

For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

HUMAN RIGHTS IN THE WORLD

CHILE	1	PORTUGAL	11
INDIA	4	RHODESIA	20
INDONESIA	9	SPAIN	25

COMMENTARIES

INTERNATIONAL COVENANTS ON HUMAN RIGHTS	33
INDIVIDUAL PETITIONS	36
UN SUBCOMMISSION ON MINORITIES AND DISCRIMINATION	41

ARTICLES

BAADER-MEINHOF TRIALS AND CRIMINAL PROCEDURE	KARIN ROSE	46
MIGRANT WORKERS	FRANK RUSSO	51
CRIMINAL JUSTICE IN AFRICA AND ASIA	SAEED EL MAHDI	59

BOOK REVIEW

"THE TRIAL OF BEYERS NAUDÉ"	62
-----------------------------	----

No. 15

December 1975

Editor: Niall MacDermot

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 over 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.

ASSOCIATES

If you are in sympathy with the objectives and work of the Commission, you are invited to become an Associate by making an annual contribution to its funds. A contribution of not less than Sw. Fr. 100.00 per year will entitle you to receive free copies of the REVIEW and of any special reports we may issue.

SUBSCRIBERS

Alternatively, you are invited to become a subscriber to the REVIEW.

Annual Subscription Rates:

By Surface Mail	Sw. Fr. 12.50
By Air Mail	Sw. Fr. 17.50
Special Rate for Law Students	Sw. Fr. 9.00

Note: Payment may be made in Swiss Francs or in the equivalent amount in other currencies either by direct cheque valid for external payment or through a bank to Société de Banque Suisse, Geneva, account No. 142.548. Pro-forma invoices will be supplied on request to persons in countries with exchange control restrictions to assist in obtaining authorization.

Human Rights in the World

Chile

The system of military justice

In August 1974 a mission from the Human Rights Commission of the Organisation of American States (OAS) visited Chile to enquire into the legal system in force with particular reference to the protection of human rights. The authoritative report of this mission included a number of recommendations which, if adopted by the military Government of Chile, would have helped to improve the protection of basic rights and to avoid the repetition of the numerous violations which were found to have occurred. Some of the recommendations were directed to improving juridical procedures, and others towards reducing the risk of torture and ill-treatment of suspects. These recommendations closely paralleled those of the report of the mission of the International Commission of Jurists published earlier in the same year (ICJ Review No. 13, December 1974, pp. 45 et seq.).

It is becoming a practice for the Chilean Junta to make a dramatic announcement of a liberalising measure on each anniversary of the coup of September 11, 1973. When the decrees to give effect to it become available, and it is possible to read the "small print", it turns out that the liberalisation is largely illusory.

On the first anniversary of the coup, September 11, 1974, General Pinochet announced the ending of the "state of war" which was one of the principal recommendations both of the OAS and of the ICJ. Normally this would have meant the ending of the system of "military justice in time of war" and its replacement by the system of "military justice in time of peace". The advantages of this are two-fold, improved judicial procedures and rights for the defence, and the restoration of a right of appeal, first to a Corte Marcial (a mixed civil and military appeal court) and then to the Supreme Court.

However, this did not follow since at the same time a decree No. 640 was published on September 10, 1974, establishing for the future a complicated system of no less than four different degrees of "state of siege". These were (a) state of siege on account of a situation of internal or external war, (b) state of siege in the degree of internal defence, (c) state of siege in the degree of internal security and (d) state of siege in the degree of simple internal commotion. The system of military justice in time of war was to remain in force under degrees (a), (b) and (c) (save that under degree (c) lesser penalties applied), and the system of military justice in time of peace was to operate only under degree (d). The Junta then declared that the previous "state of war" was replaced by a state of siege in the degree of internal defence. The result was that the system of military justice in time of

war continued in force with all its defects, in particular an extremely summary procedure and no right of appeal, even to correct blatant errors of law.

Later the Junta modified this decree by providing under Decree 1009 of May 8, 1975, that the peace-time procedure would apply with certain exceptions under both (c) and (d), i.e. under internal security and simple internal commotion.

On the second anniversary of the coup, General Pinochet announced that the state of siege in degree (b) was ended and was replaced by a state of siege in degree (c), namely in the degree of internal security. The expectations of a real improvement in the system of military justice were dashed when the exceptions to Decree No. 1009 were examined closely. They provided that even in the event of a state of siege in the degree of internal security, the system of military justice in time of war would continue in force in respect of all offences under articles 4, 5, 5 bis, and 6 (c), (d) and (e) of the Law on State Security.

Article 4 of this law covers a wide range of offences of inciting, inducing, financing, conspiring or participating in the commission of acts of subversion, revolt, rebellion, or resistance to the government, as well as sending abroad "false or tendentious information" intended to overthrow the "republican and democratic system of government" or to disturb the constitutional order, the security of the state or the economic or monetary system. Article 5 provides for more severe penalties for these offences. Article 5 bis refers to physical attacks upon the person or kidnapping of individuals in order to disturb internal security or to intimidate the population. Article 6 (c), (d) and (e) cover investigating, promoting or encouraging the destruction, disablement or paralysing of public services or services used in industrial, mining, agricultural and other activities, hindering access to bridges, streets, roads and other public property, and the poisoning of foodstuffs, water or other fluids intended for public use or consumption. As will be seen, this wording is wide enough to cover a wide field of strikes and other industrial action.

For all these offences the system of military justice in time of war remains in force. The other parts of the military jurisdiction, including offences against Law on the Control of Arms, will now be tried under the system of military justice in time of peace.

All the other recommendations made by the missions of the OAS and the ICJ remain as pertinent as at the time when they were first made, including the ending of prolonged detention in interrogation centres, often in solitary confinement, where suspects are subjected to cruel, inhuman and degrading torture and ill-treatment. The Chilean authorities have claimed in a recent report to the United Nations¹ that Decree No. 1009 of May 8, 1975, "consecrates two basic guarantees non-existent before for those individuals arrested" by the security services, namely the right of their relatives to be informed of their

¹ U.N. Doc. A/C.3/639 of 27 October 1975.

detention within 48 hours, and the right not to be detained more than 5 days without being "placed at the disposition of the corresponding court or the Ministry of the Interior". In fact, General Bonilla, then Minister of the Interior, told the ICJ Mission in April 1974 that these rights existed at that time, and claimed that they were observed. Moreover, at that time no one was supposed to be arrested except by a warrant signed by the Minister of the Interior. In fact these so-called rights are being violated at the present time, just as they were in April 1974.

UN Working Group Report

The continuation of the now familiar pattern of violations of human rights in Chile is thoroughly documented in the impressive interim report of the Ad Hoc Working Group established under resolution 8 (XXXI) of the U.N. Commission on Human Rights to Inquire into the Present Situation of Human Rights in Chile.² The position concerning human rights under the state of siege is summarized in para 108 as follows:

"The Group found that the invocation of the state of siege is being used in Chile as a justification or a cover for all kinds of measures derogating from the normal application of the laws, and for suppressions or restrictions of human rights. A variety of acts or omissions are justified by reference to the state of siege. There are no procedures of review in this regard, whether executive or judicial, which are independent of the organs entrusted with the application of repressive measures under the state of siege; there are no appeals against judgements of military courts as confirmed by military commanders. Freedom of association does not exist; there are important restrictions on political liberty; the existence of independent and impartial tribunals as regards the matters concerning State security may be questioned; persons deprived of their liberty on grounds of State security are unable to institute proceedings before the ordinary courts; persons are reported not to have been informed of any charge against them when imprisoned; the personal security of persons reported disappeared is violated contrary to guarantees in human rights instruments; families of persons held in detention on grounds of security seem not to have any legal or social protection".

The group found, however, that it is in the area of arrest, investigation, detention, trial and imprisonment that the major abuses had occurred. They describe practices of gruesome torture, ill-treatment and degrading procedures applied systematically in the interrogation of suspects. This section of the report concludes as follows (para 195):

"It is with profound disgust that the *Ad Hoc* Working Group feels that it is obliged to report these elements to the General

² U.N. Doc. A/10285 of 7 October 1975.

Assembly, which were presented to it by many Chileans of both sexes, of all ages, and of many political convictions or none, some of whom had left Chile in the very recent past. Whether it is for the purpose of punishing past political enemies or extracting in a haphazard way information which might possibly endanger the régime which has now been in power without significant disturbance for nearly two years, such acts are forbidden by international law even under an emergency situation, and it goes without saying that many of them are inexcusable and constitute an affront to the elementary moral standards of mankind and the dignity of the human individual. The fact that massive torture methods appear to be taught and learnt by investigating officers, whether members of the armed forces or not, as a technique or a new science, merely from the standpoint of their effectiveness and without consideration of any human standards, is ominous and calls for strong reprobation. The Group feels that the question of torture and cruel and inhuman treatment, including threats to human life and the security of the person, and the allegations relating to the existence of "concentration camps", should continue to retain the urgent attention of all organs of the United Nations concerned in one way or another with the implementation of the United Nations provisions concerning human rights".

Although the permission for this Working Group to visit Chile was withdrawn at the last moment, the Group were able to receive evidence from some 120 witnesses, including several recently released prisoners, who were able to give direct testimony of the continued violations which are occurring. The Group also received evidence from some 20 supporters of the present regime specially flown from Chile to testify before the Working Group clearly with the support of, and probably at the instigation of, the Chilean authorities.

This report is a historic document in the development of human rights procedures. It is one of the most complete U.N. reports yet to have been compiled describing the legislation and practices concerning human rights in a particular country. It has been done with great care and objectivity, and the greatest credit is due to the Chairman/Rapporteur, Mr. Ghulam Ali Allana (Pakistan) and his four colleagues on the Working Group. The final report of this Group will be awaited with interest.

India

The suspension of parliamentary democracy in India has caused deep chagrin among the friends of India in the West. Outright condemnation of Mrs Gandhi has followed, often in the most extravagant language which fails to take into account the opposition's share of

the responsibility for bringing about this crisis in the world's largest parliamentary democracy.

The background to the crisis

Ever since Independence in 1947 India has been governed by the Congress Party. In the 1971 elections, after a split within the party, Mrs Gandhi was returned to power with a two-thirds majority in Parliament. Her success was repeated the following year in the State elections when all but two of the States returned a Congress majority. Since then the popularity of the Congress Party has fallen steeply. The government's failure to control the high rate of inflation, bad monsoons causing poor food crops, the deteriorating economic situation, a flourishing black market, incompetence in the administration, growing charges of corruption involving members of the leadership of the ruling party, as well as internal quarrels within the party, had all contributed to this loss of prestige, which was reflected in a series of government defeats in by-elections in 1972, 1973 and 1974. The growing unrest manifested itself in strikes and in violent activity organised by the marxist-leninist communist party, popularly known as the Naxalites, and by students. In response to this situation, the much respected veteran leader Jaya Prakash Narayan, regarded by many as the spiritual heir to Mahatma Gandhi, had come out of retirement to lead a successful nation-wide campaign against corruption and urging a non-violent struggle for greater social reform.

Against this background, two decisive events occurred in June, 1975. In the state elections in Gujarat the Congress Party, although obtaining the highest poll with 46% of the votes, lost control of the state since all the opposition parties succeeded in uniting to form a government. This portended for the first time a real challenge to the control of the central government by the Congress Party in the parliamentary elections to be held in 1976. On the day after polling closed, the Allahabad State High Court gave judgment in the actions brought against Mrs Gandhi by her opponent in the 1971 elections, alleging electoral malpractices. Twelve of the charges were rejected, but two were found proved. If upheld on appeal this judgment would have invalidated Mrs Gandhi's election to Parliament and her office as Prime Minister.

Against both of these severe blows to her prestige, Mrs Gandhi reacted with complete propriety. She accepted the Gujarat defeat, and has continued to do so. Even though the Congress Party received far more votes than any other party, no attempt has been made to replace the state's coalition government by direct rule from the centre. She appealed against the judgment in the election case. On June 24 the Supreme Court vacation judge refused to give an absolute stay to that judgment, but held that Mrs Gandhi had the legal and constitutional right to remain as Prime Minister and to attend Parliament, though not to vote, pending the final disposal of her appeal.

In this situation the United Front, which had been formed of all the opposition parties represented in parliament with the exception of the Moscow-line Communist Party of India, held a public meeting in New Delhi on June 25. The hope and expectation of dislodging Mrs Gandhi from power overcame their patience. A civil disobedience campaign to begin on Sunday, June 29, was announced. Demands were made that the Parliament, which was in recess, be recalled at once, that Mrs Gandhi not appear in Parliament and that she should resign immediately as Prime Minister. Failing this, there would be a nation-wide campaign calling upon the armed forces and police not to obey the government, the civil service to bring the administration to a halt, and the people not to pay their taxes. It is difficult to imagine that any government would have stood by in face of such threats. Mrs. Gandhi's reaction was swift and draconian.

The emergency measures

On June 26 an emergency for internal reasons was declared (an emergency for external reasons had remained in force since the war with Pakistan over Bangladesh). Mrs Gandhi stated that there was an opposition conspiracy aimed at subversion and constituting a threat to the internal stability of the country. The following steps were taken:

- the suspension of fundamental rights under the Constitution guaranteeing equality before the law (Art. 14), protection of life and property of the citizen (Art. 21), protection against arrest and detention without being informed of the grounds of arrest (Art. 22), and the duty to produce arrested persons before a magistrate within 24 hours (Art. 22);
- the principal opposition political leaders were arrested, including Jaya Prakash Narayan and Morarji Desai (former Deputy Prime Minister and leader of the opposition Congress Party); some members of Parliament on the Government side, as well as a number of opposition members were also arrested;
- four political parties (none of which were represented in the Parliament) were declared illegal, namely Rashtriya Swayamsevak Sargh (RSS), Militant Hindu nationalists; the Jamait-ul-Islami, their Moslem counterpart; the Ananda Marga, an allegedly subversive religious movement; and the Naxalite Communist Party of India (Marxist-Leninist), together with 22 other splinter groups of these four organisations;
- a rigid and unprecedented press censorship was imposed, applying also to the foreign press. The censorship guidelines included a ban on reports of speeches in parliament other than government statements; reports of court cases other than the names of the judges and counsel and the operative part of the court decision; names and places of detention of detainees; any reference to agitation or violent incidents; quotations "torn out of context and intended to mislead or convey distorted or

wrong impression" (such as embarrassing quotations from speeches by Mahatma Gandhi, Nehru and Rabindranath Tagore); or anything likely to bring the government into hatred or contempt.

Congress was recalled and in accordance with the Constitution approved all the measures taken.

A very large number of persons have been arrested and detained under the Maintenance of Internal Security Act (MISA), but their rights under this Act have been severely restricted. On June 29 a Presidential Ordinance amended the Act by removing the detainee's right to be informed of the grounds of arrest (see ICJ Review No. 13, Dec. 1974). It is now stated to be sufficient if the authorities declare themselves satisfied that the arrest is necessary to "safeguard the security of India". On July 16 a second amendment to the MISA made provision for denying the right of appeal to the courts in cases of alleged illegal detention, for abolishing during the first 12 months the right to have the detention reversed by an independent advisory board, and for the attachment of the property of wanted persons who fail to surrender.

No comprehensive figures of the numbers arrested have been issued. Opposition leaders have claimed that over 200,000 have been arrested. This may include short term arrests. Estimates of those detained under the MISA indicate that the total number may have reached 60,000 to 75,000. A large number of those originally arrested, perhaps as much as 50% of them, have been released. These include Jaya Prakash Narayan. Meanwhile, many other fresh arrests have been made.

A number of amendments to the Constitution have been approved by the Parliament. Under the 38th Amendment of August 1, the Courts are debarred from reviewing the President's reasons for declaring an emergency. The 39th Amendment of August 10 deprives the Courts of their jurisdiction to rule on disputed elections of various persons holding high office, including the Prime Minister. This was made to apply retroactively to pending proceedings, which would, of course, include the case against Mrs Gandhi. The 40th Amendment, introduced on August 9 and since passed into law, extended the immunity of the Prime Minister from civil and criminal proceedings in respect of matters occurring before assuming office and during the period of holding office.

On August 5 the Election Laws (Amendment) Act was passed. This Act nullifies retroactively the specific points on which Mrs Gandhi was found guilty by the Allahabad High Court on June 12.

Rôle of the Courts

The Courts have shown a considerable spirit of independence in handling the various issues referred to them arising out of the proclamation of the emergency and the subsequent legislation. For example,

on August 11, the Supreme Court refused to discharge Mrs Ghandi's convictions under the 39th Amendment until it had heard argument on the validity of that amendment as well as on the validity of her conviction on the two election offences and her acquittal on the other 12 offences alleged against her. In the event, the Court allowed Mrs Ghandi's appeal on November 7. The judgments are not yet available but it seems that the Court accepted the validity of the Elections Laws (Amendment) Act passed in August. However it is reported to have declared invalid the 39th Amendment which sought to take away from the Court the right to review challenges to the election of the Prime Minister.

In many proceedings a challenge has been made to the validity of the Declaration of an emergency, some on the grounds that it was made mala fide, and some on technical grounds, such as that the Parliament's approval of the declaration of an emergency was invalidated by the arrest of various members of Parliament. The latter argument was rejected, and as far as is known none of these actions has succeeded.

On November 12, the Supreme Court rejected a Government request that it reconsider an important decision it had given in 1973, which asserted the right of the Court to declare unconstitutional any Amendment which had the effect of changing the essential nature of the Constitution.

On September 15 two judges of the New Delhi High Court held, in spite of the Presidential Ordinance of June 29, that specific reasons must be given to justify a detention under the MISA, and failing these, detention orders could be reviewed by the Courts. A further Presidential Ordinance was issued on October 17 seeking to overrule this decision. It was made retroactive to June 29. It remains to be seen whether the validity of this Ordinance will be accepted by the Courts.

Future for democracy

With the emergency restrictions and strict censorship in force, it is difficult to assess the public reaction within India. Numerous reports, however, by respected newspaper correspondents indicate that many of the general public are well satisfied with the steps which have been taken by Mrs Ghandi, particularly those in the economic and social field to improve the quality of administration, to control inflation and to reinvigorate the economy.

The Government's intentions about the duration of the emergency are unclear. There have been conflicting statements, even by Mrs Ghandi herself. Some Congress leaders have indicated a desire to make permanent and far-reaching changes to the Constitution, cutting down the powers of the Courts and the present guarantees under the Constitution. Mrs Ghandi is reported as saying that "democracy in India had given too much liberty to the people who, whether in newspapers or in the opposition, were trying to misuse it

and weaken the nation's confidence". At other times she has rightly stressed that all she has done has been fully within the terms of the Constitution, and that she wishes to see the return to normal parliamentary democracy as soon as circumstances permit.

