal professions in his search for a just society and a peaceful world.

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Editorial

Islam and Human Rights

The International Bill of Human Rights, which comprises the Universal Declaration and the two International Covenants (with the Optional Protocol to the Covenant on Civil and Political Rights), is sometimes criticised for being too western-orientated. It is without doubt true that much of the drafting of the document was undertaken by western scholars and the terminology employed, particularly in relation to civil and political rights, is derived from western legal systems. Some of the critics may also intend to imply that the documents are conceived too much in terms of civil and political rights, ignoring the need for economic and social rights as a pre-condition for the achievement of civil and political rights.

Be that as it may, if human rights are to be seen and accepted as being truly universal and human, it is imperative that their principles should be re-stated in terms of other legal systems and other cultural traditions than that of western humanism.

For this reason, we are glad to publish in this issue an important and learned article on Human Rights in Islamic Law by a distinguished Islamic scholar and member of the Karachi Bar, Mr Khalid M. Ishaque.

We also welcome the formation of an Arabic Association for Human Rights, with its headquarters in Beirut. Perhaps this organisation will be able to perform the task of bringing together scholars from the Islamic world to prepare an authoritative declaration on human rights which will find acceptance among Muslims. In this way they would help to make the contribution to this subject which is due at this time of re-awakening in one of the great cultures of the world.

ICJ Studies and Reports

Two reports recently prepared by the International Commission of Jurists, for which space can not be found in the Review, are available in duplicated form. Particulars will be found on the back cover of this number.

Uganda

One is a study on Violations of Human Rights and the Rule of Law in Uganda since January 1971, which was undertaken in response to numerous requests. Since General Amin came to power, international concern about Uganda has tended to focus principally upon the expulsion of the Asians in 1972, owing to the sudden and ruthless way in which the expulsions were carried out. This has served to detract attention from the extent of the brutal internal repression, involving the simple liquidation of thousands of Uganda Africans who have, for one reason or another,

aroused the suspicion of the authorities. The 63-page study covers, as well as the expulsion of the Asians, an analysis of the political and legal structure in Uganda and a brief historical account of the reign of terror which has reigned during the last 3½ years. A copy of the study has been forwarded to the Secretary-General of the United Nations with a view to its being submitted to the U.N. Human Rights Commission.

Uruguay

The second is an 11-page report by the Secretary-General of the ICJ and a Research Officer of Amnesty International upon a joint mission to Uruguay in April and May, 1974. The report explains the legal procedures for the arrest, detention and trial of political suspects under the system of military law in force, and shows how the widespread torture and ill-treatment of suspects is facilitated by defects in the system, by the failure of the authorities to follow the procedures prescribed by law, and by the lack of adequate judicial and other remedies to enforce these procedures.

Chile

A mission comprising the Secretary-General of the ICJ, Professor Covey Oliver (an International lawyer and former U.S. Ambassador), and Dr. Kurt Madlener (a German expert in Spanish and Latin-American penal law) visited Chile in April, 1974, on behalf of the ICJ to study the legal system and its application in relation to human rights. A report by this mission is in preparation and will shortly be available.

Human Rights in the World

Special Powers in Bangladesh

The Bangladesh Parliament on February 5, 1974, passed a Special Powers Act. Although the powers it confers on the government are of a kind usually regarded as emergency powers, and although justified by the government on the grounds that they are necessary in order to control the prevailing lawlessness, the Act is framed as a piece of permanent and not temporary legislation. An amendment to the new Constitution was necessary, as the Constitution had prohibited any kind of preventive detention.

The Act deals mainly with "prejudicial acts", "prejudicial reports", black market offences and acts of sabotage. A prejudicial act is defined as "any act which is intended or likely-

- (i) to prejudice the sovereignty or defence of Bangladesh;
- (ii) to prejudice the maintenance of friendly relations of Bangladesh with foreign states;
- (iii) to prejudice the security of Bangladesh or to endanger public safety or the maintenance of public order;
- (iv) to create or excite feelings of enmity or hatred between different communities, classes or sections of people;
- (v) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order;
- (vi) to prejudice the maintenance of supplies and services essential to the community;
- (vii) to cause fear or alarm to the public or to any section of the public;
- (viii) to prejudice the economic or financial interest of the State".

A prejudicial report means "any report, statement or visible representation, whether true or false, which, or the publishing of which, is, or is an incitement to the commission of a prejudicial act". In spite of these very wide and vague definitions, the Act provides that it is a criminal offence to do a prejudicial act or publish a prejudicial report. The offence is punishable with 5 years imprisonment or a fine, or both.

The government is empowered to detain any person without trial indefinitely or, if he is a non-national, expel him from the country, "if satisfied... that with a view to preventing him from doing any prejudicial act it is necessary to do so". In addition, District Magistrates can make a detention order with a view to preventing prejudicial acts under (iii) to (viii) above, subject to confirmation by the government within 30 days. No detention or other order "done in good faith" under the Act can be called in question by any Court. There are, however, some protections. The grounds of the order have to be communicated to the detainee in writing and he must be told of his right to make representations against it. An Advisory Board of three, of whom two shall be persons who are or who are qualified to be Supreme Court Judges, have to review all orders and representations and report within 170 days of the order. The detainee has a right to be heard in person but not to be legally represented. If the Board reports that there is "no sufficient cause for the detention" the government must revoke the order and release the detainee. Persons may also be temporarily released by the government subject to conditions.

There are very wide powers for the government to seize and prevent the distribution of any document if the government is satisfied that it contains a prejudicial report. The government can also impose pre-censorship on any publication if "satisfied that in the interests of the security of Bangladesh, friendly relations of Bangladesh with foreign states, or public order it is necessary to do so".

Freedom of association is also liable to severe restrictions. The government may direct any association to suspend its activities for up to six months if satisfied that there is a danger that it "may act in a manner or be used for purposes prejudicial to the maintenance of public order", and where such an order is made any documents of the association can be seized and its funds frozen. In addition, there is an absolute prohibition on "any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose".

Freedom of movement may be controlled by the government declaring places or areas as "protected places" or "protected areas", and District Magistrates may, subject to control by the government, impose curfews in any area.

Penalties for black market offences are increased, and these and other offences under the Act are triable summarily without preliminary proceedings before Special Tribunals, consisting of a Session Judge, or an Additional or Assistant Sessions Judge. An appeal lies to the High Court Division.

The power of the courts to grant bail pending trial or appeal is excluded in the case of persons accused of certain offences, including acts of sabotage, firearms offences and, more seriously, the doing of any prejudicial act or the publication of any prejudicial report. In view of the very wide definition of these offences, this is a very severe restriction upon the discretion of the courts.

It is difficult to judge of the necessity or otherwise for such legislation in present circumstances in Bangladesh. The Law Minister, in introducing the Bill into Parliament, did not seek to conceal his distaste for some of its provisions, but argued that they were necessary. There is no doubt that turbulence and violence in Bangladesh has reached alarming proportions. Terrorist activities by extreme left-wing groups have included the disruption of railway lines and other communications systems, setting fire to public buildings and warehouses, robbing banks, and the public use of firearms.

If special powers of this kind are necessary, it is regrettable that they were not passed by temporary legislation, which would then be subject to periodic review by Parliament if its renewal is thought necessary. The provisions for review of detention orders by an Advisory Board compare favourably with those in some other countries, but it is extraordinary that the right of legal representation should be denied. Also, there seems to be force in the complaint by some lawyers that the normal courts are being bypassed and their jurisdiction restricted more than is necessary. Finally, there is a most regrettable degree of restriction on press freedom.

A second piece of legislation which has attracted criticism is the Jatiya Rakkhi Bahini (Amendment) Ordinance, 1973. This gives new and very wide powers to the Rakkhi Bahini, a para-military auxiliary force based upon the former liberation movement. The Ordinance entitles officers of this force to arrest any person without warrant if they reasonably suspect him of having committed any offence and to search any person or place and seize any property in respect of which he has reason to believe an offence has been committed. Any person so arrested has to be handed over to the

police forthwith. In spite of this latter safeguard, experience shows that there are grave dangers in giving such extremely wide powers to a force which is not fully trained in proper police procedures.

Chile and Uruguay : Contrasts and Comparisons *

Chile and Uruguay both have military based regimes in which the seat of power is with the leaders of the Armed Forces. In Chile this has been made explicit by the assumption by the governing Military Junta of the executive and legislative powers under the constitution of the President and the Parliament. In Uruguay, although some of the Ministers (including the Ministers of the Interior and of Defence) are military, a civilian, President Bordaberry, remains as head of state. In both countries the parliament has been suspended and the government rules by decree.

In Uruguay the powers of the legislature have formally been transferred to a Council of State, a body nominated by the President. This is not thought to have any real power, though it has recently shown some signs of independence in making amendments to the Budget and to a bill on foreign investment, contrary to the advice of the Foreign Minister. These amendments were accepted by the government. The Armed Forces have created a military council to advise the government known as COSENA. It is generally considered in Uruguay that this reflects the views of the real decision makers. In both countries political activity is banned for all parties, and military tribunals operating under a system of military justice have sole jurisdiction over offences by civilians against the security of the state. Both regimes claim that the independence of the judiciary remains intact, but in both cases the judiciary have seen their scope restricted through the introduction of the system of military justice. The courts have also had to accept the constitutional changes which have been unconstitutionally imposed, including the abolition of the freely elected Parliaments and the assumption by the Executive of the power to legislate by Decree.

In both countries too the military rulers are going beyond their originally proclaimed purpose of countering violent subversion, and in the name of fighting communism or marxism are seeking to root out all left-wing influence, particularly in the spheres of politics, education and trade unionism. In each case new Constitutions are being devised which seem likely to be authoritarian in form with the intention of restricting severely the field of political action. Many conservatives and liberals who originally supported the military interventions are disturbed by these developments.

In Chile these elements had welcomed the coup because it seemed to them that the country was heading rapidly towards a civil war. In the last months of his regime President Allende appeared unable or unwilling to control the extremist elements in his government. Factories and farms were being seized without any lawful authority and when the courts made orders for their restoration, the government did not seek to enforce the orders. Extremely wide use of powers of delegated legislation were used,

* This article by the Secretary-General of the International Commission of Jurists is based upon the reports of an ICJ mission to Chile and a joint ICJ and Amnesty International mission to Uruguay in April and May, 1974.

which led the responsible constitutional authority, the Comptroller-General, to denounce the practice as an abuse of these powers. President Allende was also accused of abusing his power to grant amnesties so as to put his supporters beyond the law. A para-military force was being formed by left-wing groups with arms smuggled into the country in violation of the law. For these and other reasons both the legislature and the Supreme Court had formally denounced the unconstitutional acts of the regime and, with the rapidly deteriorating economic situation, scarcely veiled appeals were made to the military authorities to intervene. These allegations are not substantially disputed by supporters of President Allende's government though they do, of course, advance political and other reasons to justify them.

In Uruguay, the increased power granted to the military under the Law of National Security in July 1972 with its extension of the system of military justice, was authorised by the Parliament owing to the failure of the civilian police and the civilian system of justice to deal effectively with the violence and subversion of the Tupamaros.

Chile and Uruguay are countries steeped in a long tradition of parliamentary democracy, with liberal constitutions based on a careful balance between the executive, legislative and judicial powers. The armed forces were widely believed to be non-political and, in supporting the military interventions, conservatives and liberals hoped and believed that the Constitutions would be left intact or would soon be restored. Now these traditional democrats are beginning to view with deep concern the extension of authoritarian military control into all spheres of the national life with little prospect of a return to the former type of constitution.

The systems of military justice in force in the two countries differ widely. In Chile, in spite of the absence of any fighting, the Junta insist on maintaining the proclamation of a "state of war", thus keeping in force the extremely summary procedures of Military Justice in Time of War. Under this system security offences are tried before "Councils of War" from which there is no form of appeal. Serious violations of their own military penal and procedure codes are occurring, and there is no means of recourse. For example, the Code of Military Penal Procedure requires unanimity even in time of war for a sentence of death. Nevertheless, in one case five defendants were executed following a sentence which was declared not to be unanimous. In Uruguay the peace-time system of military justice is in force and this follows more closely the civilian procedure with rights of appeal to the Superior Military Tribunal and, in some cases, to the Supreme Court. Considerable complaints of excessive delays are made at all stages of the procedure, and the justice administered by the military judges, who for the most part are not legally qualified, is considered by lawyers to lack the objectivity usually found among civilian judges.

The most serious complaint made against both systems is the long period, usually lasting some months, during which suspects are held under interrogation in military barracks and other premises before being transferred to the jurisdiction of the military judges. In both cases this is being done in violation of the military procedure codes, and it is during this stage that ill-treatment of suspects, often amounting to severe forms of torture, is widespread. The massive evidence of these practices led the Conference of Catholic Bishops in Chile to denounce on 25 April 1974 the use of "physical and psychological pressures" during interrogation.

The other main complaint is of the anonymity of arrests. In both countries, relatives and lawyers of arrested persons have the greatest

difficulty in finding out who has arrested them, for what reason and on what authority and where they are being held. Habeas corpus and amparo proceedings have proved ineffective to deal with this situation. This too was the subject of protest by the Conference of Bishops. In many cases, arrested persons are released again after interrogation, sometimes accompanied by torture, without being brought before a court. This is part of the process of government by intimidation, often to be found in regimes of this character.

Guyana

In 1965, when British Guiana was on the verge of independence there raged a controversy on whether the (east) Indian population (which now constitutes a majority of the people of the country) were being discriminated against in terms of their representation in the civil service and particularly among the security forces. At the request of the Prime Minister, the Hon. L. F. S. Burnham, the International Commission of Jurists established a Commission of Inquiry which investigated and made recommendations with reference to this subject.

Although the Commission of Inquiry was boycotted by the main opposition party, the Progressive People's Party, whose strength is centered in the Indian Community, they did receive information from many representatives of the Indian point of view. In general, the Commission of Inquiry concluded that there was no evidence of racial discrimination or serious imbalance with reference to the civil service, the judiciary, in education and in government agencies. But when it came to the security forces, they found that there was a marked preponderance of Africans in the police and that certain recruitment criteria encouraged this imbalance. The Commission recommended measures for improving this situation.

In May and June, 1973, the ICJ received from East Indians' organizations complaints about the racial situation in Guyana, particularly alleging a growing disproportion in the composition of the security forces and the public service, as well as complaints as to certain individual cases of discrimination*. The ICJ forwarded the complaints to the Government of Guyana and has received a detailed reply from the Attorney-General. As the matter is now one of wider public interest, we reproduce the following extensive extracts of the Government reply, which we assume will form the basis for the Guyana government's comments to the UN Commission on Human Rights. The specific allegations made by the complaining Indian organizations can be seen from this government document.

* * *

* Complaints against racial discrimination with respect to the East Indian population have been brought before UN Human Rights Commission and the case was one of 8 forwarded last year by the Sub-Commission on Discrimination and Minorities to the Human Rights Commission.

Reply to International Commission of Jurists with reference to letter to I.C.J. from Movement for Indians Overseas dated 30 May, 1973, and undated document from the Guyana Council of Indian Organisations

(A) *On Racial Discrimination*

The Government of Guyana denies the accusations of racial discrimination made to the International Commission of Jurists in a letter of 30th May, 1973, from an organisation calling itself Movement For Indians Overseas, and in a subsequent undated document emanating from the so-called Guyana Council of Indian Organisations. The Government has no doubt that the M.F.I.O. is a front organisation for the People's Progressive Party. The G.C.I.O., a similar front organisation, is a pseudo council which does not represent any Indian organisation of national stature in Guyana.

It is essential that the two Indian organisations be seen in their true perspective as dissident political groups at work in a multiracial nation where it is the policy of the P.P.P., their parent body, to base its electoral support on racial foundations. By example as well as by precept, the Government espouses the United Nations Declaration of Human Rights, which in essence, is reflected in articles of the Constitution of Guyana, which entrench fundamental human rights and make the Law Courts accessible for their enforcement. The provisions concerning fundamental rights were included by the Government in our present Constitution without the benefit of contribution by the P.P.P., who boycotted the London constitutional conference at which the content of our Independence Constitution was settled.

The I.C.J. will know through its Commission of Inquiry in Guyana in 1965, constituted on the invitation of Prime Minister Burnham, that the Public Service was found in all the circumstances to reflect in a fair manner, the racial composition of the Guyanese society, in spite of accusations to the contrary by the leader of the P.P.P., Dr. Cheddi Jagan. The Commission's single concrete proposal, recommended the imposition of an ethnic quota system in the recruitment of the Security Forces. This was fully accepted by the Guyana Government and has been adhered to, in so far as reality permits, in terms of the geographical distribution of the racial groupings in the population and employment preferences of the various racial groups.

(B) *On Statistics of Racial Participation in the Public Service and Security Forces*

The M.F.I.O. has resorted to juggling statistics and playing with racial percentages, and in a number of instances they have presented totally inaccurate figures. The Government of Guyana has, in its determination to escape from the racial tensions and divisions of the past and establish a sense of national identity and unity, deliberately de-emphasized the collection of racial statistics. National unity is not, in the view of the Government, measurable by a set of statistics. It is much more; it is a state of mind; it goes beyond ethnic identities and must describe a people who are intent on nation building.

In any attempt at a racial statistical analysis of the composition of Guyana's Public Service, Public Corporations and Security Forces, it must always be borne in mind that the greater part of the recruitment for these services is bound to come from the urban centres. It is important to remember that over 85 per cent of Guyanese of Indian descent live outside

of the urban centres, in rural villages, on land settlement schemes, or on sugar estates. In 1931, only 12 per cent of the professional and Public Service occupations were filled by Guyanese of Indian descent and most of these were priests. In 1946, less than 15 per cent of those occupations were held by Guyanese of Indian origin. In 1973, it is estimated that approaching 40 per cent (not 28 per cent) of the Public Service and other Government institutions are Guyanese of Indian descent. The proportion of Guyanese of Indian descent, therefore, employed in the Public Service, Public Corporations, Security Forces, and professions or occupations which are essentially based in the cities, is extremely high relative to the percentage who live in the cities.

