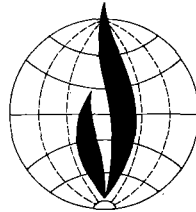


For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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Editor: Niall MacDermot

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1224 Chêne-Bougeries/Genève
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Editorial

East Pakistan Staff Study

In the last issue it was stated that the ICJ was seeking to set up a Commission of Enquiry into the events in East Pakistan in 1971. A Commission of three prominent international lawyers was duly appointed "to enquire into the reported violations of human rights and the rule of law in East Pakistan since March 1, 1971, and, insofar as they are shown to be well-founded, to enquire into their nature, extent and causes and to report, with recommendations."

Owing to the outbreak of war between India and Pakistan in December 1971, it unfortunately became necessary to cancel the enquiry. However, as a great deal of valuable documentary evidence had already been collected, it was decided that the Secretariat of the ICJ should prepare a Staff Study on the events up to the end of 1971, covering the ground of the proposed enquiry. The scope of the Study was extended to consider the application of the principle of self-determination of peoples, the role of the UN and the role of India.

The full Study is available in English (see back cover), but we reproduce in this issue of the Review some of the sections of the Study dealing with legal issues arising out of the events. The Secretariat alone is responsible for the opinions and findings in the Study and it does not commit the individual Members of the International Commission of Jurists.

The factual account and findings are based partly on contemporary newspaper accounts, partly on sworn depositions of refugees in India, and partly on oral and written statements of evidence given to the Secretariat of the ICJ between October 1971 and March 1972. Nearly all these statements have been made by European and American nationals who were in East Pakistan at the time.

We have sought to make this Study as objective as possible. Regrettably, the former Pakistan Government refused to cooperate in helping us to obtain evidence from their side, but we have done what we can to overcome this handicap. We have, of course, also had access to published accounts of their case, including the Pakistan Government White Paper on the Crisis in East Pakistan.

Vindications of Justice

It is agreeable to be able to pay tribute once more to the courage and integrity of the judges of the superior courts in South Africa. Among their recent notable decisions were those allowing the appeal of Dean French-Beytagh of Johannesburg against his conviction under the Terrorism Act, the appeal of Mr. Quentin Jackson, a British photo-

grapher, against his convictions under the Terrorism and Suppression of Communism Acts, and last but not least the appeal of Winnie Mandela against her conviction under the Suppression of Communism Act by two judges of the Pretoria Supreme Court. They had held that she had contravened the terms of her house arrest by receiving visitors at her home. One of the "visitors" was her brother-in-law who had come to collect a list of groceries she wanted. The nature of the other visit was not proved. The Supreme Court held that the aim of the restriction was to prevent a listed person from meeting others interested in promoting "Communism", but this did not mean that a listed person should be prohibited from communicating in any way with any person.

It is to be hoped that this series of decisions will lead the security police of South Africa to hesitate before continuing their harassment of the political opponents to apartheid by prosecutions under these repressive laws.

In this connection, the Angela Davis case shows that in some circumstances a black may obtain a fair trial in the United States. It may be that the world-wide publicity attaching to the case ensured that the highest standards of American justice would apply, but there are probably not many countries in the world where a defendant would have been acquitted in similar circumstances.

Massacres

Burundi has once again been the scene of tragic massacres similar to those which have occurred before in its 10 years history since independence. A violent uprising by the Hutu tribe, comprising over 80% of the country, against their Tutsi masters has led to fierce repressive measures by the Tutsis, bringing further bloodshed. The conflict is essentially a racial one.

This raises once again the question of how some international machinery can be devised to reduce the slaughter which results from these terrible mass killings. As Dr. Homer A. Jack of the International Association for Religious Freedom said in his intervention this year before the UN Commission of Human Rights, "more human lives have been taken by human massacre since World War II, since Hitler, than by conventional or guerrilla war". One has only to think of the massacres which have occurred in India, Pakistan and Indonesia, to name but three of the largest countries involved, to realise the truth of this assertion.

We have seen in recent years how quickly aid can be brought to the victims of natural disasters, and the nations are now coming together to protect us from man-made attacks upon our environment. But as yet, no machinery exists to protect people against the mass violation of the most elementary of human rights, the right to life itself.

The difficulties are formidable. These outbursts of violence occur suddenly, often with little if any warning. Even so, with modern means of transport it should be possible to bring a peace-keeping force to any part of the world within a matter of days if not hours.

These massacres usually result from deep racial or religious conflicts, with serious political implications. The governments of the countries concerned regard them as purely internal matters and will seldom agree to any outside aid, let alone any international intervention. It is difficult to see how any solution can be found until the nations are prepared to limit further the doctrine of national sovereignty in the interest of human rights.

Quote from "*Private Eye*" the London satirical magazine:

'The Africans just SAVAGES'

South African Leader Lashes
Out.

"If proof were needed of the necessity for separate development of the races in Africa, we certainly had it this week" said African leader Mandela Telegraph, 49, yesterday.

"The scenes outside the University of Cape Town have demonstrated once and for all that these white South Africans are little better than wild animals."

SAVAGES

"We black South Africans come from a civilised tradition several thousand years old. It is hard for us to understand how human beings can behave like these policemen."

"To look at them", concluded Mr Mandela Telegraph, "You would think they had only just come down from the trees."

Human Rights in the World

Brazil

Last year the International Commission of Jurists referred two allegations of violations of human rights to the Inter-American Commission on Human Rights of the Organisation of American States.

The first allegation dated 24 July, 1970, concerned torture, abuse and maltreatment of political prisoners. The Inter-American Commission (IAC) decided on 3 May, 1972, that because of the difficulties that have hindered the carrying out of its examination of this case, it has not been possible to obtain absolutely conclusive proof of the truth or untruth of the allegations, but that the 'evidence collected... leads to the persuasive presumption that in Brazil serious cases of torture, abuse and maltreatment have occurred to persons of both sexes while they were deprived of their liberty'. As a result, the IAC has recommended to the Brazilian Government that it carry out an investigation by independent judges, not subject to military or police influence, with a view to determining whether acts of torture, abuse and maltreatment of detainees has occurred and whether they have been carried out by any of the named military or police authorities. The IAC also requests the Brazilian Government to report the results of the investigation and to punish, to the full extent of the law, those persons proved responsible for violations of human rights.

The second allegation dated 22 December, 1970, concerned the arrest and detention of three of our colleagues, Professor Heleno Claudio Fragoso, Dr. Augusto Sussekund de Moreas Rego and Dr. Georges Tavares.¹ The Brazilian Government raised a preliminary objection that all internal means of procedure had not been exhausted as the case was pending before the Brazilian Council for the Defence of Human Rights. The International Commission of Jurists contended that this was an ineffectual body and did not constitute a judicial authority. The IAC appears to have accepted this contention, and has informed the Brazilian Government of its decision that examination of the case by the IAC is not barred, and it has ordered the case to be filed without prejudice to its merits.

¹ See ICJ REVIEW No. 6, pp. 6 and 7.

Iran

On January 16, 1972, a representative of the SAVAK, the Iranian State Information and Security Organisation—i.e. the secret police—announced at a press conference that 120 persons belonging to three subversive groups were to appear before military tribunals, accused of treason and of acts of terrorism. It may seem surprising that this announcement should be made by a representative of the SAVAK and not by the Ministry of Justice who are normally responsible for the conduct of prosecutions, but the event is symptomatic of an evolution which has been taking place over the last few years in Iran, whereby the police have gradually usurped control of the judicial process, following a pattern already established in other countries.

Since that announcement was made, the military tribunals have been in almost continuous session. By March 15, the record was approximately as follows: about sixty persons had been tried in groups, of whom 19 had been executed, 5 had been condemned to death and were awaiting execution¹, 10 other death sentences had been commuted to life imprisonment, 10 had been sentenced to life imprisonment; the other sentences varied from 3 to 15 years' imprisonment or forced labour. The average age of the condemned men was 23.

It is not easy to establish an exact reckoning primarily because what official information there is—and it is exceedingly rare—is both brief and enigmatic. The information published by the major Iranian newspapers is usually incomplete and often inaccurate. In this situation, one can only try to deduce, by cross-checking, who is who and who has been condemned to what. For instance, while it is known that during February and the beginning of March there were three main 'batches' of trials (referred to as the trials of the '23', the '20' and the '11') before the court of first instance and the appeal court, it is still not very clear to which subversive group any particular individual was supposed to belong. Of those who were executed on March 18 not only is there no indication as to the group to which they belonged but it is not even known with any certainty when or where they were tried. There may also be a certain confusion with regard to the sentences. For instance, the 10 whose death sentences were commuted to life imprisonment had originally been condemned to life imprisonment by the court of first instance; the court of appeal then altered this sentence to the death penalty, which was again commuted to life imprisonment by the grace of the Shah. On the other hand, three others whose original sentence of life imprisonment imposed by the court of first instance was also changed to the death

¹ Four of whom were executed in April; in May five more executions were announced.

penalty by the appeal court were in fact executed. While the difficulty of obtaining exact information may have resulted in minor inaccuracies in the figures given above, the general picture is correct. Further trials are being held and further death sentences have been pronounced and perhaps executed since these lines were written. An atmosphere of suspense and mystery surrounds everything connected with the administration of Justice in Iran.

This situation is not new. A number of summary executions had already taken place in 1971: 13 in March after the attack on the Siah Kal ' gendarmerie ' barracks (when 2 of the persons executed could not possibly have taken part in the attack as they were in prison at the time, and had been for some time), 2 in July and 5 in October. The outside world first heard of these executions *a posteriori*, having had no earlier hint that the trials were taking place. The secrecy and silence with which the military authorities surround their operations are such that one cannot help thinking that other trials and other executions may have taken place without any news ever reaching the outside world.

Many people abroad outside Iran were deeply shocked to learn of the vast round-ups operated at the time of the commemorative ceremonies at Persepolis, when the opposition talked of 10,000 preventive arrests, and foreign observers generally agreed that there had been at least 5,000 persons arrested. Many of these were, of course, later released, but not all; because of the absence of any official information, it is impossible to state with any accuracy how many are still being held, but they are believed to number several hundred—not counting those who were already in prison before the ceremonies.

A number of attempts have been made by international organisations to send observers to these trials. At first they met with a flat refusal on the pretext that this was an unacceptable interference in the internal affairs of the country. Nevertheless, this intolerance finally yielded slightly under pressure and several jurists managed to obtain visas for Iran, to talk with the authorities and to attend the various phases of several trials. Some of them went to Iran in a private capacity, others on behalf of international organisations such as the International Commission of Jurists, the International Association of Democratic Lawyers, the International Association of Catholic Jurists, the International League for the Rights of Man and Amnesty International. The reports of all these observers agree, with the result that it is now possible to establish a fairly complete composite picture of the political trials taking place in Iran. The report of the last legal observer sent jointly by the International League for the Rights of Man and the International Commission of Jurists, Maître Christian Grobet of the Geneva and Zürich Bars (Switzerland), was particularly helpful in clarifying the picture. Even in his case, the status of Observer was refused to him as being incompatible with Iranian national sovereignty; he was allowed to enter Iran and attend the hearings

only in a private capacity. A few days later a fellow jurist, Maître C. Bourguet, of the Paris Bar (France), was refused permission to enter the court; the general presiding over the tribunal stated that, in the absence of any specific orders, he had no power to authorise the presence of a 'journalist' at the trial. The Prime Minister's Office confirmed that, until further notice, authorisations to attend the hearings of the tribunals would no longer be granted to observers, even as private individuals, nor to foreign journalists.

The following is the general picture which emerges with regard to political trials in Iran.

First of all, it is the SAVAK which alone is responsible for the conduct of these trials. It is to the SAVAK, and not to the prison administration or the Ministry of Justice that one has to apply for permission to visit the prisoners or for the authorisation without which it is impossible to attend a trial. This applies not only to foreigners but also to the families of the accused, since the trials are public only in theory, not in practice.

Being a secret police, the SAVAK operates without any external controls and more or less clandestinely, at any rate with regard to those who fall into its power. It is the SAVAK which, on its own initiative, decides on and carries out searches and arrests relating to political suspects, more often than not without even bothering to go through the formality of obtaining a warrant. The persons arrested immediately lose all contact with the outside world; their families are not informed and have no means of obtaining news of them.

Again, it is the SAVAK and not an independent magistrate which is responsible for and carries out the preliminary investigation. Since the 1958 law, which supplemented that of 1957 under which the SAVAK had been created, provides that the members of this service have the same status as those of the military judicial police, they can assume the authority and the functions of an investigating magistrate. The investigation is carried out in secret; there is no system of checks or controls and the limit of 24 hours imposed by Iranian law on detention without appearing before a magistrate has no application. In other words, there is no limit to the period of preventive detention, and many detainees have been held for months before being brought before a military judge—a formality which usually takes place just before the trial. The prisoners have no right to the assistance of a legal adviser during the investigation. Under these conditions, one is not surprised to find that allegations of brutality and torture under interrogation are almost invariably made. The consistent nature of these allegations adds to their force, but the prisoners' demands to be examined by a doctor have always been refused and as the courts refuse to listen to their allegations they have no way of proving that torture is used.

Finally, it is the SAVAK which alone has the right to decide who will be brought to trial and before which tribunal. In this way the

emergency law of 1957 has led to the institution of a veritable second and secret judicial system, dominated by the all-powerful special police. Moreover, both the counsel for the defence and the judges at these trials are members of the armed forces. The normal judicial institutions have become powerless and ineffectual, their prerogatives having passed to the police and the army, in other words, to the Executive. One is therefore justified in asking whether the emergency law and its consequences are not contrary to the Iranian Constitution, which expressly stipulates in Articles 27 and 28 the principles of the separation of powers and of the independence of the judiciary. In our opinion, these principles appear no longer to be respected in the present situation.

However, even if the 1957 law is accepted as constitutional, one may still question the constitutional character of the procedures followed. There can be no doubt that the specific purpose of this law was the repression of political offences. But the status of 'political offenders' is constantly refused to the prisoners, not only by the police but by government authorities, military tribunals and His Majesty the Shah himself, all of whom insist that the accused are bandits or common criminals who have committed ordinary criminal offences. This situation presents an obvious contradiction: either the offences are ordinary criminal offences and should therefore be judged by the normal criminal courts, or they are political offences, in which case they are subject to Article 79 of the Constitution which stipulates that they must be tried before a court assisted by a jury. There appears to be no reason why a military tribunal should be exempt from this constitutional obligation, which is one of the essential guarantees of impartiality and of respect for human rights. In other words, the absence of a jury in the present trials appears to be contrary to the Constitution.