At the time of writing there are some indications, including the release of Jaya Prakash Narayan, which give some reason to hope that there may be a gradual easing of the restrictions. If parliamentary democracy is to survive in India, it needs to be restored soon. It is doubtful if it could survive a long suspension. Mrs Ghandi has a valid point when she attaches blame to the opposition for their irresponsible actions which provoked the emergency, but this does not alter the fact that most of her friends feel that the measures taken by the government were an overreaction and out of proportion to the threat posed by the opposition. The extreme powers which the government has assumed may help to achieve a degree of efficiency in the short term, but the repression of public debate and public participation leads in the end to more problems than it solves. It would be tragic if India, till now the most successful of the Third World parliamentary democracies, were to follow the way of so many others, and slide into a situation of permanent emergency.

The understanding and cooperation of a responsible opposition is one of the conditions for the working of a parliamentary democracy. If the seeds of bitterness resulting from the emergency take root too deeply, it is doubtful whether these conditions can be restored in the foreseeable future.

Indonesia

On September 30, 1965, an attempted coup by a group of left-wing military officers resulted in a counter-coup which brought to effective power the present rulers of Indonesia. Extending the responsibility for the initial coup attempt to the Communist Party of Indonesia, the new rulers proceeded to institute a reign of terror which resulted in the death of many thousands, variously estimated between 87,000 and 300,000 persons suspected of being members or supporters of the Indonesian Communist Party. In addition, tens of thousands were arrested and have since been held in detention. Many of those held have never had any connection with the Communist Party.

The International Commission of Jurists first commented on these events in its Bulletin No. 27 (September, 1966) after the visit of an ICJ observer, Mr Edward St John, Q.C. in January, 1966. The Bulletin article urged the recognition and establishment of fundamental freedoms in the country. Unfortunately, ICJ Review No. 4 (December, 1969) had to qualify Indonesia as "a country studded with prison

camps". The article pointed out that there were "...about 350 military prison camps throughout the country, where tens of thousands of political prisoners continue to languish without any charges having been preferred against them and with no prospect of trial or release in the reasonable future." At that time government figures spoke of a total of 48,000 prisoners, while unofficial estimates ranged between 80,000 to 150,000. In another review of the situation in Indonesia's concentration camps in ICJ Review No. 10, (June 1973) it was pointed out that eight years after the events of 1965, there were still at least 55,000 persons being detained without trial. The Indonesian Government was urged to bring speedily to trial those against whom there was real evidence of complicity in illegal activities, and to release the rest. ICJ Review No. 13 (December, 1974) again discussed the condition of Indonesia's political prisoners, particularly in the light of the reversal of what had appeared as a more enlightened and humanitarian policy of releases of such prisoners. This reversal followed the student riots in Jakarta on 15 and 16 January 1974, on the occasion of the visit of Japanese Prime Minister Tanaka. At that time it was estimated that there were still between 30,000 and 55,000 political prisoners who had been held without trial since the 1965-66 period.

Now again there have been signs of a more liberal policy on releases. An estimated 1,300 are believed to have been released in 1974 and another 2,500 are expected to be released by the end of the year.

This is certainly a welcome trend but it does not obviate the fact that there are still, 10 years after the present leaders came to power, tens of thousands of political prisoners who are being held without trial. If after such a period sufficient evidence could not be gathered to bring these persons to trial, it is evident that such evidence does not exist and they should be freed without further delay.

Court cases in which the conditions of political prisoners can be exposed are relatively rare, and the dangers of persecution faced by lawyers tends to inhibit further the public exposure of these conditions. It was, therefore, a noteworthy event when a highly respected defence lawyer, Mr Yap Thiam Hien, who is also a member of the International Commission of Jurists, took the opportunity at the trial of Asep Suryaman in July, 1975, to comment upon the deplorable conditions of life of the political prisoners. (Mr Yap was himself detained after the student riots in January, 1974, but was released on 24 December 1974). As reported in the Amsterdam publication *Trouw*, on 13 September 1975, Mr Yap in his final plea described the condition of these prisoners, pointing out that they are:

"... treated like the dregs of society, deprived of the most elementary rights enjoyed by all other citizens, like mere objects that can be moved from one place to another, put out "on loan" to another authority for interrogation, to give evidence or to meet the personal needs of some official; and they are not even told why they are put out "on loan" or where they are being taken. They have no power and no voice, no right to complain or protest against

their interminable imprisonment, against torture, insult, hunger or disease. They have no power and no voice in the face of this abuse against their dignity and person.

“ Many of them have become automatons, going to sleep, getting up and taking their meals like persons without any spirit, for they are not permitted to read newspapers, magazines, or books except religious literature, nor are they allowed to write to their loved ones. “ They live a sterile life, devoid of all hope and full of anxieties for their loved ones because often they don't know where they are and have no contact with them. Such a life leads them to break down under the strain. Some have become insane, others have committed suicide, some have tried to rebel against their predicament with horrifying consequences ”.

The holding of persons for an extended period without trial is a violation of fundamental human rights. The degrading treatment meted out to these many thousands of Indonesians, who have now been held in detention for some 10 years, only aggravates an intolerable situation. The maintenance of the good name of Indonesia in the international community requires that this situation be brought to a speedy end.

Portugal — the Revolution and the Rule of Law *

Since the revolution by the Armed Forces Movement of 25 April 1974, which liberated Portugal from nearly 50 years of fascist dictatorship, there has been a continuing and as yet unresolved crisis of authority. The crisis exists at the three levels of authority, the armed forces, the government and the neighbourhood and workers revolutionary committees.

When the Armed Forces Movement overthrew the Caetano dictatorship it immediately announced its programme to establish a pluralist and socialist democracy. Elections were to be held within a year for a constituent assembly, to be followed by parliamentary elections when the new Constitution had been agreed. Meanwhile, the powers of the President, Parliament and Council of State were assumed by the armed forces (Constitutional Law No. 1/74 of 25 April 1974). A concordat was later reached with all the political parties whereby a residual power was to remain with the armed forces movement for the first three to five years.

* This article was written in mid-November.

All political parties were permitted to organise except those of the extreme right. With two exceptions, the right wing Christian Democratic Party and the extreme left wing MRPP (Portuguese Popular Revolutionary Movement), all were allowed to present candidates for the elections to the Constituent assembly held on the first anniversary of the revolution. In these elections the majority of votes were divided between the socialist and popular democratic parties, both committed to a western style parliamentary democracy. The Communist party, which from its more effective clandestine organisation under the dictatorship had succeeded in gaining control of many important centres of power, and which appeared to be gaining an ascendancy over the revolutionary council of the Armed Forces Movement, received less than 13% of the votes.

The sharp differences of outlook between the different political parties is reflected at all levels of the Armed Forces Movement and has made it impossible for the government to impose its authority in support of a coherent policy. These differences have also led to frequent changes in the composition of successive coalition governments. This struggle for power has extended also to the "grass roots" level organisations of workers and neighbourhood committees, which fall under the influence of different left wing parties, socialist, communist, or "maoist".

A remarkable feature of this prolonged struggle for power has been the almost complete absence of violence. Neither at the time of the overthrow of the previous regime, nor since, have any bloody reprisals taken place, nor have any prisoners been executed. The lack of personal violence has continued in spite of the two abortive attempts at right wing coups in September 1974 and March 1975, and in spite of frequent mass meetings, demonstrations and counter-demonstrations which might have been thought likely to provoke violence. If there had been less spirit of tolerance or greater unity within the armed forces, an attempt might have been made to impose a solution, which could in turn have led to violence. As it is, different units in the armed forces outwardly support different factions, even to the point of taking part in their public demonstrations, and this intensive struggle for power continues to take place peaceably, apart from some incidents of damage to property.

The absence of violence extends also to the security forces of the COPCON, the military security organisation commanded by General Otelo Saraiva de Carvalho. Prisoners and detainees, including members of the former notorious secret police, the PIDE, have been treated correctly without torture or ill-treatment under interrogation or during imprisonment, a record which compares favourably with the aftermath of military coups in many part of the world.

The Legal System—Civil and Military Jurisdiction

The legal system in operation in Portugal must be seen and judged against this unique and unstable political background.

There are two jurisdictions in operation, the normal civil courts, and a system of military tribunals. All matters concerning security and the arrest, detention, interrogation and trial of political suspects fall within the jurisdiction of the system of military justice. Apart from the fact that it was the Armed Forces Movement which overthrew the previous dictatorship and laid down the broad lines of the pluralist socialist society which the country is endeavouring to establish, it must be realised that the existing civilian authorities responsible for maintaining law and order, including the civil police, commanded neither confidence nor respect.

The ordinary criminal jurisdiction of the civilian courts continues to function normally in respect of common law crimes. No complaints are made by advocates concerning the defence rights or the trial procedures in this jurisdiction.

The civilian courts also continue to exercise their civil jurisdictions, though it must be said that the executive authorities at times neglect or refuse to execute their decisions for political reasons, particularly in property matters.

Revolutionary Committees

In many cases property has been seized by the revolutionary committees, be it factories or farms by workers committees, or residential property by neighbourhood committees. Sometimes, when actions have been brought in the courts to recover possession of these properties, the court has made an order, but the local committee has then persuaded the local military commander to issue a written instruction that the order of the court will not be executed.

The "revolutionary" actions of these committees have extended to the unauthorised detention of persons, for example of industrial managers for several days within their factories while "negotiations" concerning the management of the concern are in progress. Sometimes there is almost an air of farce about these proceedings. On one occasion the manager of a foreign owned company was seen leaving for the airport with two large suitcases. The suspicion arose that he was removing the books of the company. The workers committee phoned the airport and the manager was detained for several hours, interrogated and subjected to a minute search. Nothing untoward was found. The whole episode was described in detail in the works newspaper, the conclusion being drawn that this was an admirable example of "revolutionary vigilance".

In spite of incidents of this kind, it must be recognised that the workers and neighbourhood committees have achieved much in a short time in bettering the social, welfare and working conditions of the working people, particularly in the cities. In rural areas their lack of expertise in husbandry, irrigation etc. has led to serious falls in production in the larger estates which have been taken over by the revolutionary committees.

An extreme example of the crisis of authority lies in the seizure of the premises of the socialist newspaper "Republica" by extreme left-wing printing workers, who made unacceptable demands upon the proprietors and editor with regard to the editorial policy of the newspaper. Their action being in breach of the new press law, the Revolutionary Council of the Armed Forces Movement ordered that control of the premises be returned to the former management. The security forces of the COPCON, however, refused to carry out the order. A similar situation arose with respect to the Catholic radio station.

Military Justice

The authority of the military tribunals in matters affecting the security of the state derives from the previous Code of Military Justice, continued in force by constitutional law No. 3/74 of 14 May 1974, and extended by Decree No. 212/74 of 21 May 1974, which brought certain civilians employed in the public administration within the military jurisdiction.

The serious disadvantage of the system of military justice is that the rights of the defence are severely restricted. An arrested person has no right to see his lawyer while he is under investigation. There is no limitation upon the time during which he can be held in custody or, indeed, in solitary confinement while under investigation. It is only when he is formally charged and brought to trial that he can see his lawyer. The anomalous position arises that arrested persons can frequently see their relatives without being able to see a lawyer. A more serious development is that by Decree No. 398/74 of 28 August 1974 the remedy of habeas corpus is no longer applicable to persons subjected to the military jurisdiction. There is, therefore, no way in which a challenge can be made to the legality of an arrest by any military authority even in a case where it can be shown that the arrest was effected without any written warrant, as required by law, or where it is alleged that the wrong person has been arrested under a mistake of identity. This decree is not expressed to be of a temporary character, and consequently this grave infringement of a fundamental principal of the Rule of Law now appears to be a permanent feature of Portuguese law.

In spite of these exceptional and, it is submitted, inadmissible powers, the use which has been made of them has been far more restrained than in many countries where such powers are in force. Persons who have been arrested, questioned and subsequently released, including people arrested after the abortive coups of September 1974 and March 1975, have testified to the correctness of their treatment and interrogation. Detention in solitary confinement other than for the first few days appears to be rare. Interrogation sessions are not intolerably prolonged (a maximum of 6 hours is laid down and observed), and improper physical or psychological pressures are not employed. It is clear that a firm decision was taken at the highest level

to forbid all forms of torture, and that instructions to this effect have been rigorously enforced. The result has been an almost complete absence of complaints by prisoners, or their families or lawyers. The exceptional allegations of ill-treatment made by members of the extreme left-wing " maoist " party, MRPP, when some 500 of their members were arrested at the end of May 1975, were investigated carefully by M. Marc de Kock, President of the Belgian League for the Defence of Human Rights, during his visit to Portugal in early June. He was satisfied that the prison authorities had not used " methods to maintain order disproportionate to the attitude of permanent revolt adopted by the prisoners ". He added that he thought that in similar circumstances the repression in a Belgian or French prison would have been infinitely more severe.¹

Numbers and categories of detainees

Precise figures of the numbers of persons in detention are not available, but estimates of the numbers during the summer of 1975 vary between 1,500 and 2,000.

Of these, much the largest category were the former members of the PIDE and DGS (the Security police organisations under the dictatorship) and the Portuguese Legion (a fascist paramilitary organisation). These detainees number approximately 1,300. About 200 others in this category have been released, on the grounds that they were employed in innocuous roles (typists, clerks, chauffeurs, etc.).

Secondly, there was a small number of persons (probably less than 20) still in custody for suspected complicity in the attempted coup of 28 September 1974.

Thirdly, there were those who had been detained for suspected complicity in the attempted coup of 11 March 1975, numbering about 100.

Fourthly, there were an unknown number of persons arrested for suspected economic sabotage, infractions of the electoral law and other " political " offences. Some of those arrested in this category had been transferred to the civilian jurisdiction.

Finally, there were some 500 members of the extreme left-wing movement MRPP, who were arrested by the COPCON at the end of May 1975. About 200 of these were released after a few days. By July their number had been reduced to 23 (20 men and 3 women), and it is understood that these have since been released.

Legal basis of detention

The Armed Forces Movement has decided not to introduce administrative detention without trial. All persons under arrest are,

¹ The assistance derived from Monsieur de Kock's admirable report in preparing this article is gratefully acknowledged.

therefore, in theory at least, held for investigation for some suspected offence.²

If the normal procedures of civilian justice applied, this would mean that the arrested persons would be brought before a judge within a very brief delay, would have the assistance of a defence advocate, and would know in respect of what suspected offence he was being held. It would also be possible to challenge the legality of his detention by habeas corpus proceedings.

None of these safeguards apply to persons held under the military jurisdiction, and many complaints have been received of persons being arrested on the vaguest suspicion or denunciations, and of being held for quite substantial periods without being interrogated, and sometimes being subsequently released without being charged with any offence.

It is right to say that the military authorities appear anxious to process their suspects within a reasonably short period and apart from the former members of the PIDE and DGS, few persons have been detained for more than a few weeks or at most a few months, and these appear to be persons whom it is intended to bring to trial. Nevertheless, the absence of proper judicial safeguards and defence rights is greatly to be deplored.

There are two special categories of prisoners, namely the first and third mentioned above, which call for further comment.

The PIDE and DGS

The members of the PIDE or, as they were later termed the DGS (Direction General of Security) were the most hated members of the former régime, and were the first to be rounded up.

The authorities were confronted with a difficult problem in deciding what to do with them. It was probably true to say, as they did, that they had to be kept in custody if only for their own safety. Against some of them there was abundant evidence of their having participated in or authorised torture of political prisoners under the previous régime, and these plainly could have been charged under the ordinary penal law. For the rest, however, there was no way of bring them to "justice" without passing retroactive legislation. The only alternatives were to introduce a system of administrative detention (a solution which, as has already been said, the Government rejected) or to release them, perhaps to go abroad. The latter solution was apparently canvassed at one stage by General de Carvalho, head of the COPCON, but perhaps regrettably was not adopted.

² There appear however to be exceptions. In the report referred to in note 1 M. de Kock states that when he asked M. Rosa Cutinho why General Kaulza, arrested in connection with the plot of 28 September 1974, was still being held in custody even though it had been announced that he would not be prosecuted, he received the reply that "He will be detained as long as is necessary for the security of the State".

Instead, the decision was taken to pass retrospective legislation. The justification for this course, which is contained in the legislation itself, is of some interest. Under constitutional law No. 8/75 of 25 July 1975 the former secret police organisations (PIDE and DGS) were declared to have been "organisations of political and social terrorism whose objective was to prevent the exercise of civil rights in our country". These organisations, it was stated, practiced systematic crimes against the people, and their well-tested lack of humanity had been rightly condemned by national and international public opinion. Their terrorist activities were carried out with complete impunity under the protection of the fascist régime. As they could not be punished under the laws in force under fascism, it was necessary to pass legislation "based on the revolutionary legitimacy of the democratic power instituted by the Movement of the Armed Forces and corresponding to the deeply-felt demands of the collective conscience of the Portuguese people to punish those responsible for the fascist repression". This, it was stated, was the only way to repair the historic injustice of these criminal activities. It was underlined that the systematic physical and psychological torture methods practiced on detainees constituted "public and notorious facts" in such a way that none of the participants, be they police personnel or their collaborators, would be unaware of the essential criminal character of their activities.

On this basis the law made punishable for varying numbers of years all those who were associated with these organisations. The ministers responsible for their activities (Prime Ministers and Ministers of the Interior) and senior officials of the organisations were made liable to 8 to 12 years imprisonment (Art. 1), those who carried out police investigations, and doctors who were shown to have assisted in the criminal activities of the police, to 4 to 8 years (Art. 2), and all other employees of the organisations and instructors in their technical school who are shown to have participated in the repressive fascist activities, as well as agents and informers of the organisations, to 2 to 12 years (Arts. 3 and 4).

All these people are to be tried before military tribunals, in accordance with a more expeditious procedure than that contained in the Code of Military Justice (Art. 13). For all these classes of prisoners, with the exception of agents and informers, the only permitted ground of appeal will be mistake of identity (Art. 12). Accused persons may be tried in their absence (Art. 9).

This law, however understandable politically, is a clear violation of all internationally accepted norms concerning retrospective penal legislation (cf. Article 11 (2) of the Universal Declaration of Human Rights: "No one shall be held guilty of any penal offence on account of an act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed"). The most that can be said is that if it was considered essential to impose punishments on

these people, it was better that it should be done by a judicial process, with rights for the defence, rather than by purely administrative security measures. It is submitted, however, that the proper course would have been to prosecute under the ordinary criminal law all those who participated in or were responsible for the commission of crimes, such as torture of suspects, and to have released the rest, if necessary to go abroad.

The conspirators of 11 March 1975

Special legislation has also been introduced relating to another category of prisoners. Article 1 of Law No. 9/75 of 7 August 1975 contains a decision of the Revolutionary Council to establish a Revolutionary Military Tribunal with power to "try those implicated in the counter-revolutionary attempt of 11 March 1975". This decision involved a rescission of one of the earliest decisions of the Armed Forces Movement, contained in constitutional law No. 3/74 of 14 May 1974, which stated in Article 18 (2) that "the existence of tribunals with special competence to try crimes against the security of the State is not permitted".