If, as the M.F.I.O. would like us to do, we are to examine the question of racial discrimination in Guyana on the basis of racial percentage in employment, a case could easily be presented on the sugar estates or in land development schemes in certain areas against Guyanese of African or other racial ancestries in favour of Guyanese of Indian descent. There is still in the commercial establishment of the capital city, Georgetown, even today an employment percentage bias against Guyanese of African descent. Landed wealth and ownership of the indigenous commercial establishment are overwhelmingly in Indian hands. This is all a reflection of the sustained direction which Indian effort in Guyana has, as a matter of natural inclination and preference, pursued.

The specific information presented by the M.F.I.O. in their letter on the subject of Permanent Secretaries employed in the Public Service is inaccurate. Twenty Permanent Secretaries are serving at the moment, of these, six are of non-African origin and three of these are of Indian descent. This represents a significant change towards racial integration of the senior posts in the Public Service, which in the years prior to Independence, were virtually the total preserve of Guyanese of African descent. In a small population as ours, personnel turnover in the highest echelons of the Public Service, is at best relatively slow, and in time a higher percentage of Indian representation at this level is inevitable.

It will be understood that quantitative information regarding the country's Security Forces must remain classified. However, the figures quoted by the M.F.I.O. bear no relation to the truth. It is a fact that Guyanese of African descent are in the majority in the Security Forces, but this is for reasons which have nothing to do with recruitment policy. The reasons are historical. Whereas Indians originally gravitated first to agriculture, then to commerce, then to the professions, Africans took immediate sanctuary in the Public Service and the Security Forces; thus a resulting differential in racial participation in those services at the outset. We are not in a position to present comparative racial statistics on employment in the Public Corporations since no such records are kept, but even a casual examination would reveal that the figure of 5 per cent employees of Indian descent offered by the M.F.I.O. is fanciful.

(C) On oppression of Indians by Government

The general accusations made by the M.F.I.O., suggesting a deliberate policy on the part of the Guyana Government to oppress Guyanese of Indian descent can hardly be taken seriously. The following picture of the decision making apparatus of the Government may be instructive:-

Seven Ministerial posts in the Cabinet of the Government including the Ministry of Foreign Affairs and Justice, are held by Guyanese of Indian descent.

The Special Assistant to the Prime Minister is of Chinese descent.

The Speaker of Parliament and the Clerk of the National Assembly are of Indian descent.

The Chancellor, Head of the Judiciary, President of the Court of Appeal and Chairman of the Judicial Service Commission; the Attorney General; one out of two Principal Legal Advisers and four out of five Senior Legal Advisers are of Indian descent. The four Appeal and High Court Judges reflect almost every ethnic influence in Guyana. The majority of persons serving on the Magistrates' Bench are of Indian descent.

The Secretary of the Guyana State Corporation (with overall administrative responsibility for the Government's Public Corporations), is of Indian descent; the General Manager of the Guyana Broadcasting Service is of Indian descent; the Foods Manager of the External Trade Bureau is of Portuguese descent; the Managing Director of Guyana Wrefords (trading company owned by Government) of mixed descent; the General Manager of the Guyana Rice Corporation is of mixed descent; and the General Manager of the Guyana Forests Industry Corporation is of mixed descent.

The Chief Labour Officer and the Chief Social Assistance Officer are of Indian descent.

The Director of Audit is of mixed descent and the Assistant Director of Audit is of Indian descent.

A Government set on a course of "Negro Racism" would not permit so many of its decision makers to be non-African. How do the M.F.I.O. and G.C.I.O. explain the very significant and countrywide involvement of Guyanese of Indian descent in membership of and as activists for the governing party?

The real motives of the M.F.I.O. are perhaps best understood by reference to their original attack against the Government of Guyana, published in their magazine, *Indian Overseas*, in July 1972, much of which has been carefully omitted from their letter to the I.C.J. For instance, Guyanese of Indian descent who work with and hold high positions in Government are described as "venal collaborating Indians of inferior ability". It seems, therefore, that the Government of Guyana is condemned whatever it does and it should be obvious that the approach taken by the M.F.I.O. in their magazine indicts them, not the Government of Guyana, as racists. The references to press censorship are unfounded. The press is free in Guyana.

(D) On the Rice Industry

The allegation that the Rice Industry is "in a state of depression because the Government thinks it would be a useful way to keep the Indians at starvation level" is scurrilous. Between the years of 1968-1973, the Government invested some \$35 m. in rehabilitation of the Rice Industry, left in a state of chaos by the P.P.P. The rice farmer today is being paid the highest price for his produce ever—in the history of Guyana. The Guyana Rice Board, a state owned Corporation responsible for all marketing of the rice farmers' produce, is now realising an appreciable profit in contrast to huge losses made under the P.P.P. in Government. Its profits are passed on to the rice farmers in the form of higher prices for their rice, credit for machinery, fertilisers, insecticides, weedicides etc. The result is that the yield per acre is the highest for many years and the rice farmer is better off today than ever he was before. It is significant that in the recent elections,

the areas mainly populated by rice farmers voted heavily for the People's National Congress, in government.

(E) *On Indian Culture*

The policy of the Government in regard to the development of Guyanese culture has been one aimed at finding a common culture, representative of the separate ethnic influences in Guyana, yet reflecting a culture identifiable with Guyana. The contribution of Guyanese of Indian descent has been considerable and has been actively encouraged by Government, in complete contrast to allegations made by the G.C.I.O. The recent development of Indian dance and its presentation at a national and international level has been entirely the result of the present cultural programme supported by Government. The practice of broadcasting Indian music programmes exclusively within specially allocated periods has been a traditional one, developed many years ago by the British owned Rediffusion station, mainly as a commercially viable enterprise designed to attract audiences of Indian descent. Broadcasters in the Caribbean, where there are a variety of ethnic influences in the population, have for some time now been seriously discussing whether this type of broadcasting is not in fact divisive in its nature. However, the practice still continues. In a typical broadcasting week of 140 hours, the time devoted to music programmes as a whole is roughly 100 hours and of this 9.20 hours is devoted to broadcasting Indian music.

(F) *On Fraudulent Elections*

Accusations of fraudulent elections have long been a habit of the leader of the P.P.P. The election laws of Guyana incorporate all the machinery for dealing with election irregularities. It is significant that the P.P.P. has never utilised this machinery to protest an election result. All the accusations levelled at the Government of electoral misconduct are justiciable in our Courts. The allegation that no Guyanese of Indian descent are employed in the office responsible for conducting the election in the Ministry of Home Affairs is quite untrue. The Deputy Commissioner of Registration and a number of Election Officers employed in the course of conducting the election are Guyanese of Indian descent.

(G) *On The Judiciary*

The Law Courts are independent of governmental control. The Courts of Guyana, exercising judicial independence, are not unaccustomed to deciding cases contrary to Government's interests where the Courts adjudge that the law requires them so to decide.

Lord Denning, the English Master of the Rolls, visited Guyana in January 1974 and looked into the way in which justice is administered in this country. At a press conference on the eve of his departure from Guyana, he uttered this judgement:

"I am impressed with the quality of the administration of the law and the way the judges and legal practitioners carry out their duties. My chief impression is pleasure and pride in the way in which justice is being administered in Guyana."

I think that we can rely on the stature of Lord Denning as a jurist of world-wide renown and a champion of human freedom anywhere to bolster our statement that in Guyana there is judicial independence and that the rule of law is a living thing. What Lord Denning found in Guyana in January 1974 establishes that the satisfactory situation in the Judiciary as found by the I.C.J. Commission of Inquiry in 1965 has been maintained. (See paragraphs 102 and 103 of the Report.)

Conclusion

When the present Government was elected in 1964, it is known that racial violence and confrontation had virtually split the country into two. There was wide-spread racial animosity and suspicion. Violent clashes between Guyanese of Indian and African descent had almost become a way of life. Prime Minister Burnham pledged that his Government would do everything in its power to bring peace and that he would strive for national unity.

Since 1964 there has not been a single instance of racial violence in Guyana. The once cruelly divided villages and cities are no more to be found in that deplorable state. The armed racial ghettos have disappeared. The Government's programmes of self-help and co-operative enterprise have brought together villagers, farmers, factory workers and city dwellers, from every walk of life and from every racial origin, in a way unprecedented in Guyana, to build schools, bridges, cottage hospitals, irrigation dams, roads, community centres and police stations.

It is always easy to point the accusing finger and present unrelated statistics to make a point, but what cannot be denied are the facts of life and the way of living of the people of Guyana since 1964. Unfortunately, general elections create precisely the climate and atmosphere in which emotions such as racism can be played upon and it is apparently the purpose of the Opposition P.P.P. and its several arms to do precisely this.

The M.F.I.O. stand plainly accused of attempting nothing less than to sow once more the seeds of racial suspicion in Guyana in the hope of causing resultant division. The racial breakdowns they have offered are *inaccurate* and bear no relation to reality. At the very least they are deliberately misleading and mischievous. The G.C.I.O., as a front for the P.P.P., seeks to encourage racial division and promotes active racial confrontation. It is the obvious position of the G.C.I.O. that political allegiance in Guyana must be based on race. The observations that "Guyana has become a land where there is government of a third of the people for a third of the people" and that the "P.N.C. speaks only for one section of the population, comprising 33 per cent" emphasise clearly the position taken by the G.C.I.O. on the question of politics and allegiance.

Constitutional issue in Malta

An unfortunate political deadlock in Malta has resulted in the suspension of the Constitutional Court. In January 1974, the issue was discussed in the Council of Europe.

Section 96 of the Independence Constitution of 1964 provides for the establishment of this Court to determine questions as to the validity of the election of Members of Parliament and the Speaker, and to hear appeals on the enforcement of constitutional rights, the interpretation of the Constitution, and the validity of laws.

The Court has been suspended since January 1972, apart from a temporary reconstitution for three months in 1973. The problem has arisen in this way. The Constitution provides for the Court to comprise a President (the Chief Justice), a Vice-President, and three other judges of the superior courts. It was widely felt in legal circles that the office of Vice-President was unnecessary and the Chamber of Advocates recommended its abolition.

The Government introduced a bill at the end of 1971 to abolish the office, but it was opposed by the Opposition (on the grounds that they had not been consulted in advance). Accordingly, the bill failed to obtain the necessary two thirds majority for a Constitutional Amendment. The Government responded by failing to appoint a new Vice-President, with the result that the Court could not be constituted.

The Government have since stated that they are only prepared to introduce an amendment to the Constitution on this issue if the Opposition will agree to other constitutional amendments. One of their proposed amendments is that a simple majority should suffice for constitutional amendments. The Government argues that a simple majority should suffice to amend a Constitution which was itself passed by only a simple majority. They even threaten to ignore the constitutional requirement for a two thirds majority, amend the constitution, and call for the resignation of any judges who refuse to accept the validity of amendments passed by a simple majority. This threat represents, of course, a much more serious challenge to constitutional rule than does the temporary abeyance of the Constitutional Court. They state, however, that they are ready to agree to the human rights provisions in the Constitution being entrenched by a two thirds majority.

There is a simple means of resolving the deadlock over the Constitutional Court, as the Government have power to make an acting appointment or to surrogate another of the judges to perform the functions of Vice-President if the office is vacant. This is what was done for the three months in 1973, and it is to be hoped that the Court will be reconstituted again in this way but on a permanent basis. As the International Commission of Jurists has urged in a letter to the Prime Minister, "it cannot be right to deprive citizens of their constitutional rights as a means of bringing pressure to bear on the Opposition to agree to desired constitutional reforms".

Portugal *

The *coup d'état* of April 25, 1974, has ended the oldest dictatorship in Western Europe and at the same time calls into question the basis of the last European colonial empire in Africa. It was a radical solution to a national crisis which General Antonio de Spínola described as the most serious in Portuguese history.

The armed forces intervened on the one hand to modernize the country's political structure which had remained unchanged for 50 years, and on the other to arrive at a solution to the problem of the colonial wars. Since the two problems were closely linked, they could not be resolved separately.

In their first proclamation to the nation, the armed forces affirmed that they sought to restore the civil liberties of which the Portuguese people had so long been deprived. As far as the question of the colonies was concerned, the answers would be reached only after widespread national debate, following which the African population would be invited to express their choice by means of a plebiscite. The choice would be between complete independence or the creation of a large Confederation (a kind of Portuguese Commonwealth). The Africans would decide freely.

* This note was written by a member of the ICJ staff who was in Lisbon at the time of the change of régime.

All this was a complete about turn. The Portuguese had finally decided to face up to the future as General Spínola had proposed in his book, almost a manifesto, "*Portugal and the Future*". Surprise, shock, and a large measure of relief were the emotions recorded in the first commentaries in Portugal on the change of régime.

A few weeks before the coup, Professor Marcelo Caetano received unanimous support from the deputies of the National Assembly for his foreign policy. At the same time Generals Costa Gomes and Spínola were removed from their posts as chiefs of staff because of the premature revolt at Caldes da Rainha. The former régime seemed to be capable of withstanding the profound crisis which the country was undergoing. The Portuguese people were only of marginal importance in the dispute and seemed destined to continue to endure unlimited repression while witnessing the growing isolation of their country as well as the continuation of the endless war in Africa. Suddenly everything was transformed. The long awaited restructuring of political, social and economic life had become possible. It took just 24 hours to topple a régime which had dominated Portugal for 48 years, a régime which for the last years had no other support than its own secret police (Pide/DGS).

Although it was the military which was immediately responsible for the sudden turnabout in Portugal, international public opinion warmly welcomed the coup. During a period when it has become commonplace to witness military action directed at limiting or suppressing democratic liberties, the coup in Portugal, on the contrary, was brought about with an eye to reestablishing the Rule of Law. It is for this reason that the coup has already been called one of the most civilized in modern history.

The Portuguese population itself was wildly enthusiastic and greeted the armed forces as though they were a liberating army. For days after the coup, the streets of Lisbon became the stage for a drama whose theme was freedom. Freedom of expression, freedom of association, freedom for political prisoners, freedom of the press. It all happened without any kind of violence or excess. May Day, which was officially sanctioned for the first time in Portugal since 1926, turned out to be a vast national celebration. Contrary to the fears expressed by many pessimists, who thought there would be widespread disturbances, the Portuguese people showed civic sense and political maturity.

The action of the armed forces has cleared the way for restoring a democratic régime. It is now up to the Portuguese people and their representatives to accustom themselves to the exercise of their new found liberties. It is to be hoped that the delicate task of returning to democratic ways will not be prejudiced by extravagance and violence from extremists.

What happened in Portugal will have international repercussions. The future chosen by the peoples of Mozambique and Angola is sure to affect the minority racist régimes in Rhodesia and South Africa. Spain, in view of its geographical proximity and somewhat parallel political development, will have to review its relationship with Portugal, while at the same time taking precautions against internal repercussions of the Portuguese example. Nor will Greece escape the influence of the coup in Portugal. Both Greece and Portugal are members of NATO and the current of liberty and respect for human rights which has swept across Portugal could well continue on its path across the Mediterranean.

Finally, there is Latin America, most notably Brazil, which was a Portuguese colony until 1822. Brazil was the first country to recognize the

new government in Portugal. One can only hope that the traditional bonds of friendship which unite these two peoples may now find new expression.

Among all of the possibilities for change the most concrete and problematical remains the future of the Portuguese territories in Africa. The question has yet to be resolved. It is up to the Provisional Government to lay a foundation upon which to establish new policies capable of bringing peace to these regions.

Apart from the unlikely event of a Rhodesia-type UDI in these territories—and it is hard to believe that the army would join in such a revolt—there remains either independence or a Portuguese commonwealth whose structure remains undefined.

The new Portuguese leaders have declared themselves ready to abide by the democratic spirit of the Charter of the United Nations. That is a good start, and a new prospect which indicates clearly the impossibility of reconciling the irreconcilable, that is to say democracy and colonialism.

Southern Africa

The Winds of Change from Portugal

The army coup overthrowing the dictatorial Caetano government in Portugal is destined to have an important effect on all of South Africa. The explosion in Lisbon, brought about in large part by pressures built up over 13 years of a frustrating, inconclusive colonial war, limits the options open to the new Portuguese government. The option of continuing the wars for any length of time, with its demands on the lives of the members of the Armed Forces and on the resources of the nation, in a cause where both justice and possibility of success are in question, would appear to be closed under present circumstances. What remains is either a negotiated settlement with the Liberation Movements, which in one form or another grants independence to these colonies, or a putsch by the Portuguese settlers in the territories like those attempted in Algeria and successfully carried out in Rhodesia. The parallel in the Portuguese colonies, with one notable exception, is closer to the situation that existed in Algeria. In the Portuguese colonies and in Algeria there exist or existed effective armed liberation movements, which was not the case in Rhodesia at the time of the unilateral declaration of independence. Moreover, the settlers in Rhodesia already had a far greater degree of independence at the time of their declaration. A resistance movement which has not only been able to survive but to grow in the face of the Portuguese army efforts to destroy it, would make the life of any white settler government in those areas most difficult if not impossible particularly in Mozambique.

Where the situation differs from Algeria is the geographical proximity of the racist governments of South Africa and Rhodesia. The open intervention of the armed forces of these governments might make possible for a time the existence of White settler governments in Mozambique and Angola. Such intervention would however raise the conflict to an international level (as it is not expected that any other States would recognize the existence of such settler governments) with consequences which at this point are unforeseeable.