Generally speaking, the procedures adopted in the hearing of these cases offer no guarantee of even the minimum rights of the defence, as is shown by only a few of the anomalies reported by observers. The indictment is not presented to the prisoner in writing; he merely hears it read at the beginning of the trial. Defence counsel cannot prepare their cases as they should, as most of them see the prisoner they are defending only for a few minutes a few days before the trial. These counsel for the defence are members of the armed forces, usually with no legal qualifications. The prisoners have no right to choose their own defence counsel, being simply instructed to select one from an official list of 10 names; otherwise a counsel is appointed by the court. Most of the prisoners formally rejected before the tribunal both their defence counsel and their defence. The defence put forward by these defence counsel is usually of the briefest nature, giving the impression of a mere formality. The charge presented by the prosecution is equally summary, with little attempt to provide proofs. Even when the facts are totally or partially denied by the

accused, the prosecution does no more than rely upon the contents of the file prepared by the security police to establish their guilt, without calling witnesses or other supporting evidence. This is contrary to the principle that a criminal trial should be based on oral evidence and lays the whole trial open to grave doubts. One may also recall in this context that even an admission of guilt is not recognised by Iranian jurisprudence as constituting in itself conclusive proof of guilt. Finally, the right of appeal to a higher court is subject to the authorisation of the Executive—a fact which adds yet further to the arbitrary nature of the procedure.

The charges most often brought against the prisoners are:

- endangering the security of the State or plotting to overthrow the regime;
- membership of an illegal political group; and
- in some cases, various acts of violence, armed attack, etc.

It is true that there have been numerous acts of violence, that these have increased recently and that they are absolutely reprehensible, even when they are committed in a political context and especially when they involve bloodshed. It is none the less true that part of the responsibility for this vicious circle of violence must be attributed to the arbitrary nature of the repressive measures introduced by the authorities against a generation of young people who are seething with new ideas and ambitions (as is the case throughout the world at the moment), and who have no outlet for expressing their political convictions except by underground action and adventure.

As for the other two heads of accusation, which come up in every trial, they are by definition political. It is these political charges which always receive the most severe sentences. For example, Saïd Arian was sentenced to death (and executed) for plotting against the government, to life imprisonment for belonging to a band of armed felons, and to 10 years' solitary confinement with hard labour for having 'adopted the communist ideology'. Another, Rahim Karimian, was sentenced to 6 years' imprisonment simply for having been a member of a 'collectivist cell'.

Before these military tribunals no overt act is needed to establish guilt. Opinions or intentions—even supposed opinions or intentions imputed to a man on the basis for instance of what he reads—are crime enough to earn the severest penalties. This attitude, which has become part of the system, is perfectly illustrated by the words of the prosecutor published in the report of a trial in the 'Journal de Téhéran' of February 3, 1972, who stressed that 'according to the law the fact of being a Communist constitutes in itself, even if it leads to no action, a punishable offence'.

More often than not, the severity of the sentences seems out of all proportion to the charges made.

Unfortunately, it seems that Iran is yet another country which is now experiencing the vicious circle of escalating violence. It is particularly distressing that this should be so in the country which hosted the 1968 United Nations Conference on Human Rights in Teheran, and whose representatives in the United Nations have played such an important part in support of human rights. We can only hope that Iran will see the wisdom of returning to normal judicial procedures in accordance with accepted principles of the Rule of Law.

Republic of KHMER (Cambodia)

At a time when Khmer (Cambodia) is going through one of the most difficult periods of its history, one would have liked to be able to say that the image it offers the world is that of a country profoundly attached to the principles of the Rule of Law. This would have greatly enhanced its international prestige and made more credible its claim to be defending democratic liberties. Unfortunately, the reverse is true, and over the last few months there has been a rapid deterioration in the situation as regards respect for the fundamental values underlying the concept of the Rule of Law.

The proclamation of a State of National Danger and the introduction of martial law had already conferred on the Executive powers which were exceptionally far-reaching, even in the light of the grave political and military crisis through which the country was passing. Then, on 18 October 1971, a special decree suspended the most important constitutional liberties and on 4 December of the same year a new decree, with retroactive effect as from the month of June of that year, further aggravated the situation by making any anti-government demonstration a punishable offence and by empowering the police to carry out at will searches, arrests and unlimited detention. These decrees were drawn up and brought into force by the Head of State without the approval of Parliament, which had previously been dissolved.

It was also by a decree—which, it may be added, was unconstitutional—that on 18 October 1971 the Head of State arbitrarily decided that the Parliament should become a Constituent Assembly. Equally arbitrarily, the Constituent Assembly was soon dissolved without having completed its task; the Members of Parliament were placed under house arrest, theoretically for their own safety, and the Parliament buildings are still closed and guarded by the army. In other words, those who should be speaking for the people have been reduced to total silence.

Finally, on 10 March 1972 the Head of State, Cheng Heng, abdicated in favour of Field-Marshal Lon Nol. The notion of abdication is in itself difficult to reconcile with that of a republic; it is even more difficult to conceive of a legal justification, under any type of regime, for the transfer of power simply on the basis of the will of the holder, unless the holder considers that power as his private property, to be used or abused at will and without rendering accounts to anyone. At any rate, Field-Marshal Lon Nol seized power and proclaimed himself President. In other words, this President, who holds in his hands the reins of absolute power, has been invested with that power by no authorized person or body; and, if we accept the principle laid down in Article 21 of the Universal Declaration of Human Rights that "the will of the people shall be the basis of the authority of government", we are bound to recognize that the authority of Lon Nol has no basis and is unquestionably illegally exercised.

This determination to ensure the continuance of a presidential dictatorship is reflected in the new draft Constitution, drawn up at the request of the government by a 16-member committee appointed by itself after the Constituent Assembly had been dissolved and the 120 articles it had already drafted had been annulled, probably as being too liberal.

For instance, it is the President who will, by decree, lay down the procedures for his own election. Again, it is he who will lay down the procedures for parliamentary elections; he who will appoint the six members of the Constitutional Court thanks to which he will be able to invalidate or confirm the presidential or legislative elections, advance or set aside political friends or enemies, and lend a semblance of legality to all the acts of those in power. It is he who will appoint his "heir", in the person of the Vice-President. And, finally, it is he who will have the power to ban any legally constituted political party he considers superfluous, in order to reach a bi-partite system. In short, the President will have absolute control over the machinery of State, and be free to use it as he will and to eliminate for as long as it suits his purposes any opposition or divergence of opinion.

It is not true that the campaign which preceded the referendum on the Constitution allowed any freedom of expression. The arrests that were made of people found guilty, or even suspected, of having criticized the government in power are an indication of the general atmosphere of intimidation which prevailed. At the same time, the disturbances in the University and the brutality with which they were repressed are an indication both of the anxiety felt by intellectuals in face of the totalitarian tendencies of the present regime and the disarray of a regime which is no longer guided or sustained by the principles of the Rule of Law. It can only be hoped that the country will return to sounder principles before it is too late.

Namibia

The widespread general strike which occurred in Namibia (South West Africa) last December and January is one of the most remarkable events in the story of the fight against racial repression by the South African government.

The strike began on 13 December 1971 with some 6,000 Ovambos in the Katutura compound outside Windhoek, a compound which was described by an editorial in the Windhoek Advertiser as "little less than a filthy ghetto". The strike quickly spread and by mid-January some 13,000 workers were on strike and 7 or 8 mines had been brought to a stand-still. This protest occurred spontaneously as all trade union activities are banned.

The strike was directed against the contract system, which we have previously described as "akin to slavery". Under this system all African workers from the "reserves" were recruited by a corporation called SWANLA (South West African Native Labour Association) who then assigned them to a "master" with whom they had no contractual relationship. The contract was for one or two years and it was a criminal offence for the worker to leave his employment during the recruitment period. At the end of the period he was returned to his reserve and could not renew his contract. In this way he was deprived of the opportunity of acquiring skills. The workers had to live herded together in compounds and had to leave their wives and families behind in the reserves. They could not leave their compounds or work places without a pass from their "master". Wages were extremely low and only a tithe of those paid to white workers.

The strikers' demands were for a legal agreement with their employer, freedom of choice as to their employment, the right to take their families with them, fair wages without racial discrimination, abolition of the pass system, and employment offices in all tribal towns and regions.

The immediate result of the strike was the abolition of SWANLA and the introduction of a revised contract system at the end of January. Employment offices are to be provided by the Ovambo and Kavango legislative councils. The new contract will be between the worker and his employer. The worker may terminate the contract by notice. Other improvements include some small wage increases, the likelihood of shorter contract periods, the possibility of successive employments with the same employer and the right to unpaid home leave at the workers' expense during the period of service.

Many of these improvements will have little effect in practice. The worst evils remain, the low wages, the compounds, the separation of families, the pass laws and other restrictions on movement. The revised recruiting procedure will cost the employer less, as clothing and blankets no longer have to be provided. The initial travel costs

to the employment may now be deducted from the worker's wages, and the employer is only responsible for the return journey at the end of the contract. Owing to the low wages few workers will be able to afford to take the permitted holidays or to give notice terminating the employment. As in South Africa, a permit to seek work in a town is not issued unless there is a shortage of labour and "redundant" Africans may be "endorsed out" of the area and returned to the reserves. Without freedom of movement there is no freedom of choice. Associations of employers to fix uniform wage rates and working conditions, and the prohibition of trade union activities, ensure that there will be no free labour market or negotiated wage rates.

The long term result of the strike remains to be seen. It has focussed world attention on the repression by the illegal regime in Namibia as nothing else has done. It must have given the Africans a new sense of confidence in their struggle for liberation, and for this reason it is to be expected that the South African regime will intensify its efforts to prevent any recurrences of collective action by the Africans.

As a result of the strike, many Ovambos were arrested. The South African government have admitted to 247 arrests and in their last statement said that 83 were still in detention. Their identity is unknown. No charges have been made against them and no information is available about their fate.

Twelve Ovambos and one coloured man were charged with:

- (1) intimidating other workers to strike;
- (2) inciting other workers to strike by threats of violence;
- (3) breaking their own labour contract by striking.

The trial at Windhoek started on 25 January, 1972. In view of its exceptional importance, the ICJ took the unprecedented step of sending successively three international observers to the trial. This was made possible with the generous help of the Lawyers' Committee in Washington and the International Confederation of Free Trade Unions. The first observer was Alexander Lyon, M.P., who attended the opening of the trial and who was instrumental in persuading the accused to accept legal representation. The trial was adjourned to 14 February to allow the defence lawyer to prepare his defence. Judge Booth, a black American judge, attended the resumed hearings in February. He made a deep impression on all who met him. The third observer was Edward Lyons, M.P., who attended the closing stages of the trial, when judgment was reserved.

The value of sending International Observers is perhaps reflected in the acquittal of four of the prisoners and the relatively light suspended sentences and fines on the eight who were found guilty of inciting other workers to strike.

The repressive attitude of the authorities, however, continues to be shown by the expulsion from Namibia of Bishop Winter, the Rev. S. T. Hayes and the Rev. David de Beer, who had done all they could within the law to help the Ovambos.

Southern Sudan

The Agreement signed on 27 February 1972 and ratified on 27 March in Addis Ababa between the Sudan government and General Joseph Lagu, leader of the Southern Sudan Liberation Movement, has brought to an end 16 years of warfare. The conflict was between the central government, dominated by the Islamic arabs in the North, and the largely animistic and in part Christian negro population in the South. It had caused disastrous devastation and destruction to the three Southern provinces of Sudan—Upper Nile, Bahr al-Gazel and Equatoria.

The Agreement was signed by members of the government of the Democratic Republic of the Sudan, members of the Sudan Liberation Movement and witnessed by representatives of the Emperor of Ethiopia, the World Council of Churches, the All-Africa Conference of Churches and the Sudan Council of Churches. The Emperor and the Church movements have contributed substantially to the conclusion of the Agreement. Their role was described by a member of the Sudan government as "acting as midwives".

The Addis Ababa Agreement on the Problem of South Sudan consists of 3 parts:

1. The Draft Organic Law to organise Regional Self-Government in the Southern Provinces of the Democratic Republic of the Sudan;
2. the Cease-Fire Agreement; and
3. Protocols on Interim Arrangements.

Under Article 4 the provinces of Bahr al-Gazel, Equatoria and Upper Nile shall constitute a self-governing Region within the Democratic Republic of the Sudan and shall be known as the Southern Region. Under Article 6 Arabic has been stipulated to be the official language for the Sudan and English the principal language for the Southern Region without prejudice to the use of any other languages.

The National Assembly reserves the right to legislate, inter alia, in matters of National Defence, External Affairs, currency and coinage, foreign trade, transport, communications, education and customs. The Regional Assembly controls economic, social and political activities in the South. The Regional Assembly may by a two-thirds majority request the President to postpone or withdraw the coming into force of any law which, in the view of the members, adversely affects the interests of the Southern Region, but the President has to accede to send a request only if he thinks fit.

However the Regional Executive Authority is vested in a High Executive Council which acts on behalf of the President and the

President of the High Executive Council is appointed and relieved of office by the President on the recommendation of the Peoples Regional Assembly. The creation of a Regional Public Service is also planned. The Regional Assembly is empowered to levy regional taxes in addition to national taxes. It is further envisaged that the Armed Forces shall include South Sudanese in proportion with the size of the population. Religious freedom is specifically granted under the Agreement.

A general amnesty has also been declared for any act of mutiny, rebellion and secession in the Southern Region. This is retrospective to 18 August 1955, and all persons who were serving sentences or held in detention were to be discharged within 15 days of the ratification of the Addis Ababa Agreement. In addition there are provisions for repatriation and resettlement under the auspices of the U.N. High-Commissioner for Refugees together with representatives of the central government and the Southern Region.

The Agreement is warmly welcomed by the International Commission of Jurists and it is hoped that it will now lead to a peaceful settlement of the issues which led to this prolonged and bitter armed struggle. It would seem that substantial powers of authority have been granted to Southern Sudan, and if the settlement proves lasting it may well serve as a model for the resolution of similar problems in Africa and elsewhere.

Uruguay

In Uruguay one finds the familiar pattern, now unfortunately typical of many countries in Latin America and elsewhere, in which a government seeks to maintain order and the authority of the state at the expense of its fundamental liberties, and in doing so only provokes further disorders.

We do not wish to minimize or ignore the grave security problem facing the Uruguayan authorities. The mounting attacks by the Tupamaros, often with tragic results, have stirred and shocked world opinion. It is perhaps pertinent to remind the militants of these guerrilla movements, who claim combattant status and the protection of the Geneva Conventions, that these Conventions prohibit attacks on unarmed civilians, as well as the capture and execution of hostages. These prohibitions are absolute and binding on each party irrespective of the conduct of the other party to the conflict.