The constitution and procedure of the Revolutionary Military Tribunal was defined in Decree Law No. 425/75 of 12 August 1975. This provided for:

- a President (an officer of the rank of general designated by the Revolutionary Council),
- two voting members (senior officers from other arms of the service than that of the President),
- an "assessor" (a legally qualified judge),
- a jury, composed of 11 members elected by the Assembly of the Armed Forces from among their number (Art. 2).

The "instruction" (i.e. the preliminary judicial investigation) is to be "secret", i.e. not in public session and without the participation of defence lawyers, and is to be completed within 48 days (Art. 7). At the end of the instruction the file is to be passed to the President of the Tribunal who may afford the defence lawyer the opportunity to propose further lines of enquiry (Art. 14).

The trial is to be held in public (Art. 29), and the defence can propose to the Tribunal witnesses for the defence (Art. 19 and 20). The defence may not challenge the jurisdiction of the Tribunal (Art. 61).

All questions of fact are to be determined by the jury (Art. 51).

There is to be no right of appeal against conviction or sentence or, by the State, against an acquittal (Art. 66).

It is difficult to see why any special legislation should have been required to deal with these cases, and it is particularly deplorable that in such serious matters the rights of the defence should be restricted. The denial of any right of appeal is no more justifiable in Portugal than it has been under the system of military justice in force in Chile since

the coup of September 1973. This has been universally condemned in relation to Chile. It is earnestly to be hoped that the Portuguese authorities will reconsider the terms of this legislation.

The Order of Advocates

The lack of proper defence rights for detained persons and other violations of human rights has led to a number of important statements made by the Portuguese Order of Advocates (Bar Association) and its Bâtonnier, Dr Mario Raposo. It should be recalled that the Order of Advocates took a courageous stand under the previous dictatorship in seeking to uphold the principles of the Rule of Law.

In the situation which has developed since April 25, 1974, the Order of Advocates has continued to defend the same principles and according to its Bâtonnier "it has been and will continue to be, whatever the circumstances and whatever the prevailing policy, the champion of human rights and freedoms" (March, 1975).

In February 1975 the General Council of the Order issued a long statement which was reported fully in the press asserting the need for a truly independent judiciary, free from all pressures. "Advocates will only be truly free", it said, "if the judges also are free". "Criminal procedure of any kind requires the application, without any derogation on grounds of special circumstances, of proper rules of procedure at every stage, from the moment of arrest until the final conviction or acquittal. No political objective must be allowed to weaken the rights and liberties of the citizen".

In the summer of 1975 among many resolutions approved by the Order was one calling upon it to fight for a free and independent system of justice, without any special tribunals and with equality for all before the law. The following principles must be established:

- No-one to be detained unless accused of some offence, under pre-existing laws, and arrested and held in accordance with proper procedures and by persons properly authorised to do so;
- the right of access to a lawyer;
- the right of every accused person to a fair trial by an independent court;
- the rules relating to detention while awaiting trial to be strictly observed;
- the right of "habeas corpus" to be granted to all, civilian or military without exception.

All these principles, it stated, were being violated. The Order of Advocates was informed in November that the Revolutionary Council had accepted the right of access of lawyers to persons held in detention. This issue appears to be resolved but the others remain.

In a speech on the occasion of the appointment of the new Minister of Justice on October 8, 1975, the Bâtonnier protested against the existence of Special Tribunals at a time when "there exists the normal

judicial machinery which can, with the same vigour and firmness, punish the attacks made upon the democratic order". He also stressed that "pre-trial detention must not be converted into an instrument of punishment, stripped of all guarantees of defence rights, as in the time of the fascists". In the same speech he assured the Minister of Justice that the Portuguese advocates were ready to risk "their own freedom in defence of fundamental freedoms and human rights".

The International Commission of Jurists, which always supported the Order of Advocates in their struggle to defend the victims of fascism and to uphold the principles of the Rule of Law under the previous dictatorship, hopes that the Order will be able to persuade the revolutionary authorities in Portugal to adhere to these well-established principles.

Rhodesia: Anti-terrorist measures and Human Rights

Following the intensification of guerrilla activities along the north eastern border of Rhodesia since the end of 1972, the situation involving the human rights of Africans in the Tribal Trust Territories has steadily deteriorated. The guerrillas operate widely through the tribal trust lands. They have been able to penetrate deep into the country to the point of attacking farms only 40 miles north of Salisbury. In response to these attacks, the Rhodesian government has begun taking measures similar to those of an occupying army in the tribal trust territories, treating the Africans living there as if they were citizens of another country whose army they were fighting. As happens all too often with modern military operations it is the civilian population who suffer the most.

The dilemma of informing on guerrillas

Under section 48B of the Law and Order (Maintenance) Act all people are required to report any information they possess concerning the presence of guerrillas in Rhodesia. The most usual contact between the African tribesmen and the guerrillas occurs when the guerrillas call at night demanding food. In some cases they tell the tribesmen to report the fact the next day for their own protection. When this is not done, the tribesmen are placed in an impossible dilemma. If they are suspected of informing by the guerrillas they are liable to be shot or maimed by them in retaliation. Estimates given by the Rhodesian security authorities are that terrorists have murdered nearly 300 civilians most of them Blacks.¹ On the other hand if the security forces suspect that the tribesmen have information which they have failed to

¹ *To the Point*, 24 October 1975, p. 8

report, they are arrested and interrogated. There is abundant evidence that these interrogations are accompanied by torture and ill-treatment if the suspects do not readily supply the information they are suspected of possessing. The consequence of confession will be, at the least, a long term of imprisonment. The maximum penalty for failing to report information is death.

“ Protected Villages ”

Owing to the widespread assistance given to guerrillas the government has been removing the tribesmen from their villages and crowding them into camps known as “ protected villages ”. Many have been forced to abandon well-built houses in which they had invested a lifetime of savings and they are not compensated for this loss. Some of these villages have subsequently been destroyed to deprive the guerrillas of houses, crops and other property.

The camps have been heralded as “ growth centres ” by governmental officials. It is said that medical services, schools and other facilities can be provided in these areas whereas this is not feasible when tribes people live far apart. While this is theoretically possible, these are not provided in fact. Far from being “ growth centres ”, the camps have created serious health problems for their African inhabitants, have severely disrupted their social structure, and deprived them of some of their near subsistence level economic existence. Often they have to walk miles to the fields or areas in which they work and are not allowed to take food with them because it is feared they may volunteer it to the guerrillas or it may be commandeered from them. The long walk and deprivation of food is especially difficult on older people. A strict curfew is enforced and those who do not return to the compound in time run the risk of being shot, as some have been.

The conditions in the camps were described by the Catholic Commission for Justice and Peace in Rhodesia in 1975 in their publication “ The Man in the Middle: torture, resettlement and eviction ”:

“ The typical “ protected village ” is of about 100 acres in area and has an outer fence, the gates of which are guarded and locked during the night. Inside the village, usually centrally situated is an administrative headquarters fortified by a number of embrasures made of sand bags. This central enclosure is surrounded by its own double fence and behind this live the European District Officer and his African Assistants ”.

The Commission found toilet facilities in most of the villages to be inadequate and that their residents feared epidemics. The water supply was described as “ inadequate or dirty ”. Of one of the “ protected villages ” in the Chiweshe TTL the report quoted a doctor:

“ There is no water, no sanitation, shelters or poles for them to build the huts they need... It is like picking up animals and moving them from one field to another ”.

The Commission was also deeply concerned by the social disruption caused to the Africans by their transfer to the protected villages from their traditional kraals. "Life in a rural kraal" they point out "follows set patterns and the social position of each person is well-defined. Customary observances relate to men, women, children of different ages, strangers, visitors, males and females, young and old in a complex interplay which by its very richness has produced an identifiable culture giving meaning to every aspect of their daily lives. Courtesy, hospitality and respect for the aged are only some of the marks of this culture. The traditional way of life is conservative and conformist in every aspect and follows certain patterns. Thus, for example, a family unit will consist of a house for the man and his wife and a separate house for the young boys will be available, and a separate house for the young girls. The older people will also be separately housed and then there will be ancillary buildings for grain storage, small livestock, bathing and possibly toilet facilities and also, perhaps, accommodation for visitors. These buildings are grouped together but probably cover an area of between a quarter and one half an acre. In addition, there are certain essential communal facilities, the most important of which would be the men's meeting place—known as a "dare" (pronounced dah-ree) where the men meet together for social purposes or to deal with important matters of common interest. It can be appreciated, therefore, that the social "contentment" of rural African people is completely bound up with their deep need to observe these norms of privacy, relationships and customary structures which make up the everyday pattern of their lives. Anything disruptive of this structure will not be readily accepted and indeed may be fatal to their psychological well-being..."

This social pattern has been violently disrupted by the concentration of villages, and indeed of many villages, into the cramped space of a militarised camp with disturbing effects upon the life and ethic of the population. The Rhodesian authorities have been ambivalent in their attitude towards these villages. At times it is suggested that they are a temporary military necessity, at others that they are intended as a permanent and progressive social development. About 100,000 people have already been removed to "protected villages" and when the present programme is completed there will probably be double that number. Indeed, if as many expect, the guerrilla struggle is soon intensified, there may well be many more than that. One thing is clear. Not only have the protected villages not been accepted by the Africans, but they are deeply resented and constitute a negative factor in the government's much vaunted battle for the "hearts and minds" of the Africans.

Violence by the security forces

On 15 August 1974 "an Appeal to Conscience by Christian Leaders" was issued by the leaders of all the principal christian denominations in Rhodesia. This described ten specific cases as examples of

the brutalities suffered by African civilians at the hands of the security forces in the North East. These included the whipping of pregnant women, beating of people with sticks, pulling out of hair, threats of castration, and murder. The Churchmen called upon the government to initiate an impartial enquiry. This the Minister of Justice refused, saying that all allegations they had investigated were found to be without foundation. He challenged the alleged victims to bring civil actions in the courts for damages. He stated " My decision that a judicial enquiry is not necessary does not in any way interfere with or restrict the remedies that are open under our law to anyone who has been wronged ". He added that " the due process of law *is still and always will be* open to those who are aggrieved by offensive actions " (italics added).

Reports of ill-treatment of arrested persons continued to be received. The Minister was taken at his word, and a number of civil actions were instituted against him. In response to these, the government passed into law an Indemnity and Compensation Act effectively depriving the courts of jurisdiction over all actions of this kind, existing and future.

Indemnity and Compensation Act, 1975

The main purpose of this Act is made abundantly clear in the Preamble:

" ...whereas it is expedient that the President, Ministers, Deputy Ministers, the commanders and members of the military and other Security Forces of Rhodesia and certain other persons should be indemnified and protected from harm in respect of actions associated with the suppression of terrorism or the maintenance of public order; "

The Act prohibits courts from hearing cases based on acts committed after 1 December, 1972 if done " in good faith for the purposes of or in connection with the suppression of terrorism " (s. 4 (1)). The Senate received from its legal committee a report that the bill contravened the Declarations of Rights in the Constitution, but nevertheless passed the bill due to what they conceived to be its necessity. The Act applies to both civil and criminal proceedings. Rather than allowing the court, an impartial tribunal, to weigh the evidence and determine whether the requirements of section 4 (1) are met, the Statute provides that a certificate in writing by the Minister of Justice that an act was done for or in connection with the suppression of terrorism " shall be conclusive proof " of the fact (s. 4 (2)). Additionally the President (which in practice means the cabinet) may stop any proceedings already launched if he believes this to be in the national interest and that the act was done in good faith for the purposes of or in connection with the suppression of terrorism or the maintenance of public order (s. 4 (3)). This power has already been used to terminate the actions which had been brought against the

Minister of Justice and Law and Order in respect of the torture of suspects. Nowhere in the Statute are such critical terms as "good faith", "terrorism" or "the maintenance of public order" defined. Their interpretation is left to the unchecked discretion of the President and Minister of Justice. This applies even when they are defendants in the suit in question.

Neither the President nor the Minister are required to state their reasons. The courts are specifically forbidden to question the validity of either the President's or Minister's decisions (s. 4 (6)). Moreover they may not order the government to pay legal costs incurred by the plaintiff. They can, however, order the plaintiff to pay the defendants' costs if they consider that the action was instituted frivolously or vexatiously.

If legal proceedings are terminated under s. 4, the sole recourse is for the claimant to apply for compensation to a Board composed of members chosen by the Minister of Justice. The Statute merely provides that the Board "may... taking into account such matters as it thinks fit, direct that compensation in such form and for such amounts as it thinks fit be paid" (s. 6 (2)). Unless it chooses otherwise, the Board sits in private (s. 7 (6) (b)). It is not bound by the rules of procedure or evidence (s. 7 (6) (a)) and the claimant has no right to appear before the Board and argue his case (proviso to s. 7 (6)). The Board is not required to explain its reasons for its decisions to the claimant or the public (s. 8 (5)). The only appeal of a Board decision is to the Minister of Justice.

Attempts have been made to justify this Act on the basis of an obscure doctrine under the English common law to the effect that the civil courts will not entertain civil actions against the military authorities during a state of war. They will only do so, it is stated, after hostilities have ceased, and then the complainant may be met by an Act of Indemnity. This Bill by giving him a right to immediate compensation affords him, it is suggested, a better protection. In fact, this limitation on the powers of the civil courts is very rarely invoked and was never invoked in Rhodesia before this Act was introduced. It applies only in a situation where martial law exists and in an area where "war is still raging" (*Marais v. General Officer Commanding*, 1902 AC 109). The doctrine has not been invoked in the actions which have been brought by civilians against the armed forces in recent years in Northern Ireland, in some of which damages have been awarded against the security authorities. The level of terrorist activity in Northern Ireland has been at least as great as that in Rhodesia. Moreover, when replying to the debate on the Indemnity Bill, the Minister of Justice and Law and Order, Mr Lardner Burke, conceded that Rhodesia was not "at war" but in a "state of unrest".

In any event there is a world of difference between an Indemnity Act passed before and one passed after the events to which it relates. To exonerate the security authorities before they have committed illegalities amounts almost to an invitation to excesses. As Sir Robert

Tredgold, Chief Justice of the former Rhodesian Federation, pointed out in a letter to the Rhodesia Herald on 3 September 1975, with the single and significant exception of the South African Act of 1961, all previous Indemnity Acts:

“...have been passed after the war or insurrection to which they were related was over, and when all the facts that were ever likely to be known were available to Parliament. There is a vital distinction between these and giving an indemnity against future occurrences—a distinction that is analgous to giving a blank cheque, as opposed to a cheque for an ascertained amount”.

Sir Robert Tredgold went on to say:

“The rule of law is an essential pillar of our democratic system, and these two laws—the South African Statute and our new Act—outrage the rule of law and thus strike at the very roots of democracy.”

and later,

“The white man’s claim to be in Rhodesia and to retain power here is sometimes based upon dubious and outdated grounds. His strongest claim rests upon the fact that he brought, and has striven to maintain, a new and better system of law and government for all its people. Every time he makes an inroad into that system he seriously weakens his right to be here”.

Spain

During 1974 there has been a significant increase in activity by opposition groups in Spain. Some has taken the form of violent armed confrontations, but much of it has been by peaceful political and trade union action.

The Spanish Government has reacted to these “offensives” with severe repressive measures, giving rise to still further violence, and a number of right-wing groups (e.g. the “Soldiers of Christ the King”) have appeared which have been responsible for attacks on militant Basque separatists and their sympathisers.

Arising out of these events there have been a number of important political trials, as well as new decrees, which are of interest from the standpoint of the principles of the Rule of Law.

Trials of trade unionists

Trade union activity in Spain is strictly controlled and all action outside the framework of the officially recognised unions is prohibited under provisions of the Penal Code relating to “subversion and terrorism”. The unions are corporative in structure and the members have only limited rights to elect their workers’ representatives, trade union

officers having to be approved by the political authorities. Anyone who establishes other organisations or participates in any other sort of trade union activity of an unofficial nature is liable to be prosecuted for "illicit association" and imprisoned. The exercise of the right to strike is similarly prohibited and severely sanctioned. Workers' discontent with the official trade union organisation and its activities has resulted in their rallying around the so-called "Workers' Committees", parallel bodies to the official unions, in cases of specific grievances. As a rule, these committees have no permanent composition and crop up in the context of specific situations and conflicts, only to dissolve again afterwards. The government considers these organisations illegal and regards them as under the control of outlawed groups such as the Communist Party, the United Socialist Party, etc. Thus their members, officers and anyone supporting them are guilty of the crime of "illicit association" and are subject to penal sanctions of from two to twenty years imprisonment (ss. 173 and 174 of the Penal Code).

In the course of 1975 there have been several trials, which have acquired considerable notoriety, against persons accused of belonging to Workers' Committees. In two of these, the International Commission of Jurists was represented by Mr Samuel Suckow of the New York Bar as an observer. One was an appeal before the Second Division of the Supreme Court of Spain in Madrid, held in February 1975, against the decision in "Trial No. 1001" (popularly known as "The Carabanchel Ten" trial). The ten accused, who were sentenced at first instance to long periods of imprisonment, had been charged with having participated in the trade union activities of Workers' Committees, and in some cases of having held office in them. The real thrust of the trial was, however, that they had worked on behalf of independent trade union organisations. The Supreme Court upheld the convictions, although it considerably reduced the sentences on the grounds that it had not been proved that the accused were trade union "officers".

The other case, held in March 1975, was a trial before the Public Order Tribunal of Madrid of two lawyers and eight workers of the Barcelona SEAT automobile plant for forming an illicit organisation (a Workers' Committee) and spreading illegal propaganda. The issue of the rights of the legal profession was raised in this case as the lawyer defendants were accused on the basis of conferences they had held in their offices with their trade union clients. The Barcelona Bar Association appointed its president as defence counsel to the two lawyers and made several official statements warning against the dangers inherent in considering the activities of lawyers in the labour field as criminal. The tribunal acquitted the accused, in spite of the fact that the public prosecutor had called for sentences of from one to eight years imprisonment. Nevertheless no decision was given on the substance of the case, on the existence or otherwise of freedom of association and the professional rights of lawyers. There was simply a statement that there was insufficient evidence on which to convict.

Repression of terrorism in the Basque Provinces

In the face of the activities of armed groups, and in particular a number of attacks resulting in the death of members of the police forces, the Spanish Government responded with increasing repression, felt particularly in Catalonia and the Basque Provinces. Legislative Decree No. 4/75 of 25 April 1975 decreed a "state of exception" in the provinces of Guipuzcoa and Biscay for a period of three months. By virtue of this decree, Articles 12, 14, 15, 16 and 18 of the Fuero de los Espanoles (the Constitution of Spain) were suspended. These articles deal with freedom of expression and movement, the inviolability of private residence, the rights of association and assembly, and the requirement that detained persons be brought before a judge for judicial investigation or release within a maximum of 72 hours after arrest.

