

For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

**CENTRE FOR THE INDEPENDENCE OF
JUDGES AND LAWYERS**

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THE INTERNATIONAL COMMISSION OF JURISTS

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

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

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

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

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

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)

The International Commission of Jurists has formed at its headquarters in Geneva a Centre for the Independence of Judges and Lawyers (CIJL).

The independence of the legal profession and of the judiciary are of primary importance for maintenance of the Rule of Law. Unfortunately in an increasing number of countries, and on an increasing scale, serious inroads have been made into the independence both of judges and of practising advocates — particularly those who have been engaged in the defence of persons accused of political offences. Advocates have been harassed, assaulted, arrested, imprisoned, exiled and even assassinated by reason of carrying out their profession with the courage and independence that is expected of them. In some countries this has resulted in a situation where it is virtually impossible for political prisoners to secure the services of an experienced defence lawyer.

The objects of the Centre are:-

- to collect reliable information from as many countries as possible about
 - (a) the legal guarantees for the independence of the legal profession and the judiciary;
 - (b) any inroads which have been made into their independence;
 - (c) particulars of cases of harassment, repression or victimisation of individual judges and lawyers;
- to distribute this information to judges and lawyers and their organisations throughout the world;
- to invite these organisations in appropriate cases to make representations to the authorities of the country concerned, or otherwise take such action as they see fit to assist their colleagues.

There are many possible actions which an organisation could take, such as writing or cabling to the Minister of Justice of the country concerned; writing or sending a deputation to the Ambassador of the country; making representations to its own government or members of parliament asking them to make known the concern of the organisation; expressing concern and support to lawyers' organisations in the country; or sending one or more members to the country concerned to contact lawyers, ascertain the facts more fully and make representations to the government.

The International Commission of Jurists invites organisations and individuals to co-operate in this project, either by supplying information about erosions of the independence of judges and lawyers in their own or in other countries, or by taking action in appropriate cases brought to their attention. Organisations or individuals willing in principle to participate are asked to write to

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Human Rights in the World

Chile

In February 1972 President Allende's government ratified the International Covenant on Civil and Political Rights, which came into force in March 1976. In August 1976 the present government complied with its obligation under Article 4 to notify the UN Secretary-General of its derogations (on grounds of a "public emergency which threatens the life of the nation") from the articles of the Covenant protecting the right to liberty and security of the person, the right to enter and leave the country, guarantees against the arbitrary expulsion of aliens, freedom of opinion and expression, and the basic political rights. It is to be hoped that the new Human Rights Committee will press the Chilean government to explain how it is that after a rigid dictatorial military rule lasting now over four years there is still a public emergency threatening the life of the nation so as to justify the continuation of these measures.

The banning of political parties was extended by Decree Law No. 1697 of March 1977 to include all parties. Previously only the marxist parties had been banned, and the others merely suspended. The Decree also provides for imprisonment for those who violate the decree which, it was explained, was passed to guarantee "the operation of Chilean values". The main party aimed at by the new decree is the Christian Democratic Party.

Measures against freedom of the press have been extended by a new Military Order No. 107 of March 1977 forbidding the publication or distribution of any new journal, newspaper, magazine or other printed material within the Santiago zone without prior authorisation by the provincial military governor. This supplements Legislative Decree No. 1281 of 10 December 1975 which gives the military governors power to suspend all existing information media.

At present Chile is declared to be under both a State of Siege and a State of Emergency. By a Decree Law 1877 of 12 August 1977 three powers which formerly could be exercised only under a State of Siege will now be available under the State of Emergency. These are the powers to detain people without trial and without bringing them before a judge, the power to expel either citizens or aliens, and the power to suspend the right of appeal to the courts known as a 'recourse of protection' (provided for under Constitutional Act No. 3 of 11 September 1976 but never put into effect). It would seem that the object of this latest Decree is to pave the way for the abolition of the State of Siege as a supposed measure of liberalisation, whilst retaining its essential powers of control.

By further Decree Laws 1876 and 1878 of 12 August 1977, the Junta announced with great publicity the supposed dissolution of the DINA. A careful examination of the legislation establishing the new National Centre of Intelligence (CNI) shows that the powers and functions as well as the personnel of the new organisation are virtually indistinguishable from those of the old. Little more than a change of

name is involved. The familiar complaints of disappearances, illegal arrests and ill-treatment of prisoners have already been made against the CNI.

In August 1977 a document signed by thousands of workers was submitted to the Junta by the trade unions. It demanded their right to participate in the "new institutionality", an end to the State of Siege or other form of emergency and to restriction of trade union rights, and a return to democracy with a general election (the latest government pronouncement envisages no election before 1986).

From 1975 to mid-1977 some 1,100 persons condemned by military tribunals for political offences have had their sentences commuted to sentences of exile under Supreme Decree 504. This represents a limited relaxation, but it is contrary both to latin american practice and to international law for exile to be imposed in this way, as distinct from being granted as an alternative to imprisonment upon the application of the prisoner (see ICJ Review No. 12, p. 22 and ICJ Review No. 14, p. 3).

Information reaching the International Commission of Jurists confirms the conclusions of the October 1977 report by the Working Group on Chile of the UN Commission on Human Rights that violations of human rights continue in Chile, though on a lesser scale than before. The whole structure of repression, and the suspension of basic rights and fundamental freedoms remains unchanged. Political cases continue to be tried by military tribunals and the civilian courts continue to refuse to exercise their powers of judicial control over the Executive under the emergency. The improvement lies in the scale of the worst excesses, such as torture of suspects, illegal arrests and the disappearance of arrested persons. Nevertheless all these practices continue. The International Commission of Jurists has received detailed information about twenty-one cases occurring during the four months May to September 1977. Nineteen cases were persons illegally arrested without any warrant, 15 of whom were tortured. In one case the suspect died in custody after torture. In almost every other case the suspect was released after a few days, but threatened with the consequences if he spoke to anyone about his arrest, in particular to a lawyer. In one case a person was illegally warned by security officials not to take part in trade union activities. In another case a lawyer who defended in political cases was attacked in the street and wounded.

Haiti

Haiti, which won its independence in 1804, is the poorest country in the Americas, with a per capita income of less than \$100 per year. According to the FAO, 20,000 of its five million or more inhabitants have died of starvation in the last two years. The unending cycle of drought, crop-failures, food and water shortages and soil erosion causes about 20,000 people a year to flee the country as economic refugees.

In the late fifties and the sixties, under its President for Life "Papadoc" Francois Duvalier and his notorious "*ton ton macoutes*"

security force, Haiti enjoyed the unenviable reputation of having perhaps the most ruthless and repressive regime in the world. Upon his death in 1971 he was succeeded by his 21 year old son Jean Claude Duvalier who in turn was immediately declared President for Life.

Under his rule there has been a slow process of relaxation, curtailing to some degree the powers of the security forces. An amnesty was declared in 1972 for 132 political prisoners, though many of these had, it is believed, been released previously and were living in exile. Sixty-four others were released between 1973 and 1975, and at the end of 1976 another amnesty was declared for 164 detainees, including 90 political prisoners.

One of the main criticisms levelled against Haiti has been that political prisoners have almost invariably been held, often for many years, without being brought to trial in any way. To meet these criticisms, a new law was promulgated in August 1977 setting up a State Security Tribunal.

The International Commission of Jurists has consistently opposed the creation of special tribunals to try political or security offences. Their creation casts a reflexion upon the competence of the normal judiciary and undermines their authority. The procedures of the tribunals usually limit severely the defence rights, justice tends to be summary and the sentences exceptionally severe. Though the objections in principle remain, it may be said that the procedures governing the proposed Tribunal are better than might be expected. They appear to be modelled on the french Cour de Sûreté de l'Etat, but unlike that tribunal it is composed only of civilian judges, nominated for three year terms. The examining magistrate (*juge d'instruction*) is also a civilian career magistrate. Proceedings can be commenced only at the instigation of the Public Prosecutor on the written instructions of the Minister of Justice. The examining magistrate has the normal powers of investigation, search and seizure under the french penal system.

However, the tribunal's jurisdiction is very broad, since it covers all offences against the internal and external security of the state, all common law crimes which by their motive or purpose have a political character and all connected crimes. This contrasts with the french law which lists the specific crimes over which the special court has jurisdiction.

The provisions of the Code of Criminal Procedure are, with a few exceptions, applicable to the proceedings before the tribunal. The right to counsel during the investigatory stage is guaranteed. The sessions are to be held in public unless the court decides otherwise, in which case it must give reasons. An appeal on points of law (by way of 'cassation') will lie against all decisions of the Tribunal or the examining magistrate.

With the exception of the wide jurisdiction of the Tribunal, these provisions are to be commended. A notable omission is that the Act does not regulate the arrest and detention of prisoners by the police, and in particular there is no requirement that an accused person must be brought before the examining magistrate within a specified period after his arrest.

It was expected that trials before the new Tribunal would begin in October 1977, but this was rendered unnecessary by a further amnesty of 104 political prisoners (11 of whom were exiles). According to the government there are now no political prisoners remaining in Haiti. Allegations have been made that there were up to 600, but there are no precise details or confirmation of this figure. The names have recently been published by exiles of some 150 political prisoners who are alleged to have died in detention during the last six years.

The latest amnesty is one of a number of recent liberalising measures and many Haitians believe that it may prove to be a turning point. The press is cautiously exercising a more independent and critical role. The government radio has acted as a forum for citizens' complaints, even against local military authorities. In private conversation people will question government measures in a way that was previously unthinkable.

These relaxations have no doubt been due in part to pressures from the countries upon which Haiti depends for its essential economic aid. The regime remains an authoritarian dictatorship but the climate of the repression has altered perceptibly. As William D. Montabo concluded in an article in *The Times* of 6 July 1977, "by the standards of savagery that have shaped its history a new day has dawned" in Haiti.

Restoring the Rule of Law in India

Mrs. Gandhi has been much criticised, including in this Review, for the measures adopted during her 20 months of emergency rule, but credit must be given for the fact she held an election in March 1977 instead of prolonging the emergency and for the fair way in which the election was conducted.

No doubt the defeat she suffered, resulting in the loss of power by the Congress Party for the first time in India's 30 years of independence, was as surprising to her as it was to the rest of the world. There are many factors which led to this result, including the unpopularity of Mrs Gandhi's son and the reaction to the compulsory sterilisation programme. Nevertheless, the desire of the Indian population to see the emergency restrictions lifted and a return to the Rule of Law can fairly be claimed as a significant factor. In any event it was an important plank in the programme of the opposition coalition which has now united as the ruling Janata Party.

The task now facing the new government in restoring the constitutional, legislative and judicial protections of basic rights and fundamental freedoms is a formidable one.

It will be recalled that the 'emergency for internal reasons' was declared on 26 June 1975. The immediate consequences were the increased use of preventive detention against political opponents and economic offenders, extensive censorship of the press, and suspension of the right to apply to the courts for enforcement of fundamental rights. Twenty-seven organisations were banned immediately. The elimination of access to the courts had the foreseeable effects; ill-treatment of prisoners, increased corruption and nepotism, and

insensitive implementation of government programmes (notably slum clearance and population control).

As the term of the popularly elected lower House (Lok Sabha) was drawing to a close in February 1976, it extended its own life to March 1977. Another year's extension was voted in November 1976, and in the same month the 42nd Amendment to the Constitution was enacted. This amendment, with 59 sections, drastically altered the balance of power in favour of the central executive and legislature at the expense of the Courts and State governments.

In January 1977, when the election was announced, opposition leaders were released from detention to participate in the campaign, and censorship of the press was suspended. The coalition of 5 opposition parties won an absolute majority in the Lok Sabha. The upper House (Rajya Sabha), elected indirectly by the State Legislatures, was not affected by this election. When the election results were confirmed, Mrs Gandhi revoked the proclamation of internal emergency, the order banning the 27 organisations, and the previously suspended censorship order.

The formal termination of the emergency automatically remedied some of the most objectionable aspects of the legal situation. For example, 1975 and 1976 amendments to the Maintenance of Internal Security Act 1971 (MISA) had provided that during an emergency the maximum period for a preventive detention order was extended to 12 months, limitations of the government's authority to issue repeated detention orders were removed, the release of detainees on bail was prohibited, and the safeguards for detainees under Article 22 of the Constitution were suspended (i.e. the right to know the grounds for the detention order and the right to make representations against it). Similar provisions had been made by amendments to the Conservation of Foreign Exchange and Prevention of Smuggling Act 1974, which authorised preventive detention for the purpose of disrupting smuggling and black-market operations. These provisions all depended upon the existence of the emergency and lapsed automatically when it ended, as did the Presidential Order suspending the right to apply to the Courts to enforce the constitutional rights of equality before the law, protection of life and personal liberty, and protection against arbitrary arrest and detention.

With the assistance of many members of the Congress party, which is now divided between defenders of the emergency and those who now look upon it as a blunder, the new government has taken many affirmative steps to redress grievances arising out of the emergency. The Prevention of the Publication of Objectionable Material Act 1976 was repealed, and the Parliamentary Proceedings (Protection of Publication) Act 1977 was enacted, restoring immunity for publishing reports of parliamentary proceedings. Two additional reforms were effected: for the first time the opposition party was granted access to All India Radio, and governmental bodies, which constitute a substantial part of the market for newspaper advertising, were directed to purchase advertising without regard for the editorial policy of newspapers.

Numerous Commissions have been created to investigate complaints

arising out of the emergency. The most important is the Shah Commission, whose single member is a former Chief Justice. This Commission is investigating matters concerning the highest officials of the former government, including receiving illegal campaign contributions, bribery in the awarding of governmental contracts, demoting two high court judges for ruling against the government, obstructing governmental investigations for political reasons, and involuntary sterilisation within the population control programme. Other Commissions are investigating incidents of corruption or abuse of power in specific ministries and State governments, and still others are investigating instances of death, torture and disappearance attributed to the police of certain localities.

In order to institutionalise the investigation of citizens' complaints the Lok Pol Bill 1977 was introduced. This bill, on which Parliament is expected to legislate during the winter session, proposes a new type of government, members of parliament and the chief ministers of the States. Unlike most ombudsmen, the ombudsman's mandate is directed to misconduct and corruption rather than grievances arising from simple maladministration.

The vast increase in the use of preventive detention was a major aspect of the emergency. It is estimated that during the 20 months, 34,600 people were detained for varying lengths of time, including leaders of legal opposition parties and approximately 30 members of parliament. The new government ordered the states to release their detainees, but it is not clear how thorough the release has been. On 24 August, 1977, the Home Minister asserted that the number of MISA detainees, which had been 6,847 in March had declined to 592 by August. The remainder, he said, included 509 foreigners either awaiting repatriation or suspected of espionage. Of the 83 Indian nationals, 33 were spies, 19 insurgents, 6 had "extra-territorial loyalties" and 21 were "anti-social elements and hardened criminals". Although the procedural rights of detainees have been restored, the government has not yet acted on its campaign promise to repeal the Maintenance of Internal Security Act (MISA). Apart from the MISA detainees, there are still several thousand Naxalite (Maoist) prisoners who have been held for long periods either charged with or convicted of offences, often of a violent nature. Many of these were offered release on condition that they renounced violence in future, but most refused to do so.

Given the trend against preventive detention in the central government, two states have issued their own ordinances authorising it. Madhya Pradesh issued such an ordinance on 25 September, which incorporates procedural safeguards at least as complete as those in the central law. The state government claimed that detention was needed to meet such threats as a then pending strike of electricity workers. The central Janata leadership criticised this law and asked the State government, also Janata, to withdraw it. Kashmir issued a much stricter ordinance effective 29 October but not made public until 6 November. In addition to authorising detention for up to two years, it forbids access to certain areas and permits banning of newspapers which report news that may incite people to commit acts prejudicial to the security of the state. This was deemed necessary in order to meet

the danger of spying and infiltration from foreign countries. Kashmir borders on Pakistan, which still asserts a claim to the area, and on China. It is difficult to see how news censorship is required to safeguard against spying and infiltration, and the press of India has reacted strongly against the ordinance. The central government, however, has said that there is no constitutional impediment to the ordinance by reason of the particular autonomy which Kashmir enjoys within the Union of India.

Amending the Constitution

Many important alterations in the legal structure were made by the 38th, 39th and 40th and especially the 42nd Amendments to the Constitution. It has been possible to nullify for the time being the effect of some of the amendments by ordinary legislation. Thus the 39th amendment, which had retroactively removed the Courts' power to rule on disputed elections for the Prime Minister or Speaker, was circumvented by an Act which created a 'special investigating body' (which the 39th Amendment permits) consisting of a Supreme Court judge nominated by the Chief Justice.

Attacks have been made in the courts on the legal validity of the entire corpus of amendments passed during the emergency. It is argued, firstly, that all purported acts of parliament passed while part of its membership was detained were not acts of the whole organic parliament, and were thus null and void, and secondly, that the amendments were invalid because they tended to destroy the basic features of the Constitution, especially judicial review. However, in the cases where these issues have been raised, the Courts have been able to give relief on narrower grounds and for procedural reasons it appears unlikely that the Supreme Court will decide these broader issues.

It seems, therefore, that the only way to dismantle this unwelcome legacy is by re-amending the Constitution. Amendments require a two-thirds vote in each House of Parliament. In the lower House, Janata controls 303 votes while Congress has 150 votes, out of a total of 542. Thus a successful vote depends upon the independent members and the 16 minor parties. The upper House, however, is securely controlled by the Congress Party. Amendment of the Constitution clearly depends upon co-operation between the two major parties. Whether this co-operation will be forthcoming is an open question. Hoping that Congress will in the last analysis not be willing to reaffirm its commitment to the emergency era, the government has drawn up a list of more than 40 items to be included in a Constitutional Amendment to be considered by Parliament.

Many of the clauses in the proposed Constitutional Amendment relate to the procedure by which an emergency could be declared. Emergencies for internal reasons would no longer be justified by internal disturbances", but only by "armed rebellion". The President could declare an emergency only with the written consent of the Cabinet. A proclamation of emergency would have to be approved within one month by a majority of the total membership of each House,

and by two-thirds of all members present and voting. Such approval would be required every six months. One-tenth of the membership of the lower House could convene the House to consider an emergency, and the House could end an emergency by a resolution passed by a simple majority.

