

FOR THE RULE
OF LAW

***Bulletin
of the
International
Commission
of Jurists***

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ASPECTS OF THE RULE OF LAW

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THE OPPOSITION IN TROPICAL AFRICA

The last five years have witnessed the emergence of many new independent States in tropical Africa. The system of government inherited by these States from the colonial powers has been one of parliamentary democracy based on the political party system. The purpose of this article is to investigate the role at present being played by parties in opposition to the government. Below, a survey with special emphasis on recent election results has been made of nineteen independent countries in tropical Africa. Finally, as a result of the survey, some conclusions are drawn on the prospects for the Rule of Law in Africa.

Cameroon Republic

The results of the election declared in April 1960 in the Cameroon (formerly the French trusteeship territory) gave President Ahidjo's party, the Union Camerounaise, 60 seats while the Union des Populations du Cameroun obtained 22 seats, the Democratic Party 11 seats and others 13 seats. In the Southern Cameroons (the then British trusteeship territory) at this time, the Cameroon People's National Convention (CPNC) and Kamerun National Democratic Party (KNDP) each held 13 seats. The Southern Cameroons united with the Cameroon in 1961. In the first election to the new Legislative Assembly of West Cameroons (formerly Southern Cameroons) the results were, KNDP 25 seats and CPNC 10 seats.

Central African Republic

In the September 1960 elections the Mouvement pour l'évolution sociale de l'Afrique noire (MESAN) won 38 seats and the Mouvement pour l'évolution démocratique en Afrique centrale (MEDAC) 11 seats. In the following February the opposition party Medac was dissolved by the government and some of its members arrested.

Chad

The Parti Progressiste Tchadien (PPT) gained 67 seats, the Parti National Africain (PNA) 10 seats and independents 6 seats

in the May 1959 elections. By August 1960 the government party, the PPT, had 71 seats to the opposition's 14. The period following independence was marked by the elimination of opponents to the regime. Finally, in March 1961, it was announced that the PPT and PNA had merged.

Republic of Congo (Brazzaville)

The government party, the Union Démocratique de Défense des Intérêts Africains, won 51 seats to the 10 seats of the Mouvement Socialiste Africain (MSA) in the June 1960 elections; some of the opposition MSA were elected from prison. The following August the leader of the MSA took office in the government.

Dahomey

The final results of the election held in April 1959 gave the Parti Républicain de Dahomey (PRD) 28 seats, Rassemblement Démocratique Dahoméen (RDD) 22 seats and Union Démocratique Dahoméenne (UDD) 20 seats. The PRD and RDD parties were in alliance and later became the single Parti Dahoméen de l'Unité (PDU). Elections were again held at the end of 1960. The PDU received 468,002 votes and the opposition UDD 213,564 votes. In 1961 the government dissolved the UDD, and many of its members, including its leader, were arrested. The 60 seat Legislature is now completely controlled by the PDU, which has further absorbed the remaining opposition parties.

Gabon

The last elections held in 1961 resulted in a complete victory for the single list candidates put forward jointly by the Bloc Démocratique Gabonais and the Union Démocratique et Sociale Gabonaise (the latter was originally the opposition party). The government list thus won all 67 seats in the Legislature.

Ghana

In the 1956 elections, the last held in Ghana, the distribution of seats in the Legislature was as follows: Convention People's Party (CPP) 71 seats, National Liberation Movement 12 seats, Northern People's Party 15 seats and others 6 seats. In 1957 the opposition parties amalgamated into one opposition party, the United Party

(UP), with 32 seats. Today in a Legislature of 114 seats President Nkrumah's CPP has 106 seats and the UP only 8 seats. Many UP members have left or fled the country and many have been arrested and placed in detention. A motion was passed in September 1962 in the National Assembly calling for a one party State. The fate of the UP is therefore uncertain.

Guinea

The last elections were held in 1957 when the Parti Démocratique de Guinée (PDG) gained 57 out of 60 seats in the Assembly. All parties joined President Sekou Toure's PDG in forming the first government after independence in 1958, and today there is no opposition.

Ivory Coast

The 1959 elections gave all the seats in the Legislature to President Houphouet-Boigny's Parti Démocratique de la Côte d'Ivoire (PDCI). The November 1960 elections showed no change, the single list candidates of the PDCI gaining all 70 seats. There is no organized opposition to the government party today.

Mali

At the last election in March 1959 the Union Soudanaise party won all the seats against the Parti du Regroupement Africain in the Soudan Territorial elections. There has been single party government ever since.

Mauritania

The Parti de Regroupement Mauritanien won all 40 seats in the May 1960 elections. The following September the most radical of the opposition parties, the Nahda El Watania, was dissolved by the government. The present government contains two members of former opposition parties.

Niger

The elections held in December 1958 gave the government party, the Union pour la Communauté Franco-Africaine (once called the

Rassemblement Démocratique Africain and later the Parti Progressiste Nigérien), 54 seats and the Sawaba party 6 seats. The election results for the seats won by the Sawaba were subsequently annulled and in the new elections the seats were won by government supporters. Later, the Sawaba was banned and dissolved and many of its leaders arrested.

Nigeria

The last Regional elections showed the distribution of seats as follows:

| Western Region | | | Eastern Region | | | Northern Region | | |
|-----------------------------|----------------------------|-----|-------------------------------|------------------------------|-----|--------------------------|-------------------------|-----|
| Before August 1960 election | After August 1960 election | | Before November 1961 election | After November 1961 election | | Before May 1961 election | After May 1961 election | |
| AG | 47 | 80 | NCNC | 64 | 106 | NPC | 110 | 160 |
| NCNC | 28 | 34 | AG | 13 | 15 | AG-UMBC | 13 | 9 |
| others | 1 | 10 | UNIP | 5 | — | NEPU-NCNC | 4 | 1 |
| | | | DP | — | 5 | | | |
| | | | others | 2 | 20 | | | |
| Total | 76 | 124 | | 84 | 146 | | 127 | 170 |

AG = Action Group; NCNC = National Council of Nigerian Citizens;
 UNIP = United National Independence Party; DP = Dynamic Party;
 NPC = Northern People's Congress; UMBC = United Middle Belt Congress;
 NEPU = Northern Elements Progressive Union.

In the last Federal elections held in December 1959 the NPC won 142 seats, the NCNC 89, the AG 72 and others 9. The AG has proved to be an effective and vigorous opposition in federal politics, but on account of the constitutional crisis in the Western Region in May this year, the future role of the AG is uncertain.

Senegal

In the March 1959 elections the Union Progressiste Sénégalaise won 79 out of the 80 seats available. Some opposition leaders have left the country, while others have joined the government.

Sierra Leone

From the time of the elections in May 1957 until independence in 1961 a united front, based virtually on all the political parties, was in power. The recent elections of May 1962 have returned the Sierra Leone People's Party (SLPP) to power in the 62 seat Legislature, while the opposition party, the All People's Congress, captured 20 seats (in the 1957 elections the SLPP won 28 out of 39 seats).

Somali

In the second election, held in British Somaliland in 1960, the Somali National League increased its strength to 20 seats out of the 33 available. At the same time in Somali (the territory at that time administered by Italy) the Somali Youth League won 83 out of the 90 seats. There has been no election since Somali became an independent state.

Tanganyika

The elections to the Legislative Council in 1960 resulted in the multi-racial Tanganyika African National Union (TANU) party obtaining 70 out of 71 seats for elected members. The one non-TANU seat went to an independent who supported TANU.

Togoland

In the 1959 elections Comité de l'Unité Togolaise (CUT) won 33 seats, Union des Chefs et des Populations du Nord 10 seats and Parti Togolais de Progrès 3 seats. In the 1961 elections the CUT obtained all 51 seats, the nominations of the opposition party, the Juvento, not being allowed to go forward. The former leader of the opposition, A. I. Santos, was arrested in December last year and is shortly to be tried.

Upper Volta

The Union Démocratique Voltaïque (UDV) won 64 seats and the Parti du Regroupement Africain (PRA) 11 seats in the April 1959 elections. Since then the UDV has strongly consolidated its position in parliament. Two opposition parties, the Parti National Voltaïque and the Parti Républicain de la Liberté (both successors

to the PRA), have been dissolved by the government. Some opposition leaders have left the country and a number have been placed in administrative internment.

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The following observations may be made from the above survey. In eight countries – Dahomey, Ghana, Guinea, Ivory Coast, Mali, Mauritania, Niger and Upper Volta – there is no official opposition. In six – Central African Republic, Chad, Republic of Congo, Senegal, Tanganyika and Togoland – there is one party which is completely dominant. The same tendency is evident in the Regions of Nigeria. In a number of States the opposition, or part of it, has merged or joined with the ruling party, while in others, such as Dahomey and Upper Volta, the opposition has been dissolved. In some States opposition leaders and supporters have been arrested, usually for criticism of the regime, and imprisoned; further evidence reveals that the imprisonment is often without trial. In Gabon and the Ivory Coast the single list system of candidates for election is in operation. It is still too early to see clearly what the trend is in the former trusteeship territories of Cameroon and Somalia, where opposition parties are still evident. The ruling party in the former country recently declared itself in favour of a single united party. It is really only in the Federation of Nigeria at the federal level that an effective opposition exists. The situation in Sierra Leone gives rise to the possibility of the development there of a useful parliamentary opposition. Other independent countries in Africa South of the Sahara reflect a tendency towards a one party or similar system; this is true of Ethiopia, Liberia and the Sudan. Even in South Africa the ruling party has been in power for 14 years and seems firmly entrenched. The situations in the Congo (Leopoldville), Rwanda and Burundi are not yet suitable for analysis.

African leaders themselves have pointed the trends towards one party rule in Africa. Mr. Nyerere, former Prime Minister of Tanganyika, wrote in *East Africa and Rhodesia* at the end of 1961:

... Tanganyika is a democratic country. We have a one-party government, to all intents and purposes a one-party state. . .

and later in the same article:

... The existence of two or more stable political parties implies a class structure of society, and we aim at avoiding the growth of different social and economic classes in our country. If we do avoid this, then opposition will take the form of disagreement on how to do things which we agree should be done. It is not essential that this type of disagreement be expressed through a two-party system.

Chief Denis Osadebay, President of the Nigerian Senate and formerly Leader of the NCNC opposition party in Western Nigeria's House of Assembly, wrote early in 1961 that he did not think "democracy was synonymous with the two party system". He also advocated for Nigeria a one-party system, with the right to oppose preserved *within* the party.

Professor Leo Hamon of Dijon University has recently pointed out, in an article on the forms which democracy takes in Africa, that the single party system predominates in most French-speaking States and that in the others the number of political parties have been reduced either by violent means or by amalgamation.

Immanuel Wallerstein, an Assistant Professor at Columbia University, at the end of 1961 began an article in *West Africa*:

The Opposition has been rapidly fading away in West Africa's newly independent countries since, and often before, independence. Many have joined the government with greater or less degrees of enthusiasm. A few are in jail, some are in exile...