The South African government may soon be faced with decisions of fundamental gravity, and this at a time when the black African population is

making greater demands through leaders recognized by the South African government itself, and when a growing number of Southern African whites have reached the conclusion that only a multi-racial society offers them a reasonable future in South Africa. This latter seems to be the lesson of the recent South African elections where, as usual, only the white population was eligible to vote. Despite a government campaign to frighten the electorate, including the new restrictive legislation described below, the one party which favoured movement towards a multi-racial society increased their parliamentary representation from one to six members. The government party, the Nationalists, who are the architects and defenders of the racialist apartheid system, increased their representation and obtained an absolute majority in the Parliament. Over the longer term, however, the growth in consciousness of both the white and black populations are more significant aspects of the situation than the electoral victory of the Nationalists in a parliament based on a small minority franchise.

The prospects facing the white minority government in Rhodesia may be even more dramatic than those before the South African government should Mozambique become independent under a government led by the FRELIMO liberation movement. The economic, geographic, and military importance of Mozambique to a viable minority government in Rhodesia is self-evident. It may not be too late for the Rhodesian authorities to give serious thought to a change of policy which might yet bring about a situation where whites and blacks can live together in peace in that area.

Winds of change are clearly blowing again in all of Southern Africa. Those who still have political responsibility and power in the region might well consider whether it would not be wiser to seek accommodation before the winds attain hurricane force.

Two new repressive Acts in South Africa

The Affected Organisations Act, No. 31 of 1974, and the Riotous Assemblies Amendment Act, No. 30 of 1974, were rushed through the South African parliament before the recent (all-white) elections. They are clearly aimed at making it more difficult for organisations opposing the political and social policies of the government to continue to be effective.

The Affected Organisations Act

Before discussing the provisions of this Act, it should be emphasised that the organisations at which it is aimed can hardly be described as radical. All radical anti-government organisations have already been outlawed or effectively robbed of their leadership by way of arbitrary and non-appealable banning orders of the Minister of Justice. All popular black movements have been outlawed. The two student organisations, NUSAS (White) and SASO (Black), have already been severely harassed by banning orders imposed on their leaders over the last few years. The organisations which appear to be aimed at by the new Act are NUSAS itself, which has been active in anti-government demonstrations and has done much to focus attention on social injustice in South Africa, the Christian Institute, an interdenominational organisation of churchmen who are opposed to Apartheid on religious grounds, and the South African Institute of Race Relations, a relatively conservative research institute to which even many members of the government party belong, including until recently a Minister, Mr O. Horwood. In a country riddled with fear of formal or informal sanctions from the government, the mere fact that an organisation has been declared, or is

in the process of being declared, an "affected organisation" will be a very inhibiting factor for the raising of funds, membership or enthusiasm. It is possible that this, rather than the effective blocking of foreign funds, will be the chief result of this Act.

Under the Act, if the government is satisfied that an organisation is engaged "in politics... with the aid of or in cooperation with or in consultation with or under the influence of an organisation or person abroad", the organisation may be declared "affected". The effect of this is that no one can solicit or receive any money from abroad, or be instrumental in introducing money into South Africa from abroad, for or on behalf of the organisation. Any person who contravenes this prohibition is guilty of an offence for which a fine of R10,000 (about US\$15,000) or 5 years' imprisonment (or both) can be exacted. Money from abroad in possession of such an organisation can be frozen and confiscated unless it is given to a welfare organisation approved by the Minister of Justice. In order to implement the provisions of the Act a new office, that of the Registrar of Affected Organisations, is created who may cause searches to be made upon any premises in order to gain information connected with an affected organisation and who shall generally be responsible for moneys extracted from affected organisations. If the registrar suspects any money to appertain to an affected organisation, he can prohibit any person to deal with such money and such money can then upon an order of the Supreme Court be confiscated in favour of the State.

The Minister of Justice will, in addition to the Registrar of Affected Organisations, be able to appoint an "authorized officer" who may, upon instruction from the Minister, proceed to investigate any given organisation and he has wide powers of search and seizure and is protected against any interference by the operation of criminal law. The actual declaration of an organisation as being "affected" shall be done by the State President (in reality the Government) after the "consideration" by the Minister of Justice of "a factual report made in relation to that organisation by a committee consisting of three magistrates appointed by the Minister, of whom at least one shall be a chief magistrate or a regional [i.e. a more senior] magistrate".

The following points need emphasis. The word "politics" is not defined. This will mean that virtually any organisation of which the Government disapproves can be declared "affected". The word "organisation" is given a very wide definition to include any group or association of two or more persons, however organised. The scope which the Government obtains for suppressing legitimate opposition, or merely critical individuals, is therefore almost limitless. Thirdly, the ostensible guarantee of an impartial investigation is transparent. There is nothing to oblige the Minister to accept the report of the panel, which will in any event operate without any procedural guarantees and which consists of people belonging to a civil service under the control of the very Minister to whom they report, without any guarantee of their independence.

As to the avowed aim of the legislation, namely to stop the flow of money to perfectly legal organisations of a political nature, the significant fact is that after 26 years in power, during which they freed themselves of all radical opposition and during which they amassed an almost limitless arsenal of powers of suppression and intimidation in support of their racist policies, the South African government still shows acute symptoms of fear over the free flow of ideas against which this vicious act is principally aimed.

The Riotous Assemblies Amendment Act

This Act reduces almost to a nullity what is left of the right of peaceful protest in South Africa. It makes derisory the statement made last year by Mr Justice Van Zyl, the Acting Judge-President of the Cape, (in the case of *S v Turrell* 1973 (1) SA 248 (C)) when he allowed the appeal of certain students against their conviction under the Riotous Assemblies Act:-

“Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundations upon which Parliament itself rests. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organise it if there is no right of public assembly”.

The major change brought about by this amending act is to allow a magistrate (a civil servant of the department of justice) to ban *any* meeting in his area of jurisdiction, even in a private place, whenever he ‘has reason to apprehend that the public peace would be seriously endangered’. What it potentially means is that a private meeting of only *two* persons could be so banned and *a fortiori* any meetings on private property. (Previously a “gathering” was confined to a group of twelve or more persons). As South Africa has no document of entrenched rights against which the courts can test any acts of the executive, the requirement that the magistrate can use these powers only when “the public peace is seriously endangered” affords little or no protection to critics of the regime whose activities would be the object of these bannings. It is an offence to publish any statement or speech made at a banned meeting.

Under the new Act the same restrictions on meetings can be imposed on the country as a whole, or on parts of the country, by the Minister of Justice. This power has already been used. A total ban on demonstrations was imposed on the country during the state visit of the Paraguayan dictator Alfredo Stroesner during the first week of April 1974. The Deputy Minister of Justice placed a total ban on all protest meetings in the entire country directed at the policies of any state (including, theoretically at least South Africa).

The result of the amendments to the Riotous Assemblies Act is that another important section of the citizen’s life has been subjected to the arbitrary will of the South African authorities. This leaves the critic of the social and political system with even less protection when he expresses his opposition to the regime. The protestations of the South African government that no-one opposing the regime peacefully need fear any incursions of his rights sound hollower than ever.

Commentaries

Human Rights Commission

The Commission on Human Rights met for its 30th Session in New York from February 4 to March 8. Each year human rights issues continue to multiply, and it soon became evident that the five weeks available for considering the 22 substantive items of the agenda were hardly adequate.

Since last year's meeting, the Sub-Commission on Discrimination and Minorities had met to evaluate communications alleging gross violations of human rights. After a year's delay, the Sub-Commission referred to the Commission eight cases involving allegations of gross violations in Brazil, Burundi, Guyana, Iran, Indonesia, Portugal, Tanzania and the United Kingdom (see ICJ Review No. 11, p. 27).

During the same year, the Secretary-General's staff had compiled preliminary reports on the impact of science and technology on certain economic, social and cultural rights. Of particular significance were two reports requested by the General Assembly, one on respect for the privacy of individuals and the integrity of the sovereignty of nations in the light of advances in recording and other technological developments, and the other on the use of electronics which might affect the rights of the person and the limits which should be placed on such use in a democratic society. The Commission also received the completed study, revised observations and conclusions of its Special Rapporteur Manouchehr Ganji on "The Widening Gap—a study of the realization of economic, social and cultural rights".

The Ad Hoc Working Group of Experts under the Chairmanship of M. Kéba M'Baye, Chief Justice of Sénégal (and member of the ICJ), submitted its interim report on developments concerning the policies of apartheid and racial discrimination in Namibia, Southern Rhodesia, Angola, Mozambique and Guinea-Bissau. On the item of the adverse consequences to human rights of assistance given to colonial and racist regimes in southern Africa, the NGO representative of the International Confederation of Free Trade Unions presented statistics on working conditions, systems of forced labour, wage scales, the development of African trade unions and the effect of white immigration on the continuing gap between white and African workers. The Commission adopted a resolution authorizing the Sub-Commission to appoint a special rapporteur to evaluate the sources of assistance to racist regimes and the effect of such assistance on the perpetuation of those regimes.

Other resolutions authorized the appointment of a special rapporteur to consider the historic and current developments of the right of self-determination and another to consider the implementation of UN resolutions related to the right of peoples under colonial and alien domination to self-determination.

No progress was made in the important Draft Declaration on the Elimination of all Forms of Religious Intolerance which the General Assembly had sent to the Commission with a view to its completion this year. Six items postponed without discussion were those dealing with conscientious objection and the role of youth; the reports of the Committee on Crime Prevention and Control; freedom from arbitrary arrest, detention

and exile; study of the right of arrested persons to communicate with those necessary for their defence; measures to be taken against ideologies based on terror or the incitement to racial discrimination and hatred; and advisory services in the field of human rights.

A large part of the Commission's time was devoted to the discussion of the item of gross violations of human rights, in which non-governmental organisations once again made a major contribution. Alleged violations in Chile dominated the discussion which included reports of two fact finding missions, one of Amnesty International and the other of the Women's International League for Peace and Freedom. Mrs. Salvatore Allende, widow of the late president, spoke on behalf of the Women's International Democratic Federation and the International Association of Democratic Lawyers. At the end of the debate the Chairman was authorised to send a cable to Chile expressing concern over the reports from various sources of gross violations of human rights and calling on the government to cease such violations, to release from detention several named political and cultural figures and to respond to the allegations made. The response came in the form of a denial of all the allegations made in the course of the debate.

The Commission was unable this year to give the new procedures for dealing with communications on gross violations an adequate test. Whether for lack of time or lack of inclination, the members failed to consider substantively the eight cases singled out by the Sub-Commission for further action. They did not order either a further study or an investigation into any of these situations, as they are authorised to do under ECOSOC Resolution 1503 (see ICJ Review No. 9, p. 5). Instead, they decided, at the expense of another year's delay, to add an additional step to the already tortuous existing procedures, subject to the approval of the ECOSOC. A small working group of 5 members are to meet before the next Commission to consider the cases submitted to the Commission, the documents transmitted for consideration, the government observations and any further reports that the Sub-Commission may submit. The working group will then report to the Commission on these communications with a view to a determination by the Commission in accordance with the existing rules of procedure.

It was the feeling of many members of the Commission that the item of gross violations of human rights was the most important issue before them and that it constituted a test of the Commission's competence, authority and effectiveness. It is to be hoped that the working group will succeed in enabling the Commission at its next session to make some real progress on the eight cases, as well as any additional cases submitted in the course of the year. If not, the Commission will be in danger of losing all credibility as a body concerned to deal with gross violations of human rights "wherever they may occur".

The International Crime of Apartheid

On 30 November 1973, the United Nations General Assembly passed Resolution 3068 (XXVIII) adopting and opening for signature and ratification the International Convention on the Suppression and Punishment of the Crime of Apartheid. The voting was 91 in favour, 4 against (Portugal, South Africa, United Kingdom, United States) and 26 abstentions. The Convention will come into force when it has been adopted by 20 states.

The Convention declares that *apartheid* is a crime against humanity. When the Convention comes into force a new crime will be created under international penal law known as "the crime of *apartheid*". State Parties undertake to make the new crime part of their domestic law, and to bring to justice in their own courts offenders over whom they acquire jurisdiction, whatever may be their nationality and wherever the crime may have been committed. In addition, offenders may be tried "by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction". There is, however, no provision for the creation of such a court under the Convention.

The definition of the "crime of *apartheid*" is exceedingly wide; indeed, in the eyes of some penal lawyers, too wide. Several of the terms used appear to lack the precision that is desirable in the definition of a criminal offence. The definition reads as follows:

" Article II

For the purpose of the present Convention, the term "the crime of *apartheid*", which shall include similar policies and practices of racial segregation and discrimination as practised in Southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) Denial to a member or members or a racial group or groups of the right to life and liberty of person:
 - (i) By murder of members of a racial group or groups;
 - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
- (d) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*."

Under Article III, "international criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State... whenever they (a) commit, participate in, directly incite or conspire in the commission of the act mentioned in Article II...; (b) directly abet, encourage or co-operate in the commission of the crime of *apartheid*". The words "irrespective of the motive involved" are difficult to reconcile with the words in Article II "committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them". The words in Article III appear to imply that where prohibited acts have been committed by one person with the necessary purpose under Article II, any other persons who participate in the commission of the act will be guilty of an offence whether or not motivated by the same racist intention. This seems a surprising result.

Under Article IX crimes of *apartheid* are not to be considered political crimes for the purpose of extradition. This will exclude, as between States Parties, the defence which is available under many extradition treaties that the offence alleged is political in nature.

The Convention contains a reporting procedure under which States Parties undertake to submit periodic reports to a group of three members of the Commission on Human Rights on the legislative, judicial, administrative or other measures they have adopted to give effect to the provisions of the Convention.

The chief virtue of the Convention is that it subjects the inhuman practices of *apartheid* to the most formal possible moral condemnation, by outlawing them under international law. It is difficult, however, to see how offenders will in practice be brought to justice except when a racist regime is overthrown. In other circumstances, the persons liable to prosecution under the Convention are unlikely to be found in a country which is a State Party to it. This may, of course, have some effect upon their freedom of movement.

Loss of Nationality and Exile

The recent and well publicized exile of Alexander Solzhenitsyn, after revocation of his Soviet nationality, and the withdrawal of nationality from several Soviet "dissidents" while they were abroad has brought once again to the forefront the legal status of loss of nationality and exile in International Law. In addition to the Soviet Government, the Greek Government has in recent years also resorted to the administrative withdrawal of nationality from opponents who were abroad, and the action of the Ugandan Government in denying national status to certain Asians who had opted for Ugandan citizenship at the time of independence, falls into a related category.

The above actions come after a relatively long period when the use of denationalization and exile as a government measure appeared to have practically disappeared. Certainly there have been in this century some

notable acts of denationalization and exile on a mass scale but these were related to periods of revolution, war or the aftermath of war. One can cite the denationalization of Russian emigrés after the October Revolution, the denationalization of Jews in Nazi Germany and the denationalization and transfer of those of German stock from the Sudetenland area of Czechoslovakia.

What we are here concerned with is more the individual act of denationalization as a form of penalty. It is certainly an ancient form of penalty, having existed in Roman Law⁽¹⁾. There are however other forms of punishment which have existed in the past but would be considered a violation of fundamental human rights today, so that precedent by itself is not a justification.

What is evident is that loss of nationality is a penalty which can have serious consequences for the individual concerned. Belonging to a state, and having its nationality, is the basis for a multitude of other rights and privileges. It would appear to be a matter of elementary justice that a penalty of a character that could be serious, should not be invoked unless the individual has committed some serious offence for which the law provides this penalty.

In addition to the effect of denationalization and exile on the individual concerned, it has effects on other States by the resulting status of statelessness imposed on the individual. Other States find themselves either in the position of being forced to grant residence to a person not their national or forcing that person to remain in constant motion between States, until some Government relents.

It is primarily on the basis of this type of reasoning that some noted scholars of international law have sought to infer an international legal principle barring denationalization when it results in statelessness⁽²⁾. Learned societies have in the pre-War period passed resolutions seeking international recognition for a principle barring withdrawal of nationality resulting in statelessness⁽³⁾. Nevertheless, it was not until the post-World-War II period, that some serious efforts were undertaken on the international level to seek a remedy for this situation.

This post-war development has occurred on three levels. On the level of principles of human rights as encompassed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, on the level of studies made on behalf of the Human Rights Commission of the United Nations, and on the level of an international covenant dealing specifically with the problems of loss of nationality and statelessness.

With respect to the first area, that of principles of human rights, Art. 15 of the Universal Declaration of Human Rights is most directly in point and provides:

- " 1. Everyone has a right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

⁽¹⁾ Dr. P. Weis, "Nationality and Statelessness in International Law", London, Stevens & Sons Ltd., 1956, p. 122.

⁽²⁾ Lauterpacht, "The Function of Law in the International Community", pp. 300-1.

⁽³⁾ Resolution of the Institute of International Law 1895, XIV Annuaire 195; 33rd Conference of the International Law Association; The Grotius Society, Grotius Transactions, 1943, p. 157.

There appears to be some ambivalence between the right of the individual in sub-division 1, which appears to be absolute, and the restriction on the State in sub-division 2, which bans deprivation of nationality only when it is arbitrary.

In addition to Article 15, Articles 13, paragraph 2, and Article 10 have a bearing on our subject. Paragraph 2 of Art. 13, provides:

“Everyone has the right to leave any country, including his own, and to return to his country”.

The applicability of this clause depends of course on whether nationality is retained and that relates back to Article 15 (para. 2), to determine whether the purported deprivation of nationality has been arbitrary. Finally, Article 10 provides:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

What has marked the cases mentioned at the start of this article is precisely the absence of any hearing before a tribunal for the determination of this very important if not fundamental right, in our present world composed of sovereign States.

The status of the Universal Declaration is unique in international law. It is the product of a unanimous vote (but with 5 abstentions) of the General Assembly of the United Nations, and resolutions or declarations of the General Assembly, unanimous or not, of themselves have only the status of recommendations. However the Universal Declaration, over and above its status as a declaration of the General Assembly, has obtained a status similar to general principles of international law, by the repeated references to it in the practice of States. Whilst there remains some ambiguity about the legal status of the Declaration, the International Covenant on Civil and Political Rights is in the form of an international convention and will therefore be binding on the States which have become parties to it. (This is on the level of principles; the possibility of enforcement depends on whether the ratifying State has made a declaration under Article 41 permitting complaints to be filed against it before a Committee set up under the Covenant by other State parties, and/or has ratified the Optional Protocol which would permit aggrieved individuals to file complaints against it).

