

**For the Rule of Law**

# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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# THE INTERNATIONAL COMMISSION OF JURISTS

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

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# Human Rights in the World

## Constitutional Changes in India

Many of the provisions of the new Act to amend the Constitution of India have far-reaching implications for the rule of law and for the checks and safeguards in the Indian Constitution. The amendments sensibly alter the balance between the powers, restricting the powers of the judiciary and increasing those of the executive, as well as increasing the powers of the Central Government in relation to the State governments.

This is done at a time when the government holds in detention without trial some two dozen opposition members of parliament under emergency laws and at a time when it has not thought fit to renew its mandate from the electorate at the end of its normal 5-year term. If and when free elections take place, the government could lose the two-thirds majority in Parliament (won in the aftermath of the successful campaign against Pakistan) which enables it to put through constitutional amendments of this kind. The government has now postponed elections for a second year under the Proclamation of Emergency, and can continue doing so year by year as long as it decides to continue the state of emergency. There have been many protests in India against making such far-reaching amendments at a time when the Parliament's and Government's powers have been extended under the emergency.

In the explanatory memorandum to the Act the government stated somewhat ominously that its purpose was "to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles. It is also proposed to specify the fundamental duties of the citizens and make special provisions for dealing with anti-national activities, whether by individuals or associations".

The Act contains no less than 59 sections, and the following are some of its principal provisions.

### **Fundamental rights**

Section 4 virtually renders the guarantees of fundamental rights in the Constitution nugatory. An earlier amendment of the Constitution, in Article 31 C, had provided that no law giving effect to the Directive Principles of State Policy relating to the ownership control and distribution of material resources for the common good, or preventing the concentration of wealth and means of production to the common detriment, could be declared void by the courts on the grounds that it violated the fundamental rights provisions of the Constitution. Now it is

proposed to extend this exclusion of the fundamental rights provisions to any Act giving effect to *any* of the Directive Principles. Since almost all laws passed by the Central or State Legislatures can be said to give effect to one or other of the Directive Principles of State Policy (in Article 39 of the Constitution), the effect of the amendment will be to place almost all laws beyond any challenge based on the fundamental rights provisions. In view of the provisions of Article 31C it is difficult to see what kind of intended legislation the government feared might be struck down by the Courts as offending against the fundamental rights provisions.

Section 5 makes provision for laws to prevent or prohibit "anti-national associations" and "anti-national activities". These are defined very widely to include, for example, any activity which disclaims, questions, threatens, disrupts or is intended to threaten or disrupt the sovereignty of India or the security of the State or the unity of the nation; or is intended to create internal disturbance or the disruption of public services, or to threaten or disrupt harmony between different religions, racial, language or regional groups or castes or communities. In relation to any such law the constitutional guarantees of freedom of speech, assembly, association, movement, and residence, property rights and the right to choose one's profession, trade or business, are all abrogated.

### **The Judiciary**

The powers of the courts to determine the constitutionality of laws is severely restricted. The constitutional validity of central laws is in future to be determined only by the Supreme Court and not by High Courts. A minimum of 7 judges must sit and a two-thirds majority is required to hold a law invalid (ss. 23 and 25). State laws can be struck down only by a two-thirds majority out of not less than 5 High Court judges (s. 42). As far as is known, this system of weighting in favour of judges who support the government is without precedent.

Amendments of the Constitution are to be questionable in the courts only on procedural grounds, and not on the grounds that they are inconsistent with the spirit or basic structure of the Constitution (s. 55). (Though many jurists have protested against this provision, the better view is probably that this is declaratory of the existing law.)

The courts are no longer to be allowed to see the internal rules framed under Article 77(3) of the Constitution for the convenient transaction of government business (ss. 14 and 28).

The qualifications for a High Court Judge (formerly 10 years practice as a High Court advocate or in judicial office) is now extended to anyone who is, in the opinion of the President (i.e. of the Cabinet), "a distinguished jurist" (s. 36). It remains to be seen how this power will be used, but it could affect the calibre and independence of the judiciary.

Provision is made in section 46 for laws setting up administrative tribunals to determine a wide range of disputes, complaints or *offences* relating to taxes, foreign exchange, imports and exports, industrial and labour disputes, land reforms by state acquisition, parliamentary or state elections, suppliers of food and other goods declared essential, as

well as disputes and complaints with respect to civil service recruitment and conditions of service. The jurisdiction of the ordinary courts on these matters may be ousted (save for the review power of the Supreme Court), and the laws made under this provision may provide for the procedure of the Tribunals and alter the rules of evidence.

### **Powers of the Executive**

Under section 13 it is made explicit that the President shall, in the exercise of all his powers, be bound by the advice of the Cabinet. He thus becomes a figurehead.

Proclamations of Emergency may in future relate to parts of India (s. 49). Proclamations of direct rule of States by the central government are to be valid for one year (instead of 6 months) without renewal by Parliament (s. 50) and any state laws made under direct rule are to remain valid until repealed or amended (s. 51).

The Central Government is to be able to deploy under its own control any armed force or other force of the Union "for dealing with any grave situation of law and order in any state", even when there has been no proclamation of direct rule or of an emergency (s. 43).

The powers of the Central Government are also to be increased by the transfer from the List of State Subjects to the List of Concurrent Subjects of the administration of justice, constitution and organisation of the courts (below the level of the Supreme Court and High Courts), education, weights and measures, forests and protection of wild animals and birds (s. 57).

There is a remarkable provision in section 59, whereby "if any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act" the President (i.e. the Cabinet) may, by order made within two years of the passing of the Act, "make such provisions, including any adaptation or modification of any provision of the Constitution, as appear to him to be necessary or expedient for the purpose of removing the difficulty". There was a transitional provision of this kind in the original Constitution, but it lasted only until the first meeting of Parliament. To give such a power to the Executive for a 2-year period, when there is in existence a Parliament, is to give the government an extraordinary power to be judge in its own cause and to amend the Constitution by order. It is also an admission of the far-reaching nature of these constitutional amendments.

### **The Legislature**

The duration of the Parliament and of the State legislatures is extended from 5 to 6 years (without prejudice to further extensions of the Parliament under emergency powers) (ss. 17, 30 and 56). No reason is given for this change in the explanatory memorandum.

The requirement for a one-tenth parliamentary quorum is removed and Parliament is left to determine its own quorum (s. 22). The powers, privileges and immunities of members of Parliament and State Legislatures are no longer to be defined by Parliament, but are to be

“such as may from time to time be evolved by such House”, whatever that may mean (ss. 21 and 34).

The allocation of seats and the boundaries of constituencies for the parliament and state legislatures are to be frozen until the year 2000. Whatever demographic changes take place in the meantime, there will be no alterations to ensure equal representation (ss. 12, 15, 16, 29 and 47).

Offices of profit under the Central or a State government will no longer disqualify a member of the legislature unless the office is declared by Parliament by law to disqualify its holder (ss. 19 and 32). In determining whether a Member shall be disqualified on such grounds, or on grounds of corruption, the President (i.e. the Cabinet) will no longer be bound by the opinion of the Election Commission (ss. 20 and 33).

### **Directive Principles and Fundamental Duties**

The directive principles of state policy in Part IV of the Constitution (which are not enforceable in any court but are now to take precedence over fundamental rights) are to include the provision of equal justice and free legal aid to economically backward classes, participation of workers in the management of industrial organisations, and protection and improvement of the environment and safeguarding forests and wild life (ss. 7-9). There is also a new Part IV A enumerating “fundamental duties”, which begins somewhat ironically with the statement that it “shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions . . .”. There is also a duty “to develop the scientific temper, humanism and the spirit of inquiry and reform” (s. 11).

### **Conclusion**

Mrs Gandhi’s opponents accuse her of intending to replace the democratic constitution of India by a dictatorial system. Whilst Mrs Gandhi protests that this is not the case, the government, with its present overwhelming majority in Parliament (gained after the successful military operation against Pakistan which led to the new state of Bangladesh), is equipping itself with powers which could be used to perpetuate the rule of the Congress Party.

In the first place there is nothing to stop the Parliament prolonging the state of emergency indefinitely. Most observers would say that there is no longer any need for the maintenance of the Proclamation, but there is as yet no indication when it will be brought to an end. It has already been used to extend the life of the Parliament by two years, to intern political opponents, and to suppress or severely restrict fundamental rights, including freedom of speech, of the press, of assembly and of association. Furthermore, the way is now clear for laws to be passed outlawing any political organisation which threatens the ascendancy of the Congress Party by saying that it threatens the security of the state, and the courts will not be able to strike down such a law on the grounds that it violates fundamental rights.

If this is not the objective of the Congress Party, it is difficult to see what is the object of the constitutional changes, or why they are considered necessary in order to bring about socio-economic reforms.

## Indonesia

In *ICJ REVIEW* No. 13 (December 1974), the case of a lawyer and former Indonesian Minister, Mr Oei Tjoe Tat, was cited as an example of the tens of thousands of political prisoners who have been held in custody without trial since 1966. His release was urged.

Over a year later Mr Oei was eventually brought to trial. Although he received a fair hearing, the decision of the Court given on March 30, 1976, was on the face of it a travesty of justice. A former loyal minister of President Sukarno, he was charged with subversion and involvement in the abortive September 1965 coup against Sukarno. The prosecution's case rested upon a written statement which had been drawn up at a meeting held in Mr Oei's house. The evidence was plain, and was accepted by the court, that not only did Mr Oei have nothing to do with the preparation of the statement, but when he saw it he immediately rejected it precisely upon the grounds that it was tantamount to an attempted coup. Nevertheless, Mr Oei was found guilty and condemned to 13 years imprisonment, whilst another accused, Adisumarto, who signed the statement received a sentence of 12 years. The Court's attempted justification of this extraordinary judgment was that Mr Oei "did not react strongly enough, although protesting against the statement". This shameful decision can be explained only by factors external to the trial itself, and as an attempt to justify Mr Oei's detention for almost 10 years before trial.

During 1976 there has been intensive pressure in the US Congress elsewhere about political detainees in Indonesia. With a view to safeguarding their foreign aid programme, the Indonesian authorities have suggested that large scale releases are under way. In an interview published in the Netherlands in *De Telegraaf* on 11 June 1976 the head of the national security organisation, Admiral Sudomo, announced a plan to release the admitted 36,000 political prisoners in Indonesia, including all those on the notorious island of Buru, by the end of 1977.

This programme was received abroad with some scepticism, especially when the Foreign Minister, Adam Malik, in a statement to a US Congressional Sub-Committee made three weeks later on 30 June, contradicted Admiral Sudomo and said that the 10,000 prisoners on Buru Island would not be released but would be "settled" there permanently. Moreover, on 24 July Admiral Sudomo stated that only 2,500 of the 34,000 category B prisoners (i.e. those against whom there is admittedly insufficient evidence to bring them to trial) would be released by the end of 1976. Finally, on 27 August 1976 Admiral Sudomo made a further announcement evading the whole issue by stating that increasing communist activities, not in Indonesia but in Malaysia and Singapore, would affect the planned release of the prisoners. He said the two things which had to be taken into account were the "possible infiltration" of communist elements from outside and the "possible

smuggling of weapons into Indonesia” to arm communist remnants there. It is shocking that tens of thousands of persons, large numbers of them having no connection with the communist party, should be kept detained without trial upon such hypothetical grounds more than 10 years after an abortive coup in which they have never been shown to have participated.

## Malaysia

In Review No. 16 attention was drawn to some recent restrictions on human rights under the emergency legislation in Malaysia. Unfortunately the guarantees of fundamental rights in the 1957 Malaysian Constitution have now been further eroded by the passing of the Constitutional (Amendment) Act of 1976.

Article 5 of the Constitution, for example, was intended to safeguard the liberty of the person by providing *inter alia* for the right to *habeas corpus* and the right to legal counsel and a prompt hearing before a magistrate within 24 hours of arrest. These provisions were made applicable to all but enemy aliens. As now amended the basic protections of Article 5 are denied to all persons “arrested or detained or placed under restricted residence under any law relating to the security of the Federation, preventive detention, restricted residence, immigration or banishment”. In this way the checks against the arbitrary and abusive exercise of executive and police powers are effectively removed and the detainee may be deprived of judicial recourse in the event of “security” arrest.

Section 30 of the Amendment Act amends Article 135 of the Constitution which protected public servants (judicial, legal, armed forces, police, railway, etc.) from dismissal or reduction in rank without a fair hearing. As a consequence of this new amendment a public servant can be dismissed summarily without a hearing when there has been made against him “an order of detention, supervision, restricted residence, banishment or deportation . . . under any law relating to the security of the Federation, prevention of crime, preventive detention, restricted residence, banishment, immigration. . . .” The amendment therefore permits dismissal of a public servant by mere service upon him of such an order. No reasons have to be given when the order is made and the order is not open to challenge in a court of law. Consequently, there is no way of challenging the dismissal.

Article 151 of the Constitution gave some protection to persons detained under any preventive detention law by declaring that “no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board [constituted by the Yang di-Pertuan Agong, i.e., Supreme Head of the Federation] has considered any representations made by [the detainee] and recommendations thereon to the Yang di-Pertuan Agong.” This safeguard has been amended (section 40) so that the Advisory Board is required to consider the detainee’s representation against detention not within three months of detention but “within three months of receiving such representations, or within such longer periods as the Yang di-Pertuan



Agong may allow." Thus it is possible for the Advisory Board's consideration of a detainee's representation to be postponed indefinitely.

A very disturbing feature of the Amending Act is its provisions for retroactive legislation. The amendment of Article 5 of the Constitution depriving those arrested, detained or restricted of the right to a prompt hearing before a magistrate is made to take effect as from Merdeka Day, i.e. from August 31, 1957. Likewise, the amendment of Article 135 has been given retroactive effect to Merdeka Day. Other amendments have been given retroactive effect to Malaysia Day, September 16, 1963. This legislation is apparently intended to lend an air of legality to past abuses of constitutional rights and freedoms in Malaysia. An act which "makes legal what was illegal when done, or renders illegal what was legal when done."

## Rhodesia/Zimbabwe

Since the publication in May 1976 of the ICJ study on *Racial Discrimination and Repression in Southern Rhodesia*<sup>1</sup>, both the armed struggle and the repression have intensified. The realisation by the white minority that they will be unable in the long term to contain the African guerilla forces, combined with the pressure brought to bear on them by South Africa following Mr Kissinger's diplomacy, has brought the Smith régime to the Geneva conference table. At the time of writing that Conference is still continuing, though making little progress. The respective delegations remain very far apart.

Meanwhile, the white Rhodesian forces have made a second series of raids upon the guerilla camps in Mozambique, at first calling them "hot-pursuit" raids. As was pointed out by Cedric Thornberry in a letter to the London *Times* in May 1976, that doctrine has no place in international law except in relation to war at sea. However, this pretext was later abandoned when a spokesman from Salisbury admitted that the raids were not in pursuit of invading guerillas, but claimed that they were pre-emptive raids carried out in self-defence. This attempted justification will find no more support in international law.

Apart from the fact that the illegal Smith régime has not received recognition by the international community, the use of force in self-defence can be justified only in response to an act of aggression. Under the definition of aggression adopted by consensus at the General Assembly of the United Nations in Resolution 3315 (XXIX) on 14 December 1974, the use of force by peoples forcibly deprived of their right to self-determination, freedom and independence, particularly peoples under colonial and racist régimes or other forms of alien domination, is not aggression. Nor is the action of Mozambique in allowing its territory to be used as a base for the armed struggle of the African liberation forces. These raids into Mozambique by the white

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<sup>1</sup> Two corrections have been requested to this 125 pp. study. When a defendant alleges that a confession was made under duress, the onus is on the prosecution to prove that it was made voluntarily and not for the defendant to prove duress (cf. p. 87). It is only materials relating to security matters which the press submits in advance to the Ministry of Information (cf. p. 40). As far as is known the *Rhodesia Herald* has published nothing about this study save to make this correction in abusive language. As Bishop Lamont stated at his trial (see below) the study "might as well never have been written as far as those who rule Rhodesia are concerned".

Rhodesian forces are, therefore, themselves acts of aggression. By carrying them out the Smith régime are running the risk that Mozambique will call in outside aid, as the MPLA did in Angola. This may be the intention of the Smith régime in a desperate gamble, hoping that in this way it can receive the military support now denied to it by South Africa and the Western powers.

The régime's response to the intensification of the armed struggle has been a considerable increase in the severity of sentences, an increase in the number of death sentences (which are now carried out in secret), and a substantial increase in the number of detentions of the leaders and active members of the lawful African parties striving for independence and majority rule. During 1976 the number of persons in preventive detention rose from about 650 to about 2,000. This is in addition to about 750 who have been convicted of political offences, such as failing to report terrorists. Together with those subject to 30 or 60 day police detention orders, there are estimated now to be about 3,000 political prisoners in Rhodesia.

The detainees are almost all classified in the lowest category as 4th class prisoners. One of the detainees who was released to take part in the Geneva conference explained that in the camp where he was detained he slept on a concrete floor with no bedding, his normal clothes were replaced by a pair of khaki trousers and shirt with no underclothes, shoes or socks. He was fed on a diet of "sadza" and even when he could receive visits from his family he was not allowed the food and clothes they brought for him. He was also denied his spectacles and the medicines he needed. He was not physically ill-treated, but about 60% of the detainees complained that they had been badly beaten by the police when they were first arrested and interrogated. Some had permanent injuries to show, including one man with a split testicle.

The dilemma of the Christian missionaries in Rhodesia was illustrated by the trial of Bishop Donal Lamont in Umtali on 22 September, 1976. The Bishop, who has been a leading critic of the racial discrimination in Rhodesia, pleaded guilty to two charges of failing to report terrorists and instructing a nun not to report terrorists. She had been approached by guerillas asking for medicines at a remote mission station in the operational areas. She felt it was her Christian duty to supply the medicines to those needing them and in this she was supported by the Bishop, who also told her not to report the presence of the terrorists. He explained to the court that the work of the missionaries would be made impossible if they were to act as informers to the authorities. Significantly, the authorities decided not to proceed with the prosecution of a doctor who had taken similar action. If their object in proceeding against the Bishop was to discredit him, the effect is likely to have been the opposite save among those who are already prejudiced against him. He was given an exemplary sentence of 10 years imprisonment with labour, but is at present on bail pending appeal. The ICJ observer at the trial, Mr Justice Henchy of the Supreme Court of Ireland, commented "If his sentence is allowed to stand, the missionary work of the Christian churches which is so important in Rhodesia will be imperilled, for all missionaries in the operational areas will be on risk".