The Universal Declaration of Human Rights of 1948 proclaimed the principle that "the will of the people shall be the basis of the authority of government" and that "this will shall be expressed in periodic and genuine elections...". In January 1961, the African Conference on the Rule of Law held in Lagos and attended by judges, practitioners and teachers of law from 23 African nations declared "that the Rule of Law can not be fully realized unless legislative bodies have been established in accordance with the will of the people". Events in many countries, such as National Socialist Germany, Fascist Italy and the Communist states, have shown that the one party system, which excludes any opposition, is an obstacle to the free expression of the will of the people. This experience supports Sir Ivor Jennings' contention that the test of a free country is to examine the status of the opposition or of the body that corresponds to the opposition. Although certain factors causing European political pluralism may not be found in Africa, the effect of the one party system on the Rule of Law in Africa deserves close scrutiny.

This is a question which can only be conclusively answered with the passage of time, but the International Commission of Jurists is keenly watching the relevant developments.

THE CONSTITUTIONAL POSITION IN THE REPUBLIC OF THE CONGO

The Basic Law of May 19, 1960

In response to what appeared to be a widespread yearning for independence among the Congolese people, the Belgian Government invited a Belgo-Congolese "round-table conference" to meet in Brussels on January 20, 1960. Its purpose in so doing was to hold talks with the foremost Congolese leaders concerning their country's gradual accession to independence. The Basic Law promulgated by the Belgian Government on May 19, 1960, arose out of the resolutions adopted by the round-table conference on February 19, 1960. It was to remain in effect only for a short time, pending adoption and entry into force of the definitive Constitution which the Congolese Parliament was to prepare after independence day (June 30, 1960).

Section 3, subsection 1, of the Basic Law stipulates that :

...the provisions set out hereinafter shall remain in force until such time as the public institutions organized under the Constitution have been set up.

To date, however, the various rival groupings in the Congo have proved unable to arrive at an agreed constitutional text. A constitutional commission, made up of jurists of different nationalities, has, in fact, been sitting for two years in Leopoldville in a vain attempt to prepare a draft acceptable to all of the 152 ethnic groups.

Meanwhile, the structure of the State and the functions of its various organs are – and, from all appearances, will continue for some time to be – determined by the Basic Law. The latter contains seven Chapters and 259 Sections; of these, only Chapters I, II and III now have any practical significance; Chapters IV to VI have virtually never been in force.

Chapter I contains the preambular provisions. Chapter II specifies what shall be the organs of the Congo, which is to be an "indivisible, democratic State" (Section 6, subsection 1). It provides for a Chief of State, elected by Parliament. The Central

Government, headed by a Prime Minister, is to be responsible to Parliament. The National Parliament, sitting in Leopoldville, is to consist of two Houses: a Senate and a Chamber of Representatives. Section 7—currently the most controversial—explicitly fixes the number of provinces at six: Katanga, Oriental, Kasai, Leopoldville, Equator and Kivu. All of the provinces are to enjoy a fair degree of internal autonomy. Each is to have its own provincial government, assisted by a parliament. The provincial government, moreover, is to have its own administrative machinery, which it controls directly.

Chapter III deals with the powers of the various state organs. The Chief of State promulgates the decrees issued by the Government and the laws passed by Parliament. He has no veto. The Government performs the normal functions of the Executive. The present national coalition government, formed as a result of the parliamentary gathering held at Lovanium in 1961, is dominated by the strong personality of Prime Minister Cyrille Adoula, a former trade union official, who is assisted by his ministers and state secretaries. Parliamentary elections are to be held every four years. One hundred thousand Congolese of full age (or any fraction thereof exceeding 50,000) are entitled to one deputy in the Chamber of Representatives. The voting is by direct universal suffrage. The Senate, which is the Upper House of Parliament, is elected in the following manner: each provincial assembly designates 14 national senators, of whom three must be customary chiefs. The senators elected by the provinces then co-opt a number of other senators. Chapter III further deals (in Part V) with the Judiciary which, in view of its outstanding importance, will be discussed later.

As indicated earlier, a start has yet to be made towards implementing Chapter IV, which deals with the establishment of regional economic councils. The same may be said of Chapters V (respective powers of the central and provincial governments), VI (establishment of a constitutional court) and VII (finance: no complete budget has yet been voted since independence).

Thus, *de lege lata*, the legal position in the Congo is fairly clear so far as public law is concerned. The fields of private and penal law are governed by Section 2 of the Basic Law, which specifies that :

All laws, decrees and legislative ordinances, rules and regulations giving effect thereto and regulatory provisions existing on June 30, 1960, shall remain in force until expressly abrogated.

It is not our purpose here to discuss the political crisis which for the past two-and-a-half years has paralyzed the Congolese administration. But the fact remains, and must be pointed out, that domestic peace in the Congo is still a long way off, and that in some areas rival tribes are still fighting it out with knives. The mere size of the country (over 900,000 square miles) and low population density (14 million inhabitants in all) may provide difficulties for the effective centralization of government. It would therefore be quite unrealistic to expect the national Parliament, torn between tribal hatreds and political rivalries, to adopt the laws and decrees required for the establishment of a Congolese private and penal law system at any early date. The two Codes, civil and penal, of the former colony are still applied – or, rather, would be applied if there was still a Judiciary to apply them. The fact that the penal code of the colony, in particular, has survived accession to independence involves a striking anomaly: the procedures prescribed for giving and carrying out judgments are not the same for European as for African delinquents.

Organization of the Judiciary

Present shortcomings in the operation of the Congolese constitutional system can only be appreciated in the light of the current situation of the legal profession. There is, for all practical purposes, no Bar in the Congo – or rather what there is is merely a survival of the colonial past, and not in any way a true “Congolese Bar”. The only independent lawyers still active are the thirteen members of the Leopoldville Bar; there is also a Bar at Elizabethville, but owing to the events of December 1961 most lawyers have left Katanga. The Leopoldville Bar consists of ten Belgians, two Italians and one Congolese. The rules of the Bar date from the colonial period. Candidates for admission must have taken their law degree and served a two-year probationary period. The members elect their Chairman, who has disciplinary powers. Any strengthening of the position and role of the Bar is unlikely to occur for some time, since practically all of the young law undergraduates of Lovanium University aim at careers in the civil service or on the Bench.

The present crisis of the Congolese Judiciary is well-nigh insoluble. It came about in the following way. On June 30, 1960, a remarkably efficient colonial Judiciary system, staffed by Belgian career judges, covered the entire country. The various levels were: district courts; Leopoldville Court of Appeal (for civil cases);

and Court of Cassation (for penal cases). In addition, a system of customary courts for Africans only operated at the district level. Its jurisdiction corresponded more or less to that of Justices of the Peace and was exercised by the regional customary chief or his agent. At every level there were prosecuting attorneys for conducting judicial inquiries and supporting the charges in court proceedings.

By the Spring of 1962 all the Belgian judges, with very few exceptions, had left. The entire Judiciary was so completely disorganized that only a handful of courts were still functioning. At Leopoldville, there remained in February 1962 a young Belgian colonial administrator who out of sheer idealism, had entered the service of the new State and presided over the Leopoldville District Court. His position, however, soon became untenable when political leaders, ministers and army officers sought repeatedly to bring pressure to bear upon him in the performance of his judicial duties. Within a month he left the country. For nearly a year, this judge had been assisted by a young prosecuting attorney - also a Belgian. Recently the latter made the mistake of indicting some policemen for rape and abduction, with the result that the mayor of Leopoldville, had him expelled. No replacements have been found either for the attorney or for the judge.

The Court of Appeal of the Republic of the Congo, which is the highest civil court, still includes four Belgian Counsellors.

In order to resolve the crisis of the Judiciary, the Central Government, assisted by United Nations experts, has drawn up a plan which is to be carried out in two stages.

First, during the coming three years (1962-65), the Government will appoint expatriate judges recruited by the United Nations, preferably in French-speaking countries. These legal experts, fourteen of whom have already been appointed, will possibly be assisted by African assessors and will sit in the provincial capitals and regional administrative centres. Out of 450 students who are now - and have been for the past two years - attending courses at the new National School of Law and Administration at Leopoldville - about half will receive judicial appointments upon graduation in 1965. Beginning in 1965, therefore, the *alumni* of the School, which is placed under the Ministry for Civil Service and whose students have civil service status, will begin gradually to replace the United Nations legal experts. Thus, by 1970 or thereabouts, the laws of the country will be administered by a competent Congolese Judiciary, without outside help.

Evolution of the Constitutional Position

The constitutional position is still characterized by the anomaly mentioned at the beginning of this article: the Basic Law of May 19, 1960, which was designed to cover a brief transition period, remains to this day—two-and-a-half years after independence—the only constitutional text in the country, owing to internal dissensions which have prevented Parliament from voting a national Constitution. The most stubborn, as well as the most dangerous, of these dissensions arose out of the Katanga problem. On August 5, 1960, barely a few weeks after independence, the province of Katanga—a territory well over 200,000 square miles in area, located in the south-eastern part of the country about 900 miles from Leopoldville—promulgated a Constitution of its own and proclaimed itself an independent State.

Since then, the various Central Governments have made vain attempts to re-conquer Katanga. Only the United Nations troops were able (in December 1961) to bring Mr. Tshombe of the Provincial Government of Katanga to the negotiating table. On December 22, 1961, Mr. Tshombe signed the Kitona agreement with Mr. Adoula. This provided for continued negotiations while in the meantime preserving the *status quo* in Katanga. On February 15, 1962, the Kitona agreement was ratified by the Katanga Parliament, whereupon Mr. Tshombe returned to Leopoldville. In conclusion, the crucial question in the Congo remains the drafting and acceptance by all parties of a new constitution.

Up to the present time Messrs. Adoula and Tshombe have held 201 meetings from which no final results have emerged. However, the two delegations reached agreement on certain preliminary matters. For instance, they agreed to discuss the elimination of outer signs of Katangese sovereignty before discussing constitutional issues in the true sense and a committee was accordingly set up with the help of United Nations experts. A Committee is to examine the problem of the integration of the Katangese currency; another is to deal with the integration of the *Katangese gendarmerie* (about 12,000 strong) in the Congolese national army. Other problems to be solved include the reopening of communications and the choice of a flag. The Central Government has always favoured a strong central authority. On this point its outlook has been strongly influenced by the fact that Katanga province up to independence in 1960 contributed 65% of the revenue of the country. Mr. Tshombe, on the other hand, advocates virtual sovereignty for the existing provinces, which would be bound together only by

a multilateral agreement leaving a wide measure of financial autonomy at the provincial level.

However, unhappily it must be recorded that there is deadlock on the new constitution, without which it is doubtful that there can be stability in the Congo.

THE EICHMANN TRIAL

The following comments on the Eichmann Trial were prepared by Professor Peter Papadatos, Associate Professor of Law at the University of Athens, who acted as an observer of the International Commission of Jurists at the Trial. They are part of a larger study now being prepared by Professor Papadatos which is to be published shortly.

The few months which have elapsed since the Eichmann case was finally closed by the execution of the condemned man cannot, of course, give us the historical perspective which is indispensable to reach a complete understanding of this trial, its underlying meaning, and its full significance.