Nevertheless, it is first and foremost the duty of those in power not to allow themselves to be drawn into an increasing use of violence,

so as to reduce the political life of the country to the level of brute force, which by definition is the negation of the principle of the Rule of Law.

Unfortunately, it would appear that the Uruguayan authorities have chosen just this path. All fundamental liberties have been successively suppressed since 1967 until the recent proclamation of a state of emergency, which gave full powers to the Executive. The opposition and all criticism have been silenced by the suspension of newspapers which do not meet with official approval, or even by their complete suppression, as in the case of the newspapers "Ya", "Extra", and "La Idea" in 1970 and 1971. Searches, arrests and arbitrary detention have become every day occurrences. Some political detainees have even been kept in prison in spite of court orders for their release. There is reason to fear that political prisoners have often been subjected to inhuman treatment. Some, like Luis Batalla, an active Christian Democrat, have died in custody in most suspicious circumstances.

Finally, under the pretext of fighting terrorism, unofficial commandos have been tacitly, and even at times openly, encouraged by the government and protected by the police. These commandos have launched a "counter-terror" and indulge with impunity in extortions, acts of violence and assaults against anyone suspected of opposing the government. Members of parliament have denounced this menace and demanded an enquiry into the activities of these "death squads", but in vain. In the result, the sacrifice of its liberties has not brought peace to Uruguay, quite the contrary, and unfortunately present policies seem likely to lead only to a further deterioration of the situation.

INTERROGATION PROCEDURES

Lord GARDINER's Report

In November 1971, the Government of the United Kingdom appointed a Committee of three Privy Counsellors to consider 'whether, and if so in what respects, the procedures currently authorised for the interrogation of persons suspected of terrorism and for their custody while subject to interrogation require amendment'.

The Committee was established owing to public concern about the interrogation procedures which, as the Compton Report (Cmnd. 4823) had disclosed, had been in use for 'interrogation in depth' at an interrogation centre in Northern Ireland.

The conclusions of the Compton Committee, as later summarised by Lord Gardiner, were that the procedures consisted of:

- (a) Keeping the detainees' heads covered by a black hood except when being interrogated or in a room by themselves.
- (b) Submitting the detainees to continuous and monotonous noise of a volume calculated to isolate them from communication.
- (c) Depriving the detainees of sleep during the early days of the operation.
- (d) Depriving the detainees of food and water other than one round of bread and one pint of water at six-hourly intervals.
- (e) Making the detainees stand against a wall in a required posture (facing wall, legs apart, with hands raised up against wall) except for periodical lowering of the arms to restore circulation; detainees attempting to rest or sleep by propping their heads against the wall were prevented from doing so and, if a detainee collapsed on the floor, he was picked up by the armpits and placed against the wall to resume the required posture.

These procedures had been taught for some time by the British army for use in emergency conditions in colonial-type situations, and members of the Royal Ulster Constabulary had been trained in their use at the British army Intelligence Centre.

The report of the Committee of Privy Counsellors was published in March, 1972 (Cmnd. 4901). A majority report, approving the use of these procedures subject to certain safeguards, was submitted by Lord Parker and Mr. John Boyd Carpenter, M P. A minority report rejecting the procedures was submitted by Lord Gardiner.

Somewhat unusually, the recommendations in Lord Gardiner's minority report were accepted by the British Government in preference to those of the majority. In view of the widespread use in other countries of interrogation methods at least as objectionable as those which had been evolved by the British army, it may be of interest to lawyers in other parts of the world to know in more detail the conclusions reached by Lord Gardiner and the arguments upon which they were based.

After summarising the procedures in the words quoted above, Lord Gardiner posed three questions. Were the procedures 'authorised'? What were their effects? Do they in the light of their effects require amendment and, if so, in what respects?

He first considered whether these procedures were authorised in domestic law:

"By our own domestic law the powers of police and prison officers are well known. Where a man is in lawful custody it is lawful to do anything which is reasonably necessary to keep him in custody but it does not further or otherwise make lawful an assault. Forcibly to hood a man's head and keep him hooded against his will and handcuff him if he tries to remove it, as in one of the cases in question, is an assault and both a tort and a crime. So is wall-standing of the kind referred to. Deprivation of diet is also illegal unless duly awarded as a punishment under prison rules. So is enforced deprivation of sleep."

He found that in Northern Ireland the powers of the police and prison officers were substantially the same as in English law, that the procedures were and are illegal, and that no Army directive and no Minister could lawfully authorise the use of these procedures unless Parliament alters the law.

It had been argued before the Committee that the procedures used also involved infringement of Article 5 of the Universal Declaration of Human Rights, Articles 7 and 10 of the International Covenant on Civil and Political Rights, Article 3 of each of the four Geneva Conventions of 1949, and Article 3 of the European Convention on Human Rights. Lord Gardiner found it unnecessary to express any opinion on these submissions as the procedures were illegal under domestic law and as the matter was *sub judice* before the European Commission on Human Rights.

As to the effects of these procedures, the Committee had received medical evidence of the possible physical and mental effects upon persons subjected to them. On the other hand, it had been submitted that the procedures were necessary for the purpose of saving lives in face of the campaign of terror conducted by the Irish Republican Army. In the opinion of the British army and of the interrogators, the considerable quantity of intelligence information obtained by these methods would not have been obtained, or not so quickly, by other means. However, these procedures had not been adopted in

war-time interrogation centres where much vital information was obtained from prisoners and suspects.

Lord Gardiner's conclusions on this point were as follows:

“ If . . . the view is taken that the use of the procedures may initially have saved lives, this has to be balanced against the fact that in a guerilla-type situation the position of the forces of law and order depends very much on how far they have the sympathy of the local population against the guerillas. If the sympathy of a large part of the population is lost, the difficulties of the forces of law and order are increased. How far the loss of that sympathy since 9th August is due to internment or to the procedures or how far in the end they may have saved lives or cost lives, seems to me impossible to determine. ’

On the question whether the procedures required amendment, Lord Gardiner said that as they had been shown to be illegal, ‘ the real question . . . is whether we should recommend that Parliament should enact legislation making lawful in emergency conditions the ill-treatment by the police, for the purpose of obtaining information, of suspects who are believed to have such information and, if so, providing for what degree of ill-treatment and subject to what limitations and safeguards. ’

He continued:

‘ I am not in favour of making such a recommendation for each of the following five reasons:

- (1) I do not believe that, whether in peace time for the purpose of obtaining information relating to men like the Richardson gang or the Kray gang, or in emergency terrorist conditions, or even in war against a ruthless enemy, such procedures are morally justifiable against those suspected of having information of importance to the police or army, even in the light of any marginal advantages which may thereby be obtained.
- (2) If it is to be made legal to employ methods not now legal against a man whom the police believe to have, but who may not have, information which the police desire to obtain, I, like many of our witnesses, have searched for, but been unable to find, either in logic or in morals, any limit to the degree of ill-treatment to be legalised. The only logical limit to the degree of ill-treatment to be legalised would appear to be whatever degree of ill-treatment proves to be necessary to get the information out of him, which would include, if necessary, extreme torture. I cannot think that Parliament should, or would, so legislate.
- (3) Our witnesses have felt great difficulty in even suggesting any fixed limits for noise threshold or any time limits for noise, wall-standing, hooding, or deprivation of diet or sleep.

All our medical witnesses agreed that the variations in what people can stand in relation to both physical exhaustion and mental disorientation are very great and believe that to fix any such limits is quite impracticable. We asked one group of medical specialists we saw to reconsider this and they subsequently wrote to us.

" Since providing evidence to your Committee we have given much thought to the question of whether it might be possible to specify reasonably precise limits for interrogators and those having charge of internees. The aim of such limits would be to define the extent of any ' ill-treatment ' of suspects so that one could ensure with a high degree of probability that no lasting damage was done to the people concerned.

After a further review of the available literature, we have reluctantly come to the conclusion that no such limits can safely be specified. Any procedures such as those described in the Compton Report designed to impair cerebral functions so that freedom of choice disappears is likely to be damaging to the mental health of the man. The effectiveness of the procedures in impairing willpower and the danger of mental damage are likely to go hand in hand so that no safe threshold can be set. "

- (4) It appears to me that the recommendations made by my colleagues in the concluding part of their Report necessarily envisage one of two courses.

One is that Parliament should enact legislation enabling a Minister, in a time of civil emergency but not, as I understand it, in time of war, to fix the limits of permissible degrees of ill-treatment to be employed when interrogating suspects and that such limits should then be kept secret.

I should respectfully object to this, first, because the Minister would have just as much difficulty as Parliament would have in fixing the limits of ill-treatment and, secondly, because I view with abhorrence any proposal that a Minister should in effect be empowered to make secret laws: it would mean that United Kingdom citizens would have no right to know what the law was about police powers of interrogation.

The other course is that a Minister should fix such secret limits without the authority of Parliament, that is to say illegally, and then, if found out, ask Parliament for an Act of Indemnity.

I should respectfully object even more to this because it would in my view be a flagrant breach of the whole basis of the Rule of Law and of the principles of democratic government.

- (5) Lastly, I do not think that any decision ought to be arrived at without considering the effect on the reputation of our own country.

For many years men and women and a number of international organisations have been engaged in trying patiently to raise international moral standards, particularly in the field of Human Rights. The results are to be found in the Universal Declaration of Human Rights, the four Geneva Conventions, which 129 countries have signed and ratified, the International Covenant on Civil and Political Rights and The European Convention on Human Rights, whose provisions are referred to in paragraph 11 above. And this is not all. The World Conference on Religion and Peace, representative of all the world's religions, held in October 1970 declared:

‘ The torture and ill-treatment of prisoners which is carried out with the authority of some Governments constitute not only a crime against humanity, but also a crime against the moral law ’

while the subsequent Consultation of all the Christian Churches declared:

‘ There is today a growing concern at the frequency with which some authorities resort to the torture or inhuman treatment of political opponents or prisoners held by them . . . There exist at the present time, in certain regions of the world, regimes using systematic methods of torture carried out in the most refined way. Torture itself becomes contagious The expediency of the moment should never silence the voice of the Church Authorities when condemnation of inhuman treatment is called for. ’

There have been, and no doubt will continue to be, some countries which act in this way whatever Convention they have signed and ratified. We have not in general been one of these. If, by a new Act of Parliament, we now depart from world standards which we have helped to create, I believe that we should both gravely damage our own reputation and deal a severe blow to the whole world movement to improve Human Rights.

Conclusion

I cannot conclude this report without mentioning two points:

- (1) An eminent legal witness has strongly represented to us that as Article 144 of the Fourth Geneva Convention provides that
‘ The High Contracting Parties undertake, in time of peace as in time of war to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population ’
and as the other three Geneva Conventions contain somewhat similar Articles, and as we do not appear to be complying with these provisions, some step should now be taken to incorporate such instructions in military training.
As we have been told by those responsible that the army never considered whether the procedures were legal or illegal, and as some colour is lent to this perhaps surprising assertion by the fact that the only law mentioned in the Directive was the wrong Geneva Convention, it may be that some consideration should now be given to this point.
- (2) Finally, in fairness to the Government of Northern Ireland and the Royal Ulster Constabulary, I must say that, according to the evidence before us, although the Minister of Home Affairs, Northern Ireland, purposed to approve the procedures, he had no idea that they were illegal; and it was, I think, not unnatural that the Royal

Ulster Constabulary should assume that the army had satisfied themselves that the procedures which they were training the police to employ were legal.

The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world. '

EAST PAKISTAN STAFF STUDY

(1) LEGAL POSITION UNDER PAKISTAN LAW

Before considering the legality of the action taken by Sheikh Mujibur Rahman and the Awami League in March, 1971, it may be useful to consider the legal basis of the military regime headed by President Yahya Khan, and of his Legal Framework Order.

Martial law was first proclaimed in Pakistan on October 7, 1958, by President Iskander Mirza, when he appointed Ayub Khan as Chief Martial Law Administrator. Although the 1956 Constitution had acknowledged, in Article 196, the possibility of martial law, the President did not purport to act under that Constitution. Indeed he abrogated the 1956 Constitution at the same time as proclaiming martial law.

Only 10 days later, Ayub Khan deposed Mirza and assumed the powers of President of Pakistan. The revolutionary nature of this seizure of power was recognised at the time by the Chief Justice of Pakistan, Muhammed Munir;

‘ If the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the old Constitution but by reference to its own success... The essential condition to determine whether a constitution has been annulled is the efficacy of the change. If the territory and the people remain essentially the same... the revolutionary government and the new constitution are, according to international law, the legitimate government and the valid constitution of the State. Thus a victorious revolution or a successful coup d’état is an internationally recognised legal method of changing a Constitution.’¹

Ayub Khan’s presidency derived further authority from the elections held in 1962, when the martial law administration was replaced by the new 1962 Constitution with a National Assembly.

¹ *State v. Dosso*, PLD SC (Pak) 533 ff. The Supreme Court of Pakistan overruled this decision on April 20, 1972, in the case of *Malik Ghulam Jilani and Altaf Gauhar v. Province of Sind and others*, Dawn Newspaper, Karachi, April 23, 1972.

With the breakdown of his administration in March, 1969, Ayub Khan dissolved the Assembly and called on General Yahya Khan to take over the power and authority of the government. The 1962 Constitution, from which Ayub Khan then derived his authority, empowered him to appoint Yahya Khan as Chief Martial Law Administrator, but it did not authorise him to transfer to him the presidency. On his resignation the Speaker of the National Assembly should have become Acting President, but the Speaker was an East Pakistani.

On taking power, General Yahya Khan issued a Proclamation purporting to abrogate the 1962 Constitution and appointing himself President with absolute powers under martial law. A few days later he issued the Provisional Constitution Order, under which he purported to bring back the 1962 Constitution subject to his own overriding powers.

Section 29 of the Constitution provides that:

'(1) If at a time when the National Assembly stands dissolved or is not in session, the President is satisfied that circumstances exist which render immediate legislation necessary, he may, subject to this Article, make and promulgate such ordinances as the circumstances appear to him to require, and such ordinance shall, subject to this Article, have the same force of law as an act of the Central Legislature.'

The Section stipulates that the National Assembly must approve the ordinance either within a period of 42 days after the first meeting of the National Assembly or within the period of 180 days of the promulgation of the ordinance.