According to the report of a mission sent by Amnesty International, composed of an American attorney, Thomas Jones, and Professor Burkhard Wisser of the Federal Republic of Germany, who visited the provinces of Guipuzcoa and Biscay from 19 to 29 July 1975, the intervention of the police and military forces involved serious breaches of human rights. According to the report, a considerable number of those arrested under the state of exception were tortured by beatings, cigarette burns, immersion in water until near asphyxiation, protracted periods without sleep, staged executions, sexual threats and attacks, and other forms of violence. They underwent exhausting and protracted questioning for considerable periods of time. The members of the mission estimated at more than 1000 the number of persons detained in each of the provinces mentioned. They also found that the abuse of power by the police and the military extended to other regions of Spain, including Barcelona and Madrid.

Decree Law concerning the Repression of Terrorism

The response to this repression was an increase in the violence, resulting in further killings of members of the police forces, responsibility for which was claimed by groups such as FRAP (the Patriotic Anti-Fascist Revolutionary Front) and E.T.A. (the Basque separatist revolutionary group). Many arrests were made and new trials were launched before courts martial.

On 26 August 1975 the Head of State, with the approval of the Cabinet, issued Legislative Decree No. 10/75 concerning the Repression of Terrorism.

In September 1975 the International Commission of Jurists received a petition signed by 488 Spanish Basques who are members of the legal and other professions. They asked the Commission to publish a critical analysis of this decree as it is an offence punishable with 12 years imprisonment for any Spaniard to criticise it in Spain.

Three of the 5 Spaniards executed on 27 September 1975 were tried in accordance with the new summary procedures and sentenced under the new mandatory death sentence provided for in this decree. These provisions were applied retroactively.

The decree refers to "communists, anarchists, separatists and all who advocate or use violence as a means of political or social action". By this means, although the decree is described as a decree law on terrorism, it in fact extends to anyone supporting "communists, anarchists or separatists" as these terms are understood in the Spanish courts. For example, it has been held that all unofficial workers trade union committees are deemed "communist", and Basques or Catalans or others who seek to establish their minority rights may be classed as "separatists".

The decree makes mandatory the maximum sentences under the penal code for all offences committed against the government, members of the armed forces, the security forces or any other public officials, with a mandatory death sentence if the offence results in the death of any such person.

It is a criminal offence for any citizen not to denounce to the authorities any place of which he has knowledge which is, or even could be, used as a hiding place for offenders against the decree.

The decree creates several new offences. Among these are:

- to defend or advocate any ideology covered by the decree, either by overt or covert means;
- to express approval of or seek to justify acts of terrorism;
- to praise those who commit or participate in acts of terrorism;
- to seek to minimize the responsibility of the offenders covered by the Decree Law by means of criticisms, express or implied, of the sanctions imposed by the law;
- to seek to impair the independence or prestige of the judiciary by means of demonstrations of solidarity with accused or condemned persons.

These provisions are so widely drawn as to make it an offence akin to terrorism itself, to criticise in any way the laws or administration of justice in relation to "communism, anarchism, separatism or terrorism". As an illustration, a Spanish press agency asked its subscribers to cancel a despatch containing a statement by the Pope in connection with the September trials for fear that it would be considered a violation of this decree. Any violation of the decree in the press may lead to the closure or suspension of the journal in addition to the imprisonment, fine, suspension or dismissal of the author and editor.

Offences against this decree may be tried either under emergency procedures before civilian courts or by the most summary procedure available before military tribunals. In the latter case the defence counsel have only 4 hours in which to prepare their defence, a wholly inadequate period for any serious offence, and above all in a capital case.

Defence lawyers who disturb the proceedings in disregard of warnings by the tribunal may be discharged from the proceedings and they are then debarred for a year from defending in all such cases.

The decree also overrides for a two year period two fundamental rights supposedly guaranteed under the Spanish Constitution. In the Preamble to the decree it is explained that "no honourable or patriotic citizen will consider himself disadvantaged by the occasional diminution of his constitutional rights" and that "these small sacrifices will be adequately compensated for by the peace and security they will bring to the whole community". Under Article 15 of the Constitution all arrested persons must be brought before a judge or set free within 72 hours. The new decree extends this to a period of 5 days or, on the authority of a judge or military tribunal, to 10 days. Under Article 18 of the Constitution no private domicile may be searched except under a warrant issued by a judge or magistrate. Now, under the decree, police or military personnel can search on the authority of their local commanding officer without a judicial warrant.

The claim in the Preamble to this decree that the new procedures it contains are similar to those recently established in England, France and Italy and under consideration in Germany is without foundation. None of these countries has any equivalent to the decree's extreme summary procedure before military tribunals with no rights of appeal. This procedure has reduced the system of justice in Spain to the level of that imposed by the military Junta in Chile, a system which has been universally condemned by all jurists who respect the Rule of Law.

Death sentences and Execution of five Spaniards

Against a background of escalating violence and intensive police and military action, four trials took place which aroused world wide interest:—

(1) The first took place on 28 August 1975 before a Court Martial at Burgos. This followed the procedure in force before Decree Law No. 10/75. The Court Martial pronounced two death sentences. The sentence of the principal defendant, Garmendia, was later commuted to thirty years' imprisonment. The other defendant, Angel Otaegui, was executed. Both were accused of the murder of a policeman, the local chief of the intelligence service, at Azpeitia near San Sebastian in April 1974, and of belonging to the E.T.A.

The International Commission of Jurists sent as an observer an eminent Swiss jurist, Maître Edmond Martin-Achard, former Batonnier of the Geneva Bar. Other jurists representing Amnesty International and the International Federation for the Rights of Man were also present. The international observers were refused entry into the courtroom. The trial took place in a military camp outside Burgos with armed soldiers and military lorries blocking access to roads and preventing anyone, including the families of the accused, from entering the area where the court was sitting. Only a few Spanish lawyers and reporters were allowed to enter. Through them it was possible to find

out what took place. The Court Martial proceedings were completed in only five hours, and both defendants were sentenced to death pursuant to section 294 bis of the Code of Military Justice. Garmendia was found to be the actual perpetrator of the crime and Otaegui to be an informer who had made the crime possible by the information he had given to Garmendia.

Garmendia had been shot through the head at the time of his arrest in August 1974 and had undergone brain surgery. Immediately after the operation while still in an extremely serious condition and with damaged brain tissue, he was questioned by the military Investigating Judge. According to the latter, he acknowledged his guilt but could not sign his confession because he was in such a precarious state of health. His finger-print was placed on the confession. While in the same condition and under similar circumstances, he is alleged to have confirmed his statement to the police. Subsequently, in a signed statement before the Investigating Judge, which was the first statement bearing his signature, he denied the confession and stated that he had not perpetrated the murder of the policeman since he had been in France at the date of the act. At the hearings, the witnesses to the crime did not identify Garmendia as the person who shot the policeman.

Two questions were raised by the defence as to Garmendia's condition. One was whether he was in a fit state to be questioned at the time of his alleged confession. The other was whether he was in a fit state to stand his trial. The public prosecutor asked two military doctors who had treated Garmendia whether he was "completely insane". They replied "not completely". On the basis of this answer the court was satisfied as to the admissibility of the confession. The issue of his mental capacity at the time of the trial seems to have been treated by the Court as having been decided before the trial by the General Military Command which handed the prisoners over for trial. The Command had apparently already decided that Garmendia was in full possession of his mental faculties and was in a fit condition to stand trial. During the five hours of the hearing Garmendia appeared to be in a dazed state and hardly spoke throughout the proceedings. He was not questioned either by the President of the Court or by the prosecutor. Not even the usual formal questions as to his identity were put to him at the beginning of the proceedings, although this is a normal requirement under Spanish law.

According to Maître Martin-Achard, the Court Martial "formed its judgment primarily on the basis of the confessions obtained from the accused during the initial phases of the police inquiries and the questioning of the investigating judge, and did not come to an independent opinion. When one considers under what conditions certain confessions are obtained through "summary" procedures, this conception of justice can only be considered profoundly shocking". This was all the more distressing in Garmendia's case since "he is not and was not (including at the time charges were laid) in full possession of his faculties after the bullet injury to his head".

In his opinion it was debatable whether Otaegui was a co-author or merely an accomplice, on the assumption that the crime was committed by Garmendia. As an accomplice he would not be liable to the death sentence. To be convicted as a co-author it would have to be shown that without the part he played the crime could not have been committed. Otaegui was accused of having indicated to Garmendia the usual route taken by the policeman on his way home. Nevertheless, his sentence to death was confirmed on appeal and he was executed on 27 September 1975, even though Garmendia's sentence was commuted to thirty years' imprisonment. It must be assumed that this was on the grounds of Garmendia's mental and physical state, which further calls into question the validity of his conviction.

(2) Another Court Martial at Madrid on 11 September 1975 was also held on the basis of the legislative provisions in force before the enactment of Decree Law 10/75. The Court passed three sentences of death, one of thirty years' and another of twenty-five years' imprisonment. Subsequently two of the death sentences were commuted to thirty years' imprisonment and one was carried out (José Humberto Baena) on 27 September 1975. The public prosecutor had asked for five death sentences, charging the accused with the murder of a policeman in July 1975 in Madrid.

At the beginning of the trial, the defence counsel moved for an adjournment, claiming that the proceedings were null and void on the grounds of serious defects in the procedures followed and of lack of jurisdiction in the military court. Their motion was immediately rejected. They then applied for certain witnesses to be called, including the witnesses actually present at the murder (two women and a policeman who was wounded in the attack) and the expert who made a ballistic examination of the weapons which allegedly had caused the death. In spite of the seriousness of the charges, all of the motions of the defence were denied on the pretext that the facts had already been "sufficiently investigated". The defence counsel argued also that the confessions—the sole basis for the public prosecutor's case—had been obtained by means of torture and that their clients only admitted to being members of FRAP but categorically denied any participation in the homicide. Whenever counsel referred to torture they were interrupted by the Court. It should be added that the families of all of the accused had laid formal, detailed and circumstantiated criminal informations before the Investigating Judges in Madrid concerning the tortures undergone by the accused.

(3) At another Court Martial in Madrid on 17 September 1975 which was governed by the rules of "extra-summary" procedure enacted in Legislative Decree No. 10/75, there were five death sentences and one of thirty years' imprisonment. Subsequently three of those condemned to death (including two pregnant women) had their sentences commuted to thirty years' imprisonment while the other two were executed (José L. Sanchez and Ramon Garcia Sanz) on 27 September 1975.

The public prosecutor had asked for five death sentences, charging the accused with having murdered a policeman in Madrid in August, 1975.

Owing to their numerous objections while the public prosecutor was stating his case, counsel for the defence were excluded from the public hearings at the Court Martial for "persistent interruption". They were replaced by five army officers who were supposed to act as defence counsel although none of them had any legal training. The lawyers who were expelled complain that the evidence which they proposed to the court was refused, in spite of the fact that the public prosecutor was calling for death penalties. They state that their clients had admitted only to belonging to FRAP but denied any involvement in the death of the policeman. They state further that all of the confessions, the sole evidence on which the decisions were based, were extracted by the most severe torture.

(4) At a Court Martial in Barcelona, sitting on 19 September 1975 and governed by the "extra-summary" rules of procedure provided for in Legislative Decree No. 10/75, one death sentence was pronounced and executed (Juan Paredes Manot). He was accused of having murdered a policeman in the course of an armed attack on a bank and of belonging to the E.T.A.

In the face of world-wide protests and appeals for clemency, these five condemned men were shot at daybreak on 27 September 1975. The only act of mercy was the decision taken at the last moment to have the executions carried out by a firing squad rather than by "common garroting" (a steel ring which breaks the neck).

The International Commission of Jurists made an appeal for clemency which, while stating that it did not condone terrorism, deplored the summary nature of the trials. On the day of the executions a public statement was issued by 74 members of 11 European sections and the US section of the International Commission of Jurists who were then meeting in Amsterdam. They protested against the defective legal procedures followed in the trials which resulted in the five executions.

Commentaries

The UN Human Rights Covenants— Soon to be in Force

The entry into force of the two United Nations International Covenants on Human Rights is an important landmark in the development of international law. The Covenant on Economic, Social and Cultural Rights comes into force in January 1976, three months after its 35th ratification.¹ At the time of writing, the Covenant on Civil and Political Rights awaits its 35th ratification, but this may have been deposited by the time this Review is published.² These Covenants were approved by the General Assembly and opened for signature and ratification on December 16, 1966. They are the first general international treaties on human rights intended to be of universal application. Till now, all such treaties have either been limited to particular subjects, such as the Geneva Conventions of 1949 on humanitarian law, the Genocide Convention and the Convention on the Elimination of Racial Discrimination, or have been conventions limited to particular regions, such as Europe or America.

Pending the entry into force of the Covenants a growing number of international lawyers have asserted that the principles proclaimed in the Universal Declaration of Human Rights are already binding upon member states of the United Nations. This claim has been based primarily upon the contention that the Declaration sets out and defines the human rights which all Member States have a duty to promote under the U.N. Charter. It is also suggested that the Universal Declaration, by its general acceptance, has matured from being a mere statement of principles recommended by the General Assembly, and has become an integral part of customary international law.

Persuasive as these arguments may be, it must be recognised that the binding effect of the Covenants upon the States Parties is more precise and more certain than that of the Universal Declaration. From the traditional conception of international law, a treaty to which a state is a party surpasses in legal value the injunctions contained in a declaration, even when as widely accepted as the Universal Declaration of Human Rights. That many States think in this way can be inferred from the reservations on this score which they invoked at the time of the adoption of the Universal Declaration, as well as from the more restrictive wording used in the Covenants as compared with the Declaration. States tend to be much more circumspect with respect to binding treaty obligations than to declarations.

¹ The ratifications have been made by Barbados, Bulgaria, Byelorussian Soviet Socialist Republic, Chile, Colombia, Costa Rica, Cyprus, Denmark, Ecuador, Finland, German Democratic Republic, Germany, Fed. Rep. of, Hungary, Iran, Iraq, Jamaica, Jordan, Kenya, Lebanon, Libyan Arab Republic, Madagascar, Mali, Mauritius, Mongolia, Norway, Philippines, Rumania, Rwanda, Sweden, Syrian Arab Republic, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Uruguay and Yugoslavia.

² The same countries have ratified this Covenant with the exception of the Philippines.

The major limitation of the Covenants is contained in Article 4 of the Covenant on Civil and Political Rights which permits State Parties to take measures in derogation of their obligations under the Covenant in times of public emergency which threaten the life of the nation, as long as the measures are not discriminatory solely on the ground of race, colour, sex, language, religion or social origin (political opinion is not included as a ground of non-discrimination). No derogations may be made with respect to: arbitrary deprivation of life (Art. 6); torture or cruel, inhuman or degrading treatment or punishment (Art. 7); slavery and servitude (Art. 8 (1) and (2)); imprisonment on grounds of inability to fulfil a contractual obligation (Art. 11); holding as criminal offences acts or omissions which did not constitute such offences, under national or international law, at time committed (Art. 15); right to recognition as a person before the law (Art. 16); freedom of thought, conscience and religion (Art. 18).

A right to derogate may be read into the negative formulation in Article 29(2) of the Universal Declaration that in the exercise of rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society. Nevertheless, the affirmative grant of the right to derogate from many of the rights contained in the Covenant on Civil and Political Rights appears to go beyond what could be justified in terms of Art. 29(2) of the Universal Declaration.

The Covenants, although in some cases adding rights not mentioned in the Universal Declaration, have left out at least three rights which had a prominent place in the Universal Declaration. These are the rights of political asylum (Art. 14 (1)); the right of everyone to a nationality (Art. 15 (1)) (limited in the Covenant only to children); the right not to be arbitrarily deprived of nationality or denied the right to change nationality (Art. 15(2)); and the right to own property without arbitrary deprivation (Art. 17 (1) and (2)).

Among the rights specifically protected in the Covenants, which are either not covered or do not have the same emphasis in the Universal Declaration are: the right of peoples to self-determination, including the right to freely determine their political status (Art. 1.1); the right of peoples to freely dispose of their natural wealth and resources (Art. 1.2); the rights of detained persons to humane treatment (Art. 10); the prohibition of imprisonment for inability to fulfil a contractual obligation (Art. 11); the right of an alien lawfully on the territory of a state not to be expelled except pursuant to a decision reached in accordance with law (Art. 13); the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion and to use their own language (Art.27).

In other respects the Covenants and the Universal Declaration are in line with one another, except that the Covenants often go into much greater detail on how the rights should be implemented.

Clearly the entry into force of the Covenants raises the question of the legal status of the Universal Declaration. The Covenants either limit, extend or define many of the rights contained in the Declaration. Where the documents are not synonymous, acceptance of the legal validity of one implies that the other has a lesser status. If the Covenant permits a derogation from a particular right, it can hardly be argued that the derogation is not operative because the language of the Declaration is not limited. If this is the

legal situation with respect to State Parties to the Covenants can it reasonably be argued that states not parties to the Covenants remain bound by the wider terms of the Declaration, i.e. that the act of ratification of the Covenants is a means of limiting a state's obligations? This also does not appear reasonable.

The logic of the situation appears to lead to the result that the Covenants will become the detailed standard of international law with respect to human rights, at least in so far as the State Parties are concerned, and that the Universal Declaration remains as an authoritative statement of principles almost universally accepted and having strong persuasive authority.

Another question raised by the entry into force of the Covenants is the rôle of the existing enforcement procedures. The major problems in the field of human rights since World War II have been concerned less with the definition of human rights than with their enforcement or implementation. In this realm important procedures have been introduced in the United Nations system, particularly in the Economic and Social Council and its subsidiary bodies, which permit the consideration of complaints. In particular there is the procedure under ECOSOC resolution 1503 for considering complaints of a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms..."

Limited as the effectiveness of these procedures may be, it would be unfortunate if the progress made in this particular area should now be put in question by the new procedures to be established under the Covenants. It can well be argued, both in terms of the provisions of the Covenants themselves and the purposes that the procedures are intended to attain, that they are not mutually exclusive or contradictory and that the new procedures do not negate the need for continuing the Resolution 1503 procedures.

The first and most obvious distinction is that the Resolution 1503 procedures deal with an aggravated situation of "consistent" and "gross" violations of human rights which by their nature affect or endanger the entire international community. In such a case the State is answerable regardless of whether it has ratified the Covenants. The procedures under the Covenants are directed more towards the application of group and individual rights specified in the Covenants.