Other proposals relate to the protection of fundamental rights. Under Art. 359 of the Constitution, when an emergency has been proclaimed the President may by order suspend the right to apply to the Courts for enforcement of fundamental rights. Two amendments are proposed in this regard: Art. 21, the right to life and liberty, would be excluded from the operation of Art. 359, so that these rights would always be subject to judicial control. Secondly, with respect to those rights whose enforcement could be suspended, enforcement would be suspended only in respect of action taken under legislation passed pursuant to an emergency.

Art. 31D (s.5 of the 42nd Amendment) currently provides that no law providing for the prevention or prohibition of anti-national activities or associations can be held invalid on the grounds that it violates the constitutional guarantees of freedom of speech, assembly, association, movement, residence, property rights or the right to choose a trade, business or profession. This article would be repealed and constitutional protection would also be given to the right to publish reports of legislative proceedings, both state and central.

With respect to the relationship between state and central power, a one year maximum would be imposed on President's Rule (i.e. Direct Rule of a State by the central government) and the imposition of President's Rule would become open to challenge in court. The central government would be barred from deploying armed forces in a State without the State's consent, and control over education would be returned to the States.

The provision of the 42nd Amendment by which the President is bound by the advice of the Council of Ministers would be retained, with a new amendment recognising his right to return a matter to the Council for reconsideration.

The terms of the lower House and of the State Assemblies, extended to six years during the emergency, would be returned to five years.

Many of the proposals are aimed at restoring the judiciary's role as guardian of the Constitution. The limitations imposed on the jurisdiction of the Courts is one of the most damaging legacies of the emergency.

Art. 31C, which protects all laws giving effect to the Directive Principles of State Policy from invalidation on the ground that they violate constitutionally protected fundamental rights, would be returned to its pre-emergency form. Thus only laws implementing the principles that ownership and control of wealth, material resources and the means of production must serve the common good would be immune from constitutional review.

The power of the Supreme Court to rule on the constitutionality of state laws would be restored. The requirement of a special majority to rule against the validity of laws would be eliminated, as would the requirement that such cases be heard by an enlarged bench.

The 42nd Amendment restricted jurisdiction over the constitutionality of central laws to the Supreme Court. To reduce hardships on litigants in remote areas, it is proposed to restore jurisdiction over such issues to the High Court. The power given to the Supreme Court to transfer to itself cases involving important legal questions is to be retained, with the amendment that parties other than the Attorney-General can request such transfer.

The power of the Supreme Court to rule on disputed elections for Prime Minister and Speaker would be restored.

The Courts' powers to give relief by interim orders would be strengthened, including a power to grant relief *ex parte*, even where a suit is pending. The respondent would in turn be entitled to a decision within 14 days upon an application to vacate the interim order.

The government has also taken steps to redress the inequities caused by the emergency government's persistent attempts to influence the judiciary in the exercise of its official duties — a policy which was proclaimed as the policy of a "committed judiciary". The government is now considering the awkward problem of transfers and promotions made as the result of judges' attitudes to the emergency, and commissions are receiving evidence about the involvement of higher officials in these transfers and promotions. There can be little doubt that judges no longer feel constrained in exercising their independent judgment — a fact which is perhaps best evidenced by a magistrate's decision to release Mrs Gandhi because he considered the government's case against her was inadequate. The government are appealing the decision, but the fact that it was given speaks volumes for the present independence of the judiciary in India.

Thailand

Military or military dominated governments in Thailand are not a new phenomenon. From 1932, when Thailand's form of government was changed from an absolute to a constitutional monarchy, until 1973, the real political power rested with the leaders of the armed forces and most of the prime ministers were generals. During this period Thailand had no less than nine constitutions.

In October 1973 popular animosity towards the military domination, led by university students, exploded into violence. To end the bloodshed and to re-establish order, the King intervened and ordered the top three political leaders, all military officers, to leave the country. In their place, a civilian Prime Minister was appointed, the first since a short period in 1957. It took nearly a year before a new constitution was

drafted and promulgated. Elections finally took place in January 1975. With a multiplicity of parties the newly elected Parliament produced an unstable governing coalition. The new political groups which were not represented in Parliament soon became disillusioned with the new system. There followed an increasing polarization between left and right wing extremists. Students began to press their demands for reform with street demonstrations. Many right-wing organisations in turn began violent anti-communist campaigns. In January 1976, Parliament was dissolved and new elections were held in April, which proved to be the most violent in Thailand's history.

The coup of 6 October 1976

In September Thanom Kittikachorn, one of the exiled generals, having been ordained a Buddhist novice, returned to Thailand with the approval of the King. This was taken as a clear demonstration of the Royal Family's support for the military leaders. Students began demonstrations at Thammasat University protesting against Thanom's return. During these demonstrations an incident occurred on which accounts vary but which had far-reaching consequences. The students say they were re-enacting a recent occurrence in which two workers who had been putting up posters were attacked and hanged. A photograph of this scene was published in right-wing newspapers saying that the students were hanging an effigy of the Crown Prince. Following this the Army's radio station encouraged all "patriots" to take appropriate action. As a result, right-wing groups flocked to the University and began a brutal attack on the students. Official reports listed the casualties at around 30 dead and several hundred wounded or beaten, though various observers reported many more deaths. Later that day, the armed forces intervened to restore order and seized power, ousting the Prime Minister and his Cabinet. According to official figures more than 3,000 students were arrested, while no members of the right-wing groups were detained.

This coup differed from past ones in a number of respects. The level of violence leading to the coup was unprecedented; for the first time the army had the support of the royal family, and none of the generals belonging to the National Administrative Reform Council (N.A.R.C.), which was responsible for the coup, took office as Prime Minister. Instead a civilian, Mr Thanin Kravichien, was appointed Prime Minister, but under the new Constitution proclaimed by the N.A.R.C. he was made subject to an Advisory Council. This body in whom the real political power lay, was composed of 24 generals belonging to the N.A.R.C.

Under Article 21 of the new Constitution, the Prime Minister, subject to the approval of the Cabinet and the Advisory Council, was given "the power to issue any order to take any action" where he "deems it necessary for the prevention or suppression of an act subverting the security of the Kingdom, the Throne, the national

economy or State affairs or disturbing or threatening public order or good morals or . . . public health". This power applied retroactively and any action taken under this power was to "be considered lawful". Under this power a number of people have been summarily executed without trial. Dr Manfred Kopp, of the German Federal Republic, who visited Thailand on behalf of the International Commission of Jurists in July 1977, was told that this power is to be invoked only in relation to serious criminal offences admitted by the accused. Since April 1977 it has been used nine times to execute summarily rapists, murderers and smugglers, and in one case a General who attempted another coup in March 1977. Article 21 was also used for sentencing without trial about 18 other persons involved in the coup, the sentences ranging from five years to life imprisonment.

All political parties and political gatherings were banned. All daily newspapers were temporarily stopped, and all publications subjected to censorship. All communist literature was banned. Later in October 1976, a series of orders and decrees were issued. Decree No. 8 revived the Anti-Communist Activities Act of 1952 in which communist activities are defined so vaguely as to include inter alia "advocating doctrines leading to communism". It gives the armed forces power to arrest and detain without warrant or charges persons suspected of communist activities whether these occurred before or after the proclamation of martial law. A further 4,287 persons were detained for communist activities and the maximum period of detention without trial was extended to 180 days under Decree No. 28. "Communist-infested zones" were created in which all liberties may be suspended and which may be declared out of bounds for habitation.

Decree No. 22 describes nine categories of persons as being "dangerous to society". These categories include six for criminal activities and three for political conduct, all of which are couched in very vague terms. The government is given sweeping powers to arrest people in these categories and to hold them indefinitely without trial. In May 1977 *habeas corpus* was suspended for these detainees who wished to challenge that there was any sufficient evidence that they were "dangerous to society".

All persons charged with offences under martial law or under the Anti-Communist Activities Act are subject to the jurisdiction of military courts. Once a person is charged with an offence under the Anti-Communist Activities Act, all other charges may be dealt with by the military court. Also in such cases there is no right to be represented by an attorney (though some defendants have been able to consult lawyers before their trial), there is no possibility of bail, and no right of appeal from any decision.

The majority of those arrested in October 1976 have been released. However, many still have to report weekly to local officials and some state that they are unable to find employment because of their arrest. Others have been sent to re-education camps and some have been rearrested for other unspecified charges under other decrees. There are reports of a great deal of indiscriminate use of official authority in outlying areas.

Eighteen of those arrested on 6 October, including Sutham

Saengprathum the former student leader, were finally brought to trial on 5 September 1977. Twelve of the defendants face ten charges, which include communist activities, taking part in a gathering of more than ten persons, instigating riots, resisting and obstructing police officers from carrying out their duties, murder and attempted murder, trespassing and illegal possession of firearms. The six other defendants are in addition charged with high treason. Many of these are capital offences. At the first hearing, the students pleaded not guilty to all the charges. They also challenged the jurisdiction of the military court and the retroactive military decrees governing the procedures. They claim that they are being held for acts which occurred during civilian government and which were lawful under the guarantees of the 1974 Constitution. The students also protested that since they were not released on bail they were not able to prepare adequately for the trial. They asked that they be given more time to consult with their lawyers, as they had been granted only twenty minutes per week with them. The court said it would submit this request to the prison authority. Military trials in Thailand tend to last a long time. With hearings at the rate of one or two a month, the trial could last up to four or five years.

Fifty-seven journalists who had been investigated before the coup were arrested and charged with having "committed acts endangering national security and serving communists." All major newspapers have been closed temporarily at least once during the past year for printing matter considered damaging to the government. One newspaper was closed for ten days for printing an editorial which criticised a report that Malaysian troops were to be based in Thailand permanently. The threat of temporary suspension has resulted in self-censorship, as these closures threaten the economic viability of the newspapers. The police have confiscated and burned thousands of books and other printed material considered to be pro-communist. In addition, small journals representing a wide spectrum of views have been banned. In August 1977 the Ministry of Education announced that private publishers were prohibited from printing text books on subjects concerning national security.

Strikes and any form of workers' demonstrations were banned in January 1977. Offenders are subject to arrest as being dangerous to society. Later in the year, the Labour Department said that state enterprises are not covered by Labour Law and therefore banned all state enterprise labour unions. A committee was established to enact new legislation on such workers' rights, benefits and welfare.

The Coup of 20 October 1977

It is unclear at present how long martial law is to continue in Thailand. When Dr Kopp, the ICJ observer, asked Dr Uppadit Tajaviyang Kul, the Minister of Foreign Affairs, why martial law was necessary in areas where there is no communist infiltration, he was told that efforts were being made to create normal conditions in the near

future, and that as soon as the political situations was normalised martial law would end. No particular period was indicated. The October 1976 Constitution had set out a twelve year plan for return to democracy. This plan contained no realistic provisions for a transfer of power at the higher levels, and theoretically, Mr Thanin could have remained as Prime Minister for eight years. It may be that this was one of the factors leading to the bloodless coup on 20 October 1977 in which Mr Thanin's government was deposed by the military authorities, this time acting under the name of the Revolutionary Party. This Party appears to be led by the same people who made up the former National Administrative Reform Council, with Admiral Sa-Ngad Chaloryu as its head. The Council is now called the National Policy Council.

It has been suggested that this coup is the result of less conservative pressures from within the armed forces by some who were concerned that Mr Thanin had begun to act too independently. Although martial law is to continue, the first actions taken by the new regime indicate some possible relaxation of the former controls. The new interim constitution which was promulgated on 10 November 1977 to replace the 1976 constitution provides that a general election shall be held within 17 months. Before this, a new permanent constitution is to be drafted by a special committee of the National Assembly. Press censorship has not been reimposed, though editors have been told that untruthful reporting or writing that tends to promote disunity or advocate political ideas detrimental to the country, its Buddhist faith or the monarchy will not be tolerated. General Kriangsak Chammanand, the new Prime Minister, is reported to be a humane man with liberal views. Under the interim constitution he can be dismissed by Admiral Sa-Ngad Chaloryu. During this interim period, Admiral Sa-Ngad will also appoint the National Assembly, which accordingly will have no independent power of decision. It remains to be seen how these changes will affect the rights of those who were subjected to the laws and decrees of the past year.

It must be recognised that Thailand's government has a serious problem with guerrillas in some provinces and with communist infiltration from Laos. The Thai Army estimates that some 8,000 armed guerrillas are operating in the jungles and mountains in the North, near the border of Laos, and in confined southern regions north of the Malaysian border. Martial law may well be necessary in these areas, but it is difficult, however, to see the need for imposing it over the whole country. Be that as it may, there can be no justification for the summary execution of suspects which is a clear violation of Thailand's obligations under common Article 3 of the Geneva Conventions, 1949. Regrettably, Article 27 of the new interim constitution gives the Prime Minister the same powers of summary execution and punishment as he had under Article 21 of the 1976 Constitution. Also, there are as yet no signs of a determination to introduce the radical reforms which will be needed if the threat of communism is to be fought other than on the military front. Professor Puey Ungphakom, former Governor of the Bank of Thailand, a respected liberal and Rector of Thammasat University who fled the country after the October 1976 coup, described

the situation to a US Congressional Committee* in June 1977 in these terms, "My country is heading towards civil war. The events of October 1976 and subsequent measures taken in Bangkok vastly help the insurgents in a way never dreamed of before by either side", an allusion to the large number of recruits to the guerrilla forces caused by the repressive measures taken against the opposition.

South Africa

19 October, 1977, is likely to prove a turning point in the history of South Africa. On that day the government decided to ban all the main African organisations of the 'black consciousness' movement. Although the government have always tried to depict this movement as being identical with 'black power', i.e. those committed to a violent armed struggle, the truth is very different. The black consciousness movement was, indeed, working for revolutionary change, in the sense of a radical alteration in the economic and social structure of the country, but its members were dedicated to doing so by peaceful means. They believed that if the African majority awoke to have pride in their own race and culture and united with strength to demand and work for their equal rights, they would be able to compel the white minority to share political and economic power with them. Their goals were not racist. They sought the reconciliation of all races in South Africa to work together in equality. The death in detention of their leader Steve Biko, and the hideous revelations at the inquest on his death, focus attention dramatically upon the cruel and repressive policies to which the South African government are now committed in its determination to maintain the ascendancy of the white minority.

The banned organisations include, apart from the Black People's Convention, associations and unions of African university and secondary school students, parents, women, social welfare workers, writers and journalists, as well as a trust fund for prisoners' families. The multi-racial oecumenical organisation, the Christian Institute, has also been banned, and four of its leaders including Dr Beyers Naudé made subject to banning orders. The largest African newspaper, *The World* and its associated *Weekend World* were banned, as was its editor and the editor of the East London *Daily Dispatch*, Donald Woods.

By measures such as these the government will succeed in repressing many lawful African activities, but far from repressing, they will heighten, the anger and bitterness and drive the Africans to violence in their struggle for their rights. The Justice Minister, Mr Kruger, some of

* The Sub-Committee on International Organizations and Movements of the International Relations Committee, House of Representatives.

whose utterances come strangely from a man responsible for the maintenance of the Rule of Law ("I am not glad and I am not sorry about Mr Biko. He leaves me cold"), has boasted that the security network is so effective that it is virtually impossible to bring about a revolution in the country. That network is now to be extended far beyond normal police and intelligence work and political repression. Three Bills published in July show that the government intends to extend its control to cover almost every social, welfare, charitable or religious activity in the country.

Under the *National Welfare Bill* there are to be established a South African Welfare Advisory Council and regional welfare boards. It will be an offence for any organisation to render social welfare services unless it has a registration certificate from the regional board. Social welfare services mean "the relief of social distress, the prevention and combating of social decline or the improvement or promotion of the social functioning of persons, families or groups of persons". This remarkable definition is wide enough to include most religious, charitable and other welfare bodies, including possibly legal aid organisations. As each regional board will have power to determine existing or future welfare needs, it will be able to refuse an organisation permission to operate simply by saying that the welfare needs in question are already being adequately met. The Minister has complete powers, backed by penal sanctions, to investigate any welfare organisation's activities and to direct the regional board to withdraw its registration. There is no appeal to the Courts against any refusal, amendment, suspension or withdrawal of a certificate. Appeal lies only to a committee constituted by the Minister for the particular case.

The Social Workers and Associated Professions Bill will make it a criminal offence for any person to "perform social work at remuneration or give any instruction on . . . social work" unless he has been registered as a social worker by a Council appointed by the Minister. Social work means "any professional act, activity or method directed at diagnosing, eliminating, preventing or treating social malfunctioning in man, or at promoting social stability in man, and includes the rendering of any material assistance with a view thereto". This well-nigh incomprehensible definition could presumably include the activities of church workers, researchers, educationalists, criminologists, town planners, and workers in legal aid bureaux, citizens advice bureaux, psychiatric clinics and a host of other activities.

The Fund-raising Bill is to control the collection of contributions by fund-raising organisations, including 'trusts or funds'. It will be an offence for anyone to collect or obtain without a permit any contributions from the public or any part of the public "with a view to promoting any object relating to the rendering of material assistance to any other person". Contributions mean "any goods or money including anything which can be exchanged for or converted into money". The necessary authorisation will have to be obtained from the Director of Donation Funds, appointed by the Minister, who will have full power to investigate any organisation and to withdraw or amend any authorisation. Again, the only appeal will be to a committee appointed

by the Minister for the particular case. Any person collecting contributions, including a bob-a-job boy scout, must have in his possession a power of attorney issued on the express authority of the management of the organisation.

Viewed against the banning of the black consciousness movement's educational, cultural and welfare organisations, and bodies such as the Christian Institute, it must be expected that the bureaucratic labyrinth to be constructed under these three Bills will be used to prevent the formation and growth of other lawful organisations to take their place.

Corrigenda

Malaysia

In Review No. 17 a short note was published on the Malaysian Constitutional (Amendment) Act of 1976. The Attorney-General has requested correction of the following points:-

- the only amendment to Article 5 of the Constitution is that persons arrested or detained *under the law relating to restricted residence* are not entitled to be brought before a magistrate within 24 hours; otherwise, the protections of Article 5, including the right to *habeas corpus* and to legal counsel, remain in force;
- where an order for preventive detention is made, Article 151 of the Constitution requires that the detaining authority shall inform the detainee of the allegations of fact on which the order is based (save where it would be 'against the national interest') and shall give him the opportunity of making representations;
- an order for detention, supervision or restricted residence is always open to challenge in a court of law by way of *certiorari* or *habeas corpus*, and the High Court may set aside a banishment order on the grounds that the person concerned is a citizen or an exempted person.