## Tamils in Sri Lanka

The problem of minority rights is one of the most difficult and explosive issues in the modern world. Even in the older countries with relatively stable conditions secessionist movements among minorities, such as the Scottish and Welsh nationalists in the United Kingdom, has been gaining strength. In Northern Ireland the discrimination against a minority within a minority has produced a seemingly insoluble problem of violence and counter-violence. The examples of Nigeria, East Pakistan and Cyprus, to name but three, show what havoc and hardships can result from minority conflicts in developing countries.

Where minorities exist with different ethnic origins, a different language, and a different religion, it is rare indeed for complaints not to be made of discrimination, thus leading to demands for greater autonomy if not secession, and a greater share of the economic resources of the nation. When the minority is among the more economically disadvantaged groups in the society, the economic problems add fuel to the complaints of discrimination. On the other hand where, as sometimes happens, the minority holds a privileged position in society, it will resist any erosion of its privileges fearing this will lead to persecution and subordination.

A minority issue which has recently attracted attention abroad is that of the Tamils in Sri Lanka, a country which can reasonably claim to have the greatest degree of political freedom in Asia. Some recently published pamphlets and studies and a report by the Government of Sri Lanka answering the criticisms levelled against them, enable those interested to obtain a better informed picture of this complex problem<sup>1</sup>.

There emerges from these documents a general agreement upon five basic facts: the Sinhala language of the majority has been made the official language of Sri Lanka; the State, as set forth in its Constitution, is committed to the protection and fostering of Buddhism — the majority religion; the Land Reform Law of 1972 has been mainly of benefit to the Sinhalese; there has been a decreasing number of Tamils entering institutions of higher learning; and thousands of "Indian" Tamils are being sent back to India. It is, however, the interpretation of these facts which constitute the main areas of disagreement between the two groups.

The roots of the present conflict reach back at least 2,000 years when the island was populated by two distinct cultures (of Aryan and Dravidian origins) which immigrated from India. Which of these groups was first to establish itself on the island is the subject of bitter disagreement today, as is the question of whether the two groups formerly constituted separate kingdoms. What is known is that when the Portuguese came to the island in the 16th century the Dravidian group (Tamil-speaking Hindus) lived mostly in the Northern and Eastern parts, while the Aryan group (Sinhalese-speaking Buddhists) lived in the Southern and

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<sup>1</sup> *A Memorandum on Discrimination* submitted to the International Commission of Jurists by the Tamil United Front, Colombo, 1973; *Tamils of Sri Lanka* by Walter Schwarz, Minority Rights Group, London, 1975; *Memorandum to M.P.'s in Sri Lanka* by Ealam Tamils Association, London, 1976; *Tamils in Sri Lanka* by W. T. Jayasinghe, Secretary, Min. of Defence and Foreign Affairs, Sri Lanka, 1976.

Western areas. This pattern of population distribution remained until the 19th century when the British imported some half million Tamils from India (now called Indian Tamils) to work the tea and coffee plantations in the heart of hitherto Sinhalese country around Kandy. This group has grown to nearly a million. In 1964 an agreement was reached between Sri Lanka (then named Ceylon) and India whereby Sri Lanka would grant citizenship to 375,000 Indian Tamils and India would accept 600,000 of these people for repatriation by 1983. The latest figures show that so far 179,000 Indian Tamils have been repatriated and 108,000 granted Sri Lankan citizenship. According to the latest census, out of a total population of 12.7 million, the Sinhalese constitute 71.9% and the Tamils 20.5% (the Sri Lankan Tamils constitute 11.1% and the Indian Tamils 9.4%).

The Tamils believe that in establishing Sinhalese as the official language of Sri Lanka and Buddhism as the official religion, in turning over plots of land to Sinhalese settlers in some areas traditionally populated by Tamils, in cutting back the number of Tamils entering universities, and in sending hundreds of thousands of Indian Tamils back to India, the Sinhalese majority government is effectively depriving the Tamils of their economic position and destroying their separate national identity, thus reducing the Tamils to the status of second-class citizens.

The government, on the other hand, answers these allegations by pointing out that the Tamil Language Act of 1958 makes provisions for use of the Tamil language in schools in the Tamil districts and in state and administrative correspondence, provides for translations of laws and official documents into Tamil, and allows Tamil as the language of record in courts within the Northern and Eastern provinces. The government also points out that the Constitution guarantees freedom of religion in Sri Lanka; that land which has been uncultivated and underdeveloped for hundreds of years must now be developed if Sri Lanka is to grow the food which it has traditionally had to import, notwithstanding the fact that these uncultivated lands lie in districts traditionally populated by Tamils; that the presence of hundreds of thousands of Indian Tamils would create serious political and economic problems on the island and that a fair means of resolving the problem of their numbers was achieved with the Indo-Ceylon Agreement. The government further asserts that due to historical and geographical reasons, the Tamils have traditionally occupied a disproportionately high percentage of positions in universities, the civil service and in industry; present government policy attempts to redress that imbalance by offering greater opportunities for the Sinhalese. The government also gives impressive statistics to show that the Tamil areas have received their fair share of government aid in development programmes.

The concerns and fears of both sides are real and relations between the two groups appear to have deteriorated recently. In May of this year, for example, the Federal Party and other Tamil organisations formed the Tamil Liberation Front to work for the establishment of an independent Tamil state. This move is likely to increase the fears of the Sinhalese majority that their land and culture may be in danger of being overwhelmed if the more militant Sri Lankan Tamils succeed in ob-

taining the support of the Indian State of Tamilnadu, 22 miles distant, which has a population of 50 million Tamils.

In these circumstances the reluctance of the Sinhalese majority to contemplate a federal solution is understandable. The risk is obvious that such a division could lead in time to a break up of the state. On the other hand, if the unitary solution is to last, greater understanding of the fears of the Tamil minority will be needed, though this will itself raise considerable political problems for the government. As Mr Walter Schwarz asks at the end of his report for the Minority Rights Group, "is it too late for an attempt to evolve an inter-communal approach to the language position and the related matters of education and employment? It would be a pity if Sri Lanka's leadership waited for bombs to explode, and for prisons to fill up again, before conceding that the Tamils need reassurance that they have a place in the future of the island".

## USSR — Psychiatric Confinement

Several more cases have been reported from the Soviet Union during 1976 alleging the confinement of dissidents in psychiatric hospitals. As the Soviet authorities do not reply to any enquiries about these cases, and as there is no legal machinery by which the order for confinement can effectively be challenged in the courts by or on behalf of the person confined, the information received about these cases is inevitably one-sided.

In every country many genuinely ill persons will be found in psychiatric hospitals who contend that they have been locked up as a result of a political conspiracy against them. Their sense of persecution is part of their illness. In such cases, however, the families and friends of the patient usually know the nature of his affliction and have, indeed, sought the assistance of the doctors. It is in cases where those who know the patient best protest that he is normal, and where there is no suggestion of violent or disturbed conduct by the patient, that the greatest suspicion arises that a mistake has been made and that the person is improperly confined.

One such case is that of Mr Argentov, a 25-year-old Christian who took part in an "unofficial seminar" of Orthodox Christians in Moscow. (This presumably means a group of Christians meeting on their own initiative and not under the auspices of the Church). The discussions at this seminar were regarded by the security authorities as "anti-Soviet" and this led to some questioning of the participants, mostly young people. Presumably someone in the security authorities thought that Mr Argentov was unbalanced, for he was summoned to the Military Commission of the Tushinsky District in Moscow on 14 July 1976.

According to the information which has been received, he was ordered to go at once to the District Psychiatric Clinic for examination, although he had never before undergone any psychiatric treatment or

examination. At the Clinic he was examined by two doctors who questioned him about his religious belief, arguing with him that "in our age of the flowering of space technology it is impossible to believe in God; it is forgivable only for illiterate old people". Consequently, said one of the doctors, they were obliged to send him to a psychiatric hospital for observation, and if he turned out to be ill he would be treated, and if he was healthy they could send him to a seminary (sic). Accompanied by orderlies he was then taken to Moscow Psychiatric Hospital No. 14 and placed in the third ward. His crucifix was taken from him by force.

The next day the doctor in charge of the ward saw him and questioned him why he believed in God, when he started to believe, and what brought this on. He then gave him aminazin tablets, telling him that if he refused he would be injected by force. Aminazin is a depressive drug, which can have harmful effects on normal people.

Mr Argentov's detention has been the subject of vigorous protests and appeals by persons who knew him well and who assert that he is not medically ill. The chief doctor at the hospital told Argentov that anyone who signed the "anti-Soviet" (as he called it) Appeal to Public Opinion would be sent to prison.

It is argued on Mr Argentov's behalf that his detention was illegal under Soviet law in that he was not examined within three days by a commission of three doctor-psychiatrists; he was forcibly hospitalised on grounds which are not specified in the relevant Instruction, of 26 August 1971; and he was made to take aminazin tablets before the correctness of his hospitalisation had been established.

Mr Argentov himself addressed a remarkable appeal on 21 July 1976 to Patriarch Pimen of Moscow and All Russia. It reads as follows:

"Your Holiness,

I turn to you as the head of the Russian Orthodox Church with an appeal for help.

On 14 July of this year I was forcibly placed in a hospital for mentally ill persons, although I have never before been under psychiatric care or examination. As the doctors frankly told me, the only reason for my confinement was my faith in God and my membership of the Orthodox Church. I am healthy and I sleep well, but here they have persistently given me sleeping pills. I am by nature a calm and well balanced person, but here allegedly to calm me they have forced me to take strong psychotropic medication (aminazin), threatening that if I did not comply they would subject me to compulsory treatment with injections. I am among seriously ill persons who are tied to their beds on account of their violence. I must listen to their wild howling and this, together with the effect of my treatment, is depressing me. But what depressed me even more is the attitude towards me of the doctors, who although they are completely ignorant about religion try to persuade me that my religious faith is mental illness. The doctors assert that our Christian faith prevents believers from defending the Fatherland, that progress in aviation and space research have proved that there is no God, that priests serve only for money and that young believers are basically pathological idiots.

Although my parents are militant atheists they consider me to be a healthy person and have repeatedly demanded my release from the madhouse. They were refused because, in the words of the doctors, I am mentally ill and require treatment.

The parting words of the doctors of the clinic that here in the hospital they would "beat all this nonsense (meaning religious faith) out of me" terrified me with their inhumanity. What they are doing with me here now shows that this was no empty threat.

Your Holiness, be kind, intercede for me! . . . And if you have no possibility to intercede for me then bless me, even silently, for being tortured for my faith.

21 July 1976

Aleksander Argentov"

There is by no means universal agreement among psychiatrists about the criteria for determining whether or not a person is mentally ill, and whether or not his forcible confinement is necessary and justified. In all countries mistakes are liable to be made. This makes it all the more necessary that there should be an adequate appeal machinery with the right to legal representation before an independent tribunal (which may be a mixed tribunal of lawyers and doctors), so that these cases can be reviewed. If the letter by Mr Argentov to the Patriarch is genuine, and there is no reason to believe that it is not, it presents a most disturbing picture. As was said by Mr Clayton Yeo at the end of his article reviewing the legal position of mental patients in the Soviet Union,<sup>1</sup> "a great step in the direction of greater guarantees for the rights of all Soviet citizens would be made by the removal of those features of Soviet legislation which have made it possible to perpetrate such abuses without even formally violating the law".

## Commentaries

### **Military Regimes in Latin America**

#### **A Pattern of Repression**

A new social phenomenon has developed in the military regimes of the southern part of Latin America, to which no definite name has yet been given. Some call it fascism, but this is an inaccurate use of the term as its ideology, so far as it has any, does not generally include either the corporatist or the racialist doctrines associated with fascism. It is, indeed, notable for the lack of any positive content in its philosophy. It is essentially negative. Its origins and its motivations are in the most literal sense counter-revolutionary. It seeks to maintain the capitalist economic system in its purest, almost nineteenth century form. It not only represses all marxist thought and all left-wing political activity but, since it believes that democracy is too weak to resist the en-

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<sup>1</sup> *Psychiatry, the Law and Dissent in the Soviet Union*, Clayton Yeo, ICJ Review No. 14, June 1975, p. 41.

croachments of revolutionary marxism, it represses all democratic political activity, liberal and conservative as well as socialist. Thus the repression becomes a value in itself, like discipline within the armed forces. The other principal value is patriotism which is identified with loyalty to the imposed military regime. It claims to protect the values of western civilisation, but in practice violates them almost without exception.

In this article the principal features of the legal structure adopted by these regimes will be outlined. The countries referred to, with the date of origin of their military regimes, are Paraguay (1954), Brazil (1964), Peru (1968), Bolivia (1971), Uruguay (1973), Chile (1973), and Argentina (1976). Peru has been included as it is a military regime, but it contrasts sharply with the other regimes both in its objectives and its methods. Certainly as originally conceived by its founders, this regime had goals of far-reaching economic and social change and its machinery of repression was much less severe. More recently there has been a noticeable swing to the right by the leadership, though the same social objectives are still proclaimed.

With this exception of Peru there is in these countries a very similar, if not identical, pattern of authoritarian and anti-judicial government. In each case legal and institutional measures have been adopted leading to the destruction of representative democracy and of all basic human rights under the protection of the Rule of Law. The principal features of this pattern are examined below.

### **The seizure of power**

These regimes all originated in a military coup. There were no significant differences in the way in which power was seized, except that in Uruguay the coup took place with the connivance and help of the existing civilian authorities following their failure to bring under control the activities of the Tupamaros. In some countries the coup involved considerable bloodshed (especially Bolivia and Chile) while in others it was relatively peaceful. In nearly all cases the coup was accompanied by the arrest of large numbers of political activists. Again, the exception was Peru where an amnesty for all political prisoners was declared within two years of the coup.

### **The legal machinery of repression**

In most of these countries "emergency measures" were adopted to concentrate more power in the Executive. These invariably included powers to arrest all persons suspected of political opposition and to detain them for long periods without bringing them to trial or allowing them access to a defence lawyer. In every case these measures, as indeed the coup itself, were illegal under the existing Constitutions. While the Constitutions contained provisions restricting fundamental human rights in emergency situations, clearly-defined limits were set to the Executive's powers in this respect, e.g. they could be invoked only in the event of attack from abroad or serious internal unrest which could not be quelled by normal constitutional means; the danger had to be real



and concrete; the restrictions could be applied only for a limited period and were to be subject to parliamentary and in some cases judicial control. In no case, however, were these limitations respected.

Proclamations of a "state of siege", a "state of internal war", a "state of danger", "prompt security measures" and the "suspension of personal security" are all expedients which have been used to establish a permanent state of emergency. Paraguay is an extreme case. The "state of siege" has been in force there for 22 years, except for short intervals of no more than 3 months.

These emergency measures have invested immense powers in the Executive. Within their framework, measures have been enacted affecting the economy, wages, education, the press, the physical freedom of the individual and even the structure of the State. This has had serious repercussions on civil, political, economic, social and cultural rights, shattering the whole system of protection for fundamental rights that had taken many years to build up.

Under these emergency measures there has been a continuous flow of repressive laws, legislative decrees, decrees, military edicts and ordinances. These created new political offences, and those already in existence were amended by the introduction of stiffer penalties and the establishment of military jurisdictions and tribunals to try them in place of the ordinary civilian courts of justice. Argentina, Bolivia, Brazil, Chile and Peru have reintroduced the death penalty for certain political offences, although the Constitutions of several of these countries prohibited the restoration of capital punishment.

### **New institutions of government**

Little by little the new system of power has gained ground. For it to do so, the democratic forms and procedures envisaged in the Constitutions had to be abolished or their application suspended indefinitely. Repression has become a necessity in order to eliminate or at least neutralize those social and political groups and trade unions which are the actual or potential opponents of those in power.

The process has been marked by the emergence or revival of military control of the political life of the country. The armed forces increasingly influence government decisions by gaining control over the different organs of the State, especially the key areas in policy-making.

In most of these countries the political Constitution has been flouted by the creation of National Councils or other bodies to deal with problems of "national security". These are sometimes endowed with the institutional status of a Council of Ministers in which the armed forces are either in the majority or play a dominant role. These bodies are responsible for policy making, for approving new legislation, for preparing production plans, and for appointing persons to posts of authority. Their competence has been extended to all affairs that relate to "national security". At the same time, a new concept of national security has evolved, termed "security for development". This covers not only the usual aspects of security, but also foreign affairs, foreign trade and investment, development policy, money and exchange rates, the standard of living, employment and unemployment, and education. Other

bodies, in which the military authorities also predominate, have been set up in some countries to deal with other aspects of economic life. Two examples taken from Uruguay are the Economic and Social Council, and the Secretariat for Planning, Co-ordination and Dissemination, the latter with ministerial status.

Brazil, Chile and Uruguay have gone furthest in institutionalizing the new order, and seeking to cover with a cloak of legality changes that were completely illegal under their Constitutions. For this purpose they have enacted what is known as Institutional Acts or Constitutional Acts to govern the major aspects of the working of the State, the form of government, the system of elections, etc. In no case is the promulgation of "Acts" of this kind authorised by the respective Constitutions. They have been enacted by an Executive which, to do so, assumed special powers beyond parliamentary or judicial control, including the power to alter the Constitution and, in many cases, the electoral powers of the people.

### **Designation of the President and the electoral system**

In Argentina, Bolivia, Chile, Peru and Uruguay all elections, whether national or local, have been suspended. In all these countries, as well as in Brazil, the President of the Republic is nominated by the military authorities. In Brazil his nomination requires the support of Congress. In Uruguay he is designated by a new body set up recently by an Institutional Act, called the Council of the Nation, in which the military authorities predominate.

The only one of these countries where presidential elections have been held is Paraguay, but in view of the restricted nature of the political activities open to the only permitted opposition party, the extent to which these elections represent the will of the people may be questioned.

In Paraguay and Brazil, parliamentary and local elections have been held, subject to very restrictive conditions.

### **Dissolution of Parliament and the banning or control of political activity**

In every case the coup d'état was accompanied by the dissolution of Parliament and of the departmental or regional legislative bodies. In all except Peru, marxist or other left-wing parties and movements were decreed illegal, and in every country, including Peru, all political activities were either prohibited or suspended.