Of the States mentioned at the outset, only the Soviet Union has ratified the Covenant (but without either the declaration under Article 41 or the Optional Protocol). The Covenant is not as yet a legally binding document as it requires 35 ratifications to come into effect, and has received only 26 to date. Nevertheless, it would not be in very good grace for a State which has adopted the Covenant to defend itself against a violation of its principles on the ground that it has not yet come into force.

Possibly because it is a potentially more binding legal document, the terms of the Covenant are more circumspect than the Universal Declaration. We can however draw some principles from its text by negative reasoning. Art. 13, for example, provides:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”.

If an alien cannot be expelled from the territory of a State without being given the right to defend himself, how much more should that apply to a national whose nationality is to be removed in order to expel.

There are several other sections of the Covenant which have a bearing on the situations mentioned above. There is first Art. 2 paragraph 1 which states that:

"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Art. 12 para 4:

"No one shall be arbitrarily deprived of the right to enter his own country".

Art. 19 para 2:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

It is submitted that the actions taken by the Soviet Union and Greece in particular would violate the protections mentioned in the citations.

Of the studies which have been undertaken by the Human Rights Commission of the United Nations, there are two which deserve special mention, the "Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile", and the "Draft Principles on the Freedom to Leave Any Country and Return to One's Own Country".

The first of these was submitted by a Committee established by the Commission of Human Rights in 1961, revised in 1962, but unfortunately never discussed, still less adopted. It is one of the items on the agenda of the Human Rights Commission which perennially gets put off to the next year.

The Committee in its discussion of exile pointed out that in many countries it is barred by the Constitution or by statute or is not specifically authorized and not practiced. Ironically, Greece was in this latter category. The Committee's conclusion with respect to exile stated:

"816. *Exile*. The Committee notes that exile has virtually disappeared. Whether as a penalty or as a political measure, exile is either prohibited or not practised in most countries. Only in a very few countries is exile applied as a punishment and then only for political offences, as a special measure in times of crisis, or as an optional measure (in lieu of imprisonment or banishment)".

That was in 1962. Since then exile has unfortunately become a matter of international concern.

The second study resulted in draft principles which were referred to governments for their attention by the UN Economic and Social Council in 1973 (see I.C.J. REVIEW No. 11, p. 61). Part II of these principles bears directly on the issues here considered:

"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."

We can thus see that when it comes to principles the international community has gone a long way towards proclaiming the right to nationality as a basic human right, but when it comes to enforceable procedures to give substance to that right the achievement has been less. Nevertheless, there has been an international effort to resolve this problem in the context of a specific convention on the Future Reduction of Statelessness. The ratification by Australia on December 13, 1973, assures that the Convention will come into force two years from that date. This is certainly a welcome and important step, but it also permits an appreciation of the difficulties that still lie ahead, because this Convention is coming into force with only six ratifications. This also illustrates the absence of standards by which applicability of international conventions are determined. This convention will come into force after only six ratifications, whereas the Covenant of Civil and Political Rights will not come into force until there are thirty-five.

Even the sixth ratification took 13 years to obtain, the Convention having been adopted by an international conference in 1961. The six States which have ratified are United Kingdom, Austria, Norway, Sweden, Ireland and Australia. Four other States have signed but not ratified, France, Israel, Netherlands and Dominican Republic.

The Conference itself, which was held in two parts, had 35 States represented at the first session and 30 at the second. It followed a long study by the International Law Commission which drew up two drafts, one which would have prohibited any denationalization and the other, the one adopted, which limits the grounds for such action. It was precisely the question of withdrawal of nationality, contained in Article 8 of the Convention which caused a deadlock at the first session of the Conference and required a second session. The text as finally adopted provides:-

"ARTICLE 8.

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:
 - (a) In the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person should lose his nationality;
 - (b) Where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

- (a) That, inconsistently with his duty of loyalty to the Contracting State, the person:
 - (i) Has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
 - (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of the State;
 - (b) That the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.
4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body."

This text was a compromise to leave intact most of the provisions on loss of nationality in the national legislation of the States represented. In the light of this fact, and the leeway that the article provides, the pitifully small number of ratifications so far obtained indicates how jealously States tend to guard their prerogatives on matters bearing on sovereignty.

TURKEY - A Reply to Prof. Hirsch

A study in German by Professor Ernst E. Hirsch, entitled "Human Rights and Fundamental Freedoms in a State of Emergency — A Case Study on Turkey and the 'strictly non-political' Agitation of International Organisations" has recently been published by Duncker & Humblot/Berlin. In it the author seeks to refute the criticisms of the emergency regime in Turkey, 1971-1973, made by certain international organisations, including the International Commission of Jurists. According to the author these organisations are motivated by "politico-ideological aspirations" or as "spokesman... of particular political ideologies". The author's arguments in so far as they relate to the ICJ will be briefly examined.

(1) The unconstitutionality of the generals' Memorandum of 12 March 1971, which provoked the resignation of the government and the introduction of a semi-military régime was described in a staff study on "The Rule of Law in Turkey" in ICJ Review No. 10 (pp. 37-38). Prof. Hirsch makes no attempt to refute the arguments in this study on the Memorandum. Instead, he seeks to qualify the generals' Memorandum as a simple and lawful act, namely the "use of the right of petition envisaged by article 62 of the Turkish Constitution" (pp. 37-38, note 40). It is a somewhat strange "petition", since the signatories were not content to submit to the competent authority their requests and complaints, but went on to threaten that if their demand for a "strong and credible government was not quickly met "the armed forces are determined to take over the administration of the state". The reader should not be surprised to find Prof. Hirsch describing this act as "profoundly democratic", since he regards the influence of the armed forces on the political life of the country as comparable to that of the trade unions or associations of lawyers or journalists (p. 42). Is this

not a total denial of one of the principles on which western democracy is based: the separation of the civil and military powers?

Prof. Hirsch even distorts well-known events to justify his theory of the "use of the right of petition". He claims that the "petition" was addressed to the Parliament, the normal recipient of petitions, ignoring the fact that it was also addressed to the President of the Republic, accompanied by an "explanatory" letter demanding amendments to the human rights provisions in the Constitution (*Yeni Gozete*, March 14, 1971).

Not content to recast events to correspond with his formalist hypothesis, the author even misrepresents the Turkish constitutional system. He attributes a juridical personality to the High Command of the Armed Forces, and raises them to the same level as the government. He also claims that the Council of National Security is charged with establishing "liaison" between these two organs. In fact, there is no such body as the High Command in the Turkish constitutional system. There is only the military hierarchy subject to the authority of civilian bodies. Moreover, the Council of National Security has only a consultative status towards the government (Article 111 of the Constitution).

(2) Prof. Hirsch attacks the ICJ for describing the constitutional amendments as altering the democratic spirit of the Constitution. His principal argument is that the amendments were made by a freely-elected parliament (p. 42). The fact that a parliament is freely-elected does not exclude the possibility of it acting under external compulsion, as was the case in Turkey. The author asserts that the Turkish Constitution of 1961 was too liberal and had to be amended to prevent abuses of its freedoms (pp. 34-35, 41-42), a thesis which he nowhere attempts to expound.

(3) In order to justify articles 141 and 142 of the penal code Prof. Hirsch relies on a decision of the Turkish Constitutional Court confirming their constitutionality. An argument of this kind cannot conceal the reality. As the Military Court of Cassation has recently affirmed, these articles envisage political offences (in french 'délits d'opinion') (*Cumhuriyet*, 1 May 1974). It is as a result of these articles, borrowed from the Italian fascist penal code, that writers, editors and translators have been condemned to prison sentences of 30 years (Mr. S. Ege) and 37½ years (Mr. M. Erdost, on May 15, 1974). In Istanbul alone no less than 682 persons have been condemned or charged under these articles between 1971 and 1973. Is there any other signatory state of the European Convention on Human Rights which has condemned its citizens to sentences of imprisonment of up to 37½ years for having translated the works of Marx, Engels and Lenin?

(4) Prof. Hirsch attacks the ICJ for criticising the oppression of the Kurdish minority by Turkish governments. He claims that this minority "does not feel or know itself as such. For it is only when a group feels and knows itself as a minority... that it can demand special treatment by the legislator and the authorities" (p. 49). How, one may ask, can a minority, or to be more precise, a people who are not allowed to write, to teach or even to sing in their own language, express their desire to be recognised more cogently than by rebellion (1925, 1929-31 and 1937-8)? Prof. Hirsch's contention that "none of the states represented at the Lausanne Peace Conference considered the Kurds established in Turkey as a minority in the sense of the right of minorities" (p. 49) cannot conceal the fact that the Kurds (1/8th of the population) were recognised as having the same rights as the Turks, and not merely those of a simple ethnic minority: —

"The Government of... Turkey is the government of the Kurds as much as of the Turks, for the true and legitimate representatives of the Kurds take their seats in the National Assembly and participate to the same extent as the representatives of the Turks in the government and administration of the country". (İsmet İnönü, Head of the Turkish Delegation at the Lausanne Conference: Documents Diplomatiques — Conference de Lausanne, publ. French Ministry of Foreign Affairs, Paris 1923, pp. 283-284)

In this context, it is difficult to understand why Prof. Hirsch cites a decision of the Turkish Constitutional Court of July 20, 1971, dissolving the Labour Party of Turkey for having tried timidly to defend the democratic rights of Kurds. This decision, so far from proving the pretended non-existence of these people, shows on the contrary that racist repression is now institutionalised in Turkey.

(5) With regard to torture and ill-treatment of political prisoners, Prof. Hirsch concedes that these do constitute violations of the European Convention if it can be shown that the facts in question occurred either on the initiative or with the agreement of the competent state authorities or if these latter did not prosecute the "authors" of these criminal acts. It is sufficient to quote two recent documents:

"The tortures committed have been no different from those applied previously. As to the methods used, we have added nothing new". (Faik Türlün, former Martial Law Commander in Istanbul, quoted in *Hürriyet*, February 7, 1974, p. 4).

"Our government considers that the past events should not be reopened for discussion..." (Reply of Prime Minister Ecevit to a question whether the government were considering an official enquiry into the "alleged use of torture". *Yeni Ortam*, March 2, 1974).

These two quotations show clearly that the Turkish authorities were well aware of the tortures and have nevertheless systematically refused to prosecute those responsible.

We leave it to the reader to determine whether it is the staff of the International Commission of Jurists or Professor Hirsch who has been motivated by "politico-ideological aspirations" or who has been "the spokesman of particular political ideologies".

HUMAN RIGHTS IN ISLAMIC LAW

by

KHALID M. ISHAQUE

For Muslims, Quran ¹ represents the culmination of a long process of divine revelation for the guidance of humanity. It, so to say, marks the opening of a new chapter in human history. Quran bears witness to the high status of human beings in the hierarchy of the creation. Verily, "We have honoured the children of Adam" is the declaration made in the Quran. Quran further characterised Man as carrier of a great trust (33.72) and recipient of great powers (45.13; 16.14; 14.32,33). Whereas in the earlier revealed religions, the individual is not sharply differentiated from the tribe, Quran carries a direct message to the individual and a promise of fulfilment of an individual destiny. It makes clear that henceforth no Prophet would come who would have miracles at hand to prove the truth of his mission nor would he like Moses remain a constant companion and guide to his community; on completion of Muhammad's mission, humanity shall seek the fulfilment of its destiny by its own efforts in the light of the revealed law and the wisdom contained in the Quran and in the Sunnah ² of the Prophet Muhammad. Efforts anchored on a correct relationship between Man and God would, according to the Divine promise reiterated in Quran, bring unimaginable happiness and contentment not only in the life in the world but also in the life hereafter.

In the Quran, the strongly legalistic tradition of Judaism is reconciled with forgiveness so often emphasized by Christ; and a new synthesis is brought about. Quran unequivocally declares that doubtless there is virtue in enforcement of law but forgiveness carries a greater reward for the individual who forgives (42.40-43). It has to be so, because unlike the body which grows on its intake, the soul develops by giving away of that which the animal in man prefers. Society, in other words, is the field for operation of both law and morality. According to Quran, every person who accepts Islam is under an obligation to expend his life and all his wealth in the discharge of his covenant with Allah whereby he is promised an immensely more beatific life in the hereafter (9.111). A Muslim is under an obligation to do all that he can within his power irrespective of the conduct of others (4.105) because his obligations are individual to him, and precede his rights. What the dimensions of the obligations are going to be is neatly summarized in the Prophet's celebrated sermon on his last pilgrimage to Mecca when he said:

“Allah says: “O Mankind, We have created you from a male and a female, and We have made you into families and tribes that you may recognize one another.” Verily, the most honourable in the sight of Allah is he who is most righteous amongst you. A coloured man has no superiority over a white man, nor a white man over a coloured man, nor an Arab over a non-Arab, except for righteousness. O people, your lives, your honours, and your properties are to be respected by one another till the Day of Reckoning comes. They are as sacrosanct as this day, as this month, in this city.”³

On another occasion, while circumambulating the Kaaba,⁴ the Prophet said:

“How agreeable are you and how fragrant is your atmosphere; how hallowed are you and how high is your station, (but) I swear by Him who has Muhammad’s life in His hand, the sacredness of a Muslim with Allah is greater than yours.”⁵

In Islam, Allah is the Law-giver and the Divine law, called the “Shariat”,⁶ is above the Rulers and the Ruled. All are equally answerable at the altar of Shariat for their acts and omissions. Only lawful commands, said the Prophet, are to be obeyed and there is to be no obedience or cooperation in that which involves disobedience of the Divine law (5.105). Exercise of public authority is a trust and every believer is bound by his covenant to discharge his trust faithfully (4.58) and to help others in doing so (5.2). The public authorities, therefore, operate in a limited field. Whereas the duties of public authorities extend to:-

- (i) establishment of justice in society, i.e. by enforcing legal obligations by helping the weak and punishing the wilfully deviant;
- (ii) performing the mandatory duties of the community like collection of social security tax (Zakat)⁷ and its disbursement to those in need on account of a permanent or temporary disability;
- (iii) performance of such duties as cannot in the nature of things be performed by individuals like undertaking of public works and defence of frontiers; and
- (iv) aiding individuals in the performance of their moral obligations; yet, their powers do not include—
 - (a) any power to abrogate the Divine Law wholly or in part; or
 - (b) the power to change the priorities fixed by the Divine law (9.19) by taking up other obligations in preference to those prescribed by Allah.

In other words, the legislatures in an Islamic State do not have an absolute or plenary power to legislate as they please, nor do the executives by the same token have the power to act as they please. They must constantly endeavour to act within the limits set by the Divine Law, and for achievement of objectives fixed by the Divine law and that too in accordance with the priorities settled by the Divine law. As all obedience is based on the assumption that the command is not contrary to Divine law, the executive or the legislature cannot be the final judge of what is and what is not legal and, therefore, cannot debar judicial review of their acts by direct or indirect exclusion of judicial jurisdiction.

Before we proceed to examine the development of the fundamental rights so explicitly stated in the sermon of the Prophet quoted in para 2 above, it is worthwhile to notice the relevant aspect of the principle of legality in Islamic law. The main thrust of the teachings of Islam is towards

the fashioning of a morally perfect being. Prophet Muhammad declared that "I have been sent (on my mission) to perfect morality."⁸ Quran prescribes doing of certain things and forbids the doing of others. Though final accounting will be done on the day of Judgment, yet some transgressions are punished in the world by provisions made in Quran itself and some are not. The community as a whole, as well as individuals are directed constantly to seek development within the principles established by Quran. On the negative side the community as a whole and by the same token every individual is forbidden from transgressing what Quran characterises as the "limits prescribed by Allah" (2.229). On the positive side, Muslims are enjoined constantly to seek ways and means to assure to each other what in modern parlance we call "human rights". In fact, in an Islamic state, assurance of the fundamental rights is the objective towards which all social energies at all levels are to be directed. Legislation and judicial review are both proper instrumentalities for the purpose because all legislative, executive and judicial energies are required to be directed towards the creation and maintenance of a just and moral society. On this approach, the only difference between the Ruling Agencies and the common man would be that the former carry a greater load of responsibilities. They also operate under distinct constitutional limitations. They cannot but act in aid of the objectives and duties of the community. In the process, a large number of rights are created in favour of the individual. These rights can neither be suspended nor abrogated, as there is no higher purpose to which they are subservient.

According to Quran, "authority in the land" or in modern parlance political power is a gift to the whole community (24.55; 5.20; 22.41); and no one can claim exclusive right to its exercise (3.79). The Prophet who was himself the direct recipient of Divine revelation was enjoined to consult the members of the community in decision of affairs (3.159) and his example is a binding authority for the whole community because Allah has said: "Verily you have an excellent example in the Prophet" (33.21). Even otherwise, a truly Muslim community is described as one whose decisions are taken by the process of consultation (42.38). The word used by the Quran is 'Shura', and in translation the word 'consultation' hardly conveys the full meaning. Originally, the word 'Shura' was applied to the process whereby honey is drawn from the hive.⁹ Its secondary use was in relation to the process of mutual discussion and consultation till by common consensus a course of conduct was agreed upon. The factors like will of the majority or a non-binding consultation did not intrude upon what was originally signified by the word 'Shura'. Furthermore, the authority is given to the community to establish 'justice', i.e. to establish a just and moral society wherein just and moral persons could live and prosper.