The Attorney-General also explained that it was never the intention of the Malaysian Government to enable the Advisory Board in cases of preventive detention to postpone the hearing of representations indefinitely. Sometimes the postponements are at the request of counsel. He also reiterated the Government's attachment to the Rule of Law and fundamental rights.

UN Commission on Human Rights debate on the Middle East

The Syrian Ambassador to the UN in Geneva has taken exception to the statement in Review No. 18, p.26, that the Syrian delegate referred at one point to atrocity as "congenital to the Jewish mind". He points out that the official records show the delegate as saying that "the violations of Human Rights by Israel are congenital to the Zionist mind". The official summary records are in the form of a précis and not a verbatim record, and the words printed in inverted commas were as our observer recorded them. However, we are happy to accept that the summary record correctly reflects the distinguished delegate for Syria's contribution to the debate. Ambassador El Fattal explained in his letter "we revere Judaism as a divine revelation with universal values, while we consider Zionism a distorted political secular movement inherently colonialist, racist and expansionist, as facts have proven it to be".

Commentaries

New Human Rights Committee

1977 has seen the birth of a new international organ for the implementation of human rights. Though not strictly a United Nations organ, it meets at the premises of the UN in New York and Geneva, is serviced by the UN staff and reports annually to the General Assembly through the Economic and Social Council. It is the Human Rights Committee established under the International Covenant on Civil and Political Rights.

The Committee has two main tasks:

- to examine the periodic reports which the States Parties to the Covenant are required to submit under Article 40 on measures they have taken to give effect to the rights recognised in the Covenant, indicating the factors and difficulties, if any, affecting the implementation of the Covenant; and
- to examine and take action upon the “communications” (i.e. complaints) submitted by individuals alleging violations of their rights under the Covenant by a party to the Optional Protocol.

There is also a procedure for communications by one State Party claiming that another State Party is not fulfilling its obligations under the Covenant, but this procedure has not yet come into force as very few countries have made a declaration submitting to this procedure.

The Committee has 18 members elected by the States Parties from a list of persons nominated by States Parties as being “of high moral character and recognised competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience”. In fact they are nearly all well-known international lawyers. They are not representatives of their countries, but serve in a personal capacity. The present composition of the Committee is six from the Western countries (Canada, Cyprus, Denmark, Federal Republic of Germany, Norway and the United Kingdom), three from Eastern Europe (Bulgaria, Rumania and the USSR), three from Latin America (Columbia, Costa Rica and Ecuador), two from Africa (Tunisia and Rwanda), and two from Asia (Iran and Syria). Somewhat anomalously, the same Committee examines the individual complaints under the Optional Protocol even though many of the members come from countries which have not themselves ratified the Protocol.

At its first two meetings the Committee made a most promising start. Its first task was to formulate its rules of procedure, a task which was approached with a commendable desire to make the procedures as effective as possible, reducing delays to the minimum and giving both parties opportunities to comment upon the other's submissions. A constructive and positive relationship, based on mutual respect, between the members of the Committee is evident. Where there have been disagreements or differences of approach on particular subjects, it has been striking how often they have cut across the familiar regional political alignments which are so familiar in UN bodies.

At the second meeting, held in Geneva in August, the Committee continued the formulation of its rules of procedure begun in January in New York, and then dealt with its first periodic reports and individual communications. It also adopted its first annual report.

State Party Reports

The Committee studied six reports, from Syria, Cyprus, Tunisia, Finland, Ecuador and Hungary. The Committee adopted the practice evolved in the Committee on the Elimination of Racial Discrimination of inviting a representative of the reporting State Party to present the report and answer questions upon it. To varying degrees these reports described the constitutional provisions and legislative rules and regulations giving effect to the rights recognised and protected by the Covenant.

Members of the Committee frequently asked for further information, including copies of legislative acts, administrative and official orders, as well as copies of civil and criminal codes. Much consideration was given to the follow-up procedures the Committee should adopt, so as to continue its monitoring efforts over a period of time.

In considering the reports much attention focused on the degree of enforcement of the Covenant provisions. The Committee repeatedly sought assurances that Covenant provisions and rights were either invocable *per se* in national courts and before administrative bodies, or that their domestic equivalent, as implemented by the State Party, could not be abrogated. Members expressed concern that other internal regulations might in practice supersede or dilute the Covenant rights and the general provisions embodied in the Constitution or its legal equivalent. They frequently asked under what conditions any limitations or restrictions on those rights could be imposed.

The Covenant does, of course, recognise that in exceptional circumstances conditions may justifiably lead to the temporary suspension by law of certain covenant provisions. Derogations relating to national security and *ordre public* and other matters are found in a number of articles. These derogations are, however, to be exercised only in extreme circumstances.

In order better to assess the reality lying behind the legal provisions, Committee members also occasionally went beyond the report and the testimony to request empirical evidence on such questions as the number of political detainees and prisoners, or the number of active unions. In seeking to test the spirit of a State Party's commitment to Civil and Political Rights, one Committee member asked a representative if his country might in future consider welcoming non-governmental trial observers to political trials.

With regard to future State Party reports, the Human Rights Committee formulated general guidelines which will be forwarded to States Parties on the content and form of reports to be submitted. The guidelines request State Parties to report briefly in two parts the general legal framework within which civil and political rights are protected and the legislative, administrative or other limitations on the enjoyment

of a right. The reports should be accompanied by copies of the principal legislative and other texts to help the Committee in its evaluation.

Individual Communications

Sixteen states have ratified the Optional Protocol to the Covenant, thus giving the right to individuals subject to their jurisdiction who claim to be victims of violations of their rights to submit communications to the Committee.

The Committee is empowered to bring any individual communication which it finds admissible to the attention of the State Party concerned, which on its part undertakes to provide the Committee within six months with a written explanation on the matter and the remedy, if any, that it may have taken. Under the Protocol the Committee is then required to consider the communications in the light of all written information made available to it by the individual and the State Party concerned, and "shall forward its views to the State Party concerned and to the individual". Examination of all such communications takes place in closed meetings of the Committee.

There are thus two determinations by the Committee, the first as to admissibility and the second as to its 'views' upon any communication declared admissible. Under the Committee's rules of procedure, a communication may not be declared admissible until the State Party concerned has received it and been given an opportunity to furnish information or observations on the question of admissibility. Communications are not admissible if all available domestic remedies have not been exhausted or if the same matter is being examined under another procedure of international investigation or settlement. Under its rules the Committee has to be satisfied that the communication is not an abuse of the right to submit a communication and is not incompatible with the provisions of the Covenant. Normally the communication should be submitted by the individual himself or by his representative; the Committee may, however, agree to consider a communication submitted on behalf of an alleged victim when it appears that he is unable to submit the communication himself. With regard to the exhaustion of domestic remedies, the Committee has provided in its rules that if the domestic procedures have become "unreasonably" prolonged, then the Committee may agree to admit the communication, presumably on the ground that the domestic remedies cannot be considered as 'available'. A decision on inadmissibility may be reviewed at a later date "upon a written request by or on behalf of the individual concerned containing information to the effect that the reasons for inadmissibility . . . no longer apply".

The Committee has also decided to forward the State Party's explanations or statement to the author of the communication "who . . . may submit any additional written information or observation". This very important rule contrasts with the Resolution 1503 procedure before the UN Commission on Human Rights, where no such practice exists.

Rule 95 provides that when the Committee finally forwards its views to the State Party and the individual "any member of the Committee may request that a summary of his individual opinion shall be appended to the views of the Committee". There was considerable difference of opinion on the formulation of this rule, with the members from the Eastern European and Latin American countries contending that dissenting opinions would significantly weaken the Committee's 'views'. They considered that 'views' should be reached by consensus. There are clearly arguments both ways on this issue. A strong majority opinion in favour of the individual might be weakened in its impact by even a single dissenting view. On the other hand dissenting views in favour of the individual may bring him some comfort if not relief. More generally, however, if the Committee had always to reach its views by consensus, this would be likely in some cases to dilute the force of the views, whether in favour of the State Party or the individual.

The Committee considered 13 individual communications at its second session. It is believed that one was a joint communication signed by 18 persons and referring to alleged violations by the Government of Uruguay of the rights of 1,200 named persons. (Uruguay ratified the Protocol before the present military regime came to power. It would seem that the Committee has power to consider only the cases of the 18 who signed. A communication referring to so many cases would seem more apt to be dealt with as a communication under ECOSOC Resolution 1503 alleging a "consistent pattern of gross violations of human rights".

As the Committee's report on its consideration of communications is confidential it is not known whether this, or indeed any of the other communications, were forwarded to the governments for their comments.

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities

The Sub-Commission met in Geneva in August 1977 for its Thirtieth Session. The following is a brief account of some of the discussions and decisions.

Human Rights of Persons Detained or Imprisoned

The Rapporteur, Ambassador Erik Nettel of Austria, submitted a draft body of principles for the protection of all persons under any form of detention or imprisonment. The draft contains 40 principles and is divided into three sections. The first consists of six principles of general application. The second contains 30 principles to apply to the arrest, detention, and imprisonment of persons accused, suspected, or convicted of a criminal offence. These include the right to be informed of the charges, the right to counsel, and the right to a review of the legality of detention by a judicial authority. The third section contains four principles relating to detention under emergency powers, including one that special powers of arrest and detention in a state of emergency "shall be clearly defined by law." In introducing his draft, Ambassador Nettel indicated that it was intended to embody "broadly worded fundamental provisions" which could be accepted by most countries. His principles had been largely taken from existing or previously drafted international instruments.

The Sub-Commission discussed the question of the legal form that this body of principles might ultimately take. Many members felt that the Sub-Commission should seek to formulate a declaration which would not impose legal obligations upon the states. However, Ambassador Nettel pointed out that all the principles in his draft could fit into an international convention.

There was substantial discussion of the third section of the draft dealing with detention under emergency powers. Mr. Cassese (Italy) thought that this section should be expanded and the relevant principles formulated in greater detail. The Secretary-General of the International Commission of Jurists also urged that there should be greater precision and that this section should apply to all cases of administrative detention, not merely administrative detention under emergency powers. On the other hand, Mme Questiaux (France) thought that this section should be deleted. She felt it would be unwise to admit derogations from general principles until it had been established that states of emergency warranted such derogations.

Twenty-seven non-governmental organisations submitted an alternative draft body of principles. The NGO draft was designed to protect all forms of detention or imprisonment, including detention on grounds of health, a category which was not covered by Ambassador Nettel's draft. However, it may be that the Sub-Commission will formulate recommendations for the protection of this category of

detainee when it makes another study requested by the Commission on Human Rights on the protection of persons detained on grounds of mental health. An important proposal in the NGO draft is that a detainee should not be returned to the custody of the investigating authority after his first appearance before a magistrate, so that he will not be under fear of further ill-treatment if he discloses to the magistrate any ill-treatment he has received.

At the end of the session the Sub-Commission requested authority to set up a working group to meet before the next session and prepare a revised draft in the light of the discussions in the Sub-Commission.

Under this agenda item, the Sub-Commission also discussed the problem of torture. Several members urged that torture should be designated an international crime. Mr. Cassese (Italy) pointed out that making torture an international crime would have two important legal consequences. First, persons practicing torture would no longer be able to invoke the act-of-state doctrine and plead that they had acted as an agent of the state. Torturers would be personally liable for their actions. Secondly, torturers would be subject to universal jurisdiction, not merely the jurisdiction of the state in which they were citizens. Mme Questiaux (France) stressed that it was necessary for the Sub-Commission to find a procedure to discuss the vast body of evidence pertaining to torture. She stated that the Secretariat's synopsis of materials received from non-governmental organisations on torture and detention practices should be put into a form suitable for publication and wide distribution. The Sub-Commission adopted a resolution calling for an end to systematic torture, arbitrary arrest, indefinite detention without trial, and summary execution of detained persons by "states whose authorities resort to such practices."

States of emergency

When considering violations of human rights and fundamental freedom several members of the Sub-Commission and non-governmental representatives expressed concern over reports of gross and systematic violations of human rights by military regimes in countries where a state of siege or emergency had been declared. A representative of the International Commission of Jurists discussed the systematic violation of human rights by illegally constituted and authoritarian governments in the southern part of Latin America.

This subject was discussed further in the annual review of developments concerning the human rights of detained persons. Mr. Cassese (Italy), referring to increasing evidence of indefinite detention without trial, disappearance and execution of detained persons, and torture or other ill-treatment of prisoners, pointed out that these practices appeared to be particularly widespread in Argentina and Uruguay.

Ambassador Martinez (Observer for Argentina) in denying these allegations made criticisms questioning the objectivity and impartiality of some of the Sub-Commission members and attacking the procedures of the Sub-Commission. This evoked some sharp retorts. Several

members considered that the attacks were not only ill-informed but amounted to an attempt to intimidate members of the Sub-Commission. On a demand that the Ambassador should apologise or withdraw, the Sub-Commission went into private session. On resuming the public session a consensus statement by the members was read, stating that its members acted "with complete independence and impartiality" and rejecting "most emphatically any allegations or insinuations to the contrary or any intimidation against its members".

After a number of reservations had been expressed by certain Latin American members, the Sub-Commission appointed Mme Questiaux (France) and Mr. Caicedo Perdomo (Colombia) to prepare a "study in outline" on the implication for human rights of "situations known as a state of siege or emergency".

Racial discrimination

The Special Rapporteur, Mr. Khalifa (Egypt), submitted his report on the adverse consequences for the enjoyment of human rights of political, economic and other forms of assistance given to the colonial and racist regimes in Southern Africa. Mr. Khalifa concluded in his report that a mandatory arms embargo and a complete severance of all economic relations are the minimum pressures required to bring about an end to the apartheid system in South Africa. The Sub-Commission decided to transmit this report to the Commission of Human Rights and invited Mr. Khalifa to prepare the necessary material for a provisional list identifying those individuals and institutions (including banks) whose activities constitute assistance to the colonial and racist regimes in Southern Africa.

Study on Minority Rights

The Special Rapporteur, Mr. Capotorti (Italy), presented his final study on the rights of persons belonging to ethnic, religious and linguistic minorities. He concluded that states have an obligation under Article 27 of the Covenant on Civil and Political Rights actively to assist minorities to enjoy their culture: non-discrimination by the state is not enough. Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." The Sub-Commission endorsed the Rapporteur's conclusions including a recommendation to the Commission on Human Rights to consider drafting a declaration on the rights of these minorities within the framework of the principles set forth in Article 27 of the Covenant.

In the discussion Mr. Whitaker (United Kingdom) noted that gypsies, properly called Roma, were the worst treated minority in his country and in other European countries. In an intervention by the Minority Rights Group, the continuing discrimination against Roma in

Europe was discussed. The need for caravan sites, special schools, and recognition of the Roma language and culture was pointed out. The Sub-Commission's resolution appealed to all countries which have Roma in their borders to accord them equal treatment.

Human Rights in Chile

When the Sub-Commission considered the situation in Chile many members indicated that there was substantial evidence of continued flagrant violations of human rights. The Sub-Commission appointed Mr. Cassese to prepare a study on the consequences of various forms of aid extended to Chilean authorities. The Sub-Commission also recommended that a voluntary fund be established to receive contributions and distribute humanitarian and financial aid to those imprisoned or detained in Chile, and to those forced into exile, and to their families.

Other studies

Baroness Elles (United Kingdom) presented her final study on the rights of non-citizens. She included in her report a Draft Declaration on the Human Rights of Individuals who are not Citizens of the Countries in which they live. The Sub-Commission requested Baroness Elles to take into account comments of governments and present a revised draft declaration at the next session.

The Sub-Commission also discussed two reports submitted by Special Rapporteurs which dealt with the right to self determination. Mr. Cristescu (Rumania) discussed in his report the connection between self determination and economic development and asserted that a basic element of the right to self determination is the right of all people to exercise sovereignty over their natural resources. Mr. Hector Gross Espiell presented his report on the Right of Peoples Under Colonial Domination to Self-Determination. These reports will be considered further at the next session.

Israeli Settlements in Occupied Territories

Introduction

The legality of the Israeli settlements in the occupied territories in the Middle East may seem a somewhat academic question after the General Assembly Resolution of 28 October 1977. In this resolution (A/Res/32/5) the Assembly declared that the Jewish settlements have no legal validity and constitute a serious obstruction to peace efforts. It instructs Israel to desist forthwith from taking any action that would result in changing the legal status, geographical nature or demographic composition of the Arab lands occupied since 1967, including Jerusalem. The resolution also asks the Secretary-General of the UN to ensure its "prompt implementation" and to report to the Assembly by 31 December, 1977. The resolution was adopted by an overwhelming majority of 131 affirmative votes, 7 abstentions and one vote against (Israel). The only major power to abstain was the United States, as it did not want to prejudice its position as Co-Chairman of possible Geneva peace talks at the end of the year. The US government has, however, on several occasions stated that the Israeli settlements in the occupied territories are illegal and an obstacle to peace, including a statement issued by the State Department on 18 August, 1977.

In spite of this overwhelming political consensus there is perhaps some value in examining the legal aspects of the issue of the settlements, partly because legal arguments are put forward to support the Israeli settlements and these deserve to be considered and answered, and partly because answers to the questions raised in this case may be of importance in other conflicts as, for example, the case of the Turkish settlements in Cyprus.

Historical background

For appraisal of the arguments, which are in part based on the disputed sovereignty of some of the territories, it may be helpful to set out as briefly as possible the main events leading up to the present situation.

During the first World War the British Foreign Secretary, Lord Balfour, formally expressed his government's "sympathy with Jewish Zionist aspirations" in the so-called Balfour Declaration of 2 November 1917. He stated that "His Majesty's Government views with favour the establishment in Palestine of a national home for the Jewish people", but added "it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine". This document, like the Sykes-Picot agreement of 1916, conflicted with earlier British undertakings given to the Arabs to 'recognise and support' the independence of the Arabs in the Arabian Peninsula, Iraq, Palestine, Syria and Transjordan.