In Brazil, Parliament was closed for a time and then allowed to reopen but with only two political parties participating, the Government party and one opposition party. This Parliament has little scope for action. Some opposition members of Parliament have been deprived of their parliamentary status and had their political rights suspended for ten years. This step was ostensibly taken on the grounds of national security under one of the Institutional Acts, but the real reason was that they had criticized the Government in strong terms, denouncing the lack of freedom and the systematic violation of human rights.

In Chile and Uruguay pseudo-parliamentary bodies have been set up

to replace the former Parliaments. These bodies are known as Councils of State. Their members are appointed by the Head of State in Chile and in Uruguay by the new body referred to above, the Council of the Nation, which is dominated by the military authorities. In Chile the Council of State is merely an advisory body to the Military Junta, which keeps the legislative powers in its own hands. The situation is much the same in Argentina, where the Executive exercises the powers invested by the Constitution in Congress, with the assistance of a Legislative Advisory Commission, composed entirely of high-ranking members of the armed forces.

In Bolivia and Peru legislative functions are performed by the Executive. Apart from Brazil, Paraguay is the only country which now has a Parliament, but its powers have been severely curtailed.

All political activities in Argentina, Bolivia, Chile and Uruguay are still either banned or suspended. The act of declaring a number of parties and movements illegal has facilitated or provided the necessary "legal" pretext for persecuting their leaders and militants. These are all exposed to arrest and severe penalties based on special repressive laws. At the same time, parties and groups not declared illegal have also been forbidden to engage in any political activity. In Brazil and Paraguay only one opposition party is allowed to be active, and in each case its activities are subject to scrutiny and control by the State security services. In Peru, as already stated, no parties have been declared illegal but all political activity is suspended by a "mandatory political recess". This is enforced by simple detention without trial of political activists rather than their prosecution for illegal activity.

Argentina, Brazil and Uruguay have gone to great lengths in attacking the political rights of their nationals, including the rights guaranteed under their Constitutions and enshrined in international declarations, covenants and conventions, such as the right to take part in the conduct of public affairs, to elect persons to fill government posts, and to be candidates for election themselves. In Argentina many well-known persons have been stripped of their political rights in this way, while in Brazil hundreds of people have had their political rights suspended for ten years. In Uruguay a recent Institutional Act suspended the political rights of several thousand people for fifteen years. The scope of this measure is very wide, since it affects the whole class of former political leaders and militants, not only those on the left but also the moderates and those in right-wing parties. It also covers thousands of people who have been accused by the military regime of political offences, though not yet convicted.

### **Limitations on trade union freedom and freedom of association**

In Argentina, Chile and Uruguay, either during or after the coup d'état, each of the governments dissolved the trade union confederations, and in many cases individual unions were also banned and their activities made illegal. A large number of union premises have been occupied by the police and armed forces, illegally closed and their goods and property seized. Many workers have been dismissed from their jobs, arrested and sentenced by military courts for engaging in

union activities and exercising rights conferred upon them by the Constitution, the law, and the Conventions of the International Labour Office. Those who, in the opinion of the security forces, are a potential threat to the system have been subjected to continuous harassment and persecution both in their public and private lives.

Those trade unions which are permitted are severely restricted in their activities. The exercise of the normal trade union rights, including the right to meet and discuss their affairs freely and the right to strike or take other industrial action, have been largely prohibited, suspended or restricted.

These restrictions on the right of association extend generally in all spheres. Even professional associations, welfare organisations and almost all forms of social activity are subject to the supervision and control of the security authorities.

### **Control of the press and other communications media**

One of the first measures to be taken by these regimes is to control the communications media. Official statements on the "complete respect for freedom of expression and of opinion" alternate with measures leading to the severe curtailment of these rights. Consequently, there is very little scope for expressing opinions that conflict with those of the regime or for denouncing its violations of human rights.

In each case the authorities have closed as soon as possible the opposition communications media. There have not been any marked differences from one country to another, only variations in the degree of arbitrariness with which each state has acted at one time or another.

In Argentina, Brazil, Chile, Peru and Uruguay, newspapers, weeklies, journals, radio broadcasts and television programmes have been closed down one after another. In Chile the military have even attacked and destroyed radio broadcasting stations and the premises of publishing houses. In these five countries, in addition to the publications which have been closed permanently, others have disappeared as a result of being economically strangled by successive temporary closures. Others have changed ownership and consequently their policy.

Censorship in one form or another exists in all countries. Usually at first there is pre-censorship, with military censors in the offices of the publications. In time this is replaced by a system of "self-censorship" which places the editors in a situation of complete uncertainty. They have to try to modify their news and commentaries in such a way as to avoid closure or the arrest and detention of members of their editorial or journalistic staff. In Brazil government censors continued working in the editorial offices of leading newspapers for many years. The principal papers are now under self-censorship, but some others are still subject to pre-censorship.

In some of the countries many journalists have been assassinated or have just disappeared, others have been prosecuted for offences such as "spreading of rumours" or "alarmist news" or offences against "the security of the state", while still others have simply been arrested and detained by executive action or expelled from the country. Expulsion has also been resorted to against correspondents of foreign newspapers

and news agencies. In Uruguay newspapers from neighbouring countries that refer to the economic, political or social situation in Uruguay have been seized on numerous occasions.

In 1974 the six newspapers in Peru classified as having a "national circulation" were taken into public ownership. Their assets, management, administration and control were supposed to be transferred to various labour, professional, social and cultural organisations regarded as representative of "significant groups in the organised population", with guarantees of press freedom. So far, in practice they have continued under the control of editorial committees appointed by the Government, without being transferred to the groups that stood to benefit from the expropriation. The result is that all national newspapers are still controlled directly by the Government. Formerly, journalists were frequently deported from Peru, but this sanction was revoked as a result of an amnesty in 1976 and they were allowed to return.

In all countries control of the press has been the subject of numerous legislative decrees and military edicts promulgated under emergency powers. Three examples may be cited:

- in Brazil a legislative decree of September 1969 on national security provides for severe penalties for such offences as "hostile psychological propaganda" and "revolutionary or subversive propaganda", which are tried by military courts. Many journalists have been convicted on these grounds.
- In Chile Legislative Decree No 1281 of December 1975 (amending the State Security Law) gives the military authorities responsible for the different zones complete control over all information media, authorising them to suspend or intervene in the management of newspapers, periodicals and other publications and radio and television stations. These measures can be applied when opinions or news are published or broadcast that tend "to alarm or offend the people, distorting the true dimensions of the facts, or to be manifestly untrue or to contravene instructions . . .". It is, of course, the same military authorities who issue the instructions and who assess the truth or falsehood of the news or opinions and the existence or otherwise of the conditions set out.
- In Uruguay Decree No 464 of June 1973 forbids the publication orally, in writing or through television broadcasts of "any kind of information, commentary or recording that directly or indirectly attributes dictatorial intentions to the Executive, or that is likely to disturb the peace and public order". This decree marked the beginning of the dictatorship.

### **Cultural freedom**

The military and police authorities in some of these countries have launched a veritable crusade against books. Public libraries, bookshops, publishing houses and even private collections of books have been searched and purged. The most extreme cases are Chile and Uruguay,

where the forces of repression have ransacked premises and depots where books are kept, and have destroyed large numbers of them by pulping or burning, sometimes publicly. This has been the fate of works of history, literary works, and publications on economics, sociology, the social and even the exact sciences and, in general any book suspected of fostering revolution, marxist or left-wing thought, including those which, although not marxist, discuss certain marxist points of view. It has often happened too that the mere possession of marxist or revolutionary works, in the broadest possible sense of these terms, has been accepted as evidence for the prosecution in cases heard by the military courts. In Chile and Uruguay, the purge affected the libraries of educational institutions in particular. In Uruguay, the authorities sent a circular (No 1376/75) in May 1975 to all secondary schools. The circular ordered the removal from the school libraries of all books, periodicals, other publications and records whose contents "did not conform to the fundamental principles of the nation, particularly when they followed a marxist line". The circular also covered all publications through which "notions harmful to the parameters of traditional western thinking could be introduced". During the same period a decree was issued in Uruguay empowering the post office to confiscate all "marxist and antidemocratic" correspondence, including books, newspapers, magazines, documents or photographs. In Chile, in 1974, the military supervisors of educational establishments gave similar orders to librarians, recommending that all books removed from the libraries as unsuitable should be burnt.

Records, tapes and cassettes of certain classical and popular music have suffered the same fate. In Brazil, Chile and Uruguay at least, it is forbidden to print, distribute, sell, perform or broadcast particular songs and music, and some foreign artists are not allowed to perform, nor may certain plays and films be shown.

The effect of all these measures, apart from the immediate restrictions they impose on cultural freedom, has been to damage severely or to destroy some extremely valuable permanent libraries and collections.

### **Political prisoners**

The treatment of persons imprisoned for political motives or offences is very similar in all these countries, again with the exception of Peru.

This is perhaps the most negative aspect of these regimes. The liquidation of the democratic system of government was preceded and followed by a savage repression, which has led to the death or imprisonment of many thousands in each of these countries. In each case the pattern has been the same: during the early stages the repression is directed against the members of armed movements which represent a real threat to the system; it is then turned against other left-wing groups, whether marxist or non-marxist, and is finally extended to all signs of political opposition, however embryonic.

The repression rapidly oversteps all constitutional and legal bounds, violating the most elementary standards of humanity. The torture and ill-treatment of detainees, whether innocent or guilty (although this distinction should not apply to persons detained without trial), has become

a daily and generalised practice, applied with brutality to men and women alike. Torture is used methodically (a) to obtain information; (b) to extract a confession, true or false, from the suspect, or accusations against other people; (c) to humiliate or punish the detainee; (d) to terrorise him and his associates; (e) to intimidate the public in general in order to keep any opposition in check; and (f) to maintain the regime in power.

In the early stages the repression is directed by the ordinary armed forces and police acting in conjunction. It is later taken over by the special security services under military control, but this does nothing to reduce the abuses committed. On the contrary, worse abuses are committed by the military and police personnel of these investigation services, especially those who have been trained in the necessary techniques. They do their work coldly and efficiently, making use of scientific and technical methods that increase the victims' sufferings and leave little or no physical traces.

In Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, the usual practice is for political suspects to be arrested by persons dressed in civilian clothing who are heavily armed and do not identify themselves. It is not known by what authority the arrest was made, who is carrying it out, where the arrested person is being taken, why or for how long.

After his arrest, a long period elapses during which the detainee is held incommunicado. It varies in length according to the country, and also according to the person held, but in most cases it violates the laws which limit the right to hold a person incommunicado. It is during this period, when the detainee no longer exists for the outside world since he is deprived of all communication with his family, friends or lawyers, that interrogation usually takes place, in many cases accompanied by torture or ill-treatment. Cases in which detainees have died under torture or have disappeared without any official explanation being given to their relatives are becoming more frequent in some of the countries.

Once the evidence against a detainee has been gathered, it is submitted to a military court if it is considered that an offence has been committed affecting the security of the State. This may be a normal military court or a special one, depending on the country concerned. In many cases the trial and judgment take place long after the time-limits specified by the Constitution and laws of the country. If sufficient evidence cannot be gathered against the detainee, he is released unless the police or military investigation services consider that, although innocent of any specific offence, he constitutes a threat to the national security. In that case he will remain in prison for an indefinite period on the orders of the Executive under special powers granted by the state of siege, state of internal war or other declaration of emergency.

If he is sentenced to imprisonment, he may be taken to gaol, but it is becoming increasingly common for prisoners to be put in special camps or quarters for the internment of political detainees. In these places, which are run by the armed forces and not by specialised prison staff, the stringent discipline and the poor conditions of internment often amount in themselves to ill-treatment. There are or have been places of this kind in Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay. In a

few cases permission has been given for these places of internment to be visited by delegates of the International Committee of the Red Cross, but only for short periods, and in no case have the Red Cross been able to visit the interrogation centres where the torture practices occur.

In October 1976 an unprecedented new law in Uruguay declares an intention to relax the "prompt security measures", but replaces them with an extraordinary power which is to form part of the permanent legislation of the country. Under it any person over 18 years of age who is found by a special tribunal to be in a "dangerous state for the security of the nation" may be subjected to various forms of control ranging from an order to reside at a particular place to a sentence of internment for up to six years in a military camp for "re-education through work". On an application by the accused, the judge may instead order him to be exiled from the country for 5 to 10 years. If he returns within that period he will be liable to imprisonment for double the period of his exile. It is expressly stated in the law that it is not necessary for the accused to have committed any offence. It is sufficient that he "shows by his conduct an inclination to commit offences against the fatherland", or "associates regularly with offenders against the fatherland" without justification, or "disturbs the effective development of preventive or executive action by the state against subversion", or repeatedly acts in a manner "which could destroy public confidence, at the national or international level, in the restoration of the values of the Nation". There is no right of appeal against the decisions of these Tribunals to either the Court of Appeal or the Supreme Court.

This sweeping official repression is compounded in Argentina, Brazil and Uruguay by other illegal or unofficial forms of repression practised by what are known as the paramilitary or parapolice groups. Members of these organisations, often pretending to be members of the state security services, arrest, kidnap, torture and even assassinate their victims. In many cases they make public statements claiming responsibility for these acts. They take it upon themselves to be the prosecutors, judges and executioners of those whom they suspect of activities against the régime in power. The authorities always deny responsibility for their acts, but it is almost unknown for one of them to be brought to justice and in practice they act with impunity. In many cases there are strong indications of their links with the official security authorities.

In Peru, following the coup, administrative detention was infrequent and for short periods. Repressive activities were kept within the bounds of the Constitution and the law. Apart from a few isolated instances, torture and ill-treatment does not appear to have occurred. Various amnesties were declared, two of which were particularly important. The first was in 1970 when all political prisoners with no known exceptions were released. The second, in May 1976, was more limited; under it the legal proceedings instituted against a number of people, mainly connected with the press and politics, were abandoned and persons who had been deported were allowed to return to Peru and Peruvian nationality was restored to those who had been deprived of it. Since July 1976, however, several hundred political and trade union militants have been arrested, following the announcement of a new "state of emergency" and the "suspension of individual guarantees".



## **Military justice: Amparo and Habeas Corpus Remedies**

A system of military justice has been imposed in varying degrees in all these countries, with the exception of Paraguay. The ordinary civilian courts of justice have been wholly or partly replaced by military courts for cases against persons suspected of political offences. This has seriously disrupted the balance of the powers in the state, since the Judiciary has been deprived of an important area of its jurisdiction, and is losing the independence conferred on it by the political Constitutions. The system of military justice has also curtailed the rights of the accused in important respects and, in doing so, has paved the way for their violation.

Formerly, the jurisdiction of the military courts in these countries was, with few exceptions, restricted by national legislation to disciplinary offences committed by the military, such as desertion, insubordination, etc. By special laws and legislative decrees, their competence has now been extended — often in contravention of the Constitution — to the hearing of cases against civilians including certain ordinary crimes not of a specifically military character. In Argentina, Chile and Peru, so-called Councils of War were set up in each area of the country, and are still active.

The main reasons for this extension of the military jurisdiction would seem to have been:

- lack of confidence in the civilian courts.
- the desire to keep all procedures relating to political suspects, including the preliminary interrogation, searches, arrest, prosecution, sentence, and the execution of judgment, within the military sphere of competence and away from all possibility of control by independent civilian authorities.
- to keep within the military jurisdiction all inquiries into abuses committed by the “forces of order” either in their treatment of detainees or in the course of their public activities. (During periods of emergency, everything of this kind is classified as a “military secret”.)
- to mete out more severe punishment on the basis of special repressive legislation.

In practice this system has a number of serious defects. For example:

- the normal judicial remedies, such as those against arrest without warrant, against holding detainees incommunicado for longer than is legally authorized, and against the use of confessions and statements obtained under duress or torture, have proved to be completely ineffectual in the military jurisdiction.
- where an accused person is found not guilty and is ordered to be released, or where a prisoner has completed his sentence, he will frequently not be given his freedom but will be kept in detention under the powers of the state of siege or other state of emergency, thus frustrating the decision of the court to set the prisoner free.

- new offences are created with retroactive effect, or special tribunals with greater powers of sentence are set up with retroactive jurisdiction, e.g. the decrees declaring the Montoneros illegal in Argentina, the proclamation of a state of war (with its many consequences) in Chile, and the declared illegality of the communist party in Uruguay.
- difficulties and obstruction have been put in the way of defence lawyers in carrying out their functions, especially in Argentina, Chile and Uruguay. In some cases the right of defendants to speak freely and in private with their defence counsel and the principle of professional secrecy have been violated. In Chile and Uruguay military courts, in coming to their decision, have in some cases relied on confidential reports from the security forces which the defence lawyer has not been allowed to see.
- in Argentina, Chile and Peru the errors in law and procedure of the Councils of War are more serious and no proper remedies have been established for rectifying miscarriages of justice, even where errors are known to have occurred.

Perhaps the greatest defect lies in the very structure and institutional position of military justice. As a rule its courts do not form part of the Judiciary but come under the Executive through the Ministry of Defence. Judges and prosecutors are military officers whose rank rises with the importance of the court in question. In most countries they do not have to be experts in the law or even to have had any legal training. In some cases an attempt has been made to meet this problem by allowing civilian lawyers to sit on military courts but they are always in a minority. Defence lawyers appointed by the courts are also usually military men with no legal training. In Uruguay, the régime has appointed lawyers as advisers to the judges and prosecutors so that the latter can call upon them if a case presents legal difficulties.

In view of the inflexibility of the hierarchical structure in the armed forces, and the habit of submission to those in command, it is rare for the judges and prosecutors to maintain the necessary independence of mind for the delicate task of administering justice. Military codes are a disciplinary tool rather than an instrument of justice and in many cases still reflect the notion of retributive justice, which has been largely discarded in jurisprudence. As Justice William O. Douglas of the United States Supreme Court trenchantly stated in the case of *O'Callahan v United States*: "the extension of military discipline beyond its own domain is a threat to freedom".

The remedies of *amparo* and habeas corpus, formerly the pride of Latin America, are completely ineffectual for the protection of human life, liberty and personal security in the situations dealt with in this article. In Brazil, for example, they are inadmissible under Institutional Act No 5 for political offences endangering national security, the economic and social order or the economy. In all countries the Executive are able to keep people in prison indefinitely without any judicial decision whatsoever being taken about them, by invoking their "emergency powers",

and the remedies of *amparo* and habeas corpus are not applicable when such powers are in force.