The Eichmann trial is, however, one of the historic events expressing in an exceptionally clear and, it could be said, revealing manner certain extreme and particularly serious contemporary situations, which influence our lives to such an extent that we cannot disregard them.

The Eichmann trial is an illustration of international penal justice. This justice, which is still in the first phases of its development, or what is often called a "primitive" state, is administered mainly by States. A State fulfils this task by applying international law either directly or through its own body of laws. In the latter case, the State adopts the rules of international law and incorporates them into its own form of law.

The Eichmann trial is directly linked to the series of trials of which the first was that of the major war criminals at Nuremberg, and the remainder, those which have subsequently taken place in the Allied-occupied territories of Germany and Japan and in the countries which were victims of the Nazi occupation. The aim of all these trials was to judge and punish the wave of crime set in motion by the totalitarian regimes of the Axis and by the second

World War. A special place among these trials will doubtless belong to that of Eichmann, for this is the first time that the whole extent, details, and evil consequences of the Nazi genocide of the 6,000,000 Jews of Europe have been heard in court.

Eichmann was judged in the first instance by the District Court of Jerusalem, the court ordinarily having jurisdiction in this field of law. He was brought to justice on the basis of Israeli Law 5710/1950 dealing with the punishment of Nazis and their collaborators.

After preliminary investigations lasting almost a year, proceedings began on April 11, 1961, and continued until August 14 of the same year. During this period, the court held a total of 114 public hearings, before adjourning to December 11, 1961, to draw up its judgment. It then sat again for three days (seven hearings), the time necessary for reading its findings, which ran into some 180 pages.

This judgment found Eichmann guilty of the majority of the crimes of which he was accused, and he was accordingly condemned to death.

In the course of the proceedings, more than 1,500 documents were submitted to the Court, and about 120 witnesses heard. In addition, the cross-examination was one of the longest which has ever taken place.

The proceedings were simultaneously translated into English, French and German. In addition, every facility was given by the Israeli authorities to the 350 foreign press correspondents, as well as to the observers, delegates, etc., from various States and international organizations who followed the proceedings.

Eichmann, as was his right, appealed against the judgment of the District Court to the Supreme Court of Israel. In accordance with the law, the Supreme Court sat as a court of appeal from March 3, 1962, to March 29, 1962, and again on May 29, 1962 (seven hearings in all).

By its judgment (336/61), the Supreme Court rejected the appeal against both the conviction and the sentence, confirming the judgment and sentence of the lower Court. Finally, after the plea for reprieve addressed to the Head of the State of Israel had been rejected, Eichmann was put to death by hanging at midnight on May 31, 1962.

As expected, the Eichmann trial has again raised all the fundamental questions of international penal law which were brought

to the fore by the London Agreement, the Statute of the International Military Tribunal, and their application at Nuremberg. The defence again raised the following issues: the non-retroactive effect of the penal law; "Act of State" and individual responsibility in international law; obedience to "superior orders"; and the question of jurisdiction in respect of these crimes.

The District Court, as well as the Supreme Court of Israel, considered these problems on the basis of the Nuremberg principles which are, moreover, embodied in Law 5710/1950 dealing with the punishment of Nazis and their collaborators.

It should be added that all the controversy on these matters between the defence and the prosecution, as well as the attitude adopted by the District Court and the Supreme Court in their judgments, were dominated by a highly scientific spirit which was a fundamental factor in linking this trial to the rules and court decisions of international penal law.

The most discussed of these issues were two, namely, Israel's right to punish Eichmann and the retroactive effect of Law 5710/1950, which makes criminal the acts for which Eichmann was brought to justice.

Israel's right to punish was denied by the defence, principally because of the fact that Eichmann had been abducted from Argentina, where he was living under an assumed name, and taken by force to Israeli territory, very probably by persons acting on behalf of the State, in order to be judged there.

The abduction of Eichmann no doubt constitutes an act contrary to law, the importance of which cannot be concealed. However, this act was not accepted by the Israeli courts as being capable of depriving them of competence to judge Eichmann. This decision was made on the strength of a long and firmly established rule of law in England and the United States of America. According to this rule, the circumstances of a person's arrest and the manner of bringing him to the territory of a State do not in the least affect his judgment by the courts of that State, provided these are ordinarily competent to judge him (cf. *Ex parte Susannah Scott* 1829, 9 B and C, 446; 109 E.R. 106, *State v. Brewster* 1835, 7 Vt 118). This rule is, moreover, binding on the Israeli judge, since Israeli law expressly refers to Anglo-Saxon case law for the interpretation of its rules or to fill a gap in written or Common Law.

It was further noted that, in accordance with this rule of law and in conformity with authoritative opinion of text book writers, the abduction of Eichmann bears only on relations between Argen-

tina and Israel. No rights whatsoever are created in favour of Eichmann, enabling him to escape Israeli justice inasmuch as, in this case, no right of asylum nor any other right deriving from an extradition treaty between the two countries is violated.

The abduction incident, which was submitted to the Security Council of the United Nations, was finally settled between Argentina and Israel in accordance with the Council's recommendations and without affecting friendly relations between the two countries. This incident has however much greater importance than that of a slight temporary conflict between two States. It is a most striking example of one of the weaknesses of present day international society, which has come to recognize genocide as an international crime which States undertake to punish, yet has not been able to ensure its effective suppression. Thus certain "barriers" are encountered which cannot for the time being be crossed, save by the commission of illegal acts.

Finally, let me point out that the controversy about the right of Israel to punish Eichmann ended in a categorical and well-founded declaration by the District Court in its judgment, to the effect that genocide, by its very nature as well as by its gravity, is a crime subject to universal jurisdiction. This declaration, which has served to strengthen the view already prevailing among authoritative writers, is of very special importance, seeing that it tends to obviate the most serious defect of the Convention on the Prevention and Suppression of Genocide. For, as is well known, this Convention established either territorial jurisdiction or that of an at present non-existent court. As the latter's jurisdiction is not compulsory the effective suppression of genocide is rendered illusory, since genocide is a crime committed essentially by the State.

The issue of the retroactive effect of the repression of genocide arose at the Eichmann trial in a special form, which was particularly emphasized by the defence. In fact, Israeli Law 5710/1950, which makes genocide a crime, is not only retroactive but even punishes acts perpetrated at a time when the State of Israel did not exist. Such acts could not, therefore, be directed against either the State of Israel or its subjects.

This question was likewise settled by the court in a broad-minded spirit and without too much regard for procedure, as befits consideration of the problems of international penal law. In other words, it recognized the existence of a "continuity of law notwithstanding changes of sovereignty", basing itself on Grotius'

conception that the right to punish lies with an injured community and derives directly from the crime committed against it. It is only the absence of sovereignty which prevents it from exercising its right to judge and punish. The State of Israel identifies itself with, and is the expression of, this community, since it is made up largely of the survivors of the people which suffered this genocide and, even more, since it owes its creation in large measure to the same people. Accordingly, Israel is directly concerned, more indeed than any other State, in repressing this crime, even if it was committed before the State of Israel came into being. For the rest, the District Court as well as the Supreme Court adopted the justification for the retroactive nature of this suppression laid down at Nuremberg and accepted by the majority of writers.

As in all trials of Nazi criminals, the leading problem was that of acts carried out under "superior orders". The central point of the defence was the submission that the accused was only a low-level, unimportant official in the administrative hierarchy of the *Reich*, and that his participation in the genocide of the Jews was only minor, limited to the administration of the transport of Jews. In any case, it was maintained, Eichmann acted under compulsory orders from his superiors to whom he owed blind obedience on pain of severe penalties, even of execution.

By thus minimizing the role of Eichmann in this criminal undertaking, the defence hoped to mitigate or even completely set aside his guilt, despite the fact that on this count Israeli Law 5710 embodies the Nuremberg principle and recognizes acting on superior orders as no more than an extenuating circumstance. The defence probably hoped that the Israeli Court would follow certain precedents of the Allied Courts in Occupied Germany, who went so far as to acquit lower Nazi officials despite the fact that these courts were applying the same principle, expressly provided for in Law 10 of the Allied Control Commission for Germany.

But neither the District Court nor the Supreme Court accepted this point of view. They acknowledged that Eichmann's activity went far beyond the limits of the functions of a mere government employee "in charge of transport" and that, in fact, Eichmann was the central agent for the execution of this criminal enterprise, from its initial phases to the physical extermination of 6,000,000 Jews.

Speaking quite objectively, though in no way putting ourselves in the place of the judge, we must admit that the evidence submitted on this count, documents as well as the evidence of witnesses, was quite conclusive and clearly revealed the important role of "co-

ordinator" which Eichmann played in the carrying out on a gigantic scale of this genocide.

The procedure followed before the District Court and the Supreme Court for the judgment of Eichmann was, generally speaking, the normal procedure laid down by Israeli law for penal cases. It should be said that this procedure, which is identical to that under Anglo-Saxon law, guarantees all the fundamental rights of the defence and, as a rule, provides conditions for a fair trial.

It is true that, for prosecutions arising under Law 5710, the court may under the provisions of this law depart from the rules of evidence, if it has good grounds for believing that this will allow the truth to be established and ensure a fair trial. However, every time the court decides on a departure of this kind, it must set out the reasons for its decision in writing. This right is a dangerous one although, if one thinks of the special circumstances in which the criminal activities of the Nazis took place, necessary. The District Court did not abuse this rule and gave clear and precise reasons each time it had to depart from the normal rules of evidence.

The mode of taking evidence raised certain problems. Of these, the most difficult arose from the fact that a number of witnesses for the defence were not able to testify before the Court since, if they were to go to Israel they would, as the Attorney-General warned, have been brought to justice for crimes against the Jewish people. One can certainly not blame the State for not waiving its right of punishment, particularly in view of the seriousness of the crimes. In the opinion of the observer, however, an exception in the case of Eichmann would have been fully justified, given the outstanding importance of this trial, the limited amount of evidence which the accused had at his disposal, and the fact that such limitation would have compromised his defence. For there is no doubt that the effectiveness of this evidence was seriously impaired by the fact that it was taken abroad on commission.

Moreover, the examination abroad of certain witnesses for the prosecution created further problems, as for example the case of a witness who knew two days in advance the questions which would be put to him or, again, the case of evidence given in Austria without defence or prosecution representatives being present.

One should also mention the difficulty which arose in weighing up certain evidence or statements unfavourable to the accused made by other Nazi criminals in the course of, or with an eye to, their own trials. Such persons obviously had every interest in saddling Eichmann with all the crimes of which they were themselves accused.

This evidence, which ought not to have been taken into consideration in the ordinary way, was accepted by the Court because of its usefulness in clarifying certain aspects of this vast criminal enterprise. In any case, the District Court, in its judgment, made reservations as to the value of this evidence and avoided basing its conviction upon it.

The serious objections which were raised against the penalty inflicted on Eichmann relate, for the most part, not to the severity of the sentence but to the death penalty as such. Much weight was lent to these objections by the fact that Israeli law does not as a rule recognize the death penalty, which was specially introduced for the most serious crimes of the Nazis and their collaborators.