At the peace settlement at the end of the First World War some of the territories of the Ottoman Empire were allocated as mandated territories to France and the UK. An area east of the River Jordan was given independence under the name of Trans-Jordan. The area west of the Jordan became the British mandated territory of Palestine. Under the mandate an increasing number of Jewish settlers entered the area in the inter-war period pursuant to the Balfour Declaration and amid growing and violent Arab opposition. After the Second World War several proposals by the British government seeking to bring to an end the conflict between the Arab and Jewish communities in Palestine failed. The United Kingdom decided to request the General Assembly to make recommendations concerning the future government of Palestine. In its resolution of 29 November 1947 the General Assembly recommended termination of the mandate under a partition plan, according to which there would be formed a Jewish state in some parts and an Arab state in other parts of Palestine, with Jerusalem becoming an international city. The Arab states rejected the partition plan. The Palestine Mandate was terminated at midnight on 14 May 1948, and the next day the Jewish community proclaimed the establishment of the State of Israel within their territorial boundaries under the partition plan.

Five weeks before the termination of the mandate an attack was made by a combined force of Irgun and Stern Jewish terrorists on the Arab village of Deir Yassin situated in the proposed Arab area of Palestine. The reports of the ensuing killings there and in other Arab centres which had been overrun led to a panic and mass flight of Arabs from both parts of Palestine. According to the present Prime Minister of Israel, 635,000 out of about 800,000 Arabs fled from the initial area of the State of Israel.¹ On the day after the termination of the mandate Arab forces from Egypt, Transjordan, Syria and Lebanon moved into the proposed Arab area of Palestine stating that they did so to protect the inhabitants. There followed the first Arab-Israeli war.

When the UN in June 1948 succeeded in securing a cease-fire, Israel was in occupation of substantially larger portions of Palestine than had been allotted to it under the partition plan, while Egypt occupied the Gaza Strip and Jordan the West-Bank. On 11 May 1949 Israel was admitted to membership of the UN. There was no peace settlement but armistice agreements were made between Israel and its neighbours in 1949, following the lines of demarcation of the 1948 cease-fire.

On 24 April, 1950, Jordan formally declared the annexation of the West Bank following elections held on 11 April for a joint Parliament. This union was formally recognised only by the UK and Pakistan. The Arab League denounced the move of Jordan but subsequently tacitly accepted Jordan's sovereignty over the West Bank in a trusteeship capacity.²

In spite of the hostilities during the 1956 Suez crisis, the geographical situation remained substantially unaltered for 18 years until the Six-Day War of June 1967. In the course of this war Israeli forces occupied the Gaza Strip, the Sinai Peninsula, which is Egyptian territory, the West Bank of the River Jordan and the Syrian Golan Heights. Part of Sinai was recovered by Egypt following their surprise attack in October

1973.

The Israeli occupied territories are, therefore, Sinai and the Golan Heights, which are respectively Egyptian and Syrian territory, East Jerusalem, and parts of the former mandated territory of Palestine which the General Assembly recommended in 1947 should form part of an Arab State, including the West Bank and the Gaza Strip.

The Scale of the Settlements

A fair survey of the literature that has appeared in recent years about the Arab-Israëli conflict would fill a whole number of this Review, let alone an attempt to give a full and impartial description of the issues.³ Besides, there is much dispute about the facts.

The existence of a settlements policy is not denied by the government of Israel, but about the actual number of settlers, displaced persons, settlements and acres involved there are widely differing figures. The number of settlements in all the occupied territories as given in the well-documented testimony of Dr. Ann M. Lesch to the US House of Representatives, hearings on 12 September 1977 was estimated at about 90 (including West Bank 36, Golan Heights 25, Gaza Strip and Sinai 22 and Jerusalem approximately 12). According to the same testimony there are in these settlements 60,000 Jewish settlers, 50,000 in East Jerusalem and 10,000 in the remaining areas. Ambassador Herzog in his General Assembly statement of 26 October 1977 gives a figure of 6,000 for "Judea, Samaria, Sinai, Gaza and Golan", but is silent about Jerusalem.

In this statement Ambassador Chaim Herzog declared "... we are discussing moves by the Government of Israel which have not displaced one single individual, which have not removed one single Arab from his property. . . ." In the same speech, however, he tells the Assembly that "in the very few instances where private property was involved, it was acquire^d for public purposes in accordance with Jordan law . . . and again^s full compensation".

This apparent contradiction is to be explained by the Israëli government's contention that the fleeing of Palestinian Arabs from their lands during the last 30 years was not caused by Israëli aggression and that Israel does not bear any responsibility for it. In 1977 UNRWA had registered as refugees approximately 1,700,000 Palestinian Arabs,⁴ while Palestinian sources say that the real number exceeds two million.⁵ In spite of resolutions of the General Assembly repeated annually since 1948, resolving "that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date . . .", Israel has not (with one exception in the West Bank in 1967) complied in any substantial way with these requests,⁶ thus denying the right of the Arab refugees to return to their homes. At the same time Israel has enacted and applied several laws⁷ which have all made possible the "legal" transfer of property from the original inhabitants into the hands of the State of Israel, the Jewish National Fund or (semi) governmental institutions such as the Development Authority.

Settlements and international humanitarian law

Modern warfare is no longer regulated only by usages but to a great extent by laws, firm rules recognised either by international treaties or by general custom. The so-called Hague Regulations of 1907, annexed to the IVth Convention of the Second Peace Conference, were already accepted as rules of customary international law after the First World War. Any remaining doubts about this were removed by the repeated statements of the Nuremberg International Military Tribunal that the rules of land warfare expressed in the Hague Regulations of 1907 were declaratory of existing international law. Provisions regarding occupation of enemy territory are to be found in the Hague Regulations articles 42-56. These rules were, together with other parts of the laws of war, re-stated, supplemented and expanded in the IVth Geneva Convention of 1949 relating to the Protection of Civilian Population in Time of War, articles 47-78 dealing specifically with occupation. The IVth Geneva Convention was ratified by Jordan (29 May 1951), Israel (6 July 1951), the United Arab Republic (10 Nov. 1952) and Syria (2 Nov. 1953).

According to well-established principles of international law occupation is to be considered as a temporary *de facto* situation, as opposed to annexation whereby the occupying power acquires all or part of the occupied territory and incorporates it in its own territory.⁸ Occupation of territory by force, be it in lawful self-defence or otherwise, can in no way bring title to the occupying power, and an occupying power continues to be bound to apply the Geneva Conventions of 1949 as a whole even when, in disregard of the rules of international law, it claims during a conflict to have annexed all or part of an occupied territory.⁹ To determine whether the policy of settlements by the Israeli government is one of annexation, appreciation of certain disputed facts is decisive. However, in the light of the permanent character of most of the settlements and the pronouncements of Israeli leaders to the effect that they are permanent, it would seem naive to regard this policy as anything other than a step towards eventual assertion of sovereignty over the territories or part of them.

Art. 49 of the IVth Geneva Convention of 1949, which deals with deportations, transfers and evacuations of the population, is very pertinent to this question. The last paragraph reads "The occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". The applicability of this article will be discussed later. Apart from the clear wording of this article, there is a general principle of international law underlying the rules relating to military occupation to the effect that an occupying power has a general duty to administer occupied territories not only in the interest of its own military advantage but also, as far as it can, for the benefit of the inhabitants.¹⁰ The occupying power may, for example, appropriate private property of property belonging to the local communities only to the extent justified by the military necessities of the occupation. Effect is given to these principles in the Hague Regulations (articles 43, 46, 47, 55 and 56) which, it is repeated, are generally accepted to express

rules of customary international law, binding upon all states.¹¹ Even if the much disputed Israeli contention were accepted that in all instances fair compensation was paid, it is difficult to see how the basically temporary character of military occupation and the general duty to act as far as possible for the benefit of the inhabitants can permit large scale acquisition of land for the purpose of settling communities of the occupying power. The limited rights of the occupying power may include the establishment of temporary military settlements for security purposes, but they do not cover settlements by civilians for alleged military and semi-military purposes. In an interview in 1969 the then Prime Minister of Israel described the settlements as being not "ordinary settlements but military agricultural outposts".¹² One wonders what the Israeli reaction would be if these settlements were bombed during hostilities. Would they be accepted as military targets? The evidence available in books, newspapers, individual testimonies and official records indicates that much the greater part of the land for the Israeli settlements has been acquired under legislation giving title to public authorities over "waste lands" or "abandoned land" or "absentee property". In other words the settlements have to a substantial extent been established through the expropriation or confiscation of private property. As to the question of displacement of Arabs, the combination of the denial of the right of Arab refugees to return and the acquisition of their property on the grounds that they are absentees can only be regarded as a form of displacement.

Settlements and the UN Charter

There is no right recognised as such in international law for a state or for individuals to establish settlements in occupied territory. In colonial times, many such settlements were established and justified by the colonising powers on the basis that the 'right of conquest' gave to conquerors full territorial sovereignty over the conquered territory. This outmoded doctrine can no longer be accepted in the light of the Charter of the United Nations with its unequivocal rejection of the use of force and its recognition of the principle of self-determination.

The UN Charter in articles 2 (4) and 51 restates and reinforces the customary rule that the use of force or the threat of force against states, otherwise than in self-defence or with the lawful authority of an organ of the UN, is illegal.¹³ Article 2 (3) in combination with article 33 (1) imposes upon Member States the obligation to pursue a peaceful settlement of international disputes. This principle of the non-use of force implies that there is no right to use force to occupy disputed or foreign territories. (Equally, of course, there is no right to use force to challenge the very existence of a Member State, such as Israel; the legal existence of the state of Israel is, however, vehemently denied by some Arab States and the PLO¹⁴) Secondly this principle involves, in the words of the famous Security Council Resolution 242 of 22 November 1967, the "inadmissibility of the acquisition of territory by war". Scholars writing in support of the Arab position claim that Israel's occupation of territories in the Six-Days War constitutes an armed

attack against the territorial integrity of Arab territory.¹⁵ Other writers assert in support of Israel the defensive character of the Israeli action and the aggressive nature of the acquisition of Palestine territory by Jordan in 1948.¹⁶ It will be clear that much of the argument is based on an appreciation of the facts, and in particular of who started the hostilities in 1948 and 1967 and with what motives. But whatever conclusion is reached on this matter, in neither case would Israel acquire any right to settle civilians in the occupied territories.

The principle of self-determination is recognised by the Charter in articles 1 (2) and 55 and the 'right to self-determination' is recognised in both the International Covenants on Human Rights. However, its precise content has still to be worked out.¹⁷ At present it is broad enough to be invoked by both Israel and the Palestinian Arabs. For Israel it means the right to establish a national homeland. To the Palestinians it means the struggle against colonialism and neo-colonial oppression and the denial of the right to participate in the government of the country and freely to dispose of their natural resources.¹⁸ Whatever else it may mean, the principle or right of self-determination of peoples must surely include the right of the people who inhabit a disputed territory to determine their own future. Consequently to introduce alien settlements under a military occupation before that determination has been made is inevitably seen as an infringement of the right of self-determination of its people. It is no answer to say that the scale of the settlements if not yet sufficient to alter significantly the demographic character of the territory, particularly when the ideology underlying the settlements envisages the eventual transformation of the territory into part of the Jewish homeland.

There is also another provision of the Charter which may be relevant to this problem. The present legal status of the Gaza Strip and the West Bank is not yet established but, deriving from the Palestinian Mandate to the UK which ended in May 1949, it could be argued that they constitute "non-self governing territories" in the sense of Chapter XI of the Charter. Under article 73 members of the United Nations "which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government, recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost . . . the well-being of the inhabitants of these territories, and, to this end . . . to develop self-government, to take due account of the political aspirations of the peoples. . . ."

The Israeli arguments

Two sets of arguments are put forward in support of the Israeli settlements, one positive and the other negative.

The first includes those based on the historical and biblical claim of the Jewish people to the Kingdom of David. On this basis any Jew can settle anywhere in what should be seen as "liberated" rather than "occupied" territories. This could include substantial territories on the East as well as the the West Bank of the Jordan. Based on more recent

history is the claim of Israel to the whole of Palestine on the reasoning that Israel's occupation should be seen as the result of a defensive war against Arab aggression. Therefore Israel has the status of a lawful belligerent occupant, while the Arab States, which occupied parts of Palestine in 1948, were unlawful belligerent occupants. The result of this "defensive conquest" is that Israel has "a better title in the territory of what was Palestine, including the whole of Jerusalem, than do Jordan and Egypt".¹⁹ This view was repeated by Ambassador Chaim Herzog in his statement before the General Assembly on 26 October 1977.

The arguments in the second category are of a more defensive nature and seek to show that there is no infringement of existing international law involved.²⁰ They may be summarised as follows:

- (1) The IVth Geneva Convention is not applicable. Art. 2, para. 2, states that "the Convention shall apply to all cases of partial or total occupation of the territory of a High Contracting Party". The West Bank and the Gaza Strip are not such territory. Jordanian sovereignty over the West Bank is insufficiently recognised by the world community of states.
- (2) The IVth Geneva Convention and, in the view of several writers, the Hague Convention and the rules of international law concerning military occupation, apply only to cases of an "ousted sovereign" since their purpose is to preserve the reversionary interests of the legitimate sovereign. There is no such sovereign.
- (3) The Geneva Convention is intended for short term military occupation and is not relevant to the *sui generis* situation in these areas.
- (4) The IVth Geneva Convention has never been formally applied anywhere in the world.
- (5) Even if Article 49 of the Convention is applicable to the Israeli occupation, article 49 does not cover these settlements because its purpose is to protect the population from deportation and displacement. The article should be read in the light of this general purpose.²¹ The Jewish settlements were not and are not established with this purpose or consequence.

The counter-arguments

The first of the "positive arguments" cannot be accepted as sound or even reasonable. As far as it rests on the Bible it has no legal force. If it rests on the argument that the Jewish people were the original inhabitants of Palestine and therefore are the ones now entitled to inhabit it and determine its future, it may be asked where the argument is to stop. It is impossible to contemplate putting back the clock of history and restoring the land mass of the world to the descendants of its supposed original inhabitants.

As to the second argument, even if the lawfulness of the Israeli occupation were to be admitted, it would not justify a claim of ownership. Lawful defensive action under the Charter confers a security interest only.²² Moreover, to claim a "better title" than Jordan and Egypt on the grounds of the alleged illegal and oppressive

character of their previous occupation is hardly consistent with Israel's expressed willingness to surrender at least part of the West Bank and the Gaza Strip in a final peace settlement. In view of Israel's insistence that it will never accept the foundation of an independent Palestine state, to what countries other than Jordan and Egypt could these territories be surrendered?

Turning to the second category of "negative arguments", the following comments may be made:

- (1) The first argument rests upon a highly restrictive reading of the wording and negotiating history of the IVth Geneva Convention. Article 2, para. 2, does not state that the Convention shall apply only to the *sovereign* territory of a High Contracting Party, and Jordan and Egypt were in de facto occupation and control of the West Bank and Gaza Strip at the time of the Israeli occupation. Moreover, much of the Convention, including article 49, is declaratory of pre-existing international law and such provisions in the Convention should be recognised as being of universal applicability and binding in all circumstances upon High Contracting Parties. In any event, even if the strictest interpretation of the applicability of Article 49 is accepted, the rights of Israel over the territory are still limited to those of a military occupying power under the Hague Rules and customary international law.
- (2) The "ousted sovereign" argument ignores the fact that the Geneva Conventions were drawn up for humanitarian reasons for the protection of individual victims of war, rather than to protect the interests of states.²³ In the words of one writer, the Convention is "people oriented" rather than "territory oriented".²⁴ The opinion on this matter of the International Committee of the Red Cross is of great authority. In its 1975 Annual Review the ICRC commented on the Israeli attitude, saying that it is "unacceptable that a duly ratified treaty may be suspended at the wish of one of the parties". This clearly shows that the Committee considered that the Convention was applicable. This view was recently endorsed by the Red Cross Movement as a whole in a resolution at its 23rd International Conference in Bucharest in October 1977.
- (3) The often repeated argument that the situation in the Middle East cannot be measured by accepted standards, being clothed instead with the lawyers' panacea of "*sui generis*", is a dangerous one. Acceptance of it would nullify the whole concept of the laws of war. No war or military occupation is precisely like another. Legal rules are established in advance to be of general application. The IVth Geneva Convention expressly prohibits agreements in derogation of the Convention, precisely because of the tendency to try to bend the rules to match particular situations. Pictet in his commentary stresses that "The Governments . . . did so [i.e. prohibited derogations] because they were afraid to leave the product of their labours, which had been drafted with such patience under the best possible conditions [i.e. in peacetime], at the mercy of modifications dictated by chance, events or under the pressure of wartime circumstances. They were courageous enough to recognise their own possible future weakness, and to guard against it."²⁵

- (4) Regarding argument (4), it is difficult to understand why the first time should be a bad time to apply a Convention. If it is intended to say that the Geneva Conventions have become obsolete, this can hardly be taken seriously in view of the recently agreed protocols.
- (5) With regard to argument (5) it is true that Professor Lauterpacht in discussing Article 49 refers to an intention to prohibit settlements which "cover cases of the occupant bringing in its nationals for the purpose of displacing the population of the occupied territory".²⁶ There is however no reason to limit the article to this sole purpose. The implied reference to Nazi practices during the second World War, which can be found throughout the whole Convention, is understandable in view of the time when the Convention was drafted, but taking into account the clear wording of the provision it seems unduly restrictive to make this particular practice the only yardstick by which violations of this paragraph can be measured. Besides, the application of this interpretation would turn upon the facts, and as has been seen, the Israeli argument that no displacement has taken place is, to say the least, unconvincing.

Conclusions

In so far as there existed any doubt about it in the period preceding World War II, the Charter of the United Nations in 1945 unambiguously rejected the 'right to conquest'. It was on the basis of this purported right that colonial powers throughout history invaded other territories and settled part of their own population in them. With the right to conquest the right to create settlements has also disappeared, and what is left is the bare right of temporary military occupation where necessary in lawful self-defence. This does not include a right to establish settlements of a civilian nature or settlements of a permanent character. There is, therefore, no valid basis in international law on which the Israeli government can maintain or continue its policy of settlement in any of the occupied territories.

This same conception underlies the IVth Geneva Convention the applicability of which must be accepted in spite of the ingenious Israeli arguments to the contrary. In particular, article 49 of this Convention, which embodies a legal principle with independent force, is pertinent in the present situation.

The Contracting Parties to the Geneva Conventions undertook in the first article "to respect and ensure respect for the present Convention in all circumstances." Pictet in his commentary states that from this follows "that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention."²⁷ Whatever the political considerations may have been in the General Assembly debate, it would seem that from the legal point of view the member states of the United Nations in passing the resolution of 26 October, 1977, were merely doing their duty.