Although Paraguay is the only country in which civilian justice has not been replaced by military justice, the rights of political opponents of the régime are no better protected there. Suspects are often held in prison for long periods (in some instances for up to 17 years), without any judicial review of their case and without any charge being made against them, or if they have been tried and sentenced by a court, they may remain in prison after serving their full term or after a judge has ordered them to be released. All this is made lawful under the state of siege which is repeatedly renewed although for only three months at a time.

### Conclusions

As has been shown, the general trend in all these countries is identical or very similar; they all tend to establish and consolidate authoritarian and anti-judicial régimes controlled and administered by the armed forces. This is no random development. It has been brought about with the aim of establishing a new kind of power structure, entailing the destruction of the traditional democratic system and the elimination or neutralisation of all opposition groups. In the absence of any parliament, representative trade unions, political parties, a free press, student and professional associations and neighbourhood associations, or any other means through which people can participate freely and actively in the affairs of the nation or seek protection against the arbitrary exercise of power, the legal regulations to protect human rights and fundamental freedoms are flouted with impunity.

With the exception of Peru, which is a separate phenomenon, the broad ideological lines and policies of this new form of State and society appear to be:

- a belief that the traditional system of democracy is obsolete in its present form and is powerless to deal with contemporary problems and requirements;
- a belief in the need for a new institutional structure with an authoritarian government controlled by the armed forces, which will concentrate the principal powers of the State in its own hands, while reserving certain specific and subordinate functions for the civilian sector;
- the attachment of supreme importance to the concept of “national security” (or “security for development” or “development in security”);
- concentration on the fight against communism, subversion and all socialist doctrines, and the manifestation of this concern at both the domestic and international level, including the formation of an ideological, political and military bloc comprising all the countries in the area;
- the achievement of economic development on the basis of a highly dependent and extremely free economic model including the en-

couragement of foreign investment, the protection of private enterprise, the restoration of certain activities still under State control to the private sector, increased emphasis on the production and export of raw material and commodities, and stringent (but not notably successful) anti-inflationary measures despite the social cost;

— generalised repression and control of the press, education, and political, trade union and even Church activities.

## **UN Sub-Commission on discrimination and Minorities**

During its 1976 session in Geneva (12 August-1 September) the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities took several innovative steps for the international protection of human rights.

### **Gross Violations of Human Rights**

This twenty-ninth session of the Sub-Commission may be remembered as the session of the "Chile-like situations". The term was frequently used by Sub-Commission members to describe the reported violations of human rights in several countries, such as Uganda and Argentina, upon which they believed the UN should act. The Chile case has been the outstanding example of UN implementation of human rights, following a 1974 Sub-Commission recommendation that the Commission on Human Rights study the situation. At this session Sub-Commission members felt it was time for similar recommendations on other situations, many of which were discussed at the meetings. Only Mr Smirnov of the Soviet Union objected, on the grounds that Chile was a different and special case since it involved "genuine fascism". Finally, the Sub-Commission followed its Chile precedent by recommending that the Commission make a thorough study of the human rights situation in Uganda, pursuant to ECOSOC Resolution 1235 (XLII).

Other "Chile-like situations" were dealt with in various fashions. Regarding the August raid by Rhodesian troops on a refugee camp in Mozambique, the Sub-Commission unanimously requested a full and quick investigation, with a published report to follow. Since the resolution did not suggest which UN body should conduct the investigation, it was left to the General Assembly and the Commission on Human Rights to follow up the request.

The Sub-Commission also adopted unanimously a resolution on the

situation of refugees in Western Sahara, expressing concern but not recommending any further UN action. The resolution was originally cast in terms of the right to self-determination, but the Sub-Commission decided to eliminate references to that right in order to prevent political controversy interfering with the humanitarian goals of the resolution.

Refugees were also the main focus of a resolution on Argentina. While expressing its deep concern at reports of the general human rights situation in Argentina, the Sub-Commission recommended in particular that the 1976 report of the High Commissioner for Refugees be transmitted to the Commission on Human Rights at its next session together with any additional information he may have on developments relating to the matters mentioned in the resolution. Although the resolution was quite brief and avoided any form of condemnation, it seemed to cause considerable concern to the Argentinian government; Sub-Commission members complained of the diplomatic pressure they had received from Argentinian officials regarding the resolution and announced that they would take steps at the next session to prevent similar occurrences in the future.

While all the above actions on human rights violations were taken in public meetings, the Sub-Commission also considered, in private meetings, communications which appeared to reveal a consistent pattern of gross and reliably attested violations of human rights, according to procedures established by ECOSOC Resolution 1503 (XLVIII). The confidentiality of the procedures, which is carefully guarded by the Sub-Commission, was partially broken this year when a news reporter discovered one of the Working Group's secret meetings being transmitted over the earphones in the Press Room. This enabled him to publish all the cases referred by the Working Group to the Sub-Commission. No further confidential actions were made known, other than references by members in public meetings to some five situations cases that had been discussed during this and the previous year. No announcement was made of the final disposition of any of these cases, however.

The status of the Resolution 1503 procedure itself was the subject of other confidential meetings (the records of which were later made public). After long debate the Sub-Commission adopted a resolution requesting the Commission on Human Rights to recommend that ECOSOC review the Resolution 1503 procedures for dealing with communications relating to violations of human rights in the light of the entry into force of the two International Covenants on human rights.

Some of the sponsors of this resolution, including Mr Smirnov (USSR), suggested that the whole procedure might be abolished now that the two International Covenants on Human Rights have come into force. Other members pointed out that the new procedure for reporting communications to the Human Rights Committee established under the Covenant on Civil and Political Rights applied only to those few countries which were parties to the Optional Protocol. Also it is only victims (and not non-governmental organisations) who can submit communications under this new procedure. The Resolution 1503 procedure could be a complement rather than a hindrance to the covenants' implementation procedures. They proposed an amendment, accepted by

the Sub-Commission, to emphasize that the review should be done with a view to improving the effectiveness of the UN efforts and machinery in the safeguards of human rights.

Mr Ben Whitaker (UK) suggested the need for (1) expediting the procedure (delays are such that communications are often out of date by the time a decision is reached), (2) reducing the confidentiality of the procedure (subject to the protection of complainants by safeguarding their anonymity) so that the pressure of informed public opinion may be brought to bear, as in the case of Chile, (3) enabling governments complained against to answer and be questioned orally before the Sub-Commission, and (4) establishing a follow-up machinery for monitoring progress in rectifying abuses, with the assistance of a rapporteur or working group.

### **Human Rights of Persons Detained or Imprisoned**

The Sub-Commission put forward several new ideas on how UN action could help improve the human rights situation involving detainees in Chile. It suggested that the Commission on Human Rights should: (1) recommend appropriate measures regarding legal and humanitarian aid for persecuted persons in Chile and their dependants; (2) consider the adverse consequences for human rights of the various forms of assistance given to the Chilean regime; (3) receive information from the ILO, UNESCO, the World Bank, OAS and the Inter-Parliamentary Union on the recent activities of those organisations relating to human rights in Chile; and (4) pay special attention to serious abuses committed by DINA (the Chilean security organisation), often in collaboration with similar agencies of other countries.

The Sub-Commission conducted its annual review of developments concerning the human rights of detained persons, according to the procedure it established in 1974. Members emphasised that their purpose in this field was not to condemn governments but to encourage improvement through monitoring and to offer assistance when possible. The final resolution on the item requested establishment of a five-member working group to meet five days before each session to prepare the review. It also highlighted two issues needing special attention: (1) the judicial and administrative supervision and control of secret police, a subject which received much attention during the Sub-Commission discussions; and (2) the human rights of detainees in situations of public emergency or state of siege.

The Sub-Commission did not produce at this session the draft body of principles for the protection from torture or other ill-treatment of all persons under any form of detention or imprisonment, as it had been requested to do by the Commission on Human Rights. Deciding it would not be able to complete the drafting at this session, the Sub-Commission designated one member, Mr Erik Nettel (Austria), to prepare a draft for consideration at the 1977 session.

### **Slavery in all its manifestations**

The Working Group on Slavery, set up by the Sub-Commission in 1974, met for three days before the meeting of the Sub-Commission. Its

report ranged over a wide field of slavery-like practices such as slave labour practices in South Africa and Southern Rhodesia (based on a report by the International Commission of Jurists), sales of Indian children in Paraguay, forced labour in Equatorial Guinea and in four countries of Central America, child labour in Morocco, and forms of debt bondage in certain areas. The Group found that there were inadequate reporting procedures under the Conventions relating to traffic in persons, the exploitation of prostitution, and the abolition of slavery. It felt that a regular reporting system should be set up with information from governments.

When the report was discussed by the Sub-Commission, Mr Smirnov (USSR) argued against the continuation of this Working Group, but the rest of the members decided that it should continue meeting annually, its reports being debated only every second year. The Working Group are to have a permanent specialist on slavery and slave-like practices on the Secretariat staff. This Working Group welcomes the assistance of non-governmental organisations, and greater participation on their part is needed. The title of the Group is perhaps misleading, giving the false impression that it is limited to slavery.

### **Racial Discrimination**

Although the Sub-Commission considered three agenda items relating to racial discrimination it did not make any new proposals at this session. The Commission on Human Rights had asked it to prepare suggestions on effective ways and means and concrete measures for securing the implementation of UN actions on racial discrimination and related matters. These were to be transmitted to the General Assembly within the Programme for the Decade for Action to Combat Racism and Racial Discrimination. The Sub-Commission prepared the draft for the Programme in 1972, but this year the majority felt they had inadequate documentation and information to make a worthwhile contribution to its implementation. Several NGOs attempted to help by offering suggestions of practical and useful action that might be taken, but the Sub-Commission decided instead to establish a Working Group to meet before its next session to examine the question.

The Sub-Commission had before it two important studies on racial discrimination. One, concerning the adverse consequences for human rights of assistance given to the racist regimes in Southern Africa, was awaited by the General Assembly for discussion as a matter of high priority at its 1976 session along with the Sub-Commission's recommendations on the matter. However, the Special Rapporteur was unable to complete the work this year, so only his draft study was forwarded with no recommendations. The Sub-Commission also had no significant recommendations based on the updating of the previously published study entitled *Racial Discrimination*, although that updating was presented in its final version.

### **Discrimination against Persons Born Out of Wedlock**

The Sub-Commission completed work this session on the draft general principles on equality and non-discrimination in respect of per-

sons born out of wedlock. The first version had been written by the Sub-Commission in 1967 and considered sporadically since then. The adopted draft will now be submitted to the 1977 session of the Commission on Human Rights for final revision and a decision on whether the principles will take the form of a convention or a declaration.

#### **Studies: Migrant Labour, Aliens, Self-Determination, and Limitations on Human Rights**

A final study on migrant labour was presented to the Sub-Commission with an impressive list of recommendations for national and international action. The Sub-Commission decided to remove the item from its agenda in future and referred the study and recommendations to the Commission on Human Rights. A final study on a related item, the protection of aliens, was discussed only briefly but the Sub-Commission will have the subject on its agenda at the next session.

A draft study on the duties of the individual and the limitations on human rights led to a debate on the position of the individual in international law and the international personality of liberation movements. The Sub-Commission's attention was also drawn to the importance certain issues in the study will have for persons detained in emergency situations when authorities attempt to justify limitations on their human rights. The final report will be examined in 1978.

A draft study on the right to self-determination provoked a lengthy debate on the right as a part of *jus cogens* and the legal nature of General Assembly resolutions on human rights such as the right to self-determination. The Sub-Commission adopted a resolution suggesting that ECOSOC request an advisory opinion on the question from the International Court of Justice.

#### **NGO Participation**

NGOs were actively involved in nearly every item on the agenda at this session, although their participation was the subject of some dispute. Much of the dispute was the extension of a two-year-long debate in various UN human rights forums on the proper procedure for NGO participation when allegations against named governments are involved.



# ORDRE PUBLIC DANS LA COMMUNAUTE EUROPEENNE

par

A. TOUFFAIT

[To mark the 20th Anniversary of *Libre Justice*, French section of the International Commission of Jurists, a colloquium was held in Paris on 10 July 1976 jointly with members of the British section, Justice, on the theme "La conscience juridique européenne". One of the speakers, Monsieur A. Touffait, Procureur Général at the Court of Cassation, gave an address on the developing jurisprudence of the European courts in the field of social law. He first examined the development of European social and labour law and then analysed the evolution within the European community of the concept of *ordre public* (lit. public order, but with a wider connotation in French), a concept of growing importance in international human rights law. This latter part of his address is reproduced below, followed by a summary in English.]

Le Traité de Rome s'intitule traité instituant la Communauté Economique Européenne. L'article 2 donne pour mission à la Communauté le rapprochement progressif des politiques économiques des Etats membres, le développement harmonieux de leurs activités économiques et un relèvement accéléré du niveau de vie. Et l'article 3 énonce les mesures économiques, douanières de coordination et le rapprochement des législations nationales pour réaliser ces fins.

La Communauté Européenne ne peut pas se limiter à organiser un marché commun pour les produits agricoles et industriels, sans se soucier des personnes et notamment des travailleurs et c'est pourquoi le préambule du Traité assigne aux Etats membres "le progrès social, l'amélioration constante des conditions de vie et d'emploi de leurs ressortissants".

Ces buts sont réalisés par la libre circulation des travailleurs, principe affirmé par les articles 48 à 51 du Traité auquel s'ajoutent notamment les principes de non discrimination fondée sur la nationalité, de la liberté d'emploi, de la liberté syndicale, de la protection de l'emploi, de la garantie de Sécurité Sociale, de l'égalité des rémunérations du travail masculin et féminin. Ces principes ont été mis en oeuvre par d'importants règlements du Conseil et de nombreuses décisions de la Cour de Justice des Communautés Européennes ainsi que des juridictions nationales, d'abord des 6 Etats membres.

Le flux judiciaire consécutif à la législation sociale communautaire

montre la vie intense de ce secteur, comparable du moins au contentieux agricole et plus abondant que celui de la concurrence. Il est une manifestation continue, permanente, jaillie des profondeurs de la vie sociale. Ce droit social nouveau qui s'applique à toute la Communauté de manière uniforme et qui appréhende sur le plan européen une matière jusqu'alors tributaire du seul droit national, complété par quelques conventions internationales, a donc provoqué une intense activité judiciaire.

[Le] principe fondamental de la création de ce droit social [est] la libre circulation des travailleurs. Cette disposition n'est affectée d'aucune autre réserve que celles relatives à l'ordre public, à la sécurité ou à la santé publiques. Il nous faut donc réfléchir quelques instants sur cette notion d'ordre public et examiner comment elle a été précisée par le droit dérivé et appliquée par la Cour de Justice de Luxembourg.

En réalité, l'intervention de la notion d'ordre public en droit international, a pour effet d'écarter l'application de la loi étrangère, pour faire prévaloir les intérêts de la collectivité nationale. Une application trop extensive par le juge national, à la limite, viderait le traité de toute sa substance et en tous cas l'application des règles du for à la place de la loi étrangère brise les efforts tendant à créer une communauté internationale. Le Traité de Rome, lui, aurait pu peut-être faire l'économie de cette réserve d'ordre public, puisqu'à la différence des traités internationaux ordinaires, il institue un ordre juridique propre intégré au système juridique des Etats membres qui s'impose à leurs juridictions.

Cependant et en outre, bien que tous les Etats membres soient démocratiquement du même idéal, de même origine judéo-chrétienne, de même civilisation, ses auteurs ont pu estimer que chacun des Etats membres conservait des particularismes nationaux tels qu'avant d'être fondus dans un ordre public communautaire, ils devaient être ménagés et éventuellement sauvegardés par la Cour de Justice des Communautés européennes pour disparaître lentement dans un consensus général.

La notion d'ordre public que l'on trouve dans tout système juridique, n'a pas de contenu déterminé et son rôle est si étendu qu'elle en a perdu toute précision. Ce caractère d'ordre public est de nature discrétionnaire, laissé dans les 9 Etats membres à l'appréciation du juge, à sa prudence en ce qu'il considère selon la formule du Professeur Raynaud "comme indispensable au maintien de l'organisation sociale" de son pays<sup>1</sup>.

En droit privé, ce précepte se trouve inscrit dans notre droit positif, notamment dans les articles 6 et 1133 du Code civil. En droit public, on y a recours pour restreindre ou supprimer une liberté au nom d'exigences supérieures, disons de la raison d'Etat que le libéral XIX<sup>ème</sup> siècle a remplacé par l'ordre public<sup>2</sup> notion formellement moins brutale et mieux acceptée.

L'ordre public est de son essence d'être imprévisible dans son intervention et illimité dans son domaine. Notre Cour de Cassation

<sup>1</sup> Marty et Raynaud, Droit civil, t. 1, vol. 1, 1956, no 99, p. 164.

<sup>2</sup> La réserve d'ordre public en matière de liberté d'établissement et de libre circulation par G. Lyon-Caen, Rev. Trim. dr. europ. 1966. 693.

applique cette notion d'ordre public, en général, sans s'expliquer sur les raisons qui y conduisent<sup>3</sup> ou en la justifiant selon une formule d'arrêt par "l'honneur et le repos des familles"<sup>4</sup>. Pour montrer sa plasticité, il suffit de noter que si les événements ont modifié les conceptions de l'ordre social entre la naissance du litige et le procès, jurisprudence et doctrine sont unanimes à affirmer que c'est la conception de l'ordre public au moment du procès qui doit prévaloir. C'est ce que Pillet appelle "l'actualité de l'ordre public" et Niboyet "sa relativité temporelle"<sup>5</sup>.

Un arrêt de la Première Chambre civile de la Cour de Cassation, rendu sur le rapport de M. Lerebours-Pigeonnière, est, sur ce point, particulièrement caractéristique; il traduit dans ses formules l'expérience de nos éminents prédécesseurs qui avaient vécu des moments troublés. Notons la date de l'arrêt 22 mars 1944, le temps de l'occupation, la date des faits, 1935, gouvernement Laval, la date d'exécution du contrat 1936, Front populaire et voici la motivation:

"Attendu que l'ordre public national dépendant dans une large mesure de l'opinion qui prévaut à un certain moment en France, les juges du second degré étaient fondés à rechercher si les décrets, français de 1935, invoqués par la Compagnie des chemins de fer portugais, étaient de nature à atténuer les exigences de notre ordre public et à permettre en 1936 l'exécution de l'ordonnance portugaise de 1932".