The observer is amongst the advocates of the abolition of this penalty, at least in developed countries, and consequently cannot help registering his disagreement with the Israeli legislators on this point. It is, of course, impossible to enlarge on this problem with special reference to international penal law. Let simply be expressed the hope that the States which are at present engaged in applying international justice through their laws and their legal organs will be more inspired by this great moral postulate of our era. It is to be hoped that such states will, as far as possible, avoid establishing, or at least inflicting, the death penalty, especially when, like Israel, they have clearly shown their opposition to this penalty by abolishing it for ordinary crimes.

The Eichmann trial will undoubtedly occupy a leading place amongst the great trials of our century concerned with international penal law. Its proceedings need careful study. This is not only for the legal questions which it raises or which it resolves but mainly because it reveals to us the certain aspects of the extreme in crime today. For it is essential to understand the causes and results of such crime in order to be in a better position to fight against it.

THE KENYA CONSTITUTIONAL CONFERENCE

From February 14, to April 6, 1962, a constitutional conference for Kenya was held at Lancaster House in London, at the invitation of the Secretary of State for the Colonies, Mr. Reginald Maudling. Delegates of all the parties represented in Parliament at Nairobi

took part, including the two parties of decisive importance—the Kenya African National Union (KANU) led by Jomo Kenyatta, and the Kenya African Democratic Union (KADU) led by Ronald Ngala.

The major difficulty in the negotiations arose from the fact that KANU was in favour of a centralized, unitary constitution, and the KADU, of a federal constitution. As a result of this conflict of views, it was not possible for the conference to reach agreement on a fully worked-out draft constitution. On the other hand, all parties accepted a “Framework of the Kenya Constitution”, submitted to the conference by Mr. Maudling. This Framework of the Constitution represented a compromise in which the federalist views of the KADU were taken largely into account. Part of the compromise was the agreement that the Kenya Government would be altered by the inclusion of representatives of KANU, which has since occurred. It is now for the coalition government, which is mainly composed of KADU and KANU representatives, to work out the details of the constitution in collaboration with the British Government.

It was gratifying to note that the introduction and guarantee of constitutional institutions were given the same careful attention by both the KADU and the KANU as was naturally given by the participants in the conference representing the European and Asiatic minorities. Evidently the developments threatening constitutional government in other African countries that have obtained independence since the Second World War have not been without influence on Kenya’s political leaders. This was particularly clear from Ngala’s first speech, which set out the KADU attitude to the underlying principles of the future constitution :

Many former colonies, British, French and Belgian, have adopted, or have been given at independence, a unitary and parliamentary system of government. In several instances the form of parliamentary democracy accepted by them has failed or it has been perverted after independence. The experience of history shows that in practice the proper working of democracy requires equality of political opportunity for more than one political party, freedom of speech and criticism, the Rule of Law, and freedom of the press. As Sir Ivor Jennings rightly states: “The test of a free country is to examine the status of the body that corresponds to His Majesty’s Opposition”. Apparently, the governments of the countries referred to found it difficult to face the criticism of a free press or the lawful activities of an opposition party. The enacted legislation aimed at the protection of state security, but in fact they applied it to combat and eliminate political criticism and opposition. I am thinking of the preventive detention acts now in force in several newly independent African countries. . .

It is obvious that laws such as the ones just described strike a shattering blow to the Rule of Law which is one of the cornerstones of personal freedom . . .

How could such degeneration and deterioration of liberty and democracy be brought about? Why is the multi-party parliamentary system in the process of giving way to the one-party system and dictatorship? One of the main reasons is without any doubt this: too much power has been concentrated in the hands of few individuals. It is an indisputable fact that power corrupts, and that absolute power corrupts absolutely. Therefore, in the constitution we are to devise, provision must be made for the decentralisation of power, so that power is shared out between many. That is the reason why we favour a federal concept of government.

From the very beginning there was agreement among all participants in the conference that the impartiality and independence of the Judiciary must be guaranteed and that the constitution must contain a Bill of Rights.

Judiciary

With regard to the organs of the Judiciary, the following principles are laid down in the Framework of the Constitution accepted by the participants in the Conference:

An impartial and independent judiciary is of fundamental importance. The necessary provision should be made by means of a Judicial Service Commission to ensure the appointment of impartial judges, and provision should also be made for their security of tenure once selected.

Provision should be entrenched in the constitution for ultimate right of appeal to the Judicial Committee of the Privy Council in specified classes of cases, including interpretation of the constitution and enforcement of the Bill of Rights.

As is known, a number of new African states have recently set up special tribunals to try offences against the security of the State. Neither the provisions concerning the appointment and composition of these tribunals nor the regulations governing the procedure followed in them provide the guarantees for the accused to which he is entitled in accordance with basic principles of personal freedom. The Committee on a Bill of Rights set up by the conference (see below) made the following observations about the problem of special tribunals:

The Committee considered the danger that special tribunals to try certain kinds of criminal offences might be set up so as to by-pass the provisions of the constitution which are designed to preserve the independence and quality of the judiciary. The Bill of Rights will, of course, guarantee that any such tribunal will have to be independent and impartial, but it cannot guarantee that the members of such a tribunal would be of the same calibre as ordinary judges and, if they were not, a person appearing before the tribunal might not be given a satisfactory trial. On the other

hand, the Committee recognised that it would not be right to prevent altogether the setting up of special tribunals to try particular kinds of cases, e.g., traffic offences. The Committee consider that a possible solution to this problem might be for the constitution to provide that where such a special tribunal was set up, its members should have to be appointed by the Judicial Service Commission. The Committee recognise, however, that it is not within their competence to make a recommendation as to the functions of the Judicial Service Commission in this respect and accordingly confine themselves to recommending that, if the constitution does not contain such a provision as is referred to above, the problem of special tribunals should receive further considerations.

Bill of Rights

Under Part 4 of the Framework of the Constitution, a Bill of Rights is to be included in the constitution to guarantee the proper protection of individuals, to be enforceable in the courts. This Bill of Rights would be based on that contained in the Uganda (Constitution) Order in Council, 1962, amended as necessary to render it applicable to Kenya and to take account of the specific recommendations contained in the report of the Committee on a Bill of Rights set up by the conference.

The Committee on a Bill of Rights set up by the conference, in which all participating parties were represented, produced a very detailed draft Bill of Rights. The Bill of Rights contained in the Uganda Constitution was chosen as a model because it is the most recent in the series of Bills of Rights prepared for the former British colonies and thus benefited to the greatest extent from the draftsmanship of the experienced lawyers in the Colonial Office. In the period 1960-62, there came successively into force the Federal Constitution of Nigeria, the Bill of Rights of the previous Kenya Constitution, the Sierra Leone Constitution and the Uganda Constitution. Special attention was paid to the definition of rights and in particular to the conditions under which they may be temporarily restricted, with the natural result that each constitution improved and refined on its predecessor with respect to the content and form of the Bill of Rights.

The Bill of Rights in the Uganda Constitution, which formed the model for the Bill of Rights in the future Kenya Constitution, with the amendments and additions recommended by the Committee on a Bill of Rights, includes all the essential Human Rights. It guarantees equality before the law, personal freedom, freedom of belief and conscience, freedom of assembly, the right to freedom of movement and free choice of domicile, inviolability of the domicile, right to property; it prohibits slavery and forced labour,

torture and cruel, inhuman or degrading treatment and punishment. An important addition was made to the guarantee of freedom of movement in the Uganda Constitution, in which subsection 1 of Article 17 reads as follows:

No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Uganda, the right to reside in any part of Uganda, the right to enter Uganda and immunity from expulsion from Uganda.

The Committee on a Bill of Rights recommends that in the future Kenya Constitution, before the words "and immunity from expulsion from Kenya", the words "the right to leave Kenya" should be inserted. Thus freedom to leave the country is to be guaranteed in Kenya. Historical phenomena such as the flow of refugees from the so-called German Democratic Republic and the construction of the Berlin Wall have reinforced the Committee on a Bill of Rights set up by the Kenya Constitutional Conference in the conviction that the right of persons "to leave any country, including their own" is one of the basic freedoms.

Readers of this *Bulletin* are aware that in certain of the new African states detention laws have been introduced which constitute a considerable threat to personal freedom, where orders for detention are issued by the Executive and where the detention procedure cannot effectively be challenged in the courts and is not subject to judicial control once it has come into effect. It is noteworthy that the most recent constitutions of African states, such as those of Sierra Leone and Uganda, provide guarantees against the misuse of detention. Under subsection 1 of Article 20 of the Uganda Constitution which, as has already been mentioned, forms the model for the future Kenya Constitution, detention is only allowed on the basis of Ordinances issued during a period of State of Emergency. Subsections 2 and 3 of Article 20 read as follows:

Where any person who is lawfully detained in pursuance only of such a regulation as is referred to in subsection (1) of this section so requests at any time during the period of that detention not earlier than six months after he last made such a request during that period, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice.

On any review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

Federal Structure as a Guarantee of the Rule of Law

As was mentioned earlier, the KADU demanded that an independent Kenya should have a federal type of state organization, not least because in their view a unitary, centralized system in a new state is a great danger to constitutional institutions. If too much power accumulates to the Executive by, for example, giving it full authority over the physical instruments of state power—the army and the police—the misuse of this power usually so weakens the independence of the Judiciary that the protection of fundamental rights through the courts ceases to be a reality. A United States judge, the late Mr. Justice Jackson, expressed this idea in the following suggestive terms: “Any wise national system should create states if they did not already exist.” The Kenya Constitutional Conference decided to adopt this procedure. The country is to be divided into six regions, each with its own parliament and government, together with the federal territory of Nairobi, and the regions are to be given important legislative and administrative powers derived from the Constitution. The question of decentralization of the physical instruments of state power gave rise to particularly close discussion. In Kenya today there is an army of 1,800 men and the well-organized, centrally-commanded police force of 14,000 men. As is normal, the army will be subject to the central government, but a new approach is used for the decentralization of the police force. The regions would be responsible in the first instance for the maintenance of law and order; they would consequently each possess their own police forces which in each region would be under the command of a regional commissioner. The latter would normally be responsible to the competent regional authorities. With the exception of the officers, members of the regional police forces would be recruited by a regional authority. Both certain reserve units and special services such as the criminal investigation department, would come under the central government. An inspector-general of police would command the units and services subject to the central government and would have supervisory authority over the regional police forces. He would be appointed by the Head of the State on the proposal of a Police Service Commission, the composition of which would be regulated in the Constitution in such a way as to enable it to function as an independent and impartial body free from political influences. The Police Service Commission would appoint all police officers (in the central and regional forces). It is also to be provided in the Constitution that the inspector-general will have independent

status similar to that of the judges. A memorandum from the Secretary of State for the Colonies, which forms an integral part of the Framework of the Constitution approved by the Conference, states:

There would, of course, be no question of a minister of the central government having power to give directions to the inspector-general as regards the operational control and use of any part of the police force in the maintenance of law and order in Kenya. The responsibility of the inspector-general to the minister would extend to the organisation, maintenance and administration of the units under the inspector-general's direct command and the inspector-general would be generally responsible for the efficient discharge of the duties assigned to him.

This attempt to prevent the misuse of the police for political ends and to make it into an independent instrument for the maintenance of law and order deserves the most attentive consideration.