References

- ¹ Begin, Menachem, *The Revolt*, W. H. Allen, London, 1951, p. 164.
- ² The Jordan law approving annexation stipulated in section 2 "... this unity shall in no way be connected with the final settlement of Palestine's just cause within the limits of national hopes, Arab co-operation and international justice". A threat to expel Jordan from the Arab League subsided after Jordan's explicit assurance to the League on May 31, 1950 that its annexation was without prejudice to the final settlement of the Palestinian question. Egypt has never claimed any title of sovereignty over the Gaza Strip.
- ³ See UN Publication Sales No. E/F. 76 1.14 (1976), and J. Moore ed., *"The Israeli-Arab Conflict"*, New Jersey 1977, which contains a 20-page bibliography.
- ⁴ UN Doc. A/32/13 (1977)
- ⁵ Cattán, Henri, "Palestine and International Law", London 1976, p. 136.
- ⁶ Report, Commissioner General UNWRA, UN Doc. A/6713, 1967.
- ⁷ See The Abandoned Areas Ordinance (1948), Cultivation of Waste Lands Regulations (1948), Absentee Property Regulations (1948), Absentee Property Law of 1950 and Development Authority (Transfer of Property) Law (1950).
- ⁸ See J. Pictet ed., *IVth Geneva Convention*, Geneva, 1958, p. 275/6 and M. McDougal and F. Feliciano, *Law and Minimum World Public Order*, New Haven and London, 1961, pp. 751-771.
- ⁹ See Pictet, *op. cit.*, pp. 273-276. Oppenheim-Lauterpacht, *"International Law"*, Vol. II, 7th ed., London 1952, p. 433.
- ¹⁰ Oppenheim-Lauterpacht, *op. cit.*, p. 433.
- ¹¹ *Ibid.*, pp. 403/406. ¹² *Newsweek*, February 17, 1969, p. 49.
- ¹³ I. Brownlie, *"International Law and the use of Force by States"*, Oxford 1963, p. 130. On the interpretation of the term 'states', p. 381.
- ¹⁴ H. Cattán, *op. cit.*; Issa Nakhleh *"The Liberation of Palestine is supported by International Law and Justice"*, March 1969, reprinted in J. Moore ed., *op. cit.* p. 121/135; W. Mallison *"The Zionist-Israeli juridical claims to constitute 'the Jewish people' National entity and to confer membership in it"*, 32 George Washington Law Review, pp. 983-1072 (1964).
- ¹⁵ e.g. Ch. Bassiouni, *"Some Legal Aspects of the Arab-Israeli Conflict"*, Arab World pp. 41-44 (1967).
- ¹⁶ e.g. S. Schwebel, *"What Weight to Conquest"*, 64 American Journal of International Law, pp. 344-347 (1970).
- ¹⁷ On the right to self-determination in general see H. Johnson, *Self-determination within the Community of Nations* (1967).
- ¹⁸ J. Moore, *"The Arab-Israeli Conflict and the Obligation to Pursue Peaceful Settlement of International Disputes"*, 19 Kansas Law Review, pp. 427-430 (1971).
- ¹⁹ S. Schwebel, *op. cit.*, pp. 344-347. Also J. Stone, *"No Peace — No War in the Middle East"*, 1970 pp.38-40 (reprinted in J. Moore, *op. cit.* note 3, pp. 323-325) and Y. Blum, *"The Missing Reversioner; Reflections on the Status of Judea and Samaria"*, 3 Israel Law Review 279-302 (1968).
- ²⁰ Generally M. Shamgar *"The Observance of International Law in the Administered Territories"*, Israeli Yearbook on Human Rights, Vol. I, 1971, p. 262-277.
- ²¹ See Oppenheim-Lauterpacht, *op. cit.*, p. 452 and, less strongly, Pictet, *op. cit.* pp. 277-283.
- ²² See J. Moore, *op. cit.*, note 18, p. 425.
- ²³ See Pictet, *op. cit.*, p. 44 and *passim*.
- ²⁴ S. Boyd, *"The Applicability of International Law to the Occupied Territories"*, Israeli Yearbook of Human Rights, Vol. I, 1971, pp. 258-261.
- ²⁵ Pictet, *op. cit.*, p. 71.
- ²⁶ Oppenheim-Lauterpacht, *op. cit.*, p. 452.
- ²⁷ Pictet, *op. cit.*, p. 17.

ASYLUM AND TERRORISM

by
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On 10 November 1976 the Committee of Ministers of the Council of Europe adopted, after prolonged discussions within the Council's European Committee on Crime Problems, a European Convention on the Suppression of Terrorism.¹ It was opened for signature on 27 January 1977. The Convention has been signed by 17 member States of the Council of Europe i.e. all member States except Ireland and Malta. It had by 15 October 1977 been ratified by two, Austria and Sweden. Sweden made a reservation to the effect that the Swedish government, in accordance with the provisions of Article 13 of the Convention, reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political offence. The Convention shall, according to its Article 11, enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or approval.

In the Preamble to the Convention the signatory states declare their conviction that extradition is a particularly effective measure to ensure that the perpetrators of terrorist acts do not escape prosecution and punishment. Since extradition for political offences is usually excluded in extradition treaties the Convention provides that certain offences are not to be regarded as political offences. Thus, Article 1 reads:

"For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

- (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

¹ European Treaties Series No. 90

- (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- (f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence".

Article 2 adds "1. For the purposes of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.

2. The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.

3. The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence."

Article 5 provides, however, "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested state has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons".

It is reported that this provision was incorporated at the request of the Irish Republic; it is, therefore, called the "Irish Clause".

In the case where the requested offender is found in the territory of the Contracting State and that State does not extradite him, Article 6 and 7 provide that the Contracting State "shall take such measures as may be necessary to establish its jurisdiction over an offence mentioned in Article 1" and "shall submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that state" i.e. the principle "*aut dedere aut judicare*".

Article 8 obliges the Contracting States "to afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought in respect of the offences mentioned in Article 1 or 2".

Article 10 provides that any dispute concerning the interpretation or application of the Convention is to be settled by arbitration in the manner prescribed in this Article, unless a friendly settlement is reached through the good offices of the European Committee on Crime Problems.

According to Article 13 "any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, declare that it reserves the right to refuse extradition in respect of any offence mentioned in Article 1 which it considers to be a political

offence, an offence connected with a political offence or an offence inspired by political motives, provided that it undertakes to take into due consideration, when evaluating the character of the offence, any particularly serious aspects of the offence, including:

- (a) that it created a collective danger to the life, physical integrity or liberty of persons; or
- (b) that it affected persons foreign to the motives behind it; or
- (c) that cruel or vicious means have been used in the commission of the offence".

The Convention has been widely criticised, particularly in France² on the ground that it affects and may even jeopardise the right of asylum. In France 23 organisations among them the "Fédération Nationale de Déportés et Internés Résistants et Patriotes" (FNDIRP), le "Syndicat des Avocats de France", le "Syndicat Général de l'Education Nationale" (SGEN), and the "Syndicat de la Magistrature" have formed a "Commission de Sauvegarde du Droit d'Asile".

Against this criticism it has been said that Article 5 sufficiently safeguards the right of asylum and also that, since the Convention is open only to accession by member States of the Council of Europe, a conflict between extradition and asylum is not likely to arise.

It seems, therefore, appropriate to examine the question whether the application of the Convention may affect the right of asylum, more closely. For this purpose it may be useful to refer to some of the proceedings in the Council of Europe relating to the Convention after its adoption.

The Parliamentary Assembly of the Council of Europe in its Recommendation 648 (1977) of 26 January 1977 regretted that the Assembly had not been consulted on the text of the Convention, which omission was explained by the Committee of Ministers by the urgency of the matter. The Parliamentary Assembly nevertheless invited its members to promote the early signature and entry into force of the Convention. In the preceding debate several members, apart from criticising that the Assembly had not been consulted, expressed concern that the Convention was ambiguous and might conflict with constitutional provisions.³ The question of the relationship of the Convention with asylum was raised by the observers of the United Nations High Commissioner for Refugees and the present writer in the Parliamentary Committee on Population and Refugees and was also discussed in the Parliamentary Committee on Legal Affairs. The Secretariat of the Committee on Population and Refugees presented a Memorandum in which attention was drawn to the Convention relating to the status of refugees of 28 July 1951⁴ to which all member States of the Council of Europe are parties. This Convention contains in its Article 33 the generally recognised principle of *non-refoulement* i.e. that a refugee may not be expelled or returned in any manner whatsoever to a territory where his life or freedom would be threatened on account of

² "Le droit d'asile en danger" by Philippe Waquet; also "Le Monde Diplomatique" November 1976, "Le Monde" — 12.11.1976 and 18.11.76, Revue "Actes" Dec/Jan, 1977.

³ Official Report AS (28) CR 23 and CR 24

⁴ UN Treaty Series 606 p. 267

his race, religion, nationality, membership of a particular social group or political opinion. Article 1 F (b) of this Convention on the other hand, excludes from its scope "any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". If the offence is of a political character, the person is not excluded. The definition of certain offences enumerated in Articles 1 and 2 of the European Convention, on the Suppression of Terrorism as being non-political might have consequences for the application of Article 1 F (b) of the Refugee Convention in that offences might be qualified as non-political for the purpose of that Article although they had been politically motivated and this might, therefore, lead to the exclusion of persons who might otherwise qualify for refugee status and asylum.

The Commission on Refugees and Population appointed Mr. de Poi (Italy) as Rapporteur on the matter. He presented an Opinion⁵ in which he expressed the view that the possible difficulties arising from the European Convention on Terrorism in relation to the right of asylum and the principle of *non-refoulement* were not likely to arise unless the Convention's provisions were taken out of their proper and limited context. He proposed amendments to the draft Recommendation presented by the Legal Affairs Committee to the Assembly to the effect that the Assembly bear in mind the Refugee Convention of 1951 and in particular Articles 1 and 33 thereof, as well as the 1967 Protocol to that Convention and invite the Committee of Ministers to call on all member governments to reaffirm their intention of maintaining their liberal attitude towards persons who seek asylum on their territory.

In the Legal Affairs Committee Mr. Blenk (Austria) dealt in his report with certain aspects of the right of asylum,⁶ inter alia with the relationship of the European Convention on the Suppression of Terrorism and the right of asylum. The report which was adopted by the Committee rightly points out that the purposes of extradition and asylum are completely different. Mr. Blenk, following an earlier report by the Chairman of the Legal Affairs Committee, Mr. Margue (Luxembourg)⁷ considered that the fears expressed in connection with the Convention can be completely allayed only if individuals threatened with expulsion or extradition are empowered to appeal to the European Commission of Human Rights and if such appeal would have suspensive effect. The Commission has, in fact, held in a number of cases that expulsion or extradition to a country in which fundamental human rights are blatantly violated constitutes a violation of Article 3 of the European Convention on Human Rights and Fundamental Freedoms which prohibits inhuman or degrading treatment or punishment.⁸ The Legal Affairs Committee presented a Recommendation in which it recommended that the Committee of

⁵ Document 4032

⁶ Document 4021

⁷ Document 3912

⁸ P. Weis "Recent Developments in the Law of Territorial Asylum" in 1 Human Rights Journal (1968) pp. 378-396.

Ministers call on all governments of member States to recognise the right of individual application under Article 25 of the European Convention on Human Rights and to suspend measures of extradition or expulsion to a non-contracting state pending consideration of an application made by the person concerned. This Recommendation, with the amendments proposed by the Committee on Population and Refugees, was adopted by the Assembly on 7 October 1977 (Recommendation 817 (1977)).

The protagonists of the Convention claim that its article 5 sufficiently safeguards the right of asylum and that situations where the right of asylum is in issue are unlikely to arise in the application of the Convention, since it is open to accession only to member States of the Council of Europe, which are democratic States where the rule of law prevails and the question of persecution does not arise. They also refer to Article 3 para 2 of the European Convention on Extradition of 1957⁹ which prohibits extradition if the requested party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons. They claim that the Terrorism Convention is not itself an extradition treaty and that Article 3(2) of the Extradition Convention remains therefore unaffected¹⁰.

Situations where the question of the right of asylum arises in the application of the Convention are indeed unlikely to arise in present circumstances. But this is not certain for the future. The example of the regime of the colonels in Greece where the rule of law did not function and human rights were grossly violated, is a case in point. The argument that the Convention is not itself an extradition treaty and that Article 3(2) of the Extradition Convention remains in force seems difficult to maintain considering that the Terrorism Convention provides explicitly in Article 3 "The provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention", and in Article 4 "For the purposes of this Convention and to the extent that any offence mentioned in Article 1 or 2 is not listed as an extraditable offence in any extradition convention or treaty existing between Contracting States, it shall be deemed to be included as such therein".

While Article 3 (2) of the Extradition Convention is *mandatory* in that it absolutely prohibits extradition to a country of persecution, Article 5 of the Terrorism Convention is *permissive*. It only does not impose an obligation to extradite to such a country. Moreover, the Extradition Convention has, as yet, not been ratified by a number of member States of the Council of Europe i.e. Belgium, France, Iceland, Luxembourg, Malta, Sweden and the United Kingdom.

The implementation of the Recommendation of the Assembly to

⁹ European Treaty Series No. 24

¹⁰ Document 3912 para 19

grant persons threatened with extradition a right of individual application to the European Commission on Human Rights with suspensive effect would if also applied to extradition to a Contracting State indeed go a long way to safeguard the right of asylum. Not all member States of the Council of Europe have, however, accepted the right of individual application and those which have not yet done so, i.e. Cyprus, France, Greece, Malta and Turkey are unlikely to do so in the near future. Other possibilities are reservations according to Article 13 of the Convention, or interpretative declarations on accession to the effect that the provisions of Article 1 and 2 should not be considered as in any way derogating from the provisions of Article 1 and Article 33 of the 1951 Refugee Convention, and/or that Article 5 of the Terrorism Convention should not be understood as in any way derogating from the mandatory obligation imposed by Article 3 (2) of the European Convention on Extradition.

The question of asylum in connection with terrorist acts, namely hijacking and sabotage of aircraft, has arisen before in connection with the drafting of the Convention for the Suppression of Unlawful Seizure of Aircraft adopted at the Hague on 16 December 1970 and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation adopted at Montreal on 23 September 1971. During the Conference at the Hague which considered the aforementioned Convention several States, in particular the Soviet Union and the United States proposed that there should be a duty to extradite offenders to the State where the aircraft was registered. This met with strong opposition by many States, in particular Western European States which wanted to safeguard their right to grant asylum. The United States withdrew their proposal.

Both Conventions contain an identical provision (Article 7) reading: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State", i.e. the principle "*aut dedere aut judicare*" which was already advocated by Grotius. The European Terrorism Convention on the other hand, leans heavily in favour of extradition.

There have, in fact been cases where persons hijacked airplanes in order to escape from persecution. In all these cases except one the offenders were not returned to the country they had fled but were punished in the country to which they had escaped. The one exception is the case of two Soviet nationals who hijacked a Soviet plane and forced it to land in Finland. They were returned to the Soviet Union by Finland. The United Nations High Commissioner for Refugees lodged a strong protest as Finland is a party to the 1951 Refugee Convention.

In summing up it must be said that it goes too far to say that the European Convention on the Suppression of Terrorism jeopardises the right of asylum. Non-extradition of political offenders is but one aspect of the right of asylum. It is unlikely that the application of the Convention will affect the right to grant asylum as long as the

Contracting States have a democratic regime in which the rule of law prevails. The Convention could, however, become a dangerous precedent if its principles were followed in other areas of the world where political conditions are different.

FREEDOM OF MOVEMENT IN THE GERMAN DEMOCRATIC REPUBLIC

by
Dr Heinrich Schrader*

After the initial post-war torrent of refugees into the Federal German Republic from the former German territories in eastern Europe, a steady flow continued from the German Democratic Republic (GDR). The number varied from year to year, influenced by the intensity of the repressive measures of the government. In 1953, when the GDR sought to speed up the 'process of history', the stream of refugees reached a peak of 331,390. Altogether some two million persons had sought refuge in the Federal Republic by the end of the fifties.

This continuing flow of refugees, particularly of skilled personnel, threatened the economic plans of the GDR and the authorities felt compelled to take all possible measures to stem it.

Although Article 8 of the GDR Constitution of 1949 guaranteed the right of freedom of movement, the People's Chamber of the GDR decided on 11 December 1957 (Law Gazette I, p. 650) to amend the existing passport law. The amendment provided for imprisonment for up to three years or a fine for leaving the GDR without the *necessary authorisation*. This offence has since been incorporated in the Penal Code of the GDR as paragraph 213; it provides for imprisonment for up to two years, and in so-called serious cases up to five years, for the offence of 'illegally crossing the border'. Aiding and abetting escape from the GDR, called 'subversive traffic in human beings', is punished in accordance with paragraph 105 of the GDR Penal Code as amended on 7 April 1977 (Law Gazette I, pp. 100, 101) with imprisonment for not less than two years, and in 'particularly serious cases' with imprisonment for life. The 'necessary authorisation' is granted as a rule only to persons at a pensionable age who are no longer of any significance as labour. The Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic, concluded on 21 December 1972, has provided a certain amount of relief in this regard. Since then, some 18,000 persons have been allowed to leave the GDR under the aspect of reuniting families, but even in such cases the GDR authorities are slow and reluctant to

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grant exit permits. Applicants often have to undergo extensive investigations, only to have their applications dismissed.

The guarantee of freedom of movement in the Constitution of the GDR was amended on 6 April 1968 (Law Gazette I, p. 199) so as to allow freedom of movement only within the territory of the GDR itself (Art. 32). It now makes no mention whatsoever of any right to emigrate, even though, by ratifying the International Covenant on Civil and Political Rights, the government has accepted the obligation under international law to permit everyone to leave the country. The only permissible restrictions are those provided by law and necessary to protect national security, public order (*'ordre public'*), public health or morals or the rights and freedoms of others.