Quelle leçon! La sécurité juridique n'a-t-elle sa place que dans les temps calmes? Et le Général de Gaulle, qui s'y connaissait en tempête, disait: il y a une hiérarchie des valeurs: la nécessité en premier lieu, la politique en second lieu, le droit dans la mesure où on peut le respecter. Il est manifeste que l'ordre public exprime ce qu'il y a de plus intense dans la souveraineté.

Or, si l'on revient à la libre circulation des personnes, on s'aperçoit que ce principe fondamental du Traité de Rome se heurte, en vertu de vieilles idées nées d'un nationalisme viscéral issu du fond des temps, à la notion d'ordre public qui recouvre entièrement le domaine propre de la police des étrangers. Alors qu'en matière de libertés publiques définies, la liberté est la règle et la restriction de police justifiée par les nécessités de l'ordre public, l'exception, au contraire, en matière de police des étrangers, il n'existe aucune liberté expressément reconnue à l'étranger qui est soumis, au point de vue de son accès sur le territoire, puis de son séjour, au pouvoir quasi arbitraire des autorités administratives. Et il est aisé de vérifier en étudiant la situation des étrangers dans les 9 Etats membres de la Communauté que si des nuances existent, la réglementation est sensiblement la même.

Ce sont à ces notions, à ces idées, à ces traditions fortement implantées que la Cour de justice de Luxembourg se trouve confrontée pour faire prévaloir un des principes fondamentaux du traité. La notion

<sup>3</sup> Cass. 3 juin 1966, Rev. crit. 1968. 64; 25 janv. 1966, *ibid.* 1966. 238; 30 mai 1967, *ibid.* 1967. 728.

<sup>4</sup> Cass. 30 nov. 1938, D.P. 1939.1.57.

<sup>5</sup> Pillet, Principes de droit international privé, p. 398; Niboyet t. 1, 3, no 1030; Batiffol, no 356; Ponsard, no 132; Lagarde, Recherches sur l'ordre public en droit international privé, no 163 s.

d'ordre public étant fluctuante et difficilement discernable, le Conseil a posé des principes en la matière notamment par la voie des directives. La première et la plus importante date du 25 février 1964. Elle a pour objet la coordination des mesures spéciales aux étrangers en matière de déplacement et de séjour justifiées par des raisons d'ordre public, de sécurité publique et de santé publique. Elle a posé des principes peu connus — il faut le reconnaître — dans notre pays, et cependant applicables directement dans la législation de tous les Etats membres. En France, ils y ont été introduits par le décret no 70-29 du 5 janvier 1970 et la circulaire du 24 mai 1972.

Les plus typiques des règles posées sont que les raisons d'ordre public ne peuvent être invoquées à des fins économiques, elles doivent être fondées exclusivement sur "le comportement personnel de l'individu" qui en fait l'objet, et la seule existence de condamnations pénales ne permet pas de les justifier. Sont protégés, non seulement le travailleur, mais également le conjoint et les membres de la famille.

Ces principes ont été mis en application par un certain nombre d'arrêts de la Cour de justice des Communautés européennes dont j'extrais dans l'ordre chronologique ceux des affaires: 41/74 Van Duyn, du 4 déc. 1974; 67/74 Bonsignore, du 26 fév. 1975; 36/75 Rutili, du 28 Oct. 1975; 48/75 Royer, du 8 avril 1976, arrêts qui, après un moment d'hésitation, montrent bien l'évolution de la jurisprudence de la Cour dans le sens d'un renforcement de la sécurité des travailleurs européens installés dans un Etat membre d'accueil et d'une interprétation restrictive, "atténuée" de la notion d'ordre public interne.

#### **Arrêt Van DUYN. —**

Mademoiselle Van DUYN, ressortissante néerlandaise, avait accepté un emploi de secrétaire en Angleterre auprès de la "Church of Scientology", secte propageant une philosophie que la Grande-Bretagne estimait constituer un danger social sans pourtant être interdite, c'est-à-dire pouvant être pratiquée par les nationaux anglais.

Dans cette affaire, la Cour de Justice a décidé, avec des motifs qui, à mon sens, n'entraînent pas entièrement l'adhésion, qu'un Etat membre pour des motifs d'ordre public national, était autorisé à s'opposer à ce qu'un ressortissant d'un autre Etat membre exerce, sur son territoire, une activité salariée au sein d'une organisation, dont les activités sont considérées par l'Etat d'accueil comme constituant un danger social sans pourtant être interdites, et bien qu'aucune restriction ne soit imposée à ses nationaux qui souhaitent exercer une activité analogue.

Il apparaît que cet arrêt ne va pas dans le sens de l'établissement de la libre circulation des travailleurs, puisqu'il admet pour des raisons d'ordre public, des mesures de discrimination à l'égard des étrangers et non applicables aux nationaux. En réalité, dans ce premier arrêt, la Cour de justice a entériné purement et simplement le contenu de l'ordre public anglais tel qu'il avait été apprécié par le gouvernement britannique.

### **Arrêt BONSIGNORE. —**

Trois mois plus tard, la Cour modifie sa position. BONSIGNORE, de nationalité italienne, vient travailler en Allemagne en 1968. En 1971, il achète un pistolet sans être titulaire d'un permis de port d'armes. En le manipulant, il tue accidentellement son frère. Il est condamné à une amende pour infraction à la loi sur la détention d'armes, relaxé du chef d'homicide involontaire.

Mais, par décision administrative, il fait l'objet d'une mesure d'expulsion du territoire allemand, fondée sur le fait que "le nombre des délits commis par des étrangers à l'aide d'armes s'est considérablement accru, il faut prévenir un nouvel accroissement de cette criminalité violente en expulsant immédiatement les étrangers qui ont enfreint la législation sur les armes". La décision était ainsi motivée par un objectif de "prévention générale" en vue de dissuader d'autres étrangers de commettre un délit identique et non "sur le comportement personnel" de BONSIGNORE révélant l'existence d'une menace suffisamment grave et prévisible pour la sécurité et l'ordre publics du pays d'accueil.

Aussi, la Cour de justice a-t-elle décidé que cette décision n'était pas conforme à la directive du 25 février 1964. A la suite de cet arrêt, un auteur, Tumerschat, a pu écrire: "Des milliers de travailleurs ont vu s'affermir leur droit de séjour et sont devenus de véritables ressortissants communautaires".

### **Arrêt RUTILI. —**

RUTILI, de nationalité italienne, né en France, y résidant depuis sa naissance, marié à une Française, travaillait à Audun-le-Tiche et exerçait une activité syndicale. En 1970, le préfet de police, à la suite de divers incidents de caractère politique, lui a attribué une carte de séjour de ressortissant d'un Etat membre, assortie d'une interdiction de séjour dans les départements lorrains, "sa présence dans ces départements étant de nature à troubler l'ordre public".

Le Tribunal administratif de Paris, saisi d'une demande d'annulation de cette décision, consulte la Cour de Justice qui dans son arrêt, redit que toute mesure d'éloignement ou de restriction de circulation doit être fondée sur "le comportement personnel" de l'étranger en cause et non sur la base d'appréciations globales. Il précise, en outre, que la réserve d'ordre public ne saurait être invoquée pour des motifs tenant à l'exercice des droits syndicaux et enfin pour la première fois, la Cour de justice rattache sa décision à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales qui dispose que les atteintes portées en vertu des besoins de l'ordre public aux droits fondamentaux ne sauraient dépasser le cadre de ce qui est nécessaire à la sauvegarde de ces besoins "dans une société démocratique".

Vaste problème qui résulte de l'existence simultanée de plusieurs systèmes de protection dans des cadres internationaux divers: celui de la Communauté, celui de la Convention européenne et celui des pactes des Nations Unies.

### Arrêt ROYER. —

Le dernier de ces arrêts date du 8 avril 1976. Ce qu'il y a de remarquable dans cette affaire, c'est que la Cour de justice a été saisie dans le cadre d'une procédure pénale par un tribunal correctionnel, celui de Liège et pour des faits dont la nature ne paraissait pas devoir faire l'objet d'un renvoi préjudiciel à la Cour de Justice.

ROYER, de nationalité française, proxénète condamné en France à deux ans d'emprisonnement, soupçonné d'avoir commis deux hold-up, était venu en Belgique — sans avoir accompli les formalités administratives d'inscription au registre de la population — rejoindre son épouse qui y tenait un café-dancing. Une mesure administrative l'avait expulsé, il était revenu clandestinement en Belgique quelques mois plus tard; retrouvé, il avait été placé sous mandat de dépôt et poursuivi devant le tribunal correctionnel. C'est celui-ci qui a saisi la Cour de justice et lui a posé un grand nombre de questions, notamment sur l'article 1 alinéa 2 de la directive de 1964 qui étend les mesures de protection qu'elle prévoit pour le travailleur au conjoint et aux membres de sa famille.

Ces faits exceptionnels pour les "travailleurs migrants" ont donné à la Cour l'occasion de répondre clairement que le droit d'accueil est acquis indépendamment de la délivrance d'un titre de séjour par l'autorité compétente d'un Etat membre et que le droit de séjour doit être reconnu au conjoint du travailleur. D'autre part, que la simple omission par le ressortissant d'un Etat membre des formalités légales relatives à l'accès, au déplacement et au séjour des étrangers ne saurait justifier une décision d'éloignement et n'est pas une atteinte à l'ordre public.

On pourrait ironiser sur cet arrêt et dire qu'il assure "la libre circulation des proxénètes", mais il faut surtout mesurer son importance dans ses prises de position de principe et ses conséquences juridiques et constater qu'il n'a pas hésité à aller à l'encontre de l'expression pénale de la souveraineté nationale telle que l'avait comprise et appliquée l'organe de poursuite d'un Etat membre.

Quelle évolution, quelle révolution! On peut comprendre que certains esprits puissent se trouver, en 1976, dans le même état que certains l'étaient au lendemain de la promulgation du traité au sujet de l'application de l'article 177, ou de la reconnaissance de la primauté du traité et de ses textes dérivés sur la loi interne même postérieure, c'est-à-dire très réticents pour l'application de principes qui aboutissent à de tels bouleversements.

On note donc sans trop de surprise — les juristes étant particulièrement attachés aux dogmes qu'ils ont l'habitude d'appliquer — des décisions de justice de juridiction des Etats membres en rébellion contre cette jurisprudence sur la primauté du droit communautaire en cette matière touchant très directement à la souveraineté de l'Etat.

Je ne citerai que des décisions qui ont été abondamment discutées par la doctrine.

I — Arrêt de la Cour constitutionnelle Fédérale de Karlsruhe du 29 mai 1974<sup>6</sup>.

<sup>6</sup> Rapport de M. Rivierez, Parlement européen, Doc. 399/75 avec l'opinion divergente de trois juges.

II — Arrêt de la Cour constitutionnelle italienne de 18-27 décembre 1973.

III — Décisions du 1er juin 1973 du Verwaltungsgerichtshof de Mannheim et du 3 mai 1973 du Bundesverwaltungsgericht de Berlin, qui se sont prononcés pour la validité des mesures d'éloignement motivées seulement pour une raison de prévention générale.

IV — Arrêt du 23 avril 1975 du Conseil d'Etat luxembourgeois, où un ressortissant d'origine pakistanaise mais de nationalité anglaise a eu son autorisation de séjour refusée sans motif "sans motivation de comportement personnel" mettant en échec, volontairement, presque agressivement les textes et la jurisprudence communautaires sur la libre circulation des personnes.

La France ne figure pas dans ce florilège de décisions judiciaires. N'en soyons pas étonné, quand on sait que c'est notre pays qui, proportionnellement, saisit le moins — des 6 Etats membres — la Cour de justice des Communautés européennes en vertu de l'article 177 du traité. Et pourtant, quel champ d'application inexploré par nos juristes. L'exposé de cette notion d'ordre public le montre d'une manière éclatante. Nous pourrions le montrer également en 2 autres matières qui ne rentrent pas dans l'objet de cette conférence: celle de la moralité publique et celle de la santé publique.

On voit ainsi le champ immense qui s'ouvre aux juristes soucieux de faire préciser les notions d'ordre public, de moralité publique, de santé publique par la Cour de justice des Communautés européennes quand ces questions se poseront dans les affaires dont ils sont saisis.

Quelle est la position actuelle de la Cour de Justice en ce qui concerne la notion d'ordre public? Nous avons noté l'évolution de sa jurisprudence et les précisions pour cerner son contour au fur et à mesure des affaires qui lui étaient soumises. D'après l'arrêt Van Duyn, il apparaît qu'il ne peut exister un ordre public communautaire que s'il est économique.

On aperçoit immédiatement la faiblesse de cette position, eu égard au principe fondamental de la liberté de circulation des personnes. En effet, si chaque Etat membre restait libre de fixer à son gré le contenu de la réserve d'ordre public, les obligations restrictives de la liberté de circulation présenteraient — assurément — dans les différents Etats membres de grandes différences de modalités d'exercice. Cette liberté de circulation implique une application uniforme dans tous les Etats membres. Il serait contraire au traité qu'un Etat membre accepte des travailleurs venant d'un autre Etat membre, tandis que ses propres travailleurs ne pourraient se voir réserver dans cet autre Etat un traitement identique à celui des nationaux en ce qui concerne l'application des règles relatives à l'ordre public.

Aussi, la Cour, pour sauvegarder l'intangibilité de ce principe fondamental de l'article 48 du traité a été amenée à préciser la notion de "comportement personnel" sur laquelle, selon la directive du 25 février 1964, doivent être fondées exclusivement les mesures d'ordre public. La Cour a été ainsi conduite d'abord à reconnaître que la notion de comportement personnel et le souci de prévention générale étaient

antinomiques, puis à indiquer que "la notion d'ordre public, dans le contexte communautaire, devait être entendue strictement, de sorte que sa portée ne saurait être déterminée unilatéralement par chacun des Etats membres sans contrôle des institutions de la Communauté".

Ces principes lui ont fait admettre que la réserve d'ordre public ne saurait être invoquée pour des motifs tenant à l'exercice des droits syndicaux, que le fait d'avoir omis d'accomplir les formalités légales relatives à l'accès, au déplacement et au séjour des étrangers, ne saurait en lui-même constituer une atteinte à l'ordre public et ne saurait à lui seul justifier ni une mesure d'éloignement, ni une détention provisoire, et estimer licites des faits considérés par la souveraineté d'un Etat membre comme constituant une infraction pénale. Des restrictions ne peuvent être apportées aux droits d'un ressortissant d'un Etat membre d'entrer sur le territoire d'un autre Etat membre, d'y séjourner et de s'y déplacer que si sa présence constitue une menace réelle par son comportement personnel, prouvé suffisamment grave pour l'ordre public.

On mesure combien cette notion d'ordre public en matière de police des étrangers qui contenait une réserve pratiquement indéfinie de souveraineté étatique, a été laminée, réduite par les autorités législatives et juridictionnelles de la Communauté.

La Cour de Justice est ainsi amenée à préciser la distribution opérée par les traités entre les compétences des Communautés et celles des Etats membres. L'histoire des fédérations a mis en lumière la mission décisive des Cours suprêmes dans la définition de cette frontière, nécessairement ajustée non seulement aux exigences économiques mais encore au mouvement des idées. La jurisprudence de la Cour de Justice permet de déceler qu'un rôle comparable lui est dévolu dans les Communautés Européennes.

Je pense qu'on peut conclure que les autorités institutionnelles de la Communautés sont ainsi amenées inéluctablement à définir un ordre public communautaire, demain une santé publique communautaire et ensuite une moralité publique communautaire, à mettre en place le programme défini aux sommets de Paris des Chefs d'Etat et de Gouvernement d'octobre 1972 et décembre 1973 et dont les points principaux concernent: une politique coordonnée en matière d'emploi et de formation professionnelle, une collaboration des travailleurs dans les organes des entreprises, la conclusion de conventions collectives européennes, ensemble politique, juridique et judiciaire, créant ainsi, petit à petit, lentement sans doute, mais quasi irrésistiblement, une communauté des esprits européens, une conscience européenne.

### **PUBLIC ORDER IN THE EUROPEAN COMMUNITY**

The fundamental principle for the creation of a community social law is the free movement of workers. This provision is subject to no reservations other than those of public order (*ordre public*), public security and public health.

The concept of *ordre public* is notoriously flexible and difficult to define. The Council has laid down certain principles in its directives of which the most important is that of 25 February 1964. Certain principles have been developed in a number of cases before the Court of Justice of the European Communities, in particular the cases of:



*Van Duyn*, 41/74 of 4 Dec. 74, where the UK had refused to allow a Dutch secretary to take employment with the Church of Scientology, whose activities were considered a social danger without being illegal; the Court upheld the refusal even though there was no restriction on the Church's employment of UK nationals.

*Bonsignore*, 67/74 of 26 Feb. 75, where an Italian worker in Germany was convicted of illegal possession of a firearm and then by administrative decision expelled on the grounds that firearms offences by foreigners had increased considerably; the Court rejected the decision holding that *ordre public* could be invoked only by reason of the personal conduct of the individual and not for reasons of general crime prevention.

*Rutili*, 36/75 of 28 Oct. 75, where an Italian in France was forbidden to reside in the Lorraine on the grounds that his trade union activities, albeit lawful, were liable to disturb the *ordre public*; the Court held these were insufficient grounds, basing its decision on the European Convention on Human Rights.

*Royer*, 48/75 of 8 Apr. 76, where a Frenchman convicted of living on immoral earnings and suspected of two hold-ups entered Belgium to join his wife and was prosecuted for failing to register; the Court held that a simple failure to follow the legal formalities relating to entry, exit or residence of foreigners could not justify expulsion on grounds of *ordre public*.

Commenting on these decisions Monsieur Touffait said that following the decision in the *Van Duyn* case it seemed that no community *ordre public* could exist unless it be economic in nature. The weakness of this position was immediately apparent, having regard to the fundamental principle of the freedom of movement of individuals. In effect, if each member state remained free to determine at will the content of the reservation of *ordre public*, the restrictions on freedom of movement were sure to vary greatly as between the different member states.

To preserve intact this fundamental principle of article 48 of the treaty, the Court has been led to specify the concept of "personal comportment" on which alone, according to the directive of 25 February 1964, *ordre public* measures should be based. The Court first recognised that the concept of personal comportment is irreconcilable with restrictions of general application, and indicated that "the concept of *ordre public* should, in the community context, be interpreted strictly, so that its scope should not be determined unilaterally by each of the state members without control by community institutions".