THE YASSIADA TRIAL AND OTHER RECENT DEVELOPMENTS IN TURKEY

On September 16, 1961, the High Court of Justice of Turkey convicted many of the leading figures of the deposed regime. Fifteen of the defendants were sentenced to death, 31 received life imprisonment and 418 were given prison terms ranging from 2 to 20 years. The Committee of National Unity (CUN) modified the sentences on the same evening. The latter group was composed of the heads of the military uprising of May 27, 1960, who, having dissolved the National Assembly, governed in the name of the Turkish nation.

The CUN re-established Article 56 of the Turkish Penal Code, which it had repealed a year earlier. This Article prescribed the automatic commutation to life imprisonment of all death sentences passed on defendants aged 65 or older. This saved the life of the former president of the Republic, Mr. Celal Bayar, while relieving the CUN of the responsibility for pardoning him. The CUN also commuted 12 other sentences of capital punishment to life imprisonment, among them those of Mr. Refik Koraltan, former President of the National Assembly, and Mr. Rustu Erdelhun, former Chief

of Staff. On the other hand, Mr. Adnan Menderes, the deposed Prime Minister, and two of his Ministers, Mr. Fatih Rustu Zorlu and Mr. Hasan Polatkan, were hanged. The final results of the trial appear to be as follows:

- 3 defendants executed;
- 42 sentenced to hard labour for life;
- 418 sentenced to prison terms, mostly former Ministers, deputies, and high functionaries of the Democratic Party;
- 123 acquitted;
- 5 discharged.

All of the defendants sentenced to imprisonment lost their rights of citizenship for the rest of their lives.

The International Commission of Jurists was represented at the trial by three successive observers: Mr. Vivian Bose, President of the International Commission of Jurists, Mr. Raymond Nicolet of the Geneva Bar and Mr. René Degouy, President of the Chamber at the Court of Appeal in Paris. The trial was remarkable for a number of juridical peculiarities. Since the former government was accused almost exclusively of political crimes, the case could not be taken up by a court of civil law. But since the crimes were committed by Ministers in the exercise of their functions, the CUN could have attempted to try them before the High Court authorized by Article 61 *et seq.* of the Constitution of 1924. This Court, according to the dispositions in force, had to be composed of 21 magistrates chosen by their equals from the Court of Appeal and from the Council of State. It could not, however, be established without the authorization of the National Assembly, which the CUN had dissolved. As for the President of the Republic, according to the Constitution of 1924, he could not be held responsible by the National Assembly for any crime except that of high treason. All of the decrees promulgated by him involved, by virtue of the same constitutional act, the President of the Council and the Ministers who had countersigned them.

By the adoption of Law No. 1, on June 14, 1960, the CUN established a High Court of Justice to judge the President of the deposed regime, the former Prime Minister and the former deputies. Article 6 of this Law, which was in effect a sort of temporary constitution, stipulated that the High Court be formed of judges belonging to the civil Bar and chosen by the CUN on the recommendation of the Council of Ministers. By virtue of the same

Article, the sentences passed by the High Court could not be subject to appeal. Only death sentences could be submitted to the CUN for review. The preamble to Law No. 1 contains the justification, in the eyes of the CUN, for the trials involving the officials of the Bayer-Menderes regime. It reads :

The leaders of the party in power violated the Constitution, suppressed the rights and individual liberties of the Turkish people, made it impossible for the opposition to exercise its functions and, in fact, instituted the dictatorship of a single party. The National Assembly of Turkey was reduced to the state of a parliamentary group and lost its legality.

The Turkish army is charged, by virtue of Article 34 of the law on the interior functions of the Army, with the responsibility of protecting and safeguarding the Turkish nation and the Turkish republic instituted by the organic Statutes. The Army took action in the name of the Turkish people in order to fulfil its legal and sacred mission against the former regime which had endangered the very existence of the Turkish nation by turning its citizens one against the other, and in order to re-establish the juridical State.

The most important penal disposition invoked against the principal defendants was Article 146 (paragraph 1) of the Penal Code. This Article, which had never been invoked before the Yassiada trial, provided that violation of the constitution was punishable by death. It was used to interpret the acts committed by the former regime as attempts to abolish all or part of the Constitution. The range of application of Article 146 was declared retroactive by an amendment providing for the punishing of accomplices by sentences of 5 to 15 years in prison (Law No. 15 of July 11, 1960, Article 3).

We can cite two examples—the “ Demokrat Izmir ” affair and the “ Istanbul-Ankara ” Incidents—to illuminate the interpretation given by the High Court of Justice to paragraph one of Article 146.

The “ Demokrat Izmir ” Affair

On May 2, 1959, members of the Democratic party attacked and burned the printing plant of an opposition newspaper. Police, stationed 200 meters away, did not intervene.

In view of the evidence, the Court reached the conclusion that the attackers were following Mr. Menderes' instructions. Instead of protecting the rights and liberties of the people, the Court stated, Mr. Menderes had used Kemal Hadimli, the Governor of Izmir, an official whose duty should have been to impede these illegal actions, to destroy the printing plant, “ thus violating the liberty

of the press guaranteed by Article 77 of the Constitution and the guarantee of private property contained in Article 73 of the Constitution.”

“ Ankara-Istanbul ” Incidents

In the spring of 1960, the students of Ankara and of Istanbul demonstrated a number of times in the streets of these two cities. The demonstrations were peaceful and the students were, in any case, accompanied by their professors and by a great number of professional men. The reaction of the police was savage. During the first demonstration at Ankara, two students were killed and a number of others seriously wounded.

In the opinion of the High Court:

On all of these occasions Celal Bayar acted as the agent of a particular party when, in his quality as President, he should have acted impartially. He instructed the competent authorities to suppress the student demonstrations so violently that they would not recur.

Adnan Menderes gave instructions to the authorities and agents of the police and remained in contact with them during the course of the demonstrations. He must thus be considered as having taken part in the suppression of the incidents. The administrative evidence leads to the conclusion that he attempted to institute a dictatorship.

The members of the Cabinet sustained these dictatorial actions, which they should have opposed to the point of resigning from office. They thus made themselves partners in the crimes committed.

The other defendants were punished because they gave illegal instructions, because they voluntarily carried out the orders of those who were attempting to install a dictatorship, and because they participated in acts of violence.

The actions of the defendants formed an important part of the violations of the Constitution.

Only a few weeks after the end of the Yassıada trial the first post-revolutionary elections were held on October 15, 1961. About 60% of the electorate voted. As none of the four main parties (the Popular Republican Party, the Party of Justice, the New Turkey Party, and the Rural Republican Party) was able to obtain an absolute parliamentary majority, a coalition government had to be formed. This coalition soon revealed itself as too unstable to govern. In June 1961, therefore, a new crisis occurred. Mr. İsmet İnönü, head of the Republican Party, was able to establish a government on June 26, which obtained the support of the other three parties. One of the conditions of this support was that an amnesty be granted to political prisoners. The officials and backers of the Menderes regime who were still in prison were set free on December

28, 1961. The government pledged itself to financial and fiscal reforms. These reforms, coupled with a policy marked by its respect for the new Constitution—ratified by the people on July 9, 1961—seems to offer hope for the future stability of Turkey.

THE “ SABOTAGE ” ACT OF SOUTH AFRICA

In December 1961, there were a number of minor sabotage outrages in the Republic of South Africa, when some ineffective attempts were made to perform acts of destruction against State property. There was no reported loss of life; an organization called “ Spear of the Nation ” was apparently responsible for the incidents. These latter, coupled no doubt with reports of the training of “ freedom fighters ” in other parts of Africa, caused alarm within government circles. The Minister of Justice, Mr. Vorster, announced that legislation would be introduced to deal with saboteurs and agitators. The General Law Amendment Bill—dubbed by its critics “ the Sabotage ” Bill—was introduced into Parliament on May 14, 1962. The Bill met with instant criticism from a wide variety of sources, which included two ex-Chief Justices of South Africa, to the effect that the Bill fundamentally attacked the liberty of the person. There followed some violent demonstrations in the Republic against the Bill. Abroad, the International Commission of Jurists was only one of many voices raised in protest against the provisions of the Bill. Nevertheless the Bill was finally passed by the House of Assembly with only minimal amendments and was promulgated on June 27.

The General Law Amendment Act is a somewhat unusual piece of legislation inasmuch as it amends a number of existing Acts, principally the Suppression of Communism Act 1950, while at the same time it creates in Section 21 the important new offence of sabotage, punishable with death. As will be seen below, the amendments place more and more power in the hands of the Executive, almost always in the person of the Minister of Justice; this development is at the expense of the individual. A few minor safeguards were inserted into the Act during its passage through the House of Assembly.

The Amendments to Existing Legislation

Section 16 of the Act amends the Public Safety Act of 1953. This latter Act, it will be recalled, gave the Governor-General (now the State President) the power to make emergency regulations after proclaiming a State of Emergency. Section 16 now makes it possible for the emergency regulations made by the State President to apply *outside* the area in which the State of Emergency has been proclaimed. Larger areas can henceforth, in fact, be covered by emergency regulations.

A number of Sections in the Act purport to alter certain Provisions of the Criminal Procedure Act 1955 as amended. Perhaps the most noticeable amendment occurs in Section 21 (4) (f) which reads:

(f) no person shall on conviction of the offence of sabotage be dealt with under section *three hundred and forty-two, three hundred and forty-five or three hundred and fifty-two* of the said Act; . . .

Section 342 of the Criminal Procedure Act, when read with Section 326 of that Act, empowers the court to deal with convicted juveniles by special methods of punishment such as placing them in care of a probation officer or sending them to a reformatory, instead of imposing other punishments such as, for example, death by hanging. Therefore the effect of specifically excluding Section 342 is to make juveniles, who in South Africa are normally persons under 19 years of age, liable to suffer the full range of punishments prescribed by law, including death by hanging. The exclusion of Sections 345 and 352 eliminates respectively the punishment of whipping juveniles, and the application generally of suspended sentences, cautions and reprimands.

One other procedural change includes the elimination of trial by jury where the Minister of Justice so directs. In this way the Minister himself directly influences the procedural aspect of a trial.

By Section 19, the Riotous Assemblies Act 1956, under which the Minister of Justice can prohibit listed persons from attending a public gathering (which is defined as a gathering of twelve or more persons) is amended. It now becomes an offence to publish in the ordinary way any statement or speech made by a person prohibited by the Minister from attending a public gathering. While the Riotous Assembly Act infringes severely the freedom of association, the new amendment cuts right across freedom of expression.

But five out of the nearly eight pages of the Act are devoted to detailed amendment of the notorious Suppression of Communism

Act 1950. It will be recalled that the latter Act was ostensibly aimed at combatting communism by declaring the Communist Party of South Africa (and bodies identified with it) an unlawful organization. In practice this Act has been used as a political instrument to discriminate against those who oppose the government's policy of apartheid. For instance, Patrick Duncan, editor of the South African weekly *Contact*, a well-known critic of government policy and anticommunist liberal, has been classified under this Act as a (statutory) communist. The following are the principal points to notice in the amendments made by the General Law Amendment Act to the Suppression of Communism Act.