This distinction is recognised in Arts. 44 and 46 of the Covenant on Civil and Political Rights. Art. 44 states that the provisions for implementation of the Covenant "shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations..." and Art. 46 provides that, "Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations... which define the respective responsibilities of the various organs of the United Nations... in regard to the matters dealt with in the present Covenant".

As the ECOSOC has jurisdiction over human rights matters under the Charter of the United Nations it would appear that its procedures for dealing with consistent patterns of gross violations should not be impaired by either Covenant.

The implementation provisions of the Covenants are of three kinds, namely periodic reports, inter-state complaints and individual complaints.

The basic implementation tool of the two Covenants is the periodic reports that governments must make on their efforts to give effect to the rights provided therein. Under the Economic, Social and Cultural Covenant these reports go to the Secretary-General of the U.N. for transmittal to the

Economic and Social Council. The Council may then refer a report to the Commission on Human Rights for study and general recommendation.

The Covenant on Civil and Political Rights on the other hand, establishes its own organ, a Human Rights Committee, with members elected in their personal capacity, to which government reports are to be directed. The Committee after studying a report may make its own report and make recommendations which it then transmits to the States Parties. It may also transmit its report and recommendations to the Economic and Social Council.

The effectiveness of this procedure in obtaining improvement in implementation of the human rights guarantees will depend in large measure on the scope of the procedures that the Committee will adopt in performing its functions. For example, in order to be able to comment authoritatively on a governmental report, will it merely rely on the information contained in that report or will it seek information from other reliable and impartial sources.

Art. 41 of the Covenant on Civil and Political Rights, allows for a declaration by a State Party that it recognizes the competence of the Committee to receive and consider communications (i.e. complaints) by any other State Party to the effect that it is not fulfilling its obligations under the Covenant, provided that that other State has made a similar declaration.

This would be a procedure analagous to one existing under the European Human Rights Convention. Unfortunately only three States have thus far made Article 41 declarations. All of them are from Scandinavia.

Finally, the Covenant on Civil and Political Rights has appended to it an Optional Protocol which when ratified by a state permits individuals subject to its jurisdiction to file complaints before the Human Rights Committee that they are victims of violations of rights granted in the Covenant. This Protocol will come into effect at the same time as the Covenant, as it has already obtained 12 ratifications³, one more than was needed to bring it into force.

Certainly the more advanced forms of enforcement, individual petitions and complaints by other States will make an important further advance in the development of human rights law. But even the requirement that a state must make reports on how it deals with human rights matters, and the fact that these can be discussed by experts and submitted to United Nations bodies, constitute an important political and psychological element in inducing compliance with the Conventions' standards.

Individual Petitions: the Irresolution of Governments

In a report prepared for the Human Rights Committee of the International Law Association, which was approved in principle by the Association at its 75th Anniversary Conference at Brussels in 1948, the late Professor Hersch Lauterpacht wrote: "While implementation through the municipal law of States must constitute the normal means of enforcement,

³ Barbados, Colombia, Costa Rica, Denmark, Ecuador, Finland, Jamaica, Madagascar, Mauritius, Norway, Sweden, Uruguay.

implementation through international agencies is of the essence of an International Bill of Rights; the full recognition of the effective right of petition must constitute the main feature of the scheme of international implementation of the Bill of Rights...¹ In a similar vein, the International League for the Rights of Man, in a memorandum submitted to the Commission on Human Rights in 1950, stated, "in the opinion of the League, the foundation of all implementation measures is the right of complaint, the right of petition of individuals and groups of individuals to an international authority".² These statements, made at the commencement of the United Nations activities in the field of human rights, illustrate the cardinal importance of individual petition in the protection of human rights at the international level.³

The issue of granting individuals the right of petition to an international instance was strenuously argued in the drafting of the International Convention on the Elimination of All Forms of Racial Discrimination and of the International Covenant on Civil and Political Rights. The question was seriously disputed on grounds of principle, doctrine and ideology. A number of governments fought valiantly for the right of individual petition present in article 14 of the International Convention on the Elimination of Racial Discrimination and in the Optional Protocol to the International Covenant on Civil and Political Rights. Having won their victory, however, few of them have given these procedures the support which was necessary to make them effective.

Article 14 of the Convention on the Elimination of Racial Discrimination, which was adopted in 1965, has so far received only four declarations (Costa Rica, Netherlands, Sweden, Uruguay). It needs ten to bring it into force. The Optional Protocol to the International Covenant on Civil and Political Rights will, however, enter into force at the same time as the Covenant itself, since it has already received two more than the necessary ten ratifications. The Covenant itself requires only one more ratification to achieve the necessary 35 to bring it into force. The entry into force of the Protocol will be a landmark in the history of human rights, but it needs to be accepted and supported in the near future by more States. Otherwise, its actual effect will be minimal.

I. Individual petitions under the International Convention on the Elimination of All Forms of Racial Discrimination

Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that a State Party to the Convention may at any time declare that it recognizes the competence of the Committee on the Elimination of All Forms of Racial Discrimination to

¹ Article 9 of his Draft International Bill of the Rights of Man.

² E/CN.4/NGO/4, 30 March 1950, para 11.

³ See further, Paul Adam "Advancement of Human Rights—European Convention Gives Individual Right of Petition", 2 United Nations Review, No. 1 (July 1956) pp. 38-41; J. W. Brugel, "The Right to Petition an International Authority", 2. I.C.L.Q. (1953) pp. 542-563; A. H. Robertson, "The European Commission on Human Rights: The Right of Individual Petition", in A. H. Robertson, Human Rights in Europe (1963), pp. 49-55; R. St. J. Macdonald "Petitioning an International Authority" in A. E. Gottlieb (Ed.), Federalism, Minorities and Human Rights (1968) pp. 121-144; John Humphrey "The Right of Petition in the United Nations", Human Rights Journal, vol. IV, p. 463 et seq.

receive and consider communications from individuals, or groups of individuals, within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

During the debate on the article in the Third Committee of the United Nations General Assembly, the Representative of France stated that the article, if adopted would introduce for the first time on the universal plane a "new idea of the right of petition (for individuals) into international law".⁴ After its adoption it was stated that it "introduced a new concept of international law"⁵; that it "stated a new principle of international law".⁶

Arguing in favour of granting individuals the right of petition, Mr. Lamptey (Ghana), who introduced the proposed article, said that it was the sincere wish of many delegations to use the right of petition and communication as an effective weapon against discrimination.⁷ Mr. Mommersteeg (Netherlands) said that... his delegation took the view, based on principle and practice, that the right of individual petition was the most effective means of giving effect to human rights in general, and the Convention on the Elimination of All Forms of Racial Discrimination in particular. As a matter of principle, it was desirable that the human being whose rights were violated or who was the victim of discrimination should be able to obtain redress without depending on the goodwill of the State. It was impossible to speak of human rights unless the possessor of those rights had the means of defending them. His delegation believed that the State and its organs had a primary duty in safeguarding human rights. However, if the State failed to fulfil that duty, the international community must serve in its stead, as was evident from Article 55 and 56 of the Charter.⁸ The Canadian representative, Mr. MacDonald, stated that "the submission of petitions was... essential... Individuals should, where necessary, have access to international authorities competent to evaluate national rules relating to human rights".⁹ Miss Tabara (Lebanon) stated that her delegation favoured an effective international petition system which would constitute a first step towards the establishment of machinery guaranteeing the rights of the individual at the international level.

Article 14 of the Convention was adopted in the Third Committee by 66 votes to none with 19 abstentions.¹⁰ This was not a recorded vote, so the names of the countries who voted for Article 14 is not known. However, of the countries who were present at the time of the vote, the following 61 countries subsequently ratified the Convention:—

⁴ Mr. Combal (France), GAOR A/C.3/SR.1357, p. 393, para 24. In fact the right of individual petition on the universal plane first came into effect under ECOSOC Resolution 1503 in relation to communications alleging a "consistent pattern of gross violations of human rights", see ICJ REVIEW No. 9, p. 5.

⁵ Mr. Bosovic (Yugoslavia), A/C.3/SR.1363, p. 433, para 21.

⁶ Mr. Al-Rawi (Iraq), *Ibid*, para 20.

⁷ A/C.3/SR.1355, p. 384, paras 38-39.

⁸ A/C.3/SR.1355, p. 384, para 45.

⁹ A/C.3/SR.1357, paras 7-8.

¹⁰ A/C.3/S.R. 1363, p. 433, para 19. The article was voted upon separately only in the Third Committee. In the General Assembly, the Convention was voted upon as a whole and was adopted unanimously.

Algeria, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Byelorussia, Canada, Central African Republic, Chile, China, Costa Rica, Cuba, Czechoslovakia, Denmark, Egypt, Finland, France, Ghana, Greece, Haiti, Hungary, Iceland, India, Irak, Iran, Jamaica, Jordan, Lebanon, Libya, Madagascar, Mali, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Peru, Philippines, Poland, Rumania, Rwanda, Senegal, Sweden, Syrian Arab Republic, Trinidad and Tobago, Tunisia, Ukraine, Union of Soviet Socialist Republics, United Kingdom, United Republic of Cameroon, United Republic of Tanzania, Upper Volta, Venezuela, Yugoslavia.

Of these 61 States, only three have made the declaration under Article 14, namely Costa Rica, Netherlands and Sweden. To-date the Convention has been ratified by a total 85 States, but only one other declaration has been made under Article 14, by Uruguay. It is difficult to understand why so few of the countries which voted in favour of the Article have followed it up by making the necessary declaration. A few may have valid reasons for not doing so, but for the great majority it is hard to think of one.

In the Committee on the Elimination of Racial Discrimination in 1974, during the discussion of its role in the Decade of Action Against Racial Discrimination, a proposal was made by Mr. P. J. G. Kapteyn that the Committee should invite the General Assembly "to draw the attention of States Parties to the Convention to the usefulness of the implementation of Article 14 as one of the means of promoting the effectiveness of the Convention". Despite not inconsiderable opposition, the proposal was adopted by 7 votes to 2, with 3 abstentions.¹¹

In the Third Committee at the twenty-ninth session of the General Assembly, Mr. Speekenbrink (Netherlands) proposed that the resolution to be adopted by the General Assembly on the report of the Committee should include the following paragraph: The General Assembly "endorse the recommendation of the Committee to draw the attention of States Parties to the convention to the usefulness of the implementation of Article 14 as a means of promoting the effectiveness of the Convention". However, the paragraph was rejected by 33 votes to 32 with 28 abstentions.

In the General Assembly at its 30th session in 1975 a proposal was moved by Uruguay to the resolution on the status of the International Convention on the Elimination of Racial Discrimination whereby the General Assembly would "appeal to States Parties to the Convention to study the possibility of making the declaration provided for in Article 14 of the Convention". The proposal was adopted in the Third Committee by 61 votes to 12, with 39 abstentions and the resolution as a whole was adopted in the Committee by a vote of 106 for, none against with six abstentions. This is a typical example of governmental attitudes within the United Nations. A proposal to the General Assembly "to draw the attention of States Parties to the usefulness of the implementation of Article 14 as one of the means of promoting the effectiveness of the Convention" is rejected, but the more innocuous proposal to appeal to States Parties to the Convention to *study the possibility* of making the declaration is accepted.

¹¹ Report of the Committee on the Elimination of Racial Discrimination, GAOR 29th Session, Supplement No. 18 (A/9618, p. 82), paras. 49-53 and pp. 82-83, Decision 2 (X).

II. Individual Petition under the Optional Protocol to the International Covenant on Civil and Political Rights

The Optional Protocol was adopted in 1966 by 59 votes to 2 with 32 abstentions. The following are the governments which voted in favour of the Optional Protocol:—

Afghanistan, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Cyprus, Denmark, Dominican Republic, Ecuador, Finland, France, Ghana, Guatemala, Honduras, Iceland, India, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Jordan, Kenya, Lebanon, Libya, Luxembourg, Madagascar, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Philippines, Spain, Sudan, Sweden, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Upper Volta, Uruguay, Venezuela, Zambia.

Of these 59 States, only 10 have subsequently ratified the Protocol, namely Colombia, Costa Rica, Denmark, Ecuador, Finland, Jamaica, Madagascar, Norway, Sweden and Uruguay. Two other States, Barbados and Mauritius, have also ratified the Protocol, making a total of 12.

III. Conclusion: The Ambivalence of Governments

The problem presented here in relation to individual petitions is merely one part of the gap between the words and actions of governments. When the Covenants on human rights enter into force, it will have taken at least ten years from the time of their adoption to the time of entry into force. Each year the General Assembly adopts without dissent resolutions calling on member States which have not yet done so to ratify the Covenants and the Convention on the Elimination of Racial Discrimination. Many of the governments which vote for these resolutions each year are the very ones which have made no serious attempt so far to ratify these instruments. What is international public opinion to make of these divergencies between protestations and practice?

The modest results yielded by the exhortation of the General Assembly through annual resolutions, and the wide divergencies between the protestations and the practice of governments, raise the question whether enough is being done within and outside the United Nations system to secure ratification of human rights treaties and of declarations recognizing the right of individual petition. Is it enough merely to have an annual resolution? It is to be hoped that the Secretary-General through the head of the Division of Human Rights will now make strenuous efforts to secure further ratification and declarations, and seek to ascertain from governments their reasons for holding up ratification or declarations. Where needed, technical assistance could be offered to assist the process.

Non-governmental organisations, for their part, should seek to bring pressure upon governments to show some real commitment by ratifying human rights treaties such as the International Covenants, the Optional Protocol and the International Convention on the Elimination of Racial Discrimination. With the Covenants coming into force shortly, governments can no longer stand on the sidelines. They should be pressed to identify themselves with the cause of human rights in a genuine way.

G. P. R.

The UN Sub-Commission on Discrimination and Minorities

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities held its 28th Session in Geneva from 25 August to 12 September 1975. The Sub-Commission's members serve as independent experts and not as representatives of their respective governments or nations. This year's discussions covered a wide field of contemporary human rights issues.

The Problem of Assistance given to South Africa's Minority Regimes

The Sub-Commission first considered a report by Mr Khalifa (Egypt) on the consequences of assistance given by certain states to the racist and colonial regimes in Southern Africa. Mr Khalifa attacked the idea that investment in South Africa would help Blacks there. He noted that during the boom years of the 1960's the plight of Blacks had not improved concurrently with that of the white population. The effect of investments was to attract migrant whites and to enable the country to spend more of its resources on defence, both of which strengthen the position of the minority regime. Foreign capital also serves to link the South African economy more closely with western economic interests. It makes it easier for the South African Government to command political support and sympathy in countries from which such investment was made. He singled out the United Kingdom and the United States which provided more than 75% of the foreign investments in South Africa. He concluded that the only way to combat racism was to withdraw all economic and military assistance from South Africa.

Under the item relating to the question of the violation of human rights and fundamental freedoms in all countries, with particular reference to colonial and other dependent countries and territories, the Sub-Commission expressed its concern over the situation in three countries: Chile, Cyprus and Angola.

Chile

The Sub-Commission was especially concerned over the denial by the Chilean Junta of permission for an ad hoc Working Group appointed by the UN Commission on Human Rights to enter the country to investigate allegations of torture and deprivation of many other basic human rights. This action was contrary to a promise that had been made by the Chilean authorities. During the debate it was stated that some 2,000 persons had disappeared and were still missing following their detention since September 1973, and that at the moment more than 8,000 persons were under arrest for political reasons. Similar arrests were still taking place, and the torture of political prisoners continued.

An Observer from Chile, speaking under the right of reply, denied that torture existed in Chile. He sought to lay the blame for the denial of entry of the Working Group upon the condemnations of Chile by resolutions of the World Conference of the International Women's Year at Mexico City and the General Conference of the International Labour Organisation, which he claimed would have prejudiced the group's decisions. He also alleged that groups within Chile were staging a campaign "to set up an atmosphere for the arrival of the working group". He deemed his country's action a mere

“postponement” of the visit of the group. In this respect it should be noted that in the four months which have elapsed since this statement the working group has still not been allowed to enter the country.

This intervention did nothing to allay the Sub-Commission's concern about torture in Chile. Mr. Van Boven of the Netherlands was “flabbergasted” by the observer's complete denial of torture. He suggested there was reason to think that the DINA of Chile had established a network with other security police and para-police organisations such as the BOSS of South Africa and the SAVAK of Iran and para-police organisations such as the AAA of Argentina and the Death Squads of Brazil, which seemed to operate beyond the control of their governments.

A resolution co-sponsored by 14 of the Sub-Commission's members was passed by a vote of 18 in favour, none against, with 5 abstentions. The Sub-Commission expressed its serious distress over the denial of entry of the working group and its utmost concern regarding the numerous and serious reports on the continuing, flagrant and widespread violations of basic human rights and freedoms in Chile, especially the large numbers of people reported to be missing. It urged the Chilean authorities to take without delay all necessary measures for the restoration and protection of the basic human rights and freedoms, to stop torture, cruel, inhuman and degrading treatment and persecution for political reasons, and to free all persons detained without charge for political reasons.

Cyprus

The continuing plight of displaced persons in Cyprus was raised by Mr. Whitaker (United Kingdom). A resolution was adopted calling for the parties concerned “to do their utmost for a just solution and the return of the refugees to their homes in accordance with the relevant UN resolutions” (General Assembly resolution 3212 (XXIX) and the Commission on Human Rights's resolution 4 (XXXI)). In introducing the resolution Mr. Whitaker had said that it did not intend to apportion blame by its wording and that it was motivated by humanitarian considerations. Nevertheless, the Turkish Observer stated that the resolution ignored the political aspects of the situation. His government considered the resolution contrary to the mandate of the Sub-Commission and “the substance of human rights” and therefore, null and void. In contrast the Cypriot Observer gave his wholehearted thanks on behalf of displaced persons in Cyprus. The resolution requests the Commission on Human Rights to review its implementation at its 32nd session.

Angola

Mr. Sekyiamah (Ghana) raised the situation in Angola. While he rejoiced that independence was enjoyed by Mozambique and by Guinea-Bissau, he was distressed about the enormity of human rights violations in Angola. The Angola independence movements were divided by ethnic loyalties, by ideologies and the support given by foreign governments. Thousands of individuals were butchered to death because the independence movements followed alien interests. On his initiative, the Sub-Commission by a vote of 20 in favour, none opposed and 3 abstentions, passed a resolution calling upon all foreign powers and alien interests to desist from interfering in the affairs of Angola while appealing at the same time to all organisations concerned to give humanitarian assistance to the victims of

the conflict. The resolution specifically condemned South Africa for the encroachment on the territorial integrity of Angola and appeals to nationalist movements to unite for the speedy independence of their country.

Persons under detention or imprisonment

The Sub-Commission continued its annual review of the question of the human rights of persons subjected to any form of detention or imprisonment, and adopted a resolution which stated that among the many issues needing immediate attention, the following deserve particular concern:

- prolonged and often indefinite detention of large numbers of unconvicted persons without any formal charges being brought against them;
- the necessity of impartial judicial investigation into alleged illegal practices against arrested and detained persons;
- the position of the family and relatives of arrested and detained persons;
- the lack or ineffectiveness of judicial control over arrest and detention practices;
- and the role of secret police and para-military organisations.