These principles in turn led it to decide that the reservation of *ordre public* cannot be invoked on grounds related to the exercise of trade union rights, and that failure to observe the legal formalities relating to entry, exit and residence of foreigners cannot in itself constitute an infringement of *ordre public*, and cannot by itself justify an expulsion or temporary detention, even where, under the sovereign national law of the member state, the circumstances involve the commission of an offence. Restrictions cannot be imposed upon the rights of a national of a member state to enter the territory of another member state, to stay there and to leave, unless his presence constitutes a real threat by reason of his personal behaviour, and this is shown to be sufficiently serious to threaten the *ordre public*.

It is notable how this concept of *ordre public* has been narrowed down by the legislative and judicial authorities of the community in relation to the police control of foreigners, formerly a field of almost unlimited state sovereignty. The Court of Justice has had to define the

respective jurisdiction of the community and of the member states, thus exercising a comparable role to that of supreme courts in federations.

The institutional authorities of the community have been led inevitably to make a community definition of *ordre public*, and in time they will have to do the same for the concepts of public health and public morals. There will thus be created, slowly but irresistibly, a European community of minds, a European consciousness.

# TORTURE AND OTHER VIOLATIONS OF HUMAN RIGHTS AS INTERNATIONAL CRIMES

## I. The discussion of the question in the International Law Commission in 1976.

In his Fifth Report on State Responsibility<sup>1</sup>, Professor R. Ago, Special Rapporteur of the International Law Commission, after a detailed examination of international practice, judicial decisions and the writings of publicists, took the view that general international law provides for two different régimes of responsibility. One applies in the case of a breach by the State of an obligation whose respect is of fundamental importance to the international community as a whole, for example the obligation to refrain from any act of aggression, the obligation not to commit genocide and the obligation not to practise *apartheid*. The other régime applies in cases where a State merely fails to respect an obligation of lesser and less general importance. On this basis, two different categories of internationally wrongful acts of the State may be distinguished: a more limited category comprising particularly serious offences, generally known as international "crimes", and a much broader category covering a whole range of less serious offences, generally known as "simple breaches"<sup>2</sup>.

In the light of this view, he proposed the following text to the International Law Commission as Article 18 of the draft articles on State responsibility:

### Article 18 — Content of the international obligation breached

1. The breach by a State of an existing international obligation incumbent upon it is an internationally wrongful act, regardless of the content of the obligation breached.

2. The breach by a State of an international obligation established for the purpose of maintaining international peace and security, and in particular the breach by a State of the prohibition of any resort to the threat or use of force against the territorial integrity or political independence of another State, is an "international crime".

3. The serious breach by a State of an international obligation established by a norm of general international law accepted by the international community as a whole and having as its purpose:

- (a) Respect for the principle of the equal rights of all peoples and of their right of self-determination; or
  - (b) Respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion; or
  - (c) The conservation and the free enjoyment for everyone of a resource common to all mankind
- is also an "international crime".

4. The breach by a State of any other international obligation is an "international delict<sup>3</sup>".

As regards paragraph 3 (b), he noted, *inter alia*, that the feeling of horror left by the systematic massacre of millions of humans being perpetrated by certain political régimes, the still-present memory of the deportation of entire populations, the outrage felt at the most brutal assaults on the human personality had all pointed to the need to take steps to ensure that not only the internal law of States but, above all, the law of the international community itself should enunciate imperative rules guaranteeing that the essential rights of the human person will be safeguarded and respected; all of this had prompted the most vigorous affirmation of the prohibition of crimes such as genocide, *apartheid* and other inhuman practices<sup>4</sup>.

The report and the draft article proposed by Professor Ago were discussed at the 1371-1376 and 1402-1403 meetings of the International Law Commission in 1976. In the course of the discussion, the following views on the human rights clause of the article were expressed by members of the Commission.

On the international law of human rights in general, Mr Yasseen expressed the view that in the sphere of human rights, classical international law had been content to prohibit States from infringing the rights of aliens. But it was now recognized that the human being had a right to some protection even against his own country. There had been interesting developments in that sphere. After the last war, when the problem of *apartheid* had been raised in the United Nations, certain States had invoked Article 2, paragraph 7 of the Charter, according to which the United Nations was not authorized to intervene in matters which were essentially within the domestic jurisdiction of any State. But it would be inconceivable today, that anyone should invoke that article in favour of certain discriminatory régimes such as that of South Africa, because of the interest taken by the international community in peoples subject to such régimes. There was, indeed, no denying that international law imposed respect for fundamental human rights<sup>5</sup>.

Mr Ramangasoavina expressed his belief that *new principles had emerged and become established* in international law, such as the principles of the equal rights of peoples and their right of self-determination, and the principle of respect for human rights and fundamental freedoms<sup>6</sup>.

Mr El Erian expressed the view that there were two *categories of international crimes*. The first included the violation of the territorial integrity of a State, the suppression of the right of a people to self-determination, which struck at the identity of the peoples concerned, and the violation of basic human rights and fundamental freedoms, which *struck at the dignity of man*. Breaches in that first category violated basic norms of State conduct and outraged the conscience of mankind; they included such crimes as *genocide, apartheid and doctrines based on racial discrimination*<sup>7</sup>.

On the question as to which violations of human rights should be regarded as international crimes, Mr Martinez Moreno felt that United Nations law

regarded colonialism, racial discrimination and the oppression of minorities as grave international crimes<sup>8</sup>.

Mr Sette Camara stated that aggression, genocide, apartheid, gross violations of human rights and fundamental freedoms and colonialism were offences that affected everyone in the organized community of States, offences that called for something much more than reparation. As for the legal consequences of violation of one of the basic norms involving aggravated responsibility it was evident that redress could be sought under the provisions of Chapter VII of the Charter. That would also apply to offences against human rights<sup>9</sup>.

On the criterion by which an international crime could be distinguished from a mere international offence, Mr Bilge, noting that the special rapporteur had spoken in paragraph 3 of a "serious breach", suggested that other possible terms were "systematic breach", for example, in the case of human rights, or "continuous breach"<sup>10</sup>.

Mr Ushakov expressed the view that an isolated act of discrimination constituted a violation of human rights, but that did not make it an international crime. Apartheid and genocide, however, were international crimes since they imperilled the existence of an entire people. The term "international crime" could not therefore be applied to breaches of all international obligations whose purpose was to ensure respect for the principle of the equal rights of peoples and their right of self-determination, or respect for human rights and fundamental freedoms<sup>11</sup>.

On the whole, all the members of the Commission agreed with the basic thrust of the article, and they agreed to its referral to the drafting committee of the Commission to settle its precise language.

### **Text proposed by the Drafting Committee**

The drafting committee discussed the article and proposed the following text to the plenary Commission:

#### **Article 18<sup>12</sup> — International crimes and international delicts [wrongs]**

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
  - (a) a serious breach of an international obligation of essential importance for maintenance of international peace and security, such as that prohibiting aggression;
  - (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
  - (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*;
  - (d) a serious breach of an international obligation of essential importance for safeguarding the preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict [wrong].

The drafting committee's text was discussed at the 1402-1403 meetings of the Commission and adopted by consensus to the applause of the members of the Commission<sup>13</sup>. As regards the international criminality of violations of human rights, the article referred to "(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*."

In the course of the discussion of the drafting committee's text, the following points were raised regarding paragraph 3(c) dealing with human rights.

Mr Quentin-Baxter observed that though paragraph 3(c) was concerned primarily with human rights, neither the Special Rapporteur's commentary nor the discussion had paid much attention to General Assembly practice in that field, and it might be advisable to recall certain key resolutions<sup>14</sup>. For example, the Economic and Social Council, with the endorsement of the General Assembly, had referred in resolution 1235 (XLII) to "gross violations of human rights and fundamental freedoms", in resolution 1503 (XLVIII) to "a consistent pattern of gross and reliably attested violations of human rights", and in resolution 1919 (LVIII) to "situations that reveal a consistent pattern of gross violations of human rights". Such resolutions demonstrated the growth of a practice in the field of human rights that did much to validate the concepts enunciated in article 18, and it was to be hoped that they could be mentioned in the Commission's report. In his opinion, article 18 would impart a new dynamism to the work of the United Nations in human rights and similar fields<sup>15</sup>.

Mr Njenga observed that the qualification "on a widespread scale" was quite unnecessary. It was also essential to explain why reference was made to "safeguarding the human being". The Special Rapporteur had rightly spoken of "respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language or religion", which was the very phraseology of Article 1(3) of the Charter<sup>16</sup>.

According to Mr Ramangasoavina, the term . . . . . "on a widespread scale" . . . . . seemed much too restrictive. In the cases of slavery, genocide and *apartheid*, it was not the number of persons which made the crime, but the will of the State and the systematization of a policy contrary to human dignity. The expression "on a widespread scale" introduced an idea of size, which seemed to authorize the perpetration of crimes "on a small scale". He was therefore in favour of deleting that expression and simply referring, as in the other sub-paragraphs, to a "serious breach of an international obligation". In his view, the words "safeguarding the human being" should be understood as meaning not merely the preservation of human life, but also maintenance of the dignity of the human person<sup>17</sup>.

On the other hand, Mr Ushakov thought the expression "on a widespread scale" was justified because the examples which followed — slavery, genocide and *apartheid* — were, by definition, breaches on a wide scale. If a breach was committed against a single person, that was a delict, not an international crime<sup>18</sup>.

Mr Sette Camara and Mr Castañeda thought that the words "on a widespread scale" should be deleted. Nobody should think that to practise slavery, genocide or *apartheid* on a small scale was not an international crime<sup>19</sup>.

The Special Rapporteur, Mr Ago agreed that the expression "*à une large échelle*" ("on a widespread scale"), in paragraph 3(c), was not satisfactory and that an expression equivalent to the English term "gross" would have to be

found. The expression would have to indicate that the breach affected a large number of persons<sup>20</sup>. Although slavery, genocide and *apartheid* were mentioned in paragraph 3(c), there were, of course, other international crimes consisting in the breach of obligations relating to the safeguarding of the human being, such as the massacre of prisoners of war or the deportation of populations<sup>21</sup>. The reason why the Drafting Committee had not included further examples was in order to avoid giving the impression that the list in sub-paragraph (c) was exhaustive and to avoid mentioning the crimes referred to in conventions on humanitarian law — a sphere in which it was very difficult to distinguish between international crimes and other internationally wrongful acts<sup>22</sup>.

Mr Bilge wondered whether the expression “for safeguarding the human being” covered human rights and fundamental freedoms. In his view, that wording could be improved. Nor did he find the expression “on a widespread scale” felicitous, since what mattered was primarily the will of the State and its policy. He therefore proposed that the expression should be replaced by the adjective “systematic”<sup>23</sup>.

Mr Castañeda regretted that in paragraph 3(c), the reference in the corresponding provision of the original text to “human rights and fundamental freedoms” had been replaced by the words “safeguarding the human being”<sup>24</sup>.

Mr El-Erian, however, regarded the expression “safeguarding the human being”, in sub-paragraph (c), as satisfactory, since it covered not only physical integrity, but also equality between human beings. In the case of *apartheid*, it was not so much the physical integrity of the individual that was threatened, as human dignity<sup>25</sup>.

Mr Tabibi agreed with Mr El-Erian’s comment on the words “safeguarding the human being”, which constituted a new notion. He felt it would do no harm to re-introduce into sub-paragraph (c) a reference to “human rights and fundamental freedoms”, which was the basic notion in the United Nations Charter. However, since the text was a compromise, he was prepared to accept it as it stood<sup>26</sup>.

In its report to the General Assembly on the work of its twenty-eighth session (1976) the Commission expressed the conviction that contemporary international law required the application of different régimes of international responsibility to different categories of internationally wrongful acts. The Commission held that whereas formerly, the view was generally shared that the rules of general international law relating to State Responsibility provided for a single régime of responsibility applying to all internationally wrongful acts of the State, whatever the content of the obligations breached by such acts, today this view was far from having wide support. After the second world war a strong trend of opinion favouring a different view had emerged, which was gaining increasing support. According to this new view, general international law provides for two completely different régimes of responsibility. One applies in the case of a breach by a State of one of the obligations whose fulfilment is of fundamental importance to the international community as whole: for example, the obligations to refrain from any act of aggression, not to commit genocide and not to practise *apartheid*. The other régime applies in cases where the State had only failed to fulfil an obligation of lesser and less general importance. On this basis, there is a greater and greater tendency to distinguish between two different categories of internationally wrongful acts of the State: a limited category comprising particularly serious offences, generally call-

ed international "crimes", and a much broader category covering the whole range of less serious offences.

The Commission pointed, *inter alia*, to the need felt after the second world war, to take steps to ensure that not only the internal law of States but, above all, the law of the international community itself should enunciate imperative rules guaranteeing that the essential rights of peoples and of the human person will be safeguarded and respected. This had prompted the most vigorous affirmation of the prohibition of crimes such as genocide, *apartheid* and other inhuman practices of that kind. The Commission pointed to the affirmed recognition of the right of every people to establish itself as an independent political entity and the prohibition of any action in general which challenges the independence of another State.

The article adopted by the Commission has been described as a historic milestone in the codification and progressive development of international law. The Commission has acknowledged that before its final adoption at the third reading, it will be scrutinised and commented upon in the Sixth Committee of the General Assembly by Governments, and also by scholars. The Commission has even indicated that it would welcome assistance from these quarters so as to improve the article.

Among the issues deserving consideration, the question may be posed whether the practice of torture should not be expressly included among the examples given of international crimes.

## II. The international crime of torture

In our submission existing international law and the practice of human rights organs supports the view that the systematic or institutionalized practice of torture is an international crime which should be added to paragraph 3(c) of article 18.

In a written statement submitted to the Commission on Human Rights at its thirty-second session, Amnesty International called upon the Commission to study the possibility of drafting a convention which would, *inter alia*, declare torture to be a crime under international law<sup>27</sup>. In a written submission made to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1976, the International Catholic Movement for Intellectual and Cultural Affairs proposed as a measure for the elimination of torture, punishing the practice of torture as an international crime<sup>28</sup>. In its report to the General Assembly in 1975, the *Ad Hoc* Working Group of Experts of the Commission on Human Rights investigating the situation of human rights in Chile recommended that one person who was said to be the leader of a gang of torturers, should be tried for crimes against humanity<sup>29</sup>. During the discussion of the Group's report in the Commission on Human Rights in 1976, Mr Zorin (USSR) stated that "those responsible for international crimes against humanity could not escape responsibility for their crimes"<sup>30</sup>.

Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights both provide that no one may be subjected to torture, or cruel, inhuman or degrading treatment or punishment. Article 4 of the International Cove-



nant on Civil and Political Rights provides that no derogation may be made from the prohibition of torture or cruel, inhuman or degrading treatment or punishment. The Geneva Conventions also prohibit torture.

Article 1, paragraph 1 of the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>31</sup> states that torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. Paragraph 2 characterizes torture as an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

By resolution 3059 (XXVIII) of 2 November 1973, the General Assembly "rejected any form of torture and other cruel, inhuman or degrading treatment or punishment"<sup>32</sup>. The General Assembly reaffirmed this rejection in its resolutions 3218 (XXIX), 3219 (XXIX) and 3453 (XXX).

By resolution 7 (XXVII) of 20 August 1974, the Sub-Commission on Prevention of Discrimination and Protection of Minorities stated that torture and other forms of cruel, inhuman or degrading treatment and punishment are *flagrant violations* of human rights.

In his report Professor Ago referred to the most vigorous affirmation by the international community of the prohibition of crimes such as genocide, *apartheid* and *other inhuman practices*<sup>33</sup>. Similarly in his statement to the International Law Commission at its 1376th meeting in 1976 Mr El-Erian gave as a rationale for the criminality of violations of basic human rights that they "struck at the dignity of man". On any of these two tests, torture could give rise to an international crime.

In a recent situation considered by human rights organs, a working group of the Commission on Human Rights found that there had been the institutionalized practice of torture. By its resolution 3 (XXXII) of 19 February 1976, the Commission on Human Rights expressed its profound distress at the constant flagrant violations of human rights, including the *institutionalized practice of torture*, cruel, inhuman or degrading treatment or punishment. The Commission concluded that the practice of torture had been systematically employed by some State organs and called upon the Government concerned to undertake measures to investigate and put an end to such activities of those agencies and of individuals in relation to acts of torture.

By resolution 3448 (XXX) of 9 December 1975, the General Assembly called on the same Government to ensure that adequate measures are taken to end the institutionalized practice of torture and other forms of cruel, inhuman or degrading treatment or punishment in full respect of Article 7 of the International Covenant on Civil and Political Rights.

Can the systematic institutionalized infliction of torture on a massive and savage scale by State organs, which takes place or continues to take place with the knowledge of the Government concerned, be anything other than an international crime?

### III. The practice of human rights organs

#### A. Criteria applied in determining violations of human rights

##### (a) General criteria

##### *Consistent pattern of gross violations of human rights*

In resolution 12 (XXXV) adopted on 6 June 1967, the Economic and Social Council authorized the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine information relevant to *gross violations* of human rights and fundamental freedoms as exemplified by the policy of *apartheid* (para. 2). In paragraph 3 of the same resolution, the Council decided that the Commission on Human Rights may, in appropriate cases, make a thorough study of situations which reveal a *consistent pattern of violations of human rights*, as exemplified by the policy of *apartheid*. In resolution 1503 (XLVIII), adopted on 27 May 1970, the Economic and Social Council authorized the Sub-Commission to appoint a Working Group to consider communications received by the Secretary-General with a view to bringing to the attention of the Sub-Commission those communications which appear to reveal a *consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms*.

In the Commission on Human Rights in 1975, the view was expressed that the categories of offences covered by the expressions "gross violations of human rights and fundamental freedoms" and "situations which reveal a consistent pattern of violations of human rights" were: genocide, slavery and slavery-like practices, discrimination on racial grounds and practices which shocked the conscience of mankind.<sup>33</sup>

In the Commission on Human Rights in 1968, the words "consistent pattern" were understood by some representatives as implying the repeated occurrence of violations over a substantial period of time as a result of a deliberate governmental policy. On the other hand the view was expressed that the concept of "gross" and "consistent violations" had nothing to do with time but should be interpreted in the light of Chapter VII of the United Nations Charter when such violations were a threat to international peace and security<sup>34</sup>.