After stating the above premises, one can formulate some of the fundamental rights contemplated in the Quran:

1) *Right to Protection of Life:*

According to the Quran, human life is sacrosanct. Of the several verses, which affirm the inviolability of human life, except for just cause, the following may be noted:

- (i) "And kill not the soul which Allah has made sacrosanct save for just cause." (17.33)
- (ii) "Whosoever killed a person—unless it be for killing a person or for creating disorder in the land—it shall be as if he had killed all

mankind; and whoso gave life to one, it shall be as if he had given life to all mankind." (5.32)

2) *Right to Justice:*

The first and foremost duty of the Prophet was to establish justice and the same continues to be the duty of the members of the community, as well as of its Ruling Agencies. Not only are the public authorities liable to provide justice to all, but everyone has a right to protest against injustice. In this behalf, the following verses, amongst others, may be noted:

- (i) "To this, then do thou invite mankind. And be thou steadfast as thou art commanded, and follow not their evil inclinations, but say, "I believe in whatever Scripture Allah has sent down, and I am commanded to judge justly between you. Allah is our Lord and your Lord. For us is the reward of our works and for you the reward of your works."
- (ii) "O, ye who believed! be steadfast in the cause of Allah, bearing witness in equity; and let not a people's enmity incite you to act otherwise than with justice. Be always just, that is nearer to righteousness. And fear Allah. Surely, Allah is aware of what you do." (5.8)
- (iii) "Surely, We sent down the Torah wherein was guidance and light. By it did the Prophets, who were obedient (to us), judge for the Jews, as did the godly people and those learned (in the Law) for they were required to preserve the Book of Allah, and (because) they were guardians over it. Therefore, fear not men but fear Me; and barter not My signs for a paltry price. And whoso judges not by that which Allah has sent down, these it is who are the disbelievers." (5.44)
- (iv) "And therein We prescribed for them; a life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and for other injuries equitable retaliation. And whoso waives the right thereto, it shall be an expiation for his sins; and whoso judges not by what Allah has sent down, these it is who are wrongdoers." (5.45)
- (v) "And let the People of the Gospel judge according to what Allah has revealed therein, and whoso judges not by what Allah has revealed, these it is who are the rebellious." (5.47)
- (vi) "And the recompense of an injury is the like of it; but whoso forgives and brings about reformation, his reward is with Allah. Surely, He loves not the wrongdoers. But there is no blame on those who defend themselves after they have been wronged. The blame is only on those who wrong people and transgress in the earth without justification. Such will have a grievous punishment." (42.40-42)

3. *Right to Equality*

Between man and man, Quran recognises only one criterion for superiority and that is due to more righteous conduct. All distinctions based on parentage, tribal relationships, colour and land are irrelevant. The following verse is the great charter in this behalf:

- (i) "O mankind, We have created you from a male and a female; and We have made you into tribes and sub-tribes that you may recognize one another. Verily, the most honourable among you, in the sight of Allah, is he who is the most righteous among you. Surely, Allah is All-Knowing, All-Aware." (49.13).

- (ii) "And for all are ranks according to their deeds so that Allah may repay them for their works (and in this) they shall not be dealt with unjustly." (46.19).

4. *Duty to Obey what is Lawful, and Right to dis-obey what is Unlawful.*

The clear implication of the idea of rule of Shariat is that a person is liable to obey only what is lawful and to dissociate from, disobey, and to even correct if he can, what is unlawful. The most comprehensive statement is contained in the following verse:

"And help one another in righteousness and piety and abet not one another in sin and transgression." (5.2).

The Prophet is also reported to have declared repeatedly that there is to be no obedience to any creature if it involves disobedience of the Creator.¹⁰

5. *Right to Participate in Public Life.*

According to the Quran, establishment of authority in this world is a grace of Allah in favour of the whole community whose members are constantly alive to their duties and obligation. The character of such a community is that their affairs are settled by mutual consultation.

The most direct verses on the point are:

- (i) "And (believers are such) whose affairs are (decided) by mutual consultation." (42.38).
(ii) "And consult them in the matters (of administration). (3.159).

6. *Right to Freedom:*

Modern constitutions divide freedom into various sub-divisions like freedom of expression, freedom of movement etc. Quran not only refers to them but amongst other directions, makes one comprehensive declaration that no person in authority, even a Prophet, has the right to enslave another in any manner.

Allah says:

"It is not for a man that Allah should give him the book, and authority and prophethood and then he should say to the people become slaves unto me, apart from Allah; but (he would say); Be solely devoted to the Lord because you teach the book and you study (it)". (3.79).

It is the very essence of slavery that a slave has no recourse against the master but is wholly dependent on the will of the master. It is denial of human dignity according to Quran that a person be so placed as not to have recourse or remedy against persons in authority. Quran in fact contemplates a clear possibility of there arising a dispute between public authorities and individuals. Such disputes were required to be resolved by reference to the Quran and the Prophet.

Allah says:

"O ye who believe; obey Allah, and obey the Prophet and those who are in authority among you. And if you differ among yourselves, refer it to Allah and His Prophet". (4.59).

Quran makes it clear at several places in the Book that Quran itself is the ultimate criterion.

Allah makes the Prophet declare:

"Shall I seek for judge other than Allah when it is He who has sent down to you the clearly explained Book." (6.114).

7. *Right to Freedom of Conviction:*

According to the Quran, Man becomes truly entitled to the spiritual honours when he willingly chooses the right path. No one can be forced into becoming a rightly guided one.

The following verses may be noted in this behalf:

- (i) "There should be no compulsion in religion. Surely, right has become distinct from wrong; so whosoever refuses to be led by those who transgress, and believes in Allah, has surely grasped a strong handle which does not break. And Allah is All-Hearing, All-Knowing." (2.256).
- (ii) "Admonish, therefore, for thou art but an admonisher." (88.21).
- (iii) "Thou hast no authority to compel them." (88.22).
- (iv) "We know best what they say; and thou has not been appointed to compel them in any way. So admonish, by means of the Quran him who fears My warning." (50.45).
- (v) "Say 'O ye men, now has the truth come to you from your Lord. So whosoever follows the guidance, follows it only for the good of his own soul, and whosoever errs, errs only against it. And I am not a keeper over you.'" (10.108).

8. *Right to Freedom of Expression:*

The believer is under an obligation to speak out the truth without fear and without desire to show favour.

Amongst other verses, the following is a comprehensive mandate in this behalf:

"O ye who believe! be strict in observing justice, and be witnesses for Allah, even though it be against yourselves or against parents and kindred. Whether he be rich or poor, Allah is more regardful of them both than you are. Therefore follow not low desires so that you may be able to act equitably. And if you conceal the truth or evade it, then remember that Allah is well aware of what you do." (4.135).

The Prophet is reported to have said that;

"Most honoured struggle (is of) one who speaks the truth in face of an oppressive ruler."¹¹

9. *Right of Protection against Persecution on ground of Difference of Religion:*

The right to be protected against persecution for differences in faith or opinion is a clear corollary of the right of freedom of conviction. It has been expressly mentioned, because many sins have been committed by well meaning but over-enthusiastic fanatics.

- (i) "And revile not those whom they call upon beside Allah, lest they, out of spite, revile Allah in their ignorance. Thus unto every people have We caused their doing to seem fair. Then unto their Lord is their return; and He will inform them of what they used to do." (6.108).
- (ii) "For each of you we (have) prescribed a Law and manifest way. And if Allah had willed He would have made you (all) one people, but (he) tries you by that which He has given you. Vie then with one another in good deeds. To Allah shall you all return then will He inform you of that wherein you differed." (5.48).

10. *Right to Protection of Honour and Good Name:*

According to the Quran protection of good name and honour of the members of the community is a very high priority in social values to be guarded by every one and particularly the Ruling Agencies. Allah seriously warns the community against loose talk, making of reckless allegations and spreading of rumours.

Allah says:

- (i) "If the hypocrites, and those in whose heart is a disease, and those who cause agitation in the city, desist not, We shall surely give thee authority over them; then they will not dwell therein as thy neighbours, save for a little while. (Then they will be) accused. Where ever they are found, they will be seized and cut into pieces." (33.60-61).
- (ii) "O ye who believe ! let not one people deride another people, who may be better than they, nor let women deride other women, who may be better than they. And defame not your own people, nor call one another by nick-names. Bad indeed is evil reputation after the profession of faith; and those who repent not are the wrong-doers." (49.11).
- (iii) "O ye who believe ! avoid most of suspicion, for suspicion in some cases is a sin. And spy not, nor back-bite one another. Would any of you like to eat flesh of his brother who is dead? Certainly you would loathe it. And fear Allah, surely Allah is Oft-Returning (with compassion) and (is) Merciful."
- (iv) "Verily, those who accuse chaste, unwary, believing women are cursed in this world and the Hereafter, And for them is a grievous chastisement." (24.23).

11. *Right to Privacy:*

Privacy, according to the Quran is the right of everyone. It is essential for a full flowering of a personality. The following verses may be noticed in this behalf:

- (i) "O ye who believe ! enter not houses other than your own until you have asked leave and saluted the inmates thereof. That is better for you, that you may be heedful. And if you find no one therein, do not enter them until you are given permission. And if it be said to you, 'Go back', then go back; that is better for you. And Allah knows well what you do." (24.27-28).
- (ii) "O who believe ! avoid most of suspicions; for suspicion in some cases is a sin. And spy not, nor back-bite one another. Would any of you like to eat the flesh of his brother who is dead? Certainly you would loathe it. And fear Allah, surely Allah is Oft-Returning with compassion and (is) Merciful." (49.12).
- (iii) "O ye who believed ! enter not the houses of the Prophet unless leave is granted to you for a meal, without waiting for its appointed time. But enter when you are invited, and when you have finished eating, disperse, without seeking to engage in talk. That causes inconvenience to the Prophet, and he feels shy of asking you to leave. But Allah is not shy of saying what is right-." (33.53).

12. *Economic Rights:*

It is the duty of every Muslim to earn a lawful livelihood and also to contribute to the common pool for looking after the needs of those who

have suffered permanent or temporary disability, and for that reason cannot contribute to the social security provided by the system of 'zakat'. Allied to this obligation is the natural corollary that believers must have an opportunity to work and labour to acquire food and other good things of life (41.10), and to get full and fair compensation for their labour. The following verses amongst many others may be noted in this behalf:

- (i) "And in their wealth there is share for one who asked for help and for one who is deprived." (51.19).
- (ii) "And they feed, for love of Him, the poor, the orphan, and the prisoner." (76.8).
- (iii) "And do not devour your wealth among yourselves through falsehood, and offer it not as bribe to the authorities that you may knowingly devour a part of the wealth of other people with injustice." (2.188).
- (iv) "And for all are degrees of rank according to what they did and that Allah may fully repay them for their deeds; and they shall not be wronged." (46.19).
- (v) "And every soul will be fully rewarded for what it did. And He knows full what they do." (39.70).
- (vi) "Say, who has forbidden the adornment of Allah which He has produced for His servants, and the good things of His providing? Say, they are for the believers in the present life and exclusively for them on the Day of Resurrection. Thus do We explain the Signs for a people who have knowledge." (7.32).
- (vii) "There is naught for man but what he laboured for." (53.39).

So far as public authorities are concerned, they acting as the agents of the community are under no further obligation than this, to look after the needs of the helpless ones—of those who suffer permanent disabilities always and all the time, and of those who suffer from temporary disabilities,—till the disability is removed; and to intervene whenever any one takes undue advantage of another. These principles from a constitutional angle operate as limits on the powers of public authorities. They do not permit public authorities the power or the right to lay down or change the basic norms of the society or its priorities. The Shariat being the source of authority and also the criterion to adjudge the validity of its exercise the public authorities are mere instrumentalities for its operation and enforcement.

13. *Right to Property:*

There are many verses in the Quran which prescribe rules of conduct in which spending from and application of one's wealth is the operative part: for example, payment of Zakat (mandatory contribution for social security), Sadqat (non-obligatory but recommended spending) and making of certain expiations. People are encouraged to earn by lawful means and to spend their wealth in accordance with the guidance provided by Allah.

He says:

- (i) "And when the prayer is finished, then disperse in the land and seek of Allah's grace and remember Allah much, that you may prosper." (62.10).
- (ii) "Children of Adam, take your adornment to every place of worship; and eat and drink, but be not prodigal. He does not love those who exceed the limits." (7.31).

(iii) Say, who has forbidden the adornment of Allah that He has brought forth for His servants and the good things of His providing? Say, they are for the believers in the present life and exclusively on the Day of Resurrection. Thus do We explain the Signs for a people who have knowledge." (7.31-32).

(iv) "And in their (believers) wealth there is share for those who ask (for help) and those deprived." (51.18).

Allah also makes it clear that in this behalf the obligations of the believers, are also the duties of the Governing Agencies. He says:

"The believers are such that if We give them authority in the land, they establish prayer and give Zakat, and enjoin good and forbid evil." (22.41).

But where the believers and their Governing Agencies are called upon to apply the lawfully earned wealth according to the priorities fixed by Allah, the hoarders of wealth have been promised a severe chastisement.

He says:

"Woe to every back-biter, slanderer, who amasses wealth and counts it time after time. He thinks that his wealth makes him immortal. Nay he shall be cast into crushing punishment." (104. 2-5).

Quran describes 'Korah' (Qaroon) as the very embodiment of the evil rich (28.76-83).

The sins of Korah were:

- (i) Arrogance and vainglorious display of wealth;
- (ii) Refusal to apply his wealth in accordance with the Divine rules;
- (iii) Claim that he had an absolute right to hoard what he had earned i.e. to use it or not to use it as he pleased.

In short, the Quran's approach to the question of private property may be summarised thus:

It is possible to own property. It is incumbent upon the believers to work hard and to create wealth and acquire the fruits of their labour. But the duty to earn carries a further obligation to earn by lawful and moral means. Spending in the path of Allah of some of the wealth acquired by unlawful and evil means would not wash away the sins of all misdeeds. It is also equally important that people should not hoard what they lawfully earn, but spend it freely in the categories that God has established. It will be open to the Governing Agency of the believers to regulate the system of the prescribed spending of which the first example was the establishment of the Baitul Mal by Prophet Mohammad.¹² In normal conditions a State may place less direct burden on the individual leaving him free to perform his obligation voluntarily. However, in times of some national emergency, war and the like, every individual may have to carry a burden far greater than in ordinary times.

14. *Right to Adequate Remuneration and Compensation:*

The dignity that Allah has conferred on the children of Adam, and the law of just requital that he has prescribed for all mankind, requires that both in this world and hereafter each man must get fair requital for what he does; and even in the matter of exposure to hazards he should be dealt with fairly. Allah says:

- (i) "And for all are degrees according to what they did; and that Allah may fully repay them for their deeds; and they shall not be wronged." (46.19).
- (ii) "And every soul will be fully compensated for what it did. And He knows full well what they do." (39.79).

The Governing Agencies, therefore, have no right to take without compensation from whom they please and to give, without regard to needs and conduct, to whom they please.

¹ Quran: For Muslims the Quran contains the word of God as revealed to Prophet Mohammad. It is cited by the number of Chapter followed by the number of Verse.

² Sunnah of Prophet Mohammad means the guidance provided by him by his deed, decision, advice or approval. The records containing the above are called the 'hadith'. The most famous works containing such record are known as Six canonical books called by the name of the compilers (i) Bukhari; (ii) Muslim; (iii) Abu Daud; (iv) Tirmidhi; (v) Nasai; and (vi) Malik. According to some, instead of Malik's 'al-Muata', Ibn Majja's 'Sunnan' should be counted.

³ Bukhari: Sunnan—Chapter 'al-Manasik'.

⁴ 'Kaaba' is the name of the holy mosque in Mecca, built by Abraham, and towards which every Muslim turns while offering the prescribed prayers. It is around Kaaba that the Muslims circumambulate during the performance of Hajj.

⁵ Ibn Majja: Sunnan—Hadith No. 3932.

⁶ 'Shariat' means the canon law of Islam.

⁷ 'Zakat' is a tax prescribed by Quran and quantified by the Prophet Mohammad to be paid by every Muslim saving or producing above a bare minimum. The prescribed categories for application of this tax are the destitute and all those who, due to permanent or temporary disability, cannot meet their liabilities; a share of 'zakat' is expendable as collection charges.

⁸ Malik: 'Al-Mauta' (Abdul Baqi edition): Chapter 47.

⁹ Ibn Faris: 'Maqaees al-Lugha'—Vol. III p. 226.

¹⁰ Bukhari: 'Kitab-al-Ahkam'.

Muslim: 'Kitab-al-Amara'.

¹¹ Tabrizi: 'Mishkat-al-Masabeeh'—Vol. II p. 325 quoting Abu Daud, Tirmidhi, Ahmed, Nasai and Ibn Majja.

¹² 'Bait-al-Mal' was the treasury established by the Prophet Mohammad. Initially the mosque was used for this purpose; later, separate buildings were constructed as official treasuries.

I.L.O. EXAMINATION OF HUMAN RIGHTS SITUATIONS

New Procedures for Special Surveys on Discrimination

by

C. ROSSILION *

I. Introduction

The history of the International Labour Organisation shows that on many occasions its member States have deemed it to be an appropriate instrument for the impartial examination of various types of situations connected with the enjoyment of certain fundamental conditions in the labour field, even where there was no Convention relating specifically to the matter. The first Director of the ILO, Albert Thomas, and its first great commentator, Georges Scelle¹, drew attention to this essential function of the Organisation at a very early stage in its history.

In accordance with this tradition, whose main features are indicated below, the Governing Body of the International Labour Office recently decided to make provision, in the ILO programmes concerning the elimination of discrimination in employment for a new procedure of "special on national situations".²

The Governing Body considered that a "special survey" on such questions might be made in various circumstances at the request of a member State with a view to evaluating a situation or seeking solutions. It further decided that employers' and workers' organisations should be entitled to submit requests for such special surveys (on the understanding that a survey would be carried out only if the government concerned agreed to it).

At its November 1973 session the Governing Body adopted on an experimental basis a number of guidelines for the examination of requests,

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¹ Georges Scelle: *L'Organisation internationale du Travail et le BIT*, Preface by Albert Thomas (Paris, Rivière, 1930), pp. 102-105.