This provision was not followed, as Yahya Khan continued to legislate by order without submitting his ordinances to the Assembly in accordance with Section 29 of the Constitution. That he was aware of this deficiency appears from Section 2 of the Legal Framework Order, 1970, which says 'This Order shall have effect notwithstanding anything to the contrary in the Provisional Constitution Order, the Constitution of 1962 of the Islamic Republic of Pakistan or any other law for the time being in force.'

It follows that if the Constitution of 1962 is to be regarded as still being in force, the Legal Framework Order, 1970, was invalid. If the Order is to be regarded as valid, it can only be on the basis that President Yahya Khan had assumed absolute legislative as well as executive powers. This again was an unconstitutional and illegal act, and has since been declared to be such by the Supreme Court of Pakistan.²

² 'There can be no question that the military rule sought to be imposed upon the country by General Agha Muhammed Yahya Khan was entirely illegal', per Chief Justice Hamoodur Rahman, *ibid*.

As has been seen, Sheikh Mujibur Rahman responded to President Yahya Khan's postponement on March 1, 1971, of the Constituent Assembly by calling a hartal (general strike) throughout East Pakistan. This was the very action which Mr. Bhutto had threatened in West Pakistan on February 28, if the Assembly were allowed to proceed.

The general strike and the directives issued by Sheikh Mujibur which had the effect of setting up a provisional Awami League government in East Pakistan, were clearly illegal in terms of President Yahya Khan's martial law regime and under that 'law' justified the use of such force as was necessary to restore the authority of the military government. On the other hand, if the army authorities had not intervened, it is clear that all the organs of government in East Pakistan, including the judiciary, the civil service and the East Pakistan units of the armed forces were prepared to accept the authority and directions of the Awami League. Applying the test of Chief Justice Muhammed Munir, if the legality of the new regime were to be judged not by reference to the old Constitution but by reference to its own success, it had a powerful claim to be recognised, at least in East Pakistan, as a validly constituted government. Moreover, unlike General Yahya Khan's access to power, it had the added authority of an overwhelming victory at a fair and free election. If the usurpation of power by General Yahya Khan is accepted to be illegal, in the constitutional vacuum which resulted Sheikh Mujibur Rahman and the Awami League, following their electoral victory, would seem to have had a better title to constitute a provisional government of Pakistan than anyone else.

(2) LEGAL POSITION UNDER INTERNATIONAL PENAL LAW

In this part of the study the events in East Pakistan from March 25 to December 31, 1971, are examined under international penal law. This can be considered independently of the issues raised in Parts III and V. Whatever view is taken of the legality or otherwise of General Yahya Khan's martial law regime, or of the right or otherwise of the people of Bangladesh to self-determination, there was as from the time of the army 'crack-down' on March 25 a military conflict in East Pakistan. The response of the Awami League leaders to the crack-down was to proclaim the independence of Bangladesh, to set up a provisional government and to call for the support of the people in a war of liberation. The provisional government was formally declared on Pakistan soil but its headquarters was based in Calcutta. As the claims of this provisional government were not recognised by any power until after the outbreak of the India-Pakistan war, the conflict was not until then of an international character. Nevertheless, being an armed conflict, certain duties were imposed on the parties to the conflict under international penal law.

From the point of view of the Pakistan army, their operations were designed to 'restore order' and uphold the authority of the state. Their task was to capture and disarm the defecting East Bengali soldiers and police, and the Awami League supporters and students who had obtained arms to use against them. They suffered from the usual difficulties of an army seeking to combat insurgents who are not in uniform and to whom the great majority of the civilian population are sympathetic. In fairness to the Pakistani army, it should be said that history has shown that in such circumstances armies do tend, however wrongly, to make indiscriminate attacks on the civilian population. Even so, the gravity of the crimes committed by the Pakistani army and their auxiliaries cannot be condoned on these grounds.

The atrocities which were committed, and be it said the atrocities committed on both sides, involved the commission of many crimes under the domestic law of Pakistan. The shooting of unarmed civilians, except pursuant to the lawful judgment of a properly constituted court, is murder. It is clear that murder, arson, rape, looting and

many other crimes both under the civil and military law of Pakistan were committed on a vast scale. However, the legal position is here considered under international rather than domestic penal law. We propose to consider it under certain conventions to which Pakistan was a party, namely the Geneva Conventions of 1949 and the Genocide Convention, 1948, and under international customary law including the applicability of the concept of crimes against humanity.

The International Bill of Human Rights

The question of specific offences under international penal law should be considered against the background of those documents which are coming to be known as the International Bill of Human Rights, as well as of the International Convention on the Elimination of All Forms of Racial Discrimination. While not themselves giving rise to any procedures against individuals in international penal law, these documents enshrine important principles of international law which are relevant when considering the specific offences. The International Bill of Human Rights comprises the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights and the Optional Protocol.¹ While not in the form of a convention, the Universal Declaration of Human Rights is now widely regarded as forming part of international customary law, and although the two Covenants and the Optional Protocol have not received sufficient ratifications to bring them into force, the unanimous enactment by the General Assembly in 1966 makes them powerfully persuasive documents for interpreting the principles of human rights provided for in the Charter and in the Universal Declaration. The Declaration itself was proclaimed by the General Assembly as 'a common standard of achievement for all peoples and all nations'.²

It goes without saying that many of the provisions of the Universal Declaration of Human Rights were violated in the situation of hatred, violence and destruction which prevailed in East Pakistan. Among the articles breached during the period of hostilities, without going back to the period preceding 25 March, one may mention Article 2, guaranteeing equal rights; Article 3, guaranteeing the right to life, liberty and security of the person; Article 5, prohibiting cruel, inhuman or degrading treatment; Article 7, guaranteeing equal protection against all discrimination; Article 9, prohibiting arbitrary arrest, detention or exile; Article 17, guaranteeing protection against the arbitrary deprivation of property; and Articles 18 and 19, guaranteeing freedom of thought, religion and expression of opinion.

¹ cf. *Human Rights: A Compilation of International Instruments of the United Nations*, A/CONF. 32/4 (1967), pp. 1-18.

² cf. *Preamble to the Universal Declaration of Human Rights*, G. A. Res 217A (III), 10 Dec. 1948.

It is to be expected that in a civil war there will be some derogation from the rights contained in the Universal Declaration. The limits of such derogation are laid down in Article 4 of the International Covenant on Civil and Political Rights, which provides that:

‘ In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’

It is specifically provided in this Article that no derogation may be made under this provision from (inter alia) Article 6 (‘ No-one shall be arbitrarily deprived of his life ’), 7 (‘ No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ’), 16 (‘ Everyone shall have the right to recognition everywhere as a person before the law ’) and 18 (‘ Everyone shall have the right to freedom of thought, conscience and religion ’).

Although the interpretation of the words ‘ the extent strictly required by the exigencies of the situation ’ will always be relatively subjective, the systematic destruction of life and property carried out by the Pakistan army and auxiliary forces may fairly be said to have been out of all proportion to the professed aim of maintaining law and order and establishing the authority of the Pakistan Government. Moreover, the killing and arbitrary arrest, detention and torture of members of the Awami League, of students and of Hindus, for no other reason than that they belonged to these groups, were clear violations of these principles.

Convention on the Elimination of Racial Discrimination

Another relevant document is the International Convention on the Elimination of All Forms of Racial Discrimination, which Pakistan was the third country in the world to ratify. Under Article 1, racial discrimination is defined as

‘ ... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’

Each State Party undertakes under Article 2 ‘ to engage in no act or practice of racial discrimination against persons, groups of persons or institutions ’, and to ensure that all public authorities act in accordance with this obligation. There is a procedure under Articles 11

and 14 of the Convention for the consideration by a Committee of complaints ('communications') from State Parties or from individuals or groups claiming to be victims of a violation of the rights set forth in the Convention. But the enforcement of the Convention by penal and civil procedures is a duty imposed on the State Parties. Under Article 5, the State Parties undertake to prohibit and to eliminate racial discrimination in all its forms, 'notably in the enjoyment of . . . the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution'. Under Article 6, State Parties undertake to 'assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals . . . as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination'.

The words 'race' and 'racial' do not have a precise scientific signification. Indeed, a study made by UNESCO came to the conclusion that biologically there was no such thing as 'race'.³ By using the terms 'race, colour, descent, national and ethnic origin', it is clear that the Convention was intended to cover the whole spectrum of group discrimination based on motivations of a racial nature in the broadest sense in which the term is used. In this sense, discrimination against the Bengalis as a group, with their historical, linguistic, cultural, social and physical differences from the people of West Pakistan, would seem to fall within the term racial discrimination.⁴ The Urdu-speaking non-Bengalis also constituted a distinct group, and the very fact that they were termed 'Biharis' indicates that they were regarded as being of a different national or ethnic origin. Discrimination against them as a group would, therefore, also fall within the term racial discrimination.

Some of the actions of the Pakistan army and auxiliary forces appear to have been directed against Bengalis simply because they were Bengalis. How else are the 'slum clearances' in Dacca to be explained, in cases where they were not directed against Hindus? If, as has been alleged, university teachers and other intellectuals were killed simply because they constituted a potential future leadership for Bengalis, that also could be evidence of racial discrimination. The treatment of all Hindus as 'enemies of the State' and therefore as qualifying for liquidation, in that it appears to have been due to an association of Hindus with India, would also seem to have been a case of discrimination based on 'descent, or national or ethnic origin'. Equally, the reprisal killing of Biharis and burning of their houses by Bengalis would seem to have been based upon similar

³ cf. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, 1970, pp. 41-42.

⁴ cf. generally Coleman, *Revue Internationale des Droits de l'Homme*, 1969, pp. 622-623.

motives of racial discrimination. It is true that the great majority of Biharis were regarded as being the allies of and collaborators with the hated West Pakistani 'enemy', but when the killing and destruction of property was directed against Biharis as such it is hard to resist the conclusion that it was a form of racial discrimination.

The Geneva Conventions

The Geneva Conventions of 1949 proved a landmark in international law by formulating categories of offences which are prohibited in armed conflicts 'not of an international character'. The laws of war as formulated in the Hague Convention applied only to international wars.

Article 3, which is common to all the Geneva Conventions must be regarded as the basic text in this field. It has the advantage of being accepted unquestionably as representing the minimum of humanitarian law. It has been recognised almost universally, since virtually all countries are Parties to the Convention.

This Article provides:

'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

- (2) The wounded and sick shall be collected and cared for.'

During the drafting of this Article some states sought to restrict its application to cases where the insurgent forces had attained a certain level of stability and authority, such as having an organised

military force and an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. These amendments were not accepted and in our view the opinion expressed in the Commentary of the International Committee of the Red Cross that the scope of this article must be as wide as possible is to be preferred. The obligation is absolute for each of the parties and the reciprocity clause in the original draft was deliberately dropped.⁵

While there was never any period when East Pakistan was free from attacks by the insurgent forces, it is probably true to say that by May 1971 there were few if any areas which were in the control of the insurgents. However, when the Mukti Bahini returned from being equipped and trained in India, there were substantial areas, particularly rural areas, which were under their control. Some of the insurgent commanders set up forms of courts to administer rough justice to 'collaborators', but there were no regularly constituted courts as required by paragraph (1) (d) of the Article. If the Article were to apply only on a basis of mutuality, the insurgents would not be entitled to claim the benefit of the article, at least in relation to paragraph (1) (d). As we have shown, however, the Article is binding on both sides, irrespective of the compliance or capacity to comply of the other party.

There is hardly a phrase of this Article which does not appear to have been violated on a massive scale by the Pakistani army and auxiliary forces throughout the period from 25 March to the surrender of the Pakistani forces on 16 December. The evidence indicates that breaches of these provisions also occurred, though on a lesser scale, in the attacks made by some Bengali units against Biharis and other non-Bengali civilians.

The massacre of unarmed civilians, the destruction of villages and parts of towns, the rape of women, the torture and intimidation of prisoners, the taking and killing of hostages, the frequent executions without trial, the failure to tend the sick and wounded, all these, wherever they occurred, and whether as acts of repression and intimidation or as punitive measures or as reprisals were inexcusable crimes, and often aggravated by an 'adverse distinction' founded on race or religion.

One of the weaknesses of the Geneva Conventions is that they contain no provisions for sanctions in the case of breaches of Article 3. The articles of the Convention which impose a duty to search out and bring to justice persons who have committed 'grave breaches' (e.g. Articles 146 and 147 of the Fourth Convention relative to the Protection of Civilian Persons in Time of War) applies only to offences against persons or property protected by the Conventions, and this

⁵ Commentary on the Fourth Geneva Convention, I.C.R.C., 1958, Geneva, pp. 35-37.

does not include victims of offences under Article 3. Nevertheless, the duties imposed by Article 3 remain, and it is submitted that an international court set up to try offenders under international penal law would have jurisdiction to consider charges brought for breaches of the Article.

The provisions of the Conventions will also apply in respect of war crimes committed during the period of the international war, i.e. between 4 and 16 December.

Genocide Convention

Both sides have accused the other of the crime of 'genocide', and in view of the scale of the killings this is hardly surprising. Genocide has become a highly emotive term, often used by laymen to describe any large scale massacre of civilians. To lawyers, however, the term has a more precise connotation.

Article I and the relevant parts of Article II of the Genocide Convention, 1948, read as follows:

'Article I. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

'Article II. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- ...

This Convention was ratified by Pakistan, and under Article V, Pakistan undertook to enact the necessary legislation to give effect to the provisions of the Convention under internal law and to provide effective penalties for persons guilty of genocide. At the time of the hostilities in 1971 Pakistan had not yet complied with this obligation and genocide did not therefore constitute a crime under the domestic law of Pakistan. However, as Article I declared genocide to be 'a crime under international law', as soon as Pakistan ratified the Convention, genocide became an international crime applicable to all persons within the territory of Pakistan.⁶

Article III of the Convention provides that 'the following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;

⁶ cf. Oppenheim: *International Law: A Treatise*, 8th Ed., Vol. I, p. 750.

- (d) Attempt to commit genocide;
- (e) Complicity in genocide.'

Under Article IV

' Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

Returning to the definition of genocide in Article II, it will be seen that the essence of the offence lies in a particular intent, namely the intent to destroy in whole or in part a national, ethnical, racial or religious group as such. It is not, for example, enough to show that a large number of persons belonging to a particular group were killed or intended to be killed. It must be shown that they were to be killed ' as such ', i.e. simply because they belonged to that group. Moreover, the group must be a ' national, ethnic, racial or religious group '. To kill members of a political group as such is not genocide.