In the Commission on Human Rights in 1968, the view was expressed that to establish a consistent pattern — the violations in question should have taken place as a result of deliberate governmental policy<sup>35</sup>.

In the Commission on Human Rights in 1968, the view was expressed that the concept of "gross" and "consistent" violations should be interpreted in the light of Chapter VII of the United Nations Charter when such violations of human rights were a threat to international peace and security<sup>36</sup>. Some representatives stressed the connexion which, in their view, existed between the provisions in Chapter VII of the Charter and flagrant and systematic violations of human rights as they felt that such violations tended to give rise to situations involving threats to international peace and security<sup>37</sup>.

In the Commission on Human Rights in 1968, several representatives considered it essential that the Commission should be provided

by its Sub-commission with *comprehensive and relevant* information on the basis of which a decision could be taken as to whether there existed a *prima facie* case of a consistent pattern of violations of human rights<sup>38</sup>.

#### *Violations which shock the conscience of mankind*

In the Commission on Human Rights in 1968, several speakers considered it as a principle which was gaining wide recognition that appropriate action by the international community was legally permissible whenever a Government rendered itself guilty of cruelties against, and persecution of, its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind<sup>39</sup>.

#### *(b) Particular situations*

In 1967 the Sub-Commission on Prevention of Discrimination and Protection of Minorities by resolution 3 (XX) drew the attention of the Commission on Human Rights to the following situations which it believed to reveal consistent patterns of violations of human rights and stated for each case the reason for its decision:

(1) The situation in the Republic of South Africa, resulting from the continued implementation of *the policies of apartheid* by the Government of the Republic of South Africa in violation of its obligations under the Charter of the United Nations and the Universal Declaration of Human Rights, and in defiance of the resolutions of the General Assembly and the Security Council;

(2) the situation in South West Africa, resulting from the intensification of *the practice of apartheid and other illegal acts* of the Government of South Africa in flagrant violation of the international status of the Territory and of the obligations of that Government under the Charter of the United Nations and the Universal Declaration of Human Rights;

(3) the situation in Southern Rhodesia, resulting from *the arrest and detention of political prisoners, detainees and restrictees*; the operation of *repressive and discriminatory legislation* and, in particular the Law and Order Maintenance Act; and restriction of African political activity denying full democratic freedom and equality of political rights;

(4) the situation in Angola, Mozambique and Guinea Bissau, resulting from *acts of repression* in violation of the Charter of the United Nations and of the Universal Declaration of Human Rights;

(5) the situation in Greece, resulting from *the arbitrary arrest, detention and ill-treatment of political prisoners*, and the denials of human rights involved, for example, in censorship and prohibitions on the rights of assembly and free speech, since the *coup d'état* of 21 April 1967; and

(6) the situation in Haiti, resulting from *the arbitrary arrest and detention of political prisoners*.

#### *B. Seriousness of violations*

The practice of human rights organs shows that in dealing with situations involving violations of human rights they have referred to

three categories of violations: (1) criminal violations<sup>40</sup>; (2) gross or flagrant violations; and (3) simple violations. The first two categories are not mutually exclusive.

A simple violation of human rights cannot, as a rule, be classified as an international crime. As a general proposition it may also be agreed that not all gross violations can be classified as international crimes.

Some of the elements which would elevate a gross violation into a criminal violation have been mentioned by members of the International Law Commission<sup>41</sup>. The following additional criteria can be suggested:

- Violations of norms of human rights which constitute *jus cogens* for example, the right of peoples to self-determination;
- Violations which amount to a threat to international peace and security such as *apartheid*;
- Violations which shock the conscience of mankind, such as slavery, genocide, torture;
- Violations which imperil the existence of an entire people;
- Violations as a result of doctrines based on racial discrimination;
- Institutionalized crimes committed with the consent or knowledge of the Government concerned;
- Particularly heinous cases of gross violations.

G.P.R.

#### References

- <sup>1</sup> A/CN.4/291/Add.2.
- <sup>2</sup> *Ibid.*, para. 84.
- <sup>3</sup> *Ibid.*, p.88.
- <sup>4</sup> *Ibid.*, para. 26.
- <sup>5</sup> A/CN.4/SR.1372, para. 14.
- <sup>6</sup> A/CN.4/SR.1372, para. 19.
- <sup>7</sup> A/CN.4/SR.1376, para. 7.
- <sup>8</sup> A/CN.4/SR.1373, para. 25.
- <sup>9</sup> A/CN.4/SR.1373, paras. 4 and 7.
- <sup>10</sup> A/CN.4/SR.1376, para. 17.
- <sup>11</sup> A/CN.4/SR.1374, para. 5.
- <sup>12</sup> In the report of the Commission for 1976, this article will become Article 19 of the draft articles on State Responsibility.
- <sup>13</sup> The writer was present when the article was adopted.
- <sup>14</sup> The commentary to the Article in the Commission's Report regrettably did not refer to this practice.
- <sup>15</sup> A/CN.4/SR.1403, para. 24.
- <sup>16</sup> A/CN.4/SR.1402, para. 78.
- <sup>17</sup> A/CN.4/SR.1403, para. 5.
- <sup>18</sup> *Ibid.*, para. 9.
- <sup>19</sup> A/CN.4/SR.1402, para. 73.
- <sup>20</sup> A/CN.4/SR.1403, para. 45.
- <sup>21</sup> *Ibid.*, para. 46.
- <sup>22</sup> Cp. II below.
- <sup>23</sup> A/CN.4/SR.1402, para. 58.
- <sup>24</sup> *Ibid.*, para. 34.
- <sup>25</sup> *Ibid.*, para. 47.
- <sup>26</sup> *Ibid.*, para. 53.
- <sup>27</sup> E/CN.4/NGO.189, paras. 2 and 4.
- <sup>28</sup> E/CN.4/Sub.2/376, para. 28.
- <sup>29</sup> A/C.3/649, pp. 10-12.
- <sup>30</sup> E/CN.4/SR.1357, para. 30.
- <sup>31</sup> GA Resolution 3452 (XXX).
- <sup>32</sup> A/CN.4/291/Add.2.
- <sup>33</sup> Mr M. Ganji (Iran), E/CN.4/SR.1307.
- <sup>34</sup> Report of the Commission for 1968, E/4475, para. 170.
- <sup>35</sup> *Ibid.*, para. 171.
- <sup>36</sup> *Ibid.*, para. 170.
- <sup>37</sup> *Ibid.*, para. 171.
- <sup>38</sup> *Ibid.*, para. 178.
- <sup>39</sup> *Ibid.*, para. 171. See for invocation of the same test, Report of the Commission for 1967, E/4322, para. 277.
- <sup>40</sup> As an instance in which a violation was held to be criminal, the *Ad Hoc* Working Group of Experts of the Commission on Human Rights investigating the situation of human rights in Chile has called for the leader of a gang of torturers to be tried for crimes against humanity (A/C.3/640, pp. 10, 12). Similarly in resolution 2 (XXXII) on the question of the violation of human rights in the territories occupied as a result of hostilities in the Middle East, the Commission on Human Rights deplored Israel's continuing gross violations, in the occupied Arab territories, of the basic norms of international law and of the relevant international conventions, in particular the Geneva Convention relevant to the protection of civilian persons in time of war of 12 August 1949, which the Commission considered as war crimes and an affront to humanity.
- <sup>41</sup> See footnotes 10-11 and 16-26 above.

# MERCENARIES AND THE RULE OF LAW

by  
RILEY MARTIN

On July 10 1976 four mercenaries, three British and one American were executed by a firing squad in Luanda, Angola, in accordance with a death sentence passed by a People's Revolutionary Tribunal. Nine other mercenaries (six British, one Irish, one American, and one Argentine) had twelve days earlier been simultaneously sentenced to prison terms of between 16 and 30 years. All thirteen were charged, inter alia, with the crime of being mercenaries<sup>1</sup>. In reading the sentences Judge Teixeira da Silva stated that African nations had been plagued for twenty years with "packs of dogs of war," and that harsh penalties were needed to halt the practice of mercenarism. By this decision mercenarism was judicially condemned in Angola.

The sentencing of these thirteen and the subsequent executions intensified the international controversy surrounding this trial. In essence, the arguments against the trial made one or more of the following points: (a) mercenarism is not an international crime, and was not a crime under Angola law; (b) since there is no crime of mercenarism, the defendants should be properly viewed, as in the case of the International Brigade during the Spanish Civil War, as foreign volunteers in a local civil war and treated as any other prisoner of war; (c) if mercenarism was only made a crime at the beginning of the trial, then the defendants were tried unjustly for having committed an act which was not criminal at the time of its commission, and have thus been illegally indicted and sentenced under an *ex-post facto* law in violation of well-settled judicial principles; (d) the proper procedure would have been to treat these men as prisoners of war and repatriate them for trial in their respective countries; (e) the thirteen defendants were only insignificant, inept, frightened men, minnows who happened to be caught, while the sharks, experienced mercenaries and their recruiters and financiers escape unscathed: thus the trial and convictions accomplished little purpose; and (f) because of the above points the trial, sentencing,

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<sup>1</sup> The Indictment, charged them with being mercenaries, and with crimes against the peace including murder and maltreatment of civilians, prisoners of war and other mercenaries: two of the four executed were specifically charged with murder.

and executions were of the nature of political reprisals, the enflamed passing of judgment upon the vanquished by the victors<sup>2</sup>.

The present article seeks to examine four ramifications of the Angola trial. It proposes, first, to shed light on the reasons why there exists strong feeling in Africa against mercenaries; second, to elucidate the concept of mercenarism; third, to summarize an Observer's Report on the Angola trial; and finally, to draw attention to the need for an international tribunal to try cases such as that adjudicated in Luanda.

### African view of mercenaries

In Black Africa a mercenary is deemed to be engaged in a sordid and inhuman occupation, and the term is used with opprobrium. This attitude is not accidental, for, apart from the usual antipathy towards a mercenary as a hired assassin, the mercenary represents to the African everything he fights to defeat: namely, racism and colonialism. For the mercenary is almost invariably white and his participation in African liberation struggles inevitably carries racist overtones. Moreover, the mercenary is seen as the accomplice of powerful colonial interests — those which stand most to gain from maintaining the status quo. This strong feeling against mercenarism which exists in Africa is made manifest in many declarations of the Organization of African Unity (OAU) which condemn mercenary activities. In Kinshasa in 1967, for example, mercenary activity in the Congo was condemned by the OAU and an appeal was made to all nations to make the recruitment and training of mercenaries a crime. A similar condemnation of mercenaries in Africa and a similar call for nations to outlaw this activity was repeated in 1969 in a statement by the heads of African states and governments at the meeting in Addis Ababa. The following year mercenarism was condemned at the meeting of the Council of Ministers in Lagos. In 1971 the OAU again condemned the "scourge" of mercenary activity in Africa, stating that mercenarism jeopardized the independence and territorial integrity of member States. The 1971 Declaration also expressed African resolve to "prepare a legal instrument for coordinating, harmonizing and promoting the struggle of the African peoples and States against mercenaries."<sup>3</sup> This juridical instrument was elaborated the following year at the council of ministers meeting at Rabat and took the form of a draft convention for the elimination of mercenaries in Africa by making mercenary activity a crime. This convention was subsequently submitted to member states for consideration but has not yet been ratified.

The attitude of African governments towards mercenaries, nevertheless, is clear: there is no place for mercenarism in Africa. For the Third World one aspect of the problem of mercenaries is how to

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<sup>2</sup> Every trial of this nature has been open to a similar charge. Justice Douglas, while on the U.S. Supreme Court, wrote, "The Tokyo Tribunal acted as an instrument of political power of the executive branch of government. It responded to the will of the Supreme Commander as expressed in the military order by which he constituted it. . . It was solely an instrument of political power," *Hirota v. MacArthur*, 338 U.S. 197 (1948), at 215.

<sup>3</sup> "Declaration on the Activities of Mercenaries in Africa," OAU Eighth Summit Heads of State Conference, Addis Ababa, June, 1971.

change the attitude of Western governments towards mercenarism. Western nations continue to allow mercenaries to be recruited, trained and equipped for deployment in the former colonies in face of strenuous objections from Third World countries. As one British commentator put the matter:

Since modern mercenaries are deployed in the territories of the Third World, it is plain folly to ignore the attitudes of their Governments towards intervention by foreign soldiers; or to ignore the fact that it is *their* courts which will conduct the trials of any British citizens caught by them . . . It might not be a crime in the United Kingdom to be a mercenary, but most African countries take a different view<sup>4</sup>.

Debates in the UN General Assembly show that it is the opinion of the great majority of nations that mercenary activity should have no place on our globe and that the time has come to make mercenarism a crime<sup>5</sup>.

### Definition of mercenaries

There are, however, some very real legal difficulties in defining mercenaries. It is not enough to say that a mercenary is one who fights for money, since virtually all soldiers receive some pay. Nor is it enough to say that a mercenary is a foreigner from a country with no interest in the struggle. Many armies and liberation movements require the assistance of expert technicians or persons with special skills, and engage them in their regular armies. Also, there may be a corps of foreign volunteers, such as the International Brigade in Spain, whom no one would regard as mercenaries.

This has led many experts to exclude from the definition of mercenaries persons who form part of the regular armed forces of a party to the conflict. Others have pointed out, however, that this offers a loophole by making it possible for a party employing mercenaries to engage them in their armed forces.

The essence of mercenarism is that a mercenary fights for money, and it is impossible satisfactorily to define a mercenary without reference to his motivation. Motivations are often notoriously complex, and many who become mercenaries may do so in part out of a misguided spirit of adventure, but this element is often present in other crimes and should not be allowed to romanticise the practice.

The Diplock Committee in the United Kingdom took a different view, holding that it would not be possible satisfactorily to define a mercenary by reference to motivation. Consequently, it advised that mercenarism should not in itself be made a crime, but that the recruitment in the UK of persons to fight in foreign armed conflicts should be

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<sup>4</sup> Colin Legum, "Why Britain must keep mercenaries out of Rhodesia", *Observer*, 8.8.76.

<sup>5</sup> The use of mercenaries has been considered by the General Assembly of the UN on at least four occasions. Each time that body has anathematized mercenarism: Resolutions 2395 and 2465 adopted in 1968, Res. 2548 (1969), and Res. 3103 (1973). This last Resolution, which reaffirms previous declarations calling for the criminalization of mercenarism, was passed by a vote of 83 to 13 (19 abstentions). Among those countries voting against this Resolution were Brazil, France, Portugal, South Africa, United Kingdom, United States and Uruguay. Another Resolution is being proposed at the 1976 session of the General Session.

made an offence<sup>6</sup>. Such a measure would neither allay the fears and anxieties of Third World countries nor meet their intense feelings about the essentially inhuman and illegal nature of mercenarism.

A more fruitful approach to the problem of mercenaries was the definition arrived at by the Third Committee of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which met in Geneva early this year. In its debate on Article 42 of Draft Protocol I, the general consensus of the Committee was that a mercenary is a person who is motivated to fight primarily by the desire for monetary gain, whether it be higher pay than is given to the regular armed forces or by way of bonuses for persons killed or captured, and that this does not include a person enlisted as a regular member of the armed forces because he is attracted by good pay. It was also generally agreed that the mercenary must be recruited to take part in the fighting itself, though some delegations would include instructors. He should also be recruited on behalf of a Party to the conflict of which he is not a national in order to participate in a particular conflict.

As to the consequences of being a mercenary it was generally agreed that, as a minimum, mercenaries should have no entitlement to prisoner of war or combatant status. There was disagreement as to whether the capturing power should be entitled to grant such status if it wanted to. Most delegations thought the mercenary should be entitled to be treated humanely in accordance with the national law of the capturing power. The question of treating mercenarism as a crime was not dealt with at the conference<sup>7</sup>.

The approach agreed at the Geneva Diplomatic Conference emphasises the essential characteristic of the mercenary, namely the pecuniary motive, and by concentrating on the essential fact of the mercenary's higher remuneration distinguishes between the idealistic volunteer enlisting in a foreign army at normal rates of pay and the mercenary who is paid at much higher rates.

### **Report of the Angola trial**

It was against this background of strong African feeling against mercenaries and the ineffectual attempts of the West to deal with this problem that the mercenary trial in Luanda took place. The trial was attended by George H. Lockwood, Q.C., a Canadian invited by the Angolan government to form part of an International Commission of Enquiry on Mercenaries, convened by that government. Mr Lockwood, who is a member of the Canadian Section of the International Commission of Jurists, also attended the trial as an Observer. In Luanda Mr Lockwood joined the subcommittee whose task it was to judge the

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<sup>6</sup> *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries*, August 1976.

<sup>7</sup> S. Suckow, "Conference on Humanitarian Law — Phase III", *ICJ Review*, No. 16 June 1976, p.58.



fairness of the trial and to examine the legality of the charges against the prisoners. In his report<sup>8</sup> Mr Lockwood concluded that, procedurally, the trial was, in the main, a fair one: the defendants' right to know the charges against them was observed, as was the defendants' right to examine the case file, right to question witnesses for the prosecution, right to be heard, right to present favourable witnesses, right to counsel, and right to a public trial. The Report also observes that the presiding judge took pains to be fair towards the defendants, was incisive in his questioning, and ruled astutely on the motions. As in other civil law countries, neither prosecution nor defence were restrained from asking leading questions, and hearsay evidence was admitted. Mr Lockwood's main criticism was that a documentary film which depicted war scenes and recruitment of mercenaries in Britain was introduced although there was no evidence which connected this film to the specific defendants on trial. There was relatively little direct evidence against the defendants, and much of it was poor in quality. However, all the defendants admitted to being mercenaries, and two of them admitted having executed fellow mercenaries.

The most "difficult and contentious" problem, the Report states, was the question of the legality of the charges, "in particular whether the crime of being a mercenary in fact existed in the law of Angola at the time of the alleged offence". The government's legal justification for the indictments rested, first, on OAU condemnations of mercenary activities agreed upon in Kinshasa in 1967, and in Addis Ababa in 1971. Mr Lockwood, however, believes that the prosecution's reliance on these statements as a basis for the trial was unfounded since the OAU condemnations only gave rise to a draft convention for the elimination of mercenaries in Africa and this document has yet to be ratified by the member states. Hence the OAU declarations are not legal instruments.