The construction of the Berlin Wall in August 1961, and the fortification of the sections of the frontier traversing open country, confronted refugees with a practically unsurmountable barrier. Frontier fortifications at present comprise 1,083 km of metal fencing; 491 km of minefields; 248 km of the notorious spring-gun installations, each of which, when set off, shoots out 90 sharp-edged iron fragments; 224 km of guard-dog patrol paths and various other installations. The strong GDR border patrol force is assisted by some 2,000 civilians, called 'border helpers', who go about their surveillance duties in civilian clothes. As was to be expected, this resulted in a considerable decrease in the number of refugees, although the stream did not dry up completely. Many sought to escape through neighbouring countries, but a large number risked their lives in breaking through the barriers. Any refugee who chooses this escape route must run the risk of being killed in the attempt. This is made painfully evident by the existence of an 'order to shoot' (paragraph 62 of the Border Regulations dated 15 June 1972, Law Gazette II, p. 483), under which border troops have the duty to prevent illegal crossing of the frontier, if necessary by the use of fire-arms. The past 15 years have witnessed 171 deaths at the frontier of the GDR, 70 of these at the Berlin Wall.

No substantial alteration of these policies is to be expected from the Final Act of Helsinki. The communist countries interpret human rights only within the context of their own marxist-leninist doctrine. For them the concept of individual rights in detachment from or in opposition to the State is meaningless, since they consider that the individual can attain the fulfilment of his rights only by integrating himself into the socialist state. If there are still a few reactionaries who wish to leave their State without authority, in order to put their abilities at the disposal of those who are opposing the inevitable march of history towards the socialist society, it is only right that they should be prevented from doing so.

As their philosophy does not admit of the possibility of error, the concept of tolerance, which for others is a basic condition for human rights, is absent from their thinking. If those in error are sent to prison, or committed to mental hospitals, or allowed to be torn to pieces by shrapnel at the frontier, it is obvious that tolerance cannot be reconciled with their concept of human rights.

THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW — CONCLUDED

by Samuel Suckow*

After four sessions, the conference on the Reaffirmation and Development of International Humanitarian Law first convened on February 20, 1974, completed its drafting work on two protocols to the 1949 four Geneva Conventions on June 10, 1977 by the ceremonial signing of a Final Act.** The Protocols will remain open for signature for a period of 12 months from December 10, 1977.¹ They come into force six months after the second instrument of ratification has been deposited with the Swiss Government, as depository for the Geneva Conventions.²

Under pressure from the Swiss authorities to complete their work at this session, the delegates evidenced a high degree of diplomacy and ingenuity in finding compromises and tying up loose ends. The pressure of time, however, did not prevent a complete revision of Protocol II, that relating to non-international conflicts, being introduced just two days before the articles coming out of four sessions of the Conference were due to be adopted in Plenary. This revised text, called forth in the name of finding acceptability among a wider number of countries than might otherwise be the case, carried the day.

This Conference offered a microcosm for the study of international relations in a changing world. First convened during the Vietnam war, the Conference started in a spirit of Soviet-American confrontation, particularly on the issue of the seating of the Revolutionary Government of South Vietnam, but also on other issues. In that situation the third world could play a decisive role either as arbiter or initiator. The Conference ended, however, in the glow of Soviet-American co-operation which some third world delegates believed was achieved at their expense.

One of the areas where the deception of the third world was most apparent, and Soviet-American co-operation most effective, was that of the restriction of arms which may cause superfluous injuries or have an indiscriminate effect.

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** Bracketed numbers accompanying numbers of articles in this report refer to the numbers by which those articles were designated in the Draft Protocols prepared by the International Committee of the Red Cross, or when inserted as additional articles during the Conference. These are also the numbers referred to in the previous reports on this Conference.

No substantive steps on arms restriction came out of this Conference and several attempts to introduce provisions on arms in Protocol I were narrowly defeated. Defeated, that is, by failure to obtain the two-thirds vote which the rules of the Conference required for passage of a substantive proposal.

The primary result and innovation of the first session, the widening of the definition of international conflicts to include anti-colonial wars, was confirmed and adapted to the Geneva Conventions by various provisions, including that covering the prisoner-of-war status of guerilla fighters. The attempt, however, to prohibit reservations at the time of ratification to those innovative clauses failed in a rather embarrassed display of the results of east-west compromise. The effectiveness of a proposed fact finding commission on violations of the Conventions and Protocol I appeared to have been another trade-off in the final negotiations of the Conference.

110 States and three liberation movements attended this final session. Many States were thus absent due primarily to personnel or financial considerations. Some States, however, took the political decision not to participate, including China, Albania and South Africa.

Protocol I

Protocol I, relating to the protection of victims of international armed conflicts has 102 articles and is divided into six parts, with two Annexes.

Part I — General Provisions

This part contains 7 articles. Of these, Articles 2 to 7, encompassing definitions,³ the determination of when the Convention and Protocol apply to a situation and when they cease to apply,⁴ the non-effect of the application on the legal status of the parties,⁵ the important article on the appointment of protecting powers and of their substitutes,⁶ the obligation to train personnel to help carry out the responsibilities undertaken by the parties,⁷ and a provision on the calling of meetings of the parties to consider general problems concerning the application of the Conventions and Protocol,⁸ had all been adopted by Committee I at the second session of the Conference in 1975,⁹ and were all adopted in Plenary at this last session by consensus. Some of these articles, Art. 5 on Protecting Powers, and Art. 6 on Qualified Persons, had been the subject of votes at the Committee stage.

A consensus, however, did not obtain for the famous Article which extended the coverage of the Conventions and this Protocol to armed conflicts "... in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination. ..." The Israeli delegation insisted on submitting the article to a vote. The result was 87 in favor, 1 (Israel) against, and 11 abstentions.

Thus Article 1 with a form of language that leaves much to be desired, has achieved overwhelming international acceptance. It marked the highpoint of third world success and constituted a political victory for the third world-socialist coalition that emerged during the first session. Its practical effect, however, is very much in doubt. Assuming general acceptance without reservations, it would appear difficult for any State to admit that it was the colonial or racist state to which that article in the Protocol refers. Such an admission would be inherent in the agreement of a Government to apply the Protocol to the type of conflict described in Art. 1 (4).

Part II — Wounded, Sick and Shipwrecked

This part, non-political in nature and clearly humanitarian, adds to the protections in the First and Second Geneva Conventions. As justified by their non-controversial character, the 27 articles included in this part were all adopted by consensus.

The Part is divided into three sections. Section I is entitled "General Protection", and includes articles dealing with terminology,¹⁰ the situations to which these rules apply, namely in all international conflicts,¹¹ the overall rule in Article 10 that wounded, sick and ship-wrecked persons shall be respected, protected and humanely treated, and protection of the individual against medical procedures which are not justified by his condition¹². Medical units may not be attacked¹³ unless outside their humanitarian function they commit acts harmful to the enemy.¹⁴

In the event of occupation of a territory, Art. 14 sets forth the limited conditions under which civilian medical units may be requisitioned, and Art. 15 speaks of the protection to be accorded to the civilian personnel performing medical and religious functions.

Art. 16 sets forth several principles that would prohibit punishing or mis-using medical personnel in a manner inconsistent with medical ethics.

There follows an article on the role of the civilian population in regard to those who are wounded, sick or shipwrecked,¹⁵ and one on how medical and religious personnel, medical units and medical transports are to be identified.¹⁶ States not parties to the conflict, whether neutral or not, are bound by the articles in this Part with respect to those protected persons who end up on their territory.¹⁷ Finally, there is a general prohibition of reprisals against the persons or objects protected by this Part.¹⁸ This was adopted by consensus both in Committee and at the Plenary.

Section II of Part II deals with medical transportation. The articles decree the respect and protection of medical vehicles¹⁹ and extend the protection afforded hospital ships under the provisions of the Second Convention, particularly where they are carrying civilian wounded, sick and shipwrecked.²⁰ Other medical ships are covered in Art. 23 (24) but not to the same degree as in the previous article.

Art. 24 (26) provides that medical aircraft shall be protected and respected if complying with the subsequent articles.

The rules then differ as to whether the aircraft is flying over an area not controlled by an adverse party,²¹ or where control is not clearly defined²², or over enemy controlled territory.²³

The use of medical aircraft to seek to obtain a military advantage is prohibited as is the armament of such aircraft.²⁴

The obligation of belligerents to notify the adversary of medical flights and for the adversary to respond are spelt out in Art. 29 (30) and the obligations of medical aircraft to land on command and be inspected in Art. 30 (31). Finally, the obligations of States not parties to the conflict with respect to medical aircraft is extensively covered in Art. 31 (32).

The third and last section of this part, introduced by the United States, is clearly related to the experience of the US in obtaining information about their missing and dead after the Vietnamese War. The Section entitled "Missing and Dead Persons" is governed by the general principle that the activities of the Parties shall be prompted mainly by the right of families to know the fate of their relatives.²⁵ The following articles provide the obligations of the Parties with respect to missing persons²⁶ and the remains of the deceased.²⁷

Part III — Methods and Means of Warfare, Combatant and Prisoner-Of-War Status

As the title suggests, this Part in Section I deals with an area, "Methods and Means of Warfare", not previously covered by the 1949 Geneva Conventions. It is one of the primary advances of this Protocol.

The basic rules are that the choice of methods or means of warfare are not unlimited and that methods or weapons that cause superfluous injury or unnecessary suffering, as well as means and methods that are intended, or may

be expected to cause widespread, long-term and severe damage to the natural environment are prohibited.²⁸ The parties are also placed under an obligation to consider the previous basic rules in relation to new weapons systems.²⁹

An additional series of articles relate to methods and means of combat. These include articles prohibiting killing, injuring or capturing an enemy by acts which are defined as perfidy,³⁰ making improper use of distinctive emblems, signs and signals,³¹ or flags, insignia or uniforms of the adversary or of a neutral party,³² or ordering that there shall be no survivors or to threaten to conduct hostilities on that basis.³³ An enemy who is *hors de combat*, i.e. who has been captured or offers to surrender or is incapable of defending himself because of incapacity caused by wounds, sickness or unconsciousness, may not be made the object of an attack.³⁴ This article also contains a clause finding its rationale in guerilla type combat. It is a form of reciprocity towards their opponents who accept to treat the guerilla as a combatant entitled in the event of capture to prisoner-of-war status. It provides that in the event prisoners of war are taken under unusual conditions of combat which prevent their evacuation as provided for in the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

The above articles of this Part were the product of consensus politics. The next was a notable exception to that rule. It deals with persons parachuting from aircraft in distress. At the 1976 session a provision was written into the article which would make such a person descending by parachute subject to attack if it appears that he would land in territory controlled by his own side or forces friendly to that side. This was moved by several Third World countries and supported by liberation movements on the ground that pilots, if they can return to their own lines, would fly once again causing serious casualties and destruction among those whose military capacity does not provide adequate air defence. It passed in Committee where the Eastern bloc abstained. However, these Eastern bloc countries also have air forces, and had second thoughts on the subject. At the 1977 session, the article was brought up again and the offending words removed. The new version was passed in Committee by 52 votes to 4, with 22 abstentions and in Plenary by 71 to 21 with 11 abstentions.

The second section of Part III deals with combatant and prisoner of war status. At the 1976 session, Committee III had already adopted by consensus the article defining what constitutes the armed forces of a party,³⁵ the protection of persons who have taken part in hostilities and fall into the power of an adverse party,³⁶ as well as the definition of what constitutes spying.³⁷

Held over from the third session because no consensus appeared was the critical article on prisoners of war, then known as Art. (42) and now numbered Art. 44.³⁸ This article was the first one taken up by Committee III this year, and as consensus was still not possible, a vote was taken with the following result: 66 in favour, 2 (Israel and Brazil) against, and 18 abstentions. When the matter came before the Plenary, Israel once again asked that the article be put to the vote. This time the result was 73 in favour, 1 (Israel) against, and 21 abstentions.

At the end of the 1976 session, there appeared to be complete deadlock on this issue of mercenaries (cf ICJ Review No 16, p. 58). It was a good omen for the work of the final session that at the outset a compromise text was adopted by consensus in both Committee and Plenary.

It deprives a mercenary of the right to be a combatant or prisoner of war, but does not prohibit the granting of either status by the opposing party.

The article defines the term mercenary by a series of limitations. The mercenary is one who, not being a national of a party to the conflict or a resident of a territory controlled by such a party, nor a member of the armed forces of such party, nor sent by another State as a member of the armed

forces of that other State, is specially recruited to fight in, and does in fact take a direct part in hostilities, and is motivated to take part by a desire for private gain evidenced by a promise of material compensation substantially in excess of that paid or promised to combatants of similar rank and function in the armed forces of that party.³⁹

Part IV — Civilian Population

Part IV is the direct sequel to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.

Section I of Part IV covers "General Protection against Effects of Hostilities". Chapter I includes the basic rule that military operations may only be directed against military objectives⁴⁰ and the definition of what constitutes an attack.

Chapter II defines civilians and civilian population⁴¹ and bars the indiscriminate attacks and reprisals against civilians.⁴² These provisions were passed in spite of French arguments that the articles unduly inhibited a Party in conducting an adequate defence of its territory.⁴³

An article on protection of cultural objects and places of worship,⁴⁴ another on the protection from attack of objects indispensable to the survival of the civilian population, including the barring of the use of starvation of civilians as a method of warfare,⁴⁵ an article barring methods of warfare intended or expected to cause damage to the natural environment, including a bar on attack against the natural environment by way of reprisal,⁴⁶ and an article limiting the situations in which attacks may be made against installations which may release dangerous forces such as dams, dykes and nuclear electric generating stations,⁴⁷ all maintained their consensus in Plenary.

The next article,⁴⁸ the first of Chapter IV of Section I, entitled "Precautionary Measures", was the object of a vote both in Committee and at Plenary. It establishes a "rule of proportionality" in the determination of whether an attack should be made. It requires that a Commander refrain from launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

There were no opposing votes. The argument of the abstainers (3 in Committee, 4 in Plenary) was that it was not a practical rule for a field commander to apply.

Art. 58 (51), which enjoins parties to a conflict, to the maximum extent feasible, to remove civilians from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas was also submitted to a vote at French request. The result was 80 to none, with eight absentions. The argument of the French delegation was that in countries which are highly populated faithful adherence to the provisions of this article would mean absence from defending their territory in the event of attack.

Unanimity was again achieved for the two articles of Chapter V of Section I, entitled "Localities and Zones under Special Protection", namely Art. 59 (52) dealing with non-defended localities and Art. 60 (53) with demilitarised zones.

The last chapter of Section I deals with civil defence and all its seven articles were agreed by consensus after considerable difficulties. The major problem lay in the differences in the organisation of civil defence. In some countries it is a purely civilian function, in others, particularly in Eastern Europe, it is conducted by units under military discipline. The compromise reached was to include such military units under the protections afforded civil defence personnel but they must be permanently assigned to such tasks and not perform any other military duties.

Starting with an article on definitions and scope of application,⁴⁹ the articles in this chapter cover the granting of a general protection to civil defence personnel, organisations and their buildings and *matériel*,⁵⁰ the treatment of civilian civil defence organisations in occupied territories,⁵¹ the circumstances under which the previously granted protection would cease,⁵² the identifiable markings of civil defence facilities and personnel,⁵³ and finally the protections and limitations of protection of members of the armed forces and military units assigned to civil defence organisations.⁵⁴

Section II of this Part IV is devoted to relief in favour of the civilian population, and was agreed by consensus in Committee II. It provides that in occupied territories the occupying forces have an obligation to ensure the provision of clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population.⁵⁵ The modalities for relief actions in non-occupied territories are set out in Art. 70 (62). Protection is limited to those which are humanitarian and impartial in character and conducted without any adverse distinction. Art. 71 (62 bis) sets forth the obligations of relief personnel not to exceed the terms of their mission, but to those that comply with the requirements of the article it provides protection.

Section III, pertaining to the "Treatment of Persons in the Power of a Party to the Conflict", overlaps the field of human rights law. It is divided into three chapters, the provisions on the general protection of persons and objects in the power of a party to the conflict, the special provisions concerning women and children, and a special article on journalists on dangerous missions.

In Chapter I, Art. 72 (63) sets forth that the provisions that follow are additional to the rules concerning humanitarian protection of civilians and civilian objects contained in Parts I and III of the Fourth Geneva Convention, and other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

The first substantive article guarantees protection for persons who were recognised as stateless or as refugees, either under international instruments accepted by the parties concerned or under the national legislation of the State of refuge or of residence.⁵⁶ There follows a clause enjoining parties to a conflict to facilitate in every possible way the re-union of families and to encourage the work of humanitarian organisations engaged in this task.⁵⁷

Art. 75 (65) is one of the most important in the Protocol. It is the equivalent of a Bill of Rights applicable in circumstances of armed conflict.

It opens with a general statement that all persons in the power of a party to the conflict shall be treated humanely, without adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. There follow prohibitions of certain acts, at all times and in all places. These include murder, torture, whether physical or mental, corporal punishment or mutilation. They also include outrages upon personal dignity, the taking of hostages, collective punishments or the threat to commit any of the foregoing acts. The article also contains a series of procedural guarantees for persons in detention and those facing trial.

Chapter II deals more specifically with protection of women and children. Women should be particularly protected against rape, forced prostitution and indecent assault. Parties are urged not to pronounce death penalties on pregnant women or mothers having dependent infants for offences related to the armed conflict, and the death penalty on women in that situation may not be executed.⁵⁸

Children are given special protection under Art. 77 (68). The most progressive step contained in this article is to bar the execution of the death penalty on persons who had not attained 18 years of age at the time the offence was committed.

Art. 78 (69) lays down the general rule that a party shall not arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of health or medical treatment so require or, in occupied territory, their safety so requires. Even in these limited circumstances the written consent of the parent or person in charge is required. The final chapter of this section deals with journalists and provides that they should be considered and treated as civilians and proposes an identity card to identify them.

Part V — Execution of the Convention and the Protocol

Many of the articles in Section I of Part V, entitled "General Provisions", were adopted by consensus. There was a consensus for obligating the parties to take all necessary measures for the execution of their obligations;⁵⁹ for granting the International Committee of the Red Cross (ICRC) and the National Red Cross Societies the facilities they need to carry out the functions assigned by the Conventions and the Protocol;⁶⁰ and requiring the availability of legal advisers to advise commanders on the application of these documents.⁶¹ The communication of official translations of the Protocol and relevant implementation legislation and regulations is required by Art. 84 (73).