Mr. Van Boven (Netherlands), one of the sponsors, placed particular emphasis on the last two items whose importance he stressed in view of the situation in Chile. The resolution noted that the International Covenant on Civil and Political Rights in Art. 4, para. 2, does not allow any derogation from the right not to be subjected to torture, or to cruel, inhuman, or degrading treatment or punishment even in a state of emergency.

More than any other aspect of this topic, the Sub-Commission was concerned over an increase in reports of torture in the world. Now that this item has become a continuing one on the Sub-Commission's agenda it will be possible for them to make the first thorough and systematic study of this problem within the UN. A great deal of factual information was supplied by non-governmental organisations but the Sub-Commission's consideration was hampered by the lack of machinery to distribute this information. Only on the day the item was reached on the agenda, and on the initiative of the Chairman, were some 200 pages of reports disseminated unofficially to the participants.

In his speech to the UN General Assembly on 22 September 1975, the U.S. Secretary of State, Mr. Kissinger, called torture "one of the most persistent and serious problems". He stated that "the United Nations Commission on Human Rights has taken its first steps against gross violations of human rights where serious and reliable allegations are submitted by individuals", and added, "We support those steps". He proposed that the General Assembly establish a group of experts to be appointed by the Secretary-General to study the nature and extent of torture in the world and to report back to the next session of the General Assembly. The Sub-Commission would appear to be the appropriate body in this respect. It should be given the necessary support and facilities to enable it to undertake this task effectively.

Exploitation of Labour through Illicit and Clandestine Trafficking

The Sub-Commission received an extensive final report by Mrs. Halima Warzazi (Morocco) which concentrated generally on problems of the migrant workers in the field of education, trade union rights, family rights

and rights relating directly to employment and work conditions. The report concluded that

“ far from declining, illicit migration was increasing, apparently as a result of measures taken by the host countries, to restrict or suspend migration due to the economic recession ”.

Mr. Martinez Cobo (Ecuador) criticized the report for its failure for the most part to consider other than European problems. The rapporteur explained this as being due to lack of replies from South American Governments, with one exception. Only in her oral presentation did she go into detail about the situation in the United States, which involves millions of illegally present migrant workers. Her report is an example of the shortcomings of information supplied by governments and demonstrates the need for non-governmental organisations to take a more active part in providing information to the Sub-Commission.

In addition to the report, a number of draft recommendations were submitted by the rapporteur. In order to bring illegal migration substantially to an end, severe penalties, including imprisonment, were recommended for employers who recruit illicit workers. Among the recommendations for ensuring the protection of the fundamental rights of such workers are the ratification of the new ILO Convention, regularizing the status of illegal workers whenever possible, and releasing them from penalties imposed on them for being illegally present.

Due to lack of time, the Sub-Commission could not complete consideration of the draft recommendations, and decided to forward them with the report to the Commission on Human Rights, and to keep the item on its agenda.

Slavery

A working group established by the Sub-Commission reported that “ new and subtle forms of slavery ” existed. These included the illicit transportation of women (“ white slave trade ”), illicit trafficking in migrant workers, and trafficking of children for the purposes of forced marriages or sale to couples who cannot have their own children. The working group concluded that the old concepts of slavery do not fit today’s problems. This touched off a debate as to whether the concept of slavery and future reports should take on a wider scope. Mr. Khalifa argued that, while it may be just as bad as slavery, traffic in women could not be considered as slavery because it depended upon the women’s consent. Except in very rare circumstances, it does not involve abduction or kidnapping.

A resolution was passed recommending that all states become parties as soon as possible to the international conventions on slavery, and enact any legislation necessary to ensure that their laws conform to the terms of these treaties. The resolution also recommends that states be called upon to examine thoroughly situations resulting from economic dependence which engender not only the known forms of economic slavery, such as debt bondage, but also other practices leading to slavery in all its manifestations and to take appropriate measures for their gradual elimination. States are also asked to assist persons who have escaped from any form of slavery. The Commission on Human Rights and ECOSOC are asked to broaden the terms of reference of the working group so that it can carry out a more thorough consideration of the problem.

Other items

The Sub-Commission considered an interim report on the Prevention and Punishment of the Crime of Genocide. The report concluded that all states need to adopt legislative measures dealing specifically with the crime of genocide and containing broader provisions of criminal law and procedure capable of ensuring its effective prevention and punishment. The present genocide Convention was seen only as a point of departure in the adoption of further international measures. The drafting of a new instrument was recommended to establish the principle of universal jurisdiction and to offer states the choice between extradition and trial and punishment by the state on whose territory the accused person is living.

Mr. Van Boven argued that criminal responsibility lies with individual and not with abstract entities and that the state has only a "political responsibility". Therefore, an international criminal tribunal, as called for in Art. VI of the Convention, should be established. This was thought to be over ambitious by Mr. Nettel (Austria) who argued that international jurisdiction was even less widely accepted now than it had been in the past. He noted that only 40 states had accepted the compulsory jurisdiction of the International Court of Justice. The genocide tribunal, he thought, would be far more controversial.

The Sub-Commission also heard reports on and debated the rights of individuals who are not citizens of the country in which they live, self-determination, discrimination against indigenous populations, the rights of persons belonging to ethnic, religious and linguistic minorities, and racial discrimination. These reports, further refined, will be discussed at the next session of the Sub-Commission. In addition, draft principles on equality and non-discrimination in respect of persons born out of wedlock were formulated by an informal working group, and forwarded to the Commission on Human Rights. It was decided to keep this item on next year's agenda. The hope was expressed that the principles will eventually become the subject of an international convention.

Debate over Resolution 1503 Procedure

Some of the most important work of the Sub-Commission is conducted in private session, when it considers communications concerning human rights received by the Secretary-General which appear to reveal a consistent pattern of gross violations of human rights. It is understood that three such cases were referred to the Commission on Human Rights on this occasion.

This procedure, established under the terms of ECOSOC Resolution 1503 in 1970, is the principal mechanism by which private individuals may complain to the United Nations of violations of internationally recognized human rights. Its continued existence may soon be called into question since the ECOSOC resolution which established it contains a provision calling for its re-evaluation upon the entry into force of the International Covenant on Civil and Political Rights. Mr. Van Boven saw no inconsistency in the simultaneous existence of the two types of procedures because the ones followed by the Sub-Commission involve fundamental principles based on provisions of the UN Charter on Human Rights. Moreover the Resolution 1503 procedure is universal in its application, whereas the procedure under the Covenant on Civil and Political Rights will apply only in respect of those States which have made declarations under Article 41 (relating to complaints by other States) or which have signed the Optional Protocol (relating to complaints by individuals).

THE BAADER-MEINHOF TRIALS

Recent Amendments to Criminal Procedure in the Federal Republic

by

KARIN ROSE*

The declared objective of the comprehensive reform of criminal law, criminal procedure and penal law in the Federal Republic of Germany has been to promote its humanization, decriminalization, liberalization and adherence to the principles of the rule of law. The revision of the substantive criminal law, which is now nearing completion, largely bears out this claim and has gained international recognition as an outstanding legislative achievement. There are, however, indications that in the sphere of criminal procedure matters have developed rather differently. The latest amendments to the Criminal Procedure Code show no tendency towards liberalization and have even been described as incompatible with principles based on law and justice.

In truth, the reform of the German law of criminal procedure—influenced by current events—has taken an unforeseen turn. At first the work involved was dealt with as planned in stages. The First Criminal Procedure Reform Act was in its final stages of preparation and promulgation, and a second Bill was already drafted, when suddenly at the end of 1974 Parliament was stirred to action by the sensational death on hunger strike of a remanded prisoner, the murder of a judge, and the impending start of a number of major trials of members of the Baader-Meinhof terrorist group. In great haste, a supplementary Bill was drawn up and passed into law. It came into force on 1 January 1975 at the same time as the First Criminal Procedure Reform Act. The supplementary Act combines long-planned reforms with some ad hoc modifications. This hasty legislation has, from a formal point of view, aroused many doubts. It is suspected of having been designed to cover a special case, and its provisions have provoked criticism among both advocates and opponents of the principles of the rule of law. In practice, the shortcomings of several of the new provisions became apparent very quickly and numerous amendments to them have already been suggested. For the time being, however, the supplementary Act of 1 January 1975 remains valid and governs the day-to-day practice of the local courts as well as that of the more spectacular Baader-Mainhof trials. Certain provisions of this supplementary Act will be referred to, which illustrate the close connection

* Assistant at the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg im Breisgau.

between these trials and the Act. Indeed, the Act itself has come to be known as the "Lex Baader Meinhof". These provisions deal with the right of the accused to be present during the hearing, restriction on the number of defence counsel, a prohibition against counsel appearing for more than one defendant, and provisions for the exclusion of defence counsel in certain cases.

One part of the new Act specifically concerns the position of the accused. Legal authorities in the Federal Republic consider that in cases of political extremism there is not only a special form of criminality but also a new type of accused. These have now clearly been taken into account in the reform of criminal procedure. In particular, increased powers to hold the hearing in the absence of the accused is of considerable legal and political importance. In principle, the uninterrupted presence of the accused at his trial is necessary in order to guarantee his constitutional right to a fair hearing of his case. Under the previous law exceptions to this requirement were imperfectly defined. They were, however, admissible only after the accused had been interrogated about the charge. In contrast, the supplementary Act contains a precise definition of the grounds for exclusion of the accused and this can now occur at an earlier stage. The presence of the accused can now be dispensed with where he intentionally and culpably renders himself incapable of participation in the trial so as to frustrate its orderly conduct or the continuation of the proceedings (s. 231 (a), Criminal Procedure Code). This provision, which was finally provoked by the systematic hunger-strikes of those held on remand in the Baader-Meinhof case, is intended to prevent the accused making himself unfit to stand trial and thus stopping the proceedings against him. Furthermore, an accused who is excluded from the courtroom as a result of his hostile conduct will continue to be excluded as long as it is considered that his presence will be incompatible with the peaceful conduct of the trial (s. 231 (b), Criminal Procedure Code). This section reflects practical experience with accused persons of this "new type" as well as actual apprehensions with regard to the Baader-Meinhof trials, apprehensions which have already been confirmed by the repeated application of the new law. In both cases, the presence of the accused may be dispensed with even *before* the interrogation as to the matter in issue provided that he has been given the opportunity to plead to the charge. In answer to critics of the new law who state that it is contrary to the constitution (Basic Law) and the European Convention of Human Rights, so far as it imposes restrictions upon the accused's right to be heard, it may be said that the accused is not deprived of his right to be present but rather that he voluntarily and knowingly surrenders this right. Recently it has rather been a matter of protective measures which have repeatedly had to be taken by the Court, provoked by the abuse of the accused's right to be present through obstruction and delaying tactics.

The most important changes in the law on which public discussion has centred are the encroachments upon defence rights in criminal cases contained in the supplementary Act of 1 January 1975. It is particularly in the so-called political cases that the judiciary has frequently regarded the rights of the defence with reserve and distrust. This phenomenon has led, within the framework of the proceedings pending against terrorist groups, to an apparent tension which is reflected in the legal amendments under discussion.

Most notable is the restriction of the number of defence counsel to not more than three per accused (s. 137, para. 1, Criminal Procedure Code). This provision was hurriedly included in the Act after various accused

in the Baader-Meinhof case declared that they would come to court with more than fifty counsel. The Government's original bill contained no such restriction, but after the Federal Council (Bundesrat) has recommended a limit of five defence counsel, a cabinet decision was taken to reduce the number and in the final text of the Bill it was reduced to only three. It is very doubtful whether this provision, designed specifically for use in the Baader-Meinhof trials, can be justified in this form in other cases. In modern important trials—one needs only to be reminded of the "Contergan" case—there may be a quite justifiable requirement for more than three defence counsel, because the volume and nature of the subject matter necessitate dividing up the work into many sections. The appointment by the Court of additional defence counsel, as "assigned counsel" is not accepted, at least in the mind of the accused, as an adequate alternative since it will only be in the rarest cases that the accused will have confidence in these counsel.

A further new provision forbids without exception the simultaneous joint defence of several accused by the same lawyer (s. 146, Criminal Procedure Code). The consequent reshuffle of the defence counsel in the Baader-Meinhof case, and the simultaneous reduction of their number to three for each accused led to considerable delay in the start of the trial. The official reason given by the legislature was that the joint defence of several accused by the same lawyer could lead to risks of conflict of interest, in that no exact parallel can be drawn between the cases of individual defendants. This may be indisputable, but it is very questionable whether such an absolute prohibition was actually necessary since the danger of a conflict of interests is already reduced by a three-fold safeguard: principles of professional conduct and ethics, as well as the Federal Lawyers Act (s. 45, No. 2) already forbid a lawyer to represent, within the same case, parties with different interests; furthermore the Criminal Code threatens imprisonment for violations of this duty as a special offence, the so-called "betrayal of the parties" (s. 356).

This provision also seems incompatible with the intentions underlying the provisions already referred to in the same Act reducing the number of defence counsel. The prohibition of a joint defence by one lawyer leads, on the contrary, to the appointment of many more counsel in cases where one would have sufficed, and also leads in many cases to an unnecessary and unjustified increase in legal costs.

The new provisions concerning the exclusion of defence counsel are particularly explosive politically. The question has been under discussion for a long time, particularly over the last few years when it has been suspected that certain counsel have to an increasing extent abused their right to have unhindered communication with their clients. It has therefore been suggested that where such suspicion arises, communications by counsel with prisoners on remand should be subject to the supervision of the Court. As a consequence of the dramatic exclusion of a Baader-Meinhof counsel by the Federal Supreme Court in August 1972, which was followed shortly afterwards by the reversal of this decision by the Federal Constitutional Court, the legislature decided in favour of a provision for the exclusion of defence counsel instead of placing them under supervision. The Constitutional Court had, by its decision of 14 February 1973, referred with disapproval to the lack of any statutory grounds for expelling lawyers from certain cases and requested the introduction of suitable legislation. Since then, the following detailed grounds for expulsion have been passed into law:

- suspicion of participation in any offence, or of being an accessory after the fact, obstructing the course of justice, or receiving stolen property (s. 138a, para. 1, Criminal Procedure Code);
- strong suspicion of improper use of access to accused persons in custody in order to commit further criminal acts or to endanger the security of the place of custody (s. 138a, para. 2, Criminal Procedure Code); and finally,
- in the case of political offences, reasonable belief that there is a threat to the security of the State (s. 138b, Criminal Procedure Code).

The power of expulsion lies with the Provincial Court of Appeal, subject to an immediate right of appeal to the Federal Supreme Court.

The exclusion of a defence counsel from a particular criminal trial is completely new to our legal system. The legislature was obliged to break new ground over a wide area and had the difficult task of going to extreme limits to protect the Rule of Law without infringing it. The principles of the Rule of Law involve not only the promotion of a freely-functioning and efficient system of criminal justice but also guarantees of the right to a fair trial and a high degree of freedom and independence for the defence in criminal cases. As the Federal Constitutional Court recognized in its above-quoted judgement, the exclusion of a defence counsel is an especially serious interference with criminal procedures and should only be allowed in limited and narrowly defined circumstances. Whether the new provisions comply with strict requirements of clarity, certainty or completeness has been strongly disputed. At the least it seems legitimate to call into question the lack of precision in the definition of various types of suspicion which constitute the basis of the decision in each case.

As to the particular grounds for exclusion, the following comments may be made. Rightly, the new provisions are related in the first place to the commission of criminal acts. The State, which has the duty to prevent such acts, cannot allow the misuse for criminal purposes of special privileges granted on constitutional grounds, including uncontrolled written and oral communications between lawyers and their clients in custody. As an example of a possible application one can recall the case some two years ago of the proceedings against the defence counsel chosen by Gudrun Ensslin (one of the four chief accused in the present Baader-Meinhof trial) who was suspected, on the occasion of a visit to his client in custody of having smuggled out of prison a document containing orders and instructions for other members of the group who were still at large. The suspected counsel was debarred from taking further part in the case by the decision of the Federal Supreme Court as described above. This decision was reversed on appeal to the Federal Constitutional Court because at that time there was no statutory basis for it.

In comparison with this ground for exclusion, which appears to have been a reaction of the State in self-defence against a threat to the rule of law, the risk to the security of a correctional institution seems relatively insignificant. This provision was influenced, inter alia, by the fact that it was through the access of defence lawyers to several of the Baader-Meinhof prisoners that the solidarity of their hunger-strike was maintained. It is questionable whether such conduct is really a substantial threat to the security of a correctional institution and whether it constitutes such a serious attack upon the rule of law as to justify, on bare suspicion, the

definite exclusion of a lawyer from the rest of the proceedings. As to exclusion on the grounds that the State is endangered, one must note the uncertainty of the conception "danger to the security of the Federal Republic of Germany". This broad, imprecise kind of wording, which the Federal Constitutional Court explicitly warned against in this connection in the decision quoted above is, however, frequently encountered in laws concerning the protection of the State. In s. 138b of the Code of Criminal Procedure, however, this already vague concept is further blurred so that in any case where there is a "reasonable belief" in a risk to security the defence counsel may be excluded.

That Parliament itself is not uncritical of the new provisions of the Code of Criminal Procedure is shown by the fact that although the supplementary Act to the First Criminal Procedure Reform Act has only been in force for a few months many proposals for its revision have already been submitted. Those who expected a return to the process of liberalization will, however, be disappointed. With the declared aim of achieving greater efficiency in the administration of criminal justice, the further draft proposals, both from the government and opposition sides, will if accepted tighten up still further the laws governing trial procedures. One of these proposals would add an additional ground for excluding defence counsel, namely the so-called sabotage of trial proceedings, i.e. improperly impeding the conduct of the trial. Above all there is the proposal, which only recently was expressly rejected after a heated discussion in Parliament, to supervise the written and oral communications between an accused in custody and his defence lawyer.

Whether one thinks that the current development of the reform of criminal procedure in the Federal Republic tends to protect or to endanger the rule of law, one thing is certain: Narrow limits have been set to its liberality and they are about to be drawn narrower still. Ten years of efforts to liberalize the law of criminal procedure have thus suffered a regrettable set-back.

MIGRANT WORKERS

Existing and Proposed International Action on their Rights

by

FRANK RUSSO

Introduction

The migration of people in search of a livelihood from the territory of their birth to lands inhabited by other peoples is a phenomenon that predates written history. Since the rise of the nation state with the protection it afforded its citizens, governments have been grappling with how they should treat foreigners working and living on their soil.