² See ILO, Governing Body, 188th Session (November 1972): Report of the Committee on Discrimination and minutes of the session; and *ibid.*, 191st Session (November 1973): Report of the Committee on Discrimination and minutes of the session.

having particular regard to the fact that they might be submitted by employers' or workers' organisations. It thus indicated more precisely the features of the system—which, however, remain very varied—while retaining its freedom to define them in greater detail on the basis of subsequent experience.

Non-discrimination and, in positive terms, equality of opportunity and treatment in employment form part of the ILO's declared constitutional aims. These matters have also been specially dealt with in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and Recommendation, 1958 (No. 111). These instruments—which aim at eliminating discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin—have been given special attention under the general procedures relating to the ratification and implementation of standards. The Convention has now been ratified by 82 countries. In addition, a special programme providing for further action in this field was established by the Governing Body in 1962 in order to promote the observance of these principles in all countries, whether they had ratified the above-mentioned standards or not. In broader terms, the purpose of the programme was to provide a better understanding of the problems and the methods of solving them and to encourage the use of such methods. Since 1962 it has entailed recourse to various educational and practical types of action (publications, meetings, etc.).

The new system of "special surveys" aims at giving to all concerned a further means of examining problems and seeking solutions within the context of special national circumstances; while it is an innovation in this field, and notwithstanding its markedly original character, it is bound up with long-standing traditions.

II. ILO Traditions of Technical Investigations and Impartial Examination

Consideration of a procedure under which a government concerned may submit a request for special examination of a particular situation immediately brings to mind traditional technical co-operation activities. The ILO, like other international organisations, has a well-established tradition of technical co-operation in its various fields of competence. Moreover, its member States have traditionally regarded it as a framework in which special surveys or studies can be carried out in a spirit of objectivity and service for purposes which may partly coincide with those of technical co-operation but which have related more especially to "fact finding" in regard to certain fundamental principles in the labour field. Lastly, in accordance with its tripartite structure, the ILO has traditionally associated workers' and employers' organisations, as well as governments, in the performance of its various tasks by enabling them to instigate action and participate therein. This is a feature of all ILO activities and it has been particularly marked in the field of freedom of association.

Technical Co-operation

Since the ILO established a programme dealing specifically with the elimination of discrimination in employment there has been an understanding that member States may ask it to provide technical co-operation in this field. In this regard the ILO makes available from time to time, particularly at the request of governments, advice and documentation concerning

action which has been or should be taken in the matter. Consideration is now being given to a more comprehensive technical co-operation project concerning the elimination of discrimination in the private sector of the economy in a particular country, namely Malaysia. The submission of requests for technical co-operation proper in this field obviously presupposes the existence, at the national level and in government policy trends, of various circumstances and conditions which are often not all reflected in the actual situation.

However, it should not be forgotten that in carrying out technical co-operation activities relating to other fields or having more general aims the ILO has also had to take account of the need to eliminate discrimination and, in broader terms "to promote equality of opportunity and treatment" in the fields within its competence. This is especially true of action under the World Employment Programme (which the ILO is carrying out with the co-operation of the other organisations in the United Nations system), which aims at helping the countries concerned to promote "full, productive and freely chosen employment" for all workers "irrespective of race, colour, sex, religion, political opinion, national extraction or social origin".³ Several "global employment strategy" missions carried out under the Programme at the request of governments have had to deal especially with particular questions concerning, for example, equality of opportunity and treatment in employment for persons of different ethnic or regional origins (which often amounts to the same thing).⁴

Requests for ILO technical co-operation have sometimes been inspired largely by a government's desire to resolve difficulties arising from serious national or international dispute concerning its action. This is especially true of matters affecting conditions and fundamental rights in the labour field. A particularly clear example of such recourse to technical co-operation is the study of labour problems in Greece carried out in 1947-48 by an ILO "technical assistance mission" requested by the Greek Government.⁵ The request followed protracted discussion in ILO organs⁶ concerning the trade union situation in Greece, and one of the main purposes of the mission was to study that situation. It also concerned itself with other matters (employment, conditions of work and social insurance) and helped to cope with certain difficult disputes within the country.

Special Enquiries and Studies Requested by Governments

Cases such as that just mentioned are related to another traditional ILO function which, quite apart from the procedures for supervising the application of ratified Conventions, has been reflected in the carrying out,

³ In the terms of the Employment Policy Convention, 1964 (No. 122), and Recommendation, 1964 (No. 122), the standards which may be said to constitute the framework for the Programme.

⁴ See in particular the report of the mission to Sri Lanka (Ceylon): *Matching Employment Opportunities and Expectations: A programme of Action for Ceylon* (Geneva, ILO, 1972); and the report of the mission to Kenya: *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya* (Geneva, ILO, 1972).

⁵ The report of the mission was published under the title *Labour Problems in Greece* (Geneva, ILO, 1949), Studies and Reports, New Series, No. 12.

⁶ See for example the statements made by Léon Jouhaux at the 102nd Session of the Governing Body (June-July 1947) (*Minutes of the 102nd Session of the Governing Body*, pp. 48 and 136); and the discussions at the 29th (1946) Session of the Conference (*Record of Proceedings*, pp. 221 ff. and 243 ff.).

at the request of governments concerned, of special studies and enquiries relating to situations which were particularly complex or the subject of dispute. This function, which dates back to a very early stage in the history of the Organisation, is based on the general responsibility for information and investigation entrusted to the Conference, the Governing Body and the International Labour Office under article 10 of the Constitution.⁷

This function has been exercised in regard to matters connected with the observance of fundamental principles deriving directly from the ILO Constitution—to which all member States have, as such, subscribed—even when they did not concern the implementation of ratified Conventions.

Such special enquiries and studies have related, among other things, to freedom of association. An enquiry of this kind was undertaken in 1920 at the request of the Hungarian Government following “rumours of the alleged White Terror and persecution of the workmen”. The enquiry served to establish the facts and it was noted that the Government also took action in respect of various points brought to light by the mission which carried it out.⁸ In 1949 another important enquiry concerning freedom of association was conducted by a mission set up by the International Labour Office at the request of the Government of Venezuela, in particular as the result of complaints voiced in ILO organs by the Workers’ group.⁹ Questions of freedom of association were thereafter dealt with essentially under the special standing procedure set up for the purpose in 1950 (see below).¹⁰ However, in 1968-69, at the request of the Spanish Government, an ILO “Study Group” made a special examination of the situation in Spain, which had long been the subject of dispute.¹¹

There have been many other enquiries and studies concerning situations affecting the enjoyment of “just and favourable conditions of work” and cases in which particularly deplorable conditions were alleged to exist. In 1921 there was a rather special case in which the Office made an enquiry into conditions in internment camps for Russians in Germany following allegations received from various sources and in agreement with the Government. It was pointed out that this assignment was a mark of confidence in the ILO’s ability to make an objective and impartial examination of certain matters and that one of the results of the enquiry was that it allowed “the Government itself voluntarily to rectify abuses of which

⁷ See the remarks made by Albert Thomas in 1921 on the nature of this function and the general arrangements for discharging it: Report of the Director, International Labour Conference, Third Session, 1921 (*Record of Proceedings*, Vol. II, pp. 1090 ff.).

⁸ cf. International Labour Conference, Third Session, 1921: *Record of Proceedings*, Vol. II, Report of the Director, p. 1097 ff.; and *Official Bulletin*, Vol. IV, No. 17, 26 October 1921.

⁹ *Freedom of Association and Conditions of Work in Venezuela*, (Geneva, ILO, 1950), Studies and Reports, New Series, No. 21; and the Government’s observations on the report of the ILO mission: *ibid.*, No. 21 (A) (Geneva, ILO, 1951).

¹⁰ A series of surveys on the trade union situation in various countries—whose aims differed from, but were to some extent akin to, those of the special surveys dealt with in this paper—was made by the ILO on the basis of on-the-spot missions from 1959 to 1962. (The reports on the countries covered were published separately during that period).

¹¹ The Study Group, which was composed of independent persons, followed a quasi-judicial procedure. Its report was published under the title *The Labour and Trade Union Situation in Spain* (Geneva, ILO, 1969).

it had been in ignorance".¹² In 1920 the same ideas had enabled the Governing Body, failing an on-the-spot mission, at least to make "friendly representations" to the Persian Government concerning the conditions of work of women and children in certain industries.¹³ In 1934 a mission on "the social aspects of industrial development" was made in Japan, following discussion in the ILO concerning the extent to which the success of Japanese exports may have been due to production costs which were "strongly influenced by unsatisfactory conditions of labour in the exporting industries" (social dumping).¹⁴ This matter was causing concern to the workers, employers and governments of other countries.¹⁵ Following various discussions, special enquiries were also made into the conditions of Indian and Pakistani seafarers in 1947¹⁶ and into labour conditions in the oil industry in Iran in 1950;¹⁷ (the latter enquiry was not unrelated to the question of the status of the Anglo-Iranian Oil Company at that time). Moreover, in 1949 a committee of enquiry investigated "conditions in ships flying the Panama flag", following allegations made by the International Transport Workers' Federation and at the request of the Government (which had not at that time ratified the ILO Conventions on the subject).¹⁸

As regards fields affecting the elimination of forced or compulsory labour, a special study of the "compulsory labour service" in Bulgaria was carried out in 1921 at the request of the Government, following the differences of opinion which this para-military system had provoked within and outside the country. The study served to establish the facts and showed not only the positive features of the system but also the drawbacks which it might have in other contexts.¹⁹ In 1951 a fact-finding mission was sent to the Suez Canal Zone at the request of the British Government, following Egyptian allegations relating in particular to forced labour (in the circumstances which followed the denunciation of the Anglo-Egyptian Agreement of 1936); the parties concerned thereafter came to an agreement.²⁰ With broader aims in mind, the operation of "civic services" and other forms of youth mobilisation for development was studied in various countries in 1964-66, with the agreement of the Governments

¹² cf. International Labour Conference, Fourth Session, 1922: *Record of Proceedings*, Vol. II, Report of the Director, pp. 909-911; and *Official Bulletin*, Vol. VI, No. 5, 2 August 1922.

¹³ *Ibid.*, Third Session, 1921, *ibid.*, pp. 1070 and 1129.

¹⁴ *Social Aspects of Industrial Development in Japan*, Studies and Reports, Series B, No. 21. See also International Labour Conference, 18th Session, 1934, *Record of Proceedings*, p. 165; and 19th Session, 1935, *Report of the Director*, p. 64.

¹⁵ It is interesting to note that the Governing Body is currently giving further consideration, in more general terms, to the question of the relationship between the development of international trade and "fair labour standards".

¹⁶ See *Seafarers' Conditions in India and Pakistan* (Geneva, ILO, 1949), Studies and Reports, New Series, No. 14.

¹⁷ See *Labour Conditions in the Oil Industry in Iran* (Geneva, ILO, 1950), Studies and Reports, New Series, No. 24.

¹⁸ See *Conditions in Ships Flying the Panama Flag* (Geneva, ILO, 1950), Studies and Reports, New Series, No. 22.

¹⁹ See Lazard: *Compulsory Labour Service in Bulgaria* (Geneva, ILO, 1922), Studies and Reports, Series B, No. 12.

²⁰ See ILO: *Minutes of the 117th Session of the Governing Body*, pp. 41-42 and 131-133; and *Minutes of the 118th Session of the Governing Body*, pp. 30 and 132.

concerned, following the discussions which such systems had provoked.²¹ These studies led to the adoption by the Conference of new standards (Special Youth Schemes Recommendation, 1970 (No. 136)).

The above-mentioned enquiries and studies reflect a variety of characteristics. In some cases they were the consequence of a formal Governing Body decision²² and in others they were organised by the International Labour Office (under Governing Body supervision). They were carried out either by persons specially appointed for the purpose or by the Office itself. They were generally justified, more or less explicitly, by the existence of differences of opinion or special difficulties arising from situations which it had become important to clear up in the interest of all concerned.²³ They were based on a certain confidence in the ILO and its traditions of impartial investigation founded by means of procedures—of a quasi-judicial character—that provided safeguards for all parties. Of course, they met with varying degrees of success, depending on the circumstances of each case. By and large, however, they served to establish the facts objectively, encourage progress and overcome difficulties, including obstacles encountered by the government itself inside the country. In this way, and through their detailed recommendations, these enquiries and case studies often performed a real function of “technical assistance” in the broad sense.

Examinations Made at the Request of Workers' or Employers' Organisations: Special Procedure relating to Freedom of Association

In most of the cases just mentioned the decision to undertake a special enquiry or study was the consequence of concern expressed by workers or employers in ILO organs; in some cases they also reflected differences of opinion between governments directly concerned.

This inherent feature of the ILO's tripartite structure is reflected in one way or another in all the functions of the Organisation. Even in matters other than those affecting the functioning of ILO institutions, technical co-operation and educational activities may serve employers' and workers' organisations directly. Moreover, the role of such organisations under the general procedures for supervising the application of Conventions and

²¹ Surveys of forced labour systems throughout the world, which were of various types and did not entail on-the-spot studies of particular cases, were also carried out by the UN-ILO Ad Hoc Committee on Forced Labour (see *Report of the Ad Hoc Committee on Forced Labour* (Geneva, ILO, 1953), Studies and Reports, New Series, No. 36; and United Nations document E/2431) and later, in 1956-59, by the ILO Ad Hoc Committee on Forced Labour.

See C. Rossillon: “Youth Services for Economic and Social Development”: A General Review”, in *International Labour Review*, Vol. 95, No. 4, April 1967. These studies were carried out on the spot, particularly in Afghanistan, Bolivia, the Central African Republic, Colombia, Congo (Brazzaville), Dahomey, Ecuador, Ghana, Iran, Israel, Ivory Coast, Mali, Senegal and Tanzania.

²² Like the “technical assistance mission” to Greece in 1949 (see above, footnote 5), the formal enquiry concerning ships flying the Panama flag in 1949, the mission to the Suez Canal Zone in 1951 and the Study Group on the trade union situation in Spain in 1968.

²³ In exceptional cases they were based on an actual “dispute” outside the scope of the constitutional procedures for the examination of complaints or representations concerning the observance of ratified Conventions. (This applies to the 1949 enquiry into conditions in ships flying the Panama flag and the 1951 mission to the Suez Canal Zone.)

Recommendations is well known. The procedure whereby employers' and workers' organisations may make "representations" concerning the observance of ratified Conventions, just as governments have the right to file complaints on the subject, is particularly significant.

Under the special procedure in force since 1950 workers' and employers' organisations also have a well-established right to instigate the examination of cases involving respect for freedom of association—as have governments. A characteristic feature of the procedure is that it is not restricted to problems arising in countries which have ratified the ILO Conventions on the subject. Indeed the setting up of the procedure was justified on the ground that freedom of association is a constitutional principle of general application and the ILO's competence was justified on the ground that article 10 of the Constitution, referred to above, gives the Organisation general responsibility for information and investigation.

The ILO has thus established a standing procedure which provides for action to be taken in the first instance by a committee of the Governing Body (the Committee on Freedom of Association) and then, if the Governing Body deems it appropriate and the government concerned agrees, by a special body which can make an independent examination of the case (the Fact-Finding and Conciliation Commission). While the latter has functioned in a few cases, most cases are settled at the stage of their consideration by the Governing Body Committee on Freedom of Association. That does not mean that the procedure is generally blocked at that point, but merely that this first stage is normally sufficient for the examination of cases which are often of a circumstantial or individual character. The situation would not necessarily be the same in other fields.

III. New Procedure for Special Surveys concerning Discrimination

The new procedure concerning special surveys on the elimination of discrimination in employment combines various features of earlier procedures.

The only bases which the Governing Body found it necessary to lay down for the procedure were those of the special programme adopted in 1962, which derive as in other cases from constitutional standards that lay down certain principles and certain general fields of competence mentioned above.

Scope

It was understood that such special surveys might be based on criteria such as those laid down in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the corresponding Recommendation, which developed the relevant constitutional principles.

However, the new procedure for carrying out such surveys is not limited to countries which have ratified Convention No. 111 and it is in some respects more general in scope.

The Governing Body considered that the questions raised should concern the situation of groups of people defined, "for example", according to race, religion, national extraction or origin, social origin, membership of a minority group, or even sex or age. The procedure may be used to examine the situation of foreign workers, although Convention No. 111 does not expressly cover foreign workers as such. The above enumerations

is not restrictive. However, it was understood that requests should not concern "individual cases unrelated to broader issues of policy".

Requests Submitted by a Government Concerned

The aim of such a request may be, for example, to obtain a form of technical co-operation on questions of evaluation or method in this field. It is felt that in such circumstances recourse to outside observers, whose action would have an objective character, could help governments to overcome difficulties arising in respect of these questions.²⁴ For example, mistrust between different groups in the country may render it difficult to make evaluations and decisions which would be accepted without question by all concerned. In other circumstances a government may wish to clear up certain doubts to which its action in this field may have given rise at the international level. In that case the new procedure would offer the same possibilities as the special enquiries and studies carried out on other subjects.

Requests Submitted by Another Government

The receivability of a request submitted by a government in connection with questions arising in another country is strictly governed by the condition that the request must relate to "specific questions of concern to it". This presupposes a sufficiently close link between the interests of that government and the questions raised. The Governing Body considered that this could be the case, for example, when such questions concerned the situation of its own nationals working in another country. The special surveys procedure may thus be of particular interest in connection with equality of opportunity and treatment for migrant workers.²⁵

Special surveys carried out in such cases may of course have technical objectives comparable to those of requests submitted directly by a government concerned, but they may also have to deal with situations which are the subject of sharper dispute.²⁶

²⁴ Countries which have ratified the Convention may also have recourse to the procedure of *direct contacts* approved some years ago by the bodies responsible for the regular supervision of the application of Conventions. Under this procedure, the ILO may examine with the national authorities, at the request or with the agreement of the government, any important question of fact or law connected with the implementation of a Convention. If Convention No. 111 has been ratified, a government may therefore choose between this procedure and the "special surveys" procedure, depending on the nature of the questions (see *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 58th Session, 1973, Report III (Part 4 A), pp. 10 and 12-17). On-the-spot consultations similar to those provided for under this procedure have already taken place in a number of countries concerning the possibility of ratifying Convention No. 111 or other questions connected with its application (particularly in Ceylon, Singapore, Barbados, Jamaica, and Trinidad and Tobago. See Governing Body, 191st Session (November 1973), Report of the Committee on Discrimination, paragraph 2).