Many people in Bangladesh no doubt feel that the whole of the military action and repressive measures taken by the Pakistan army and their auxiliary forces constituted genocide, aimed at destroying in whole or in part the Bengali nation or people as a national, ethnic or racial group. All that need be said is that there may be difficulties in establishing this proposition in a court of law. To prevent a nation from attaining political autonomy does not constitute genocide: the intention must be to destroy in whole or in part the people as such. The Bengali people number some 75 million. It can hardly be suggested that the intention was to destroy the Bengali people. As to the destruction of part of the Bengali people, there can be no doubt that very many Bengalis were killed. We find it quite impossible to assess the total numbers, and we cannot place great confidence in the various estimates which have been made from time to time. However, it appears to be indubitable that the killed are to be numbered in tens of thousands and probably in hundreds of thousands. But this in itself is not sufficient to establish that the intent was to kill them simply because they belonged to the Bengali people as such.

After the initial holocaust of the army crack-down in Dacca, the Pakistani authorities appear to have been pursuing in particular members of three identifiable groups, namely members of the Awami League, students and Hindus. Anyone who was identified as belonging to one of these groups was liable to be shot at sight, or to be arrested and in many cases severely ill-treated, or to have his home destroyed. The fact that these groups were singled out for special attention itself militates against the finding that the intent was to destroy in whole or in part the Bengali people as such.

This does not mean, of course, that particular acts may not have constituted genocide against part of the Bengali people. In any case where large numbers were massacred and it can be shown that on the

particular occasion the intent was to kill Bengalis indiscriminately as such, then a crime of genocide would be established. There would seem to be a prima facie case to show that this was the intention on some occasions, as for example during the indiscriminate killing of civilians in the poorer quarters of Dacca during the 'crack-down'.

As far as the other three groups are concerned, namely members of the Awami League, students and Hindus, only Hindus would seem to fall within the definition of 'a national, ethnical, racial or religious group'. There is overwhelming evidence that Hindus were slaughtered and their houses and villages destroyed simply because they were Hindus. The oft repeated phrase 'Hindus are enemies of the state' as a justification for the killing does not gainsay the intent to commit genocide; rather does it confirm the intention. The Nazis regarded the Jews as enemies of the state and killed them as such. In our view there is a strong prima facie case that the crime of genocide was committed against the group comprising the Hindu population of East Bengal.

It will be noted that under the provisions of Article IV, 'constitutionally responsible rulers, public officials or private individuals' are liable to be punished for acts of genocide. Act of State cannot provide a defence. What is less clear is whether and to what extent the defence of 'superior orders' is available to a person charged with genocide. An article in the original draft expressly excluded this defence, but this article was rejected when the Convention was finally approved. Many authorities consider, however, that principle IV of the Nuremberg Principles is of general application. This provides that 'the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him'.

The question of whether the killing of non-Bengalis by Bengalis involved crimes of genocide involves difficult questions of law and fact in determining whether the necessary intent existed. It is to be noted that if these killings did constitute genocide, then it would seem that all massacres pursuant to communal violence are to be regarded as genocide. For our part, we find it difficult to accept that spontaneous and frenzied mob violence against a particular section of the community from whom the mob senses danger and hostility is to be regarded as possessing the necessary element of conscious intent to constitute the crime of genocide. Of course, the matter would be different if it could be shown that particular defendants as leaders of the mob possessed that intent and worked up the frenzy of the mob in order to achieve their purpose.

Customary Law: Crimes Against Humanity

The violations of human rights which occurred in East Pakistan are also to be considered in international law from the point of view

of customary law. One of the most authoritative statements of the principles of customary international law in the field of human rights is found in the Nuremberg Principles.

The International Military Tribunal at Nuremberg was one of the first tribunals to try the members of the government of a sovereign state for violations of international law in its treatment of its own nationals. The Charter of London, which was signed on August 8, 1946, by the victorious powers of the U.S.A., the U.S.S.R., France and the U.K., defined war crimes and crimes against humanity and constituted an International Military Tribunal to apply that law.⁷ In the words of the Tribunal:

‘ The Charter is not an arbitrary exercise of power on the part of the victorious nations, but . . . it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.’⁸

The principle that a sovereign is bound to a minimum standard of humanity in his treatment of his citizens has its basis in customary international law. The Preamble of the Hague Convention stated that in cases not covered by the laws of war, the victims of war were nonetheless protected by ‘ the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience ’. The doctrine of humanitarian intervention allowed a state to intervene forcibly in certain circumstances to prevent another state from treating its own nationals in such a way as to ‘ shock the conscience of mankind ’. The United Nations Charter explicitly recognises what earlier writers on international law accepted, that all people are entitled to respect for certain fundamental human rights by all governments, including their own.⁹

The Charter of London, as only a four-power treaty, might have difficulty in itself in claiming to establish international law, but after its inception nineteen other nations acceded to it, and it was incorporated into the peace treaties signed with many of the axis powers, thus bringing to quite a substantial number the nations which formally agreed to its formulations. In 1950, the United Nations General Assembly accepted as part of international law the Nuremberg Principles as formulated by the International Law Commission at their request.¹⁰ Finally a number of international treaties such as the International Covenants of Human Rights and the Genocide Con-

⁷ 82 U.N.T.S. 279.

⁸ Judgment of the Nuremberg Tribunal, p. 216, quoted in Wright, *The Law of the Nuremberg Trial in International Criminal Law*, Mueller & Wise, eds. (1965).

⁹ Wright, *supra*, p. 264-265.

¹⁰ Woetzel, *The Nuremberg Trial in International Law*, 1962, p. 233.

vention, as well as the Universal Declaration of Human Rights passed by the General Assembly in 1948, embody many of the principles of Nuremberg within their provisions. Thus the principles of Nuremberg are today fully accepted as a part of international customary law.

The Nuremberg Principles, as formulated by the International Law Commission, define war crimes as:

‘Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.’

Crimes against humanity are defined as:

‘Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.’

A ‘crime against peace’ is defined as

- ‘(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).’

The Nuremberg Principles were formulated in relation to an international war situation and there has been much discussion as to how far they are applicable under customary international law to an internal war situation, i.e. to ‘an armed conflict not of an international character’.

As far as ‘crimes against peace’ are concerned, it is plain that the definition relates only to the outbreak of an international war, and at least up to December 3, 1971, no question arises of a ‘crime against peace’ in East Pakistan.

The application of war crimes is less simple. The definition is in very general terms and includes crimes committed against civilian populations and property. Some writers take the view that the definition in terms of violations of the laws of war or customs of war limits war crimes to offences committed in international wars. In our view this restrictive interpretation fails to recognise the very wide scope which the United Nations plainly wanted to give to these principles, and they should be considered equally applicable in an internal war situation. The adoption of Article 3 of the Geneva Conventions itself shows that the international laws of war extend to

internal war situations and accordingly ' war crimes ' should, at the least, include breaches of Article 3.

The notion of ' crimes against humanity ' has undergone a similar evolution. This is particularly well set out in the report of the United Nations Working Group of Experts commissioned to study the question of *apartheid* from the point of view of international penal law.¹¹ The report prepared by the Rapporteur, Professor Felix Ermacora, is an important document.

In the Nuremberg formulation, there is some overlapping between war crimes and crimes against humanity, but crimes against an enemy civilian population were in general intended to be covered by the term ' war crimes ' and crimes against a belligerent's own population by the term ' crimes against humanity '. The Nuremberg Principles, as stated, relate crimes against humanity to crimes ' in execution of or in connection with any crime against peace or any war crime '. There seems to be no reason in principle why the concept of crimes against humanity in international law should be confined to an international war, or indeed to a war situation at all. This is certainly the view which has been taken in the United Nations.

Since the United Nations have been dealing with the policy of *apartheid*, various decisions have condemned the policy as being ' incompatible with the principle of the charter of the U.N. and constituting a crime against humanity '.¹² During its 26th session the General Assembly adopted a number of resolutions which are relevant to this issue:

' (a) Resolution 2775 F (XXVI), entitled ' Establishment of Ban-tustans ', contains the following preambular paragraphs:

' *Recalling* its resolutions 95 (I) of 11 December 1946, in which it affirmed the principles of international law recognized by the Charter of the International Military Tribunal, Nürnberg, and the judgment of the Tribunal,

' *Bearing in mind* the obligations of all States under international law, the Charter of the United Nations, the human rights principles and the Geneva Conventions,

' *Noting further* that under the aforementioned resolution crimes against humanity are committed when enslavement, deportation and other inhuman acts are enforced against any civilian population on political, racial or religious grounds.'

(b) Resolution 2784 (XXVI), entitled ' Elimination of all forms of racial discrimination ', adopted on 6 December 1971, in paragraph 1 of section II ' *Reaffirms* that *apartheid* is a crime against humanity '.

(c) Resolution 2786 (XXVI), entitled ' Draft convention on the suppression and punishment of the crime of *apartheid* ', adopted on 6 December 1971, contains the following preambular paragraph:

¹¹ UN Document E/CN. 4/1075, 15 February 1972.

¹² *Ibid.*, p. 5.

‘ *Firmly convinced that apartheid constitutes a total negation of the purposes and principles of the Charter of the United Nations and is a crime against humanity* ’.

Perhaps the most authoritative statement that ‘ crimes against humanity ’ are not limited to international war situations is contained in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity which entered into force on 11 November 1970. Article 1 of the Convention provides:

‘ No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

‘ (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the ‘ grave breaches ’ enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

‘ (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.’

Pakistan voted for this Convention, and although she has not ratified it so as to be bound by the restriction on periods of statutory limitation, her vote in favour of it involves an acceptance of the principle that crimes against humanity are not limited to international war situations.

If it be accepted that the concepts of war crimes and crimes against humanity were applicable to the hostilities in Pakistan, there is abundant evidence that war crimes were committed by the Pakistani army and auxiliary forces and that many crimes against humanity were also committed. It does not seem necessary to repeat here again the nature of the systematic actions of the Pakistani army and auxiliary forces which fall within the definition of war crimes and crimes against humanity.

A more difficult question is whether the reprisal attacks made by Bengalis against non-Bengalis, in particular between 26 March and mid-April, 1971, are also to be regarded as war crimes and/or as crimes against humanity. The scale of the crimes was of a lesser magnitude, but nevertheless was probably sufficient to qualify for consideration as crimes against humanity. A crime against humanity requires a certain magnitude of violence before it becomes the concern

of the international community in that it must surpass 'in magnitude or savagery any limits of what is tolerable by modern civilisations'.¹³

As in the case of genocide, we doubt whether atrocities committed by unorganised mobs in spontaneous outbursts should be considered as crimes under international penal law. However, any individuals who knowingly incited a mob to violence could be held guilty of a crime against humanity.¹⁴ So also where the attacks were made by organised forces.

Individual Responsibility

The remaining questions to be considered are those of individual responsibility under international law for violations of human rights, and where such responsibility exists, what proceedings fall to be taken against those responsible and in what form.

We are not concerned with any political issues which may be involved in deciding whether particular individuals should be prosecuted in connection with the violations of human rights which have occurred. We are concerned only to examine what in international law is the liability of individuals to prosecution and what duty lies upon states who may decide to prosecute them.

The question whether and the extent to which individual persons are subject to international law is much disputed, but the one field in which it is now clearly established that individual persons are bound by international law is that of human rights. The Nuremberg Principles explicitly state that 'any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment' (Principle I), that 'crimes against peace', 'war crimes' and 'crimes against humanity' are 'punishable as crimes under international law' (Principle VI), and that complicity in the commission of these crimes is itself a crime under international law (Principle VII). Moreover, 'the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law' (Principle III), and 'the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him' (Principle IV). Furthermore, 'the fact that internal law does not impose a penalty for an act which constitutes a crime under internal law does not relieve the person who committed the act from responsibility under international law' (Principle II).

¹³ Opening speech of Justice Jackson, Chief U.S. prosecutor at Nuremberg, cited in Schwelb, *Crimes against Humanity* (1946), 23 B.Y.I.L. 178, 195.

¹⁴ cf. the case of Julius Streicher, convicted at Nuremberg of crimes against humanity for inciting people through his newspaper, *Der Stürmer*, to murder and extermination of Jews; Woetzel, *supra*, p. 10.

In our view these principles are declaratory of principles of general application in international law, and apply in internal war situations as much as in international wars. The effect of these principles is that the individual officers and soldiers who carried out the 'kill and burn' missions and other crimes under international law are liable to be prosecuted and punished unless there was no moral choice open to them. Those who ordered the commission of the crimes are liable to prosecution. Equally, those who passed on the orders or who, knowing of these crimes or the orders for them, failed to prevent their being carried out when they had the opportunity to do so, are themselves guilty of 'complicity' in the commission of the crimes.

Form of Tribunal

What form of tribunals should be established for the trial of persons accused of these crimes? Clearly they may be tried under the domestic criminal law either before the normal criminal courts or before special tribunals established for the purpose. The persons charged have, of course, the right to a fair trial on the facts and law (Nuremberg Principles, Principle V). This should include the right to counsel of their choice, who may be an advocate from another country. The law under which they are to be tried must be law which was applicable at the time when and at the place where the offences were committed.

Although the Government of Bangladesh is entitled to hold any such trials under domestic law before domestic tribunals, it is suggested that there are cogent reasons why it would be preferable if those considered principally responsible for these offences were tried under international law before an international tribunal. If, as has been reported, senior Pakistani officers and officials are to be tried, it would be easier to satisfy international opinion that they have received a fair trial if the tribunal is international in character. In this connection, it should be recalled that the International Military Tribunal at Nuremberg was widely criticised for being composed exclusively of judges from the victorious countries. It is suggested, therefore, that it would be preferable if a majority of the judges were from neutral countries. In a situation of this kind, one would prefer to see an international tribunal constituted under the authority of the United Nations to try those principally accused. In present circumstances it is regrettably the fact that no such initiative is to be expected, though the Prime Minister of Bangladesh has made clear that his Government would welcome such a tribunal. If an international tribunal is to be constituted, it would have to be by the Bangladesh Government itself. For this reason, and on the assumption that the procedure to be adopted is likely to be the ordinary criminal law procedure of the country (which is based on and follows the English

common law procedure), it seems reasonable that the Court should be presided over by a Bangladesh judge.

Assuming that such a tribunal is established under Bangladesh law, there would seem to be no reason why offences should not be charged both under international law and under the domestic law of Bangladesh.

An additional reason for preferring charges under international law arises in relation to the crime of genocide. As we have seen above, it would not be possible to charge persons with genocide under Bangladesh domestic law without passing retrospective legislation but no such difficulty would arise in relation to a charge preferred under international law.¹⁵

¹⁵ See p. 55 above.