The second legal basis relied on by the prosecution for the indictment against defendants was the various Resolutions of the United Nations which condemn mercenary activity as criminal and which call for its abolition. According to the Report, the prosecution argued that these Declarations against mercenarism became part of an existing body of international law. Angola, by an act of sovereignty, then incorporated that law into its own law upon its independence. Mr Lockwood, however, disagrees with this line of reasoning, pointing out that at the time of the trial Angola was not a member of the UN, "nor is there any internal law which evidences the desire of the State to incorporate the crime of being a mercenary into its own laws." He thus concludes by saying that, in his opinion "the crime of being a mercenary did not exist in Angolan law and the defendants therefore were unjustly convicted on that count". He added, however, that two of the executed defendants were plainly guilty of murder.

In his examination of the court's written opinion, Mr Lockwood observes that "the part of the judgment dealing with what is called mercenarism is confused and not easy to follow". From the Report it is obvious that the court's attempts to define mercenarism only succeeded

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<sup>8</sup> Report on Trial of Mercenaries, Luanda, Angola, June, 1976 (unpublished).

in confusing the principal indictment against the defendants by attempting, first, to equate *being* a mercenary with common law crimes (such as murder, rape, and robbery), then by asserting that mercenarism “consists of specific crimes known to all penal systems”. These difficulties experienced by the Angolan court in attempting to define mercenarism only emphasize the need for general international agreement on the term.

According to the Report, a subcommittee consisting of outside observers at the trial was formed to prepare a draft international convention on the prevention and suppression of mercenary activity. Article 1 of this draft convention would make it a crime for any individual, group, state representatives, and the state itself to oppose by armed violence a “process of self-determination” by organising, financing, training, supplying or otherwise supporting soldiers who fight in foreign countries for pay<sup>9</sup>. This definition has been forwarded by the subcommittee to the Angolan government, to the OAU, and to the UN.

It is hoped that a draft convention on the prevention and suppression of mercenarism will receive urgent consideration by these bodies and that they will act promptly to codify its principles and outlaw mercenarism. It is, however, very questionable whether any useful purpose is served by including in a definition of mercenarism that the mercenary must be opposing “a process of self-determination” or a “national liberation struggle”. The Angola conflict itself illustrates the danger that in conflicts between rival liberation forces it is only those who fight on the losing side who will be categorised as mercenaries. Those who fight for the victors will presumably be regarded as liberators.

### **Need for an International Tribunal**

There is, however, another lesson to be learned from the Angola mercenary trial. The often tenuous legal reasoning of the court and the criticism directed in the past at other courts of this nature, emphasise again the need for a permanent International Criminal Tribunal as a just and effective procedure for future trials of this nature. Ever since Nuremberg, trials by war crimes tribunals set up ad hoc by the victors have generally been condemned by the international community as trials motivated by revenge, rather than by a concern for justice. Former initiatives in the United Nations aimed at establishing an Inter-

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<sup>9</sup> Article 1 of the draft convention reads: “The crime of mercenarism is committed by the individual, group or association, representatives of state and the state itself which, with the aim of opposing by armed violence a process of self-determination, practices any of the following acts:

a) organizes, finances, supplies, equips, trains, promotes, supports or employes in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense:

b) enlists, enrolls or tries to enroll in the said forces;

c) allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces”.

national Criminal Tribunal were held up by the lack of any internationally agreed definition of "aggression". Now that this obstacle has been overcome, the way is clear for the UN to establish such a tribunal to deal with the growing list of crimes recognised under international law.

## *Judicial Application of the Rule of Law*

### **Habeas Corpus: Freedom Fighters as Visiting Forces**

The Appellant was an Information Secretary and member of the Executive of the South West African Peoples Organisation (SWAPO), the Namibian liberation movement. He has been residing in Zambia since 1972. Certain differences arose between the SWAPO leadership and the Appellant and some of his colleagues. The Zambian government feared that this dispute might lead to violence. Accordingly on 21 April 1976 the Appellant and 10 other dissident members of SWAPO were taken by Zambian security officers to a camp where they were held under a Zambian armed guard. On an application to the Zambian High Court for a writ of habeas corpus, the Attorney-General contended that the Appellant was not under detention but was being allowed to live in a separate area under guard for his own protection, and that as a member of the armed forces of a national liberation movement he was subject to the discipline and control of that force and was not entitled to the freedoms and protection enshrined in the Zambian Constitution. This argument was accepted and the application was refused.

An appeal was lodged. While the appeal was pending the Applicant was flown to Tanzania.

In the Supreme Court the appeal was allowed by a majority decision (Baron D.C.J. and Gardner J.S., Silungwe C.J. dissenting).

In his dissenting judgment Chief Justice Silungwe upheld the refusal of the writ on two grounds. First he found that, although there is no legislation in Zambia comparable to the Visiting Forces Act 1952 in the United Kingdom, the government of Zambia has in practice "allowed various armies of liberation to observe their own rules of conduct in relation to internal discipline and administration", that "the people of Zambia have long since recognised the principles, customs and rules of conduct in relation to armies of liberation movements that have transit facilities in the country", and that "all that now remains is for the courts of law to put a stamp to the recognition — a mere formality". He held, therefore, that "the common law of Zambia in this area does exist in substance and is somewhat analogous to the United Kingdom Visiting Forces Act in its application". He took the view that the Appellant was a member of SWAPO's army of liberation, which had been recognised as a visiting force and given transit facilities. The Appellant could not, therefore, avail himself of the jurisdiction of Zambia's domestic tribunals as the matter at issue related to SWAPO's internal discipline and administration. He further held that the court has no jurisdiction on the ground that the Applicant was outside the territorial jurisdiction of the court and the Zambian government had neither legal nor de facto control of the Appellant.

Deputy Chief Justice Baron, in a judgment with which Gardner J.S. concurred, stated that it was clear that the Appellant had been deprived of his liberty by the Zambian authorities and that unless there was shown to be a legal basis for the deprivation it was the duty of the court to order his release. He found it unnecessary to decide the question whether, and if so to what extent, the common law recognises the concept of a visiting force and the special

jurisdiction which that entails since, to establish the exclusion of the jurisdiction of the Zambian courts on this ground, it would be necessary to show by evidence that (1) the government had accorded visiting force status to the army in question and recognised the jurisdiction of its tribunals to the exclusion of that of the domestic courts, (2) that the Appellant was a member of that force, and (3) that the action alleged against the Appellant constituted an offence under the law of the visiting force. There was no evidence before the court on any of these matters. Moreover, there was an overriding and compelling reason for issuing the writ in that the Appellant feared that if handed over to SWAPO he would be brought before a tribunal on fabricated charges and executed. There was evidence before the court of a press interview with Mr Sam Nujoma, President of SWAPO, which indicated that there was at least some foundation for this fear. There was no evidence or suggestion that the Appellant had committed any offence for which he could be executed under Zambian civil or military law.

On the second question, whether the writ could issue when the Applicant was no longer in Zambia, the Deputy Chief Justice, following *Barnado v Ford*, held that where it was doubtful whether the Respondent had relinquished all custody and control, the writ should issue so that the matter could be investigated and decided on the return. On the affidavits before the court it was not clear in whose custody or control the Appellant was. In view of the friendly political relationship between Zambia and SWAPO and Tanzania, it was difficult to imagine that a request from Zambia to SWAPO for the Appellant's return would not result in his being returned. Accordingly the appeal should be allowed and the writ issued.

(Cases cited: *Amand v The Secretary of State for Home Affairs* (1942) 2 All E.R. 381; *Ex p. Anderson* (1861) 3 El. and El. 487; *Re: Keenan* (1972) 1 Q.B. 533; *R v Rowle* (1795) 2 Burr 834; *R v Earl of Crewe, ex p. Sekgome* (1910) 2 K.B. 576; *Re Ning Yi-Chin* (1939) 56 T.L.R. 3; *Ex p. Mwenya* (1969) 1 Q.B. 241; *Secretary of State for Home Affairs v O'Brien* (1923) 2 K.B. 381; *Re: Attorney-General v Brenner-hasset* 67 1 L.T.R. 136; *The Schooner Exchange v M'Faddon* (1812) 7 Cranch 116; *Barnado v Ford, Gossage's Case* (1892) A.C. 326; *R v Barnado, Tye's Case*, 23 Q.B.D. 305)

## SUPREME COURT OF ZAMBIA

### SHIPANGA v ATTORNEY-GENERAL

22 July, 11, 12 August, 21 September, 1976

Judgment No. 44 of 1976; Appeal No. 3 of 1976.

[*Note:* On the return to the writ it appeared that the SWAPO leadership was not prepared to return the Appellant to Zambia as it was not considered in the best interest of the liberation struggle, and that the Zambian government, after discussions with the Tanzanian High Commissioner to Zambia, had decided not to make any formal request for his return. It has been reported that the Appellant is being held in a Tanzanian prison under the control of the Tanzanian government. As far as is known, no habeas corpus application has been made on his behalf in Tanzania.]

## Book Reviews

"CHURCH WITHIN SOCIALISM: Church and State in East European Socialist Republics", Erich Weingärtner, ed., IDOC International, Via S. Maria dell'Anima 30 (III), 00186 Rome, Italy; 262 pp., maps, US\$ 6.95.

The purpose of this IDOC double volume is to review the present status of religion within the socialist systems of Eastern Europe. It is divided into two parts. The first part, a translation and abridgement of *Stati Socialisti E Confessioni Religiosi* by Giovanni Barberini, Professor of Jurisprudence at Perugia University, Italy, provides an examination of socialist ideological assumptions regarding religion as formulated by Marx, Engels and Lenin — assumptions which became, in varying degrees, the basis of official socialist government policy towards the church. This policy can be summarised in three propositions: ideally religion has no place in a socialist state; it is not necessary to infringe the principle of freedom of conscience by banning religion; it should, however, be removed by legislation from any part in the activities of the state.

There follows a careful study of socialist constitutional legislation which has effected the complete separation of church and state, and then a review of the "temporary accommodation" between church and state in the various politico-religious accords such as those involving the Holy See, local Catholic churches, non-Catholic religions and Eastern European governments. The first part concludes with observations on what the author sees as recent moves by religious bodies from a position of conflict towards a kind of co-existence with the governments of East European Socialist Republics: towards a church "not beside, not against, but within socialism".

Part two presents a factual review of the status of religion in each of the nine countries of Eastern Europe (USSR, Rumania, Bulgaria, Hungary, Czechoslovakia, Poland, East Germany, Yugoslavia and Albania). The first section of each national review consists of a map, representative facts, statistics concerning area and population, basic facts concerning governmental and political organisations, the names of the country's important political and religious leaders, historical notes, and estimates of church membership. The second section presents the country's constitutional provisions which spell out the fundamental rights and duties of citizenship with emphasis given to provisions directly affecting religious communities. This is followed by texts of the legislation regulating the relationship between religious faiths and the particular government. The third section presents current selected articles, interviews, speeches and news reports from East European sources. These documents exemplify current trends in church-state relations. The book also includes an extensive bibliography (classified by country) which includes clandestine documents, news releases and East European church handbooks.

This book contains a great deal of valuable factual information about the legal framework of church-state relations in the eastern bloc countries. However, as it concentrates upon the legislation and official pronouncements on both sides, it tends to play down the extent to which the churches have had to surrender their religious freedom in order to survive and the extent to which religious persecution still exists.

THE LAW OF HABEAS CORPUS, R. J. Sharpe, Oxford University Press, £10.00; 254pp.

This work presents a comprehensive, critical and lucid review of the law of habeas corpus. It focuses mainly on the English law, but also includes discussion of the law in other countries of the British Commonwealth. The book first provides a valuable historical review which traces the development of the writ from its medieval English origins to the passage of the Habeas Corpus Act of 1679, when it took its modern form.

It then considers the scope of judicial review, including subjects such as the form of review, jurisdictional aspects, review of patent error, superior court orders and convictions, certiorari, the non-discretionary nature of habeas corpus and alternative remedies. The examination concludes that the scope of review on habeas corpus is very wide in England, although (as opposed to US practice) English courts do not as a rule review convictions in criminal cases by common law courts. Otherwise, "when a court is faced with the sort of decision for which habeas corpus is seen to be an appropriate remedy," the author observes, "it will rarely refuse a remedy because an error of law cannot be properly classified".

Other sections then deal with the consideration of questions of fact, habeas corpus and various forms of executive or emergency detention, habeas corpus in criminal law, and the review of commitments to mental hospitals for compulsory treatment.

The final part is concerned with more technical and procedural aspects of habeas corpus and will be of interest and value both to the practicing lawyer and the law student. Commencing with a broad review of the problems of restraint of liberty, of illegalities prior to detention, and of restraint *in futuro*, the author examines problems of territorial jurisdiction in the use of the writ, appeal, successive applications and protection against re-arrest and, finally, aspects of practice, which include bringing the application before the court, and third party and prisoner applications. This study concludes that habeas corpus is a versatile and flexible remedy for the protection of personal freedom and that the writ "still has significant day-to-day uses, and is properly seen as a fundamental constitutional guarantee and a cornerstone of the rule of law."

SOUTH AFRICA: A POLICE STATE? Christian Institute of Southern Africa, c/o Interchurch Aid Department, P.O. Box 14100, Utrecht, The Netherlands, 55pp., US\$3.00; Foreword by C. F. Beyers Naudé.

One indication of the increasing repression in South Africa is the fact that a few days after its publication in late September this report by the Christian Institute of Southern Africa was banned. Anyone in South Africa in possession of the report thus becomes guilty of an offence under Section 47(2)(e) of the Publications Act, which forbids publications "prejudicial to the safety of the state, and to the general welfare, peace and order." The question whether South Africa has become a police state is posed rhetorically in the title, but the report presents facts from which the reader can make his own judgment.

The first section which deals with security legislation shows that the Nationalist Party has since 1950 promulgated 59 laws designed to "protect the security of the state". These laws range from the Suppression of Communism Act (amended 80 times since 1950) to the Promotion of Internal Security Act passed this year (see ICJ Review No. 16, pp. 11-13).

The main part of the report contains particulars of cases of detention, banning and ill-treatment of political suspects, followed by a detailed account of the most important political trials which have taken place in South Africa in

the last two years. These give a penetrating insight into the operation of the South African security forces.

The report also lists 274 persons detained during 1975 and 1976 who were still being held in detention on 10 September 1976. The list does not claim to be complete, and does not include many of those arrested since the Soweto and other disturbances. The list gives the name, date of detention, security legislation under which detained, place of confinement, and profession or affiliation of the detainees.

Particulars are given of three more deaths in detention shortly after arrest (making a total of at least 25 since 1963), and of 18 different methods of torture which defendants have alleged in court cases were used against them. In one recent case three prisoners succeeded in a civil claim for damages arising from having been blindfolded, gagged, tied to a tree, subjected to electric shocks and assaulted while in prison. However, such successful suits are extremely rare. As the report confirms most victims of these brutalities are frightened to or, by being held incommunicado, are unable to take proceedings. "About the only avenues left," the report states, "are publicity and prayer."

This report is the most detailed account yet received of the recent application of the security laws in South Africa. In banning it the South African government only underscores the evidence it contains that South Africa is now "an incomplete police state, if in fact not a police state in the full sense of the word."



# ***ICJ News***

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## *New Commission Member*

Monsieur Louis Joxe (France) has been elected a Member of the Commission. M. Joxe has earned a distinguished position in French public life as a former Minister of State and as French Ambassador to the USSR and later to the German Federal Republic, in addition to serving, at various times, as Permanent Secretary of the Ministry for Foreign Affairs, Minister of National Education, Minister of State in charge of Algerian Affairs, Minister of State for Administrative Reform, and Minister of Justice and Keeper of the Seals. He is President of "Libre Justice", the French National Section of the ICJ.

## *Seminar on Human Rights in One-Party States*

The ICJ held an international seminar on "Human Rights, their Protection and the Rule of Law in a One-Party State" in Dar-es-Salaam, Tanzania, on 23-28 September 1976. The seminar was attended by 37 participants, the majority of whom came from Tanzania, Zambia, Sudan, Botswana, Lesotho and Swaziland. The participants included high-level government ministers, legal officers, judges and ombudsmen, private and academic lawyers, political scientists and churchmen.

Committees and workshops discussed in private sessions working papers relating to various aspects of the Rule of Law and Human Rights in a One-Party State. These included the constitutional aspects, legal and non-legal protection of human rights, preventive detention, freedom of the press, freedom of association, public participation, and individual and collective rights. The atmosphere of these discussions was noticeably open and constructive and the conclusions and recommendations of the Committees and Workshops were considered and approved at the final plenary session.

The seminar decided that the conclusions and recommendations should be submitted by the ICJ on behalf of the participants to the Heads of State of the countries from which the participants came. After these governments have had time to consider them, they will be published in a report together with a summary of the discussions and the working papers.

The seminar was financed by grants from the government of Sweden and the Ford Foundation.

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## **Racial Discrimination and Repression in Southern Rhodesia**

Staff Study by the ICJ, published by the Catholic Institute for International Relations, London, and the International Commission of Jurists, Geneva, May 1976, 125 pp, £1.30 postage included.

A legal study of the system of racial discrimination and repression in Rhodesia and of the violations of human rights including the detention, torture and killing of suspects by the security authorities. It shows how the minority government's policies, rather than moving towards racial equality, are "the intensification of the repression and the growing adoption by Southern Rhodesia of the laws and values of the apartheid system in South Africa".

Available from ICJ at Sw.Fr. 6.—, postage by surface mail free.

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## **Human Rights and the Legal System in Iran**

Two reports by ICJ Observers, William J. Butler, New York attorney, and Professor Georges Levasseur, of Paris University, published by the International Commission of Jurists, May 1976, 80 pp, Sw.Fr. 6.—, postage by surface mail free.

Mr. Butler's report describes the evolution of the one-party state under the Shah, the series of political trials between 1963-1975, the situation concerning human rights and fundamental freedoms, the restrictions on civil and political rights and the system of internal security. Professor Levasseur describes the organisation of the judicial system, covering both the ordinary courts and the military tribunals and other special courts. He also outlines developments in Iranian criminal law, including the "special criminal law" dealing with offences against the state, public security and public order.

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## **Asylum in Latin America**

Staff Study by the ICJ on "The Application in Latin America of International Declarations and Conventions Relating to Asylum", published by the International Commission of Jurists, Geneva, September 1975, 64 pp, Sw.Fr. 10.—, postage by surface mail free (available in English and Spanish).

Contains 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 sets out the relevant provisions of Latin American conventions and declarations on asylum.

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