(1) Section 2 slightly enlarges the category of bodies which can be declared by the State President unlawful organizations.

(2) By Sections 3 and 7, the Minister may prevent communists and those furthering the objects of communism from attending gatherings (which, as defined, may be "of any number of persons").

(3) Newspapers, under Section 5, cannot now register under the Newspaper and Imprint Act, 1934 unless they deposit 20,000 Rand (i.e., £10,000) with the Minister of the Interior. It would appear that this provision will normally apply to new newspapers registering from the date the Act becomes operative. Should a newspaper which has been obliged to deposit 20,000 Rand be banned by the State President by virtue of Section 6 of the Suppression of Communism Act, then the paper forfeits the deposited sum. To reappear under a different name, the paper would have to find a further 20,000 Rand as deposit. Thus in a particularly oblique way the Act strikes both at freedom of the press generally and at the very existence of smaller anti-government publications whose funds are limited.

(4) In Section 8 (a) the Minister of Justice receives new and sweeping powers in respect of listed persons; the relevant passage from the Law reads:

...the Minister may...prohibit him, [the designated person] during a period so specified, from being within or absenting himself from any place or area mentioned in such notice or, while the prohibition is in force, communicating with any person or receiving any visitor or performing any act so specified.

The above "prohibition" has been referred to by many critics of the Act as a form of "house arrest". It has been pointed out, perhaps extravagantly, that the Minister now has the legal power to set up what are tantamount to concentration camps. As

originally drafted by Mr. Vorster the Bill provided that a detainee could be visited by no one. Fortunately the House of Assembly amended the Section so as to permit the detainee's lawyer to visit him. However, the Section, as it stands, permits the Minister to detain persons indefinitely on no charge. There need be no trial, and the detainee may be cut off from almost all human and spiritual contact. What if a minister of the church wishes to visit the detainee? There is no mention in the Section as to what rights, if any, the detainee has in his place of detention. Certainly the door has been left wide open for abuse by unscrupulous officials.

(5) Listed persons may be ordered by the Minister of Justice under Section 9 to report "...to the officer in charge of such police station and at such times and during such period as may be specified in the notice concerned..." Technically a statutory communist could be obliged to report to a police station every day of his life.

(6) Under Section 10 (1) (e), which closely resembles Section 19 (b), it will be an offence for listed persons, *inter alia*, to secure publication of articles or statements; the editor too will be liable. This is the new provision which has silenced among the 102 persons so far listed by the government, ex-Chief Albert Luthuli, Nobel Peace Prize winner in 1961. The *Johannesburg Post* announced in June it would no longer print his articles in view of the provisions of the Act. In August, when two listed men appeared in court, newspapers refrained from publishing their pleas to the charge, leaving instead an eloquent blank. The Minister of Justice has personally had to intervene to somewhat modify the application of the Act in respect to court proceedings. But certainly the fact remains that this Section silences, in an underhand way, open critics of the regime.

Sabotage

Sabotage is a new offence in South Africa Law. One of the main legal criticisms of this new offence is the extraordinarily wide terms under which the definition of sabotage is drafted. Many of the acts included under this definition could not possibly be dangerous to the State.

The Act cites a list of occasions when any wrongful and wilful act of a person amounts to sabotage. One such occasion arises when any person damages, tampers with or endangers "any property whether movable or immovable, of any other person or

of the State". Thus the painting of anti-government slogans on a wall could amount to sabotage. Under the Act an accused will not be guilty of the offence if he can prove that the commission of the alleged offence was not calculated to produce any of a considerable number of effects, one of which reads:

... to further or encourage the achievement of any political aim, including the bringing about of any social or economic change in the Republic.

The procedural effect here is to shift the burden of proof to the accused (in particular the proof of the absence of *mens rea*), who will be convicted unless he can prove his innocence. Normally in a civilized jurisprudence an accused man is innocent until proved guilty by the prosecution, on whose shoulders the burden of proof rests.

There are three further points on the offence of sabotage which should be mentioned. In the first place the maximum penalty for the offence is death. Secondly, the Act lays down a *minimum* period of 5 years imprisonment. This would clearly be a very severe measure in cases of conviction where the motives of the accused were far from objectively proved. Thirdly, Section 21 (4) (g) reads:

...acquittal on a charge of having committed the offence of sabotage shall not preclude the arraignment of the person acquitted on any other charge arising out of the acts alleged in respect of the charge of the offence of sabotage.

This means that the prosecution can charge a person again in respect of acts on which he has been previously found not guilty. This is a change in South African procedural law.

The Effect of the Act

There are other unsatisfactory features of the Act not mentioned in the above commentary. For example, it will now be easier under Section 18 of the Act for the prosecution to secure convictions against those citizens of South Africa leaving the country without a passport. It will also be possible at the instance of the Attorney-General to dispense with a preliminary investigation; this procedure has always provided an accused person charged with a serious crime with the opportunity to know what the case against him is.

What will be the main effects of the passing of this Act? Undoubtedly the individual's civil rights are further whittled away.

Several fundamental rights are—under the Act—made dependent on the will of the Executive. Often a man may move and speak and write only by courtesy of the Minister of Justice. Those affected will, of course, in the main be opponents of the Government's policy of apartheid. It is already obvious to the reader that the newspaper world and the reading public will be drastically affected by the Act. Also trade unionists will be directly injured by the Act. For under the terms of Section 21 workers striking unofficially for better pay or living conditions could be found guilty of sabotage. In future a man strikes at his peril.

No one disputes the right of the South African government to legislate on behalf of the security of the State. But it is contended that in the manner of legislating the Government have again ignored many of the basic principles of the Rule of Law. The provisions in the Act for "house arrest" and for the silencing of critics of the regime are but two examples showing the continued authoritarian trend of Dr. Verwoerd's Government.

Before the Act became law, the International Commission of Jurists issued on June 21, 1962, a press statement concerning the Act. The last paragraph of the statement said:

The Bill, which has been widely condemned by world opinion and by countless numbers in South Africa itself, including the parliamentary opposition, is now in its last stages of consideration in the South African parliament. There is no doubt that if the Bill becomes law, South Africa will have taken a major, if not final, step towards the elimination of all rights of the individual and the Rule of Law. The world legal community is profoundly and deeply disturbed over the Sabotage Bill and other steps being taken by the South African Government which will lead inevitably to the annihilation of human rights in South Africa.

THE CAIRO TRIAL OF FRENCH DIPLOMATS

Few events in the past have aroused such emotion in international legal opinion and created such unity of apprehension as the arrest and trial of four French diplomats and eight other co-accused in Cairo. The fact that the case involved one of the most fundamental questions of international law, that of diplomatic immunities, made it an acid test of the observation of the Rule of Law in the United Arab Republic. The outcome was

inconclusive. The accused have been set free and the French diplomats permitted to return to their country; yet their release was not grounded on a clear judgment of not guilty by the tribunal. The executive act that brought an end to the trial was couched in terms of an indefinite postponement of the trial "for high policy considerations related to the general interest". This decision was announced on the eve of the French referendum on the future of *Algérie* and was interpreted by government sources as a token of appreciation of the spirit with which the Evian cease-fire agreements were being carried out by General de Gaulle and as a gesture of friendship toward the French people.

Thus, while the various devices of surveillance admittedly applied against the French diplomats during their mission in Egypt, their arrest, seizure of archives and alleged maltreatment while in custody constitute one serious issue in this case, the other derives from the abuse of judicial process for clearly political purposes. Merely four days before all the accused were released, the prosecution demanded life sentences of hard labour for the four main accused and claimed—notwithstanding the evidence produced by the defence—that the charges of espionage and plotting to kill President Nasser and to overthrow the political regime of the United Arab Republic had been proven through signed confessions in pre-trial proceedings.

The chronology of this alarming case begins on November 24, 1961, when Egyptian police arrested at their respective homes four members of the French mission operating in the United Arab Republic since 1958 to liquidate French interests sequestered by Egypt after the French-British-Israeli operation against the Suez Canal Zone in 1956. On the same day and during the following week a number of other persons were arrested. After an investigation of twelve days, the Prosecuting Branch of State Security published on December 5, 1961, the charges directed against a total of twelve accused, six of whom were of French nationality, four Egyptians, one naturalized Egyptian of Greek origin and one Italian. One of the French accused was to be tried *in contumaciam*. The five others in actual detention were André Mattei, President of the French commission and counsellor of the French Foreign Office, Henri-Pierre Mouton, Director at the French Foreign Office delegated to the commission, Jean-Paul Bellivier, member of the commission and of the Foreign Office staff, André Miquel, cultural attaché, and François Faire, lawyer practising at Cairo.

The commission to which the first three above-mentioned accused belonged was established on the basis of agreements reached in Zurich on August 22, 1958, and confirmed by a note of the Egyptian government dated April 23, 1959. The first document defines in Article 6 the authority of the commission and stipulates:

This commission, composed of a limited number of French experts, shall offer its good offices with Egyptian authorities competent in matters of sequestration to all French citizens who will approach it regarding their property interests and their rights.

This commission, the presence of which in Egypt will be of limited duration and which will remain restricted to the achievement of its purpose, shall dispose for the duration of its mission of all facilities necessary for its accomplishment.

The note of the Egyptian government of April 23, 1959, specifies in Article 5 as follows:

The head of the commission as well as its members would enjoy the following exemptions and facilities:

(a) Immunities against legal procedures...

Finally, a Presidential decree of September 16, 1959, published on the subject of the French commission in the Egyptian Official Gazette, contains in its Article 2 a guarantee of immunity against prosecution for acts committed by its members in their official capacity and assures, under the condition of reciprocity, inviolability of the mission's premises, archives and all documentation in its possession.

The above agreements and instruments thus established a mission *ad hoc* enjoying within the limits of its defined authority protection of the same scope and nature as is available to regular diplomatic representations. It has been one of the best observed rules of international law that diplomatic immunities continue to be mutually respected even in times of war between the powers concerned; the personnel of foreign missions are assured of safe conduct to their home country and the exterritoriality of the buildings containing their archives is preserved.

Since the Suez crisis of 1956, there have been no diplomatic relations between France and Egypt—later the United Arab Republic. The commission established by the Zurich agreements of 1958 has therefore operated under the protection of Switzerland, the power chosen by France to represent her interests in Cairo. The French authorities did not succeed in obtaining permission

for the commission to use such regular facilities as the diplomatic pouch and the code. All communications of its members to their superiors at the French Foreign Office therefore had to proceed through regular mail channels and were subject to strict censorship. By the same token, private conversations in the diplomatic premises under Swiss protection were systematically taped and recorded by the Egyptian police.

It should be finally pointed out that, contrary to usage applicable under similar circumstances, the government of Egypt did not appoint any representative in Paris whose presence in the French capital would have constituted a guarantee of the observation of the immunities granted to French members of the commission in Cairo.