(3) RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW

The principle of the right of a people to self-determination seems self-evident, but there is no more explosive issue in today's world. What constitutes a people? In what circumstances can they claim the right? What is the extent of the right? Does it include a right to secession? How is the right to be reconciled with the principle of the territorial integrity of each Member State of the United Nations?

The problem was succinctly stated by U Thant in his 'Introduction to the Report of the Secretary-General' in 1971:

' I feel obliged to mention a problem which has been almost daily in my mind during my time as Secretary-General. I refer to the violation of human rights within the frontiers of a state. Theoretically, the United Nations has little standing in such situations — and they are all too common . . .

' A related problem which often confronts us and to which as yet no acceptable answer has been found in the provisions of the Charter, is the conflict between the principles of the integrity of sovereign States and the assertion of the right to self-determination, and even secession, by a large group within a sovereign State. Here again, as in the case of human rights, a dangerous deadlock can paralyse the ability of the U.N. to help those involved.'

The notion of the right of a people to self-determination amounts to a *de jure* recognition of a sociological phenomenon: the concept that certain human groups constitute 'peoples' and that a people constitutes an entity having a legal personality or status analogous with that of a human person, and is accordingly entitled to certain rights and fundamental liberties which, like those of the individual, must be respected. In practice the sovereignty which, according to the principle of self-determination, should rest with peoples, is assumed by organs of the state, and in many if not most states of the world any attempt by a group within an existing state to assert the right of self-determination will be regarded as a form of treason. In consequence, the will to assert the right is often manifested by a violent challenge to an established power with a view to obtaining by force a change of

status, the legitimacy of which will be sanctioned if and only if the use of force carries the day.

The concept of self-determination finds its origin in the modern concept of nationalism in which the sovereignty of the feudal Prince is replaced by the sovereignty of the people. This revolutionary and recent intervention arose from the evolution of ideas during the 17th and 18th centuries which were institutionalised in the French Revolution. The Declaration of the Rights of Man established the legal basis for these nationalist and revolutionary rights, the rights of peoples and of individuals. The socio-juridical transformation was radical. All the attributes formerly attaching to the person of the Prince were conferred on the 'sovereign people'. The new sovereign became a new socio-juridical entity, the Nation, in which was vested the sole authority to exercise the right of sovereignty.

If we consider the question in this original context, we are led to the conclusion that the right of a people to self-determination means, legally speaking, the right of a people to constitute, either alone or jointly with other peoples, a sovereign nation. This interpretation is confirmed by the Charter of the United Nations, whose Preamble opens with the words:

'We the Peoples of the United Nations . . .',

thus marking the difference between People and Nation. And by Article 1 (2) of the Charter, one of the purposes of the United Nations is:

'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .'.

It is even more clearly stated in the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. Article 1, which is common to both Covenants, reads:

'1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

2. . . .

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

The important principle is, therefore, established that the duty to 'promote the realisation of the right of self-determination' is imposed upon all State Parties and not merely upon the colonial powers. This implies some limitation upon the absolute sovereignty of existing nation states.

Article 1 of the two International Conventions on Human Rights follows the wording of Article 2 of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Similar terms are to be found again in the important 'Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations', which was approved by the General Assembly in 1970 by Resolution 2625 (XXV). This is the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity. The conflicting principles are stated in the Preamble to the Declaration in these terms:

' The General Assembly,

...

Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality,

Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter, ...'

The Declaration then proclaims 7 principles of international law relating to friendly relations and cooperation among states. One of these is 'The principle of equal rights and self-determination of peoples'.

Under this principle it is stated:

' By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.'

The form which self-determination may take is stated in these terms:

' The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.'

Finally, the duty of a state towards a people claiming the right to self-determination is stated as follows:

'Every state has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuance of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.'

One cannot fail to be struck by the extremely wide scope of these provisions asserting the sovereign right of all peoples to self-determination. Moreover, it is the free determination by a people of the form of their political status, without external interference, which constitutes the exercise of their right to self-determination; a decision freely taken automatically leads to the acquisition of a status, and it becomes an infringement of international law for any state to attempt to deprive them of that status by forcible action, and if any state does so, other states should give support to the people asserting their right of self-determination.

Turning to the conflicting principle of territorial integrity we find it stated under 'The Principle of Sovereign Equality of States' that 'all states enjoy sovereign equality', and that sovereign equality includes as one of its elements:

'(d) The territorial integrity and political independence of the state are inviolable.'

This principle has to be given full weight when considering the extent of the right of self-determination of peoples. Not only does the general part of the resolution assert that 'each principle should be construed in the context of other principles', but under the principle of equal rights and self-determination of peoples it is expressly stated:

'Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.'

This courageous attempt to reconcile the two conflicting principles still leaves a number of difficulties. In the first part it says that the principle of territorial integrity is to prevail in the case of sovereign states conducting themselves 'in compliance with the principle of equal rights and self-determination of peoples'. This seems to recognise that a state may include more than one 'people', each of whom is entitled to self-determination, but implies that self-determination is something which can be achieved within the framework of a larger state. Presumably what is contemplated is a reasonable measure of

autonomy, perhaps within a federal state. If so, the term 'self-determination' in this passage has a different meaning from the passages quoted earlier which equate self-determination with freedom and independence. The final phrase makes clear that if a state is conducted in compliance with the principles of equal rights and self-determination of peoples, it must have a government representing 'the whole people belonging to the territory without distinction as to race, creed or colour'.

This passage must also be considered in the light of another principle not referred to in the Declaration of Principles. It is a widely held view among international lawyers that the right of self-determination is a right which can be exercised once only. According to this view, if a people or their representatives have once chosen to join with others within either a unitary or a federal state, that choice is a final exercise of their right to self-determination; they cannot afterwards claim the right to secede under the principle of the right to self-determination. It was on this principle that the claim to independence of the southern states in the American Civil War and of Biafra in the Nigerian Civil War was resisted. It is submitted, however, that this principle is subject to the requirement that the government does comply with the principle of equal rights and does represent the whole people without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive.

Against the background of these legal principles, we propose to consider:

- (1) whether the population of East Pakistan constituted a 'people' in the sense in which the term is used in the U.N. Charter and other relevant instruments of international law;
- (2) if the answer is 'yes', whether the people of East Pakistan were entitled in international law to assert a right to independence under the principle of self-determination.

In considering these questions, we shall base our judgments on the texts already referred to, incorporating the general consensus of opinion of the Nations of the world on this subject, and we shall strive to interpret them in a restrictive sense, in view of the obvious dangers involved in adopting an excessively wide interpretation.

(1) Did the Population of East Pakistan Constitute a 'People'?

First, we must seek to establish, as best we can, what constitutes 'a people' having the right to self-determination. As we have seen, the Declaration of Principles of International Law is silent on this question, and equally, no guidance is to be obtained from the Charter of the United Nations or the two International Covenants on Human Rights.

It may be helpful to begin by examining what groups do not, or not necessarily, constitute a people. Clearly there can be many minorities, linguistic, racial or religious, which have legitimate rights as such, but which are not entitled to claim the right to self-determination. Regional groupings and regional loyalties may be very real and of great importance, without their populations constituting peoples within the meaning of this doctrine. Again, a tribe is not to be regarded as such as a people, but rather as a group of clans. Successful nations achieve a real unity in diversity of many different elements. The right of self-determination is not intended to encourage separatism for every grouping which goes to make up the complex pattern of a historical nation.

The difficulties of the problem perhaps become clearer if one tries to establish a list of the characteristics possessed by a people, to establish as it were a composite picture permitting its identification.

If we look at the human communities recognised as peoples, we find that their members usually have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be:

- historical,
- racial or ethnic,
- cultural or linguistic,
- religious or ideological,
- geographical or territorial,
- economic,
- quantitative.

This list, which is far from exhaustive, suggests that none of the elements concerned is, by itself, either essential or sufficiently conclusive to prove that a particular group constitutes a people. Indeed, all the elements combined do not necessarily constitute proof: large numbers of persons may live together within the same territory, have the same economic interests, the same language, the same religion, belong to the same ethnic group, without necessarily constituting a people. On the other hand, a more heterogeneous group of persons, having less in common, may nevertheless constitute a people.

To explain this apparent contradiction, we have to realise that our composite portrait lacks one essential and indeed indispensable characteristic — a characteristic which is not physical but rather ideological and historical: a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist. A modern example is the ancient Jewish people who have exerted their will to exist as a separate Israeli nation only during the present century. This leads us to suggest that the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.

What is plain is that there is no single, authentic answer to the question 'what is a people'? All the official texts ignore it, presumably owing to the difficulty of definition. In a matter where passions are so easily aroused, this ambiguity is dangerous and can lead to extremely grave consequences. We do not propose ourselves to attempt to formulate any comprehensive definition. Rather, in the absence of any accepted objective criteria, we propose to consider the question whether Bangladesh constituted a people by applying the various criteria referred to above.

Historically, the links between East and West Pakistan are of modern origin, apart from the fact of their both having been included in the much larger Moghul and British empires. Racially, if we may use this non-scientific term to express differences of physical appearance, dominant characteristics and behaviour, the population of the eastern and western wings may be said to be of different races, though both belonged to the wider Indo-Aryan race. Linguistically there was a marked difference. In East Pakistan 98% of the population spoke Bengali, compared with under 2% speaking Urdu, the principal language of Pakistan. The languages, which are written with a different script, each have a rich culture and literature of their own. Religion was the chief common factor shared between the two wings. Though there were important religious minorities, the great majority of both populations practised the Moslem religion, and as we have seen it was the determination to create a strong Islamic state which was the principal motive force in the foundation of Pakistan. Geographically, the eastern and western wings were separated by over a thousand miles of foreign territory, and their geographical features were very different. This in turn was reflected in social differences. The staple diet of West Pakistan was corn and that of East Pakistan was rice. West Pakistan turned naturally for its cultural and commercial exchanges towards the Arab Middle East and Iran, East Pakistan towards India and the Asian Far East. Economically, the two wings hardly comprised a natural unity, and the economic conflict with India resulted in East Pakistan being cut off from their natural economic outlets and trading partners in the neighbouring parts of India. Quantitatively, each of the wings was large enough in population and territory to constitute a separate nation state.

Together these various factors constitute a strong body of presumptive evidence in support of the contention that there existed a distinct Bengali people. The only real common bond was the Moslem religion. It is important to remember, however, the profound hold which this religion has upon its adherents, the concept of an Islamic state being one in which the whole culture and civilisation is permeated by Moslem ideology.

Turning to the last of the suggested criteria, the conscious identity of themselves as a people and with the political will to self-government, it was only in the later political evolution of the state of Pakistan that

one finds significant evidence that the people of East Pakistan thought of themselves as a separate people. Long before the foundation of Pakistan there was, of course, a Bengali people which included the predominantly Hindu population of West Bengal. It was, however, by a deliberate choice of the state legislators in 1946 that the decision was made that East Bengal should join the Moslem state of Pakistan rather than maintain the unity of Bengal within a secular Indian state.

The first landmark in the move towards greater autonomy of East Pakistan was the 1954 elections, when the United Front in East Pakistan won 97% of the seats, and routed the Moslem League which had constituted the foundation of the unitary Pakistan state. Although the struggle was one for greater provincial autonomy, the motive force was an awakening national consciousness and the determination, clearly expressed by democratic means, to free themselves from the domination of West Pakistan.

In the 1970 elections the population had a further opportunity to express their views. The results of these elections, by their near unanimity, take on the force of a referendum. There can be no doubt that the principle which won that consensus of opinion was the single basic notion of autonomy, the religious question having played little or no part in the voting. As regards the juridical framework within which that autonomy might be realised, while there were some who believed that autonomy could never be achieved without secession, the great majority of voters were content to accept the Awami League proposals for autonomy within a federal constitution. What is of significance for our present purpose is that the electorate of East Pakistan showed that what they really hoped for was to be able at last to manage their own affairs as they wished, without having to receive orders from or render account to people whom they tended to see as a domineering and alien power whose attitudes and behaviour had provoked resentment.

It seems impossible to deny that the result of the 1970 election established that the population of East Pakistan now considered themselves a people with a natural consciousness of their own and were claiming a high degree of autonomy within the federal state of Pakistan. In these circumstances, assuming as we do that an independent nation state may include more than one 'people', we consider that by 1970 the population of East Pakistan constituted a separate 'people' within the 'whole people' of the state of Pakistan.

- (2) *Were the People of East Pakistan Entitled in International Law to Assert a Right of Independence under the Principle of Self-Determination?*

The starting point on this issue was the decision by the elected representatives of what became East Pakistan to opt for union with West Pakistan rather than for union with West Bengal within the state of India. Many would argue that this constituted an exercise by the

people of East Bengal of their right (if any) of self-determination. As against this it may be said that this question had not been an issue in the campaign when the legislators were elected, and that the choices open to them did not include independence for East Pakistan. Nevertheless, they were elected representatives at the time and it seems right to accept that this was an exercise of the right of self-determination by the people of what became East Pakistan. In these circumstances, no further exercise of the right would arise in international law so long as they were being accorded 'equal rights and self-determination . . . and thus [were] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

A strong case can be made out for saying that the people of East Pakistan would have been entitled to claim independence before the 1970 election on the grounds that the denial of 'equal rights' which they had suffered since the institution of the state of Pakistan brought into force their right of self-determination. Until the 1970 election, they had never been allowed equal representation, the doctrine of 'parity' between the two wings being itself a denial of equality. Bengalis were heavily under-represented at all levels of the civil service and military forces. The economic and social disparities were even more striking. East Pakistan was consistently denied its fair share of investment, economic aid and development, and the per capita income of its population which was 18% lower than that of the west in 1949-50 was 75% lower by 1967-68. There was the same disparity in social, educational and health fields. It is these factors which led the people of East Pakistan to claim that they were in the words of the Declaration of Principles approved by Resolution 2625 subject to 'alien subjugation, domination, and exploitation [which] constitutes a violation of the principle [of self-determination], as well as a denial of fundamental human rights, and is contrary to the Charter'.

After the 1970 election the case for saying that East Pakistan was being denied equal rights largely disappears. These elections were for the first time held on the basis of one man one vote in order to elect an assembly to draw up a new constitution. There was no discrimination against East Pakistan either in the conduct of the election or in terms of the Legal Framework Order under which it was held. That Order contained conditions about the powers of the central government, and directive principles to safeguard the Islamic State, but these applied equally to East and West Pakistan. The Awami League would no doubt contend that the refusal to grant the Six Points was itself a denial of 'the principle of equal rights and self-determination of peoples'. As we have seen, the Declaration of Principles of International Law seems to imply that a separate people within a nation state are entitled to a high level of self-government in order to develop their own cultural, social and economic institutions. But how is it to be determined what that level should be? On what criteria can it be

said that the Six Points complied with the principle, whereas a federal constitution within the Legal Framework Order would not have done?