Since World War II there has been an explosion of migration of workers from one country to another due to a number of factors, among them greater ease of international movement and disparities in development which have created a need for workers in some countries and a financial incentive for them to leave their homeland to escape chronic unemployment, underemployment and low wages. Statistics on the numbers involved have been described as "particularly unreliable"¹. However estimates have concluded that between 1965 and 1972 the average annual flow of migrant workers to Europe from other continents was between 600,000 and 1,000,000². The total number of migrants working in Europe is said to be at least 10 million.³ In the United States there are an estimated 4,600,000 aliens legally present,⁴ and in Libya migrants comprise approximately 1/4 of the total work force.⁵ Millions migrate within Africa and South America.

Today, many international, regional and bi-lateral agreements, as well as national laws, attempt to afford migrant workers certain rights. Despite these efforts, trans-national migrants in most countries suffer serious discrimination in employment, housing, education of children and denial of many of the basic human rights enjoyed by citizens of the

¹ J. H. Lasserre-Bigorry, *General Survey of Main Present Day International Migration for Employment* (International Labour Office: Geneva, July 1975), p. 1.

² Mrs Halima Wazazi, *Exploitation of Labour Through Illicit & Clandestine Trafficking*, 17 June 1974, UN Document E/CN.4/Sub.2/351 para 19.

³ David Stephen, "Western Europe and its Immigrants", *New Society*, 13 June 1974, p. 628.

⁴ Lasserre-Bigorry, op. cit, para 52.

⁵ *Ibid*, para 16.

countries they live in. Being poorly paid and restricted by work permits or other means to those sectors where manpower is lacking, these migrants contribute importantly to the development of the countries they work in. Their expulsion would create tremendous problems, not only for the migrants involved, but for the economies of both the exporting and importing countries.⁶ Therefore, the continuing existence of a mass migrant working population must be recognised and their rights more effectively protected.

The plight of migrant workers, aggravated by the present economic recession throughout most of the industrialised western world, has aroused the conscience of the international community. In November 1972, the International Labour Organisation (ILO) placed on the agenda of the Fifty-Ninth (1974) Session of the International Labour Conference an item concerning migrant workers and work was begun by employers, trade union and government members on the drafting of an instrument dealing with problems inadequately covered by the existing international instruments. In June 1975, this culminated in the adoption of Convention 143 and Recommendation 151 both of which will be analysed later in this article. Activities to benefit migrant workers and their families continue to be one of the main items of the long-term plan of the ILO for 1976 to 1981⁷ and of the programme and budget proposals for 1976 to 1977⁸. Various bodies of the United Nations have studied the problem and made recommendations. In 1972 the General Assembly stated that it was "deeply concerned by the *de facto* discrimination of which foreign workers are the victims".⁹ In 1973 the Economic and Social Council referred the problem to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission in August 1975 considered the final version of a report by Mrs Halima Warzazi on the "Exploitation of Labour through Illicit and Clandestine Trafficking". The Helsinki Conference on Security and Cooperation in Europe Final Act of August 1975 deals with the social problems of migrant labourers. In September 1975, for the first time, an international Conference was held of Non-Governmental Organisations to discuss the problems of migrant workers in Europe. Many of the delegates expressed their desire to see a similar conference held in North America.

Existing Law and Problems

It has been suggested that contemporary international law as formulated by the United Nations and its specialised agencies would alter the state of affairs of migrant workers were it fully respected.¹⁰ While much progress could be made through more effective implementation of these provisions for the enjoyment of a minimum level of basic human

⁶ See, Stephen *loc. cit.*

⁷ "Foreign and Migrant Workers"—Draft Long-Term Plan, 1976-81-ILO Governing Body, 192nd Session, Geneva, 1974—G.B. 192/PFA/10/1 (para 312-222).

⁸ "Foreign and Migrant Workers"—Programme and Budget Proposals for 1976-77-ILO Governing Body, 195th Session, Geneva 1975, G.B. 195/PFA/14/1 (para 242-268).

⁹ G.A. Res 2920 (XXVII).

¹⁰ International Association of Democratic Lawyers, "Legal Principles for a 'Statute of Migrant Worker'", NGO Conf. Paper No. XI.

rights by migrants, an analysis shows that clauses of the international instruments prohibiting discrimination are notable for their silence as to discrimination due to nationality.¹¹ The Charter of the United Nations speaks of "race, sex, language, or religion" in Article 1 (3). The Universal Declaration of Human Rights, while prohibiting discrimination based on, *inter alia*, "national origin", does not by that term include individuals who are citizens of foreign countries.¹² Although Article 8 proclaims that everyone, thereby including aliens, has the right to an effective remedy for acts violating the fundamental rights granted him by the constitution or laws, it does not forbid national laws from discriminating against aliens. Similarly the International Convention on the Elimination of all Forms of Racial Discrimination, although requiring in Article 6 effective protection and remedies to all whose rights and freedoms are violated contrary to its own provisions, by Art. 1 (2) allows states to discriminate between their citizens and others by exclusions, restrictions or preferences. The Human Rights Covenants, although requiring that their basic guarantees be provided to all without discrimination, do not forbid discrimination based on nationality with respect to any additional rights which a state may recognise for its own nationals. The International Covenant on Economic, Social and Cultural Rights contains the added provision that developing countries may determine to what extent they would guarantee the economic rights recognized in it to non-nationals. ILO Convention 97 (1949) concerns itself only with equality in matters regulated by law or administrative actions (Art. 6). The ILO Discrimination (Employment and Occupation) Convention No. 111 (1958) states only that the addition of nationality as one of the bases upon which discrimination is prohibited may be included by a ratifying state after consultation with representative employers' and workers' organisations. (Art. 1.1(b)).

The threat of expulsion is a "Sword of Damocles" hanging over the heads of migrant workers which effectively renders many protections of international and national law meaningless. Mrs Warzazi's study prepared for the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities concluded:

"The problem of affording adequate protection to migrant workers is closely related to the question of security of residence in the country of immigration and the risk of arbitrary expulsion. Where the risk is felt by foreign workers, they may be led to accept discriminatory conditions of employment and to refrain from claiming their rights".¹³

Article 13 of the Covenant on Civil and Political Rights concerned with expulsion, merely provides that it may be made "pursuant to a decision in accordance with law" and that an alien must have certain procedural rights. It does not prevent arbitrary expulsion under a law containing vague criteria such as threats to the national security or economy.

In many countries a migrant worker may reside only for as long as he is employed under the conditions of his work permit. These often restrict the migrant to a single occupation, in many cases even to a specific employer. In the latter case, loss of one's job means expulsion. In either case the migrant is usually restricted to the least paid posi-

¹¹ Vierdag, *The Concept of Discrimination in International Law* (1973) p. 88.

¹² Cf. discussion of Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN4/Sub2/SR5, pp. 2-12.

¹³ *Op. cit.* para 172.

tions¹⁴, in the most dangerous occupations¹⁵ with the longest working hours. It is only after working and residing in a country for a period of time ranging up to 10 years, that migrant workers are given permission to reside permanently in the country in which they live and work.

The right of the family is one of the fundamental human rights. According to Art. 16 of the Universal Declaration of Human Rights, "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state". The Covenant on Civil and Political Rights calls for "the widest possible protection" of the family (Art. 10). Yet in many countries, notably in Europe, the migrant does not enjoy the right to be accompanied by members of his family or to be joined by them later on. According to the Joint ILO/WHO Committee on Occupational Health, this places an additional strain on migrant workers who are in an environment demanding considerable capacity for adaptation and encourages permanent separation, the establishment of illegitimate families, and abandonment of children.¹⁶ In some cases a "family reunion" is allowed but due to financial inability and numerous legal and other restrictions even this is not effectively enjoyed. Principle 6 of the Declaration of the Rights of the Child (UNESCO) states that "The child... shall whenever possible, grow up in the care and under the responsibility of his parents". Even when the migrant is able to gain permission for a child to reside with him he is faced with a cruel dilemma. The child does not receive the same educational advantages as children of citizens due to the lack of help in overcoming his inadequate knowledge of the language of the country and other cultural handicaps. Mrs Halima Warzazi recently concluded that "The true victim of emigration was neither the worker nor his wife, but the child. If the child remained in his own country far from his parents, he suffered. On the other hand, if he accompanied them, he had to learn—without any help, and because his parents were working—how to adjust himself to and defend himself in a society which often rejected or ignored him".¹⁷

The educational problems faced by children of migrant workers is an example of the insufficiency of the *de jure* application of equality, and demonstrates that in order to arrive at *de facto* equality migrants need greater social assistance than citizens. This is especially true on their arrival. Even where equality of treatment is assured in law, migrant workers due to the length of their residence in the country, nature of employment, or other factors very often do not meet the requirements of the law to qualify for social security, housing benefits, and vocational training. Family allowances, for instance are often payable only in the country of employment and therefore do not benefit workers who cannot or do not bring their families with them.¹⁸ Due to their lack of knowledge

¹⁴ Sweden is the one known exception. On the average blue collar migrants earn 3.6% more than the average for all such workers. This may be due to a higher volume of piecework done by migrants. ILO, Social and Labour Bulletin, Vol. 275 (1975), p. 207.

¹⁵ "Migrant workers are usually allocated to the less skilled types of work which are characterised by handling heavy manual labour and exposure to a higher risk of accident". Joint ILO/WHO Committee on Occupational Health, "Occupational Health and Safety of Migrant Workers", (1975) JCOH/VII/1975/D.7 (Rev.), p. 3.

¹⁶ Ibid, para 71.

¹⁷ Speech in the UN Sub-Commission, E/CN.4/Sub.2/SR 730, p. 20.

¹⁸ Warzazi, op. cit. para 80.

of the language of the country and other factors many migrants do not know what their rights are under existing international and national laws. A recent ILO report concluded that "Equality before the law should be complemented by the guarantee of equality of opportunity and treatment in all aspects concerning the conditions of life and work of migrants and by guarantees of the elimination of discrimination in practice".¹⁹

The problem of illegal aliens is especially severe both in the numbers of human beings it affects and the individual deprivations it causes. Existing legal and physical barriers have been largely ineffective to prevent massive illegal migration into many countries.²⁰ In many of these countries it is not illegal for employers to hire such persons even if they know that the person is illegally present or does not have the proper authorization to work in the country. Even where there are fines these are usually ineffective as they may be offset by the profits made by employing such labour at cheaper prices than otherwise possible—in other words the fines are treated as a normal business cost. In the United States, where aliens entering illegally face fines of up to \$1,000 and imprisonment of up to 6 months upon being apprehended for the first time, it is estimated by the immigration service that there are 3 million aliens illegally present. In 1973, over 600,000 such illegal aliens were detected and deported,²¹ and the number is said to be increasing. Recidivism is very high. Other sources estimate that as many as 12 million illegal aliens are living and working in the United States. In 1972, 2 million migrants were estimated to be illegally working in Europe and in Latin America. "80% to 90% of workers migrating from one country to another were regarded as illegal by the authorities".²² These migrants are the victims of the worst forms of discrimination and denial of human rights. Knowing that they cannot assert their rights, employers often do not accord them the minimum statutory benefits such as guaranteed minimum wage, safety conditions, and maximum number of hours. Often they are forced to live in hiding under very poor conditions and their children do not go to school. They have "practically no access to medical and welfare services and any health problems they have are consequently serious".²³

New ILO Convention

In June 1975, the International Labour Organisation adopted Convention 143 and Recommendation 151 attempting to remedy the inadequacies or non-existence of international provisions, including those found in former ILO Conventions, on many of the problems of migrant workers. The Convention becomes binding only upon ratification. According to the ILO Constitution, it must be submitted to the appropriate national authorities for ratification within 18 months of its adoption. The recent NGO Conference on Discrimination against Migrant Workers in Europe concluded that ratification and enforcement of this Convention "would go a long way to remedying the most patent abuses which now exist with

¹⁹ ILO Report V (1); 60th Session (1975) p. 6.

²⁰ H. Warzazi, *op. cit.* p. 48.

²¹ Vernon M. Briggs, Jr., "Mexican Migrations and the U.S. Labour Market, a Mounting Issue for the Seventies", *Studies in Human Resources Development*, No. 3, University of Texas, Austin, 1974, p. 3.

²² H. Warzazi Speech, *op. cit.* at p. 3.

²³ Joint ILO/WHO Committee, *op. cit.* p. 21.

respect to migrant workers".²⁴ However, even if the Convention does not get a large number of ratifications it should at least serve as a standard of achievement for member states and have substantial impact, as many past unratified Conventions have had. As has been pointed out, ILO Convention 48 on the maintenance of pension rights by migrant workers, although ratified by only 6 States, has nevertheless had an impact.²⁵ Its principles are said to be "at the basis of all international social security regulations of recent years. Traces are to be found in all national legislation".²⁶

In a somewhat controversial action, the Convention was split into two parts, the first concerning migration in abusive conditions and the second dealing with equality of opportunity and treatment. States may exclude from their ratification either part if they so desire. This was done because the delegates feared that if States were forced to choose between ratifying all or none of the Convention's provisions, the more controversial elements of part II would doom the whole to a low number of ratifications. However, States excluding either part from their ratification are required by Art. 16 (3) to include in their reports to the ILO a summary of steps they have taken concerning the excluded part and the reasons why they have not ratified it.

Part I of the Convention contains a programme which, if carried into effect, would effectively eliminate the existence of a massive illegal work force of migrants. The application of "administrative, civil and penal sanctions, which include imprisonment in their range", would be required against those who organise the illegal entry of migrant workers or who employ illegal migrants (Art. 6). Employers must have the right to furnish proof of good faith in order to escape these sanctions. The ratifying States agree to undertake between themselves action including the prosecution of those who traffic in manpower notwithstanding the country from which they exercise their activity (Art. 6). In addition many rights are given to migrants. Governments must respect the basic human rights of all migrant workers, including those present illegally (Art. 1). They agree not to regard otherwise legally present migrant workers as illegally present by the mere fact of loss of employment (Art. 8 (1)), and to give them the same treatment as nationals in guarantees of security of employment, the provision of alternative employment, relief work and retraining (Art. 8 (2)). A qualified right to equality of treatment for illegal migrants and their families in respect of remuneration, social security and other benefits arising out of past employment is recognized so long as it does not prejudice efforts to control illegal migration.

Under Part II of the Convention each ratifying country undertakes to promote effective equality of opportunity and treatment between migrants lawfully present and nationals in a number of fields including employment and occupation, social security, trade union and cultural rights, and individual and collective freedoms for persons. The provisions go far beyond ILO Convention 97 (1949) which, although requiring equality in certain fields, limited the actions of governments to matters regulated by law or

²⁴ Legal Commission Report of International NGO Conference on Discrimination against Migrant Workers in Europe.

²⁵ E. A. Landy, "The Influence of International Labour Standards: Possibilities and Performance", *International Labour Review*, Vol. 101, No. 6 (June 1970), p. 13.

²⁶ *Ibid.*, p. 13, N. 2.

administrative actions. (See Art. 6 of Convention 97). Thus the new Convention calls for the use of educational programmes to secure acceptance of the policy by citizens (Art. 12 (b)) and to inform migrants of their rights (Art. 12 (c)), both aimed at effectively giving migrants the rights contained in its provisions. It recognizes that migrants' problems are not merely legal, and may require efforts in addition to those made for the nationals of a country. Art. 12 (e) calls for:

“ a social policy... which enables migrant workers and their families to share in advantages enjoyed by its nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs as they may have until they are adapted to the society of the country of employment ”.

It contains provisions to ameliorate the social problems of returning migrants and their families, especially children who are supposed to enjoy the possibility of being given knowledge of their mother tongue. The Convention is weak on family reunification. It merely states that “ a member may ... facilitate the reunification of the families of all migrant workers legally residing in its territories ” (Art. 13). Because of the use of the word “ may ” this Article would appear to have effect as a recommendation.

In perhaps its most controversial Article, the Convention requires that the migrant be afforded free choice of employment and geographical mobility after he has been lawfully present for a period not exceeding two years (Art. 14). This is subject only to the caveat that where it is “ necessary in the interests of the State ” a government may restrict access to “ limited categories of employment or functions ” (Art. 14 (c)). This would, of course, free migrants from working exclusively in the least desirable and lowest paid jobs, promote their equality with nationals, and enable them to compete for other occupations based on their ability and effort. When coupled with the provision in the first part of the Convention that the loss of employment shall not in itself make a migrant illegally present (Art. 8), this enables migrants of two years residence to refuse to accept exploitative conditions in the occupations they were restricted to in their original work permits, and should provide an incentive for improvements to be made by employers of those migrants.

The Convention guarantees to legally present migrants “ individual and collective freedoms for persons ” which includes many civic rights such as freedom of information, expression and assembly, but is neutral as to participation in the political process, in particular the right to vote.²⁷ Although the Universal Declaration of Human Rights in Arts. 18 and 19 grants to “ everyone ” the rights of freedom of information, expression and assembly, these are, in fact, often denied to migrants by such practices as requiring police authorizations, which can be easily revoked, before they may form their own organisations²⁸ or by conditioning their stay upon not engaging in political activities.

Conclusion

In order fully to implement the spirit and letter of the ILO Convention and to secure equal economic, social and cultural rights for migrants, their

²⁷ See ILO Report V (2) 60th Session p. 17 and ILO Report V (1) 60th Session para 60.

²⁸ G. Rochan, “ Migrants Rights ”, Migration News, Vol. 3, May-July 1975, p. 9.

participation in politics, at least on a local level, is imperative. This is presently enjoyed in the canton of Neuchâtel in Switzerland, and Sweden is expected to grant a local franchise to its migrants in 1976. The lack of voting power by non-citizen migrants in the other countries of immigration has, in the word of a recent conference:

“ re-created a condition painfully remedied in the 19th century—the existence of a working population without the right of franchise ”.

Political parties are more likely to pay attention to the needs of migrants if their success at the polls is determined, in part, on the votes of migrant workers. This has been demonstrated by the experience of Irish and other Commonwealth immigrants in the United Kingdom, who, being citizens and therefore able to vote, have exerted some political influence. It seems only reasonable that, since migrants contribute to the development of the countries they are in by undertaking those tasks citizens are not willing to perform and by paying taxes, they should have some say in how these funds are spent. This, indeed, was eloquently expressed some 200 years ago during the American Revolution: “ Taxation without representation is tyranny ”.

CRIMINAL JUSTICE SYSTEMS IN AFRICA AND ASIA

by

DR SAEED EL MAHDI*

Judicial systems and procedures all over the world are not sacred cows. They must be attacked and bombarded heavily in order to reform them. The Judiciaries are conservative, some of them are even ultra-conservative. They resist change and the veils behind which they hide must be lifted. They should be shaken to the marrow. They are incapable of change and adapting themselves to the realities of modern life. If they do not face realities, realities will face them. Judiciaries are conservative, because they live in the past, because they quote precedents. They tie their hands and feet and look for others to salvage them. Therefore change must come from the law-makers without interfering with the independence of the Judiciary.