There was, however, some controversy concerning Art. 83 (72) dealing with the obligation of the parties to disseminate the Convention and Protocol as widely as possible. When the article came out of Committee it contained a third paragraph requiring the parties to make periodic reports on their dissemination activities to the depositary (the Swiss Confederation) and to the ICRC. There was opposition to this provision, led by the Soviet Union. In Plenary, the paragraph failed to obtain the necessary two-thirds vote and was eliminated.

Section II entitled "Repression of Breaches of the Conventions and of this Protocol" gave rise to various conflicts. The most important provisions are to be found in Art. 85 (74) dealing with the repression of breaches,⁶² which achieved consensus. However, a Philippines amendment, seeking to include in grave breaches the use of certain specific weapons such as dum-dum bullets and poison gas was not accepted.

An original article (75) making the perfidious use of the Red Cross sign or other protective signs a grave breach had been combined by Committee I at its 1976 session with Art. 85 (74) as sub-paragraph 3 (f).

At the same session, Art. 86 (76) requiring the repression of breaches resulting from a failure to act when under a duty to do so, and maintaining the responsibility of a superior for the acts of his subordinate if he did not take all feasible measures to prevent the breach, was adopted by consensus and this consensus carried over to the Plenary.

The rest of the articles in this Section were debated in Committee I at the 1977 session of the Conference. In spite of a few abstentions in Committee, the Plenary adopted by consensus Art. 87 (76 bis) on the duty of commanders to prevent and repress breaches. Another article, on barring the defence of acting under superior orders when committing a breach in certain circumstances⁶³ had passed in Committee by a simple majority, but failed to obtain the required two-thirds in Plenary.

An article proposed in the ICRC draft text⁶⁴ on extradition was defeated in Committee. The first paragraph would have permitted the parties to treat grave breaches as extraditable offences. The second paragraph would have provided that nothing could prejudice the right of a State not a party to the Conventions or Protocol to grant extradition in respect of the trial of its own nationals outside its own territory.

Another article, not having complete unanimity in Committee, passed in Plenary with only 3 abstentions. It was Art. 88 (79) relating to mutual

assistance in criminal matters. The most controversial paragraph was paragraph 2, which obligated the parties to ".....give due consideration to the request (for extradition) of the State in whose territory the alleged offence has occurred".

Another article states that in situations of serious violations of the Conventions or of the Protocol, the Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.⁶⁵

Articles dealing with reprisals, a fact-finding commission and, it is believed, reservations were the subject of an East-West trade-off that dominated the final days of the work of Committee I and carried over into Plenary.

A previous article,⁶⁶ showed that there was serious opposition to a French proposal for an article authorising and regulating the use of reprisals in certain circumstances, and that there was very strenuous opposition by the Soviet Union to a proposal for a fact-finding commission with mandatory jurisdiction.

These were the most evident elements in a compromise whereby reprisals are permitted except where prohibited by a specific provision and the fact-finding commission can act only where both parties to the dispute give their consent. There is reason to believe that the consideration given by the Soviet Union for having its position on the fact-finding commission accepted included at least tacit support for the Western position on avoiding any specific article limiting reservations.

The article on the Fact-Finding Commission that finally emerged,⁶⁷ provides for the establishment of such a body when at least 20 States have agreed to accept the competence of such a Commission in relation to any other High Contracting Party accepting the same obligations. Any State tempted to make this prior declaration would have to keep in mind that the administrative expenses of the Commission are to be borne by the States making the declaration and by voluntary contributions.

In all other situations, and assuming that the Commission had come into existence, which is certainly not assured, the Commission could only institute an inquiry with the consent of all parties concerned.

In the event of an inquiry, the Commission reports its findings to the Parties but may not report them publicly. This is a rather meaningless restriction, because there is nothing to prevent the party benefitting from the report from making it public.

In Plenary, a group of Third World States tried to have included a mandatory jurisdiction in the case of occupied territories. This was opposed by both East and West, but the solidarity of the Socialist bloc was not maintained on this vote. Cuba and North Korea voted in favour of the proposal and Vietnam abstained. Rumania, which often voted independently during this Conference, also voted in favour. The proposal failed by one vote to obtain the two-thirds required.

In the view of this observer, a more propitious place to introduce the concept of compulsory jurisdiction would have been breaches occurring in the national territory of the party requesting the investigation, which territory was under its own control. The argument of violation of sovereignty would not apply and the problem of investigating in a territory controlled by a party which refuses to permit the investigators to enter would not have arisen. Thus, indiscriminate bombings could have been more easily identified. As it stands, there is not much possibility of any effective investigations resulting from the new article.

Finally, in this Part, there was added an article introduced by Vietnam by which a violator of the provisions of the Conventions and of the Protocol shall, if the case demands, be liable to pay compensation. The Party shall be

responsible for all acts committed by persons forming part of its armed forces. The article was accepted by consensus in both Committee and Plenary.

Part VI — Final Provisions

The six articles of this final Part of Protocol I do not require much elaboration. As already mentioned the Protocol will be opened for signature on December 10, 1977, and will remain open for 12 months.⁶⁸ Ratification is urged to be as soon as possible with the instruments deposited with the Swiss Federal Council.⁶⁹ Accession to the Protocol is open to any Party to the Conventions who has not signed the Protocol.⁷⁰ The Protocol is to enter into force six months after the second instrument of ratification or accession has been deposited, and thereafter shall come into force for a Party ratifying six months after deposit of the instrument.⁷¹ When amendments are proposed and the Depository has consulted with all the High Contracting Parties and the ICRC, the Depository may convene a Conference to consider the amendment.⁷² All of these procedural articles were adopted by consensus in Committee I and in Plenary.

Art. 96 (84) which had passed the Committee by consensus was submitted to a vote in Plenary at the request of Israel. The point at issue was paragraph 3, which states that a liberation movement "may undertake to apply the Conventions and this Protocol in relation to a conflict in which it is engaged by means of a unilateral declaration addressed to the depository".

The effect would be to bring the Conventions and Protocol into immediate effect for the liberation movement, which then assumes the same rights and obligations as those which have been assumed by a High Contracting Party, and the Conventions and this Protocol are equally binding upon all the Parties to the conflict. The vote was 93 for, 1 (Israel) against, and two (Thailand and Spain) abstaining.

This completes the adopted articles of Protocol I, but there were two articles of significance in this last Part that failed to be adopted. One was proposed Art. (85) dealing with reservations. In its original form, the ICRC draft proposed limiting the right of making reservations by excluding such articles as those relating to the protecting power; protection of the wounded and sick; limitation on the adoption of methods of warfare; prohibition of perfidy; organisation of armed forces in a manner to be able to enforce the rules of international law; prohibition of mistreatment of enemy *hors de combat*; and the requirement not to attack civilians or civilian objects. This would have implied the right to reserve with respect to the other articles. As the Conference developed, however, and the dominant issue became the extension of the Conventions and Protocol to wars of liberation, some Third World delegations, which strongly supported the extension, feared that the acceptance of the various articles relating to it would be undermined by reservations entered by the major Western powers. For this reason, those delegations sought a reservation clause which would bar reservation on the most important articles related to liberation wars. On the other hand, Western Powers adopted the position that there should be no article on reservations and that the general rule of international law on the ratification of treaties, which prohibits reservations that are incompatible with the object or purpose of a convention, should apply. The Third World delegations' proposed reservation clause was not adopted as it failed to obtain the necessary two-thirds majority. To the surprise of the Third World delegations, the east european countries voted with the western countries against it in Committee and abstained in Plenary. This led to strong suspicions that the Soviet Union and its most direct allies were paying the price for western support on the Fact-Finding Commission.

The other important debate relating to this Part was on the proposed Article

(86 bis) to establish a procedure for reviewing the law with reference to conventional weapons that cause unnecessary suffering or have an indiscriminate effect. This is dealt with below in the discussion on weapons.

Protocol I has two Annexes, one concerning regulations on means of identification of protected personnel; emblems; signals, light and radio; medical aircraft; flight plans; civil defence personnel and material; installations containing dangerous forces and codes and other means of communication. This Annex is divided into 16 articles. Annex II has just one article, which is the identity card for journalists on dangerous professional missions.

Finally, the Conference had to adopt the preamble for Protocol I. This had been the subject of a lengthy debate in Working Group C of Committee I, with the Socialist bloc emphasising the prohibition of the use of force in the United Nations Charter and the West wishing to assure that the Conventions and Protocol will apply to all war victims without distinction as to the nature or origin of the armed conflict or as to the causes espoused by or attributed to the Parties to the conflict.

The result was a marriage of these concepts which first recalls the duty of every State to refrain in their international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of every other State. It then expresses the belief that it is nevertheless necessary to re-affirm and develop humanitarian law applicable in international armed conflicts although nothing in the Protocol or the 1949 Geneva Conventions should be construed as legitimising or authorising any act of aggression or other use of force inconsistent with the Charter of the United Nations. In conclusion, the preamble re-affirms that the Protocol and the Conventions are applicable to all persons protected by those instruments, regardless of the origin of the war or the cause involved. This preamble was approved by consensus in Committee I and in the Plenary.

The entire Protocol I was adopted by the Conference by consensus, but not before the French delegation made clear that had the Protocol been put to the vote France would have abstained.

The Weapons Debate

The previous articles in this series referred to the Ad Hoc Committee set up at the first session to try and arrive at agreement on the barring or restriction of conventional weapons which have an indiscriminate effect or cause unnecessary suffering. This Committee met throughout the four sessions of the Conference, and in addition sponsored two experts' meetings between sessions. Nevertheless, no agreements emerged from its work.

On the one hand, the Soviet Union and its allies insisted all along that the Conference was not authorised to reach any agreements on arms, that being a matter for international disarmament bodies. The Western Powers, although not challenging the Committee on jurisdictional grounds, nevertheless were less than enthusiastic to reach concrete agreements at this stage.

The final report of the Committee pointed to a fairly general agreement on projectiles which break up into fragments not detectable by X-rays. There was a more limited agreement on mines and booby traps. However, after much discussion, delegates were still far apart on such weapons as high velocity small calibre projectiles, fuel air explosives and incendiary weapons such as napalm.

The frustrations built up among many Third World delegates at what the Mexican delegate referred to as "...indifference or delaying tactics on the part of Military Powers, which had never put forward any proposals themselves and which had described as negative the efforts made to ensure that all the work done was not lost in a vacuum", spilt over into Committee I and the Plenary.

In the Plenary Session the Third World delegations generally supported proposals which would have been steps towards restricting certain weapons. The first debate was on an amendment proposed by the Philippines. It would have made the use of dum-dum bullets in violation of the Hague Declaration of 1899, or of asphyxiating, poisonous or other gases in breach of the Geneva Protocol of 1925, a grave breach of the Protocol. The main debate was on a Mexican proposal for the establishment of a Committee of States charged with considering and adopting recommendations with regard to the prohibition or restriction of the use of conventional weapons that may cause superfluous injuries or have indiscriminate effects. On the basis of the Committee's recommendation, the depositary government would be authorised to convene a Conference with a view to adopting agreements on such weapons. Both the Philippine and Mexican proposals failed to gain acceptance as they both fell a little short of the needed two-thirds majority. In these votes, East and West combined to oppose and defeat the majority of Third World nations.

The passions aroused on the arms issue and the closeness of the votes, particularly as it was a two-thirds vote that was required, must have given all parties food for thought.

There had been three draft resolutions introduced relating to follow-up on the work of the Ad Hoc Committee. In the final week consultations resulted in a common draft which was adopted by consensus. The resolution recommends that the documents produced by the Ad Hoc Committee should be transmitted to the Governments of the States represented at the Conference and to the Secretary General of the United Nations. It further recommends that a Governmental Conference should be convened not later than 1979, with a view to reaching agreements on the prohibition or restriction of the use of specific conventional weapons, together with acceptance of a mechanism for the review of such agreements and for the consideration of further proposals of the same nature.

Thus the Conference ended this point on a positive note.

Protocol II

It will be remembered that the Diplomatic Conference was charged with the task of producing two Protocols. The first dealing with international conflicts has been discussed *in extenso*. The second was to deal with non-international, ergo internal or domestic conflicts.

The only reference to this type of conflict in the original Geneva Conventions was Article 3, common to all four Geneva Conventions. That article sets out certain minimum rules that should be applied. These include the requirement for humane treatment of persons not taking any active part in hostilities, including those who have laid down their arms or been placed *hors de combat*. More specifically, the article bars violence to life and person, including torture, mutilation or cruel treatment; the taking of hostages; humiliating and degrading treatment and the passing of sentences and the carrying out of executions without judgment of a regularly constituted court.

The article also contains some non-mandatory provisions, among them one providing the possibility for impartial humanitarian bodies, such as the ICRC, to offer their services to the parties to the conflict; and urging that the parties to such a conflict activate other clauses of the Conventions by means of special agreements.

Since the Conventions were adopted in 1949, these internal types of conflicts have predominated. Other conflicts form a hybrid or are in a zone between international and internal conflicts. This has led many to advocate a more rigorous regulation of such conflicts from the humanitarian point of view.

From the outset of the Diplomatic Conference it was apparent that there

was no unanimity on this point. Many developing countries, having faced or facing real danger of internal conflict, did not hide their hostility to the concept of such a Protocol. Others proposed limiting the protections so that the Protocol would be acceptable to a larger number of States.⁷³

Nevertheless, the Conference churned out articles in all of the sessions, forming a very complete document, in apparent consensus, and seemingly oblivious of the undercurrent of opposition or discontent that this Protocol aroused.

It is fair to note that by upgrading anti-colonial wars to international status at the first session and then in the second session, limiting the application of this Protocol to situations where the dissident forces exercise a control over a part of the territory, the subsequent consensus may have been more one of disinterest than approval. However that may be, the Conference went into its Plenary session having a complete series of articles before it for approval.

The relatively calm and steady progression of Protocol II was deceptive. Behind the scenes negotiations were in full swing. Captained by heads of delegation from Pakistan, Canada and the USA, there emerged from these discussions two days before voting was to begin on the articles of Protocol II, and 10 days before the end of the Conference, a text submitted as an amendment and calling itself "Simplified Draft of Protocol II".

The debate on Protocol II was opened by a moving appeal from Mr. Jean Pictet, on behalf of the ICRC. The author of the classic commentary on the Geneva Conventions appealed to the Conference to adopt the texts by a large majority.

He stressed that the Protocols did not represent a danger to Governments and constituted a fair balance between the realities of life in society and the humanitarian idea. Nothing in the texts, he pointed out, was prejudicial to national sovereignty. Finally, he begged the Conference not to delete provisions which were essential for the protection of human individuals and not to destroy the very substance of an instrument the need for which had long been recognised.

On the simplified text, he stressed on behalf of the ICRC, that it was the minimum acceptable.

The Conference then turned to a detailed examination of the articles of Protocol II, and of the amendments proposed in the simplified text.

Article I was the product of an uneasy consensus in Committee I at the second session in 1975. It establishes the field of application of the Protocol, or more precisely, limits that application to armed conflicts that are not covered by Protocol I and are not acts of violence on a scale less than would occur when there exist dissident armed forces or organised armed groups, under responsible command, exercising such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement Protocol II.

The "Simplified Draft" made no effort to modify that article. Nevertheless, the fragile consensus did not survive the discussion in Plenary.

In the vote the article was adopted, but only by 58 to 5, with 29 abstentions. As opposing delegates pointed out, this article was the basis for the rest of the Protocol, and the large number of states that did not give their support to the article indicated the measure of distrust of the entire Protocol. However, among the opposing or abstaining states, opposite reasons were invoked. One group wanted to limit the Protocol further by adding that the determination of whether the factual situation mentioned in the article existed was incumbent upon the *de jure* government of the State concerned. This group included such States as Brazil, Chile, India, and Nigeria. Others, including Syria, Norway and Algeria, considered that the article was already so limited that it would have little practical effect.

Article 2, which provides that the Protocol is to be applied without racial or other discrimination and that those whose liberty has been restricted for reasons related to a conflict covered by the Protocol shall enjoy the protection specified in Arts. 5 (8) and 6 (10), did not give rise to any discussion and was adopted by consensus.

The elimination of the following article (3) which was proposed in the "Simplified Text" was accepted in the Plenary by consensus.

At first sight it seemed innocuous, merely stating that any agreements that those in conflict may enter into to apply other articles of the Conventions or of Protocol I to the particular conflict *shall not affect the legal status of the parties to the conflict*. The rationale for the opposition to this article stemmed from a refusal to recognise the status of any force opposing the *de jure* government as being a *party* to a conflict. This "drafting" change was thereafter universalised throughout the remaining articles of the Protocol.

An article which affirmed the responsibility of governments to maintain or re-establish law and order by all legitimate means and barring the use of the Protocol as a justification for outside intervention in an internal conflict,⁷⁴ raised no problem. The proposed Art. (5) which provided that "the rights and duties which derive from this Protocol apply equally to all *parties to the conflict*" was now bound to fail, which it did.

Art. 4 (6) providing fundamental guarantees for all persons not taking a direct part in hostilities or who have ceased to take part, did not raise any problem. In fact, the article was used as a depository of some of the provisions of other proposed articles thus facilitating their elimination. Thus, adding rape to the outrages upon personal dignity prohibited by this article facilitated the deletion of proposed Art. (6 bis) entitled Protection of Women and Children, and the addition of a sentence stating that it is " . . . prohibited to order *that there shall be no survivors*" to the first paragraph of Art. 4 (6) permitted the deletion of proposed Art. (22), which read — "It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis".

In their original context, both of the eliminated articles applied to persons involved in the conflict as well as others. In the revised form adopted, the restrictions apply only to persons who do not take part, or have stopped taking part, in hostilities. Thus ordering that there be no survivors in a battle with the opposing force would not be barred as a result of the "simplification". This article also included many of the provisions of proposed Art. (32) on the protection of children, the latter article also being deleted.

The minimum standards with respect to persons interned or detained for reasons related to the armed conflict contained in Art. 5 (8) were not significantly altered on adoption.

When the article on penal prosecutions⁷⁵ came before the Plenary, two proposed paragraphs were eliminated, as proposed in the "simplified text". One would have provided that in the case of a prosecution of a person by *reason only* of his having taken part in hostilities, the court in passing sentence should take into consideration the fact that the accused had respected the Protocol, and in such a case a death penalty could not be carried out before the end of the armed conflict. The other provided that anyone sentenced should have the right to seek pardon or commutation of sentence. Another paragraph scheduled for elimination nevertheless survived. It provides merely that at the end of hostilities the authorities in power should endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict. One important provision in the adopted article, which was never put in question, provides that the death penalty shall not be pronounced on persons under the age of 18 years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.⁷⁶

A proposed article requiring respect for the protection of civilians, civilian objects, objects indispensable to the survival of the civilian population and the protection of works containing dangerous forces, even when there had been a violation of the Protocol by the opposing party,⁷⁷ was eliminated, as was an article providing definitions of various terms used or intended to have been used in Protocol II.⁷⁸

An article on the protection of the civilian population⁷⁹ had three paragraphs eliminated.