²⁵ The question of migrant workers has been placed on the Conference agenda for 1974 and 1975 with a view to the adoption of Conventions and Recommendations which would, in particular, deal further with the question of equality of opportunity and treatment for such workers in a manner comparable to that of the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111).

²⁶ However, a distinction should be drawn between these cases and those in which the complaints procedure provided for under article 26 of the Constitution

Requests Submitted by an Employers' or Workers' Organisation

In this case too, requests may have certain objectives comparable to those of technical co-operation in regard to points specifically connected with action by employers or workers. However, they may also concern situations in which a government's appraisal or action is called into question. In that event the situations may have caused some dispute²⁷ and the requests may accordingly be likened in some respects to complaints regarding freedom of association, although the conditions governing their submission are different. Moreover, since they must relate to groups of people and to broad policy issues which concern them, the cases to which such requests would refer would be neither as wide in scope nor as frequent.

As in the case of freedom of association, the request may come either from a national organisation directly concerned or from international organisations having consultative status with the ILO, or from other international or regional employers' or workers' organisations, provided the questions raised directly concern organisations affiliated to them.

Examination of Requests

The Governing Body was called upon to lay down certain guidelines for the examination of requests received from an employers' or workers' organisation or a government other than the one directly concerned. In so doing it proceeded on the basis of general procedural principles which would provide appropriate safeguards.

The Director-General may ask the authors of requests to provide further details on the specific questions which they propose to raise and to communicate additional information within a specified time limit.

Moreover, the Director-General must, as soon as possible, inform the government of the country in regard to which the survey would be made and request it to communicate within an appropriate time limit its observations on this question and its views concerning the possibility of carrying out a special survey.

In cases where the government requests or accepts such a survey, the Director-General may take steps to settle the arrangements for carrying it out in agreement with the government; these arrangements must provide the necessary safeguards, in particular as regards the consultation of employers' and workers' circles concerned. The Director-General is responsible for reporting to the Governing Body Committee on Discrimination on requests received, replies from governments, special surveys undertaken or planned and cases in which surveys could not be organised, including cases in which requests have been refused or no replies have been communicated within a reasonable time limit.

The Committee on Discrimination will thus be regularly enabled to make such recommendations as it deems appropriate on such questions.

Lastly, the Director-General was requested to examine the possibility of drawing up a list of experts and persons of acknowledged competence,

could be used; moreover, in the latter cases the Convention must also have been ratified by the government which submits the complaint. On the other hand, there are no other restrictions as regards "questions of concern to it".

²⁷ These cases should also be distinguished from those in which the representations procedure open to employers' and workers' organisations under article 24 of the Constitution—which must relate to the observance of a ratified Convention (see preceding note)—could be used.

selected from the different regions of the world, whose services could be called upon for the carrying out of such surveys. It was understood that they could also be carried out directly by the International Labour Office.

IV. Conclusions

The new procedure relating to special surveys for the examination of questions connected with the elimination of discrimination in employment may be used to cover a wide range of circumstances.

The cases already under consideration show that such surveys can effectively meet a variety of needs, whether they are in the nature of technical co-operation or of an enquiry into situations which have caused some dispute, or whether they are carried out at the request of the government concerned or at the instigation of other parties.

Governments and employers' and workers' organisations will have to continue to give shape to this new tool by making use of it. However, past experience and the nature of these problems have shown that it would be useful to have a "multi-purpose" procedure which could be applied to various cases and deal with each in a way that would not necessarily attempt to define its features—which are often composite—in unduly narrow terms.

The new procedure illustrates the adaptability of certain means of action and the permanence of certain traditions which may also be relevant to the examination of other situations connected with the promotion of fundamental rights in the labour field.

THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

- A Case Study -

by

SAMUEL SUCKOW*

The development of International Law has always contained an element of mystery for the lawyer as well as the layman. Unlike national law which has its source from legislative authority or jurisprudence, international law can develop in several different ways. There is what is known as international legislation which consists of international treaties or conventions. There is also, however, what are known as the customary principles of international law which are to be deduced from the accepted practice of States. This latter source has been hard to define, has often led to controversy, and has traditionally required a long period of accepted practice to be acknowledged as law.

Today the international community is more closely organized with various international forums where the views of States, including legal views, can be expressed, and this has hastened the process by which international legal principles are enunciated and become generally accepted.

The recently concluded first session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law offers an interesting case study of the evolution of a new legal concept.

The Development of International Humanitarian Law

Held in Geneva, between 20 February and 29 March, 1974, this initial stage of the Conference (the Conference is to resume on 3 February 1975 and continue until mid-April of that year) called by the Swiss Government, brought together delegates from 126 countries and 10 National Liberation Organizations, to discuss the updating of the rules of war in the light of experience since the adoption of the Four Geneva Conventions in 1949. The Four Geneva Conventions cover treatment of sick and wounded members of armed forces in the field (this category includes resistance movements as long as they belong to a Party to the conflict, have a command structure, wear a fixed distinctive sign recognizable at a distance, carry arms openly and conduct operations in accordance with the laws and customs of war); the treatment of wounded, sick and ship-wrecked members of

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armed forces at sea; the treatment of prisoners of war and the protection of civilians.

The post war world has seen the development of a series of guerilla style wars which the 1949 Conventions were not adequately drawn to meet. The ICRC has been called into situations, like the Vietnam War, where it was limited in its effectiveness. This gave rise to a series of criticisms of the present state of humanitarian law which led to a resolution on the subject at the 1969 United Nations Conference on Human Rights in Teheran, and resolutions of the General Assembly of the United Nations calling upon the International Committee of the Red Cross (ICRC) to propose an updating of such law.

Finally, at the XXI International Conference of the Red Cross Societies in Istanbul in September 1969, a unanimous resolution urged the ICRC to draft rules supplementing existing international humanitarian law and to convene government experts to discuss them. An experts conference to which 40 governments sent delegates was convened in May 1971, and a second session enlarged to 77 governments was held in May 1972.

Following these conferences the ICRC prepared two Draft Additional Protocols to the Geneva Conventions, one providing additional protection in traditional wars between States, and a second introducing much more detailed provisions than existed in the common Article 3 of the 1949 Conventions for wars not of an international character. Some government experts had urged that wars of national liberation should be specifically included in the first Article of the First Protocol as being international wars.* The majority of experts, who came primarily from the long established states which participated in the 1949 Conference, did not agree and neither did their governments as they gathered for this session of the Diplomatic Conference.

The debate on this issue took place in the first Committee. It turned into a confrontation between what might be termed the traditional concept of international law, which considered that only States were the subjects of international law and that only conflicts between States could be considered as international conflicts, and the view that conflicts between a colonial power and those in the colonial territory fighting for independence, although not constituting a state or a government, were nevertheless between parties who were both subjects of international law and their conflict was of an international character.

The gradual acceptance of this second theory by a majority of the delegations and its path to the point where the principle (but not the wording) seemed to come near to achieving a consensus among 126 States, was the drama of this Conference.

From the outset it became clear that a great many of the African States, supported by some Asian States and the Socialist States would seek to introduce the concept of liberation wars as international conflicts into the First Protocol. When the First Committee met for its first session of substantive discussion, Prof. Abi Saab, speaking on behalf of the Egyptian delegation, introduced an amendment co-sponsored by 15 other States which would have added an additional paragraph to Article 1 of the First Draft Additional Protocol. Article 1, which is entitled "Scope of the present Protocol" contained only the following text in the ICRC draft:

* cf. a study arriving at a similar conclusion, Prof. Abi Saab, "*Wars of National Liberation and the Laws of War*", *Annales d'Etudes Internationales*, 1972, Vol. 3.

"The present Protocol, which supplements the Geneva Conventions of 12 August 1949, for the Protection of War Victims shall apply in the situations referred to in Article 2 common to these Conventions".

It should be recalled that Article 2, common to all four of the 1949 Geneva Conventions, provides for the application of the Conventions "...to all cases of declared war or of any other armed conflict which may arise between *two or more of the High Contracting Parties...*". The Conventions also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance. Finally it also applies to conflicts between High Contracting Parties as far as their mutual relations go, even though there may also be *Powers* in conflict who are not parties to the Convention. The provisions of the Convention would also have to be extended to such a *Power*, if it accepted and applied the Convention.

There are thus two terms used to determine those to whom the Conventions might apply, "High Contracting Party" and "Power", both of which have traditionally referred to States.

The amendment (CDDH/I/11) would have added the following words:

"The situations referred to in the preceding paragraph include armed struggles waged by peoples in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations".

Since there was no proposal to change the wording of the Common Article 2 of the Conventions, it would presumably have to be assumed that the proposed paragraph would have extended the meaning of the term "Power" to include the movements engaged in armed struggles for self-determination.

This proposal was submitted in the main by Arab States, namely Algeria, Egypt, Kuwait, Libya, Sudan, Syria and Democratic Yemen, several African States, Cameroon, Ivory Coast, Nigeria and Zaïre, and also Australia, Norway, Pakistan and Yugoslavia.

The eastern bloc, less Rumania but joined by Tanzania, submitted an amendment which would have included in the term "international conflicts" only those armed conflicts where the people are fighting against "colonial and foreign domination and against racist regimes" (CDDH/I/5). This wording was, it seems, intended to cover the liberation struggles in Southern Africa and Palestine.

The previously mentioned proposal was broader than the Eastern bloc was ready to accept, evidently fearing that conflicts other than in colonial areas might come under the definition of "struggles for self-determination", although the sponsors of the above Amendment 11, had tried to allay such fears by qualifying the circumstances where the definition would apply by reference to United Nations documents.

Rumania submitted its own wording (CCDH/I/13) which would have added at the end of the first paragraph the following words:

"...and in armed conflicts in which the people of a colony or non-self-governing territory or a territory under foreign occupation are engaged in the exercise of the right of self-determination and the right of self-defence against aggression, with a view to ensuring more effective protection for the victims of aggression and oppression".

The position of many Western European powers, supported by the United States and Japan and co-sponsored by Argentina and Pakistan was expressed in amendment (CDDH/I/12) which reiterated the wording in the ICRC draft and then added:

"In cases not included in this present Protocol or in other instruments of conventional law, civilians and combatants remain under the protection and the authority of the principles of international law, as they result from established custom, from the principles of humanity and the dictates of public conscience".

This was a re-statement of the famous "Martens Clause", and would have referred cases not specifically covered by the Conventions or Protocols to the "general principles of international law". It appeared in the debate at this point that most of the States supporting this amendment intended the First Protocol to apply only to States. They argued that only States possess the resources and institutions to see that the obligations of the humanitarian code are observed and the whole of this code would have to be re-written if it were to apply to the liberation movements. Belgium stated that the four Conventions and Protocol I could not apply to entities which were not States. The United Kingdom spokesman said specifically that struggles for national liberation fell within the ambit of Protocol II. Italy took the position that struggles to exercise the right of self-determination were not international conflicts. Japan said that any attempt to apply the Conventions to armed conflicts involving entities other than States would tend to destroy the established system. The United States representative spoke of the need that the application of humanitarian law be vested in a State or other equally responsible body. It is to be noted that while emphasizing the responsibility of States, the American position left the door open to the inclusion of an "...other equally responsible body". Nevertheless the general tone of the American delegate's remarks, and particularly a comment that the United States fully endorsed the views expressed by the Belgian and United Kingdom representatives, placed the U.S. among those States reluctant to expand the coverage of the Conventions beyond that of States.

There was another group of States which, while not expressing themselves directly on the extension of the coverage of the Protocol beyond States, nevertheless attacked the wording of the resolutions seeking inclusion of liberation movements as being framed in subjective and political terms. Among the States supporting this view were France, Philippines, Uruguay, Switzerland, Canada, Spain, Holland and Ireland. Needless to say, the States in favour of limiting coverage only to States were also of this view.

Brazil suggested that a territorial test should be applied, and that a liberation war should be recognized as international when the revolutionary forces controlled a part of the territory.

Finally there was a tendency expressed by New Zealand and echoed by Spain and Norway, that Protocol I should apply to all armed conflicts whether international or national once a certain "level of intensity" of the conflict had been reached. This was not a theme picked up by many other States and although not expressed, it was apparent that multi-national or multi-racial States were opposed to the extension of coverage to "wars of secession". This attitude was to be an important factor in determining the wording of the proposed amendments.

The major tendency during the discussion was a growing body of support for the principles in the 15 nation text proposed by Egypt. In addition to

the sponsors Cuba, Morocco, Indonesia, Madagascar, Burundi, Mexico, India, Venezuela, China, Togo, Tunisia, Argentina, Albania, Uganda, Guinea-Bissau, Ghana and Senegal took the floor to support the position that international law had evolved to include wars for national liberation among international conflicts.

While the debate was proceeding, efforts were being made to combine or compromise the texts of the amendments that had been submitted in favour of extending protection to liberation wars. The Western Powers, because they did not submit any amendments of their own to extend coverage in non-political language, or because they opposed extension at all, found themselves outside the mainstream of the discussions over the wording of a compromise amendment. It would appear that this was the result of a political miscalculation by which the Western Powers may have believed that a two-thirds majority could not be mustered in favour of the resolutions which had been presented. (A qualified majority at this Conference was two-thirds of those voting. In the 1949 Conference decisions were made by a simple majority vote).

As a result of the consultations among sponsors of the various resolutions a text emerged (CDDH/I/41) originally sponsored by 32 States and later increased to 51. This was a combination of African States, Arab States and Eastern bloc States joined by India, Cuba, Yugoslavia, Bangladesh, Indonesia, Sri Lanka and Pakistan. The text of this draft provided that the second paragraph should read as follows:

"The situations referred to in the preceding paragraph include armed conflicts *where peoples fight against colonial and alien domination and against racist regimes* in the exercise of their right of self-determination,..." (the rest takes the remaining words of amendment CDDH/I/11).

Thus wars for self-determination were to be included as international conflicts only if they were fought against colonial and alien domination or against racist regimes. This restrictive language was intended to meet the fears of those States opposed to extending coverage to "wars of succession". Australia and Norway had dropped out of sponsorship.

Turkey produced its own amendment (CDDH/I/42) which extended coverage to "armed conflicts waged by the national liberation movements *recognized by the regional intergovernmental organizations concerned* against colonial and foreign domination in the exercise of the principle of the self-determination of peoples as set out in the Charter of the United Nations".

The trend of opinion was apparent at this stage and some of the previous statements made against extension of coverage were now being nuanced. At the second session of Committee I, the Philippines delegate had supported the view that Article 1 of the Protocol I should not be substantially changed. Speaking during the fourth session he emphasized the need to develop international humanitarian law. He said that wars of liberation could certainly no longer be ignored by law. He asked for time to study the various amendments to Article 1.

Committee I then went on to a discussion of Articles 2 to 5 while a working party was to try and arrive at a more generally accepted amendment to Article 1. The discussion did not however come to grips with these other articles. Many speakers made their positions on them dependent on the outcome on Article 1.

During this interim period Argentina, Honduras, Mexico, Panama, and Peru submitted an amendment (CDDH/I/71) which practically amal-

gamated the terms of amendment CDDH/I/12, proposed mostly by western powers, and whose novelty was the introduction of the "Martens Clause", with the terms presented in Amendment CDDH/I/14 accepting national liberation wars as constituting international conflicts.

The wording of amendment CDDH/I/71 differed slightly from that of CDDH/I/41, referring to armed conflicts where "peoples are fighting against *colonial and alien occupation* and racist regimes..." in place of the terms "...against *colonial and alien domination* and against racist regimes..."

When Committee I resumed its discussion of Article 1 of Protocol I at its 13th Session, negotiations were still in progress between the sponsors of amendment 41 and the new amendment 71 over the minor differences in the two texts as related to liberation wars. At this point Canada and New Zealand introduced a resolution which they had already announced at the previous meeting, which would have set up an inter-sessional working group with representatives from all geographical areas to "consider, as its prime task, the problem of the right of peoples to self-determination in relation both to Protocol I and Protocol II, commencing with the relevant proposals advanced during the Diplomatic Conference". The working group would report to the next session of the Conference. This initiative, which earlier in the Conference might have been welcomed as a constructive way to go forward, at this point gave rise to suspicion among many delegations that it was intended to block the Conference from arriving at what appeared to be an inevitable conclusion. Support expressed for the resolution was limited and Canada itself took the position that no detailed discussion be held on it until the fate of Article 1 had been settled.

After a break to permit negotiations between the sponsors of 41 and 71 to be completed, it was announced that an agreement had been reached and the final operative wording would be "...fighting against colonial domination and alien occupation, and racist regimes...". Thus with the insertion of the word "domination", what appeared to be a very large majority had been rallied behind an agreed text.

After a short discussion Egypt moved the closure of debate, which was adopted 64-27, with 4 abstentions; another vote 64-14 with 14 abstentions gave priority to amendment 71; another vote 56-21, with 6 abstentions rejected a vote paragraph by paragraph, and then on a roll call vote Amendment 71 was adopted 70-22, with 12 abstentions and 31 delegations not being present.