While we are all facing new situations in crime, new patterns of violence and new attacks on persons and property and premises, the Judiciaries and the procedures restricting their movement and advance are not changed and modified to cope with new ideals and values of life. The laws and the skills of the Judiciary must be developed to meet the new challenges.

In African, Asian and other developing countries the following characteristics of the judicial, criminal and procedural laws are shared:—

1. The training of lawyers started very late, mostly just before or after the Second World War and therefore there are not enough judges and lawyers in our countries. Law schools were established by the colonial powers very late in this century. They did not train good lawyers.
2. The colonial powers left behind them a legal heritage that is still followed. Cultural and legal imperialism are still with us in spite of attaining political independence and hoisting of national flags. Judges still think in terms of London, Paris, Lisbon, Madrid, Rome or the Hague. In every country in the developing world we are following the colonial model of the Judiciary, a court of appeal, provincial courts and district courts, or a cour de cassation and other inferior courts under the continental

* Dean of the Faculty of Law, University of Khartoum.

This article is based upon a speech made by Dr. El Mahdi during the discussions at the Fifth U.N. Congress on the Prevention of Crime and Treatment of Offenders, Geneva, September, 1975. It was one of a number of speeches made by delegates from the Third World commenting upon their need to free themselves from rigid adherence to the legal systems inherited from the former colonial powers, and to develop their laws and procedures on lines more adapted to their traditions and culture.

system. Every country colonised by the European powers has a western style penal code, codes of criminal and civil procedure, and laws of evidence and other laws. The colonialists established prisons on the model of their prisons; it was the same with the police forces, probation officers, reformatories; etc. In anglophone Africa, appeals from domestic courts of appeal used to go to the Judicial Committee of the Privy Council in London. English judges who had never been to Africa nor Asia sit as appellate authorities for cases coming from countries with different social, political and cultural background. This state of affairs was brought to an end on the attainment of independence. In franco-phone countries there was complete europeanisation of the legal system on the french model.

3. The justice and judicial systems we had in Africa and Asia are poor carbon copies of European justice complete with bowler hats, pipes, ivory-towerism, Chancery Lane suits, oxonian accent, conservatism, robes, gowns, wigs and above all legal brain-washing. This is second rate justice.

In Africa and Asia and other colonised areas of the world there are generally two legal systems transplanted and imported by France, Spain, Portugal and Britain, namely the continental and common law systems. They were both imposed by conquest and not adopted by imitation or admiration. They diminished the role of the indigenous judicial systems and procedures. They undermined them. These indigenous systems were customary law, Islamic law, Hindu and Buddhist law.

In Africa, European judicial systems were applied to the urban centres established by the colonial powers. In rural Africa customary or Islamic law was and is still applied. The African Chief sitting under a tree administering justice or the Arab Sheikh in a tent doing the same are still daily ordinary scenes.

In some countries about 70% of the volume of judicial work is entrusted to native and local courts. They are fulfilling a social function. Their justice and procedures are speedy, effective and cheap.

In the Third World we will not be able to get rid of the problems in our judicial systems unless we go back to customary Islamic, Buddhist and Hindu laws in our respective areas. The European legal systems do not provide the right answers to our present problems. These are foreign systems. If we want to adopt them, we must adapt them to our needs. We do not want to seal off our countries from other legal systems, but we want to solve our problems in our own way. We do not reject the good traditions and principles of other legal systems. We must modernise our legal systems, renovate them, and revitalize and reinvigorate them.

It is an open secret that in the Arab world many meetings and conferences were held to unify the legal systems. In Africa there is a trend to collect and codify customary law. This is at least the experience of East African countries. This is not because of national sentiments or pride, but because European criminal justice and models have failed to solve our legal problems radically. An act constituting an offence in Europe may not be so in Africa and Asia. Polygamy is lawful in Africa and Asia, whereas it is an offence in Europe.

The European imported machinery of justice has become potentially and realistically unable to cope with the problems of injustices and miscarriage of justice we are suffering from. This machinery must be thrown overboard, but at the same time we may retain parts of it.

We have our own natural law and rules of natural justice which can cope with many factual situations that European models of justice have failed to cope with. The old Bailey model does not work in rural Africa and Asia nor in many other urban centres in these places. For instance, in Africa as well as in Asia superstition, magic, sorcery and witchcraft are sometimes encountered in the administration of criminal justice. The state courts manned by university law-trained graduates have been confronted with strikingly interesting cases of witchcraft which, because of the different socio-economic backgrounds, may not come before European courts. Although the African and European courts may reach the same result, the reasons behind the decision in these cases may be different. Two examples will serve to illustrate this point:

1. *The Ghost case:* A man rode his donkey at dawn on his way to his farm which lies outside the village where he lives. There was a superstition about ghosts in that vicinity. They were said to walk at night, frighten or sometimes kill people. While the man was riding towards his farm he saw a dark figure in front of him. He called upon it: Who are you? A Satan or human being? There was no reply. He got scared stiff. He attacked the ghost and beat it to death and ran back to the village where he broke the news to the villagers. They came with him and to their great horror they found that he had killed the old dumb woman known to everybody in the village. It seemed she was thirsty and was looking for water. The accused was tried and acquitted because he believed he killed a ghost and not a human being.
2. *The Amulet case:* A alleged to everybody in his village that he was bullet proof and knife-proof because of the amulets he wore. A quarrelled with B, they exchanged abuse and blows. They wrestled and during the fight B pulled his knife and tried to stab A. A took it away from him forcibly and stabbed him to death. When he was tried A pleaded self-defence. The court did not accept his defence because he was not under any apprehension of death since he was amuletised and thus immune from all knife attacks. He should have repelled the knife attack without using a knife since he was knife proof.

If we continue to use European machinery of justice and do not give the courts some discretion, solutions for cases such as these could not be reached so easily.

We have all these imported machineries of justice, i.e., the Penal Code, the code of criminal procedure, the prison and police regulations. They are modern and continuously up-dated. But the real issue is whether they work to our satisfaction in our social and economic environment. The answer is that sometimes they just do not, and so we have to find alternatives to those parts of the criminal justice systems which do not work.

To conclude there must be fundamental changes in our codes of criminal justice. The judicial personnel should also be retrained.

Failing this, crime in the Third World can neither be prevented nor controlled effectively. Action for reform is overdue. Moral values are collapsing and that is why crime is rising in their place. To save our moral values and prevent crime we have to go back to rural and village morality.

Book Review

“THE TRIAL OF BEYERS NAUDÉ: CHRISTIAN WITNESS AND THE RULE OF LAW”

Edited by the International Commission of Jurists, Geneva. Search Press, London, 188pp, £2.50.

As Sir Robert Birley says in his introduction to this book, which recounts a notable trial in South Africa, there are “some trials when the roles of the participants seem to be reversed, the man in the dock becomes the prosecutor, the prosecutor is in the dock. The trial of Socrates is an obvious instance. The trial of Joan of Arc is another. Coming to more recent times I should cite the trial in 1944 of the students of Munich University, calling themselves the White Rose, who had resisted the Nazis. I feel that the same change is seen in this trial of Dr Beyers Naudé. It was not done by any kind of histrionics. The tone is quiet, almost gentle. Those who knew him will recognize the man as they read his evidence. Slowly the tables are turned; it is the South African Government and, to Dr Naudé’s obvious deep sorrow, his own Church, who have to answer the charges.” This passage goes to the heart of the matter and shows where the interest lies in this book.

Dr. Beyers Naudé comes from an Afrikaaner family. Like his father before him he was a minister of the Nederduits Gereformeerde Kerk. Eventually he was led by deep theological conviction to reject the doctrine of *apartheid*, and this in turn brought him into conflict with his church. He accepted an invitation to become Director of the Christian Institute and relinquished his status as a minister. The Christian Institute has a few thousand members and consists of small groups of all races and denominations, who meet privately to discuss the problems of their times in the light of the Bible.

In time the Christian Institute began to exert considerable influence in South Africa. The Government, which had long shown its hostility to the Institute, later sought to discredit it as a “subversive” organisation by referring it to an extraordinary inquisitorial Commission known after its first Chairman as the Schlebusch Commission. This Commission, which was set up to enquire into “certain organisations” was composed of members of parliament, and had the power to summon any person to testify before it, including members of the organisations under investigation. The hearings were in secret, no charges were preferred, no information was available of evidence already given against the organisation or the persons called upon to testify, and there was no right to legal representation by persons called before it.

Dr. Beyers Naudé’s trial followed his prosecution for refusing to testify before this Commission. The question at issue in the trial was whether, in the words of the Commissions Act, Dr. Naudé could show that he had “sufficient cause” for refusing to testify. This enabled his counsel to adduce evidence of the entire spiritual pilgrimage which had led Dr. Naudé into this clash with the State, and to explain the reasons for his refusal to testify. He made clear that he would welcome an opportunity to testify before a properly constituted independent enquiry conducted in public in accordance with the principles of the Rule of Law. The legal background to the case is lucidly explained in a chapter by Professor Allott of London University.

Dr. Naudé's case has taken a somewhat remarkable course. In November 1973 the Magistrate, Mr. L. M. Kotze, found Dr. Naudé guilty and sentenced him to a fine of R50 and one month's imprisonment, with a further 3 years' imprisonment suspended for 3 years. An appeal was lodged to the Transvaal Provincial Division of the Supreme Court (Justices Bekker and Botha) who allowed the appeal on the somewhat technical ground that only some of the members of the Commission, and not the full Commission, were assembled on the occasion when Dr. Naudé refused to testify. The State appealed against the decision to the Appellate Division of the Supreme Court. Before this appeal was heard, another Bench of the Transvaal Provincial Division (Justices Snyman and Viljoen) in deciding an appeal by another Christian Institute Member, Mrs. Dorothy Cleminshaw who had also been convicted for refusing to testify, refused to follow the decision of their brothers in Dr. Naudé's appeal and upheld the magistrate's conviction. The Appellate Division, by a majority of 4 to 1 (Chief Justice Rumpf with Justices Botha, Trollip and Rabie, Mr. Justice Corbett dissenting), followed the Provincial Division in Mrs. Cleminshaw's case and restored the Magistrate's decision convicting Dr. Bayers Naudé. All these judgments are summarised and extensively cited in the book. They give a fascinating insight into the way in which legal decisions often depend upon the importance which judges attach respectively to the rights of the individual and to the powers and prerogatives of the executive.

Dr. Naudé's case is still not finished. After the decision of the Appellate Division, the case was returned to the Provincial Division to decide the second question raised on his appeal, namely the question of substance in the case. This was whether he had "sufficient cause" by reason of his religious convictions to refuse to testify before an inquisitorial commission, whose procedure violated the principles of the Rule of Law. The appeal was heard in March 1975. It appears that the bench, consisting of Justice W. G. Boshoff and Acting Justice D. M. Williamson, was divided on this issue and accordingly the appeal will now have to be reheard before a full bench of three other Justices.

Meanwhile, the Schlebusch Commission has published a lengthy and highly tendentious report on the Christian Institute. It should be made clear that Dr. Beyers Naudé has made numerous statements showing that he and the Institute reject violence and that the aims of the Institute are constructive to bring together Whites and Blacks to consider the problems of their country in common. He has, however, frequently warned, as he did in his trial, that unless radical changes take place in the social order violence is bound to follow. But he has never supported violence.

In spite of this, the Schlebusch Commission has tried to smear the Institute with the suggestion that it supports violent change, and therefore constitutes a danger to the State. The steps by which it arrived at this conclusion are revealing and defy logic. They should be read in full but, in short, the Commission finds that the Christian Institute has pursued the objectives of a group of planners known as Sprocas II who had "set up as an objective the substitution through racial conflict of a Black dominated socialist system for the existing order"; that the Institute has attempted to achieve these objectives "regardless of the *possibility* that their action *might lead to* the violent overthrow of the authority of the State". From this a double jump is made: first to a finding that "a Black-dominated socialist state is aimed at, and that violence has been *accepted* as an element in achieving such a socialist state", and secondly that it is "clear to the Commission that the strategy adopted by the Institute to bring about the

desired change is *characteristic of revolutionary socialist technique* " (italics added throughout).

The Commission then concludes that " certain [unspecified] activities of the Institute constitute a danger to the State " and recommends that " certain statutory provisions may apply to the organisation under consideration and recommends that the proper authorities give the necessary attention to the organisation in this connection ".

This was a clear reference to the Affected Organisations Act (see ICJ Review No. 12, June 1974, p. 16) and the government duly made an order declaring the Institute an Affected Organisation within the Act, with the result that it is now unable to continue to receive funds from churches and other supporters abroad.

Any lawyer knows how easy it is by a selective choice of evidence to pick out material to support almost any conclusion following an enquiry of this kind. It is usually only by an examination of the whole of the evidence that a judgement can be made whether the conclusions of the Commission are justified. That is impossible in the present case, as the Commission has not published the evidence. However, for once this is hardly necessary, since the quality of the report is such that it is hard to believe that any impartial reader would be impressed by its findings. As was said in a leading article in the Cape Times on June 4, 1975, " it is about the worst document of its sort we have ever set eyes on, when judged by the criteria of unsubstantiated assertion, guilt by association, unveiled innuendo and jumping to conclusions ".

One of the effects of the Report, and of the Government's subsequent declaration that the Christian Institute is an affected organisation, has been to increase substantially the Institute's financial support from within South Africa. The Institute is determined to continue its work in face of all the difficulties and harassments placed in its way by the South African Government. The latest of these is the arrest of the Deputy Director of the Institute, Mr. Horst Kleinschmidt, on September 15, 1975, and his continued detention without trial under the provisions of the notorious Terrorism Act.

Readers of *The Trial of Beyers Naudé* will gain an unusual insight into the nature of the struggle taking place within South Africa, and will see how a careful and impressive judicial system is able to exist side by side with a system of detention without trial, banning orders, and secret inquisitions over which the judiciary has no power or control. They will also encounter in the Defendant a very remarkable personality of whom Lord Ramsey of Canterbury says in his Preface " when I think of the men who have shown me what it means to be a christian, my thoughts will always go quickly to Beyers Naudé ".

MEMBERS OF THE COMMISSION

T.S. FERNANDO (President)	Sri Lanka High Commissioner to Australia, former Attorney-General and former President of the Court of Appeal of Sri Lanka
PER T. FEDERSPIEL (Vice-President)	Attorney-at-law; Copenhagen
FERNANDO FOURNIER (Vice-President)	Attorney-at-law; Costa Rica; former President of the Inter-American Bar Association; Professor of law
MASATOSHI YOKOTA (Vice-President)	Former Chief Justice of the Supreme Court of Japan
GODFREY L. BINAISA	Former Attorney-General of Uganda
ALPHONSE BONI	President of Supreme Court of Ivory Coast
BOUTROS BOUTROS-GHALI	Professor of International Law and International Relations, Cairo
ALLAH-BAKHS K. BROHI	Former Pakistan Law Minister and High Commissioner
JOEL CARLSON	Former representative of the ICJ in South Africa; U.S.A.
HAIM H. COHN	Supreme Court Judge; former Minister of Justice, Israel
ROBERTO CONCEPCIÓN	Former Chief Justice, Philippines
CHANDRA KISAN DAPHTARY	Senior Advocate; former Attorney-General of India
ELI WHITNEY DEBEVOISE	Attorney-at-law; New York
TASLIM OLAWALE ELIAS	Former Chief Justice of Nigeria, Member of International Court of Justice
ALFREDO ETCHEBERRY	Professor of Law, University of Chile; Advocate
EDGAR FAURE	President of Assembly; former Prime Minister of France
HELENO CLAUDIO FRAGOSO	Professor of Penal Law, Rio de Janeiro, Brazil
ENRIQUE GARCIA SAYAN	Former Minister of Foreign Affairs, Peru
LORD GARDINER	Former Lord Chancellor of England
BAHRI GUIGA	Counsellor, Court of Appeal of Tunisia
JOHN P. HUMPHREY	Professor of Law, Canada; former Director, U.N. Human Rights Division
HANS-HEINRICH JESCHECK	Professor of Law, University of Freiburg, Germany
P. J. KAPTEYN	Professor of International Law, Leiden University, Netherlands
SEÁN MACBRIDE	U.N. Commissioner for Namibia; Former Minister of External Affairs of Ireland
RUDOLF MACHACEK	Member of Constitutional Court, Austria
KEBA M'BAYE	President of the Supreme Court of Senegal
LUIS NEGRON FERNANDEZ	Former Chief Justice of the Supreme Court of Puerto Rico
MRS. NGO BA THANH	Secretary, Institute of Comparative Law, Saigon
TORKEL OPSAHL	Professor of Law, Norway; Member of European Commission
GUSTAF B. E. PETREN	Judge and Deputy Ombudsman of Sweden
SHRIDATH S. RAMPHAL	Attorney-General and Minister of State, Guyana
EDWARD ST. JOHN	Q.C.; Barrister-at-law, Australia
MICHAEL A. TRIANTAFYLIDES	President Supreme Court of Cyprus; Member of European Commission
J. THIAM-HIEN YAP	Attorney-at-law; Indonesia

Secretary-General: **NIALL MACDERMOT**

INTERNATIONAL COMMISSION OF JURISTS, 109, ROUTE DE CHÊNE, 1224 CHÊNE-BOUGERIES
GENEVA, SWITZERLAND

The Trial of Beyers Naudé:

Christian Witness and the Rule of Law
Edited by the International Commission of Jurists
Search Press, London, 188 pp. £2.50

An account of the trial of a great Christian leader in South Africa, Dr. Beyers Naudé, Director of the Christian Institute. He was prosecuted for refusing to testify before the notorious secret inquisition the Schlebusch Commission. His evidence traces the spiritual pilgrimage which led him from his traditional Afrikaaner background into conflict with his church and with the State on the issue of race relations in South Africa. Lucid introductions by Sir Robert Birley and Professor A. N. Allott describe the significance of the trial and its legal background. The reader gains an insight into the legal web in which the *apartheid* society is entangled. He also meets a remarkable personality of whom Lord Ramsey of Canterbury says in his Preface, "when I think of the men who have shown me what it means to be a Christian my thoughts will always go quickly to Beyers Naudé".

Available from ICJ at SwFr. 15.—, postage by surface mail free.

Asylum in Latin America

A 64-page legal study by the ICJ on "The Application in Latin America of International Declarations and Conventions Relating to Asylum" September, 1975. Includes an analysis of asylum, extradition and non-refoulement under international law; background information on refugees in 8 countries; individual cases of refoulement, harassment, kidnapping and assassination of refugees; comments and conclusions. An Appendix contains the relevant provisions of the conventions and declarations governing asylum in Latin America.

Available in english or spanish. Price: SwFr. 10.—, postage by surface mail free.

International Commission of Jurists
109, route de Chêne
1224 Chêne-Bougeries/Geneva
Switzerland