These would have barred the employment of methods or means of combat which strike or affect indiscriminately the civilian population and combatants; attacks by bombardment which treat as a single military objective a number of clearly separated and distinct military objectives located where there are a concentration of civilians or civilian objects; and using civilians to shield military objectives from attack.

There does remain in the article the proviso that the civilian population as such, as well as individual civilians, shall not be the object of attack and that acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁸⁰ The provision that the wounded, sick and shipwrecked should be treated humanely and provided with medical attention⁸¹ passed without opposition.

A proposed article (12 bis) on protection of persons, had its first paragraph, prohibiting medical procedures on detained persons not indicated by the state of health of the person concerned, incorporated in Art. 5 (8) paragraph 2 (e). The second paragraph, specifically prohibiting detainees from being the object of physical mutilation, medical or scientific experiments, or removal of tissue or organs for transplantation, was deleted by consensus.

A proposed article (13) entitled "Search and Evacuation", which provided for both search for sick and wounded, particularly after a military engagement, and evacuation of wounded, sick, aged persons and children from a besieged or encircled area was deleted and replaced by an article dealing only with search.⁸²

Proposed article (14) on the role of the civilian population and of relief societies with respect to the wounded, sick and shipwrecked was deleted, but a part of its content, duly modified and relating only to the authorisation to civilians and relief societies to offer their services for performance "... of their traditional functions in relation to the victims of the armed conflict," was incorporated in Art. 18 (33).

The protection of medical and religious personnel was maintained as was the provision that they shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.⁸³ Another article providing that medical personnel shall not be punished for carrying out medical activities compatible with medical ethics regardless of the person benefitting was also maintained.⁸⁴ This article protects the confidentiality of the doctor-patient relationship but only to the extent permitted under national law. Medical units and transports are given protection⁸⁵ but a paragraph listing a series of situations which would not qualify as hostile acts justifying the removal of the protection was eliminated.

An article covering the protection of both distinctive emblems and signals was limited to emblems.⁸⁶

An article prohibiting reprisals was deleted,⁸⁷ as was an article which would have limited the right of a party to choose methods or means of combat which cause superfluous injury or unnecessary suffering and prohibited methods of combat causing widespread, long term and severe damage to the natural environment.

The "simplified text" suggested the deletion of article 14 (20 bis) on the protection of cultural objects. However, the article was broadened to include

places of worship and adopted, leading some to comment cynically that more value was being placed on objects than on humans.

The Conference proceeded then to eliminate: the prohibition against perfidy⁸⁸; Art. (22) on no quarter, previously mentioned; an article on the safeguard of an enemy *hors de combat*;⁸⁹ an article on improper use of recognised signals;⁹⁰ an article requiring that parties distinguish between civilians and combatants in planning attacks;⁹¹ an article defining civilians and civilian populations;⁹² and an article barring making civilian objects the object of attack.⁹³

The "simplified text" called for the elimination of the article which protected objects indispensable to the survival of the civilian population.⁹⁴ This article prohibits the attack, destruction, removal or rendering useless of objects indispensable to the survival of the civilian population, such as foodstuffs, crops, agricultural areas, livestock, drinking water installations and irrigation works. After an impassioned speech by the delegate of the Holy See, the Conference voted to retain the article.

After paring off two paragraphs, the Conference adopted by consensus part of the article on dangerous forces,⁹⁵ providing that dams, dykes and nuclear electrical generating stations shall not be made the object of attack if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Most of another article prohibiting the forced movement of civilians except if their security or military necessity requires,⁹⁶ was retained by consensus.

An article providing protection for civil defence personnel was deleted,⁹⁷ as was an article on establishing an information bureau on victims of conflicts covered by the Protocol⁹⁸ and an article requiring each party to the conflict to take the necessary measures to ensure observance of the Protocol.⁹⁹ The article on dissemination¹⁰⁰ was reduced to the sentence, "This Protocol shall be disseminated as widely as possible". An article specifically encouraging special agreements between conflicting sides to invoke additional provisions of the Geneva Conventions or Protocol I,¹⁰¹ which already exists in common article 3 of the Geneva Conventions, was deleted, as was an article specifying that the ICRC may offer its services to the parties to the conflict.¹⁰²

The remaining procedural articles were adopted without change. These articles deal with signature of the Protocol,¹⁰³ ratification;¹⁰⁴ accession;¹⁰⁵ entry into force;¹⁰⁶ amendment;¹⁰⁷ denunciation;¹⁰⁸ notifications;¹⁰⁹ registration;¹¹⁰ and authentic texts.¹¹¹ All these provisions conform to the equivalent provisions of Protocol I.

The preamble of Protocol II was adopted by consensus. It recalls that the humanitarian principles enshrined in Common Article 3 of the Geneva Conventions constitute the foundation of respect for the human person in non-international conflicts and also that international instruments relating to human rights offer a basic protection to the human person. It also states that in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience. The preamble thus repeats the Martens Clause principle.

Protocol II, in its final amended form, was adopted by the Conference by consensus. The explanation of vote of States which had indicated throughout their opposition to the principle of such a protocol, such as India, Indonesia, Nigeria and others, tended to show that the "simplified text" of the Protocol had not fundamentally changed their position.

Final Resolutions and Final Act

In addition to adopting the two Protocols and passing the resolution on weapons previously discussed, the Conference adopted several other resolutions.

Among these were resolutions urging the International Civil Aviation Organisation to establish procedures for identification of medical aircraft; urging States which have not yet adhered to the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its additional Protocol of 1954 to do so; and urging States and the ICRC to improve the dissemination of knowledge of international humanitarian law and particularly its teaching in the Universities and in the armed forces.

Norway and Libya sponsored a resolution urging the ICRC to consider establishing a single, unified and universally recognised protective emblem to take the place of the existing recognised emblems such as the Red Cross, the Red Crescent and the Red Lion and Sun. Implicitly it would also take the place of the Red Shield of David used by Israel, which emblem the Conference had refused to recognise. It lost, 15 for, 19 against and 62 abstentions.

There was one more controversial subject to be settled before the Conference could adjourn. This concerned who would be authorised to sign the Final Act. Here again, the division of the first session asserted itself, with one side insisting that the liberation movements who had attended the Conference be permitted to sign, and the other insisting that only States could sign a Final Act. After negotiations the matter was compromised to permit the liberation movements to sign on a separate page. Israel, however, refused to accept the compromise and insisted on a vote. The vote was 78 in favour, 1 (Israel) against and 18 abstentions. The abstentions included the US, UK, France, Federal Germany, Japan, Belgium, Australia, Canada, Spain, Cameroon and Uruguay.

All the participants present, with the exception of Israel, signed the Final Act at the close of the Conference.

Conclusion

It is difficult at this stage to make any definitive comments on the years of effort expended, prior to and during the four sessions of the Conference.

There is still the matter of the signature of the Protocols whose rolls will be open for 12 months from December 1977. It would be prudent to expect a number of States present and accepting the final consensus not to be among the signatories to Protocol II.

There is the even more important matter of ratification or accession, and the reservations that may yet be tied to any such ratifications or accessions. It will thus be years before one can begin to appreciate the legal value of these documents. Even then, the effectiveness of the new provisions on the conditions applying in battle zones will remain to be proved.

In any event humanitarian law can have only a limited effect in reducing the deleterious effects of war. Experience proves that in spite of humanitarian law, the effects of war have become ever more widespread and ever more cruel. As with other forms of international law, humanitarian law follows after the event, sometimes long after.

That is to say, new and more devastating techniques of warfare are first developed and then applied, and only then, if the universal conscience becomes sufficiently aroused, are legal documents slowly drafted to blunt the effect. By then, the techniques have usually developed much further.

What may thus appear as a pessimistic appraisal is not intended to deny the positive role that humanitarian law does play. That role is more of a brake on the progression of the cruelty of war rather than a reversal of that tendency. It is in comparison with what might have been if there was no humanitarian law that its effectiveness and ultimate justification must be assessed.

The greatest achievement of humanitarian law is in having implicitly accepted by all parties that the cruelty imposed by war, which is unrelated to a military objective, is both unproductive or even counter-productive and

contrary to what may be described as the universal conscience of mankind.

It is in supporting these principles, now made more explicit than ever, that the Protocols have their greatest significance. Whatever the final outcome of the legal procedures of ratification, the general principles of international law have been advanced significantly. In so doing, the Conference has demonstrated one of the ways in which international law can be developed in our day.

References

- ¹ Protocol I, Article 92 (80), Protocol II, Article 20 (40).
- ² Protocol I, Article 95 (83); Protocol II, Article 23 (43).
- ³ Art. 2
- ⁴ Art. 3
- ⁵ Art. 4
- ⁶ Art. 5
- ⁷ Art. 6
- ⁸ Art. 7
- ⁹ see ICJ Review No. 14 p 42.
- ¹⁰ Art. 8
- ¹¹ Art. 9
- ¹² Art. 11
- ¹³ Art. 12
- ¹⁴ Art. 13
- ¹⁵ Art. 17
- ¹⁶ Art. 18
- ¹⁷ Art. 19
- ¹⁸ Art. 20
- ¹⁹ Art. 21 (22)
- ²⁰ Art. 22 (23)
- ²¹ Art. 25 (26 bis)
- ²² Art. 26 (27)
- ²³ Art. 27 (28)
- ²⁴ Art. 28 (29)
- ²⁵ Art. 32 (20 bis)
- ²⁶ Art. 33 (20 ter)
- ²⁷ Art. 34 (20 quater)
- ²⁸ Art. 35 (33)
- ²⁹ Art. 36 (34)
- ³⁰ Art. 37 (35)
- ³¹ Art. 38 (36)
- ³² Art. 39 (37)
- ³³ Art. 40 (38)
- ³⁴ Art. 41 (38 bis)
- ³⁵ Art. 43 (41)
- ³⁶ Art. 45 (42 bis)
- ³⁷ Art. 46 (40)
- ³⁸ A detailed description of this proposed article is contained in ICJ Review No. 16, p. 57.
- ³⁹ Art. 47 (42 quater)
- ⁴⁰ Art. 48 (43)
- ⁴¹ Art. 50 (45)
- ⁴² Art. 51 (46)
- ⁴³ see ICJ Review No. 16, p. 55
- ⁴⁴ Art. 53 (47 bis)
- ⁴⁵ Art. 54 (48)
- ⁴⁶ Art. 55 (48 bis)
- ⁴⁷ Art. 56 (49)
- ⁴⁸ Art. 57 (50)
- ⁴⁹ Art. 61 (54)
- ⁵⁰ Art. 62 (55)
- ⁵¹ Art. 63 (56)
- ⁵² Art. 65 (58)
- ⁵³ Art. 66 (59)
- ⁵⁴ Art. 67 (59 bis)
- ⁵⁵ Art. 69 (61)
- ⁵⁶ Art. 73 (64)
- ⁵⁷ Art. 74 (64 bis)
- ⁵⁸ Art. 76 (67)
- ⁵⁹ Art. 80 (70)
- ⁶⁰ Art. 81 (70 bis)
- ⁶¹ Art. 82 (71)
- ⁶² This article is described in detail in ICJ Review No. 16, pp. 53-55.
- ⁶³ Art. (77)
- ⁶⁴ Art. (78)
- ⁶⁵ Art. 89 (new Art. before or after Art. 70)
- ⁶⁶ ICJ Review No. 16, pp. 55-56
- ⁶⁷ Art. 90 (79 bis)
- ⁶⁸ Art. 92 (80)
- ⁶⁹ Art. 93 (81)
- ⁷⁰ Art. 94 (82)
- ⁷¹ Art. 95 (83)
- ⁷² Art. 97 (86)
- ⁷³ For a discussion of the progress of Protocol II during previous sessions see ICJ Review No. 14, p. 50-51 and ICJ Review No. 16, p. 59-60.
- ⁷⁴ Art. 3 (4)
- ⁷⁵ Art. 6 (10)
- ⁷⁶ Art. 6 (10) para. 4
- ⁷⁷ Art. (10 bis)
- ⁷⁸ Art. (11)
- ⁷⁹ Art. 7 (26)
- ⁸⁰ Art. 7 (26) para. 2
- ⁸¹ Art. 8 (12)
- ⁸² Art. 9
- ⁸³ Art. 10 (15)
- ⁸⁴ Art. 11 (16)
- ⁸⁵ Art. 12 (17)
- ⁸⁶ Art. 13 (18)
- ⁸⁷ Art. (19)
- ⁸⁸ Art. (21)
- ⁸⁹ Art. (22 bis)
- ⁹⁰ Art. (23)
- ⁹¹ Art. (24)
- ⁹² Art. (25)
- ⁹³ Art. (26 bis)
- ⁹⁴ Art. 15 (27)
- ⁹⁵ Art. 16 (28)
- ⁹⁶ Art. 17 (29)
- ⁹⁷ Art. (30)
- ⁹⁸ Art. (34)
- ⁹⁹ Art. (36)
- ¹⁰⁰ Art. 19 (37)
- ¹⁰¹ Art. (38)
- ¹⁰² Art. (39)
- ¹⁰³ Art. 20 (40)
- ¹⁰⁴ Art. 21 (41)
- ¹⁰⁵ Art. 22 (42)
- ¹⁰⁶ Art. 23 (43)
- ¹⁰⁷ Art. 24 (44)
- ¹⁰⁸ Art. 25 (44 bis)
- ¹⁰⁹ Art. 26 (45)
- ¹¹⁰ Art. 27 (46)
- ¹¹¹ Art. 28 (47)

ICJ News

ICJ Seminar

In its series of regional seminars on human rights the ICJ held its second seminar in Barbados from 8-13 September 1977 on "Human Rights and their Promotion in the Caribbean". It was organised in co-operation with the Organisation of Commonwealth Caribbean Bar Associations (OCCBA).

There were 72 participants from the following 16 countries: *Bahamas, Barbados, Bermuda, Cuba, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Surinam and Trinidad and Tobago* and the following Associated Territories: *Antigua, Dominica, St. Kitts, St Lucia and St Vincent*. The participants included Government Ministers or senior officials from the 11 countries in italics. There were participants from the following Caribbean organisations: the Caribbean Community (CARICOM), Caribbean Conference of Churches, Caribbean Congress of Labour, and OCCBA. The ICJ was represented by Mr William J. Butler, Chairman of the Executive Committee, Niall MacDermot, Secretary-General, and Hans Thoolen, Executive Secretary, in addition to Professor Telford Georges, a Commission Member from the Caribbean.

Equal focus was given in the discussions to economic, social and cultural rights and to civil and political rights, and this was reflected in the working papers. A report on the seminar will be published early in 1978. It will include the key-note speech by Mr William Demas, Director of the Caribbean Development Bank, the working papers, a summary of the discussions and the Conclusions and Recommendations.

On the initiative of some of the Caribbean participants the seminar decided to establish a Continuation Committee to seek to implement the Recommendations. Its principal task is to try to bring into existence the "regional co-ordinating organisation" referred to in the Conclusions and Recommendations, which it is hoped will include some government representatives. The regional co-ordinating organisation is asked to consider framing a Caribbean declaration of rights and to examine existing instruments with a view to framing a Caribbean Convention on Human Rights which is particularly suited to the region.

The seminar stressed the importance for the region of the right to self-determination, the right to participate in public affairs, the right to work and freely join trade unions, the equal treatment of children born out of wedlock, the status of women, the provision of free and compulsory primary education, the need for pre-primary education and adequate medical and health care.

The seminar urged all governments in the region which have not yet done so to ratify the international instruments relating to human rights.

The organisation of this seminar was made possible by grants from the Netherlands Government and the Ford Foundation.

Affiliated Organisation

The newly-formed Grenada Council for Human Rights has affiliated to the ICJ.

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The International Commission of Jurists is a non-governmental organisation devoted to promoting throughout the world the understanding and observance of the Rule of Law and the legal protection of human rights.

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Its activities include the publication of its Review; organising congresses, conferences and seminars; conducting studies or inquiries into particular situations or subjects concerning the Rule of Law and publishing reports upon them; sending international observers to trials of major significance; intervening with governments or issuing press statements concerning violations of the Rule of Law; sponsoring proposals within the United Nations and other international organisations for improved procedures and conventions for the protection of human rights.

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Human Rights in a One-Party State

Edited by the International Commission of Jurists, Search Press, London, January 1978, 130 pp,
£1.80, US\$ 4 or Sw.Fr. 10, plus postage.

A report of an international seminar convened by the ICJ and held in Dar-es-Salaam in September 1976 on 'Human Rights, their Protection and the Rule of Law in a One-Party State'. The 37 participants included government ministers and senior officials, judges, advocates, law lecturers, teachers and churchmen from Sudan, Tanzania, Zambia, Botswana, Lesotho and Swaziland. The report includes summaries of the working papers and discussions on constitutional aspects, the organisation and role of the legal profession, preventive detention, ombudsman institutions, public participation, freedom of expression and association, and individual rights and collective rights. In his preface, Shridath Ramphal, Secretary-General of the Commonwealth says that the seminar performed a signal service "by exploring the reality that underlies the form [of the one party state], as well as by making suggestions conducive to the healthy evolution of those conventions of constraint on which, in the ultimate analysis, good government depends".

Decline of Democracy in the Philippines

A report on Human Rights under Martial Law by William J. Butler, New York attorney, Professor John P. Humphrey of Canada and G. E. Bisson, Chairman of ICJ New Zealand Section, published by the International Commission of Jurists, Geneva, August 1977, 107 pp.
10 Swiss Francs, US\$ 4 or UK £2.25, plus postage

The authors conclude that the declaration of martial law in 1972 was justified, but that it has been prolonged unnecessarily to perpetuate the personal power of President Marcos. The denial of basic political rights, freedom of speech and the press, the right to strike, freedom of movement and the independence of the judiciary, as well as the prolonged detention of suspects without trial, often accompanied by torture, are examined. Detailed particulars are given of 25 cases of torture since January 1976.

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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