The debates in the final days indicated that positions of those opposed to Amendment 71 may not have been as far apart from those of supporters as at first. For example France took the position that differences of opinion on the problem of the right of peoples to self-determination were concerned much less with the objectives than with the means to achieve them. Holland stated that it would continue its efforts to find a universally acceptable solution to the problem of defining wars of self-determination and the U.S. suggested that Protocol I should be clarified so that it applied to any armed conflict which attained a certain level of intensity.

This was even more strikingly illustrated when it came to discussion of the final report of Committee I. The Rapporteur in describing the discussion on Article 1, stated that the majority favoured the inclusion of armed conflicts in which peoples fight against colonial and foreign domination and racist regimes under the definition of international conflicts but that "*other delegations considered that the four Conventions and Protocol I could not be applicable to entities other than States*".

Austria, Belgium, Canada, West Germany, Netherlands, United Kingdom and the United States proposed an amendment to replace the last sentence above with the following:

"Other delegations considered however that such a procedure was unacceptable in that, in their view, it involved the introduction into Protocol I of criteria of political motivation. Some of these delegations made it clear that they accepted that the Four Geneva Conventions and Protocol I could apply to armed conflicts other than between States, but only in so far as the Parties to the conflict accepted the provisions thereof and were willing and able to apply them".

That such a statement should have been proposed by the sponsors, disassociating some of them from the rigid limitation of applicability only to States, was an important indication of changing concepts. Had these States earlier in the debate proposed an amendment incorporating these ideas the debates may have taken a different turn than they finally did. At this final stage, this proposal was met with suspicion and could not be adopted. It was finally agreed that the Report would merely refer the reader to the summary records for the views of delegations which had opposed the amendment on liberation movements. There was to be yet one other occasion for the militant mood of the Committee to assert itself. India proposed that the report contain a recommendation to the Plenary that the text of amendment 71 be adopted by the Conference.

Some delegations who had supported amendment 71 in the Committee were hopeful that the Committee's decision would be conducive to further consultations to arrive at a greater consensus on a more generally agreed wording. Adoption by the Plenary Conference of the text of 71 would have precluded further efforts in that direction. This explains why the majority on India's proposal was less than that on Resolution 71, although it still achieved the necessary two-thirds for adoption. Before the matter came to a vote the United States tried to have changed the words "recommend for adoption" to "recommend for consideration", but this was defeated 40-26, with 10 abstentions. On the Indian resolution itself the vote was 51-23, with 9 abstentions.

Committee I had made its point. There was a large majority in favour of including national liberation wars under the concept of international wars. By the time the report came up at the plenary session there had been time for some reflection and the majority backed away from taking an irrevocable position. Instead, a motion was introduced which adopted the report of Committee I, containing the above mentioned recommendation and welcomed the adoption by Committee I of Article 1 of Protocol I. It did not adopt the wording of the new Article 1 as definitive. This motion was accepted by consensus.

It is now clear that a final version of Article 1 will have to encompass liberation wars, and it also appears that many of the delegations which voted against Amendment 71, are prepared, subject to qualifications, to accept this in principle.

It is to be hoped that in the interim, before the reconvening of the Conference on 3 February 1975, a wording could be agreed which would adopt the principle as part of International Humanitarian Law in a more legal language, less susceptible to political interpretation. Whereas it may be considered "backward" today to insist on limiting the definition of international conflicts to those among States, when international law in the post-war years has gone beyond that concept in other areas, particularly human

rights, it is also necessary to obtain its widest acceptance by the parties to conflicts, and this cannot be done by a wording that would be considered a "provocation" by one of the parties.

In order for a colonial power to accept to treat liberation wars in their colonies as being international on the basis of the present wording of Article 1, they would have to accept that they were exercising colonial domination and alien occupation in those territories. While this may be true, it cannot reasonably be expected that they will admit to it.

It does not appear to be an insurmountable task to find a definition that could encompass the situations intended to be covered, and only those, in a language that does not give offence to a party who must accept and apply it. To achieve that, the States will have to agree to apply a legal analysis rather than a political test to the circumstances they wish to cover.

To assist the search for such a wording, the author would propose a wording along the following lines for the second paragraph of Article 1 of Protocol I:

"2. The situations referred to in the preceding paragraph include armed conflicts between a controlling power and forces opposing such power in a non self-governing territory. For the purposes of this paragraph the term "controlling power" refers to a power in total or partial control of a non self-governing territory, and the term "non self-governing" refers to a situation where the majority of the population of the territory do not have full citizenship rights or did not have at the time the conflict commenced. This paragraph shall not be applicable to armed conflicts within a multi-national, multi-racial or multi-cultural State where full citizenship rights are extended to the various nations, races or cultural entities composing such State".

A wording of this kind would, it is suggested, help to overcome some of the political problems. The more serious problem remains of how to adapt to guerrilla warfare the obligations of the Geneva Conventions in such matters as treatment of POW's, sick and wounded and prosecution of offenders against the code. It is right to point out, as do the Liberation Movements, that this problem also exists in cases where the territory of a State is occupied and resistance takes the form of guerrilla warfare. These cases already come within the definition of international conflicts.

THE JUDICIARY IN ITALY

A Reply to the article in ICJ Review No. 10

by

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Article 25 of the Italian Constitution of 1948 states that "no one can be withdrawn from his natural judge predetermined by law". This is one of the fundamental principles of law. It was established for the first time by the French Constituent Assembly and has been recognised by many modern democratic constitutions as the principal indefeasible guarantee for the defence of human rights and fundamental liberties.

In order to determine in any particular case who is the "natural judge", any set of rules relying solely on the criterion of the "judge having jurisdiction in the territory in which the offence has allegedly been committed" would clearly be insufficient. An offence does not always consist of a single instantaneous action committed in a single place. An offence may be attempted, continued or permanent and the action or actions amounting to an offence may take place in one or more places. The Italian code of penal procedure provides that the competent judge is the judge of the place where the last act aimed at infringing the law was committed, or where the continuation or the permanence of the offence ceased to exist. This is the general rule, and there are other provisions to cover cases which cannot be determined in this way.

In certain cases Article 55 of the code of penal procedure provides that the Court of Cassation may assign the case to another court in order to secure a fully equitable and fair judgment. This procedure, which is of an exceptional character, applies in two classes of cases, namely where there are either serious reasons of public order, or "justifiable suspicion" that justice may not be done. The right to apply for the removal of an action to another court for "justifiable suspicion" is granted both to the Chief Prosecutor and the accused.

The Italian Constitutional Court has declared that these provisions are in accordance with the provisions of the Constitution (see Judgment No. 50 of 1963) and that in the Italian legal system the natural judge means the judge resulting from all relevant provisions, provided such provisions

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(as in the case in point) are applied solely to the objective facts of the case in accordance with the law. These provisions are important as they prevent the fairness of trials being affected by external circumstances, such as violence or threats to persons taking part in the trial.

All Italian magistrates are perfectly aware of these provisions, even those few (in relation to the total number of judges) who belong to the self-styled "democratic current" of the National Association of Magistrates, a current in which democracy exists in little but name.

For example, these magistrates make the point that during the Valpreda case, which arose out of a bomb explosion at a bank in Milan in December 1969, the police transferred from Milan to Rome an important witness whom the prosecutor was looking for in vain in Milan. They see in this a conflict between the executive and the judiciary. However, the reason why this witness was questioned in Rome is that on the same day as the bomb explosion occurred in Milan (causing 16 dead and 87 wounded), other explosions took place at approximately the same time in Rome in another bank and at the Tomb of the Unknown Soldier. The case was transferred from Milan to Rome for reasons of competence, in accordance with the penal procedure provisions, only ten days after the bomb explosion. The case then proceeded in Rome but later, during the trial, it was transferred back to Milan by the assize court of Rome (still in accordance with the provisions of the penal procedure code), since they took a different view in law of an episode affecting the determination of the venue. Due to the situation created in the meantime in Milan by left wingers in support of Valpreda, the case was removed by the Court of Cassation to the assize court of Catanzaro under Article 55 of the penal procedure code.

This decision represents neither "a blow to the prerogatives of the judges", nor "an insult to the town itself". In all cases in which these principles have been applied, no town has ever felt hurt by the transfer of a case to another town, nor can the application of rules declared lawful by the Constitutional Court itself represent "a blow to the prerogative of the judges".

The truth is that the version of the facts set forth by the so-called democratic judges in Italy and the arguments they present are usually influenced by their political leanings. For instance, they praise the Superior Council of Magistrates when it rejects a request from a Chief Justice of a Court of Appeal to assign other functions to a judge, but they severely criticise the same Council when it grants other similar requests. Recently, the Chief Justice of the Florence Court of Appeal proposed that five judges be assigned to other duties. The Council rejected three of the five requests. The result: praise from the "democratic" judges for the proposals rejected and criticism for those granted, in particular the transfer of Judge Accattatis.

In this connection the author states: "This decision also seems to be very serious if one reflects that the reasons for the transfer flowed from the fact that Judge Accattatis, who was responsible for supervising the application of the "security measures", had sent to his colleagues copies of a report addressed to the Minister of Justice in which he had expressed his belief that certain of these measures and certain of the prison regulations were unconstitutional. His action was regarded as a kind of instigation to those colleagues to whom he sent it to disobey the laws of the state."

All this is incorrect. The Superior Council of Magistrates, on the proposal of the Heads of the Court of Appeal of Florence, removed the above-mentioned judge from his appointment as "supervising judge" of Pisa

because he systematically misapplied the existing prison regulations. In fact, contrary to these regulations, he gave "leave" to prisoners who were detained by reason of "security measures". He regarded the limitations on leave laid down in these regulations as unlawful, but failed to take into account that if they were unlawful, he had no power to grant leave.

Concerning the decisions of Judge Accattatis, the Superior Council of Magistrates pointed out "that the above-mentioned judge ordered the release of certain offenders (detained in the section for the physically disabled in Pisa prison because they were socially dangerous) by granting them so-called working leaves for periods far in excess of the maximum of 15 days laid down in Article 283 of the Prison Regulations; that these decisions, carried out systematically, resulted in an anticipated repeal of the security measures, such a repeal not falling within the powers of the supervisory judge; and that the system adopted has caused social damage, confirmed by the fact that some of the beneficiaries have been involved in criminal episodes during these leaves."

Thus, one must ask whether it is correct or not to send to other judges the report in question, in which Judge Accattatis held that the measures he misapplied were unconstitutional, having regard to the social damage pointed out by the Superior Council of Magistrates; whether this does not constitute an implied invitation to other judges to follow his theory; and whether the reference to the facts, as they have been reported (see Official Bulletin of the Ministry of Justice, No. 8 of April 30, 1973, page 951) is objective and complete.

It is the same in other cases. For example: in the University of Milan, as in other Italian universities, there has taken place, and is still to this day taking place, student agitation, generally provoked by the same persons who are still classified as students even after decades. During one of the demonstrations in question, in which Roberto Franceschini died, the first inquiries to ascertain criminal responsibility were conducted by a young magistrate still "uditore giudiziario" (i.e. the first appointment in the judiciary), as he was the magistrate on duty only for external service. Later the State Attorney of Milan replaced him with a more experienced magistrate owing to the complicated nature of the inquiries. This measure was very opportune and was dictated only by considerations of justice. Immediately the "democratic" magistrates criticised this substitution and stated that the intention was to divert the inquiries in hand, insinuating that the death of the student had been caused by the police. The article then says: "Similar incidents all concerning the possible criminal responsibility of the police, have occurred in Pisa, Turin and Rome."

According to some of these magistrates, the Italian police carry out criminal activities or—as stated by another magistrate subjected for this reason to disciplinary proceedings—send fascist provocateurs to cause disturbances at democratic meetings. On April 30, 1971, a magistrate, Praetor in Florence, presented a complaint against police officials for unlawful arrest and false imprisonment to the prejudice of some students. In the complaint no mention was made of the fact the the magistrate's daughter, a high school student, had taken part together with some hundreds of other students in a demonstration against the principal of the local Professional Institute, and that some of the students had entered the Institute by forcing the entrance door. On May 5, 1971, the complaint was held to be groundless and filed away by the Florence Investigating Magistrate as requested by the Public Prosecutor.

Disciplinary proceedings are being held against some "democratic" magistrates and against others criminal proceedings are pending for insulting the judiciary (they stated at meetings and gatherings that the magistrates are the servants of their masters and the right hand of the executive power; that during the Valpreda case the investigating magistrates had coerced some witnesses and so on (see Official Bulletin quoted above, page 950).

Rather than dwelling on single episodes, it must be pointed out that the "democratic" magistrates reason out and discuss judicial matters from a political point of view and many of them state (as one of the Milan magistrates stated a short time ago at the Communist House of Culture) that a judge should be allowed to use his judgments "as a weapon of political struggle".

Space does not allow us to cite other details. In short, however, it may be said that manipulating facts, taking only what supports one's own point of view and ignoring what is unfavourable, is not permissible, especially in a judicial context. Article 3 of the Italian Constitution provides that all citizens are equal before the law, without distinction... of political opinions, personal or social conditions; Article 101 lays down that judges are subject only to the law. Impartiality cannot prevail when politics penetrate the courts of justice.

To summarise, the article published in REVIEW No. 10 reflects only the point of view of the very small group of "Magistratura Democratica" and not that of the majority of the Italian magistrates, who are faithful to the principles of the Constitution of the Republic and of the law in general.

Comments on this reply
by the author of the Article in Review No. 10,
Dr. Attilio Baldi, A Milan Magistrate

Dr. Noccioli does not like the ideas and decisions of judges whom he terms the "self-styled democratic current". He has every right to his opinion, but it seems to me that, I having for my part set forth certain facts, he would have done well, from his point of view, to show either that those facts are not true or that they are unimportant. On the contrary, he has not, in substance, denied anything which I said.

For example, he finds that the Valpreda case proceeded quite smoothly and that nothing occurred to give rise to concern for the rights of the citizen or the independence of the judiciary. I am glad of this for Dr. Noccioli's peace of mind. Unfortunately, his view is not shared by public opinion. Perhaps out of ignorance of the principles of the law, so well applied in this case, public opinion was on the contrary very disturbed, as is shown, if proof is necessary, by the newspapers of the time.

On the other hand, there are certain inaccuracies in what Dr. Niccioli says:

- 1) It was not only the "democratic" judges who expressed their concern over the threat to the prerogatives of the judiciary and the insult to

the civic spirit of the City of Milan, due to the transfer of the Valpreda case to the Court of Catanzaro. The whole assembly of magistrates belonging to the National Association of Magistrates in Milan, an association to which the majority of magistrates belong, approved the resolution which expressed this concern.

- 2) The substituted prosecutors in the Franceschi affair were two in number, and the second was a senior and experienced magistrate. There was no question of his needing to be replaced by a "more experienced magistrate".

It seems to me also important to emphasise that all decisions can be reviewed and modified by the natural and proper means of judgments on appeal. Having recourse, however, to disciplinary procedures or to the transfer of judges in connection with their judgments or other orders is a serious attack upon the independence of the judiciary.

To conclude, I would confine myself to underlining certain reflections, drawn from the evidence of facts and not from a pre-conceived political attitude:

- the law in a democratic society (without inverted commas) permits differing interpretations, which often correspond with differing political attitudes, whether the judges are aware of it or not;
- all citizens, and the judges among them, have the right to be concerned about certain judicial interpretations or the application, often not enlightened, of "judicial policy", if they think that they see in them the fruits of an anti-democratic, not to say fascist, mentality;
- it is perhaps worth reflecting on the fact that certain interpretations by the appeal court (Court of Cassation) or by other non-"democratic" judges (I think, for example, of certain definitions of the right to strike) are completely political and in any event give no satisfaction to many other judges, jurists and citizens in general;
- that there exists a problem, acute and at times agonizing, concerning the contrast between formal freedoms and actual freedoms.

There are naturally many other things to say, but it seems to me that, in order not to abuse the hospitality of the REVIEW, it is sufficient to ask the reader to have the patience to read the two articles in question and to draw his own conclusions.

Civil Jurisdiction preferred in Colombia

On February 26, 1971, the government of Colombia decreed a "state of seige" in a large part of the national territory. Consequently, all offences against the constitutional order and the internal security of the state and connected offences fell within the jurisdiction of military tribunals. In July 1972 over 180 persons, including the Colombian film director, Carlos Alvarez, were arrested and charged with belonging to an urban group of the National Liberation Army, the principal guerrilla movement in the country. Under the decree relating to the state of seige, they were dealt with under the system of military justice. The trial began in February 1973 before a military Council of War at Bucaramanga.

On December 29, 1973, by another decree the government declared that the state of seige was suspended, as public order had been restored. The question then arose whether the ordinary civil courts or the military courts were competent to decide the case. The defence advocates argued that the case should be transferred to the ordinary courts in view of the suspension of the state of seige. In so doing they provoked a conflict between the civil and military systems of justice.

Article 26 of the Political Constitution of Colombia provides that "No-one will be tried except before a competent tribunal in conformity with laws in existence before the alleged offence and in accordance with all the procedures proper to each case. In criminal matters, the law most liberal or favourable (to the accused) should be applied, even if it is later (than the date of the offence), in preference to a more restrictive or unfavourable law."

On March 8, 1974, a Disciplinary Tribunal (the competent tribunal to resolve conflicts as to jurisdiction) decided that all procedural steps by military tribunals trying civilians, taken after the state of seige had been suspended, were of no effect. In the same judgment they ordered that the case be transferred from the military jurisdiction to that of the ordinary civil courts. The accused were released on provisional liberty and are now awaiting judgment.*

State v CARLOS ALVAREZ NUÑEZ and others

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Bogota, D.E., 8 March 1974

* This decision is to be welcomed in a continent where emergency jurisdictions have become the general rule. It is fully in accordance with the principles of the Rule of Law and compares favourably with what happened in Turkey when the state of seige was lifted. There the military courts continued to deal with cases against civilians which were then pending before them.

ICJ News

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The ICJ deeply regrets to report the death of Sir Leslie Munro (New Zealand), former President of the U.N. General Assembly and former Secretary-General of the ICJ.

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