The reason why President Yahya Khan would not allow a constitution to be drawn up in accordance with the Six Points is clear. He considered that in any constitution which would have resulted, the powers of the central government of Pakistan would have been weakened to the point where the future territorial integrity and political unity of Pakistan was threatened. It is easy to understand this attitude. As a military leader, it came naturally to him to think that a strong central government was the best and indeed the only way of maintaining the unity of the state. As he believed in the legality of his own Presidency and of his martial law regime, and was supported in this belief by the earlier decision of the Supreme Court in Dosso's case¹, he naturally considered that he was entitled and indeed that it was his duty to refuse to permit a constitution to be drawn up which did not comply with the conditions he had laid down in the Legal Framework Order.

We have already considered in Part III the legality of the martial law regime under Pakistan law, and have seen that the Legal Framework Order under which the elections were held was invalid. It may be argued from this that the Constituent Assembly itself was invalid and that the only way of returning to legality was by recalling the old National Assembly elected under the 1956 Constitution, and transferring the Presidency to the Speaker of the Assembly. In the circumstances prevailing, and in particular after the result of the 1970 election, whatever the strict legal position may have been, the old assembly would have lacked any political authority. The only practical way, it is submitted, of returning to legality would have been by convening the Constituent Assembly and allowing it to draw up a new constitution. These, however, are matters of domestic law. President Yahya Khan's regime had been internationally recognised as the Government of Pakistan, and its authority could not be challenged in international law.

It must also be remembered that the Awami League had no mandate for independence, not did they claim to have one. They had fought the election on the Six Points programme of autonomy within a federal constitution. It was only when the army made it clear by their crack-down that they were not prepared to entertain a constitution on this basis that the Awami League leaders proclaimed the independence of Bangladesh and called for armed resistance.

Therefore, if the Declaration of Principles of International Law is accepted as laying down the proper criteria, it is difficult to see how it can be contended that in March 1971 the people of East Pakistan,

¹ See Part III above.

or the leaders of the Awami League on their behalf, were entitled in international law to proclaim the independence of Bangladesh under the principle of self-determination of people.

It does not follow from this, of course, that the action of the Awami League leaders in calling for armed resistance to the army cannot be justified under the domestic law. As we have seen, the martial law regime was illegal and the old constitution had broken down and was completely discredited. It was necessary to draw up a new constitution for the state of Pakistan. The 1970 elections had resulted in a clear decision in favour of a certain level of provincial self-government. Let it be conceded in favour of General Yahya Khan that this would have seriously weakened the power of the central government. Nevertheless, it still recognised the territorial integrity and political unity of Pakistan. It may be that the only way of maintaining this unity was by reducing the power of the central government. As we have seen in Part I, the all-India constitution which Mr. Jinnah would have been prepared to accept in 1946 would also have resulted in a weak central government. Provided that the majority were ready, as they were, to grant an equal degree of autonomy to the people of West Pakistan, it is difficult to see why on democratic principles their will was not entitled to prevail. If the people of West Pakistan were not prepared to accept a constitution on this basis, the only remedy would have been partition of the state. The minority were not entitled to force their preferred constitution upon the majority.

In our view it was not in accordance with the principles of the Charter of the United Nations for a self-appointed and illegal military regime to arrogate to itself the right to impose a different form of constitution upon the country, which was contrary to the expressed will of the majority. As the army had resorted to force to impose their will, the leaders of the majority party were entitled to call for armed resistance to defeat this action by an illegal regime.

(4) THE ROLE OF INDIA

The Rules of Good Neighbourliness

As the violence spread in East Pakistan the flood of refugees fleeing from that violence took on such vast proportions that it created a formidable problem for India. In face of this invasion of refugees, the Indian Government adopted a policy whose impact on events in East Pakistan was decisive. During a first phase, from the end of March to the end of November 1971, various measures were taken of direct or indirect assistance to the insurgents, including an increasingly active military assistance which finally led to frontier incidents and engagements between Indian and Pakistani troops. Then, on December 3, took place the Pakistani air attack on Indian air bases, and India's retaliation in the form of a massive land attack which led to the surrender of the Pakistani forces in East Pakistan. By these acts, first of assistance and later of armed intervention, did India contravene its international obligations? Or did India have adequate legal motives to justify those acts?

It should be borne in mind that according to the terms of Article 2 of the Charter India, like Pakistan and all other Member States of the United Nations, was bound to settle its international disputes by peaceful means and to 'refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State'. Moreover, in accordance with international customary law India's first duty was to maintain an attitude of neutrality and to refrain from interfering in the hostilities which had broken out in the neighbouring State. Indeed, subject to other considerations which will be discussed later, the traditional rule of neutrality in respect of belligerents engaged in a civil war was applicable to India up to December 6, 1971, the date on which she recognised Bangladesh as an independent country.

We will consider first the legality of the assistance given by India to the insurgents who were fighting for an independent Bangladesh, and then the legality of India's armed attack, resulting in the surrender of the Pakistani armed forces in East Pakistan.

Assistance to Insurgents

If India's actions had been limited to receiving and offering shelter to the Bangladesh leaders claiming to constitute a 'government in exile', granting them certain practical facilities such as the use of its radio services for broadcasts intended for Bangladesh, and even building up troop concentrations along its frontiers with Pakistan, they would not have offered very serious cause for protest on the part of Pakistan. The right of sanctuary for belligerents is recognised in customary law, and as to the radio broadcasts, the mass media of a neutral nation may be permitted to take whichever side in the controversy they may select. It may be that the radio programmes from India served to increase the flow of refugees, by increasing their fear of the Pakistan army, and by making it known that the Indian Government was prepared to allow them to cross the frontier and to provide for them in refugee camps. But none of these things involved an infringement of neutrality. As regards the concentration of troops along the frontiers, while this may be seen as the expression of an unfriendly and mistrustful attitude, it is nonetheless a current practice, even among states which are particularly careful to maintain an attitude of strict neutrality when civil war is raging in a neighbouring country.

More serious, however, from the point of view of international law, is the military assistance given by India to the Bangladesh insurgents. This assistance is not admitted by India, but there seems to be little doubt that the Bangladesh guerrilla forces, the Mukti Bahini, were able to recruit and train volunteers on Indian soil, and were given the necessary arms, ammunition and logistic support to enable them to mount operations from Indian territory. According to the principles of customary international law, India was under a duty to observe neutrality by refraining from providing either of the belligerents with any military supplies or allowing them to use her neutral territory for the transit of military forces or for the preparation or launching of military operations. It appears clear that these obligations under the customary laws of neutrality were not respected by India.

If the people of East Pakistan had been justified in international law in asserting their independence under the principle of self-determination, then by virtue of Article 2 of the United Nations Charter they would have been entitled to seek and to receive support in accordance with the aims and principles of the Charter, and India, like all other states, would have had a duty to 'promote the realisation of the right of self-determination' (U.N. Resolution 2625). We have already expressed the view, however, that it cannot be established that the principle of self-determination of peoples applied to this situation, and India's assistance to the insurgents cannot, therefore, be justified under this principle.

In any event, any such assistance in promoting a right of self-determination must be 'in accordance with the provisions of the Charter'. The Declaration on Principles of International Law approved in Resolution 2625 states (in the section dealing with the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations) that

'Every state has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.'

and that

'Every state has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts, *when the acts referred to in the present paragraph involve a threat or use of force.*' (our italics)

On the face of it, certain of India's actions fall within the terms of this condemnation, namely the provision of military supplies to the insurgents and the granting of facilities to recruit and train guerrilla forces on Indian soil. India's involvement appears to have gone further than this. There can be no doubt that India did take military action against Pakistan before the outbreak of open war. Apart from shelling across the frontier which had gone on for some time on both sides, each alleging it was done by way of retaliation, more serious operations occurred towards the end of November. As we have seen, the Indian army penetrated several miles into Pakistan territory with tank forces and indeed captured and brought back to India some Pakistan tanks. India's justification was that this action was directed to stopping the attacks being made and being prepared by Pakistan forces against Indian territory. It is always difficult to pass judgment on conflicting claims concerning frontier incidents, but it is hard to see how these attacks by India can be justified. These hostilities did, however, retain the character of frontier incidents up to December 3.

In these circumstances, what was the justification for the preventive attack, or 'pre-emptive strike' by the Pakistan airforce against Indian air bases on December 3? The only justification for resorting to force expressly recognised by the United Nations Charter — and then only subject to certain conditions — is that referred to in Article 51, that is to say 'the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. Customary international law authorises military action in self-defence only where there exists a 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment

for deliberations'.¹ Moreover, the response to the attack must be proportionate to the threat which the attack represents.

We find it difficult to see how the military action taken by India up to the date of the Pakistan air attack justified more than frontier reprisals of the kind which had been taking place on both sides for some time. It was natural that Pakistan should want to put a stop to the Mukti Bahini's Indian based guerilla operations, and the pursuit of guerillas on to Indian territory or attacks on training centres in India could no doubt have been justified upon this ground. But the Pakistan air raids on Indian air bases hundreds of miles away from the frontier with East Pakistan cannot be justified either on the basis of reprisals or as self-defence.

India's reaction to Pakistan's 'pre-emptive strike' was to treat it as an act of aggression, a *casus belli*, justifying India in sending her forces into the territory of Pakistan. Soon thereafter India recognised the Government of Bangladesh as an independent sovereign state and from then on India's justification for her action was that she was giving aid to this government in its war of liberation against Pakistan. And so the internal conflict between the two provinces of Pakistan became an international armed conflict of the conventional type.

While it is difficult to establish accurately the exact moment at which the Indian troops came into action, it seems that there was an interval of about two days between the Pakistani preventive attack and the Indian retaliation. A surprise attack of this type certainly offers sufficient justification for retaliation, and probably is sufficiently grave to constitute a *casus belli*. Various writers have speculated upon the motives underlying Pakistan's air attack against India and India's reply to it. It has been suggested that Pakistan intended to precipitate the war and thought she would be able to achieve military successes on the western front which would strengthen her hand in the negotiations she anticipated would result from a United Nations intervention. On the other hand it has been suggested that India seized upon the opportunity offered by the air attack to transform into a *casus belli* an event which was certainly serious but which might have been seen as an isolated 'incident' had she not preferred to magnify its importance and treat it as an 'aggression'.

It would be unwise to embark on a judgment of either party based on their supposed intentions. We restrict ourselves to the facts. In our view the circumstances, technically, justified a declaration of war and India's claim that she was acting in self-defence in accordance with Article 51 of the Charter of the United Nations was legally valid. It does not follow, however, that all of India's subsequent actions can be justified on grounds of self-defence.

¹ 29 British and Foreign State Papers 1129, 1138 (remarks of Mr. Webster, April 24, 1841).

As we have observed in relation to Pakistan's air attack, the doctrine of self-defence requires that the response to an attack should be proportionate to the threat which the attack represents. We find it difficult to accept that the scale of India's armed action was motivated solely by military considerations based on the need to protect her national frontiers and territory. India, of course, also argues that as from December 6, when she recognised the Government of Bangladesh, her action was justified as legitimate support for her new ally in its struggle for independence.

This is a dangerous doctrine, and would set at nought all the principles of international law enjoining neutrality on third-parties in a civil war situation. All that a neighbouring country would need to do would be to grant recognition to the rebel forces in order to justify her intervention in their support. It becomes necessary, therefore, to look further into the circumstances in order to determine what justification, if any, there was for India's full-scale invasion of Pakistani territory.

In the Name of Humanity

Neither the military operations, nor the political developments which followed, offer support for the allegation that India wanted to take advantage of the situation in order to settle its account with Pakistan and put an end to the dispute on the western frontier which had not been settled by armed conflict a few years earlier. But it is clear that India did intend to use military action to free Bangladesh and enable it to become a sovereign state independent of Pakistan. On what grounds, if any, can the resort to force for this purpose be justified in international law? The answer is complex and involves matters of international concern as well as India's own direct interests.

We have already rejected the proposition that India's actions can be justified in international law as support to a people who were asserting a right to self-determination.

We may also recall the 1950 treaty between India and Pakistan, by which the two contracting parties solemnly guaranteed for all citizens within their respective territories absolute equality, regardless of religious distinctions, and security in respect of their lives, culture, property and personal dignity.² This treaty is important because it gives India a direct interest in the way in which Pakistan treats its Hindu minority, and it means that Pakistan cannot claim that this is a question falling solely within its domestic jurisdiction. The treaty officially recognised the real character of the problem as an international, and not merely an internal, affair. There can hardly be any doubt that the large-scale and systematic discrimination and persecution of which the Hindus were victims from March to December

² 131 United Nations Treaty Series 3 (8 April, 1950).

1971 constituted a violation by Pakistan both of its international treaty obligations and of its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. One may, however, question whether these violations alone, if there had been no additional circumstances, would have constituted a sufficient justification for launching the war. Moreover, the religious question, important though it was, does not seem to have been the decisive factor in the crisis which finally led to war.

Closely linked with the preceding problem is that of the refugees, which again has both national and international aspects. No exact figures are known. India claimed that at the beginning of December 1971 the total number exceeded 10 million, and the judgment of most impartial observers appears to confirm that the number was of that order.

One can get some impression of the scale of this migration, or 'civil invasion' as Mrs Indira Gandhi fairly called it, by comparing it with the total estimated number of refugees in the world. These were estimated in 1959 at about 15 million and in 1970 at 17.6 million, which would give an average annual increase of something less than 200,000.³ When one realises that the 'tidal wave' of refugees into India probably raised the world figure, in a little over six months, from 17.6 million to about 27.6 million and that only a single country was affected, one begins to understand what the impact on that country must have been. Quite apart from the social and political repercussions provoked by this flood of destitute humanity pouring into an area already over-populated, with large numbers living in great poverty, the sheer cost of harbouring the refugees until the end of December 1971 has been estimated at over 500 million dollars. About half of this was provided by international assistance, but there was no assurance that this level of international aid would continue, still less that it would increase.

It is probable that the effect on the Indian economy was such as to disrupt, possibly even to halt for several years, the normal economic development of the whole country. The World Bank estimated that if the refugees had remained on Indian soil for a further three months, the cost of that further period might have amounted to 700 million dollars. We find neither historical precedent nor juridical definition applicable to this situation. It was not an 'armed attack' in the sense of the Charter, nor even a provocation on the part of Pakistan, nor a blockade — although it gravely threatened India's economy. It must be recognised that India's vital economic interests were at stake and that the only possible solution to the problem was to be found in the creation of political conditions which would make it possible to repatriate the refugees. The United Nations, as we have seen, was

³ U.S. Committee for Refugees, World Refugee Reports 1969 and 1970.

doing nothing to bring about those conditions, and it is hard to see how they would have been achieved without the liberation of Bangladesh.