The trial began on Monday, January 15, 1962, before the Supreme Court of State Security, the immediate past President of which, Kamel Loutfallah, committed suicide on December 18, 1961, shortly after the publication of the charges against those accused in the French diplomats' case. Before a tribunal under the Presidency of Mahmoud Hassan Omar, the prosecution was represented by the Prosecutor-General, Ali Nureddin, his deputies Salah Nassar and Abdel Gaffar Mohamed, and a number of government attorneys. Only Egyptian lawyers were admitted as counsel for the defendants; two leading French jurists, former Bâtonnier of Paris René-William Thorp and M^e Raymond Geouffre de la Pradelle were, however, authorized to advise their Egyptian colleagues in the preparation of their briefs and in conducting the defence. Moustapha El Baradei, the Bâtonnier of the Bar of the UAR, headed the list of lawyers whose courage, legal acumen and determination have provided another fine page in the history of the Egyptian legal profession.

The accusation charged the existence of a net of espionage and sabotage established by members of the commission of French property in Cairo. Specifically, there were listed by the prosecution

... espionage in the UAR and contact with a foreign power with the purpose to harm the military, political and economic situation of the UAR, distribution of pamphlets against the UAR and incitement to overthrow the regime by fanning hatred against it and indulging in propaganda susceptible of damaging public interest, corruption through paying or granting certain advantages to persons with the objective to gather for the benefit of France military, political and economic information on the UAR; preparation of political murders and incitement to the murder of the President of the UAR.

The defence, composed of a number of leading Egyptian counsel, took issue firmly with the prosecution's thesis, eventually upheld by the Court, that the four French diplomats did not enjoy diplomatic immunity and that the Supreme State Security Court was competent to try them. In outspoken and impressive interventions, the Egyptian lawyers outlined the long history of diplomatic immunity and referred to a long line of leading cases in various countries of the world where such rights guaranteed under international law have been scrupulously observed. Counsel Ali el Raggal set the tone of the defence pleadings by stating that: "There is an old saying that when politics come through the window justice goes out of the door." He and his colleagues deplored the attitude of the Prosecutor-General who held that the Egyptian assurances of immunity contained in the note of April 23, 1959, had been couched in terms of courtesy and entreaty rather than those of a firm legal obligation. "If this was but an act of courtesy", exclaimed counsel Aly Mansour, "then it cannot be revoked without committing a discourtesy. And even if it was nothing more than a simple promise, it is binding upon our government which does not contradict itself. Yet that note does not merely promise. It gives a guarantee, and that is irrevocable". Another lawyer, Mahir Mohammed Ali, warned the Court that its judgment would affect its standing with other nations. The prestige of the country was equally invoked by Aly Mansour who recalled that this was the first occasion when a person with diplomatic immunity had to appear before an Egyptian court of justice.

With remarkable frankness, the defence lawyers pointed out the damage that would result to the prestige of the UAR from such blatant disregard of international obligations. "A state cannot grant immunities and then revoke them", argued Mr. Raggal, "it would harm the UAR less to expel the defendants than to account to the family of nations for ignoring its promises".

With equal determination and concern for the Rule of Law did the Egyptian lawyers assist their clients in attempting to nullify the effect of statements made in pre-trial investigation under alleged duress. Chief defence counsel El Baradei demanded that all accused be subject to a new interrogation and that they be made to testify on the conditions under which their pre-trial investigation had taken place. Allegations of serious irregularities were made by all the defendants; Mr. Bellivier summed up their repudiation of forced confessions as follows:

I consider the whole framework of my declarations null and void because I signed them under physical and moral constraint—in other words, physical and nervous fatigue, lassitude and mental anguish typical of police interrogation when based exclusively on completely forged documents.

It is only fair to point out that the defendants as well as their counsel were free to plead their cause throughout the 37 sessions of the Court. The courage of the former and the professional skill and dedication of the latter should be highly praised. They have undoubtedly made a decisive contribution to the final outcome of the trial which ended in the immediate release of all the accused on April 7, 1962. Though the sudden decision of the government has certainly been affected by political considerations, it might not have been reached but for the embarrassing situation created by the prosecution's obvious inability to substantiate its charges. The credit for having prevented another miscarriage of justice is shared by the undaunted defendants and by their Egyptian counsel whose character and perseverance have furnished a new proof of the ultimate dependence of the Rule of Law on the spirit and morale of the legal profession. Their task was facilitated by the fairness and impartiality of the presiding Judge, Hassan Omar.

In view of these positive aspects of the Cairo trial, it is particularly regrettable that the International Commission of Jurists was unable to be represented by its observer. A request to grant the usual facilities to Professor Alf Ross of the Law Faculty of the University of Copenhagen was submitted to the authorities of the UAR by the Secretary-General on December 7, 1961, but remained, despite repeated interventions, without reply. It was only on the day following the opening of the trial that a non-committal communication was received from the Minister of Foreign Affairs of the UAR. Faced with the prospect that Professor Ross would find himself upon his arrival in Cairo prevented from exercising his functions as an observer, the Commission has reluctantly to abandon its project of sending an observer to Cairo.

INCREASE IN THE APPLICATION OF THE DEATH PENALTY IN THE USSR

A growing number of death sentences have been passed in the USSR during the last two years. Concern aroused by world public opinion over this development compels the International Commission of Jurists to comment on it from the viewpoint of the Rule of Law and of fundamental Human Rights, the defence and promotion of which is the Commission's main objective. Comments were made on the situation in the *Bulletin of the International Commission of Jurists* No. 12 (December 1961). The present article supplies additional information on the situation in the Soviet Union in the light of recent legislation broadening further the scope of application of capital punishment in that country.

The penal policy of a State is, of course, a matter for its domestic jurisdiction subject, however, to the provisions of the Charter of the United Nations and to moral obligations arising from the Universal Declaration of Human Rights. Within these limits, every State may conduct the kind of penal policy it finds most appropriate under local circumstances. Yet, general trends of penology cannot be disregarded by the policy-makers of any State lest their administration of justice appear at a serious disadvantage.

Capital punishment was abolished in the USSR in 1947, but restored in 1950; the scope of its application was broadened in 1954; it was retained as "an exceptional punitive measure pending its complete abolition" in the recent federal criminal legislation of 1958 and in Criminal Codes of the Union Republics like that of the RSFSR (Russian Soviet Federated Socialist Republic). Section 22 of the "Basic Principles of Criminal Legislation of the USSR and the Union Republics" prescribed the death penalty for high treason, espionage, sabotage, terrorist activities, banditry and murder in aggravating circumstances. Since the enactment of the new federal legislation the scope of application of this exceptional penalty was further expanded by five consecutive decrees:

— Decree No. 207 of May 5, 1961, covered pilfering of State or public property in especially large amounts, counterfeiting money for profit, and the commission of violence in detention by especially dangerous habitual offenders;

— Decree No. 291 of July 1, 1961, dealt with speculation in foreign currency;

— Decrees Nos. 83, 84 and 85 of February 12, 1962, extended the death penalty to attempts in aggravating circumstances upon the life of a policeman or special constable on duty; to qualified rape (i.e., by a group of persons, or by an especially dangerous habitual offender, or entailing especially grave consequences or if committed on a minor); to taking bribes by public officials provided they were in a responsible position or recidivists.

These changes were included in the "Basic Principles of Criminal Legislation of the USSR and the Union Republics" by Decree No. 147 of the Presidium of the Supreme Soviet of April 6, 1962, published in the Official Gazette of the Supreme Soviet of the USSR (*Vedomosti Verkhovnoy Soveta SSSR*), No. 14, 1962.

The Supreme Court of the USSR urged an intensified struggle against these types of crimes in its plenary session of September 14, 1961, and again in March 1962. In March, the full Bench of the Court called once more the attention of all courts to the fact that pilfering of State and public property was a dangerous crime and that to combat it was one of the Judiciary's most important tasks.

The new legislative norms and policy directives concerning the death penalty indicate a controversial trend in recent Soviet penal practice. There seem to exist two distinct trends, contradicting each other, as revealed by an article of N. R. Mironov, chief of the Department for administrative organs of the Central Committee of the Communist Party of the Soviet Union (CPSU), in *Partiinaya Zhizn* (Party Life), No. 5, 1962.

There are some people who think that the imposition of more severe penalties by the courts for particularly dangerous crimes does not conform to the ideological principles of our State, which curtail the scope of administrative action, limit the punitive function of the State, and aim at the gradual replacement of these measures by the influence of public opinion and education. This argument cannot be upheld.

Yet the new Communist Party Programme, adopted by the 22nd Congress of the CPSU in October 1961, contains, among others, the following declaration:

Higher standards of living and culture and greater social consciousness of the people will pave the way to the ultimate replacement of judicial punishment by the influence of public opinion and education. Under socialism, anyone who has strayed from the path of the working man may return to useful activity.

Such humanitarian aims are in accordance with the general

trends of penal policy as expressed by competent international authorities.

The increasing application of the death penalty in the USSR to suppress economic crimes seems to reverse this humanitarian tendency. For those accused of special economic crimes, such as those listed above, reports published so far on trials under the new legislation indicate that conviction often spells death by shooting. Obviously, nobody can return to useful activity, or as the Communist Party Programme has put it, to " the path of working man " if he has been shot.

Both the 20th and the 22nd Congress of the CPSU proclaimed the need to strengthen socialist legality. In pursuit of this objective, they condemned vigorously both Stalin's well-known dialectical theses on the intensification of the class struggle in the final stage of advancing towards communism, and the resulting injustices. The re-emphasis on the practice of physically liquidating those imbued with the " remnants and survivals of capitalism " raises, however, the question whether the application of Stalin's precepts has not merely been shifted from the political to the economic field. Inspired by motives which seem to be challenged even inside the Soviet Union, excessive punishment by shooting still persists. While the Stalinist abuses of justice have been exposed and rejected today in a period which has been hailed by present Soviet leaders as one of permanent stability in the political, social and economical revolution of the socialist countries, the application of the death penalty has in fact increased during this very period.

There is however another aspect of the current practice which has given cause to very broad concern throughout the world, namely, that the prosecution of persons for economic crimes and the application of the death penalty has signs of racial overtones. The number of Jewish names found among those condemned to death is strikingly high while there appear to be disproportionately high sentences passed on Jewish persons as compared with others.

THE DJILAS CASE

"The Circuit Court of Belgrade sentenced Milovan Djilas to five years imprisonment for giving away official secrets."

In this way the communist Yugoslav daily, *Borba*, announced in its issue of May 15, 1962, the result of the Djilas trial. Ever since his arrest in April 1962, the case of Milovan Djilas has been hotly debated in Yugoslav and foreign newspapers.

The Personal Record of Djilas

The accused, Milovan Djilas, now 51, was first gaoled in 1933 by the Royal Yugoslav government for communist activities when still a university student. In 1938 he became a member of the Central Committee of the Yugoslav Communist Party and carried out important tasks during the Second World War in organizing anti-fascist opposition with his Montenegrin zeal and ruthlessness. After the war he occupied top positions in the new Yugoslav Communist hierarchy: he was secretary of the Party's Central Committee, a member of the Government and, in 1953, one of the Vice-Presidents of the Federal Executive Council, the supreme organ of the State. As a member of the Yugoslav Government he took part in several missions abroad, both to Moscow and to the United Nations, where he served as his country's chief delegate for a number of years. As a top ideologist, he defended Yugoslav policy after the break with the Cominform.