This problem of the refugees involved a further and far from negligible problem of a humanitarian nature. Indeed, it is in this realm of humanitarian law, in the widest sense of the term, that Pakistan was most vulnerable. In addition to the appalling brutalities which were continuing within East Pakistan, the condition in which the refugees were forced to live, in spite of Indian and international assistance, itself involved a massive violation of human rights. One need only consider the physical conditions and the appalling death rate which actually resulted and that which might have resulted in the long term. Should India have allowed these mass deaths to continue? Within East Pakistan, the insecurity which had provoked the exodus had not diminished. Human rights were still violated on a major scale and the general and systematic nature of the inhuman treatment inflicted on the Bangladesh population was evidence of a crime against humanity. Was this massacre to be allowed to continue?

This brings us to the traditional doctrine of humanitarian intervention which Sir Hersch Lauterpacht, in the last edition of Oppenheim's *International Law*⁴ defines as follows:

'... when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.'

And Professor Borchard⁵ defines more clearly the form that such intervention may take:

'When these human rights are habitually violated, one or more states may intervene in the name of the society of Nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled. Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in the last resort, by the most appropriate organ of the international community.'

Humanitarian intervention has been described by Professors McDougal and Reisman as 'a venerable institution of customary international law... regarded as accepted law by most contemporary international lawyers'.⁶ It was accepted by both Grotius and Vattel,

⁴ Oppenheim, L., 1962, *International Law*, 8th ed., Vol. I, p. 312 (ed. H. Lauterpacht).

⁵ Borchard, 1922, *Diplomatic Protection of Citizens Abroad*, p. 14.

⁶ *International Lawyer*, Vol. 3, No. 2, p. 438.

and it has been invoked many times since. Examples are the armed intervention by Great Britain, France and Russia against Turkey which led to the independence of the Greek nation in 1830, and the Syrian intervention by France in 1860 following the protocol of the Conference of Paris.

The unilateral use of this ancient and respected doctrine, which is the expression of a profound and innate sense of justice corresponding to the natural feelings and reactions of the average person, is nevertheless questionable from two points of view. First of all it may open the door to all sorts of abuses and risks and be used as a pretext for acts of aggression. The justification for it is liable to be subjective, whereas one would wish to see the reasons for a humanitarian intervention established objectively. Secondly, it is reasonable to suggest that as a result of the creation of the United States Organisation (and possibly of Regional Organisations such as the Council of Europe) there has been a transfer of authority and responsibility and that henceforth humanitarian intervention is a matter to be dealt with by international bodies rather than individual nations. By virtue of Article 39 of the Charter it is in the first instance the responsibility of the Security Council to 'determine the existence of any threat to the peace... and... decide what measures shall be taken'. This means that it is for the Security Council to decide whether or not a collective humanitarian intervention is called for or, in certain cases, to authorise action on the part of an individual state, and the Member States are bound to accept this decision and to assist in its implementation. The General Assembly, for its part, may make recommendations in accordance with Article 55 of the Charter concerning the 'universal respect for, and observance of, human rights and fundamental freedoms for all', and indeed Article 56 translates this general obligation into a specific duty for each of the Member States, who 'pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of (these) purposes'.

Some authorities have argued that the right of unilateral intervention has been completely supplanted by these procedures for collective humanitarian intervention under the United Nations.⁷ But what if violations of human rights on a massive scale are not even considered in the United Nations to see whether they constitute a 'threat to the peace', and if international organisations offer no redress or hope of redress? Must everyone remain impassive in the face of acts which revolt the human conscience, paralysed by considerations which are primarily of a procedural nature or even — which is worse — by procedural obstruction? When it is clear that

⁷ e.g. Jessup, *Modern Law of Nations* (1949), p. 170; Ganji, *International Protection of Human Rights*, 1962, Geneva, p. 44; Thomas & Thomas, *The Dominican Republic Crisis 1965*, Hammarskjöld Forum, 1967, p. 20; the contrary view, namely that the right of unilateral humanitarian intervention remains unaffected, is stated by McDougal & Reisman, *International Lawyer* Vol. 3, No. 2, p. 444.

the international authorities cannot or will not discharge their responsibilities, it would seem logical to resort again to customary international law, to accept its rules and the validity of the doctrine of humanitarian intervention.

At the same time, to avoid the obvious dangers implicit in this doctrine, it is suggested that before unilateral humanitarian intervention by a single nation can be justified, the following requirements should be satisfied:

1. The state against which measures are to be taken must have shown itself manifestly guilty in respect of its citizens of systematic cruelty and persecution to the point at which
 - (a) their fundamental human rights are denied them, and
 - (b) the conscience of mankind is shocked and finds that cruelty and persecution intolerable.
2. The circumstances must be such that no practicable peaceful means of resolving the problem is available, such as negotiations with the state which is at fault, intermediation, or submission to a competent international organisation.
3. The international community must have had the opportunity within the limits imposed by the circumstances:
 - (a) to ascertain whether the conditions justifying humanitarian intervention do in fact exist, and
 - (b) itself to solve the problem and change the situation by applying such measures as it may deem appropriate.
4. If the international community does not avail itself of the opportunities offered and fails to act in order to prevent or put a stop to widespread violations of human rights which have been called to its attention, thereby leaving no choice but intervention, then a state or group of states will be justified in acting in the name of humanity provided that:
 - (a) before resorting to force it will deliver a clear ultimatum or 'peremptory demand' to the state concerned insisting that positive actions be taken to ameliorate the situation;
 - (b) it will resort to force only within the strict limits of what is absolutely necessary in order to prevent further violations of fundamental human rights;
 - (c) it will submit reports on its actions to the competent international agency to enable the latter to know what is being done and to intervene if it sees fit to do so;
 - (d) it will withdraw the troops involved in the intervention as soon as possible.

In our present world it is only in quite exceptional circumstances that unilateral action on the part of a state can be considered as legally justified on the basis of the doctrine of humanitarian intervention,

particularly if that action involves the use of force on a scale of some magnitude. Unilateral action is likely to be arbitrary and to lack the disinterested character which humanitarian intervention should possess. In the situation with which we are concerned, and on the basis of the rules we have laid down, India might be accused of not having pursued all possible peaceful means of solving the problem since she did not submit the matter to the Security Council — a step, we may add, which no Member State of the United Nations saw fit to take. Such a reproach may seem somewhat unrealistic, since it was plain to all that there was no prospect of the Members of the Council reaching an agreement capable of offering any possibility of an effective solution, and nothing could have been worse than a show of decision which would have paralysed action without providing a positive solution. In our view the circumstances were wholly exceptional; it was becoming more and more urgent to find a solution, both for humanitarian reasons and because the refugee burden which India was bearing had become intolerable, with no solution or even any hope of a solution in sight. Events having been allowed to reach this point, it is difficult to see what other choice India could have made.

It must be emphasised that humanitarian intervention is not the ground of justification which India has herself put forward. As we have seen, India claims to have acted first in self-defence, and secondly in giving support to the new Government of Bangladesh which she recognised when the hostilities began. We have given our reasons for not accepting the validity of these claims. If India had wished to justify her action on the principle of humanitarian intervention she should have first made a 'peremptory demand' to Pakistan insisting that positive actions be taken to rectify the violations of human rights.⁸ As far as we are aware no such demand was made.

In conclusion, therefore, we consider that India's armed intervention would have been justified if she had acted under the doctrine of humanitarian intervention, and further that India would have been entitled to act unilaterally under this doctrine in view of the growing and intolerable burden which the refugees were casting upon India and in view of the inability of international organisations to take any effective action to bring to an end the massive violations of human rights in East Pakistan which were causing the flow of refugees. We also consider that the degree of force used was no greater than was necessary in order to bring to an end these violations of human rights.

⁸ cf. Ganji, *op. cit.*, pp. 14, 15 and 38.

Judicial Application of the Rule of Law

Capital punishment held unconstitutional in California

The California Supreme Court has declared capital punishment to be unconstitutional in the most populous state in the USA. The Court based its decision upon the prohibition of "cruel *or* unusual punishment" in the State Constitution rather than upon the "cruel *and* unusual punishment" clause of the United States Constitution. This had the effect of insulating the California decision from review by the United States Supreme Court. The highest court of any state has the last word as to the interpretation of its own state constitution and laws, so long as that interpretation does not contravene any federal constitutional principle.

The Court's opinion noted that there are four possible justifications for punishing criminal offenders: rehabilitation, retribution, the protection of society and deterrence. Rehabilitation has no relevance to the death penalty. As to retribution, the Court said it was "incompatible with the dignity of an enlightened society to attempt to justify the taking of life for purposes of vengeance". The third justification was rejected on the ground that "society can be protected from convicted criminals by far less onerous means than an execution. In no sense can capital punishment be justified as 'necessary' to isolate the offender from society". As to deterrence, it "recognised that whether a substantial deterrent effect can be proven is a vigorously disputed proposition", and held that there was "no basis upon which to conclude that, as presently administered, capital punishment is any greater deterrent to crime than are other available forms of punishment".

In addition, the Court noted that forty nations have abolished capital punishment and that the death penalty has become unusual both in California (one execution since 1963), and throughout the United States, which has had a steadily declining number of executions since the 1930's and no executions since 1967.

The Court ended its opinion by observing: "We have concluded that capital punishment is impermissibly cruel. It degrades and dehumanises all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members. Lord Chancellor Gardiner reminded the House of Lords, debating abolition of capital punishment in England: 'When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and disembowled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect.'"

SUPREME COURT OF THE STATE OF CALIFORNIA

(Wright C. J. with Peters, Tobriner, Mosk, Burke, Sullivan, JJ.; concurring; McComb J. dissenting)

THE PEOPLE v. ROBERT PAGE ANDERSON

Decided February 18, 1972

Crim. No. 13617

Martial law regime declared illegal

The Supreme Court of Pakistan considered two appeals raising the question of the validity of detention orders made under the Defence of Pakistan Rules 1971 and under martial law.

Leave to appeal was granted 'to consider (1) whether the doctrine enunciated in the case of the *State v. Dosso* (P.L.D.) (1958) (Pak) 533 was correct, (2) whether the doctrine applied to the facts and circumstances in which Field Marshal Ayub Khan transferred power to General Yahya Khan and (3) if the source of power assumed by General Yahya Khan was illegal and unconstitutional, then whether all the legislative and executive acts done by him including the imposition of martial law and the promulgation of martial law regulations and orders were illegal'.

The *Dosso* case, decided in 1958, gave legal recognition to the then martial law regime. Basing its judgment on the doctrine of Hans Kelsen, the court held that 'a victorious revolution or a successful coup d'état is an internationally recognized legal method of changing a constitution'.

In these appeals, the Supreme Court overruled the *Dosso* case on the grounds, inter alia, that the rule of international law with regard to the recognition of States does not determine the validity also of the States' internal sovereignty.

In the leading judgment, Chief Justice Hamoodur Rahman said on the other questions raised in the appeal:

'I am driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of an agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State. I cannot, therefore, agree with the learned Attorney-General that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the constitution, which he is bound by his oath to defend ...

'Looked at, therefore, either from the Constitutional point of view or the Martial Law point of view whatever was done in March, 1959, either by Field Marshal Mohammad Ayub Khan or General Agha Mohammad Yahya Khan was entirely without any legal foundation. It was not even a revolution or a military coup d'état in any sense of those terms. The Military Commander did not take over the reins of Government by force nor did he oust the Constitutional President. The Constitutional President stepped out of his own free will and in response to the public demand stepped aside and called upon the Military Commander to restore law and order, as he was bound to do under the law and under the Constitution. On the stepping aside of the Constitutional President the constitutional machinery should have automatically come into effect and the Speaker should have taken over as Acting President until fresh elections were held for the choice of a successor. The political machinery would then have moved according to the Constitution and the National and Provincial Assemblies would have taken steps to resolve the political disputes, if any, if the Military Commander had not by an illegal order dissolved them. The Military Commander, however, did not allow the constitutional machinery to come into effect but usurped the functions of the Government and started issuing all kinds of Martial Law Regulations, Presidential Orders and even Ordinances.'

He continued, 'there can be no question that the military rule sought to be imposed upon the country by General Agha Mohammad Yayha Khan was entirely illegal'.

The Chief Justice then considered which of the acts and legislative measures of the illegal regime should, under the doctrine of necessity, be condoned and maintained in the public interest notwithstanding their illegality. The Court held that these did not include the Orders under which the appellants had been detained, and the appellants were released.

SUPREME COURT OF PAKISTAN

(Hamoodur Rahman C. J., Muhammad Yaqub Ali, Sajjad Ahmad Jan, Wahiduddin Ahmed, Salahuddin Ahmad JJ.)

MALIK GHULAM JILAMI and ALTAF GAUHAR v. THE PROVINCE OF SIND AND OTHERS

Decided 20 April 1972

Criminal Appeal Nos. 19 and K-2 of 1972.

SECRET DECREES

The modern world has become accustomed to secret arrests, secret trials and even to secret executions.

The latest development in this Kafka-like concept of the Rule of Law is a new decree signed by President Medici of Brazil in November 1971, which authorises him to make secret decrees relating to national security.

As the opposition leader Pedrosa Horta said in the Congress "Decree No. 69534 is, in my opinion, a unique case in Brazilian law. How can a law, a decree, or a regulation be obeyed if it is to remain unknown? I do not even know if, by making these comments, I may be violating the law".

Veja, 24 Nov. 1971

MR JOEL CARLSON ON VIOLENCE

The following is an extract from a speech by Mr. Joel Carlson, the South African lawyer and member of the International Commission of Jurists, at the last meeting of the Fourth Committee of the United Nations:

"Violence is the arbitrary arrest of persons and their indefinite detention in solitary incommunicado for the purpose of endless interrogation.

"Violence is a system of informers and arbitrary restrictions, where the individual is unsafe and unsure of his actions or his future.

"Violence is the refusal to educate all sections of the population to the best of their ability.

"Violence is the forcible removal of persons from their homes and the forcible breaking up of the family life.

"Violence is the failure to provide sufficient medical care and food and allowing men and women to die of starvation and of diseases which could be treated before they reach the stage of death.

"Violence is the regimentation of people, the limitation of their right to work, to play, to travel and to live where they will."

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THE EVENTS IN EAST PAKISTAN, 1971

A LEGAL STUDY BY THE ICJ SECRETARIAT

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