In 1953, already a non-conformist, he called for a two-party system, for more freedom and more democracy than was so far realized in Yugoslavia. For this deviation the Central Committee of the Party expelled him on January 17, 1954, from all Party and government posts. After having granted an interview to *The New York Times* on his political ideas, he received a suspended sentence of eighteen months imprisonment on January 24, 1955, for "hostile propaganda intended to undermine the Yugoslav state". On November 19, 1956, *The New Leader* of New York carried an article by Milovan Djilas entitled: "The Storm in Eastern Europe". According to the article the Hungarian revolt marked the beginning of the end of the world Communist movement.

He charged the Yugoslav government with renouncing, in the case of Hungary, its stand against foreign interference in domestic affairs taken in 1948 against the USSR.

On December 12, 1956, he was sentenced for his criticism to three years imprisonment. While serving his sentence, he published outside Yugoslavia a book entitled, *The New Class*. In it he described contemporary communism, as he saw it, with all its limitations and failures, criticizing it for perverting socialist democracy into an ideological despotism. The Sremska Mitrovica Circuit Court sentenced him to seven years imprisonment on grounds of hostile propaganda against the Yugoslav state, which he was alleged to have committed by publishing the book.

On January 20, 1961, he was released on parole having promised "not to undertake any political activity that may be contrary to the laws of Yugoslavia". He was re-arrested on April 7, 1962, and brought to trial on May 14 charged with giving away official secrets and engaging once more in "active hostile work against the socialist country of Yugoslavia".

The Indictment

Djilas was charged with the violation of Article 320 of the Criminal Code of 1951 as amended up to July 29, 1959, which provides as follows:

(1) The official person who communicates, conveys or otherwise makes accessible to an unauthorized individual the documents or information that have come to his knowledge in the course of the performance of the service, and which by their function represent an official secret, shall be punished with imprisonment of not less than three months.

(2) If the documents or information are specially valuable, or if the offender has accepted a bribe, he shall be punished with severe imprisonment of up to ten years.

...

(5) The punishment for the offences contained in Paragraphs 1 and 2 of the present article shall also be inflicted on the person who communicated or conveyed confidential documents and information even after termination of service.

In the charge it was stated by the Public Prosecutor that in a manuscript entitled *Conversations with Stalin*, written by Djilas and passed towards the end of 1961 to a publishing house in New York, disclosure was made without authorization of confidential information of special importance. This information was obtained by the accused in his official capacity as a member

of Yugoslav State and Party delegations to the USSR during the years 1944-1948.

The book, *Conversation with Stalin*, is an account of three talks Djilas had with Stalin in Moscow at that time. It is based on memoranda he wrote after each of the three official visits to Moscow. Much of the same information was published some years ago, with President Tito's explicit approval, in Vladimir Dedijer's authorized biography of the Yugoslav President. In an effort to secure the release of Djilas, the American publisher went to Belgrade and offered to destroy all the proofs of the new book. This effort failed. The official Yugoslav argument was that though the book had not yet been published, sufficient material from the book had already been given to various western newspapers to warrant prosecution.

The Trial

There was a one-day trial, on May 14, before the Belgrade Circuit Court. In the morning of the opening of the trial, the public and foreign newspaper correspondents were admitted. It is from the accounts of the journalists that some of the details of the trial can be pieced together. Djilas and his lawyer first asked that the hearing be in public; then Djilas started to read a statement, which was reproduced in a dispatch by the correspondent of *The Guardian* (of London and Manchester). Djilas had said:

There is no legal and no human reason for the public to be excluded. I have the right to defend myself publicly because I have been publicly defamed.

He added that the charge against him was "artificial" and full of distortions, aimed at obtaining a propaganda effect. "The indictment", he had argued according to the despatch, "has many fabrications, not to say it is based entirely on them". Then, interrupted several times by the presiding judge and the prosecutor, he advanced from his seat in the dock to the middle of the courtroom, and said:

If the trial is not public I shall not answer any question and I will not defend myself.

After a 40 minute adjournment to consider the defence motion for a public trial, the judges upheld the prosecutor's proposal that the proceedings should continue and the indictment read *in camera*,

since " this is dictated by the interest of keeping secrets, considering that Milovan Djilas has been accused of giving away official secrets ". So the Court went into secret session, permitting only relatives of the accused, his brother, two sisters, his wife, and also his lawyer to attend the proceedings. Correspondents were unable to get any information concerning the trial *in camera*. The judgment was read in an open session the same day at 6 p.m.

The Court's Judgment

In its judgment the Court rejected the argument of the defence that the confidential information in the manuscript had already been published and had thus lost its confidential nature. In his finding the presiding judge said that Djilas disclosed *published and unpublished* information, added to it, distorted it, gave it an overtone of his own impression and issued it in a new version. The arbitrary interpretation and assessment of individual events would revive, the judge stated, the mistrust of Western and non-aligned countries towards Yugoslavia. At the same time the book created the impression that Yugoslavia was trying to dominate in an unneighbourly fashion Greece, Bulgaria, Rumania and Albania. The Court held that the publication of the work by Milovan Djilas served the purposes of cold-war propaganda. By this Djilas " voluntarily and consciously became a pawn in the game of cold war played by foreign powers ". The already quoted article of May 15 in *Borba* added that Djilas had

... availed himself of the opportunity to provoke a confusion and play a role of a " vanguard of anti-communism " and to attempt to compromise Yugoslavia by representing her policy as false, both in the Balkans and in general. The aim of the real organizers of the action to which Djilas has offered his services is clear: the designers of cold war strived and are still striving to underestimate, present in a wrong light and compromise Yugoslavia before the world, particularly the non-aligned countries...

In conclusion, the Belgrade Circuit Court passed a sentence by which

Milovan Djilas, on the basis of Article 320, paragraph 2 in connection with paragraph 5, and with application of Article 38 of the Criminal Code, has been condemned to five years imprisonment. By the same sentence, the release on parole, granted to Milovan Djilas after his statement and petition of January 20, 1961, after he had served 4 years, 2 months and 12 days in prison on the basis of previous sentences, has been cancelled. He has been given a total of thirteen years imprisonment of which he has still to serve eight years and eight months. (*Politika*, Belgrade, May 15, 1962)

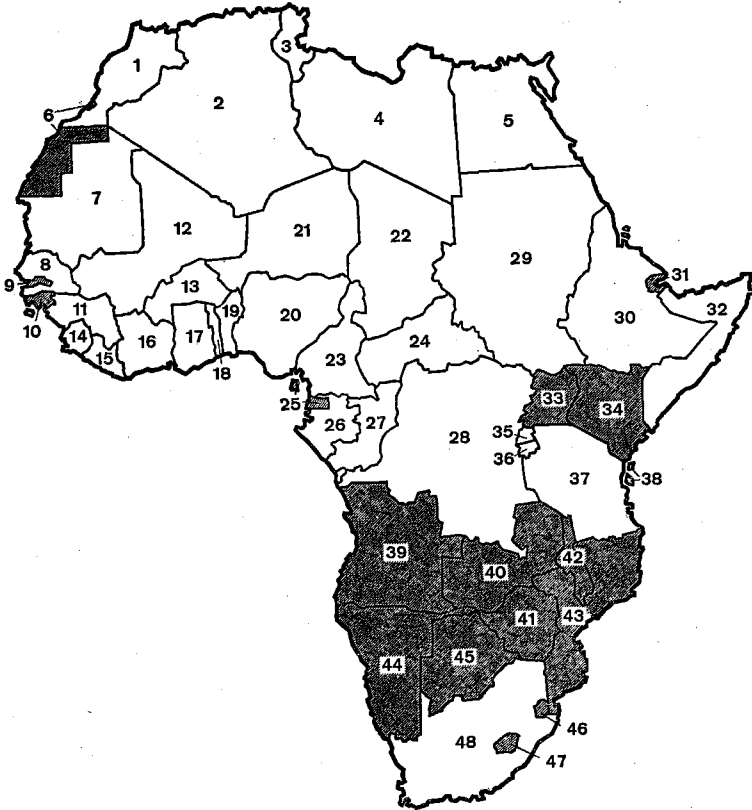
It should be noted that Article 38 of the Criminal Code deals with aggravating circumstances in fixing the degree of punishment.

Western newspapers announced on June 4, that Djilas' lawyer had appealed against the conviction and the sentence using the same arguments that the defence had used in the trial, i.e., that the publication of the material in the book did not disclose official secrets because most of the material in it had already been published in foreign newspapers or revealed by Yugoslav officials.

The book in question was published after the trial on May 25, in New York. A study of the book makes it evident that it contains mainly published material. To be able to invoke Article 320 of the Criminal Code the prosecutor stressed that Djilas disclosed unpublished information though the unpublished material, – as mentioned above – represents a minor item. Besides, the Court's judgment reproaches the accused's "cold-war propaganda" and "arbitrary interpretation and assessment of individual events" concerning Yugoslav-Soviet relations. These accusations can not be based on Article 320. The session *in camera* was decreed in spite of the *prima facie* evidence which showed that many of the alleged secrets were made public in the polemical quarrel between the USSR and Yugoslavia after 1948. After the court had decided to hold the trial *in camera*, Djilas made a statement that he would not defend himself in closed proceedings against a charge which he himself defined as "moral disobedience", *Borba* called it, however, "playing the role of a 'vanguard of anti-communism'... to present Yugoslavia in a wrong light and compromise her before the world, and particularly the non-aligned countries".

It is rather the trial in which the political motives are self-evident that presents Yugoslavia in a bad light before the world, including the non-aligned countries. This has been apparent by the numerous protests coming from all continents against the prosecution of Djilas which have been mentioned, not without a certain resignation, in the Yugoslav press.

AFRICA



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|--------------------------|-----------------------------|----------------------|
| 1 Morocco | 17 Ghana | 33 Uganda |
| 2 Algeria | 18 Togoland | 34 Kenya |
| 3 Tunisia | 19 Dahomey | 35 Ruanda |
| 4 Libya | 20 Nigeria | 36 Burundi |
| 5 Egypt | 21 Niger | 37 Tanganyika |
| 6 Spanish Western Sahara | 22 Chad | 38 Zanzibar |
| 7 Mauritania | 23 Cameroon | 39 Zanzibar |
| 8 Senegal | 24 Central African Republic | 40 Northern Rhodesia |
| 9 Gambia | 25 Spanish Guinea | 41 Southern Rhodesia |
| 10 Portugese Guinea | 26 Gabon | 42 Nyasaland |
| 11 Guinea | 27 Congo (Brazzaville) | 43 Mozambique |
| 12 Mali | 28 Congo (Leopoldville) | 44 South West Africa |
| 13 Upper Volta | 29 Sudan | 45 Bechuanaland |
| 14 Sierra Leone | 30 Ethiopia | 46 Swaziland |
| 15 Liberia | 31 French Somaliland | 47 Basutoland |
| 16 Ivory Coast | 32 Somalia | 48 South Africa |

N.B. The shaded portions represent territories still dependent on October 1, 1962.

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